



The Law Commission

Consultation Paper No 138

Criminal Law

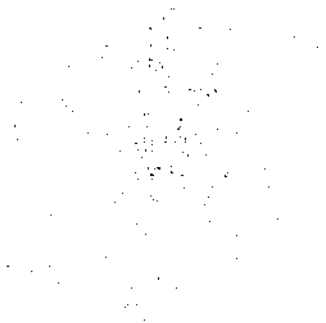
EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

A Consultation Paper

HMSO

© *Crown copyright 1995*
Applications for reproduction should be made to HMSO Copyright Unit

ISBN 0 11 730223 6



LAW COMMISSION

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART I: INTRODUCTION		
The background to this consultation paper	1.1-1.9	1
The function of the law of evidence in criminal cases	1.10-1.15	4
Principles of reform	1.16-1.17	6
The issues	1.18-1.25	6
The limitations on reform	1.26-1.30	9
Method of working	1.31-1.33	10
The structure of this paper	1.34-1.40	11
PART II: THE HEARSAY RULE TODAY (I): THE RULE		
Introduction	2.1-2.2	13
What is the rule?	2.3-2.4	13
The purpose of the evidence	2.5-2.8	13
When does the rule apply?	2.9-2.11	15
To what material does the hearsay rule apply?	2.12	15
Hearsay evidence as distinct from real evidence	2.13-2.19	16
The extent of the rule: "implied assertions"	2.20-2.25	18
The extent of the rule: negative hearsay	2.26-2.32	19
Summary of the rule	2.33	22
PART III: THE HEARSAY RULE TODAY (II): EXCEPTIONS TO THE HEARSAY RULE CREATED BEFORE 1988		
Introduction	3.1-3.3	23
A. COMMON LAW EXCEPTIONS TO THE HEARSAY RULE	3.4-3.49	23
<i>Admissions and confessions</i>	3.9-3.13	25
<i>Denials, and neutral and mixed statements</i>	3.14-3.20	26

	<i>Paragraph</i>	<i>Page</i>
<i>Admissions by a third party</i>	3.21-3.25	30
<i>Statements by deceased persons: declarations against interest</i>	3.26	31
<i>Statements by deceased persons: declarations in the course of duty</i>	3.27	31
<i>Statements by deceased persons: declarations as to public or general rights</i>	3.28	31
<i>Statements by deceased persons: dying declarations in cases of murder or manslaughter</i>	3.29-3.32	31
<i>Statements by deceased persons: declarations as to pedigree; declarations by testators as to their wills</i>	3.33	32
<i>Public documents</i>	3.34-3.37	33
<i>Statements admitted as part of the res gestae</i>	3.38-3.41	34
(i) <i>Statements about the maker's physical condition or mental state</i>	3.42-3.45	35
(ii) <i>Statements of the maker's intention</i>	3.46-3.49	36
B. STATUTORY EXCEPTIONS CREATED BEFORE 1988	3.50-3.60	37
<i>Depositions</i>	3.50-3.53	37
<i>Written evidence at trial</i>	3.54-3.55	38
<i>Sundry statutory provisions</i>	3.56-3.58	39
<i>Private documents</i>	3.59-3.60	39

PART IV: THE HEARSAY RULE TODAY (III): THE CRIMINAL JUSTICE ACT 1988

Introduction	4.1-4.7	41
<i>The structure of the hearsay exceptions in the 1988 Act</i>	4.4-4.7	42
First-hand hearsay: section 23	4.8-4.27	43
<i>"a statement made by a person in a document"</i>	4.9	43
<i>"admissible...as evidence of any fact of which direct oral evidence by him would be admissible"</i>	4.10-4.11	44
<i>Reasons why the maker is unavailable</i>	4.12	44
<i>The witness "...is dead or by reason of his bodily or mental condition unfit to attend as a witness": section 23(2)(a)</i>	4.13	44
<i>The witness "is outside the United Kingdom; and...it is not reasonably practicable to secure his attendance": section 23(2)(b)</i>	4.14-4.18	45
<i>"...all reasonable steps have been taken to find the person who made the statement, but...he cannot be found": section 23(2)(c)</i>	4.19	46
<i>The witness "...does not give oral evidence through fear or because he is kept out of the way: section 23(3)(b)</i>	4.20-4.23	46
<i>Proving the foundation requirements for section 23</i>	4.24-4.27	48
"Business, etc documents": section 24	4.28-4.39	49
<i>"...a statement in a document..."</i>	4.29	49

	<i>Paragraph</i>	<i>Page</i>
<i>"...evidence of any fact of which direct oral evidence would be admissible..."</i>	4.30	49
<i>"...created or received by a person in the course of a trade, business, profession [etc]..."</i>	4.31-4.35	49
<i>Proving the foundation requirements for section 24</i>	4.36-4.39	51
Discretion and leave requirements	4.40-4.65	52
<i>Sections 25 and 26</i>	4.44-4.62	53
<i>Attacking the credit of an absent witness</i>	4.63-4.65	57
The weight of hearsay evidence	4.66-4.67	58
The rule in practice	4.68	59

PART V: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction	5.1-5.3	60
Article 6	5.4-5.25	61
<i>Is there a right to put questions directly?</i>	5.13-5.14	63
<i>Must the defence be able to put its questions at the trial itself, or may the questions be put at an earlier stage?</i>	5.15-5.17	64
<i>Will a statement be inadmissible if the accused never had a chance to question the witness?</i>	5.18-5.25	66
The use at trial of a witness's previous statements	5.26	69
Victims of crime and the Convention	5.27-5.30	69
The application of the hearsay rule to the defence as to the prosecution	5.31	70
The right of the defendant to adduce hearsay evidence	5.32-5.33	71
Conclusions	5.34-5.39	71

PART VI: JUSTIFICATIONS OF THE HEARSAY RULE

Introduction	6.1-6.2	74
<i>"[Hearsay] is not the best evidence..."</i>	6.3-6.7	74
The danger of manufactured evidence	6.8-6.15	75
The risk of errors in transmission	6.16-6.19	77
<i>"...the light which his demeanour would throw on his testimony is lost."</i>	6.20-6.30	78
<i>"...it is not delivered on oath."</i>	6.31-6.35	81
The absence of cross-examination: <i>"The jury would have no opportunity to judge the way in which [the prosecution witnesses] stood up to that testing process."</i>	6.36-6.62	83
The risk of a lay tribunal being misled	6.63-6.80	90
The hearsay rule protects the accused	6.81-6.87	95

	<i>Paragraph</i>	<i>Page</i>
The right to confront one's accusers	6.88-6.94	96
"If hearsay were admitted, valuable court time would be wasted hearing evidence of little weight"	6.95-6.99	99
Conclusions	6.100	100

