EVIDENCE OF CONDUCT/DEMEANOR:
A STRETCH FOR PROBATIVE VALUE

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Introduction

Human behaviour can often be unusual, unpredictable, irrational or suspicious. Similarly, people feel, demonstrate and express different emotions over what may be seen to be similar events. When this occurs following the commission of a criminal offence, there is a potential for too much emphasis to be placed on these actions or sentiments and for them to become part of a body of evidence known as “consciousness of guilt.” The purpose of this paper is to provide a brief overview of this topic under the following headings:

- Background
- Terminology
- Types of Post Offence Conduct
- Issues of Proof and Procedure
- Demeanour Evidence
- Consciousness of Innocence
- Concluding Comments

Background:

During the trial of Guy Paul Morin several witnesses were called by the crown to demonstrate that Mr. Morin exhibited through his words and conduct a “consciousness of guilt or strange conduct or demeanour consistent with guilt” (see Executive Summary page 27). The report concluded that much of this evidence had little or no probative value, limited reliability and should not have been left with the jury. It was determined within the report that this evidence was relied upon heavily by the Crown during the trial and was present in the crown’s closing address, and the Trial Judge made reference to
this evidence during his instructions to the jury. The cumulative effect resulted in the wrongful conviction of Paul Morin.

The Commission made the following recommendations:

**Recommendation 76A: Overuse and misuse of consciousness of guilt and demeanour evidence**

a. *Purported evidence of “consciousness of guilt” can be overused and misused.* Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel and police should also be educated as to the dangers associated with this kind of evidence. This recommendation should not be read to suggest that such evidence should be prohibited.

b. *Purported evidence of the accused’s “demeanour” as circumstantial evidence of guilt can be overused and misused.* Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence. In particular, where such evidence of strange demeanour is brought forward after the accused is publicly identified, Crown counsel, the police and the judiciary should be alive to the danger that this “soft evidence” may be coloured by the existing allegations against the accused. The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way.

**Recommendation 76B: Use of term “consciousness of guilt”**

*In accordance with the Peavoy decision, the term “consciousness of guilt” should be avoided.*

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Terminology:

Traditionally, this type of evidence which was extensively used in the Morin case has been classified or labeled as “consciousness of guilt.” While this type of evidence is often present in criminal cases, it is unusual for it to be specifically referred to as evidence of “consciousness of guilt.” It is most likely to be identified as a separate body of evidence only in cases involving jury trials, where it forms part of the Judge’s instructions of the law to the Jury. It is apparent that in recent years, the subject has received a great deal of attention and this is in no small measure attributable to the results of the Morin Inquiry.

Clearly the term, “consciousness of guilt” could suggest greater culpability to a lay person than “after-the-fact conduct” or another more neutral term. When a Juror hears the words “consciousness of guilt” it raises a considerable risk of suggesting that the ultimate issue for the trier of fact has already been resolved, namely guilt.

Recent decisions have criticized the label “consciousness of guilt” and recommended that the terminology to be used should be “post offence conduct” or “after-the-fact conduct.” See for example Peavoy supra where Weiler, J.A. stated at page 237,

The characterization of the conduct in question as evidence of consciousness of guilt isolates it from other circumstantial evidence. To encourage the trier of fact to consider after-the-fact conduct with other circumstantial evidence and not to isolate it, the use of more neutral terminology is desirable. The use of neutral terminology such as the term after the fact conduct, also avoids labelling the evidence with a conclusion which the jury might not wish to draw and is therefore more accurate.

The Supreme Court of Canada has now approved the more neutral terminology of after-the-fact conduct and post offence conduct in R. v. White and Cote (1998), 125 CCC (3d) 385.

Types Of Post Offence Conduct:

There are many actions of an accused person following a crime that may be construed as circumstantial evidence of culpability. The actions of the accused that may attract culpability may be broken down into several categories, but in general terms there are five main categories as follows:
i. Flight by an accused person from the scene of a crime or the jurisdiction.

ii. Attempts by an accused person to hide or conceal his or her identity.

iii. Attempts by an accused person to hide evidence or tamper with evidence, including attempts to influence witnesses.

iv. Providing false explanations, statements or alibi evidence

v. A suicide attempt by the accused.

Post offence conduct or after-the-fact conduct is of course circumstantial evidence and is subject to the well established rule that the evidence must be consistent with guilt and inconsistent with any other rational conclusion. Any explanation provided by the accused is relevant in this analysis. In some cases an accused person may deny liability for the offence with which he is charged, but be willing to accept responsibility for another offence which may explain his conduct.

