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# Examining Police Officers on Prior Misconduct - Crossing the Thin Blue Line

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Introduction

¶ 1 No self-respecting defence counsel would argue with the proposition that there are, regrettably, a number of police officers who are prepared to engage in penury in order to procure a conviction. The Criminal Lawyers Association has recently began to compile a data base of cases involving such police officers. [See Note 1 below] To what extent can counsel use this database to cross-examine police officers, and adduce their evidence of prior misconduct?

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Note 1: This data base of cases was initiated through the efforts of Toronto lawyer Edward Sapiano - see the attached Toronto star article dated August 19, 1997.

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¶ 2 Not surprisingly, courts have been loathe to permit cross- examination of police officers on their prior misconduct. On a practical level, one suspects that courts are fearful that if a single instance of a police officer's misconduct is allowed to taint the officer's evidence whenever he testifies in the future, too high a price will have been paid, because too may guilty persons may reap the benefits of the previous perjury.

¶ 3 In a case where the accused alleges that a police officer fabricated evidence or was involved in other misconduct, cross-examination of the police officer on his previous instances of misconduct is vital. Evidence that a officer has acted illegally in the past increases the likelihood that he has acted illegally again. If the administration of justice is concerned with protecting the rights of the innocent, it should be of no concern that the cross-examination of a police officer who has acted illegally in the past may hinder the successful prosecution of other cases involving the same officer. This is not a legitimate basis upon which to prohibit this type of cross-examination.

The Conservative Approach

(i) R. v. Edward

¶ 4 The most sustained discussion as to whether a jury should be allowed to hear evidence of the behaviour of a police officer in a previous case is found in the English case of R. v. Edward [1991] 2 All ER 266 (CA). In Edwards, the appellant was convicted of robbery on the basis of a series of admissions that the police alleged he had made. At trial, Edwards testified basis of a series of admissions that the police alleged he had made. At trial, Edwards testified that these statements had been fabricated by the police. On appeal he sought to have his conviction quashed because the prosecution had not provided disclosure of instances of prior misconduct of the police officers involved in his case. The evidence not disclosed was as follows:

(i) One of the officers had been convicted of a disciplinary offence;
(ii) There was a outstanding charge of penury against one of the officers and public complaints had been made against several of the officers;
(iii) There was substantial evidence of discreditable conduct in other cases by fellow squad members of the officers concerned; and
(iv) The testifying officers had given evidence in other cases which had resulted in a acquittal, or the quashing of a conviction on appeal.

Consequently, the Court of Appeal had to consider whether the non-disclosed material could have been used by the defence at trial if the defence had known about it.

¶ 5 The Court concluded that police officers may be cross- examined on any relevant criminal conviction, and on any proven disciplinary offence. The Court did not address what it meant by a "relevant" conviction. In Canada, a Crown witness may be cross-examined on any previous conviction, whether "relevant" or not, under s. 12 of the Canada Evidence Act.

¶ 6 The Court held in Edwards that defence counsel could not cross-examine a officer on outstanding criminal [See Note 2 below] or disciplinary charges. Cross-examination of police officers about earlier instances of discreditable conduct by themselves or by other officers in the same squad would not normally be permitted. The proposition that such evidence was admissible as it showed the police "were prepared to go to improper lengths to secure a conviction" [See Note 3 below] was rejected. The Court in Edwards held that cross-examination in these circumstances was only to be allowed if the prior misconduct involved the same officer and the same accused as the matter being tried. Edwards disavowed the notion that prior misconduct evidence was admissible to show a "consistent course of conduct or system of strikingly similar pattern" of behaviour [See Note 4 below]. The Court found this argument to be "misconceived" with "no legal basis to it".

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Note 2: In Canada the law is different. See R. v. Titus, R. v. Gonzague, R. by Hoillet (infra)

Note 3: See R. v. Funderburk [1990] 2 All ER 482 (CA) and R. v. Busby (1981) 75 Crim App R 79 (CA) (infra)

Note 4: This argument has been characterized as the "reverse similar fact argument" by Cross on Evidence. (infra)

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¶ 7 As a general rule, the Court found that a officer giving evidence in a case which resulted in a acquittal did not itself constitute relevant evidence at a later trial. The Court acknowledged, however, that if it could be demonstrated that the earlier acquittal was the result of the same police officer's evidence being disbelieved, he could be cross-examined

on the circumstances of the prior acquittal. The Court noted, however, that such an instance would be "rare" since only in "exceptional cases" could it be shown that the acquittal must have been the result of a jury disbelieving a officer's evidence.