PART VII: CRITICISMS OF THE HEARSAY RULE

Introduction	7.1	101
The complexity of the rule	7.2-7.30	101
(i) <i>Judicial interpretation of the exceptions</i>	7.9	103
(ii) <i>The use of the res gestae exception</i>	7.10-7.12	103
(iii) <i>The exception of evidence of physical or mental sensations</i>	7.13	104
(iv) <i>The admissibility of evidence of intention in order to prove that the intention was carried out</i>	7.14-7.16	104
(v) <i>Dying declarations</i>	7.17-7.18	105
(vi) <i>Statements of deceased persons</i>	7.19	106
(vii) <i>Difficulties arising out of the Criminal Justice Act 1988</i>	7.20-7.30	106
(a) <i>The limits of the "unavailability" categories in section 23</i>	7.20	106
(b) <i>Frightened witnesses: section 23(3)(b)</i>	7.21-7.24	106
(c) <i>Proving the foundation requirements</i>	7.25	108
(d) <i>The "maker" of the statement in section 24</i>	7.26-7.29	108
(e) <i>The reliance on the exercise of judicial discretion</i>	7.30	109
The waste of court time	7.31-7.33	109
The exclusion of cogent evidence	7.34-7.73	110
<i>The exclusion of cogent evidence on behalf of the defence</i>	7.35-7.50	110
(i) <i>Confessions by a co-defendant or non-party</i>	7.37-7.45	111
(ii) <i>An appeal may be allowed on the basis of inadmissible evidence</i>	7.46-7.50	113
<i>The exclusion of cogent evidence tendered by the prosecution</i>	7.51-7.73	114
(i) <i>It may be impossible to adduce evidence from particular categories of witness</i>	7.52-7.53	114
(ii) <i>The exclusion of high quality first-hand oral hearsay</i>	7.54	115
(iii) <i>The contemporaneous note written down by someone else</i>	7.55	115
(iv) <i>The exclusion of implied hearsay</i>	7.56-7.73	116
"[The hearsay rule] often confuses witnesses and prevents them from telling their story in the witness-box in the natural way."	7.74-7.75	120
The arbitrary nature of the law	7.76-7.79	121
The indiscriminating nature of the rule	7.80-7.82	122
Contravention of the Convention	7.83	123
Summary of the criticisms of the hearsay rule	7.84	123

PART VIII: PREVIOUS REFORM PROPOSALS

Introduction	8.1	125
The Law Reform Committee’s Report on Civil Hearsay	8.2-8.5	125
The CLRC’s Report on Criminal Hearsay	8.6-8.16	126
The Roskill Report	8.17-8.28	130
The Royal Commission on Criminal Justice	8.29-8.31	134
The Law Commission’s Report on Civil Hearsay	8.32-8.34	134

PART IX: THE NEED FOR CHANGE AND PRELIMINARY ISSUES

Introduction	9.1	136
Option 1: no change	9.2-9.3	136
The European Convention on Human Rights	9.4-9.5	136
<i>Additional protection for the accused</i>	9.5	137
Judicial discretion	9.6-9.25	137
<i>Advantages of judicial discretion</i>	9.11-9.13	138
<i>Disadvantages of judicial discretion</i>	9.14-9.18	139
<i>Provisional conclusion</i>	9.19-9.25	140
The formulation of a hearsay rule	9.26-9.35	141
<i>Defining hearsay: implied assertions</i>	9.27-9.32	142
<i>Defining hearsay: the distinction between hearsay and real evidence</i>	9.33-9.34	143
<i>Defining hearsay: negative hearsay</i>	9.35	143
Conclusion	9.36	144

PART X: OPTIONS FOR REFORM (I): THE SIX OPTIONS FOR REFORM

Introduction	10.1-10.2	145
<i>The rationales for admitting hearsay evidence</i>	10.2	145
Option 2: the free admissibility approach	10.3-10.27	145
<i>Advantages</i>	10.8-10.14	146
<i>Disadvantages</i>	10.15-10.27	147
Option 3: the “best available evidence” principle	10.28-10.35	150
Option 4: an exclusionary rule with an inclusionary discretion	10.36-10.55	151
<i>Advantages</i>	10.43-10.45	153
<i>Disadvantages</i>	10.46-10.55	153
Option 5: adding an inclusionary discretion to the current scheme	10.56-10.64	154
<i>Advantages</i>	10.61	156
<i>Disadvantages</i>	10.62-10.64	156
Option 6: categories of automatically admissible evidence	10.65-10.72	156

	<i>Paragraph</i>	<i>Page</i>
<i>Advantages</i>	10.66-10.68	157
<i>Disadvantages</i>	10.69-10.72	157
Option 7: categories of automatic admissibility plus a limited inclusionary discretion	10.73-10.78	158

**PART XI: OPTIONS FOR REFORM (II):
THE PREFERRED OPTION -
HOW IT MIGHT WORK**

The provisional proposals	11.1-11.5	160
Admissible hearsay	11.6-11.11	162
The new exception	11.12-11.35	163
<i>Death</i>	11.13	164
<i>Illness</i>	11.14	164
<i>Absence abroad</i>	11.15-11.19	164
<i>Disappearance</i>	11.20-11.21	165
<i>Refusal to give evidence</i>	11.22-11.27	166
<i>Witnesses whose evidence could not be adduced under our proposals</i>	11.28-11.29	168
<i>Safeguard against abuse of the exceptions: where the person tendering the statement has caused the witness's unavailability</i>	11.30-11.33	169
<i>A possible further safeguard</i>	11.34	169
<i>A possible additional power to exclude evidence</i>	11.35	170
The residual inclusionary discretion (the "safety valve" provision)	11.36-11.38	170
Procedural matters	11.39-11.51	171
<i>Evidence taken "on commission"</i>	11.40-11.41	171
<i>The application to admit the statement</i>	11.42-11.44	172
<i>The burden and standard of proof of the conditions of admissibility</i>	11.45-11.46	172
<i>Challenging the credibility and the reliability of the maker of the statement</i>	11.47-11.50	173
<i>Additional evidence</i>	11.51	174
The avoidance of unnecessary interruptions to a witness's evidence	11.52	174
The judge's direction to the jury	11.53-11.56	175
Existing law	11.57-11.60	176
Compliance with the Convention	11.61	177

**PART XII: OPTIONS FOR REFORM (III):
SHOULD THE SAME REFORMS TO
THE HEARSAY RULE APPLY
(A) TO THE PROSECUTION AND TO
THE DEFENCE; AND
(B) IN COURTS-MARTIAL,
PROFESSIONAL TRIBUNALS AND
CORONERS' COURTS?**

