R. *v.* White and Côté*: A Case Comment*

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In *R.* v. *White and Côté* ("*White*"), the Ontario Court of Appeal reversed its earlier decision in *R.* v. *Court and Monahan* ("*Court*"), which required a separate standard of proof for assessing consciousness-of-guilt evidence. The category of circumstantial evidence known as "consciousness-of-guilt" evidence is highly problematic, and is increasingly gaining attention. Characterizing certain behaviour as consciousness of guilt is unfortunate for two reasons: it labels the conduct in question in a preconceived manner, and it requires a special instruction to the trier of fact, both of which carry a serious risk of prejudice to the accused.

The author contends that the decision in *White* does little to rationalize the use of consciousness-of-guilt evidence or limit its abuse. She criticizes the existing jurisprudence on consciousness-of-guilt evidence (including *White*) for jeopardizing the presumption of innocence as a fundamental principle of criminal law, and for allowing the use of impermissible reasoning in criminal cases. She illustrates the problem by discussing the Guy Paul Morin case, where statements by the accused (an innocent man) were identified as "consciousness-of-guilt" evidence.

The court in *White* rejected holding consciousness-of-guilt evidence to a separate reasonable-doubt standard. The author suggests that the court's decision to overrule *Court* was correct, since a reasonable-doubt test is not enough to prevent the potential misuse of this evidence. She argues, further, that the admissibility of consciousness-of-guilt evidence should be tested on *voir dire* in a manner similar to the hearing held about the admissibility of "propensity" or "similar-fact" evidence. Finally, the author proposes a reevaluation of our assumptions about the relevance of consciousness-of-guilt evidence, drawing an analogy to the criminal justice system's recent efforts to combat pernicious stereotypes and bias that feed into rape myths and myths about battered women.

Dans *R.* c. *White et Côté* («*White*»), la Cour d'appel d'Ontario a renversé *R.* c. *Court et Monahan* («*Court*»), une de ses décisions antérieures. Ce dernier arrêt exigeait un standard de preuve distinct pour établir la conscience de culpabilité. La catégorie de preuve circonstancielle désignée comme preuve de «conscience de culpabilité» est grandement contentieuse et attire de plus en plus l'attention des juristes. L'auteure donne deux raisons pour lesquelles cette catégorisation n'est pas appropriée. D'abord, elle juge de manière préconçue la conduite examinée. Ensuite, cette catégorisation demande qu'on donne des instructions particulières à ses fins au juge des faits. Ces deux opérations risquent sérieusement de porter préjudice à l'accusé.

L'auteure soutient que *White* apporte peu à l'effort de rationalisation de l'usage de la preuve de «conscience de culpabilité» ou à l'élimination de son abus. Sa critique principale est à l'effet que la jurisprudence récente, y compris *White*, d'une part, met en péril la présomption d'innocence en tant que principe fondamental du droit criminel et, d'autre part, permet l'utilisation de déductions qui sont autrement interdites en droit criminel. Elle illustre son propos par un examen de l'affaire Guy Paul Morin, où les déclarations de l'accusé, une personne innocente, furent utilisées eomme preuve de sa «conscience de culpabilité».

Dans *White*, la cour rejette la possibilité de mesurer la preuve de «conscience de culpabilité» à un standard spécial de doute raisonnable. L'auteur suggère que la cour a alors eu raison de casser *Court* parce que le test du doute raisonnable ne permet pas de prévenir les mauvais usages potentiels d'une preuve de «conscience de culpabilité». De plus, elle soutient que l'admissibilité d'une telle preuve devrait être décidée en *voir dire*, de la même manière qu'on décide de l'admissibilité des preuves de «propension» et de «faits similaires». Finalement, l'auteure nous propose de réévaluer ce qu'on prend pour acquis quand vient le temps de décider de la pertinence de la preuve de «conscience de culpabilité». Lors de cet exercice, elle utilise une analogie avec les efforts récents du système de justice criminelle dans son combat contre les stéréotypes pernicieux qui s'immiscent dans les mythes autour des viols et du syndrome de la femme battue.

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I. Introduction

In *R.* v. *White and Côté*,[1] the Ontario Court of Appeal addressed a category of circumstantial evidence known as "consciousness of guilt". This type of evidence is a form of admission by conduct that permits the prosecution to pigeon-hole actions of the accused, such as flight or false alibi, as conduct capable of supporting an inference of guilt.[2] This label is unfortunate in two ways. It imports more significance onto certain behaviour than is always justifiable, and, once identified, it requires a special jury instruction, which serves to emphasize further the evidence's (doubtful) significance. First principles of evidence law illustrate this difficulty.

To be admissible, evidence of a person's conduct must describe relevant behaviour. The link between proffered evidence and a fact in question is located in an underlying generalization. In the case of consciousness of guilt, that fact is the guilt of the accused. The generalization involved in evidence of flight, for example, is that persons who flee after a crime has been committed are likely to have committed that crime. This may be true, of course, but the converse may also be true. Moreover, nothing logically distinguishes this reasoning from the clearly impermissible (and less persuasive) claim that persons who deny guilt are likely to be guilty. The ambiguity flows from two related assumptions: that intentions are reliably revealed by our actions, and that we can reliably identify the intention so revealed. Even if the first is true, the corollary is highly doubtful, a problem inadequately addressed by the special jury instruction which this evidence requires.

Courts treat consciousness-of-guilt evidence differently from other admissions, and differently from other circumstantial evidence as well. When behaviour is selected by the prosecution and proffered as demonstrating "consciousness of guilt", a specific charge is given to instruct the trier of fact on how the evidence is to be addressed. The charge must instruct the trier of fact that it may find the conduct proof of guilt *per se* if it concludes that the evidence constitutes consciousness of guilt and if it finds it relates to the offence charged at trial. This is a powerful conclusion to reach about ambiguous conduct that is based on questionable psychological theory. Although the instruction that labels the behaviour "consciousness of guilt" also cautions the jury that people attempt to avoid detection for many reasons and that this behaviour is not necessarily proof of guilt, the label itself prejudicially highlights the evidence. Both the label and the charge are potent aids to the prosecution's case, but aids that bring with them considerable risk of prejudice.

Unfortunately, the decision in *White* does little to rationalize the use of consciousness-of-guilt evidence or limit its abuse. This comment considers the minimal relevance of this evidence and the danger of impermissible reasoning associated with

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[1] *R.* v. *White* (1996), 29 O.R. (3d) 577, (*sub nom. R.* v. *White (R.G.) and Côté (Y.)*) 91 O.A.C. 321 [hereinafter *White* cited to O.R.]. An application for leave to appeal to the Supreme Court of Canada was submitted 25 April 1997: [1997] S.C.C.A. No. 53 (QL).