¶ 8 As a example of a "exceptional case", in R. v. Cook (1986), 84 Cr App R 286 (CA), the English Court of Appeal held that the trial judge had erred in refusing to allow defence counsel to cross-examine a police officer on his involvement in other related cases. In Cooke, the police officer in question had interviewed a number of accused persons with respect to their involvement in the same group of offences. He claimed that they all made admissions to him. The evidence against all accused essentially consisted of their alleged admissions to this officer. Some of the accused were tried separately. Two of the separately tried accused were acquitted. The Court held that the acquittals demonstrated that the officer's evidence must have been disbelieved in the earlier proceedings. He therefore could be cross-examined on his involvement in those cases.

¶ 9 In Edwards itself, the Court concluded that the police officers could have been cross-examined on their involvement in two earlier cases which had resulted in acquittals. In the earlier cases, scientific evidence had been led at trial which showed that the accused's admissions had been fabricated by the police. The Court set out the ambit of cross-examination which should have been allowed at trial had the defence known of this evidence:

> "It would have been relevant and admissible to put to the officers in question that they had given evidence in the trials, that in each of the trials there was a issue as to whether the alleged confessions had been fabricated and that the trials had ended in the way described."

¶ 10 However, Edwards found that defence counsel would not be afforded the opportunity to cross-examine these officers on their involvement in two additional earlier cases, where convictions had been set aside on appeal as unsafe. In both cases the central issue at trial had been the reliability of police evidence that the accused had admitted his involvement in the offence. In R v. Parchment, the case was referred to the Court of Appeal after scientific examination of the police interview notes conducted two years after trial revealed that the original notes had been altered prior to trial. In R. v. Khan, the Court of Appeal set aside the appellant's conviction, as it was "very doubtful" whether the evidence of the appellant's admissions was reliable. It would appear that in each of these cases there was a implicit finding from the Court of Appeal that the police officers involved had committed perjury. Nevertheless, the Court in Edwards stated:

> "The fact that the Court of Appeal was not satisfied about aspects of the police evidence provides no proper foundation for the cross-examination of individual officers as to their veracity in general or the truthfulness of their evidence in the instant case. Such cross-examination would not properly have been permitted."

Consequently, any jury listening to the evidence of these officers in a future trial would not be privy to their conduct in these two earlier trials. Such a result does not reflect well on any justice system.

(ii) R. v. Meddoui

¶ 11 In R. v. Meddoui [1991] 3 S.C.R. 320, aff'g (May 10, 1990, Alta.C.A.), the accused was convicted of abducting a child. The trial judge had prohibited cross-examination of the investigating officer on a allegation that he had lied under oath at a previous trial which involved the same accused and another complainant. The Alberta Court of Appeal, in its reasons, held that there was no suggestion that the evidence from the previous trial revealed a "particular animus by the officer towards the accused" and thus the question of the officer's actions in the earlier case was collateral to the issues to be determined at the later trial. [See Note 5 below] In a brief endorsement, the Supreme Court of Canada upheld the Alberta Court of Appeal because the proposed line of questioning "related to a collateral matter. Furthermore, its relevance was extremely tenuous...." This is a remarkably conservative approach to the issue. However, Meddoui probably does not have much precedential value as neither judgment provides any meaningful outline of the underlying facts of the case. As well, no reference is made in the judgment to the Supreme Court of Canada decision in R. v. Macdonald (1959), 126 C.C.C. 1 (S.C.C.), [See Note 6 below] in which the Court held that a police officer may be cross-examined on the suggestion that he and his fellow squad members fabricated evidence against the accused in previous proceedings. [See Note 7 below]

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Note 5: This suggests the extraordinary propositIon that evidence that a policeman has an animus against all accused is not proper material for cross-examination!

Note 6: Discussed infra

Note 7: The conservative approach in Meddoui is also found in sexual assault case law which prohibits the defence from cross-examining a complainant on false allegations of sexual assault against persons other than the accused. In R. v. Riley (1992), 11 O.R.(3d) 151 (CA.), the Court held that, in order to cross-examine a complainant on a prior allegations of sexual assault, a accused must establish a pattern of fabrication by the complainant involving allegations of sexual assault. A pattern was not established by evidence that a accused in another case involving the complainant was acquitted on a charge of sexual assault.

