

COURT OF APPEAL FOR ONTARIO

ROSENBERG, ARMSTRONG and BLAIR JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	
	)	
	)	John McInnes and Elliott Behar
Respondent	)	for the respondent
	)	
- and -	)	
	)	
	)	Timothy E. Breen
	)	for the appellant
RAMNARINE KHELAWON	)	
	)	
Appellant	)	Heard: August 10, 2004
	)	

On appeal from convictions imposed by Justice Peter Grossi of the Superior Court of Justice on November 21, 2001.

R.A. BLAIR J.A.: (dissenting in part)

OVERVIEW

[1] The appellant seeks to set aside convictions registered against him by the Honourable Mr. Justice Grossi for assault causing bodily harm and assault with a weapon (in relation to Attilio Dinino) and for aggravated assault and uttering death threats (in relation to Teofil Skupien). He was found not guilty of assaulting three other individuals.

[2] The five complainants were all residents of The Bloor West Retirement Village, a home for elderly residents in Toronto. Mr. Khelawon, a thirty-five-year old registered

nurse, was the manager of the home, which is owned by his mother. He worked the night shift, from 7:00 p.m. until 7:00 a.m, seven days a week.

[3] At the time of the incidents in question, the complainants, Mr. Dinino and Mr. Skupien, were sixty-eight and one-half years of age and eighty-one years of age, respectively. Both died before the trial – not from the alleged incidents, but from natural causes. They had each given videotaped statements to the police, and the trial judge permitted the Crown to introduce these statements into evidence. The statements are central to the Crown’s case against the appellant in relation to the relevant charges, and counsel agree that if the statements were inadmissible acquittals should be registered.

[4] The issue on the appeal is whether the trial judge erred in ruling that the videotaped statements of these two complainants were admissible as proof of the truth of their contents, pursuant to the principled exception to the hearsay rule. I have had the opportunity to read the lucid reasons of my colleague, Rosenberg J.A. Respectfully, I cannot agree with his conclusion concerning the inadmissibility of the videotaped statement of Mr. Skupien. I agree that the trial judge erred in admitting the statement of Mr. Dinino, but he did not err in admitting that of Mr. Skupien, in my opinion. I would therefore allow the appeal with respect to the convictions concerning the charges relating to Mr. Dinino and dismiss the appeal with respect to those concerning Mr. Skupien.

[5] My reasons for arriving at these conclusions follow.

FACTS

[6] The Bloor West Retirement Village has about forty elderly residents, all of whom require supervised care. In May 1999, five of the residents complained that the appellant had assaulted them. One of them, Mr. Dinino, said he had been beaten with his cane. Another, Mr. Skupien, said that his life had been threatened.

[7] The three other complainants were Cazimir Grocholska, George Peiszterer, and Kathleen Poliszak. Each said they, too, had been beaten by Mr. Khelawon.

[8] The complaints first came to the attention of the police when Joanna Stangrat – a cook and assistant at the residence – took Mr. Skupien to the police. On May 8, 1999, Ms. Stangrat had been serving breakfast at the retirement home and had become concerned when Mr. Skupien did not appear. She went to his room where she found him lying down in an injured state, red-faced and with blood around his mouth and a scratch on his head. One eye was bruised, as were his nose and the left side of his chest. He was frightened and his clothes were packed in a garbage bag. Ms. Stangrat took him from the home and arranged for him to be cared for by one of her friends. A few days later – after he finally agreed to go – she took Mr. Skupien to a doctor (Dr. Pietraszek), who testified that he found recent scratches, abrasions, bruising and swelling. An x-ray showed that

three ribs had been fractured. Ms. Stangrat then took Mr. Skupien to the police station, where he gave a videotaped statement describing what he said had happened to him.

[9] Not long before these events, the appellant had dismissed Ms. Stangrat from her employment at the retirement home. She was still working there at the time of these events because she had been permitted to remain for an additional month while she sought other employment. The defence argued that she had put the complainants up to their allegations as a way of getting back at the appellant for having dismissed her.

[10] After taking the Skupien statement, the police attended at the retirement home and arrested the appellant. The next day they broadened their investigation and returned to the home to speak with various residents. In this respect they had the benefit of a list of names given to them by Ms. Stangrat in the course of a statement that she had provided while attending the police station with Mr. Skupien. They spoke with Mr. Dinino, Ms. Poliszak and Mr. Grocholska. Videotaped statements were taken from these three individuals at the retirement home, using videotaping equipment that had been brought from the police station. The police also interviewed another resident, Mr. Boychuk, who told them that Mr. Dinino had complained to him about the appellant hitting him with a cane (this interview was not videotaped). The following day, the police took a videotaped statement from Mr. Peiszterer's son, who said his father had complained to him about being assaulted by the appellant.

[11] The charges against the appellant arose out of the alleged assaults of Mr. Skupien, Mr. Dinino, Ms. Poliszak, Mr. Grocholska, and Mr. Peiszterer. After a *voir dire* the trial judge ruled the videotaped statements of Mr. Skupien, Mr. Dinino and Ms. Poliszak substantively admissible on the grounds that the tests of necessity and reliability had been met. He refused to admit Mr. Grocholska's statement on necessity grounds because the transcript of Mr. Grocholska's evidence at the preliminary enquiry was available. He refused to admit a series of oral statements as well. These statements included oral statements made by Mr. Skupien to Dr. Pietraszek and to Ms. Stangrat; oral statements made by Mr. Dinino, Mr. Grocholska, and Ms. Poliszak, to Mr. Boychuk; and the statement of Mr. Peiszterer to his son. The trial judge was satisfied that the oral statements were "trustworthy" because they met the requirements of necessity and reliability, but he concluded that to admit them would be oath-helping, since he had the video statements to consider.

[12] A chart of the various oral and videotaped statements that were taken in this case was included as an appendix to the respondent's factum. To provide a convenient summary of those statements, including a précis of the circumstances in which they were made and of their contents, I have attached that chart as Appendix "A" to these reasons.

[13] Based on the foregoing rulings, the Crown offered no evidence in respect of the charge of assault against Mr. Peiszterer and the appellant was acquitted in relation to it.

[14] The appellant testified. He denied the allegations against him. The trial judge acquitted the appellant on the charges respecting Ms. Poliszak and Mr. Grocholska. He acquitted on the charge of aggravated assault in relation to Mr. Dinino, but convicted the appellant of the lesser included offence of assault causing bodily harm. He also convicted on the charge of assaulting Mr. Dinino with a weapon, but stayed that conviction on *Kienapple* principles. He found the appellant guilty of aggravated assault on Mr. Skupien and of threatening him with death.

[15] The appellant was sentenced to two and one-half years imprisonment on the aggravated assault charge and six months concurrent for the death threat. He was sentenced to two years imprisonment, consecutive, for the assault causing bodily harm of Mr. Dinino. There is no appeal from sentence.

ANALYSIS

The Position of the Defence and of the Crown

[16] Mr. Breen submits on behalf of the appellant that the trial judge erred in considering circumstances “extrinsic” to the taking of the statements of Mr. Dinino and Mr. Skupien in ruling on their admissibility. In particular, he contends that the trial judge erred in relying upon the following:¹

- (a) The similarities between the statements of the several complainants;
- (b) The existence of prior consistent statements;
- (c) The presence of corroborating injuries;
- (d) The temporal proximity of the statements to the alleged events;
- (e) The absence of an alternative suspect;
- (f) The mandatory duty of the doctor who examined Mr. Skupien to take notes; and,
- (g) Ms. Stagrat’s observation of packed garbage bags in Mr. Skupien’s room.

¹ Appellant’s factum, para. 49.

[17] He further submits the trial judge failed to recognize the full significance of the hearsay dangers inherent in the case – particularly, the danger presented by the absence of the ability to cross-examine the declarants – and that the statements ought to have been excluded, based upon the following:²

- (a) the age, condition and medical history of Mr. Dinino and Mr. Skupien;
- (b) Mr. Skupien’s stated dissatisfaction with the residence and the appellant;
- (c) Ms. Stangrat’s involvement in the investigation;
- (d) the potential for collaboration;
- (e) the absence of a record of the pre-interview of Mr. Dinino;
- (f) the nature and quality of the statement elicited from Mr. Dinino; and,
- (g) the significance of the statements to the prosecution case.

[18] On behalf of the Crown, Mr. McInnes argues that the statements were made in circumstances that ensured sufficient threshold reliability to be admissible. He says they were made solemnly and in circumstances where Mr. Dinino and Mr. Skupien understood the importance of telling the truth, that the declarants knew this was a police investigation and that they were talking to police officers, that there was no motive to fabricate and that the complainants were serious about the statements they made. He submits that the cross-examination of Ms. Stangrat served “as a proxy” for the cross-examination of the declarants in the circumstances, since it was her involvement that formed the alleged source of the motive to fabricate. Finally, he notes that because these elderly victims had died, their evidence was available in this form or not at all, and the interests of truth would not have been served by the exclusion of this evidence.³

The Standard of Review

[19] The standard of review in cases of this nature is succinctly stated by Doherty J.A. in *R. v. Merz* (1999), 140 C.C.C. (3d) 259 at para. 49 (Ont. C.A.):

² Appellant’s factum, paras. 50-51.

³ Respondent’s factum, para. 23.

In reviewing a trial judge's decision to admit evidence under the principled exception to the hearsay rule, this court, absent manifest error, must accept the findings of fact made by the trial judge on which the ruling is predicated. The court must, however, apply a correctness standard to the ultimate question of whether the trial judge properly applied the criteria relevant to the admissibility of the evidence to the facts as found by the trial judge: *R. v. Hawkins, supra*, at 160.

Principles Affecting the Admissibility of Hearsay Statements on a Substantive Basis

[20] In our system of justice, hearsay statements are generally inadmissible in evidence unless their admission can be justified on the twin principled pillars of necessity and

reliability: *R. v. Starr* (2000), 147 C.C.C. (3d) 499 (S.C.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.); *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.)

[21] The reason for this exclusionary approach lies in the inherent frailties traditionally associated with such evidence: it has not been tested by cross-examination; it is not made under oath; and the trier of fact is unable to assess the demeanour of the declarant. Historically, hearsay admissibility depended upon the tendered evidence fitting into a recognized exception to the hearsay rule. Beginning with its decision in *Khan*, followed by *Smith* and a series of other cases culminating in *Starr*, however, the Supreme Court of Canada has moved away from what Lamer C.J.C. referred to in *Smith* as “a set of ossified judicially created categories” (p. 269) to a principled approach which involves determining whether the hearsay evidence meets the dual tests of necessity and reliability.