[2] Throughout this comment the term "flight" will be used to denote a variety of conduct that may be characterized as "consciousness of guilt", including false alibi, lying to police and evading custody.

it, and suggests ways to limit its misuse. First, the problem is set out and illustrated with reference to the case of Guy Paul Morin. The comment then turns to the decision in *White*, setting out the facts and the reasons for judgment and discussing the two grounds dealing with consciousness of guilt more fully. An examination of the authorities relied on and rejected in *White* will demonstrate how far we have strayed from assessing relevance within a framework that presumes innocence, and to what extent impermissible reasoning is still permitted. The comment concludes with a proposal to reexamine our assumptions about the relevance of this type of evidence. The suggested approach to this reexamination draws upon the insights gained from a feminist analysis of the spurious relevance associated with rape myths and gender stereotypes, which provides both an analytical approach and a procedural model for the interpretation of consciousness-of-guilt evidence. It is suggested that its admissibility be tested on *voir dire* in a manner similar to the hearing held about the admissibility of "similar-fact" or "propensity" evidence.

A. The Problem

Consciousness-of-guilt evidence is increasingly gaining attention, and is being addressed by courts of appeal with considerable frequency.[3] Moreover, some of the most frequently cited texts on evidence, including those written by Charles T. McCormick and John H. Wigmore, deal with this issue.[4] Despite this interest, one cannot say that its use is well understood, or that its potential for misuse is well contained. Indeed, the test currently used to evaluate this type of evidence is incomplete and confusing. As a result, its application may permit the use of highly prejudicial evidence and instructions at trial.

The test for the analysis of this evidence, as outlined in judicial instructions to the jury, consists of four inferences that must be drawn before flight may be identified as consciousness of guilt and used as evidence of guilt *per se*. These inferences, identified by McCormick,[5] have been used in many U.S. jurisdictions and were adopted by the Supreme Court of Canada in *R.* v. *Arcangioli*.[6] They are now recognized as the governing test in cases dealing with consciousness of guilt and were described as such in *White*:

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[3] For an example of this trend in Ontario, see the series of recent decisions on consciousness-of-guilt evidence discussed by the Court of Appeal in *White*, *supra* note 1.

[4] See E.W. Clearly *et al.*, eds., *McCormick on Evidence*, 3d ed. (St. Paul: West, 1984) at 797-818 [hereinafter *McCormick*]; and J.H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Boston: Little, Brown, 1904) §§ 265-93. There is actually little on the subject in Canadian texts such as S. Schiff, *Evidence in the Litigation Process*, 4th ed. (Toronto: Carswell, 1993); or J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992).

[5] See *McCormick*, *ibid.* at para. 271.

[6] See [1994] 1 S.C.R. 129 at 144-45, 87 C.C.C. (3d) 289 [hereinafter *Arcangioli* cited to S.C.R.].

> Evidence of consciousness of guilt has probative value, however, only if the trier of fact draws four related inferences. These four inferences were described by Major J. in *Arcangioli*, as follows:
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> (1) from the accused's behaviour to flight;
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> (2) from flight to consciousness of guilt;
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> (3) from consciousness of guilt to consciousness of guilt concerning the offence in question;
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> (4) from consciousness of guilt of the offence in question to actual guilt of the offence in question.[7]

The first step in the test requires the trier of fact to connect the commission of an offence, or some other evasive conduct, with evasion. For relevance of the conduct to a finding of guilt *per se* to persist, the second step requires the trier of fact to infer that the evasion stems from a guilty conscience, rather than from some other motivation. A third inference must then be drawn that connects this "sense of guilt" to the particular offence charged, rather than to some other crime or flight-producing situation. If the three prior inferences have been successfully drawn, it is open to the trier of fact to conclude that the behaviour is evidence of a consciousness of guilt and that it thus supports a conclusion of guilt *per se.*

This apparently logical series of inferences does little to guard against the impermissible reasoning that may result from the introduction of this type of evidence. This is so, in part, because the initial step involves a presumption of guilt by the prosecution. It is not McCormick's first inference, but the process by which the prosecution identifies behaviour, that is the source of the inherent weakness. The conduct selected by the Crown may simply indicate a suspicious relationship between the offence charged and the actions of a suspect who subsequently becomes an accused. This suspicious relationship, however, is elevated by the label of "consciousness of guilt" into a category of evidence. When unpacking this sort of inference, it is important to remember that the reasoning at the stage of building the prosecution case proceeds from an assumption of guilt. It unfolds in the following way. Paradigmatically, a crime has occurred and someone has left the vicinity or the jurisdiction. These two events are only of interest if the person who left is suspected of having committed the crime. All of his or her behaviour is then screened through the prism of guilt; through this prism, the departure becomes "flight" relevant to the crime in question. For the prosecution, the departure constitutes flight that was prompted by the commission of the offence, and thus it connotes consciousness of guilt. The other inferences in the four-step test then follow naturally. This reasoning makes the initial inferences, from conduct to a conclusion that it is flight motivated by guilt, particularly suspect.

Wigmore recognized the danger inherent in labelling the suspect's suspicious actions as "flight". He also noted that once the inference from conduct to consciousness of guilt is drawn, it is almost inevitable that, short of evidence of delusion, the infer-

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[7] *Supra* note 1 at 589 [references omitted].

ence of consciousness of guilt to actual guilt by the trier of fact will follow.[8] This prosecution choice has considerable significance. Once conduct is identified and labelled in this way, the consciousness-of-guilt instruction must be given by the judge. The instruction includes a caution that an inference of guilt *per se* need not be drawn from the evidence of evasion, yet no real limits are placed on what types of behaviour may be identified in this manner. Moreover, the caution highlights the suspicious conduct, and the use of the inflammatory nomenclature "consciousness of guilt" significantly increases the potential for prejudice. Unremarkable and potentially innocent actions are thus given greater significance by the prosecution's decision to classify them as consciousness-of-guilt evidence. In *White*, two separate facts, that a crime occurred and that someone left the jurisdiction, are connected and labelled "flight", a classic category of consciousness of guilt.[9] The label was applied despite the absence of haste, chase or other *indicia* of flight. In other cases, the connection has been drawn when a crime is committed and the accused lies to the police[10] or refuses to participate in an identification lineup.[11] Since the categories of conduct are not fixed or closed, even more ambiguous actions could be labelled "consciousness of guilt".

This evidence is problematic in another way. Its assessment involves common sense, and thus is apparently a perfectly proper matter for jury evaluation. The difficulty is that "common-sense" evaluation is a dangerously constructed template giving the fact-finder nothing to measure the evasion against.[12] For example, there is never expert evidence to assist the fact-finder in evaluating the behaviour more critically or to avoid reaching a mistaken conclusion. The judge or jury is left to consider only whether the fact that this particular accused fled, lied to police, or whatever, supports a conclusion of guilt. Not surprisingly, it usually does. In any event, this particular conduct becomes a special part of the case as a whole, referred to by all as "the consciousness-of-guilt evidence", and as such casts a pall over the other evidence, which might also be quite suspect. Of course, this risk of prejudice exists with all circumstantial evidence, but most other circumstantial evidence does not come clothed in the label "consciousness of guilt". Both this label, and the caution and the instruction for dealing with it, give this class of evidence "special relevance".

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[8] See Wigmore, *supra* note 4, §§ 262-76 and especially § 273.