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Moving Away from the Conservative Approach:

(i) Beyond Meddoui and Edwards

¶ 12 It is important to grasp the limits imposed by Edwards and, perhaps, Meddoui on defence counsel's ability to cross- examine police officers on prior misconduct. The Edwards Court suggested that to some extent the answer depends on the individual trial

judge's assessment of the effect that such evidence of prior misconduct might have on the credibility of the witness's testimony. At first sight, this creates a broad scope for a trial judge to exercise his discretion to allow this type of cross-examination. The Court, however, then limited this discretion by stating that defence counsel may not cross-examine on any outstanding allegations of misconduct, and prohibited cross-examination on acts of prior misconduct, unless that conduct revealed the personal bias of a particular officer to a particular accused. Edwards allowed a "rare" exception to this general prohibition, if it could be proved that in a prior case a acquittal had been entered because of a officer's testimony being disbelieved.

¶ 13 Should defence counsel be able to cross-examine on outstanding charges or complaints? In Canada, this type of cross-examination of a crown witness is permitted, and the job description of the Crown witness is irrelevant. In R. v. Gonzague (1983), 4 C.C.C.(3d) 505 (Ont.C.A.), Martin J.A. said:

> "Clearly, the fact that a person is charged with a offence cannot degrade his character or impair his credibility, but a ordinary witness, unlike a accused, may be cross-examined with respect to misconduct on unrelated matters which has not resulted in a conviction: see R. v. Davidson, DeRosie and MacArthur (1974), 20 C.C.C.(3d) 424 at 443-444, 6 O.R.(2d) 103. Consequently, counsel was entitled to cross-examine the witness, Charboneau, on the facts underlying the 15 charges of fraud in order to impeach his credibility."

See also R. v. Titus (1983), 2 C.C.C.(3d) 321 (S.C.C.) and R. v. Hoilett (1991) 4 CR(4th) 372 (Ont. CA).

¶ 14 The Edwards principle that evidence of prior police misconduct will not generally be admissible has been subject to criticism. Cross on Evidence (8th ed) states that "it is not obvious why this reverse similar fact argument is rejected so perfunctorily". In "Evidence of Previous Malpractice by Police Witnesses and R. v. Edwards" [1992] Crim. L.R. 549, the author questioned why the Court summarily rejected the proposition that a police officer who has acted improperly in the past is likely to have acted the same way again. She said:

> "Suppose an accused both denies that he confessed to certain policemen and claims that these officers plated the drugs he is charged with possessing i.e. that they have invented the crime. Evidence that these police have done this sort of thing several times before would be highly probative on the issue of his guilt and ought not be excluded. The situation does not differ materially from one where a defendant adduces evidence of disposition to support the defence that his co-accused was wholly to blame for the offence."

¶ 15 The Court's prediction in Edwards that it will be a "rare" case where defence counsel is allowed to cross-examine a officer on previous cases where a acquittal has been entered has proved to be accurate in the U.K. In the majority of acquittals, except those where a successful defence of fabrication has been made, it is a matter of

speculation as to whether a acquittal must indicate that the jury disbelieved a testifying officer. Thus, in the English case of R. v. Lucas [1993] Crim.L.R. 599 (CA), the Court of Appeal upheld the trial judge's refusal to allow the appellant, who was charged with use of a firearm in resisting arrest, to cross-examine a police officer on his co-accused's acquittal on a related charge of assault police. The Court suggested that the jury in the co-accused's trial may have acquitted on the basis of either (1) accident or (2) the use of excessive force by the police. It had not been demonstrated that the prior acquittal necessarily resulted from the latter, and that the police officer's evidence had been disbelieved. [See Note 8 below]

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Note 8: See also R. v. Gale [1994] Crim.L.R. 210 (C.A.)

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¶ 16 Edwards accepted the view that proof of a pattern of misconduct by a particular police squad does not constitute admissible evidence against a member of that squad in a case in which the accused alleges that he was subjected to the same abuse by the same squad. In R. v. Clancy [1997] Crim.L.R. 290 (CA), the accused appealed his convictions for robbery on the basis that the confessions alleged to have been made by him were unreliable. He sought to adduce evidence of a pattern of discreditable conduct by the robbery squad to rebut the Crown's position at trial that the anomalies arising out of the police evidence could be innocently explained. The Court allowed the accused's appeal on the basis that there was evidence of discreditable conduct by the particular officers involved in the appellant's case which cast doubt on their honesty. However, the Court ruled evidence of the squad's pattern of misconduct to be inadmissible on the authority of Edwards.