Introduction	12.1	179
A. SHOULD THE SAME RULES APPLY TO THE PROSECUTION AND TO THE DEFENCE?	12.2-12.15	179
The current position	12.2-12.4	179
The issue	12.5	180
Options for Reform	12.6-12.15	180
<i>Option 1: Different rules for the defence and for the prosecution</i>	12.7-12.13	180
<i>Option 2: To preserve the same rules in respect of hearsay evidence for defence and prosecution, save in respect of different standards of proof</i>	12.14-12.15	182
B. SHOULD THE SAME REFORMS TO THE HEARSAY RULES APPLY IN COURTS-MARTIAL, PROFESSIONAL TRIBUNALS AND CORONERS' COURTS?	12.16-12.21	182
The current position	12.16-12.20	182
<i>Courts-martial</i>	12.17	183
<i>Professional tribunals</i>	12.18	183
<i>Coroners' courts</i>	12.19-12.20	183
The issue	12.21	184

**PART XIII: THE RULE AGAINST PREVIOUS
CONSISTENT STATEMENTS**

The rule	13.1-13.4	185
Exceptions to the rule	13.5-13.27	186
<i>Recent complaint</i>	13.6-13.9	186
<i>Previous identification</i>	13.10-13.16	187
<i>To rebut a suggestion of afterthought</i>	13.17-13.18	189
<i>The accused's response</i>	13.19	190
<i>A pre-recorded interview with a child</i>	13.20-13.24	190
<i>Summary of the exceptions</i>	13.25-13.27	192
Cross-examination on previous inconsistent statements	13.28-13.29	192
Justifications and criticisms of the rule against previous consistent statements	13.30-13.38	193

	<i>Paragraph</i>	<i>Page</i>
Options for Reform	13.39-13.55	196
<i>Option 1: Retain the present law</i>	13.39	196
<i>Option 2: All previous statements to be admissible</i>	13.40-13.41	196
<i>Option 3: Previous consistent statements to be admitted as evidence of the truth of their contents in certain circumstances</i>	13.42-13.55	197
<i>To rebut suggestion of afterthought</i>	13.49-13.50	198
<i>Evidence of previous identification or description</i>	13.51	198
<i>On accusation, save for prepared self-serving statements</i>	13.52	199
<i>Where a witness is unable to remember details contained in a statement which the witness had made or adopted when the details were fresh in his or her memory, and it is unreasonable at the date of the trial to expect the witness to be able to recall them</i>	13.53-13.54	199
<i>Summary of Option 3</i>	13.55	199

PART XIV: COMPUTER EVIDENCE

Introduction	14.1-14.2	200
Section 69 of PACE	14.3-14.9	200
<i>The scope of section 69: what is a "computer"?</i>	14.4	201
<i>Complying with section 69</i>	14.5-14.9	201
Problems with the present law	14.10-14.21	202
Options for reform	14.22-14.32	206
<i>Option 1: Do nothing</i>	14.23-14.26	206
<i>Option 2: Repeal section 69 and leave it to the common law, relying on the presumption that the machine works</i>	14.27-14.32	207

PART XV: EXPERT EVIDENCE AND THE HEARSAY RULE

Introduction	15.1-15.2	210
The present law	15.3-15.11	210
Options for reform	15.12-15.26	213
<i>Option 1: Make no change</i>	15.12	213
<i>Option 2: Retain the present system and impose cost sanctions against the counsel concerned</i>	15.13-15.20	213
<i>Option 3: Permit cross-examination only with the leave of the court</i>	15.21-15.22	215
<i>Option 4: An exception to the hearsay rule for information relied on by an expert</i>	15.23-15.24	216

	<i>Paragraph</i>	<i>Page</i>
<i>Option 5: An exception to the hearsay rule for information relied on by an expert and provided by someone who cannot be expected to have any recollection of the matters stated</i>	15.25-15.26	217
 PART XVI: SUMMARY OF PROVISIONAL PROPOSALS AND ISSUES FOR CONSULTATION		 218
 APPENDIX A: STATUTORY PROVISIONS IN ENGLAND AND WALES		
Civil Evidence Act 1968		227
<i>Section 10</i>		
Police and Criminal Evidence Act 1984		228
<i>Section 69</i>		
<i>Section 70</i>		
<i>Section 71</i>		
<i>Section 72</i>		
<i>Section 78</i>		
<i>Section 118</i>		
<i>Schedule 3, paras 8-12, 14 and 15</i>		
Criminal Justice Act 1988		231
<i>Section 23</i>		
<i>Section 24</i>		
<i>Section 25</i>		
<i>Section 26</i>		
<i>Section 27</i>		
<i>Section 28</i>		
<i>Section 30</i>		
<i>Section 31</i>		
<i>Section 32</i>		
<i>Section 32A</i>		
<i>Schedule 2</i>		
Criminal Justice (International Co-operation) Act 1990		242
<i>Section 3</i>		

	<i>Paragraph</i>	<i>Page</i>
APPENDIX B: THE HEARSAY RULE IN OVERSEAS JURISDICTIONS		
A. COMMON LAW JURISDICTIONS	1.1-4.24	244
Australia	1.1-1.14	244
<i>State courts</i>	1.2	244
<i>Federal courts or courts exercising federal jurisdiction</i>	1.3	244
<i>The Evidence Act 1995</i>	1.4-1.14	244
Canada	2.1-2.14	247
<i>The rule and the exceptions</i>	2.2-2.3	247
<i>A discretion to admit hearsay</i>	2.4-2.12	248
<i>An exclusionary discretion</i>	2.13	250
<i>The Canadian Charter of Rights and Freedoms</i>	2.14	250
New Zealand	3.1-3.15	251
<i>Implied assertions</i>	3.3-3.5	251
<i>The Evidence Amendment Act (No 2) 1980</i>	3.6-3.12	252
<i>Other statutory exceptions</i>	3.13	254
<i>The Bill of Rights Act 1990</i>	3.14-3.15	254
United States of America	4.1-4.24	255
<i>The definition</i>	4.3-4.4	255
<i>Prior statements</i>	4.5-4.8	256
<i>Admissions</i>	4.9	257
<i>Exceptions</i>	4.10-4.13	257
<i>Hearsay within hearsay</i>	4.14	259
<i>A general inclusionary exception</i>	4.15	259
<i>Impeaching the credibility of an absent witness</i>	4.16	260
<i>An exclusionary discretion</i>	4.17	260
<i>The Sixth Amendment: the confrontation clause</i>	4.18-4.21	260
<i>The Fifth Amendment: the due process clause</i>	4.22-4.24	261
B. CIVIL LAW JURISDICTIONS: FRANCE AND GERMANY	5.1-5.36	262
<i>Introduction</i>	5.1-5.8	262
France	5.9-5.21	264
<i>Safeguards</i>	5.16-5.21	266
Germany	5.22-5.36	268
<i>Safeguards</i>	5.32-5.36	271

APPENDIX C: MISCELLANEOUS STATUTORY PROVISIONS ON THE ADMISSIBILITY OF HEARSAY	273
---	------------

ABBREVIATIONS

In this paper we use the following abbreviations:

Archbold: *Archbold Criminal Pleading, Evidence and Practice* (1995 ed, ed PJ Richardson)

the ALRC: the Australian Law Reform Commission

Blackstone: *Blackstone's Criminal Practice* (5th ed 1995, ed P Murphy)

the 1988 Act: the Criminal Justice Act 1988

the CLRC: the Criminal Law Revision Committee

the CLRC Evidence Report: Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972) Cmnd 4991