[9] Fabricated alibi is the other "classic" category.

[10] See *R.* v. *Syms* (1979), 47 C.C.C. (2d) 114 (Ont. C.A.). On a charge of arson, the accused's lie to the police as to his whereabouts at the time of the fire was characterized as consciousness of guilt and represented the additional evidence needed to justify a new trial after an acquittal.

[11] See *R.* v. *Shortreed* (1990), 54 C.C.C. (3d) 292, 75 C.R. (3d) 306 (Ont. C.A.). On a trial for multiple sexual assaults committed over a two-and-a-half-year period, the steps taken by the accused to avoid having a police surveillance photograph taken were found to be a form of consciousness of guilt.

[12] A perhaps significant exception arose in *Arcangioli*, *supra* note 6, discussed in Part II.B.1 below. The fact that more than one person participated in a fight highlighted the inappropriateness of using the subsequent flight conduct, which all the participants engaged in, as having particular relevance to the accused. There may have been a similarly limiting influence in *R.* v. *Wiltse* (1994), 19 O.R. (3d) 379, (*sub nom. R.* v. *Wiltse (J.W.) and Yarema (M.W.)*) 72 O.A.C. 226 (C.A.) [hereinafter *Wiltse* cited to O.R.].

B. An Illustration of the Problem: The Guy Paul Morin Case

The use of the label "consciousness of guilt" for some of the evidence relied on by the Crown in the vigorous prosecution of Guy Paul Morin[13] illustrates many of the problems associated with the current treatment of this evidence. The circumstantial case against Morin was bolstered by incidents and utterances highlighted by the prosecution as having "special relevance".[14] An examination of this evidence reveals that a presumption of guilt must have been made in order to justify the label.

On the appeal following the first trial, the Crown provided a list of the evidence it considered significant, which was reproduced in the dissenting reasons of Mr. Justice Cory (then a member of the Ontario Court of Appeal). This list identified certain conduct as consciousness-of-guilt evidence:

> (b) statements that were made by the respondent to the police on February 22, 1985, from which inferences of his consciousness of guilt might be drawn including his statement that when the police cars drove into the Jessop's driveway at 7:30 on October 3rd, he had predicted that Christine was dead.[15]

The strength of the reasoning that permitted labelling these statements as "consciousness of guilt" was not analyzed further by the Court of Appeal or by the Supreme Court of Canada.[16] We can assess the evidence, however, because it is set out in considerable detail in the judgment of Mr. Justice Robbins, in his reasoning concerning the seriousness of an error related to the burden of proof. He quotes Morin: "'... I said, you know for some reason and I'm really good for when it comes to prediction, I said I bet little Christine is gone.'"[17] Mr. Justice Robbins continues:

> [W]hen an officer [then] came over to the Morins' to ask if they had seen Christine, the respondent's reaction was "Holy shit, dad ... I was right. Why did I predict that". When asked by the officer why that (Christine's disappearance)

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[13] Guy Paul Morin was tried twice for the murder of his neighbour, Christine Jessop. The first trial, held in Newmarket, Ontario, resulted in an acquittal (7 February 1986). The Crown appealed successfully and a new trial was ordered (see *R.* v. *Morin* (1987), 21 O.A.C. 38, 36 C.C.C. (3d) 50 (C.A.) [hereinafter *Morin* (C.A.) cited to C.C.C.], aff'd [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193) [hereinafter *Morin* (S.C.C.) cited to C.C.C.]). His second trial, held in London, Ontario (before Mr. Justice Donnelly), commenced in May 1990, and after a series of motions and interlocutory appeals, resulted in a conviction in July 1992. A complete discussion of the investigation and prosecution is provided in the popular book on the case by Kirk Makin, *Redrum the Innocent* (Toronto: Viking, 1992).

Morin was in fact innocent of the murder: his conviction was overturned on the basis of DNA evidence (see *R.* v. *Morin*, [1995] O.J. No. 350, 37 C.R. (4th) 395 (C.A.)). A commission of inquiry into the causes of his wrongful conviction is being conducted in Toronto. It commenced in September 1996 and is expected to make its report in early 1998.

[14] These details are from the first trial (*ibid.*) but consciousness-of-guilt evidence of this quality was equally if not more important at the second trial (*ibid.*).

[15] *Morin* (C.A.), *supra* note 13 at 56.

[16] This point was acknowledged by the Ontario Court of Appeal in *White*, *supra* note 1 at 596.

[17] *Morin* (C.A.), *supra* note 13 at 71.

> would spring to his mind, the respondent replied, "for some reason, I am so close to many things when I predict, eh?".[18]

For the purpose of the consciousness-of-guilt characterization, the actual testimony identified with that label is particularly revealing given that these comments were made by what we know now was an innocent man, and the inference of guilt therefore highly spurious. From this perspective, it is important to remember that it is common[19] in watching a story unfold about a tragedy like a missing child that bystanders will make predictions and then comment on the accuracy of their forecast. The question is, can this common behaviour ever be truly relevant to prove guilt?

Quite simply, it cannot. Indeed, the court in *White* acknowledged that the statements about predictions and the like in *Morin* were merely "the labelling and the contentions of the Crown."[20] However, it described a supposedly valid example of consciousness-of-guilt evidence in *Morin* in the following way:

> Of particular note in the present case is the court's treatment of one of the statements to Hobbs [an undercover officer placed in Morin's cell]. The officer had asked Morin how he relieved his frustrations and Morin responded: "I red rum the innocent." "Red rum" is "murder" spelled backwards. Morin explained at trial that his remark was mere sarcasm directed at the officer's own alleged conduct.
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> Quite apart from the labelling and the contentions of the Crown, the statements to Hobbs clearly were evidence of consciousness of guilt even though in the form of spoken words rather than conduct.[21]

No reasons are given for the conclusion that this peculiar statement is "clearly" evidence of consciousness of guilt. Morin's statement is relevant in that it may literally be an admission that Morin murders the innocent as a way of relieving frustration, but it is no more than that. The effect of conferring on such a statement the categorization of "consciousness of guilt" is to accord it "special relevance". Yet, to demonstrate consciousness of guilt in this special sense, surely the prosecution should be required to show that the statement springs from some psychologically relevant and reliably demonstrable motivation. Such an utterance is as likely to demonstrate a naive attempt at talking tough as it is to demonstrate a guilty conscience. Once again, the statement is truly probative only if one assumes guilt. If it has any other relevance, it is as a literal admission, and does not merit special treatment.

It should be of great concern that in many prosecutions, so-called "consciousness-of-guilt" evidence may have no more relevance than this. In both instances in *Morin*

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[18] *Ibid.*

[19] Whether or not this conduct is "common" behaviour is itself a matter of the "common sense" construct. It happens to resonate with me as likely and unremarkable behaviour. This personal resonance cannot necessarily be generalized, however, which is, of course, the issue vis-à-vis the contested generalization of consciousness of guilt.

[20] *Supra* note 1 at 596.