¶ 17 The Ontario Court of Appeal has taken a less doctrinaire approach than the English Court of Appeal. In R. v. Speid (1988), 42 C.C.C.(3d) 12 (Ont. CA.), the accused testified that he had been assaulted by members of the Toronto hold-up squad to obtain a confession from him. In support of his testimony he sought to adduce evidence from other witnesses that they too had been assaulted in similar fashion by members of the hold-up squad. Counsel attempted to call evidence to prove the allegations of the other witnesses. He had not, however, put these allegations to the particular officers during cross-examination. The trial judge refused to admit evidence to prove the allegations of the other witnesses. The Court of Appeal held that the trial judge had not erred in refusing to permit the defence to call evidence to prove the allegations of others. However, Cory J.A. said:

> "What the appellant was seeking to do was to establish a pattern of conduct of a organization (the hold-up squad) which would in turn assist in establishing that the appellant had been beaten. It may well be appropriate for a accused to lead evidence to establish a pattern of conduct of a organization such as the hold up squad: see for example, McCormick on Evidence, 3rd ed. (1984) pp. 574-7. However, if that is to be done, an accused must lay a foundation as to the basis upon which he wishes to seek to impeach the evidence of a police officer: see

McCormick on Evidence, pp. 87-8."

¶ 18 Recently, there are indications that a more expansive approach to the question of prior police misconduct may be taking hold in the United Kingdom. In R. v. Maxime Edwards (1996), 2 Cr App R 345 (CA), the Appellant had been convicted of possession of a narcotic for sale. She denied at trial that she had been in possession of the drugs. She also denied that she had admitted her guilt as alleged by the arresting officers. In 1992 the Appellant was denied leave to appeal. Subsequently, a series of investigations were conducted into allegations of improprieties by the same drug squad that had arrested Ms. Edwards. These investigations resulted in findings of serious misconduct on the part of numerous members of the squad, but not those directly involved in Ms. Edwards' case. In addition, there had been a number of cases involving the same arresting officers in which accused persons had put forward defences of fabrication at trial and had been acquitted. Based on these developments, in 1996 the Appellant's case was referred by the Secretary of State to the Court of Appeal.

¶ 19 On the reference, the Crown argued that the subsequent evidence of police misconduct would not have been admissible at trial because: (1) the investigations did not result in charges or disciplinary proceedings being brought against any of the police officers who arrested Ms. Edwards; and (2) there was no "sufficient connection" between the officers' testimony in the previous cases and the acquittals to allow cross-examination on the officers' involvement in the earlier cases. The Court of Appeal rejected these arguments. It held as a result of the "degree of suspicion" since raised against the arresting officers it was impossible to say that the jury's verdict would have been the same had this prior misconduct evidence been known to them. The Court said:

> "Once the suspicion of perjury starts to infect the evidence and permeate cases in which the witnesses have been involved, and which are closely similar, the evidence on which such convictions are based becomes as questionable as it was in the cases in which the appeals have already been allowed."

¶ 20 While not stated explicitly, it would appear that Maxime Edwards has accepted that "closely similar" prior misconduct evidence is relevant to allegations of police misconduct in another later case. [See Note 9 below]

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Note 9: See commentary to R. v. Whelan [1997] Crim.L.R. 353 at 354.

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(ii) R. v. Malabre

¶ 21 Recently, in a endorsement, the Ontario Court of Appeal moved some way from the restrictions of Edward and Meddoui. In R. v. Malabre (March 21, 1997) [See Note 10 below] the accused was charged with trafficking in cocaine. The defence at trial alleged

that the arresting officers had fabricated their evidence and deliberately framed him. The defence was allowed to cross-examine an investigating officer on his involvement in another case wherein the officer had threatened a person to induce him to become a informant, for which the officer had subsequently been disciplined under the Police Act. In allowing this cross-examination, the trial judge said:

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Note 10: The authors have had the benefit of access to the factums filed which considerably supplement the facts that appear in the actual endorsement.