Cross: Sir Rupert Cross, *Cross on Evidence* (7th ed 1990, ed C Tapper unless otherwise indicated)

the Strasbourg Commission: the European Commission of Human Rights

the Convention: the European Convention on Human Rights

the Strasbourg Court: the European Court of Human Rights

the Roskill Committee: the Fraud Trials Committee (Chairman: The Right Honourable The Lord Roskill PC)

the Roskill Report: the Fraud Trials Committee Report (1986)

LRC: the Law Reform Committee

NZLC: the New Zealand Law Commission

Phipson: *Phipson on Evidence*, (14th ed 1990 ed MN Howard, P Crane, DA Hochberg)

PACE: the Police and Criminal Evidence Act 1984

the Royal Commission: the Royal Commission on Criminal Justice (Chairman: Viscount Runciman of Doxford CBE FBA)

the Report of the Royal Commission: (1993) Cm 2263

Wigmore on Evidence: J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd revised ed 1940)

PART I

INTRODUCTION

The background to this consultation paper

- 1.1 On 28 April 1994 the Secretary of State for Home Affairs made a reference to the Commission¹ in the following terms:

to consider the law of England and Wales relating to hearsay² evidence and evidence of previous misconduct in criminal proceedings; and to make appropriate recommendations, including, if they appear to be necessary in consequence of changes proposed to the law of evidence, changes to the trial process.

- 1.2 We welcomed this reference as we were conscious that hearsay is “one of the oldest, most complex and most confusing of the exclusionary rules of evidence”.³ Lord Reid said in 1964 that it “[was] difficult to make any general statement about the law of hearsay evidence which is entirely accurate”,⁴ while Diplock LJ said two years later that hearsay is a branch of the law “which has little to do with common sense.”⁵ One of the reasons is that “its definition, and the ambit of exceptions to it are both unclear”.⁶

- 1.3 The Royal Commission considered⁷ the law on hearsay in criminal cases to be “exceptionally complex and difficult to interpret”. It advocated major reforms when it concluded that

...in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. We believe that the probative value of relevant evidence should in principle be decided by the jury for themselves, and we therefore recommend that hearsay evidence should be admitted to a greater extent than at present. ...We think that before the present rules are relaxed in the way that we would

¹ This reference was made pursuant to a recommendation made in the Report of the Royal Commission on Criminal Justice, ch 8 paras 25-26 and Recommendation 189; and see further para 1.3 below.

² The hearsay rule is expressed in *Cross* at p 42 in the following terms:
an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.
This definition was approved by the House of Lords in *Sharp* [1988] 1 WLR 7, 11F. See also para 2.3 below.

³ *Cross* p 508.

⁴ *Myers v DPP* [1965] AC 1001, 1019G-1020A.

⁵ With whom Widgery J agreed in *Jones v Metcalfe* [1967] 1 WLR 1286, 1290H and 1291C.

⁶ *Cross* p 508. Revealingly, more than 150 pages in the latest edition are devoted to the rule and the exceptions.

⁷ Report of the Royal Commission, ch 8, para 26.

like to see, the issues need thorough and expeditious exploration by the Law Commission.⁸

- 1.4 The uncertainty and complexity of this branch of the law is illustrated by the fact that in 1991 three days in the House of Lords were occupied by oral argument on the apparently straightforward issue of whether, on a charge of possessing drugs with intent to supply, a prosecutor could rely on evidence by the police that they had been to the home of the defendant when he was not there, and had there received telephone and personal calls from people (who were not called as witnesses) asking about drugs that the defendant had for sale.⁹ Three of the law lords¹⁰ held that the hearsay rule led to the exclusion of this evidence, whereas the trial judge,¹¹ three judges in the Court of Appeal¹² and two dissenting members of the House of Lords¹³ would have admitted it. That there is a need for simplification in this branch of the law of evidence is also clearly apparent from the criticisms of the rule made by judges,¹⁴ academics,¹⁵ practitioners¹⁶ and the Home Office.¹⁷
- 1.5 It is the statutory duty of this Commission to keep the whole of the law under review “with a view to its systematic development and reform, including...generally the simplification and modernisation of the law”.¹⁸ In this context there are at least four reasons why it is *particularly* desirable to simplify and modernise the law relating to the admissibility of evidence in the criminal courts.

⁸ *Ibid*, ch 8, para 26 and Recommendation 189.

⁹ *Kearley* [1992] 2 AC 228.

¹⁰ Lord Bridge of Harwich, Lord Ackner and Lord Oliver of Aylmerton.

¹¹ Judge Best.

¹² Lloyd LJ, Schiemann and Jowitt JJ in *Kearley* (1990) 93 Cr App R 222.

¹³ Lord Griffiths and Lord Browne-Wilkinson.

¹⁴ Eg Lord Reid (para 1.2 n 4 above) and Lord Diplock (para 1.2 n 5 above). Lord Griffiths said in *Kearley* [1992] 2 AC 228 at page 236H-237 that “most laymen if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply ‘Then the law is an ass’.”

¹⁵ Eg *Cross* pp 508 and 515: “It is possible to point to cases in which evidence of indisputable reliability has been excluded under the hearsay rule” and decisions reached which “were grossly unjust”. RW Baker writes in *The Hearsay Rule* (1950) p 168 that because of the rule “often valuable testimony is excluded and...sometimes injustice is caused”.

¹⁶ The CLRC observed that there was “little doubt that the majority of lawyers now favour substantial relaxation” of the rule; CLRC Evidence Report para 234.

¹⁷ In its evidence to the Royal Commission, the Home Office said that “the hearsay rule has significance for potential miscarriages of justice”: Home Office Memoranda (1991), para 3.57.

¹⁸ Law Commissions Act 1965, s 3(1).

- 1.6 First, an objection to a questionable line of evidence may have to be taken by an advocate on the spot, and then argued by the opposing advocate before being immediately ruled on by the judge or magistrates, without any real opportunity to consider the authorities. Secondly, unlike in civil cases, no interlocutory appeal¹⁹ on issues relating to the admissibility of evidence is generally available:²⁰ if a judge's ruling is wrong, this may lead to the quashing of a conviction,²¹ and possibly an order for a new trial,²² with all the additional expense that this will involve.²³
- 1.7 Thirdly, uncertainty about the law may induce advocates to advise their clients to plead not guilty because of uncertainty about the admissibility of powerful prosecution evidence, whereas if the law were clear they would not have given such advice. And finally, when giving directions to the jury, a judge ought to be able to direct it about the rules of evidence to be applied in terms which it can *readily understand* and accept as *reasonable*.²⁴ The law must also be easy for magistrates to apply.
- 1.8 In essence, if a comprehensive and comprehensible law of hearsay were to be brought into force it would greatly reduce the incidence of argument and error with which the criminal law is at present burdened. It would also make it much easier for the law to be explained to the lay magistrates and juries who play such a large part in its use in criminal courts, and for them to apply it. This point is significant as a substantial proportion of the judiciary who are appointed to hear criminal cases and direct juries fulfil that function only on a part-time basis.²⁵
- 1.9 The need for statutory intervention to reform and simplify the rules on hearsay was compounded by the majority decision of the House of Lords in 1965 in *Myers v DPP*²⁶ that the courts themselves should not introduce any further exceptions to the

¹⁹ I.e., before the conclusion of the trial.