[21] *Ibid.*

(the irrelevant prediction and the simply relevant "red rum" comment), all that is offered is a spurious relationship — relevance is bootstrapped on a presumption of guilt. This error occurs because the reasoning is circular — that the accused is probably guilty is confirmed by his guilty behaviour. The behaviour is "guilty" (that is, it is given relevance) from the "guilty" fact of it being the action of the accused. It is not evidence that moves the court's understanding forward from a presumption of innocence, but rather, it moves it back from a presumption of guilt. Logically, if an innocent person might also behave as the accused did, the evidence cannot have true probative value and should be excluded in recognition of its prejudicial risks, or at least treated with very special care.

II. *R.* v. *White and Côté*

The potential for abusing the "consciousness-of-guilt" categorization is considerable, and the court in *White* addressed and rejected two alteruatives to curb the latent prejudice inherent in this type of evidence. A full five-judge panel comprised of Associate Chief Justice Morden, and Justices Catzman, Carthy, Doherty and Laskin, delivered a *per curiam* judgment that dealt with the evidence on two grounds: first, they overruled the previous rule in *R.* v. *Court*[22] that held this evidence to a reasonable-doubt standard; and secondly, they interpreted the assessment of probative value on the question of guilt in a very generous way, distinguishing the more restrictive interpretation established in *R.* v. *Arcangioli*.[23]

A. *The Facts*

In November 1990, Richard G. White and Yves Côté were found guilty of the first-degree murder of Wei Kueng Chiu, whose body was found outside Ottawa on August 27, 1989. Chiu had been killed by two shotgun blasts to the body and four bullets to the head from a .22 calibre handgun in what the Crown described as an "execution style" murder. The largely circumstantial case established opportunity and connected the murder weapons to the two accused. It was buttressed both by accomplice evidence and by consciousness-of-guilt evidence. No evidence of motive was adduced.

The Crown established opportunity based on evidence that Chiu and the two appellants were friends who had served time in prison together, and on circumstantial evidence suggesting that they were all together as late as 8:00 P.M. on August 26, the day before Chiu's body was found. Essentially uncontested evidence placed White and Côté together, without Chiu, by 9:00 or 9:30 P.M. of the same day. Ballistics evidence linked the murder weapons to weapons the appellants admitted they used within three days of the murders, in bank robberies on August 29 and on September 5. The Crown buttressed this circumstantial case with the evidence of an accomplice,

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[22] *R.* v. *Court* (1995), 99 C.C.C. (3d) 237, 23 O.R. (3d) 321, (*sub nom. R.* v. *Court (G.R.) and Monaghan (P.D.)*) 1995, 81 O.A.C. 11 (C.A.) [hereinafter *Court* cited to C.C.C.].

[23] *Supra* note 6.

one Paul Corner, who had also served time with them, and with the contested consciousness-of-guilt evidence.

Corner testified that when he registered the appellants in a motel and arranged a car for them on August 29, they described shooting someone in Ottawa.[24] He said that they referred to possible "heat" in Ottawa and the need to avoid it,[25] thus providing the necessary link for a conclusion of "flight". The credibility of this witness was contested, but the Court of Appeal held that the caution given at trial was adequate.[26] The Crown also relied on several additional pieces of evidence as proof of guilt, each of which formed part of the consciousness-of-guilt evidence that became a central issue on appeal. This evidence consisted of the following: White and Côté's departure from Ottawa on August 27 or 28, which was characterized as flight by the prosecution; the appellants' failure to attend parole reporting meetings; their actual flight from police pursuit and their efforts to dispose of a handgun at the time of their arrest in Ottawa on September 8; their possession of the weapons used in the robberies and the murder when they were arrested after a chase; and finally, as a linchpin, the Crown introduced the statements made by the appellants to Corner in its attempt to label their actions "consciousness of guilt". These statements, reminiscent of the statements relied on in *Morin*,[27] do not fit the usual definition of consciousness of guilt. The question of whether they had been made at all was strongly challenged at trial, further complicating the analysis.

Neither accused testified at trial.

B. The Judgment

Two issues concerning consciousness-of-guilt evidence were dealt with on appeal: first, the failure to charge in accordance with *Arcangioli*;[28] and second, the failure to charge the jury that an inference of consciousness of guilt must be proved beyond a reasonable doubt before it can be relied upon, in accordance with *Court*.[29] Neither ground succeeded.

1. The Failure to Charge in Accordance with *Arcangioli*[30]

Giuseppe Arcangioli, charged with aggravated assault, admitted being present at the fight in question and having struck a blow. He blamed another, however, for the stabbing that was the gravamen of the aggravated assault. All the participants in the fight had fled. The issue at trial was not whether Arcangioli had participated, but

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[24] See *White*, *supra* note 1 at 586-87. The description is consistent with the murder of Chiu.

[25] *Ibid.*

[26] *Ibid.* at 606.

[27] See Part I.B, above.

[28] *Arcangioli*, *supra* note 6, discussed in *White*, *supra* note 1 at 591ff.

[29] *Court*, *supra* note 22, discussed in *White*, *ibid.* at 594ff.

[30] The Supreme Court of Canada decided *Arcangioli* in January 1994, more than three years after White and Côté's conviction. The Ontario Court of Appeal, in *White*, agreed that if the rule applied, then the appellants must receive its benefit.

rather his level of participation. The Supreme Court of Canada concluded that the flight evidence could not have probative value since his "guilty conscience" could have arisen from either the punch he admitted or from the stabbing he denied.[31]

The defence in *White* argued for a "no probative value" charge on the flight evidence in line with *Arcangioli*.[32] Its position was that the departure from Ottawa on or about August 27 was as consistent with avoiding apprehension for a parole violation (the basis for White's arrest on September 8) as it was with flight from the commission of a murder. Further, the defence argued that the accuseds' efforts to avoid arrest and to dispose of their weapons on September 8 were as consistent with fear of apprehension for the two armed robberies they admitted committing as it was with consciousness of guilt for the murder of Chiu.

The Court of Appeal rejected the appellants' arguments on two grounds. First, the Court distinguished the two cases on their facts. In *Arcangioli*, the admitted flight stemmed from a conceded, albeit limited, participation in the offence charged. By contrast, participation was denied in *White*. As a result of this distinction, both the issues to be determined and the possible probative value were different. The Court then went on to consider the second ground, the question of how to deal with probative value when the flight could be equally explained as stemming from an offence other than the offence charged. This was the foundation situation in the case relied on by the Supreme Court in *Arcangioli*[33] and the explanation advanced by White and Côté. The Court distinguished that claim as well. The test it drew from *Arcangioli* would require an instruction to a jury that the evidence had no probative value only where the evidence could not "reasonably support the inference" that the prosecution wanted drawn — in other words, when it would be unreasonable to infer that the conduct in question related to culpability for the offence charged.