[22] We are not concerned with necessity in this case, as Mr. Dinino and Mr. Skupien had both died by the time of trial, and their videotaped statements were the only source of their evidence. We are concerned with threshold reliability. In *Smith*, at p. 270, Lamer C.J.C. said:

The criterion of “reliability” – or, in Wigmore’s terminology, the circumstantial guarantee of trustworthiness – is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be “reliable”, i.e., a circumstantial guarantee of trustworthiness is established.

[23] In *Starr*, Iacobucci J. reaffirmed what earlier authorities had noted, namely that at the admissibility stage the court is concerned only with threshold reliability, not ultimate reliability. He reaffirmed the central importance of the search for circumstantial guarantees of trustworthiness in the reliability analysis, and commented on the role of motive – or lack of it – in this connection. He also stated that, in assessing threshold reliability, courts should confine their focus to factors that concern the taking of the statement itself. As motive and resort to external evidence (both in the form of extrinsic facts and of other oral statements) are factors in this appeal, I quote the following oft-cited passage at paras. 215-217 of his reasons in full:

. . . Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the

circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan, supra*; *Smith, supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins, supra*; *U. (F.J.), supra*; *B. (K.G.), supra*).

And indeed, lower courts have recognized that the absence of a motive to lie is a relevant factor in admitting evidence under the principled approach: see *R. v. L. (J.W.)* (1994), 94 C.C.C. (3d) 253 (Ont. C.A.); *R. v. Tam* (1995), 100 C.C.C. (3d) 196 (B.C.C.A.); *R. v. Rose* (1998), 108 B.C.A.C. 221; see also B. Archibald, “The Canadian Hearsay Revolution: Is Half a Loaf Better than No Loaf at All?” (1999), 25 Queen’s L.J. 1 at p. 34. Conversely, the presence of a motive to lie may be grounds for exclusion of evidence under the principled approach. Put another way, it is the role of the trial judge to determine threshold reliability by satisfying him or herself that notwithstanding the absence of the declarant for cross-examination purposes, the statement possesses sufficient elements of reliability that it should be passed on to be considered by the trier of fact.

At the stage of hearsay admissibility the trial judge should not consider the declarant’s general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal’s decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608, 80 C.C.C. (3d) 467; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.

[24] This court has repeatedly held – both before and after *Starr* – that, in determining threshold reliability, the trial judge must have resort only to the surrounding

circumstances under which the statement was made, and may not take into account matters extrinsic to those circumstances: see, for example, *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); *R. v. Merz*, *supra*; and *R. v. Conway* (1997), 121 C.C.C. (3d) 397 (Ont. C.A.). To this tenet there appears to me to be a small coterie of exceptions, however. First, as noted above, the presence or absence of a motive to fabricate has been held to be a principal factor in determining threshold reliability: *Starr* at paras. 215-216, and *Czibulka* at para. 36. The motive concern cannot be resolved without looking at factors exterior to the circumstances surrounding the making of the statement. While the existence of a motive to fabricate is itself a circumstance surrounding the making of the statement, the motive concern cannot itself be resolved without looking to exterior factors. Secondly, the court may bear in mind the nature of the relationship between the declarant and the person about whom the statement is made in making its determination – something that may as well involve resort to facts beyond those surrounding the making of the statement itself: see, for example, *Czibulka* and *Merz*, *supra*. Finally, in *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.), Chief Justice Lamer held that “a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements” (para 40) – also a resort to external factors.

[25] The *U. (F.J.)* exception is of particular importance in this case, and I shall return to it and to the issue of motive to fabricate later in these reasons.

The Statements

[26] The videotaped statements and other oral statements that were considered at the *voir dire* have been referred to earlier in these reasons and are summarized in Appendix A. Of these various statements, it is the admissibility of the videotaped statements of Mr. Dinino and Mr. Skupien that is at issue on this appeal.

[27] In his videotaped statement, Mr. Dinino told the police officers, in substance, that the appellant came into his room and, using Mr. Dinino’s cane for the attack, hit him on his forehead, his left eye, his left knee and his left thigh areas. The appellant was angry that there was water on the washroom floor in Mr. Dinino’s room and told Mr. Dinino that if he found water on the floor again he would kill him. This type of incident occurred twice. Mr. Dinino was afraid of the appellant.

[28] Mr. Skupien told the police in his videotaped statement that on Friday May 7th, the appellant came to his room and beat him, apparently because the appellant was angry that Mr. Skupien had gone into the kitchen after being told not to do so. He said that the appellant slapped and punched him in the face and body and told him that if he did not leave the residence he (the appellant) would kill him. Mr. Skupien said he believed that the appellant would do this.

[29] In his ruling the trial judge touched on a number of issues concerning admissibility, but he dealt only tangentially with the statements on an individual basis. Central to his reasoning, however, was his view that taken globally the various statements contained sufficiently striking similarities that – although the points of similarity may not have been sufficiently striking to render coincidence unlikely when standing alone – “the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely explanation”. In this respect, he undoubtedly had in mind the observations of Chief Justice Lamer to that effect in *U. (F.J.)*, *supra*, at para. 41.

[30] This issue of striking similarity between the statements, together with the issue of whether Mr. Dinino and Mr. Skupien had a motive to fabricate in making their statements, is common to the admissibility of both the Dinino and Skupien statements, as is the general issue of whether the trial judge erred in considering circumstances extrinsic to the taking of those statements. I shall deal with these issues first, therefore, before turning to a consideration of the videotaped statements individually.

Consideration of Facts Extrinsic to the Circumstances Surrounding the Taking of the Statements

[31] As noted above, the Supreme Court of Canada has declared in *Starr* that the presence of corroborating or conflicting evidence is not something to be considered in determining threshold reliability. Moreover, although other provincial appellate courts had come to a different conclusion,⁴ this court had consistently followed that approach even before *Starr*. In *Merz*, at para. 51, for instance, Doherty J.A. reiterated the theme:

The reliability inquiry, when made in the context of determining the admissibility of a hearsay statement, looks to those factors surrounding the making of the statement which tend to diminish the risks associated with the admission of out-of-court statements. Evidence from other witnesses which is consistent with the substance of an out-of-court statement is not a circumstance surrounding the making of that statement and cannot generally be seen as diminishing the risks associated with the admission of hearsay evidence.

⁴ See, for example, *R. v. Pearson* (1994), 95 C.C.C. (3d) 365 (B.C.C.A.); *Winnipeg Child and Family Services v. L.L.*, [1994] 6 W.W.R. 457 (Man. C.A.).

See also, *R. v. Conway*, *supra*: *R. v. Diu* (2000), 144 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); *R. v. C. (B.)* (1993), 80 C.C.C. (3d) 467 (Ont. C.A.).

[32] This aspect of *Starr* – together with the Ontario cases, at least inferentially – has been the subject of sharp criticism in academic circles. See, for example, Lee Stuesser “*R. v. Starr* and Reform of the Hearsay Exceptions” (2001), 7 Can. Crim. L. Rev. 55; D. Stuart “*Starr* and *Parrot*: Favoursing Exclusion of Hearsay to Protect Rights of Accused” (2001), 39 C.R. (5th) 284 at 286; David M. Tanovich “*Starr* Gazing: Looking into the Future of Hearsay in Canada” (2003), 28 Queen’s L.J. 371 at para. 64; D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002) at 100-103; Laurie Lacelle “The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes” (1999), 19 C.R. (5th) 376. Nonetheless, while there may be inconsistencies in the ways in which the Supreme Court of Canada has approached the threshold reliability issue⁵, and whatever one may think of these criticisms, the law on this question is settled in Ontario in my opinion, subject to further revision by the Supreme Court of Canada. The law is that with rare exceptions – the *U. (F.J.)* exception and matters concerning motive to fabricate, for example – a trial judge may not have resort to factors external to the circumstances surrounding the making of the statement itself, in determining threshold reliability.

[33] Accordingly, in light of *Starr* and the Ontario authorities, the trial judge in this case ought not to have considered such external circumstances as the presence of corroborating injuries, the absence of an alternative suspect, the mandatory duty of the doctor examining Mr. Skupien to take notes,⁶ or Ms. Stangrat’s observation of Mr. Skupien’s packed belongings in the garbage bag. These factors were of relative insignificance to the trial judge’s decision, in my view, however. At the core of his reasoning was the view that the various out-of-court statements contained such strikingly similar features that the videotaped statements of Mr. Dinino and Mr. Skupien met the test of threshold reliability.

[34] I turn now to the questions of whether it was open to the trial judge in law to adopt the *U. (F.J.)* approach, and if it was, whether he was correct in applying the exception in the circumstances of this case.

⁵ In *Khan*, for instance – the authority upon which the principled exception to the hearsay rule is founded – the court ruled that the presence of a stain on the child’s sleeve (containing the doctor’s semen) was an important indicator of reliability.

⁶ The mandatory duty of Dr. Pietraszek to make notes would be a relevant consideration in determining the threshold reliability of Mr. Skupien’s statement to him, as it would form part of the circumstances of the making of that statement. For reasons set out herein, however, I have not considered that statement in assessing the reliability of Mr. Skupien’s videotaped statement.

The *U. (F.J.)* Exception – “Strikingly Similar Statements”

[35] In *U. (F.J.)* the accused was charged with incest. His daughter, the declarant, initially told the police she had been sexually assaulted by him repeatedly, and gave considerable detail. The accused was then interviewed and admitted engaging in sexual intercourse and other sexual acts with his daughter. At trial, both resiled from these statements. The Supreme Court of Canada affirmed the admissibility of the daughter’s prior inconsistent statement on a substantive basis.

[36] At para. 40 – at the beginning of the section of his reasons entitled “Beyond *B. (K.G.)*” – Chief Justice Lamer said that “a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements”. Later, at para. 45, he observed that he “anticipate[d] that instances of statements so strikingly similar as to bolster their reliability will be rare”, and at para. 47, when dealing with the proper procedures for the necessary *voir dire*, he referred to the comparative striking similarity between “the statement being assessed and another statement which is already clearly substantively admissible”.