²⁰ Except, eg, from rulings at preparatory hearings in serious fraud trials: see Criminal Justice Act 1987, s 9(3)(b) and (c) and (11).

²¹ See, eg, *Kearley* [1992] 2 AC 228 and *Beckford and Daley* [1991] Crim LR 833.

²² Criminal Appeal Act 1968, s 7(1).

²³ The cost of a criminal trial in the Crown Court was approximately £7400 per day in the financial year 1993-4 (data provided by the Lord Chancellor's Department, Information Management Unit).

²⁴ The CLRC Evidence Report, para 25; and see the dictum of Lord Mackay of Clashfern LC in *Sharp* [1988] 1 WLR 7, 9C.

²⁵ The percentage of trials dealt with in the Crown Court by Recorders and Assistant Recorders in 1994 was approximately 23%: data provided by the Lord Chancellor's Department Business Management Unit.

²⁶ [1965] AC 1001, 1021-2E-B, 1028F and 1034C, *per* Lords Reid, Morris of Borth-y-Gest and Hodson respectively. It has been suggested by A Ashworth and R Pattenden in "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, 296 that notwithstanding this decision the courts have in fact significantly extended the scope

hearsay rule. They said this on the basis that legislation was already overdue. Since then, although some judicial impatience has recently been expressed about the absence of statutory intervention,²⁷ the scope for any further judicial development of the exceptions to the rule has been limited by the decision in *Myers*.

The function of the law of evidence in criminal cases²⁸

1.10 In order to determine the principles on which the law of hearsay should be reformed, we must first identify the function of the law of evidence in criminal cases. Rules of evidence have the function of defining the evidence a court may receive in order that it may elicit the truth in relation to any matter in dispute. Different courts and tribunals have different functions and they therefore seek the truth in different ways.²⁹ Criminal proceedings are concerned with the public interest in the enforcement of the criminal law and the need to avoid the erroneous conviction of the innocent while ensuring the conviction of the guilty.³⁰ In order to avoid any erosion of public confidence in the criminal justice system which might follow if wrongful acquittals or convictions occurred more frequently, the rules of evidence should help to maintain public confidence by minimising, so far as is practicable, the likelihood of any miscarriages of justice.³¹ We also bear in mind, and agree with, the traditional view that the conviction of an innocent person is a more serious miscarriage of justice than the acquittal of someone who is guilty.³²

1.11 This wish to avoid conviction of the innocent leads to a *fundamental* difference between the aims and objectives of criminal proceedings and those of civil proceedings, whose purpose is to ensure the just resolution of disputes without any additional concern for the protection of an individual from unjust conviction and

of exceptions to the rule against hearsay where the reliability of the evidence appeared to warrant its admission; see para 7.9 below.

²⁷ For example, Lord Griffiths in *Kearley* [1992] 2 AC 228, 237A said that if the law was indeed as the majority held it to be in *Kearley*, "I would think that a powerful case had been made out to re-examine the wisdom of the decision in *Myers*."

²⁸ Criminal rules of evidence apply in proceedings other than criminal trials in magistrates' courts and Crown Courts; see paras 12.16-12.20 below.

²⁹ Eg industrial tribunals are not bound by rules as to evidence on oath or affirmation or to the admissibility of evidence: Industrial Tribunals (Rules of Procedure) Regulations (SI 1980 No 884) reg 8(1), and see, further, *The Hearsay Rule in Civil Proceedings* (1993) Law Com No 216, para 4.44.

³⁰ W Twining, *Rethinking Evidence* (1990) p 186.

³¹ See, eg, A Zuckerman, "Miscarriage of Justice and Judicial Responsibility" [1991] Crim LR 492, 492-493.

³² *Warner v Metropolitan Police Commission* [1969] 2 AC 256, 278C, *per* Lord Reid. But note the contrary view of the CLRC at para 27 of its Evidence Report that "it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted", and note the comments on this passage in *Cross*, p 387.

punishment.³³ Another fundamental difference is that in most civil cases, the evidence is assessed and the facts are found by a judge and not by a jury,³⁴ whereas in criminal cases it is the jury or the magistrates that is the fact-finding body. This is the basis for our provisional view that there should be different rules of evidence for civil and criminal trials.

1.12 We must, however, mention a powerful contrary argument. In 1972 the CLRC considered that the fact that hearsay evidence was now widely admissible in civil proceedings in England and Wales³⁵ was a fresh argument in favour of allowing such evidence in criminal proceedings. It believed not only that it was desirable that the law of evidence in civil and criminal proceedings should be as alike as possible (although it accepted there were bound to be substantial differences), but also that it would be particularly unfortunate if any differences in that law were to lead to different results in civil and criminal proceedings relating to the same facts. It drew attention to the fact that it was possible, in theory, for a person to be sued for fraud and found not to be liable on the strength of hearsay evidence which was admissible under the 1968 Act, and yet to be convicted of fraud on the same facts in a criminal court because that evidence was not admissible in criminal proceedings.³⁶

1.13 Our strongly-held provisional view is that there must be different rules for the admissibility of evidence in criminal and civil courts. As we have said,³⁷ the purposes of the two kinds of proceedings are different and, significantly, they have, on the whole, very different fact-finding bodies as well as different standards of proof.³⁸ Moreover, while we accept the theoretical validity of the point made by the CLRC, a finding in civil proceedings has no probative value in criminal proceedings,³⁹ while a conviction in criminal proceedings is regarded in civil proceedings (other than for libel and slander)⁴⁰ as evidence only that the person in question committed the offence unless the contrary is proved.⁴¹

³³ With the exception of proceedings where the welfare of a child is paramount, eg under the Children Act 1989.

³⁴ See Supreme Court Act 1981, s 69(1).

³⁵ Under the Civil Evidence Act 1968.

³⁶ CLRC Evidence Report para 235; see paras 8.9 and 8.12 below.

³⁷ See paras 1.10 and 1.11 above.

³⁸ The standard of proof in criminal proceedings is "beyond reasonable doubt" (see *Woolmington v DPP* [1935] AC 462) whereas the standard in civil proceedings is "on the balance of probabilities" (see *Hornal v Neuberger Products Ltd* [1957] 1 QB 247).

³⁹ *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

⁴⁰ Civil Evidence Act 1968, s 13(1). For those proceedings, the conviction is conclusive evidence.