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> "If Pearson's conduct in dealing with a informant was the subject of review in Grunning, you may examine him on that conduct for the purpose of determining whether he exhibited a cavalier attitude with the informer in this case."

When the police officer was cross-examined on this misconduct, he testified that he had learned from his actions in that case. Counsel then sought to cross-examine the officer on his actions in another case (R. v. Montgomery and Stuart), [See Note 11 below] which followed R. v. Grunning, where the same officer had failed to follow police procedures in completing an informant's report, and had failed in other regards to follow proper procedures. The trial judge had characterized the officer's actions in Montgomery and Stuart as "shocking". Counsel sought to cross-examine the officer on these incidents of misconduct because they revealed that he had not learned his lesson and that he was lying in his claim that he had. The trial judge in Malabre refused to allow the defence to cross-examine the officer on his activities in Montgomery and Stuart since, in his opinion, the officer's conduct did not amount "discreditable conduct" but only demonstrated incompetence and a lack of conscientiousness on his part.

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Note 11: The value of "police files" is apparent when one considers the facts in Malabre.

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¶ 22 In its endorsement, the Court of Appeal in Malabre held that the trial judge was correct in his characterization of the officer's conduct in the case of Montgomery and Stuart. The Court concluded that evidence of this prior conduct was at best of marginal relevance to the case against the appellant. The Court, however, said that if the trial Judge in Montgomery and Stuart had made a "clear and explicit" finding of credibility that was "tantamount to a determination" that the police officer had lied under oath, counsel should have been permitted to cross-examine the officer on those findings. To quote the most important part of the endorsement, the Court said:

> "Despite the wide latitude that must be allowed in cross-examination, we are not persuaded that the trial judge erred in the exercise of his discretion by refusing to

> allow cross-examination on Pearson's conduct in the prior case. In our view, the trial judge was correct in characterizing the officer's conduct in the prior case as "a lack of competency or an unconscientiousness in his work" but not "discreditable conduct." Evidence of this prior conduct was, at best, of marginal relevance to the case against the appellant.
>
> The appellant also contended that the trial judge in the earlier case had made findings of credibility with respect to Pearson that were tantamount to a determination that he had lied under oath. We would find merit in the appellant's argument if there had been a clear and express finding to that effect. However, the findings of the trial judge in the earlier proceeding on Pearson's credibility are subject to interpretation. In the circumstances, we are not persuaded that the trial judge in this case erred by refusing to allow cross-examination on those findings."

¶ 23 Malabre represents an advance on the reasoning in Edwards. The Court's endorsement amounts to a acknowledgment that defence counsel can cross-examine a police witness on his conduct in another case for which he has been professionally disciplined. Malabre therefore accepts the proposition that evidence of a police officer's prior misconduct is relevant to whether the officer acted in accordance with that prior behaviour in his subsequent acts. The judgment further holds that a police officer who is found to have lied in another criminal proceeding may be cross-examined on that finding at a subsequent trial. It is unclear from the judgment, as it was in Edwards, whether this right to cross-examine would extend simply to the trial judge's finding that the officer had lied or would include the reasoning behind the trial judge's finding that the witness had lied.

Some Helpful Well-Established Evidentiary Rules

(i) Relevance

¶ 24 Firstly, evidence that a police officer's prior misconduct constitutes relevant and admissible evidence finds support in the decision of the Ontario Court of Appeal in R. v. Watson (1996), 108 C.C.C.(3d) 310. Doherty J.A. articulated the scope of relevance. He said:

> "Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and prima facie admissible."

Applying this analysis to the theme of this paper, where a police officer has lied in a previous proceeding (fact "A") it is more probable that he is lying in a later proceeding (fact "B").

¶ 25 In R. v. Wesley (March 23, 1994), 23 W.C.B.(2d) 215 (Ont.C.A), defence counsel cross-examined a Crown witness on his prior criminal record for drug offences and the facts underlying those offences. The defence alleged that the drugs belonged to the witness and not the accused. On appeal, the conviction was quashed because the trial judge had instructed the jury that the witness' criminal antecedents were admissible only to undermine the witness's credibility. The jury should also have been told that the evidence could be used to prove that the Crown witness, and not the accused possessed the drugs. The premise that "if he did it once he will do it again" is always a permissible line of attack for the defence, (but not always for the prosecution).