[37] *U. (F.J.)* therefore stands for the proposition that a striking similarity between statements may suffice to establish threshold reliability for admissibility in rare cases where (a) the declarant is available for cross-examination at trial, (b) the comparator statements are themselves already substantively admissible, and (c) there is no evidence of collusion, prior knowledge, or improper influence. In a footnote to the passage from *Merz* cited above, Justice Doherty noted that the Supreme Court decision in *U. (F.J.)* provided an exception to the general rule against resort to external evidence. I might call it the exception of “strikingly similar statements”.

[38] The Crown relies upon that exception here. Whether it may do so depends upon the answers to a number of questions. First, did *Starr* overrule *U. (F.J.)* and therefore abolish the exception? Secondly, if it did not, may the exception be extended to cases where the declarant is not available to testify? Thirdly, can it apply in situations where the strikingly similar statements of fact relate to similar, but different, incidents, as opposed to similar factual statements about the same event? Fourthly, do the comparator statements in this case meet the “substantively admissible” standard referred to by Chief Justice Lamer? Finally, do the statements in this case otherwise meet the *U. (F.J.)* criteria?

Did Starr Overrule *U. (F.J.)*?

[39] Taken literally, the language of Iacobucci J. in para. 217 of *Starr* could be read as overruling *U. (F.J.)*. In *R. v. Nguyen* (2001), 153 C.C.C. (3d) 495, the Alberta Court of Appeal concluded that *Starr* “settled the issue concerning corroboration of hearsay by

evidence other than that found in the circumstances surrounding the making of the statement” (para. 23), including corroboration by resort to other hearsay statements. With respect, I do not agree that *Starr* precludes a consideration of the latter. The Supreme Court did not state that it was overruling itself in *U. (F.J.)*, a clearly articulated and well-recognized prior authority. Indeed, Iacobucci J. referred to *U. (F.J.)* two paragraphs earlier in his reasons in reference to another point.

[40] The Supreme Court does not easily overrule its prior judgments, although it will do so where there are compelling reasons and in accordance with established guidelines: see *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193 at 229 (S.C.C.); *R. v. Salituro* (1991), 68 C.C.C. (3d) 289 at 297 (S.C.C.); and *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 at 281 (S.C.C.). Although it is not necessary as a matter of law, had the court intended to overrule itself on such a well-defined point as that made in *U. (F.J.)*, I would have expected it to have said so, and to have conducted at least a minimal analysis of the guidelines. It did neither.

[41] This court has applied or recognized the *U. (F.J.)* principles on at least three occasions since *Starr*: see *R. v. Chrisanthopoulos*, [2003] O.J. No. 5252 (C.A.); *R. v. Chang* (2003), 173 C.C.C. (3d) 397, at para. 119; and *R. v. R.(R.)* (2001), 159 C.C.C. (3d) 11 (Ont. C.A.). The latter decision was affirmed by the Supreme Court of Canada: (2003) 171 C.C.C. (3d) 575 (S.C.C.). Without referring specifically to *U. (F.J.)* or using the language of “striking similarity” the British Columbia Court of Appeal upheld a trial judge’s decision to admit a hearsay statement on the basis that its reliability was established through similarity with statements by other witnesses, in *R. v. Misir* (2001), 153 C.C.C. (3d) 70 (B.C.C.A.). The Supreme Court dismissed an application for leave to appeal from this judgment. In spite of its earlier decision in *Nguyen, supra*, the Alberta Court of Appeal appears to have applied *U. (F.J.)* subsequently, in *R. v. S. (J.A.)*, [2004] A.J. No. 884.

[42] These cases support the proposition that *U. (F.J.)* has survived *Starr*, and for the foregoing reasons, I am satisfied that it has. That being the case, I am not prepared to assume that Justice Iacobucci’s reference in *Starr* to “prior or subsequent statements, consistent or not” was meant to encompass strikingly similar statements that fall within the *U. (F.J.)* exception.

Can U. (F.J.) Apply Where the Declarant is Not Available for Cross-Examination?

[43] *U. (F.J.)* is in the *B. (K.G.)* lineage of cases. It was a case where the declarant was available for cross-examination at trial. Accordingly, before the *U. (F.J.)* principle can be applied, I must consider whether it can be extended, on a principled basis, to situations where the declarant is not available for cross-examination. In my opinion, it can be so extended, for the following reasons.

[44] The *U. (F.J.)* exception is helpful and logical. The central notion underpinning it is that – absent collusion, prior knowledge, or improper influence or interference – striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration (see paras. 40-42). This notion is equally applicable whether the declarant is available for cross-examination at trial or not. Clearly, there will be situations where the availability of the declarant for cross-examination is important to test the presence or absence of collusion, prior knowledge or improper influence or interference. Thus, the significance of the absence of cross-examination remains a factor to be weighed by the trial judge in assessing threshold reliability. But it is not, in and of itself, an impediment to the principled application of the *U. (F.J.)* exception.

[45] There are valid reasons for drawing a distinction between situations where the declarant is available for cross-examination and those where the declarant is not, in considering the admissibility of hearsay statements: see *Czibulka, supra*, for an analysis postulating that the Supreme Court of Canada has developed a two-modelled approach to the admissibility question focussed upon this distinction. The declarant's availability provides an important substitute for the absence of cross-examination at the time the hearsay statement was originally made. One of the foundational frailties of hearsay is therefore at least partially addressed. This may justify a more liberal approach to admissibility in situations where the declarant is available. However, it does not negate the application of the basic *U. (F.J.)* concept (striking similarity belies coincidence and therefore bolsters reliability). Striking similarity, in addition to other indicia, may sometimes be sufficient, even absent cross-examination. *Chrisanthopoulos, R. (R.)*, and *Misir, supra*, all involved the application of the *U. (F.J.)* principle in situations where the declarant of the hearsay statement being assessed was not available for cross-examination. So, too, did *R. v. Dubois* (1997), 118 C.C.C. (3d) 544 (Que. C.A.) and *R. v. Harvey* (1996), 109 C.C.C. (3d) 108 (B.C.C.A.).

[46] Therefore, although Lamer C.J.C. created the *U. (F.J.)* exception in the context of the admissibility of a prior inconsistent statement where the witness was available for cross-examination – and articulated it as such – I do not see a principled impediment to extending that exception to a situation where, as here, the declarant is not available at trial.

Can *U. (F.J.)* Apply when the Striking Similarities Relate to Different Events?

[47] *U. (F.J.)* was a case in which the contents of the out-of-court statement being assessed related to the same event as those of the comparator statement.

[48] Although Chief Justice Lamer did not deal with this point, my colleague, Rosenberg J.A., argues that his reference to “strikingly similar statements” was a

reference to statements dealing with facts relating to the same event, because to apply the principle to cases like the present – where the statements refer to similar but different events – is to take a “similar fact” approach to the problem, thus slipping out of the *U. (F.J.)* exception and back onto the forbidden territory of external facts. Respectfully, I do not believe this to be the case, however. The exercise remains one of comparing strikingly similar factual assertions in different statements. I cannot see a logical difference, for these purposes, between statements in which two or more people comment on the same accused doing the same thing on the same occasion, and statements in which they comment on the same accused doing the same thing on different occasions.

[49] In any event, even if there are similar fact overtones to applying *U. (F.J.)* in such circumstances, the rationale underpinning both the *U. (F.J.)* exception and the similar fact exception are rooted in the same soil, namely, the notion that arresting similarities between the particular act or statement being assessed and those being used as comparators, belie coincidence. As Binnie J. noted respecting the admissibility of similar fact evidence, in *R. v. Handy* (2002), 164 C.C.C. (3d) 481 at para. 47 (S.C.C.), the policy basis behind the exception is that “[p]robative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation”. In the companion case, *R. v. Shearing* (2002), 165 C.C.C. (3d) 225 (S.C.C.), he observed that “[t]he theory of similar fact evidence turns largely on the improbability of coincidence” (para. 40). See also, *R. v. Arp* (1998), 129 C.C.C. (3d) 321 at para. 43 (S.C.C.); and *R. v. Paul* (2002), 170 C.C.C. (3d) 107 at para. 31 (Ont. C.A.).

[50] Accordingly, since the justification underlying the *U. (F.J.)* principle and the admissibility of similar fact evidence is identical, I am not troubled by the application of *U. (F.J.)* in circumstances where the hearsay statement being assessed and the comparator statements relate not to the same event but to similar, but different, events.

[51] That is the situation here.

To What Extent do the Comparator Statements have to be Substantively Admissible?

[52] In determining whether an out-of-court statement is admissible on strikingly similar grounds, the court must be alert to reliability concerns respecting the comparator statements. In *U. (F.J.)*, Lamer C.J.C. said that the comparator statement must be “already clearly substantively admissible” (para. 47). Indeed, the court must be on guard to ensure that the strikingly similar statement principle does not become a vehicle for “bootstrapping” the substantive admissibility of several statements that would not otherwise meet the threshold reliability test. This concern was expressed by the majority in *Idaho v. Wright*, 497 U.S. 805 (1990), a case relied upon by Iacobucci J. in *Starr*.

[53] I do not read Chief Justice Lamer as requiring the comparator statements to be substantively admissible in the full sense, however. A statement that is otherwise reliable and trustworthy may ultimately be inadmissible for a variety of reasons – because it is not necessary, for instance, or because it would be considered oath helping, both examples from the case at bar – yet such statements should be available for purposes of the striking similarity analysis, it seems to me. It may be that the trier of fact is left without the reliable but otherwise inadmissible comparator statement in assessing ultimate reliability, but there are other instances where trial judges hear evidence on an admissibility *voir dire* that the trier of fact does not hear. Take, for example, a *voir dire* concerning the admissibility of an accused’s statement where the accused testifies but does not testify at trial; if the statement is admitted, the trier must finally determine whether to accept it as voluntary and reliable without the full evidence heard by the trial judge on the *voir dire*. In my opinion, once the comparator statements meet the threshold reliability standard, and if the necessary degree of similarity is demonstrated between the statement being assessed and the comparator statements by “the unique nature of the particular factual assertions”, the reliability of the statement being assessed is enhanced: *U. (F.J.)* at para. 41

[54] The question remains, therefore, whether the trial judge was entitled to apply the *U. (F.J.)* exception in the circumstances of this case. In my view, he was.