⁴¹ *Ibid*, s 11.

- 1.14 Given that we think the rules in criminal proceedings need not be the same as those in civil proceedings, we will attach some, but not excessive, importance to the reforms in the rules for civil litigation in the last 30 years, although we will not be referring to them at any great length. More specifically, we believe that the relaxation of the rule against hearsay in civil proceedings⁴² and its proposed abolition⁴³ should not *automatically* be followed in criminal cases.
- 1.15 **We provisionally propose that the admissibility of hearsay evidence in criminal cases should continue to be governed by rules separate from those applicable to civil cases.**

Principles of reform

- 1.16 The Scottish Law Commission has said that the following principles should underlie any reform of the hearsay rule:
- (1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.⁴⁴
 - (2) As a general rule all [relevant] evidence should be admissible unless there is a *good reason* for it to be treated as inadmissible.⁴⁵
- 1.17 We agree; we would add that we take “relevant” to mean that “nothing is to be admitted which is not logically probative of some matter requiring to be proved”,⁴⁶ and also that evidence should not be admitted if a jury or magistrates cannot be given an effective warning about any limitations in the weight that can be attached to it. As we shall show, difficulties arise in deciding whether something is logically probative and, above all, in deciding whether juries and magistrates are capable of safely appraising hearsay evidence in the light of its limitations.

The issues

- 1.18 Our task is to ascertain whether all hearsay evidence should continue to be *prima facie* inadmissible, or whether some forms of hearsay should be admissible subject to certain safeguards, for example, a warning to the jury or magistrates of its limitations.

⁴² See, eg, the Civil Evidence Acts 1968 and 1972.

⁴³ The Government is proposing to implement our recent report (The Rule against Hearsay in Civil Proceedings (1993) Law Com 216). A fundamental feature of that report is the abolition of the rule (subject to certain safeguards) on the basis that the court will be able to determine how much weight to attach to hearsay evidence.

⁴⁴ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149, para 2.3.

⁴⁵ *Ibid*, para 2.30 amplifying para 2.3.

⁴⁶ JB Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898) p 530.

1.19 It may help readers in considering the hearsay rule and its exceptions⁴⁷ if we set out at this stage the way the rule has been justified and the arguments against extending the exceptions any further. These are encapsulated in a speech by Lord Bridge of Harwich in the House of Lords in 1985,⁴⁸ with which the other four Law Lords agreed:⁴⁹

The rationale of excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination. As Lord Normand put it, delivering the judgment of the Privy Council in *Teper v The Queen*:⁵⁰ “The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the witness whose words are spoken to by another person cannot be tested by cross-examination, and the light which his demeanour would throw upon his testimony is lost.” The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve.

1.20 We will consider these justifications for the rule in greater detail in Part VI below. We would welcome comments from those of our readers who have had experience of hearsay evidence in civil cases, particularly in lay tribunals, and who will be able to say how many of these fears have proved to be justified in a jurisdiction in which hearsay is more readily admitted than in criminal cases.

1.21 We consider that an issue of preliminary and fundamental importance is to determine whether juries can understand any warning that may be given to them about the weaknesses of hearsay evidence.⁵¹ If they can, they will be able to understand the limited value to be attached to hearsay evidence and, if so, it should be readily admissible. If, on the other hand, they cannot do so, this would be a very powerful argument for being less willing to treat hearsay evidence as admissible in criminal courts.

1.22 We are very sorry that it is not possible for us to carry out any research into juries’ approach to hearsay evidence, and their comprehension of any warnings given to

⁴⁷ The rule and its exceptions are described in Parts II-IV below.

⁴⁸ In *Blastland* [1986] AC 41, 54.

⁴⁹ Namely Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Brightman and Lord Templeman.

⁵⁰ *Teper v The Queen* [1952] AC 480, 486.

⁵¹ See para 6.66 below for an example of the kind of warning which may be given to a jury.

them by judges, because of the prohibition contained in section 8 of the Contempt of Court Act 1981. The Royal Commission has recommended that this section should be amended to enable research to be conducted into juries' reasons for their verdicts "so that informed debate can take place rather than argument based only on surmise and anecdote".⁵² We agree, and we are very conscious that any views that we may express about the approach of juries to hearsay evidence are seriously impaired by our inability to commission appropriate research.⁵³ We note that in a Crown Court study commissioned by the Royal Commission, over 61% of jurors questioned said they had found the judge's directions on law not at all difficult, and a further 33% not very difficult.⁵⁴

1.23 In due course⁵⁵ we will also consider Professor Glanville Williams's pertinent comment that juries

are credited with the ability to follow the most technical and subtle directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge's observations, attach the proper degree of importance to hearsay.⁵⁶

1.24 Lord Devlin understood the importance of this point when he said⁵⁷ in his fifth Hamlyn Lecture in 1956 that

the first object of the rules [of evidence]...was to prevent the jury from listening to material which it might not know how to value correctly. What a man is said to have said, ie hearsay, may often be of some weight even though the man is not there to be cross-examined about it and though he might, if he came, deny saying it. But the danger of hearsay is that the jurymen, unused to sifting evidence, might treat it as first hand; so, except for limited purposes, it is not allowed.

1.25 In order to form a view on the validity of these points, it is necessary first to carry out a detailed analysis of the justifications and criticisms of the hearsay rule, and this we do in Parts VI and VII below.

⁵² Report of the Royal Commission, ch 1, para 8; Recommendation 1, p 188; and see A Ashworth and R Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, 331.

⁵³ We commented on this problem in our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.64.

⁵⁴ Crown Court Study (Research Study No 19) p 216.

⁵⁵ See para 6.73 below.

⁵⁶ Glanville Williams, *The Proof of Guilt: a Study of the English Criminal Trial* (3rd ed, 1963) p 207.

⁵⁷ Sir Patrick Devlin, *Trial by Jury* (Revised third impression 1965) p 114.

The limitations on reform

- 1.26 Although the Convention⁵⁸ has not been incorporated into English domestic law, the United Kingdom is a party to it; its citizens have long enjoyed an individual right of petition to the Strasbourg Commission, and thence, if their petition is declared admissible, to the Strasbourg Court, on the basis that a rule of domestic law has led to a violation of their rights under the Convention. It follows that, whenever it contemplates any particular measure of law reform, the United Kingdom, and therefore this Commission, should do its best to ensure that any law which it proposes, or which it confirms in place, does indeed conform with the requirements of the Convention.⁵⁹
- 1.27 Under Article 6 of the Convention, in the determination of any criminal charge against him or her, everyone is “entitled to a fair and public hearing”⁶⁰ and has a number of minimum rights including the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him”.⁶¹
- 1.28 In *Blastland*⁶² the Strasbourg Commission found that the purpose of the hearsay rule in English law was partly to ensure that the best evidence is before the jury or magistrates and partly to avoid undue weight being given to evidence which cannot be tested by cross-examination. It therefore held that the United Kingdom was not in breach of Article 6.
- 1.29 There have been a number of later cases in which the use of hearsay evidence has been the subject of review, but it is difficult to ascertain with any confidence the court’s current view.⁶³
- 1.30 Our provisional, and diffident, interpretation of the effect of the Convention is as follows:⁶⁴
- (a) There is no automatic infringement of Article 6 if the accused has had the opportunity of questioning a witness against him or her at some point in the proceedings, even if not at the trial.