This was the interpretation the Court of Appeal had used earlier in applying *Arcangioli* in another consciousness-of-guilt case, *R.* v. *Wiltse*,[34] and the Justices relied on their reasoning in *Wiltse* to support the interpretation applied in *White*.[35] In *Wiltse*, both of the accused provided a false alibi to a charge of first-degree murder, thereby raising the issue of consciousness of guilt. However, one admitted to manslaughter, while the other claimed that his participation was nonculpable. Doherty J.A. held that for Wiltse, the accused who admitted to manslaughter, the false alibi was nonprobative pursuant to the decision in *Arcangioli*.[36] With respect to the co-accused, Yarema, who denied culpable involvement, the jury was to be instructed that the evidence could have limited probative value.[37] Mr. Justice Doherty indicated that the jury should also have been directed to make certain it was satisfied that the guilt demon-

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[31] *Arcangioli*, *supra* note 6 at 146.

[32] *Supra* note 1 at 591.

[33] See the Court's discussion of *United States* v. *Myers*, 550 F. 2d 1036 (5th Cir. 1977) [hereinafter *Myers*], in *Arangioli*, *supra* note 6 at 144ff.

[34] *Wiltse*, *supra* note 12, referred to in *White*, *supra* note 1 at 592.

[35] *Ibid.* at 592-93.

[36] See *Wiltse*, *supra* note 12 at 384.

[37] See *ibid.* at 384-85.

strated by Yarema's false alibi and other acts were a reflection of guilt for the murder, and not for the nonculpable but morally wrong actions he had admitted to.[38] In other words, Yarema's conduct could establish only culpability, not the degree of fault. The error, however, was not seen to be fatal to the conviction.

The same interpretation was used in deciding *White*. To compel a "no probative value" direction, the defence would have had to have shown that the inference that the accused fled because of the murder of Chiu was unreasonable.[39] The Court held that the defence had not done so since murder provides a greater motivation for flight than either parole violation or robbery. The only concession made to the significance of the alternative explanations was that the trial judge should have instructed the jury that consciousness-of-guilt evidence could have probative value only if the jury was satisfied that it pertained to the murder rather than to the parole violation or the bank robberies. The Court also concluded that the jury would have understood this limitation from other instructions given at trial.[40] Overall, the trial judge's approach to this evidence, essentially a standard charge in cases like this, was approved by the Court of Appeal:

> The trial judge was therefore not required to instruct the jury that they could not draw an inference of consciousness of guilt or guilt itself from the appellants' conduct. Indeed, had he done so, he would have usurped the jury's fact-finding function.[41]

2. The Decision to Reverse *Court and Monahan*

In 1995, the Ontario Court of Appeal, in a *per curiam* judgment, decided that a separate reasonable-doubt standard must be applied to the facts from which a jury is being urged to draw an inference of consciousness of guilt.[42] In reaching this decision, it adopted the reasoning of the British Columbia Court of Appeal in *R.* v. *Poirier (M.R.)*,[43] which required both that the foundation facts upon which the Crown relied, and the inference itself, be proven beyond a reasonable doubt. The court in *White* set out the reasoning adopted in *Court* and *Poirier* as follows:

> It seems to me that a jury should be told that an inference of consciousness of guilt can only be drawn if they are satisfied that the facts from which the inference is sought to be drawn have themselves been proved beyond a reasonable doubt and they are also satisfied beyond reasonable doubt after considering all the evidence, including explanations advanced by the accused for the conduct in question and any other possible explanation for it, that the inference of consciousness of guilt should be drawn. The jury must be told that if they are not satisfied that consciousness of guilt has been proved to this standard then they

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[38] *Ibid.* at 385.

[39] See *White*, *supra* note 1 at 591-92.

[40] See *ibid.* at 594.

[41] *Ibid.* at 593.

[42] See *Court*, *supra* note 22.

[43] (1995), 56 B.C.A.C. 131, 92 W.A.C. 131 [hereinafter *Poirier* cited to B.C.A.C.].

> should decide the case on the whole of the evidence without having regard to that as a possibility.[44]

The British Columbia Court of Appeal reached its conclusion in *Poirier* despite the ruling of the Supreme Court of Canada in *Morin*, which held that it was an error to suggest that a jury hold individual items of evidence to a reasonable-doubt standard.[45] In distinguishing *Morin*, the Court relied on what it termed the "special" probative value of consciousness-of-guilt evidence:

> I am, however, persuaded in the end that because, if accepted as such, it involves a conclusion of guilt, "evidence of consciousness of guilt", [*sic*] cannot properly be regarded as an "item of evidence" for the purposes of the rule in *Morin* — that is to say merely something to be considered with everything else in deciding whether guilt has been established to the criminal standard on each ingredient of the charge.[46]

This decision, delivered after the trial of White and Côté, was used by the accused as a ground of appeal. The Crown in *White*, however, argued that *Court* was wrongly decided and that as a result, it should be overruled. The Crown argued that

> evidence, including that relating to consciousness of guilt, should not be considered piecemeal by reference to the criminal standard of proof beyond a reasonable doubt. The jury should be told to consider the evidence as a whole in determining whether guilt is established beyond a reasonable doubt.[47]

The Ontario Court of Appeal agreed with the Crown that *Court* and *Poirier* had both misinterpreted *Morin*. The Justices reasoned that the case against Morin had included consciousness-of-guilt evidence, and that the Supreme Court of Canada must have therefore had this type of evidence in mind in their consideration of the standard of proof. They held that

> [o]ther than in the headings, no judge in either this court or the Supreme Court of Canada used the expression "consciousness of guilt" in his reasons. That, however, is to be expected in a context where no one apparently contended for a distinction. The three forms of circumstantial evidence were treated generically as a single species of evidence calling for the same directions. Accordingly, evidence of consciousness of guilt was clearly before the court and was adjudicated on in Morin, and this court is bound by the conclusion.[48]

The Court of Appeal in *White* did not simply follow this interpretation of *Morin*, however. It went on to justify this position on the merits of the case and to analyze the history of the position that had held consciousness of guilt to a separate standard of proof.[49] A distinction emerges in the cases. Where the proposed inference may be drawn from evidence that can stand alone, a separate reasonable-doubt standard is required. When it is either offered as corroboration or must be considered along with

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[44] *Poirier*, *ibid.* at para. 15, cited in *Court*, *supra* note 22 at 274, and in *White*, *supra* note 1 at 595.

[45] See *Morin* (S.C.C.), *supra* note 13 at 211, discussed in *White*, *ibid.*

[46] *Poirier*, *supra* note 43 at para. 14, cited in *White*, *supra* note 1 at 594.

[47] *White*, *supra* note 1 at 594.

[48] *Ibid.* at 596.