(ii) Bias

¶ 26 Evidence of bias is a well established exception to the collateral fact rule. In R. v. Lindlau (1978), 40 C.C.C.(2d) 47 (Ont.C.A.), the accused was prevented from cross-examining the complainant on a false allegation that she had made in the past that he had stabbed her common-law husband. On appeal Martin J.A. quashed the conviction and said:

> "If this evidence was true, it would have been relevant to the complainant's credibility in that it would have shown bias, and her answer would not have be subject to the restriction that the answers of a witness on cross-examination with respect to collateral matters cannot be contradicted."

¶ 27 In the English cases of R. v. Funderburk [1990] 2 All ER 482 (CA) and R. v. Busby, (1981) 75 Cr App R 79 (CA), the Court of Appeal recognised that a accused may adduce evidence of prior misconduct of a police officer on the basis that it showed that "the police were prepared to go to improper lengths to secure the accused's conviction". In Busby, defence counsel had cross-examined the investigating officers alleging that they had fabricated the accused's admissions, and that they had also threatened a witness who was prepared to testify on the accused's behalf. The trial judge refused to allow the defence to adduce evidence from this witness that he had, in fact, been threatened by the police. The Court of Appeal held that the trial judge erred; that where there is a issue at trial as to whether the police were fabricating evidence, testimony that the police were threatening witnesses was relevant evidence. The Court said:

> "We are of the opinion that the learned trial judge was wrong to refuse to admit the evidence. If true, it would have shown the police were prepared to go to improper lengths in order to secure the accused's conviction. It was the accused's case that the statement attributed to him had been fabricated, a suggestion which could not be accepted by the jury unless they thought that the officers concerned were prepared to go to improper lengths to secure a conviction."

¶ 28 In Edwards, the English Court of Appeal attempted to characterise Busby as simply articulating a particular exception to the collateral fact rule which applied only to

situations where the prior misconduct involved both the same officer and same accused to the matter being currently tried.

¶ 29 A similar position to Busby was adopted in R v. Speid (1988), 42 C.C.C.(3d) 12 (Ont CA), discussed supra. In fact, Speid extends Busby to include evidence of previous misconduct in other cases by a police squad as a whole, not just evidence of misconduct on prior occasions involving the same accused by the particular officers giving evidence.

Police Misconduct Evidence as Relevant Evidence

¶ 30 A new approach to prior police misconduct evidence is required. In essence, a approach is needed which would challenge the central assumption in Edwards that evidence of a police officer's misconduct is relevant only to credibility and not to a issue at trial. This is merely a play on words. As we all know, the credibility of a police officer's testimony is often the only issue at a criminal trial.

¶ 31 Defence counsel should be afforded the opportunity to cross-examine a police officer on whether he has engaged in a conspiracy to fabricate evidence against the accused on a earlier occasion. In R. v. Macdonald (1959), 126 C.C.C.1 (S.C.C.), the accused had been acquitted on a charge of conspiracy to traffic heroin. At his subsequent trial on the substantive charge of possession of heroin for the purpose of trafficking, he sought to adduce evidence that the Narcotics Squad of the R.C.M.P. in its investigation of both charges had been involved in a conspiracy to "prepare false reports and give false evidence" against him. Martland J. stated:

> "Facts to establish bias on the part of a witness may be elicited on cross-examination and, if denied, may be independently proved. It was open to the defence to cross-examine [the police officers] Macauley and Yurkiw as to whether they were parties to a conspiracy which sought to wrongfully obtain a conviction against the appellant. If denied, evidence which directly implicated either of them as being parties to a conspiracy for that purpose would be relevant because this would relate to establishing bias."

In R. v. Aalders (1993), 82 C.C.C.(3d) 215 (SCC), Cory J. rejected the proposition that evidence which reflects adversely on the credibility of a witness (in that case the accused) is determinative of whether that the evidence is collateral. He stated the test to be whether the evidence "was related to a essential issue" that may be determinative of the case. Similarly, in R. v. P.(G.) (1996), 112 C.C.C. (3d) 263 at 275 (Ont.C.A.), Rosenberg J.A. held that the test to determine whether evidence is collateral requires consideration of whether the evidence is "relevant to some issue in the case other than merely to contradict the witness". It has been said elsewhere that the question of whether a particular piece of evidence is collateral requires a balancing of the probative value of the evidence with the concern that the length of the trial will be unnecessarily lengthened by its admission. Surely justice should not give way to expediency so easily.