**Issues of Proof and Procedure:**

The starting point for an analysis of post offence conduct is the Supreme Court of Canada decision in *R. v. Archangioli* [1994] 1SCR, 129. The Supreme Court dealt with an issue raised as “consciousness of guilt” arising from flight from a crime scene. The accused had been charged with aggravated assault and had admitted that he punched the victim several times, but he testified that another individual stabbed the victim and upon seeing the stabbing he had fled. Justice Major for the court began his analysis of the issue with a quotation from *McCormick on Evidence* (volume 2, section 263, at page 182),

*In many situations the influence of consciousness of guilt of a particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the “wicked” generally, rather than resolving the issue of guilt of the offence charged.*

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3. For example, see *R. v. Archangioli*, infra.
The court adopted an approach outlined in United States v. Myers 550 F. 2d 1036 (5th Cir, 1977), where Clarke J. concluded that the proper approach required the court to examine whether or not there was sufficient evidence to support the drawing of four inferences:

1. From the accused’s behaviour to flight
2. From flight to consciousness of guilt
1. From consciousness of guilt to consciousness of guilt concerning the offence in question.
2. From consciousness of guilt of the offence in question to actual guilt of the offence in question.

Applying this test, the trier of fact must first connect the commission of an offence with evasion or flight. Secondly, the trier of fact must infer that the conduct stems from a guilty conscience rather than from some other motivation. Thirdly, if there is some type of guilty conscience, it must relate to the particular offence charged rather than to some other offence or scenario that could cause flight or evasion. If these three inferences have been drawn it is then open to the trier of fact to conclude that the behaviour is evidence of consciousness of guilt and it then can be used to support a conclusion of guilt.

In Archangioli the Supreme Court ruled that on the facts of the case, the Appellant’s flight was equally consistent with both common assault and aggravated assault, therefore it could not be evidence of guilt of the latter. In discussing the inferences that can be drawn from after-the-fact conduct, the court stated at paragraph 43,

Such evidence can serve the function of indicating consciousness of guilt only if it relates to a particular offence. Consequently, where an accused’s conduct may be equally explained by reference to consciousness of guilt of two (2) or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a Trial Judge should instruct a jury that such evidence has no probative value with respect to any particular offence.

When an accused’s actions are equally consistent with two offences, one of which is admitted, it is necessary for a Trial Judge to provide a “no probative value” instruction to the trier of fact.
Prior to Regina v. White and Cote (1996), 108 CCC (3d) 1 (Ont. C.A.) there was some confusion as to whether or not after-the-offence conduct or evidence of consciousness of guilt should be separately considered by the trier of fact and that the evidence should be weighed on the test of proof beyond a reasonable doubt. This approach was argued by the Appellant in White but rejected by the Ontario Court of Appeal. The court overruled themselves in the previous decision in R. v. Court and Monaghan (1995), 99 CCC (3d) 237. After a thorough review of previous decisions in the Ontario Court of Appeal Doherty J. stated at page 27,

In the light of the foregoing we are satisfied that Court and Monaghan was wrongly decided. Evidence of consciousness of guilt should not be considered in isolation and taken into account in deciding upon a verdict only when it satisfies a standard of proof beyond a reasonable doubt. Rather it should be considered together with all of the other evidence in the determination of whether guilt has been proven...
- and -
Guilt or innocence should be determined on all the admissible evidence considered together. Court and Monaghan can result in a case being decided on less than all the admissible evidence and accordingly in erroneous verdicts. (see page 29)

The Ontario Court of Appeal decision in White and Cote was confirmed by the Supreme Court of Canada in Regina v. White & Cote (1998), 125 CCC (3d) 385. After confirming that the term consciousness of guilt should be replaced by more neutral terms such as post offence conduct or evidence of after-the-fact conduct, the following points were outlined by the Court:

a. Post offence conduct must be relevant to a live issue in the case

b. The question of whether a jury can consider post conduct evidence will depend on the facts of each case.

c. If the evidence cannot be used to support guilt, it may still in some cases be used for other purposes such as connecting the accused to the scene of the crime or to a piece of physical evidence, or to undermine credibility.
d. Ultimately, it is up to the trier of fact to decide on the evidence if post offence conduct is related to the crime before them rather than some other culpable act.

e. The trier of fact will decide how much weight to give such evidence in the final determination of guilt or innocence.

f. A “No Probative Value” instruction will only be called for in very limited circumstances, where the post offence conduct is equally explained by or equally consistent with, two or more offences.

g. A “No Probative Value” instruction will not be given where the accused has denied any involvement in the facts underlining the charge in issue.

h. Where the extent of post offence conduct is out of proportion to the level of culpability of an offence admitted the conduct may be found to be more consistent with the offence charged.

i. Post offence conduct should be considered with all other evidence in the trial and should not be examined on a “piecemeal” basis.

j. There is no principled basis for the claim that evidence of after-the-fact conduct is substantially different from other kinds of circumstantial evidence and it does not require a separate reasonable doubt analysis.

k. A Judge should instruct a jury that post offence conduct does not necessarily imply guilt, but can arise from any number of innocent motives and any explanations for the accused’s actions should be provided to the jury.

**Demeanour:**

The actions of an accused person after an offence may be closely scrutinized and introduced as evidence of consciousness of guilt or post offence conduct. It is not only the acts of an accused person however, but also the accused person’s demeanour or a third party’s interpretation of that demeanour that has been used as post offence conduct evidence. In the Guy Paul Morin case, most of the evidence of so-called “consciousness of guilt” was in fact demeanour evidence. It consisted of other people’s interpretation of his looks, mood, body
language, and comments. These observations by third parties and their interpretation of their observations should play no part in the trial of an accused person. It is purely subjective evidence and if it is believed by the trier of fact, it is extremely difficult to rebut.