Application of U. (F.J.) in the Circumstances of this Case

[55] The trial judge placed considerable reliance upon what he saw as “striking similarities between the videotape statements of Mr. Dinino and Mr. Skupien and the other complainants”, as well as between those statements and the oral statements made to Ms. Stangrat, Dr. Pietraszek, and Mr. Boychuk. He noted in particular that they all complained of being beaten by the appellant and that their accounts of the attacks and the injuries were strikingly similar. Although he did not say so specifically, he presumably meant that they all complained of being hit around the face and head and in the stomach or ribs and leg areas, and that the attacks were triggered by some relatively minor incident that apparently sparked the appellant’s anger (in the cases of Mr. Dinino and Mr. Grocholska, it was that there was water on their floors; in Mr. Skupien’s case, it was that he had wandered into the kitchen when forbidden to do so; with respect to Ms. Poliszak, it was her request for some money to visit her daughter; and Mr. Peiszterer said he was beaten for trying to stop the appellant from taking his money). The trial judge observed that the complainants all pointed to the same person, the appellant, as their assailant, and that the statements were made spontaneously and more or less contemporaneously, with no opportunity for – or evidence of – collaboration, collusion or investigative interference.

[56] In addition, the trial judge concluded that the various videotaped and oral statements met the threshold reliability test. As already noted, however, he chose not to admit the video statement of Mr. Grocholska on necessity grounds because he had the transcript of the witness's evidence at the preliminary hearing, and not to admit the oral statements because to do so would simply be oath helping in view of his ruling that the videotaped statements of Mr. Dinino, Mr. Skupien and Ms. Poliszak were admissible.

[57] On grounds that I will articulate shortly, I do not agree with the trial judge's ruling that Mr. Dinino's videotaped statement is reliable, but I do agree that Mr. Skupien's is. Accordingly, I do not think Mr. Dinino's statement can be used in the *U. (F.J.)* analysis. I am satisfied that the videotaped statements of Ms. Poliszak and Mr. Grocholska meet the threshold reliability test and may therefore be used for striking similarity comparisons.

[58] In the case of Ms. Poliszak's statement, there was no oath or affirmation, or warning about the importance of telling the truth and the consequences of not doing so. Given her age and circumstances, however, I am satisfied that the formality and seriousness of the occasion, and the fact she was making a statement to the police, were sufficient to impress upon her the solemnity of the event and the importance of telling the truth. There is no evidence of collusion, or of prior knowledge of what the others were saying, and there is no taint of improper influence or interference. Not only is there no evidence of any *animus* on her part towards Mr. Khelawon, suggesting a motive to fabricate, there is some evidence of lack of motive; she appears to have been concerned that he might lose his job. The availability of the video addresses concerns about demeanour and about the accuracy of the record. I found her statement to be intelligible and her story to be unexaggerated and straightforward. I see no basis for second-guessing the trial judge's conclusion that her statement met the threshold reliability test.

[59] The trial judge did not rule specifically on the reliability of Mr. Grocholska's videotaped statement because he determined that it should not be admitted on necessity grounds. For reasons similar to those set out above in relation to Ms. Poliszak's statement, I conclude that his video statement would meet the threshold reliability test. In addition, Mr. Grocholska was given a warning about the importance of telling the truth and he indicated his assent to that proposition. While there is no direct evidence of lack of motive in his case, there is an absence of evidence of any motive to fabricate, and this factor is therefore at least neutral: *Czibulka* at para. 43. His statement may therefore be considered in the *U. (F.J.)* analysis.

[60] With the foregoing comparator statements available for consideration in applying the *U. (F.J.)* exception, I do not think it is necessary to resort to the other oral statements made by the complainants to Ms. Stangrat, Dr. Pietraszek, and Mr. Boychuk. Therefore,

I need not consider the correctness of the trial judge's view concerning their trustworthiness.

[61] Whether there are striking similarities between statements in a particular case is a matter of fact for determination by the trial judge, and with respect to which the trial judge is entitled to considerable deference. In *Chrisanthopoulos*, the court considered striking similarities between an event described by a 911 caller and the events that occurred shortly after the call in applying the *U. (F.J.)* exception. Here, there were close parallels between the complainants' descriptions of the nature of the attacks said to have been made on them, the injuries sustained, and the common overreaction by the appellant to what most professionals would consider relatively minor (albeit different) irritants. There is no evidence that the police alerted the complainants to what their co-residents had said, nor is there any indication of collusion between the complainants or of any improper influence by the interrogating authorities. The fact that the statements were taken shortly after the police arrived at the retirement home, the day after Mr. Skupien gave his statement and the appellant had been arrested, reinforces this last point.

[62] In my view, the trial judge was entitled to consider the videotaped statements of Ms. Poliszak and Mr. Grocholska, in determining whether Mr. Skupien's videotaped statement met the threshold reliability test for admission. Even if the oral statements and the videotaped statement of Mr. Dinino are removed from the analysis, it would be open to a trial judge to conclude, on the record here, that even if the points of similarity between the statements would not be sufficient, standing alone, to render coincidence unlikely, their cumulative effect, taken together, rendered Mr. Skupien's videotaped statement sufficiently distinctive to reject coincidence as a likely explanation: *U. (F.J.)* at paras. 41 and 47.

[63] In this respect I am in agreement with the following comment of Brossard J.A. in *R. v. Dubois*, *supra*, at 558-559 (translation):

The judge therefore does not have to engage in an analysis in isolation, hermetically sealed, of each of the statements, as if only one existed. On the contrary, he may have recourse to all of the statements when examining them for reliability.

Motive to Fabricate

[64] A further issue that is common to the admissibility of the videotaped statements of both Mr. Dinino and Mr. Skupien is that of motive to fabricate. I turn to that issue now.

[65] The significance of motive to fabricate in assessing threshold reliability was highlighted by Rosenberg J.A. in *Czibulka*, *supra*, at paras. 36-46. See also, *Starr*, *supra*, at paras. 215-216. Here, Mr. Breen argues there are two ways in which Mr. Skupien and

Mr. Dinino demonstrated a motive to fabricate a story to implicate the appellant. The first concerns the involvement of Ms. Stangrat in the investigation.⁷ She is alleged to have encouraged the complainants to implicate the appellant, in order to avenge her earlier dismissal by him from her employment at the retirement home. The second relates to the grievances Mr. Skupien expressed about the appellant and the way he managed the facility.⁸

[66] The trial judge found that there was “no animosity directed at the accused other than voicing their complaint”. The appellant argues, however, that the emphasis placed by Mr. Skupien in his video statement on his complaint about how the appellant managed, or mismanaged, the facility, and Mr. Dinino’s statement that he didn’t like the appellant, demonstrate that they may well have had a motive to lie about the appellant’s actions in order to place him in a bad light. This, coupled with the potential influence of Ms. Stangrat, taints the statements to the extent that they cannot be reliable in the absence of the opportunity to cross-examine, the argument goes.

[67] I do not agree. *Starr* stands for the proposition that “the presence of motive to lie may be grounds for the exclusion of evidence under the principled approach” (para. 216; emphasis added). It does not say that evidence must be excluded in the presence of indicia of any motive to lie, regardless of the strength of those *indicia*. In *Merz*,

⁷ A factor extrinsic to the circumstances surrounding the taking of the statement, I note.

⁸ Also an extrinsic factor.

Doherty J.A. noted that “the existence of a strong motive to testify falsely can undermine the reliability of an out-of-court statement” (para. 53).

[68] A motive to fabricate may be slight, or it may be strong, or it may lie somewhere between those extremes. In my view, depending on its strength, the presence of a motive to fabricate may be overridden, for threshold reliability purposes, by other factors pointing to reliability. It is for the trial judge to determine, in all of the circumstances, whether, in spite of the presence of some evidence of such a motive, other pertinent factors nonetheless render the proffered statement sufficiently reliable at the threshold stage that it should be passed on to the trier of fact for determination of its ultimate reliability.

[69] Here, motive to fabricate is not an impediment to the admissibility of the statements of Mr. Dinino and Mr. Skupien. The trial judge’s finding of no animosity directed towards the appellant effectively negates the motive argument in respect of the complaints. A review of the video statements confirms the apparent lack of any such animosity. While Mr. Skupien did express some objections to how the facility was managed by the appellant, it is not evident that those concerns translated into an *animus* against the appellant that manifested itself in a deliberate and false attempt to implicate him in a crime. The same is true with respect to Mr. Dinino’s remark that he didn’t like the appellant. It was made in the context of his explaining his fear of Mr. Khelawon.

[70] Moreover, the record does not support an inference that Ms. Stangrat improperly interfered with the investigation or improperly influenced the declarants to tailor their statements in any particular way. Expressing a concern over injuries to elderly people, endeavouring to help one of them by taking him to care elsewhere out of the home and then taking him to a doctor (where the consistency of the injuries with the story she was told was confirmed) and then to the police (where she provided a list of other residents about which she was concerned), does not equate to interfering with the investigation or putting the complainants up to making their complaints. In addition, as the Crown submits, her availability to testify goes at least some distance in exposing the allegations to the test of cross-examination.

[71] This case is markedly different from that of *Merz*, for example, where the declarant had two strong motives to fabricate and to show the accused in a bad light: she was in the midst of a bitter custody battle with him, and, in the proceeding in which she made the statement in question, she was also trying to secure an acquittal on another criminal charge. Nor is this case comparable to *Czibulka*, where the declarant had a potentially strong motive in painting a threatening picture of the deceased in her letter to her cousin, in order to persuade him to permit her to live with him in California.

[72] While the trial judge dealt with motive only indirectly, and in a cursory fashion, his finding that there was no animosity directed towards the appellant by the declarants was open to him on the evidence. Given that finding, I do not think it can be said that the statements of Mr. Dinino and Mr. Skupien should be excluded on the basis that their threshold reliability is contaminated by a possible motive to fabricate.

[73] I turn now to a consideration of some individual matters regarding the two statements.

Mr. Dinino's Statement

[74] In spite of the foregoing, Mr. Dinino's statement ought not to have been admitted, in my view.

[75] I have carefully viewed and listened to this statement. It lasted about ten minutes on the videotape. I am satisfied that the trial judge erred in three respects in admitting it. First, he failed to give adequate consideration to the fact that the statement was unsworn and that no warning had been given to Mr. Dinino about the importance of telling the truth and the consequences of not doing so. Secondly, he failed to consider the fact that the entire discussion with Mr. Dinino was not recorded. Finally, Mr. Dinino's statement is simply unreliable for a number of other reasons.