⁵⁸ See Abbreviations, p xiii above.

⁵⁹ See *Binding Over* (1994) Law Com No 222, paras 5.1-5.2.

⁶⁰ Article 6(1) set out at para 5.4 below.

⁶¹ Article 6(3)(d) set out at para 5.4 below.

⁶² *Blastland v United Kingdom* Appl 12045/86; (1988) 10 EHRR 528 and for earlier proceedings see *Blastland* [1986] AC 41 and paras 7.38-7.41 below.

⁶³ Eg C Osborne, “Hearsay and the European Court of Human Rights” [1993] Crim LR 255.

⁶⁴ See Part V below and in particular paras 5.34-5.39.

- (b) The use of hearsay evidence by the prosecution which consists of statements from people whom the defence have had (and will have) no chance to question is probably compatible with the Convention where questioning by the defence is genuinely impossible, but such evidence must not found a conviction if it stands alone.
- (c) There would be no breach of Article 6(3)(d)⁶⁵ where the witness does appear in court, if the court accepted an earlier statement made by the witness as evidence of the truth of its contents, even if the earlier statement contradicted the evidence the witness had given on oath.
- (d) It is not necessary for the same rules to apply to the prosecution as to the defence. Moreover, if a defendant was not allowed to use a cogent piece of evidence because it fell foul of the hearsay rule, he or she might have a valid complaint that this infringed his or her right to a fair trial under Article 6(1).⁶⁶

Method of working

- 1.31 In order to ascertain the strengths and weakness of the present law before we prepared this consultation paper, we were very anxious to obtain the views of as many people as possible with practical experience of criminal trials. We therefore produced a series of questionnaires which we circulated to individuals and organisations involved in the practice of criminal law. Responses to these questionnaires were received from prosecuting authorities, defence bodies, representatives of the judiciary, barristers on the different circuits, solicitors, magistrates and clerks to justices, as well as from many of the organisations to which they belong. We are grateful to all of them for their assistance, which has helped us to focus on the main issues of contemporary importance.
- 1.32 They all welcomed this review, and they were inevitably concerned with different aspects of the present defects of the law of hearsay. It was widely accepted that the present rules are difficult to apply and that a lot of time is wasted on arguing points of basic importance, in respect of which there is no clear answer. It was evident that a modernised and simplified law would be widely welcomed.
- 1.33 We are greatly indebted to Mr J R Spencer, Professor-Elect of Law at the University of Cambridge, who is acting as our consultant on this project. Mr Peter Duffy assisted us on matters concerning the Convention, as did the British Institute of International and Comparative Law. Professor Colin Tapper of the University of Oxford was kind enough to supply us with some articles and material that he had written. We had very helpful exchanges of information and ideas with the Scottish

⁶⁵ See para 1.27 above.

⁶⁶ See para 1.27 above.

Law Commission. The Criminal Law Committee of the Judicial Studies Board allowed the Commissioner responsible for criminal law to lead a very useful discussion on hearsay at its seminar for the Crown Court judiciary held in Cheltenham in April 1995. We are grateful to all of them for their help.

The structure of this paper

- 1.34 In Parts II, III and IV we set out the current law on the rule itself (Part II), the common law exceptions to the rule and the statutory exceptions created before 1988 (Part III), and the hearsay provisions of the Criminal Justice Act 1988 (Part IV). In Part V we set out the relevant law of the Convention as we understand it. In Parts VI and VII we examine in turn the justifications for, and the criticisms of, the rule. In Part VIII we set out previous suggestions for reform.
- 1.35 In Part IX we consider, and reject, the option of leaving the existing law unchanged (option 1), and discuss certain preliminary issues. In Part X we go on to examine six different options for reform. As we have said,⁶⁷ the present law on hearsay is exceedingly complicated and contains many sub-rules. This means, inevitably, that there will be many different options for reform.
- 1.36 Two of these options (options 2 and 3) would involve the abolition of the hearsay rule altogether. The other options all involve retaining the rule in some form. Option 4 relies on the exercise of judicial discretion to admit hearsay. Option 5 involves leaving the rule as it is, except for the addition of an inclusionary discretion. Option 6 depends on a fixed list of exceptions to an exclusionary rule. Option 7 consists of a fixed list of exceptions plus a limited discretion to admit hearsay falling outside them.
- 1.37 We provisionally consider that certainty is of prime importance in the law of evidence and we therefore favour fixed, defined categories of exceptions. We believe, however, that these should be tempered by the possibility of admitting evidence which does not fall within them. We therefore provisionally prefer the last-mentioned option, option 7, which consists of adding a residual inclusionary discretion to a fixed list of exceptions. We explore this option in Part XI.
- 1.38 In Part XII we consider whether the same proposed rules on the admissibility of hearsay evidence should apply to both the prosecution and to the defence and also whether they should apply in all tribunals and other places where criminal rules of evidence are in force.
- 1.39 In Parts XIII, XIV and XV we examine three related topics which overlap with that of hearsay evidence: the admission of witnesses' previous statements (whether consistent or inconsistent with the oral testimony given at trial), of evidence

⁶⁷ See paras 1.2 and 1.3 above.

generated by computer, and of expert evidence. The admissibility of much of this evidence is determined by the hearsay rule, and we are conscious of dissatisfaction in some quarters with the law on these matters. We examine them as discrete subjects, first describing the present law and setting out the background issues to be determined, and then putting forward options for reform.

- 1.40 **Our provisional conclusions and proposals are emphasised in the text and then collected together in the final Part, Part XVI. We will welcome comments on any or all of the views we express. Readers need not, however, restrict their responses to the particular issues we raise, and we will be interested in comments on any aspect of the paper and in any other suggestions that they may wish to put forward.**

PART II

THE HEARSAY RULE TODAY (I)

THE RULE

Introduction

- 2.1 In this Part, we set out the current law, starting with the rule and its application. In Part III we move on to consider exceptions which were created before 1988. Part IV is devoted to the exceptions created by the Criminal Justice Act 1988. The complexity of the rule is self-evident.¹
- 2.2 We consider the law in detail in this Part and Parts III and IV, and, in so doing, we refer to defects in the law on which we comment in greater detail in Part VII.

What is the rule?