Demeanour evidence was introduced against Susan Nelles in the infamous Toronto Hospital for Sick Children case. Ms. Nelles was a nurse who was wrongly charged with the murder of four (4) infants at the hospital. She was discharged at the preliminary inquiry. The Crown in that case had called a doctor as a witness against her who testified about a strange expression on her face and her absence of signs of grief. In fact the doctor barely knew her and knew nothing about her emotional make-up. See R. v. Nelles (1982), 16 CCC (3d) 97.

Demeanour of course plays an important role inside the courtroom, particularly in cases that are decided on the basis of credibility. In Faryna v. Chorny, [1952] 2DLR 354 (BCCA) the British Columbia Court of Appeal noted:

*If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances of the case may point decisively to the conclusion that he is actually telling the truth.*

*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 the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderence of the probabilities which a practical and informed person would readily recognize in that place and in those conditions.*

So-called evidence of demeanour should be dealt with with extreme caution whether it be demeanour which is exhibited after an offence has been committed or whether it is demeanour exhibited on a witness stand. It is very difficult to make accurate inferences by
judging another’s looks, mood, tone of voice, or body language and this is particularly true when the parties are not well known to each other.

**Consciousness of Innocence:**

Clearly, evidence of post offence conduct can be a powerful weapon in the hands of a prosecutor. This raises the question of whether favourable post conduct evidence can be used at the instance of the accused. For example, should the fact that an accused person did not leave the scene of a crime but waited for the police to arrive, be construed as evidence supportive of innocence? Should the fact that the accused promptly gave a statement to the police be evidence that is capable of bolstering the accused’s defence?

In *R. v. Wray (1973)*, 10 CCC (2d) 215 (SCC) the accused attempted to lead evidence that on a charge of murder he had been at large in the community without any legal requirements to remain in the jurisdiction and that he appeared for his trial as required. His counsel sought to introduce this evidence to counteract the possibility of the crown leading evidence of consciousness of guilt. No evidence was adduced by the crown that the accused had attempted to leave the jurisdiction and the majority of the court held that because he was presumed innocent, any evidence that he did not refuse to do what was required by law for him to do, namely show up at the trial, did not affect the issue of his guilt or innocence one way or the other. The court noted however that the crown had not adduced evidence that the appellant had attempted to evade justice, but that if they had, his proposed evidence might have been relevant and admissible to counter-act any inference of consciousness of guilt.

In a minority decision, Hall, J. held that the evidence was admissible, but that the real issue was the question of weight to be attached to the evidence. At page 221 he stated,

*The fact that the exclusion of the evidence did not in my view result in a substantial wrong or miscarriage of justice cannot be regarded as a bar to the admission of evidence which can be classified as constituting “evidence of a consciousness of innocence.” I think the statement is to be found in Wills On Circumstantial Evidence 7th ed., p. 277, quoted by my brother Ritchie in his reasons, is a sound proposition and not one to be rejected out of hand as unknown to our law. The fact that the proposition has not been articulated in a reported decision is of no consequence.*
In Regina v. S. C. B. (1997), 119 B. C. (3d) 530, the Ontario Court of Appeal examined a situation where after-the-fact conduct was introduced during the trial by the defence. The accused faced serious sexual assault charges and on the day following the incident he was arrested by the police. The complainant has provided evidence that she could positively identify the accused as her attacker. The accused offered to take a polygraph test, he provided a statement to the police despite being advised that he did not have to, he provided a sample of his blood for DNA testing, he provided a saliva sample and samples of his pubic and head hair and scrapings from underneath his fingernails. In addition, he offered to turn over his clothing to the police although there was some question of whether or not the clothing had already been through a wash cycle. These offers of cooperation came from him knowing that the exhibits would be sent for testing and not knowing what information the police had to support their charge at that time.

Typically, this evidence would be seen as self-serving evidence and inadmissible at the instance of the defence. In this case however, Justices Doherty and Rosenberg writing for the court reviewed that test set out in Peavoy supra and stated,

We see no reason why after-the-fact conduct, which is reasonably capable of supporting an inference favourable to the accused, should not also be received unless its probative value is substantially outweighed by its potential prejudicial effect. We are unaware of any evidentiary rule or theory of relevance which would admit evidence that an accused ran away when confronted by the police as evidence of guilt, but would exclude evidence that an accused effectively turned himself over to the Police for whatever investigative purpose they desired as evidence supporting an inference that the accused did not commit the crime.

In S.C.B. case the court concluded that a mere offer to provide a polygraph examination would not satisfy the test of admissibility, as it would have very limited probative value as essentially an accused would risk nothing as a failed test would be inadmissible. The acquittal in S.C.B. was overturned by the Ontario Court of Appeal on a separate ground of appeal.

**Concluding Comments:**

Post offence conduct has received a great deal of judicial attention during the last few years. It is clear that attention is starting to focus on the dangers inherent in this type of evidence.
and the need for careful examination and instructions before the evidence can be utilized. Lawyers practicing in the criminal field should be particularly wary of this type of evidence and the need to examine its relevancy, admissibility and weight.