¶ 32 In R. v. Cullen (1989), 52 C.C.C.(3d) 459 (Ont.C.A.), the defence was prohibited from cross-examining the complainant on the facts underlying her conviction for possession of burglary tools. In allowing the conviction appeal, Galligan J.A. said:

> "In my opinion those authorities show than for the pulse of challenging a witness's credibility, cross-examination is permissible to demonstrate that a witness had been involved in discreditable conduct. Possession of burglar's tools is an offence that could contain an element of dishonesty. A person involved in such a offence is a person who could be considered to have been involved in discreditable conduct. In my opinion, therefore, the trial judge's restriction of defence counsel's cross-examination within the parameters of s. 12 of the Canada Evidence Act deprived the defence of the opportunity to bring to the jury's attention circumstances which may very well have assisted the jury in deciding what weight it would place upon the complainant's evidence." (emphasis added)

Further support for the argument that a police officer's prior misconduct is relevant and material evidence may be found in the recent Supreme Court of Canada decision in R. v. S. (D.R.) (Sept. 26, 1997). In that case, in her reasons for acquitting the accused of several assault police related offences, the trial judge had said:

> "I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted."

A majority of the Court held that these comments did not give rise to a reasonable apprehension of bias. Some of the judges in the majority were, however, "troubled" by the trial judge's comments, as there was no evidence before the trial judge that this particular police officer was racist and overreacted accordingly. Presumably, if defence counsel at trial had sought to cross-examine the police officer on the history of his dealings with groups of non-whites, it would have been proper.

¶ 33 Courts have been taking an increasingly liberal approach to the admissibility of evidence before a jury. In R. v. Corbett (1988), 41 C.C.C.(3d) 385 (S.C.C.), Dickson J. said:

> "In my view, the best way to balance and alleviate these risks is to give the jury all the information but at the same time give a clear direction as to the limited use they are to make of such information. Rules which put blinders on the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information so long as it accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value."

In R. v. Saroya (1994), 36 C.R.(4th) 253 (Ont CA), the trial judge's exercise of his "Corbett" discretion, permitting the accused to be cross-examined on a prior record for the same violent offences with which he was charged because the convictions "reflect a disregard for the laws an rules of society" (per McFadyen J.A. in R. v. Charland (1996), 110 C.C.C.(3d) 300 (Alta.C.A.)) which made it more likely that the accused would lie under oath, was upheld. Likewise, the evidence of a police officer's prior "disregard for the laws and rules of society" makes it more likely that he or she acted in a manner consistent with that attitude of lawlessness in apprehending and investigating an accused on a later occasion.

¶ 34 A jury needs to be provided with all the information about the character and disposition of the Crown witnesses, especially if the Crown cross-examines the accused on a previous criminal record. R. v. Parsons (1993), 84 C.C.C.(3d) 226 (Ont.C.A.) decided that if a accused has led evidence of the propensity of a third party to commit the offence with which the accused is charged, fairness dictates that evidence as to the accused's propensity to commit the offence also be brought before the jury. Likewise, if a jury is aware of a accused's record for criminal conduct, they should also correspondingly be made aware of a police officer's prior misconduct. Otherwise, as Dickson J. in an analogous context suggested in R. v. Corbett (1988), 41 C.C.C.(3d) 385 (S.C.C.), the jury will be left with the impression that the accused was a hardened criminal, while all the Crown witnesses had unblemished pasts.

Conclusion

¶ 35 There are no special policy considerations which should limit a defence counsel's cross-examination of police officers on their prior misconduct. There is a public interest in not extending the length of trials unnecessarily, but this should not prevent the trier of fact from hearing relevant evidence necessary for its fact finding process. As stated by Rosemary Pattendon in "Evidence of Previous Malpractice by Police Witnesses and R. v. Edwards" [1992] Crim.L.R. 549 at 557:

> "A wider rule under which the defence is permitted to cross-examine an officer who is alleged to have fabricated evidence about his other misdeeds - provided these can be established by prima facie evidence - would have been preferable. And in the "unlikely event" that the officer should give a unsatisfactory answer, why not allow the defence to rebut it? "[T]he necessity of keeping the criminal process within the proper bounds and avoiding the pursuit of side issues" does not override the need to show jury that the policeman who says that the accused confessed to him, is a man who in the past has stooped to the fabrication of evidence in order to secure a conviction."