[76] In *R. v. B (K.G.)*, *supra*, at 288-291 and 294, Chief Justice Lamer highlighted the importance of a statement being made under oath or solemn affirmation as an indicia of reliability. While the presence of an oath or affirmation is not absolutely necessary for such a finding, the court must be satisfied in its absence that there was an adequate substitute to ensure reliability: see *R. v. B. (K.G.)* at 291 and 294; *R. v. Diu*, *supra*, at para. 79; and *R. v. Conway*, *supra*. An adequate substitute will generally take the form of something driving home to the declarant the importance of telling the truth coupled with a warning as to the penalty for failing to do so. Most recently, in *R. v. Moonias*, 2004 CarswellOnt 5210, this court said, at para. 13:

It should have been made clear to the complainant that anything she said could lead to serious criminal charges and that it was of the utmost importance that she tell the truth. Similarly, the complainant should have been told she risked penal consequences if she lied in the statement.

[77] Mr. Dinino was not provided with any such warning, nor was any attempt made to impress upon him the importance of telling the truth. To the extent the trial judge considered this issue, he satisfied himself by observing that "the circumstances of taking

the statements was as formal and solemn as could be expected in the situation”. Respectfully, this was inadequate in the case of Mr. Dinino.

[78] There was nothing to prevent the police from arranging for the statement to be taken under oath or at the very least – as was the case with the statement of Mr. Skupien – to have provided a warning and taken steps to ensure that Mr. Dinino understood the importance of telling the truth.

[79] Secondly, only about ten minutes of an approximately thirty-nine minute discussion with Mr. Dinino were recorded. P.C. Pietroniro acknowledged that he had spoken with Mr. Dinino for about 30 minutes before commencing the videotape statement. He kept no notes of that conversation, but insisted he had not led Mr. Dinino during the pre-video interview. He simply “wanted to talk to him to get some background as to what exactly had happened”. P.C. Pietroniro conceded that “possibly” a better way to have ensured that he obtained a statement without some prior influence would have been “by just putting [Mr. Dinino] on video and asking him the open-ended question: What happened?”. The trial judge did not deal with this lapse.

[80] In addition, there are problems inherent in Mr. Dinino’s statement itself. It is barely intelligible in places, even after repeated scrutiny. Even if one accepts the written transcript as generally accurate, the risk that the shape of the statement was influenced by the need for P.C. Pietroniro to unravel what Mr. Dinino was saying and feed it back to him for clarification is great. The officer conceded that some of the video is inaudible, that he had to draw answers out of Mr. Dinino, and that there were some things he (P.C. Pietroniro) could not understand. P.C. Pietroniro was clearly doing the best he could in the situation, but the problem is well illustrated in the following passages from his cross-examination:

Q. Well, I’m going to suggest to you that you were guessing at the answers.

A. Guessing at the answers?

Q. Yes.

A. I was trying to recite what he was trying to tell me, and if you read the transcript, whenever I would repeat what he said, he would again say “yeah” or “yes” to basically verify that what I said was correct.

Q. Well, let’s just stick to what was on the video. We all heard it. A lot of it’s inaudible I’m going to suggest.

A. Some of it’s inaudible, yes.

...

Q. So that really, again, whenever you filled in the blanks so to speak, those inaudible portions of the transcript of the video of what Mr. Dinino said, I'm going to suggest to you that it was a guess, somewhat educated but not a perfect guess, as to what he was saying: correct?

A. Correct.

[81] All of the foregoing, taken cumulatively, lead me to conclude that the trial judge erred in applying the circumstantial guarantee of trustworthiness test to the facts before him in admitting Mr. Dinino's videotaped statement for the truth of its contents.

[82] I move now to a consideration of Mr. Skupien's videotaped statement individually. It rests, I think, on a different footing.

Mr. Skupien's Statement

[83] Mr. Skupien's statement, taken at the police station, provided the trigger for the police investigation. I have carefully viewed and listened to this videotape as well. A number of factors internal to the taking of the statement and the statement itself bolster its reliability. First, while the statement was not taken under oath or affirmation, Mr. Skupien was asked if he understood the importance of telling the truth and warned that if he did not do so he could be charged. His response satisfied the trial judge, and satisfies me, that he held truth telling to be very important and appreciated the seriousness of the sanction for not doing so. See *Moonias, Diu, and B. (K.G.)*, *supra*. I also accept that Mr. Skupien may have been moved to truthfulness by the formality and solemnity of giving a statement to the police at the police station: see *R. v. Nicholas* (2004), 182 C.C.C. (3d) 393 (Ont. C.A.), and *R. v. Fleet* (2001), 163 C.C.C. (3d) 177 at para. 52 (N.S.C.A.). In the statement, his speech was intelligible and relatively coherent, although he tended to wander at times. The video enabled the trial judge, and this court, to observe Mr. Skupien's demeanour – how he calmly and clearly described what he says the appellant did to him and the injuries he sustained, without any apparent attempt to exaggerate – and to be satisfied as to the accuracy of the statement as recorded. The interview was conducted in a straightforward and unintimidating manner by Detective Karpow, and, like the trial judge, I do not think the questioning was leading in any significant respect.

[84] All these factors relating to the circumstances surrounding the taking of Mr. Skupien's videotaped statement tend to shore up its threshold reliability. When they are taken together with the striking similarities that the trial judge found between that statement and the other videotaped statements of Ms. Poliszak and Mr. Grocholska, and when they are coupled with my conclusions concerning the absence of motive to

fabricate and of collusion or interference, I am persuaded that there are sufficient guarantees of trustworthiness to justify the admission of his statement on a substantive basis in accordance with the principled exceptions to the hearsay rule.

DISPOSITION

[85] For all of the foregoing reasons, then, I am satisfied that the videotaped statement of Mr. Skupien was properly admitted by the trial judge for the truth of its contents. Mr. Dinino's statement ought not to have been admitted.

[86] I would accordingly allow the appeal with respect to the conviction for assault causing bodily harm and assault with a weapon in relation to Mr. Dinino, set aside that conviction and enter a verdict of acquittal with respect to those charges. I would dismiss the appeal respecting the convictions for aggravated assault and uttering a death threat with respect to the charges concerning the attack on Mr. Skupien.

Signed: "Robert A. Blair J.A."

ROSENBERG J.A.: (Armstrong J.A. concurring)

[87] I have read the comprehensive reasons of Blair J.A. While I agree with his conclusion concerning the appellant's conviction in relation to Mr. Dinino, I cannot agree with his conclusion concerning the conviction relating to Mr. Skupien. In my view, the trial judge also erred in admitting Mr. Skupien's videotaped statement. Since the convictions depended on those statements, I would allow the appeal, set aside the convictions on both counts and enter acquittals.

[88] Before explaining my reasons for this conclusion, I wish to make a brief comment about the procedure followed in this case. The police faced a formidable challenge in investigating the allegations against the appellant. The witnesses to the allegations were elderly. Some were in poor physical health and some suffered from mental illness. Despite these difficulties, they deserved and were entitled to the full protection of law. It would appear that the police contemplated that it would be necessary to preserve their evidence should these vulnerable witnesses not be available for any subsequent trial. Hence the decision to videotape the statements. Regrettably, the authorities pinned their hopes on a robust interpretation of the emerging principled approach to the hearsay rule.

[89] The principled approach to the hearsay rule represented by cases such as *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) and *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.) can assist in prosecuting difficult cases. However, it is not the only way to preserve evidence of witnesses who may not be available for trial. Sections 709 to 713 of the *Criminal Code* expressly contemplate and provide a procedure for dealing with the possibility that witnesses may not be available for trial because of illness or other sufficient cause. Those sections permit a party to apply for an order appointing a commissioner to take the evidence of such a witness. The accused has the right to be present at the commission and to be represented by counsel. Had the prosecution obtained such an order, the evidence of these witnesses could have been obtained and at the same time the rights of the appellant protected through his ability to cross-examine at the commission.

[90] I now turn to the admissibility of Mr. Skupien's statement. As I read the reasons of the trial judge and of Blair J.A., Mr. Skupien's statement would not have met the test for threshold reliability but for its consistency with other statements made by the other victims in which they described what happened to them. I approach the case on the same basis. In my view, as the law stands as laid down by the Supreme Court of Canada it is not open to a court to rely upon statements of other witnesses relating to other events to meet the threshold reliability requirement, where the declarant is not available for cross-examination.

[91] In my view, there are two problems with my colleague's analysis: (1) it conflicts with the decision of the Supreme Court of Canada in *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (the *Starr* problem) and (2) it confounds threshold and ultimate reliability (the procedural problem).

(1) The *Starr* Problem

[92] In my view, the use of the statements of the other complainants at the stage of determining threshold reliability is inconsistent with the reasons for judgment of Iacobucci J. for the majority of the court in *R. v. Starr*. Blair J.A. has set out the relevant paragraph but I repeat para. 217 from *Starr* for convenience:

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608, 80 C.C.C. (3d) 467; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability. [Emphasis added.]

[93] This part of the reasons of the majority in *Starr* has been criticized by academics and others. Professor Stuart for example queries whether “the Court fully appreciated the significance of its position”. He points out that in *Khan* itself, Justice McLachlin “took into account the real evidence of the semen and saliva stain in deciding there were circumstantial guarantees of reliability of the young complainant’s evidence that the [accused] had placed his penis in her mouth”. He also raises a concern for prosecution of domestic abuse cases where physical evidence would sometimes provide a guarantee of trustworthiness to permit substantive use of the prior inconsistent statement of a recanting witness. See D. Stuart, “*Starr* and *Parrott*: Favouring Exclusion of Hearsay to Protect Rights of Accused” (2001), 39 C.R. (5th) 284 at 286.⁹

⁹ Also see R.J. Delisle, Annotation to *R. v. Nguyen* at (2001), 42 C.R. (5th) 36.

[94] Similarly, in her pre-*Starr* article, “The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes” (1999), 19 C.R. (5th) 376, Laurie Lacelle is critical of what she perceives as the inflexible Ontario position (later adopted in *Starr*) that corroborative evidence cannot be used to find a hearsay statement reliable. She concludes, at pp. 391-92, that, “While inquires into the reliability of hearsay statements may have traditionally focused on a narrow inquiry into the circumstances surrounding the making of the statement, a rigid adherence to this approach cannot be countenanced in a new era of hearsay cases.”

[95] In light of these and other concerns with the *Starr* rule, it is important to consider precisely what the Supreme Court majority decided. That task should be undertaken against the backdrop of the point made by Ms. Lacelle, and repeatedly reaffirmed by the Supreme Court itself, that the new principled approach to hearsay must be a flexible one. One of the earliest expressions of that flexible approach is found in *R. v. Smith* (1998), 75 C.C.C. (3d) 257 (S.C.C.) at 270:

What is important, in my view, is the departure signalled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. *The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination.* [Emphasis added.]