[49] See *ibid.* at 597ff.

other evidence to have significance, the line of authority is clear that all evidence must be considered together. The Court cited *R.* v. *Bouvier*[50] at some length and drew this conclusion:

> *Bouvier* did not deal with evidence of consciousness of guilt but the quoted excerpts make the point adverted to earlier that there is good reason to treat evidence of different kinds and qualities in the same fashion when deliberating on the ultimate question of guilt or innocence. Consciousness of guilt evidence may consist of false alibi, flight, an alias, possession of a police scanner, false identification, escape from custody, resistance to arrest, lying to the police, or removal of blood from a car, to name a few examples. These examples may be extremely significant within the entire body of evidence or, in other circumstances, they may be barely worth attention. Most of these examples, standing alone, likely would not support an inference of guilt of the crime beyond a reasonable doubt. Therefore, under the test suggested in *Court* this evidence would, in most cases, be excluded from consideration.[51]

The Court thereby extended the argument made by Martin J.A. in *R.* v. *Minhas*[52] and expressed it in terms of the rationale underlying consciousness-of-guilt evidence:

> The mind may speak its piece or act it out. Actions may be more ambiguous than words, requiring special directions, but the evidence of each plays the same role in the process of analysis leading to a verdict.[53]

In effect, a jury, which might not be satisfied of guilt beyond a reasonable doubt on the basis of either of two pieces of evidence standing alone — in *Bouvier* an eyewitness and a licence number, in *White* some evidence of opportunity and eventual possession of the murder weapon — might be satisfied upon viewing the two pieces of evidence together, and thus should be permitted to do so.

In *White*, the Court of Appeal also reversed its holding in *Court* that consciousness-of-guilt evidence is distinctive in that it goes directly to the ultimate issue. The Court pointed out that oral admissions by way of pretrial confessions are even more direct, but that no separate standard of proof applies before a jury may consider a confession along with the balance of the case.[54]

III. Analysis and Discussion

A. *The Rationale Behind* Arcangioli *— What the Ontario Court of Appeal Ignored*

By narrowly distinguishing the rule set out in *Arcangioli*, the Ontario Court of Appeal in *White* failed to follow the spirit of that judgment. It also failed to take into

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[50] (1984), 11 C.C.C. (3d) 257, 1 O.A.C. 302 (C.A.), aff'd [1985] 2 S.C.R. 485, 22 C.C.C. (3d) 576, cited in *White*, *ibid.* at 599.

[51] *White*, *ibid.*

[52] (1986), 29 C.C.C. (3d) 193, 16 O.A.C. 42 (C.A.), discussed in *White*, *ibid.* at 600-601.

[53] *White*, *ibid.*

[54] See *ibid.* at 601-602.

account what we know, or do not know, about how people react to fear or guilt. In fact, we know very little about guilt, how it manifests itself, and for what reasons. People may feel great guilt over events for which they have no criminal responsibility. We do know, however, that how we perceive behaviour is socially constructed and does not necessarily lead to any satisfactory degree of certainty about what motivated a particular behaviour. These lessons were learned in part by questioning socially constructed assumptions about behaviour based on gender-specific stereotypes. Similar lessons have been learned in the effort to unmask other stereotype- and bias-driven assumptions.

The Supreme Court of Canada's adoption in *Arcangioli* of the following caution expressed by McCormick shows an appreciation of this ambiguity:

> [I]n many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the "wicked" generally rather than resolving the issue of guilt of the offense charged.[55]

Mr. Justice Major analyzed the evidence proffered in *Arcangioli* with this concern in mind. In support of this approach, he invoked the Supreme Court's decision in *Gudmondson* v. *The King*.[56] Gudmondson failed to stop and assist those injured by a collision in which he was involved. He was charged with criminal negligence. The Supreme Court, concerned that a jury could easily be misled "as to the significance of that conduct for the purpose in hand, as well as in respect of its evidentiary cogency",[57] held that a strong caution should have been given to the jury. The Court's concern was that Gudmondson's failure to stop would be misused by the jury in determining whether he had caused the accident by driving in a criminally negligent manner. In these circumstances, the Court explained,

> [the trial judge] ought at least to have added a warning to the jury that such conduct, however reprehensible, could have no more than an indirect bearing upon the issue before them. ... [B]ut, in view of his other observations, he should have told them that they ought to be very cautious in imputing to the accused a consciousness of guilt, because of actions which, on reflection, they might think capable of explanation as due to panic.[58]

In this context of caution about the probative value of this type of evidence, the Supreme Court identified a situation where a jury should be instructed that consciousness-of-guilt evidence has little or no probative worth. This was seen to be required when the conduct in question could be explained by reference to two or more offences. The Court adopted this position in part based on the decision in *United*

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[55] *McCormick*, *supra* note 4 at 803, cited in *Arcangioli*, *supra* note 6 at 143, Major J.

[56] (1933), 60 C.C.C. 332 (S.C.C.) [hereinafter *Gudmondson*], cited in *Arcangioli*, *ibid.* It is instructive to note how significantly the focus of concern has shifted in regard to consciousness-of-guilt evidence. In *Gudmondson*, *ibid.*, the key concern was causing prejudice.

[57] *Gudmondson*, *ibid.* at 333.

[58] *Ibid.*

States v. *Myers*.[59] In *Myers*, the accused was charged with two separate counts of robbery (one in Florida, the other in Pennsylvania). His flight from the F.B.I. was held to have no probative value on the Florida charge, given that he knew that he was also wanted for a robbery committed in Pennsylvania. In other words, it would have been just as rational to conclude that he fled out of consciousness of guilt with respect to the offence committed in Pennsylvania. The United States Court of Appeals, Fifth Circuit, referred to McCormick's four inferences and held that "[a]nalytically, flight is an admission by conduct [and] [i]ts probative value as circumstantial evidence of guilt depends on the degree of confidence with which four inferences can be drawn."[60]

In this factual context, separate events that each had the potential to explain the "guilty" behaviour led to the conclusion of "no probative worth". This reasoning compelled Mr. Justice Major to hold in *Arcangioli* that "[t]o be useful, flight must give rise to an inference of consciousness of guilt in regard to a specific offence."[61] He then went on to particularize the holding:

> Consequently, where an accused's conduct may be *equally explained* by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence.[62]

This is the detail that the Ontario Court of Appeal has chosen to emphasize. According to the decision in *White*, in order for alternative explanations of flight to be considered "equal", they must refer to identical offences where one is admitted, or to an admission of limited participation in the crime alleged. On this reasoning, the rule in *Arcangioli* will apply only where the issue is the degree of fault, or in the rare cases where one of several identical charges is admitted. In this context, the accused's admission to one of the charges, not the existence of other rational explanations, determines the probative value of the flight evidence.

This mechanistic approach to relevance and probative value was specifically articulated in *R.* v. *Jenkins*.[63] In *Jenkins*, the Ontario Court of Appeal concluded that the "issues in dispute at trial and ... the defence advanced by the accused" determine whether consciousness-of-guilt evidence has probative value.[64] Obviously, questions about what is probative are determined on the basis of what is legally at issue. It follows that what is at issue is influenced, not determined, by what is admitted by the accused and by what defences are subsequently raised. However, it seems to be a misreading of *Arcangioli* to limit the case's holding in this way. Faced with an argument that the proper test is to measure probative worth against other rational explanations, the court in *White* held that the appellants' alternative explanation did not meet the

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[59] *Supra* note 33.
[60] *Ibid.* at 1049.
[61] *Supra* note 6 at 145.
[62] *Ibid.* [emphasis added].
[63] (1996), 29 O.R. (3d) 30, 107 C.C.C. (3d) 440 (C.A.) [hereinafter cited to O.R.].
[64] *Ibid.* at 61.

"threshold" of an "equal" explanation.[65] The court did not articulate the principles that would establish this "equality", but implied that exact similarity is required.

In *White,* the requirement that the alternative explanations have "equal" explanatory force was significant to the final outcome of the case. The consciousness-of-guilt evidence was central to the prosecution case, which was otherwise based merely on evidence of opportunity, and the key to giving the consciousness-of-guilt evidence any probative value was the conclusion that the appellants' departure from Ottawa was in fact "flight" from the murder.[66] The appellants explained that their flight was related to their missed parole meeting. The court relied on the disputed accomplice evidence to transform the Ottawa departure into an escape from "heat" because "they had snuffed somebody." From this, the court concluded that the departure and the risk of a parole violation "did not afford a proper basis for a 'no probative value' instruction."[67] If one removes the notoriously unreliable evidence of an accomplice with a lengthy criminal record from the analysis, it is difficult to see why the explanation for leaving Ottawa offered by the appellants would not be believable as the commonplace behaviour of ex-convicts who have missed a parole interview, in which case the behaviour should not be inflated into consciousness-of-guilt evidence. Indeed, this evidence would not meet the strict test for evidence of "flight" set out in *Myers.* The *Myers* test requires the prosecution to adduce direct evidence that the behaviour relied on to show "flight" was spontaneously prompted by the guilty conduct at issue.[68]

In *White,* the court's flat rejection that flight from a charge of armed robbery is not "equally consistent" with flight from a charge of murder is less persuasive than its rejection of the "parole violation" explanation offered by the appellants for their sudden departure from Ottawa. Armed bank robbers facing arrest would behave precisely in this manner, whether they had committed a murder or not. Their rejection of this plausible explanation, however, does highlight the dilemma posed by evidence of flight and its elevation to the special category of consciousness-of-guilt evidence. As the court reasoned, murder could also have prompted the flight. The difficulty is that making an inference that the behaviour constituted flight from a charge of murder entails making an impermissible presumption of guilt.

Indeed, it is difficult to imagine what objective evidence might serve reliably to distinguish between "flight from murder" and "flight from robbery". What is clear is that the "no probative worth" instruction should be used whenever it *might* be appropriate. It is not an instruction that the defence should have to plead for, but one that the prosecution should be required to rebut.

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[65] *White, supra* note 1 at 593.

[66] See discussion of the facts above, in Part II.A.

[67] *White, supra* note 1 at 593.

[68] See *Myers, supra* note 33 at 1051.

B. The Rationale for a Separate Standard of Proof

The court in *White* did not approach its analysis of consciousness-of-guilt evidence from the perspective of limiting its potential misuse. It is thus not surprising that it rejected holding this type of evidence to a separate reasonable-doubt test. As in *Morin*, the court in *White* was concerned that by isolating evidence and subjecting it to a reasonable-doubt standard, it would overly complicate the task given to the trier of fact.[69] The correlative fear was that by overly complicating the evaluation of evidence, otherwise probative evidence would be rejected. In other words, the isolation of consciousness-of-guilt evidence could lead to the acquittal of the guilty. Consciousness-of-guilt evidence, however, is already treated differently because of the separate instruction it compels and because of its prejudicial label. Both these factors increase the risks associated with this type of evidence. The use of a reasonable-doubt standard for establishing the facts on which the Crown is basing the application of the label "consciousness of guilt" is certainly one means of curbing the potential for misuse. Rather than, or in addition to, removing this inference from the jury when alternative explanations are available to explain the conduct, holding the evidence to a separate standard of proof places the onus on the prosecution to establish the "foundation" facts. Once these facts — that is, the circumstances of flight — are established, the Crown should be required to justify drawing the inference from the facts to a conclusion of guilt *per se*.

The analogy to confession evidence, drawn by the court in rejecting a reasonable-doubt standard for consciousness-of-guilt evidence, is helpful.[70] Confession evidence may not be considered by the jury until it has been proven to be voluntary beyond a reasonable doubt on *voir dire*; only then does it become an admissible "item of evidence".[71] The requirement of voluntariness aims to ensure the reliability of the evidence and to avoid jury error induced by prejudicial information. Coerced or induced confessions are recognized as inherently untrustworthy.[72]

If one accepts that the risk of misusing consciousness-of-guilt evidence exists, then the analogy to confession evidence is sound. The rule in *Court* required the prosecution, first, to establish the "foundation" facts, that is, the circumstances of flight. In many cases, these facts are admitted or at least are an uncontested part of the narrative. It is only when they are in dispute, as they were in *Morin* or as the accomplice evidence was in *White*, that the reasonable-doubt rule might serve to limit prejudice. The difficulty is that the prejudice does not flow from reliance on unproven facts (although this may aggravate it) and the solution in *Court* does not fully address the overly broad and problematic assumptions which are the *raison d'être* for this evidence. Proving the "foundation" facts to be true does not remove the problem for consciousness-of-guilt evidence, as it does for confessions.

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[69] See *White*, *supra* note 1 at 601.

[70] See *ibid.*

[71] The classic rule was given in *Ibrahim* v. *The King*, [1914] A.C. 599 (P.C.).

[72] See *ibid.* at 609-610.

The second branch of the test in *Court*, which determines whether the proffered evidence demonstrates a consciousness of guilt beyond a reasonable doubt, is more attractive. Without articulating what a reasonable doubt might be, however, and how the prosecution can overcome it and how the defence might raise it, this "test" is a hollow safeguard. The court in *White* was persuaded that Guy Paul Morin's statement "I redrum the innocent" betrayed a consciousness of guilt. That Morin was innocent suggests that something other than a reasonable-doubt test is required for assessing consciousness-of-guilt evidence. Whether or not for all the right reasons, the court in *White* was correct to overrule *Court*.

IV. Conclusion

The label "consciousness of guilt" is no more than a theory of relevance premised on a prosecution hypothesis. In this sense it is similar to the theory of relevance in "propensity" or "similar-fact" evidence, and the potential for prejudice is equally substantial. In the latter instances, however, rules for admissibility exist to guard against impermissible reasoning. Consciousness of guilt is evidence that relies for its relevance on poorly supported and even false assumptions about motivation and behaviour. It is therefore suspect in the same way that other evidence of dubious relevance is suspect. The challenge is to craft safeguards that will adequately screen this class of potentially relevant circumstances and restrain faulty reasoning.