[96] Given that context, I turn to what was actually decided in *Starr*. First, I do not read *Starr* as holding that extrinsic evidence is unavailable for use in determining reliability. At para. 215 of that case, Iacobucci J. said this about threshold reliability:

Again, it is not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. *Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.* This could be because the declarant had no motive to lie (see *Khan*, supra; *Smith*, supra), or because there were safeguards in place such that a lie could be discovered

(see *Hawkins, supra*; *U. (F.J.), supra*; *B. (K.G.), supra*).
[Emphasis added.]

[97] As Blair J.A. points out, in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances. For example, in *Smith* at p. 273, Lamer C.J.C. took into account that the deceased may have had a motive to lie to her mother about whether the accused had come back to give her a ride home because of her fear that her mother would send another man, one Philip, to pick her up and bring her home. Lamer C.J.C. relied upon the evidence that Philip had assaulted the deceased on a previous occasion. This evidence was extrinsic to the statement.

[98] Extrinsic evidence of motive, it seems to me, is nevertheless directed to the question of whether “the circumstances surrounding the statement itself” provide a sufficient circumstantial guarantee of trustworthiness. Whether at the time the declarant made the statement in question he or she had a motive to make a false statement is a circumstance surrounding the statement. More generally, extrinsic evidence about the declarant’s state of mind at the time he or she made the statement is admissible at the threshold reliability stage.

[99] Second, *Starr* is a case like *Khan* and *Smith*, where the declarant was unavailable and never subject to cross-examination by the accused. Cross-examination is a fundamental safeguard in considering the admissibility of hearsay and different considerations may apply where the accused has had the opportunity to cross-examine the declarant as in *R. v. B. (K.G.)*, *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.) and *R. v. Hawkins* (1996), 111 C.C.C. (3d) 129 (S.C.C.). As Lamer C.J.C. said at para. 37 of *U. (F.J.)*, “absence of cross-examination is the most important risk underlying the hearsay rule”.

[100] Third, Iacobucci J. was careful in *Starr*, to delineate the categories of evidence that would not be available for determining threshold reliability. He referred to four types of evidence at para. 217:

- The declarant’s general reputation for truthfulness;
- Prior or subsequent statements, consistent or not;
- The presence of corroborating evidence; and
- The presence of conflicting evidence.

[101] I will deal briefly with those categories identified by Iacobucci J. as they affect the decision in this case.

(i) General reputation

[102] The first category, the declarant's general reputation, is important. It would be inimical to the principled approach that certain types of declarants would be deprived of the protection of the law because of a general reputation for dishonesty. I point out, however, that what is prohibited is evidence of *general* reputation. For example, in *Smith*, Lamer C.J.C. took into account, at p. 273, that at the time of the telephone call the declarant was travelling under an assumed name and using a forged or stolen credit card; circumstances that Lamer C.J.C. took into account as also providing a motive to lie to "conceal some aspect of her activities or circumstances". He also considered that this evidence showed the declarant "at least capable of deceit". I take it this was not a comment on the declarant's general reputation but evidence of a specific character trait based on specific acts surrounding the making of the statement.

[103] It would seem to me that, as well, specific evidence of the declarant's mental state is admissible on the threshold reliability inquiry. Such evidence, especially expert evidence, does not run afoul of a rule prohibiting use of evidence of general reputation. See *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 (Ont. C.A.) at 425-26. Thus, in this case, the Crown led evidence from a geriatric psychiatrist about the mental condition of the complainants. She had viewed the videotaped statements and reviewed the complainants' medical records. This evidence was properly admitted on the issue of threshold reliability and would be of great assistance on the question of ultimate reliability

(ii) Corroborating evidence

[104] In my view, the use of the statements of the other complainants is contrary to the holding in *Starr* prohibiting the use of corroborative evidence at the threshold reliability stage. The holding in *Starr* against using corroborating evidence is perhaps the most difficult aspect of the *Starr* rule since it seems counterintuitive to disregard evidence that shows, perhaps unequivocally, that the declarant is telling the truth. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357 in a classic statement describing the task of the trier of fact, O'Halloran J.A. said this:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably

subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

[105] Or, as Ms. Lacelle points out in her article at p. 387, “It is a fundamental tenet of the law of evidence that corroboration is a proper consideration for a trier of fact in weighing evidence and making findings of fact.” The unqualified holding in *Starr* against using corroborating evidence would also, as Professor Stuart points out, seem inconsistent with the holding in *Khan*.¹⁰ However, until the Supreme Court revisits the issue, it seems to me that this court is bound by the holding in *Starr*. The importance of flexibility in developing the hearsay principles can go only so far in a hierarchal system like ours.

[106] Moreover, the prohibition against using corroboration, especially where the declarant is not available for cross-examination, is based in principle. Where the declarant is unavailable for cross-examination, the risk of inaccuracy and untrustworthiness must focus on the circumstances under which the statement was made. The fact that there is other evidence corroborating the statement is no substitute for the inability to cross-examine to expose the frailties in the statement. It will be recalled that in *Starr*, Iacobucci J. referred with approval to the decision of the United States Supreme Court in *Idaho v. Wright*. At p. 823 of that decision, the majority of the United States Supreme Court held that “the use of corroborating evidence to support a hearsay statement’s ‘particularized guarantees of trustworthiness’ would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause [of the Bill of Rights] be so trustworthy that cross-examination of the declarant would be of marginal utility”. The fact that other evidence may confirm the declarant’s statement does not mean that cross-examination would be of marginal utility. As Professor Stuart noted at p. 286 of his article, “In favour of the *Starr* and Ontario position, it could be argued that weak hearsay should not be bootstrapped into admission by reference to physical or other evidence.”

[107] The hearsay rule serves both evidentiary and procedural goals. The rule seeks to ensure that only trustworthy evidence is admitted. But, the rule also preserves the accused’s right to due process and a fair trial. In *Khan* itself, McLachlin J. recognized this important aspect of the rule when she said at p. 105 that “[i]n determining the admissibility of the evidence, the judge must have regard to the need to safeguard the

¹⁰ It is not for me to try and resolve this apparent conflict between the two cases. It may be that like striking similarity in *R. v. U. (F.J.)*, there are some cases where the corroborating evidence is so closely connected to the statement that they can fairly be considered “the circumstances in which the statement was made” within the meaning of *Starr* at para. 217. It will be recalled that the statement by the victim in *Khan* came in response to questions from her mother shortly after the mother noticed the victim picking at a wet spot on her sleeve. It was this wet spot that turned out to be a combination of the victim’s saliva and the accused’s semen.

interests of the accused”. The admission of an untrustworthy statement without the opportunity to cross-examine and expose the defects and frailties in the statement does not safeguard the interests of the accused simply because there is other evidence that suggests that the statement may be true.

[108] *Starr*, like this case, concerned admissibility of a statement by a deceased declarant. As in this case, the accused had no opportunity to cross-examine the declarant. The statements of the other victims fall squarely within the prohibition in *Starr* against using corroborating evidence. Their use, through similar-fact-type reasoning as circumstantial evidence to corroborate Mr. Skupien’s statement, is not permitted.

[109] Blair J.A. holds that it is open to this court to avoid the impact of this part of *Starr* by extrapolating from the result in *U. (F.J.)*. I agree with him that it is unlikely that the *Starr* majority intended to overrule *U. (F.J.)* and therefore that its holding is still available in an appropriate case. This court has already considered the relationship between *U. (F.J.)* and the use of corroborative evidence at the threshold reliability stage. In the pre-*Starr* case, *R. v. Merz* (1999), 140 C.C.C. (3d) 259 (Ont. C.A.) at para. 51, Doherty J.A. explained the rationale for not permitting resort to such evidence at the threshold reliability stage:

The reliability inquiry, when made in the context of determining the admissibility of a hearsay statement, looks to those factors surrounding the making of the statement which tend to diminish the risks associated with the admission of out-of-court statements. Evidence from other witnesses which is consistent with the substance of an out-of-court statement is not a circumstance surrounding the making of that statement and cannot generally be seen as diminishing the risks associated with the admission of hearsay evidence.

[110] In *Merz*, Doherty J.A. noted the possible conflict between this proposition and the holding of the Supreme Court in *U. (F.J.)* and in a footnote to para. 51, he wrote as follows:

R. v. U. (F.J.) (1995), 101 C.C.C. (3d) 97 (S.C.C.), provides an exception to this general rule. In that case, the court held that the striking similarities between an accused's confession and the out-of-court statement of a witness could enhance the reliability of that out-of-court statement. In *R. v. U. (F.J.)*, the out-of-court statement was made by the complainant who had recanted her evidence at trial. *She was available for cross-examination.* [Emphasis added.]

[111] The fact that the declarant was available for cross-examination in *U. (F.J.)* is, in my view, a critical feature that distinguishes that case from *Starr*, *Merz*, and this case. In light of *U. (F.J.)* there may be room to move away from the strictures of *Starr* where the declarant is available for cross-examination and the accused is able to conduct a full and meaningful cross-examination. Where the declarant is available the emphasis is not so much on the inherent reliability of the statement itself but the safeguards in place to detect unreliability. Iacobucci J. made this very point and relied upon *U. (F.J.)* when he said the following at para. 215 of *Starr* in relation to a motive to lie:

This [threshold reliability] could be because the declarant had no motive to lie (see *Khan, supra*; *Smith, supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins, supra*; *U. (F.J.), supra*; *B. (K.G.), supra*).

[112] The reliability inquiry in *U. (F.J.)* was, as Blair J.A. points out, driven by the striking similarity between the statements of the recanting declarant and the accused. But, it was more than that. Striking similarity would provide the comparable assurance of reliability only if from the circumstances the trier of fact could be assured that “the two declarants were both referring to an actual event—that is, they were both telling the truth” (*U. (F.J.)* at para. 40). That assurance depended not just on striking similarity but also on a demonstration that the two declarants had not colluded or been influenced by other parties. It is highly unlikely that two people could independently come up with a strikingly similar description of an event, if that event did not happen, unless the declarants had colluded or been provided with information from an outside source, such as the interrogator. Where these conditions are met, and the declarant is available for cross-examination to explain the reasons for the change in position, the trier of fact is in a position to make a reasoned decision to choose the out-of-court version of the event over the sworn version, despite the preference for sworn evidence. Or, in the words of Iacobucci J. in *Starr* quoted above, “there were safeguards in place such that a lie could be discovered” (at para. 215).