One possible approach to reducing the risk of prejudice posed by this evidence can be found in the feminist critique of relevance.[73] The role that faulty reasoning based on stereotypes and flawed assumptions may play in the criminal justice system has been exposed in a number of contexts in recent years, and a variety of remedies have evolved, from common-law to constitutional and legislative remedies. The challenge to the errors caused by stereotypes and false assumptions has been particularly sharp and effective (at least at the public, surface level) in the case of sexual offences against women, where the elimination of "rape myths" and gendered stereotypes has been championed by the Supreme Court and by Parliament.[74]

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[73] In referring to "the" feminist critique of relevance I am not unmindful of legitimate concerns about essentialism, nor am I unmindful of the nuances and differences in feminist approaches to this question. However, in the context that I am working in, it is helpful to universalize in order to borrow from the entire range of feminist critiques, all of which offer two valuable insights: first, the understanding that underlying assumptions and generalizations are socially constructed and as such may be flawed by bias and overreaching stereotypes, and second, that remedies for the flawed results flowing from biased reasoning must incorporate clear and specific guidelines and measures. Both lessons provide a helpful approach to the questions of relevance dealt with in this comment.

[74] See *e.g.* the discussion of rape myths and the so-called "rape shield" in *R.* v. *Seaboyer*; *R.* v. *Gayme*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321 [hereinafter *Seaboyer*] and the legislative response in sections 276, 276.1, 276.2 and 276.3 of the *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1992, c. 38, s. 2; see also the approach to disclosure of confidential counselling and medical records in *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 and *R.* v. *Beharriell*, [1995] 4 S.C.R. 536, 103 C.C.C. (3d) 92; and see the limits to cross-examination of sexual-assault complainants on coun-

Similarly, faulty gendered assumptions about battered women have been challenged and opened up to alternative explanations. In particular, the need for expert evidence has been recognized to assist the trier of fact in understanding battered women's circumstances and their defences.[75] In a related recognition of the danger of stereotypes, the potential for systemic racism — the difficulty for a black accused to get a trial free from bias and distorted assumptions about relevance and behaviour — has been judicially recognized.[76] In all these circumstances (and in others), the justice system recognized that prevailing wisdom — "common sense", as it were — produced wrong conclusions. False assumptions producing spurious claims of relevance retarded rather than advanced the search for truth, and remedial action was taken, by way of common-law, constitutional or legislative development.

At the same time, we have witnessed a movement away from formulaic, restrictive rules of evidence towards a wider scope of admissibility, again in the interests of advancing the search for truth. Many special rules for the admissibility of evidence or for the instruction of juries have been simplified or discarded. Dramatic changes to the admissibility of hearsay evidence are the most obvious and recent example of this trend,[77] but the elimination of special rules for the use of circumstantial evidence[78] and the elimination of formalistic rules of corroboration and special cautions for certain witnesses such as accomplices[79] were precursors of the trend towards increased admissibility.

Less tension exists between these two trends than might appear at first glance. The values driving contemporary evidence jurisprudence represent, arguably, a movement away from unneccessary formalism and towards the admissibility of all relevant evidence, even in the face of some risk of prejudice. The point of common ground between these values lies in the determination of relevance and the unpacking of the assumptions and underlying generalizations that lead to our conclusions about it. In other words, the "reform" movement that eschews formulaic rules is the same movement that encourages a reconsideration of assumptions and bias. In the case of

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selling and psychiatric records in *R.* v. *Osolin*, [1993] 4 S.C.R. 595, 26 C.R. (4th) 1. This demystification has primarily manifested itself at the public, surface-level.

[75] See especially *R.* v. *Lavallée*, [1990] 1 S.C.R. 852 at 870-73, 55 C.C.C. (3d) 97. Madame Justice Wilson recognized that when considering the actions of a battered woman, judges and juries need the assistanee of expert evidence to avoid error.

[76] See *R.* v. *Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.).

[77] See *R.* v. *Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92. Initially a product of the rejection of false assumptions about the reliability of children's testimony, *R.* v. *Khan*, *ibid.*, led to a new approach to the admissibility of all hearsay evidence, an approach based on the principles of reliability and necessity (see *R.* v. *Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257). The "principled approacli" to all hearsay evidenee was embraced in *R.* v. *B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257.

[78] This was the rule that to found a conviction, circumstantial evidence must be consistent *only* with guilt and with no other rational conclusion. If there is another rational conclusion, a reasonable doubt as to guilt exists. This is the so-called "rule in *Hodge's Case*", (see *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136) considered by the Supreme Court in *R.* v. *Cooper*, [1978] 1 S.C.R. 860, 34 C.C.C. (2d) 18 [hereinafter *Cooper*].

[79] See *R.* v. *Vetrovec*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1.

evidence proffered to demonstrate consciousness of guilt, these trends offer a real opportunity to limit prejudicial reasoning without unduly complicating trials or handicapping a fair prosecution.

One potentially fruitful approach can be found in the procedural and evidentiary rules relating to the cross-examination of complainants in sexual assault cases, where the analysis of relevance is rigorous and helpful. Section 276 of the *Criminal Code*[80] requires the defence to apply to the presiding judge for a hearing on the relevance of a request to cross-examine the complainant on past sexual history or to adduce evidence concerning such conduct. The application must be particularized, in writing, and must establish that the proposed evidence is relevant. It must also show that pursuant to paragraph 276(2)(c), it "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." What is and is not relevant is also addressed in the provisions dealing with consent (sections 265(4) and 273.1) and mistake (section 273.2). The result is a fairly complete guide to our present appreciation of what is probative and what is prejudicial on the question of consent. The process of legislative amendment that produced this guide has become a recognized practice, giving us hope that as our appreciation and understanding of stereotypes further evolve, the courts and legislatures will be prepared to evolve as well.

These are good tests and they represent a significant advance in the law on the possible use of a complainant's sexual history as it stood after the decision in *Seaboyer*.[81] They also demonstrate principles that should be emulated or at least adapted to test evidence offered to establish consciousness of guilt. The prosecution should be required to have its proposed consciousness-of-guilt evidence reviewed before its introduction at trial, in the same way that similar-fact and confession evidence are now tested on *voir dire*. The appropriate test should be drawn from general principles dealing with circumstantial evidence. That is, if another rational explanation for the behaviour is available, no special inference as to consciousness of guilt should be drawn, and the evidence should have no probative value — or at least no "special" probative value. In most cases the information would already be before the jury as part of the narrative, as *res gestae* or as an admission. In those circumstances, however, it should not be accorded special status by either the prosecution or the court.

In the wake of *Morin*[82] and *Cooper*,[83] the admissibility of all circumstantial evidence is without sufficient guidelines and limitations. A new test would serve to redress this problem as well. It is salutary to remember that at his first trial,[84] Guy Paul Morin — an innocent man — was acquitted by a jury given the "incorrect" instruction

[80] *Supra* note 74.
[81] *Supra* note 74.
[82] *Supra* note 13.
[83] *Supra* note 78.
[84] 7 February 1986, *supra* note 13.

concerning the individual testing of contested pieces of circumstantial evidence. The jury on his second trial,[85] charged "correctly", found him guilty.[86]

Circumstantial evidence depends for its probative force on the way we draw inferences and make connections. This is often a matter of "common sense". It is important to keep in mind how easily "common sense" masks prejudicial and unfounded reasoning. Curbing these human weaknesses in the case of evidence proffered to show consciousness of guilt marks one more necessary step towards the achievement of a fair and accurate fact-finding method.

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[85] July 1992, *supra* note 13.

[86] Admittedly, other factors contributed to both decisions.