[113] The declarant’s availability for cross-examination provides a powerful safeguard for discovering whether the prior out of court statement is true. Where, however, the declarant is not available, *Starr* holds that the safeguards must be found in the circumstances surrounding the taking of the statement. The statements by other complainants about what happened to them at the nursing home have nothing to do with the circumstances surrounding the making of Mr. Skupien’s statement.

[114] That said, I would not preclude the possibility that striking similarity reasoning can be used when the declarant is unavailable. But the declarant and the strikingly

similar evidence must, at least, be referring to the same event; otherwise the analysis has become wholly divorced from the circumstances surrounding the statement itself. This may be the explanation for this court's *obiter* comments in *R. v. Chrisanthopoulos* (2003), 180 O.A.C. 124 at para. 9. That case concerned the admission of a "911" call made by an unknown caller apparently describing the kidnapping of the victim. This court held that the 911 call was properly admitted, despite the unavailability of the declarant:

It is apparent from the trial judge's reasons that in performing the threshold reliability assessment, he looked only to the circumstances surrounding the call. Moreover, although we need not finally decide the matter, we are inclined to agree with the Crown that in light of the striking similarities between the event described by the caller and the events which occurred shortly thereafter, this was one of those rare instances, identified in *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.), in which it would have been permissible for the trial judge to consider the surrounding evidence as a means of testing the reliability of the 911 call.

[115] In finding that Mr. Skupien's statement meets threshold reliability, Blair J.A. relies on the experiences of other declarants about different events as described in their statements. I think this runs afoul of *Starr*. In this case, the declarants are talking about different events. A trier of fact at the end of the day might well conclude, using similar fact reasoning, that the same person committed all of the crimes. But that is an issue going to the ultimate reliability of the convictions. The declarants' descriptions of what happened to them say nothing about the circumstances under which Mr. Skupien's statement was taken. It would be equally wrong to find Mr. Skupien's statement unreliable, if it otherwise met the reliability requirement, because another resident at the nursing home describing similar events that happened to him, named someone other than the appellant as the perpetrator.

[116] Finally, one of the declarants, Mr. Grochalska, was unable to identify the appellant as the perpetrator of the assault against him. Even accepting Blair J.A.'s analysis, his statement was simply irrelevant to the reliability inquiry since there was no link between his statement and the appellant. See *R. v. Sweitzer* (1982), 68 C.C.C. (2d) 193 (S.C.C.) at 198-99.

(iii) Prior or Subsequent Statements

[117] The prohibition on use of prior or subsequent statements at the stage of threshold reliability refers, in my view, to statements by the same declarant. This part of *Starr* thus precludes the use of statements Mr. Skupien made to his physician and Ms. Stangrat. However, Blair J.A. does not rely on those pieces of evidence and so I do not intend to make any further reference to this aspect of *Starr*. Obviously, if I am wrong and Iacobucci J. intended a broader meaning so as to include prior or subsequent statements by other declarants of what happened to them, my colleague's holding in this case would also run afoul of this part of *Starr*.

(iv) Conflicting evidence

[118] The fourth category of evidence that Iacobucci J. holds is not available at the threshold reliability stage is conflicting evidence. Conflicting evidence is not an issue in this case and so I do not intend to deal with that issue except to note that it is the converse of the use of corroborating evidence and probably can be justified on the same basis.

(v) Other appellate cases

[119] I want to very briefly deal with the cases from this and other appellate courts that Blair J.A. relies upon as applying or recognizing the *U. (F.J.)* principles. I have already referred to *Chrisanthopoulos*. As to *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), that was a case dealing with the continued viability of the co-conspirators exception to the hearsay rule. In the course of the analysis finding that the exception will ordinarily meet the requirements of necessity and reliability, the court relied upon the fact that in accordance with *R. v. Carter* (1982), 67 C.C.C. (2d) 568 (S.C.C.), the statements of alleged co-conspirators are only admissible against the accused where there is other evidence showing that the accused is probably a member of the conspiracy. The court recognized that it was bound by *Starr* but found it significant at para. 118, "that the kind of probability reasoning based on the unlikelihood of coincidence to which we attach importance does not depend so much on the truth of the hearsay as on the fact that it was said".

[120] More importantly the reasoning in *Chang* does not conflict with *Starr* because the finding that the *Carter* requirements are met is not made at the threshold reliability stage. Those requirements are findings made by the trier of fact at the end of the case. The strictures on the use of corroborating evidence at the threshold reliability stage have no

application where the trier of fact comes to decide on ultimate reliability.¹¹ If the trier of fact is not satisfied, for example, that the accused is part of the conspiracy, the hearsay evidence cannot be used.

[121] I recognize that, at para. 119 of *Chang*, this court said the following:

We also note that the statement in *Starr* that a court should not consider corroborating evidence does not appear to be of universal application. In *R. v. F.J.U.*, [1995] 3 S.C.R. 764, 101 C.C.C. (3d) 97, at paras. 40-45, Lamer C.J.C. for the majority opined that a court, in some circumstances, when considering the admissibility of prior inconsistent statements, may look to the similarity between the statements of two declarants as an indicator of reliability.

[122] I accept that this *obiter* comment is capable of supporting Blair J.A.'s thesis that the *U. (F.J.)* principle can apply more broadly than simply to admission of prior inconsistent statements from a recanting witness. There may well be some circumstances where the *U. (F.J.)* principle can be applied more broadly on a principled basis and, as I have said, *Chrisanthopoulos* may be an example. However, the impact of this comment from *Chang* also has to be measured against the previous holding of this court in *Merz* and the holding in *Starr*. I can see no principled basis for failing to apply the holdings in *Merz* and *Starr* where, as here, the circumstances are analogous.

[123] Blair J.A. also refers to this court's decision in *R. v. R. (R.)* (2001), 159 C.C.C. (3d) 11. In that case, the trial judge had relied upon the similarity between the acts described by the accused and those by the unavailable declarant. Abella J.A. writing for the majority of the court said the following at para. 41:

Aside from noting the similarity between the acts described by the appellant and the complainant, the trial judge heard evidence from her mother that the complainant knew the difference between the truth and a lie and was not someone who lied. In addition, the trial judge could observe the complainant's level of understanding, personality and demeanour during her statement by videotape. The videotaped statement was made shortly after the incident, and there was an absence of evidence of any reason to expect fabrication from her. [Emphasis added.]

¹¹ See *R. v. Merz* at para. 51.

[124] It is not clear that in this passage Abella J.A. was sanctioning the trial judge's use of the similarity of the acts described in the two statements, especially since she made no reference to para. 217 of *Starr*. In any event, *R. (R.)* is of no assistance in this case where the statements relied upon are of persons describing different events. While the Supreme Court of Canada upheld this court's decision in *R. (R.)* at (2003), 171 C.C.C. (3d) 575, the only issue before that court was that of necessity. In his brief reasons, Iacobucci J. was careful to limit his decision to the necessity question.

[125] In *R. v. Misir* (2001), 153 C.C.C. (3d) 70 (B.C.C.A.), the court upheld the trial judge's decision admitting a number of statements made by the deceased at the accused's trial for murder. In challenging the ruling, the accused argued that the evidence from the deceased's relatives was unreliable because it was coloured by their relationship to her. At para. 26, Proudfoot J.A. said the following:

In assessing the reliability of the evidence in the case at bar, some caution must be observed when dealing with the evidence of the deceased's family members, as it might be "coloured". *However, there is also evidence from co-workers of the deceased that supports the testimony of the family members.* The evidence of non-family witnesses carries less suggestion that it is "coloured", and provides support for the trustworthiness of all of the deceased's statements. [Emphasis added.]

[126] Unfortunately, Proudfoot J.A. does not refer to *Starr* in her reasons. Accordingly, I am not sure that *Misir* is of any assistance in resolving the issues in this case.¹²

[127] Finally, Blair J.A. refers to the memorandum of judgment of the Alberta Court of Appeal in *R. v. S. (J.A.)*, [2004] A.J. No. 884. *S. (J.A.)* was a *U. (F.J.)* case in that the Crown sought to make substantive use of a prior inconsistent statement of a recanting witness. As in *U. (F.J.)*, the declarant was available. However, the comparison in *S. (J.A.)* was not between the statement of the witness and the statement of the complainant given at around the same time as in *U. (F.J.)*. Instead, the comparison in *S. (J.A.)* was between the statement of the witness and the testimony of the complainant at trial. Nevertheless, the declarant's statement and the complainant's evidence in *S. (J.A.)* concerned the same event, an act of sexual abuse by the accused that was witnessed by the declarant. That case can therefore be said to be a principled extension

¹² Blair J.A. also refers to the decisions of the British Columbia Court of Appeal in *R. v. Harvey* (1996), 109 C.C.C. (3d) 108 and the Quebec Court of Appeal in *R. v. Dubois* (1997), 118 C.C.C. (3d) 544. He cites them as examples of the application of the striking similarity principle where the declarant is not available. Since those cases precede *Starr*, they are of limited use in resolving the issue in this appeal.

of *U. (F.J.)*, given that the declarant was available for cross-examination. The court also held that it would have to be shown that the complainant's testimony on the crucial issue was not affected by knowledge of what had been said by the declarant in his statement. Where the declarant is not available, the Alberta Court of Appeal has applied *Starr*. See *R. v. Nguyen* (2001), 153 C.C.C. (3d) 495 at paras. 37 and 38.

(2) The Procedural Problem

[128] There is a second, procedural, problem with the use of hearsay statements of other persons. Blair J.A. holds that the comparator statements need not be substantively admissible and thus he relies upon the videotaped statement given by Mr. Grochalska in deciding on threshold reliability. Statements that are not substantively admissible are not available to the trier of fact when determining ultimate reliability. I fear that the form of analysis proposed by my colleague confounds threshold reliability with ultimate reliability. In *U. (F.J.)*, Lamer C.J.C. held that the comparator statement must be substantively admissible. In my view, one reason for that requirement is that the comparator statement must be available to the triers of fact so that they can make their own decision on the ultimate reliability of the hearsay statement. While the trial judge as arbiter of the law may form a view as to, for example, the likelihood of coincidence or collusion, the final decision on that issue has to be with the triers of fact. If the triers of fact only have access to some of the material relied upon by the trial judge, they are not in a position to make the decision about ultimate reliability.

[129] I am not sure that Blair J.A.'s analogy to admission of other types of evidence such as confessions is an apt one.¹³ In the case of a confession, the trial judge is principally concerned with voluntariness, not reliability. The judge may hear evidence on

¹³ In some cases, there may be other issues, such as whether the accused had an operating mind.

the voluntariness issue that may or may not be relevant to the jury's task of deciding whether, if the statement is admitted, it is true. Evidence bearing on voluntariness such as allegations of threats may be relevant to that issue but the jury is not called upon to make a determination about the voluntariness of the statement.

[130] Admission of hearsay under the principled approach is different. The judge and the jury are asked to pass on the same issue—reliability. It would seem odd that evidence the trial judge relied upon to find that the statement was reliable (threshold reliability) would not be available to the jury when it comes to make its decision on ultimate reliability. There may, of course, be cases where some of the evidence heard on the threshold reliability *voir dire* will not be necessary when the trier of fact comes to make a decision on ultimate reliability. But, I can see no justification for depriving the trier of fact of the very piece of evidence that convinced the trial judge that the statement was reliable.¹⁴ Yet, that is the inevitable consequence of relying upon inadmissible hearsay statements, such as Mr. Grocholska's statement, to bootstrap the admissibility of Mr. Skupien's statement.

[131] For these reasons, I would not admit the statements of either of the complainants.

DISPOSITION

[132] Accordingly, I would allow the appeal, set aside the convictions and enter acquittals.

Signed: "Marc Rosenberg J.A."

"I agree Robert P. Armstrong J.A."

RELEASED: "MR" February 28, 2005

¹⁴ A better analogy would be the necessity issue. It seems to me that necessity is an issue solely for the judge at the stage of admissibility. There would be no need for the jury to have access to information bearing solely on necessity since it does not, ordinarily, impact on its task in deciding what weight to give to the hearsay statement.

Appendix "A"
Table of Statements

Teofil Skupien [Count 5 - Appellant Found Guilty of Aggravated Assault Wounding]

[Count 6 - Appellant Found Guilty of Uttering Threats]

Statement	Date	Circumstances in Which Statement Was Made	Content of Statement	Ruling on Admissibility
Oral statement to Joanne Stangrat	8-May-99	Ms. Stangrat entered Skupien's room and found him lying down. He had blood "all around his face", bruising, a cut on his forehead, a crooked nose, and swelling around his eye. He was having trouble breathing. Ms. Stangrat asked him what happened. Skupien asked her to close the door and then told her. [Vol.I, p.18, l.14 - p.25, l.13.]	The appellant entered Skupien's room when he was lying in bed and attacked him, punching him in the face and ribs. The appellant threatened to kill him. The appellant told Skupien that he was beating him up because Skupien had gone into the kitchen when he wasn't supposed to. [Vol. I, p.24-28.]	<i>Inadmissible</i> " <i>...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements.</i> " [Ruling, p.13, l.7-l.11]
Oral statement to Dr. Bogdan Pietraszek	12-May-99	Dr. Pietraszek saw Mr. Skupien as a patient in his office. Ms. Stangrat was present in the examination room. Dr. Pietraszek observed that Mr. Skupien looked "rather not well" and had bruises on his face and "big swelling showing that something had happened to him". Dr. Pietraszek asked him what happened. Mr. Skupien explained. [Vol.I, p.123,l.12 - p.124, l.29.]	"[Mr. Skupien] was assaulted by the owner, his name is supposed to be Tony, and he was hit in the face and in the body with something which was either a cane or a metal pipe." [Vol.I, p.124, l.16-l.19]	<i>Inadmissible</i> " <i>...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements.</i> " [Ruling, p.13, l.7-l.11]
Videotaped statement	13-May-99	Mr. Skupien provided a videotaped statement in the video recording room at 11 Division. The interview was conducted by Detective Peter Karpow and Constable John Birrell. Mr. Skupien understood the importance of telling the truth and that if he did not tell the truth he could be charged. [Appeal Book Vol.I, p.133-135]	The appellant entered Skupien's room at the nursing home, said "enough is enough", and slapped him in the face. Then he punched him "in the face...in the ribs, all over". The appellant attacked Skupien because he had gone into the kitchen to return his dishes. [Appeal Book, Vol.I, p.133-171]	<i>Admissible</i>

Atilio Dinino

[Count 1 - Appellant Found Guilty of Assault Causing Bodily Harm]

[Count 2 - Appellant Found Guilty of Assault with a Weapon (Stayed Pursuant to Kienapple)]

Statement	Date	Circumstances in Which Statement Was Made	Content of Statement	Ruling on Admissibility
Oral statement to Nick Boychuk	before May 13, 1999	Mr. Boychuk was a resident at the nursing home. When Mr. Dinino visited Mr. Boychuk's room one day, Mr. Boychuk saw that he was limping and asked what had happened. [Vol.I, p.371, l.31 - p.374, l.5]	Mr. Dinino pointed to his leg below the knee and explained that the appellant had beaten him with a cane. [Vol.I, p.373, l.14-l.30]	<i>Inadmissible</i> <i>"...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements." [Ruling, p.13, l.7-l.11]</i>
Videotaped statement	14-May-99	Mr. Dinino provided a videotaped statement in the sitting room of the nursing home. He was interviewed by Constables Pietroniro and Hughes. Mr. Dinino understood English but wanted PC Pietroniro there because he could also speak Italian. Though Mr. Dinino was not questioned directly about the importance of telling the truth, the circumstances of the interview appear to have impressed upon him the importance of telling the truth and his manner appears to reflect this. [Appeal Book, Vol.II, p.212-p.261]	After finding water in the washroom, the appellant attacked Mr. Dinino in his bed, hitting him with a cane in the head, face, legs and ribs. The appellant threatened to kill him. [Appeal Book, Vol.II, p.212-p.261]	<i>Admissible</i>

Cazimir Grochalska

[Count 7 - Directed Verdict of Not Guilty of Assault Causing Bodily Harm]

Statement	Date	Circumstances in Which Statement Was Made	Content of Statement	Ruling on Admissibility
Oral statement to Nick Boychuk	before May 13, 1999	Mr. Grochalska came to Mr. Boychuk's room and asked him who "the man downstairs" was. Mr. Boychuk asked him why he wanted to know. [Vol.I, p.374, l.30 - p.375, l.30]	"The man downstairs" came to Mr. Grochalska's room when he was sitting on the bed and said 'you bastard, you blocked the toilet'. He hit Mr. Grochalska below the eye. [Vol.I, p.375, l.14-l.18]	<i>Inadmissible</i> <i>"...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements." [Ruling, p.13, l.7-l.11]</i>
Videotaped	14-May-	Mr. Grochalska provided a videotaped	The appellant hit Mr.	<i>Inadmissible</i>

statement	99	statement to Detective Karpow and Constable Pietroniro in the basement of the nursing home. He was told several times that whatever he said in his statement had to be the truth, and that this was important. Mr. Grochalska appeared to agree. [Appeal Book, Vol.I, p.173-174]	Grochalska twice on the left side of the head. Mr. Grochalska was in his room at the time. [Appeal Book, Vol.I, p.173-184]	"...in this case, the witness has testified under oath. In my view, that is the best evidence. The necessity requirement has not been met." [Ruling, p.9]
Testimony at the Preliminary Inquiry	January 2000	Mr. Grochalska testified under oath at the preliminary inquiry. At the threshold competency inquiry he demonstrated an understanding of the nature and importance of telling the truth. The Crown conceded that the witness did demonstrate gaps in his memory, but argued that he was able to communicate the evidence and that any such gaps would simply go to reliability. The defence did not make submissions on the voir dire. The court allowed Mr. Grochalska to testify. [Appeal Book, Vol.I, p.186-192]	Mr. Grochalska explained that the person in charge of the nursing home, whose first name he said was "Danny", had beaten him up, taken his money, and told him to get out of the home. "Danny" hit Mr. Grochalska twice in the head and tried to hit him in the stomach. Mr. Grochalska could not identify the appellant in the courtroom. [Appeal Book, Vol.I, p.193-199]	Admissible (At the conclusion of the Crown's case a directed verdict of not guilty was made with respect to the alleged assault on Mr. Grocholska)

George Peiszterer

[Count 3 - Found Not Guilty of Assault Causing Bodily Harm]

Statement	Date	Circumstances in Which Statement Was Made	Content of Statement	Ruling on Admissibility
Oral statement to Boris Rabar	early May 1999	Mr. Rabar would regularly visit his father, Mr. Peiszterer, at the nursing home. When Mr. Rabar was arriving for one visit he saw the appellant leaving Mr. Peiszterer's room. The appellant ran past Mr. Rabar down the corridor. When Mr. Rabar entered the room he found his father on the floor, bleeding. Mr. Peiszterer could not speak at first, and after five or ten minutes he started to cry. When his son asked him what had happened, Mr. Peiszterer explained. [Vol.I, p.354, l.5 - p.357, l.20; Ruling, p.12]	Mr. Peiszterer told Mr. Rabar that the appellant had beaten him up. Mr. Peiszterer had tried to stop the appellant from taking his money away. [Vol.I, p.357, l.4-l.12]	Inadmissible "...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements." [Ruling, p.13, l.7-l.11]

Kathleen Poliszak

[Count 4 - Found Not Guilty of Assault Causing Bodily Harm]

Statement	Date	Circumstances in Which Statement Was Made	Content of Statement	Ruling on Admissibility
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Oral statement to Nick Boychuk	before May 13, 1999	Mr. Boychuk had a conversation with Ms. Poliszak. He had observed that she had a black eye. [Vol.I, p.374, l.6 - l.29]	Ms. Poliszak explained that she had no money to visit her daughter, who had epilepsy. When she asked the appellant for money he pushed her out the door and hit her in the face with his fist. [Vol.I, p.374, l.6 - l.29]	<i>Inadmissible</i> " <i>...I am of the view that the oral statements, while in and of themselves meet the threshold of reliability, to admit them would be oath-helping in that I have the video statements.</i> " [Ruling, p.13, l.7-l.11]
Videotaped statement	14-May-99	Ms. Poliszak gave a videotaped statement to Constables Hughes and Pietroniro at the nursing home. She was not specifically cautioned about the importance of telling the truth. [Appeal Book, Vol.II, p.262-287]	Ms. Poliszak went to see the appellant about getting some money from her old age pension, but the appellant would not give it to her. He became "very angry". He pushed her and slapped her and hurt her mouth. [Appeal Book, Vol.II, p.262-287]	<i>Admissible</i>