- 2.3 Although various formulations of the hearsay rule have been debated,² the most comprehensive is Professor Cross's formulation:
an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact or opinion asserted*.³
- 2.4 The words emphasised show that not all evidence of what a witness not present in court has said is hearsay: it is essential to determine the *purpose* for which the evidence is tendered. A question of hearsay only arises where the words spoken are relied on "testimonial",⁴ that is, as establishing some fact narrated by the words. Statements not given for the *purpose* of asserting the truth of the matter asserted⁵ fall outside the hearsay rule.

The purpose of the evidence

- 2.5 In *Subramaniam v Public Prosecutor*, it was held by the Privy Council that:⁶
Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible

¹ See para 1.2 above.

² *Cross* p 42-43; *Phipson* para 21-02; *Stephen's Digest of the Law of Evidence* (12th ed 1948) art 15; *Myers* [1965] AC 1001, 1005-6.

³ *Cross* p 509 (emphasis added). A shorter formulation (omitting "or opinion"), now at p 42 of the current edition, was approved by the House of Lords in *Sharp* [1988] 1 WLR 7, 11, *per* Lord Havers with whom Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Griffiths concurred. This formulation was also approved in *Kearley* [1992] 2 AC 228, 254H-255A, *per* Lord Ackner, with whom Lord Bridge of Harwich agreed.

⁴ *Ratten* [1972] AC 378, 387, *per* Lord Wilberforce.

⁵ *Mawaz Khan* [1967] 1 AC 454, 459F-G, *per* Lord Hodson approving *Wigmore on Evidence* vol 6, p 178.

⁶ *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970 *per* Mr LMD de Silva (emphasis added).

when the object of the evidence is to establish the *truth* of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the *fact* that it was made.

- 2.6 This vital distinction of purpose between establishing “the truth” of what was said and the bare fact that it was said is illustrated by the facts of that case. The appellant had been charged with being in possession of firearms without a lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by Malayan terrorists. The judge would not allow the accused to state what had been said by the terrorists, but the Judicial Committee of the Privy Council advised that the conviction had to be quashed because the reported assertions were tendered as original evidence to explain the accused’s state of mind; whether or not the terrorists truly intended to carry out their threats was not at issue and not significant.
- 2.7 By the same token, the courts have held that evidence which might at first appear to be hearsay, is not in fact hearsay, because it is not tendered to show that it is *true*. The Privy Council upheld a direction of the trial judge in *Mawaz Khan* who had permitted prosecution evidence that the two accused had put forward identical alibis (outside court) since “the fabrication of a joint story would be evidence against both. It would be evidence that they had co-operated after the alleged crime”.⁷ The defence contended that it was hearsay, but this was rejected on the grounds that fabrication of identical alibis had nothing to do with the law of hearsay. As Lord Bridge of Harwich has said, “This case demonstrates...that, if two men have put their heads together to concoct a false alibi, this is *prima facie* evidence against both of a guilty state of mind”.⁸ The case of *Irish* illustrates how this preliminary point can be missed.⁹
- 2.8 Evidence adduced for the limited purpose of attacking or bolstering the credibility of the witness will not be treated as hearsay. We address this type of evidence under

⁷ [1967] 1 AC 454, 461.

⁸ *Blastland* [1986] 1 AC 41, 57.

⁹ The defendant, a social work assistant, was accused of theft and attempted theft from an elderly man whom she looked after. That she had obtained a blank cheque from him was not in dispute. The Crown sought to adduce a statement by the man in which he said he could not remember the assistant’s name nor giving her a cheque. He was clearly mistaken, and he appeared in the statement to be senile. The Crown’s case was that the defendant had taken advantage of his senility. The truth of the contents of the statement was not important; it was accepted that he was wrong, yet the Court of Appeal treated the statement as one to which the hearsay rule applied. As Professor Sir John Smith wrote in the commentary: “This document which is tendered to show that the maker is a senile and befuddled old gentleman who cannot remember anything at all, is to be excluded because he is a senile and befuddled old gentleman who cannot remember anything at all!”: *Irish* [1994] Crim LR 922, 924.

the section dealing with the “rule against previous consistent statements” in Part XIII below.

When does the rule apply?

- 2.9 The rule applies when there is a contested hearing where evidence is called. In addition to trials, this expression includes “special reasons” hearings and *Newton* hearings.¹⁰
- 2.10 In practice, the courts frequently make decisions in the course of passing sentence on the basis of what would otherwise be condemned as untested hearsay. Whether a convicted person goes to prison or not may depend on whether he or she has been offered a job: this may be proved in mitigation by a letter from a prospective employer rather than the employer in person in the witness box. Disquiet has been caused by lenient sentences which were given on the basis of unchecked hearsay evidence which later turned out to be false.¹¹
- 2.11 The rule against hearsay applies to evidence tendered by the prosecution as well as to that tendered by the defence. This was reiterated in 1975 in *Turner*.¹²

The idea, which may be gaining prevalence in some quarters, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous.

This principle undermines the notion that “the rule has been evolved and applied over many years in the interest of fairness to persons accused of crime”.¹³ We will reconsider this aspect of the rule below when we consider the principles put forward to justify the rule and when we consider in our options for reform¹⁴ whether different rules should apply for the prosecution and the defence.

To what material does the hearsay rule apply?

- 2.12 In addition to applying to oral statements, the rule also applies to documents. Thus it *prima facie* excludes not only informal documents, like personal letters, but also

¹⁰ The decision in *Newton* (1982) 77 Cr App R 13 requires the judge to accept the defence’s version on matters of substance for the purpose of sentencing on a plea of guilty unless he or she has considered the oral evidence of the defence and the prosecution on that point at a special hearing and concluded that he or she is sure that the defence version is wrong. See also *Ahmed* (1984) 80 Cr App R 295, 297.

¹¹ As in a celebrated case in 1977 where the Court of Appeal substituted a suspended sentence for an immediate sentence on a soldier who had committed grievous bodily harm with intent to rape upon the basis that this would enable the soldier to continue his promising career in the Coldstream Guards, following which the army promptly expelled him: *The Times* 18-23 June 1977.

¹² *Turner* (1975) 61 Cr App R 67, 88, *per* Milmo J.

¹³ *Kearley* [1992] 2 AC 228, 278C, *per* Lord Oliver of Aylmerton.

¹⁴ See Part XII below.

formal written statements made to the police.¹⁵ The rule excludes not only “documents” in the sense of written documents but also tapes, whether audio or video, if the witness describing the event is absent. It also applies to conduct, such as pointing, mouthing, miming, and nodding.¹⁶

Hearsay evidence as distinct from real evidence

- 2.13 The rule does not exclude tapes or films or still photographs which *directly* record the disputed incident *actually taking place*, such as films taken by security cameras of robbers or shoplifters in action.¹⁷ This is real evidence.
- 2.14 Real evidence was defined in *The Statue of Liberty*¹⁸ as “evidence afforded by the production of physical objects for inspection or other examination by the court.” However, where that physical object is a document it can be very difficult to distinguish between documents which are real evidence because the fact of the document itself is relevant, and those which are relevant because of their contents, such documents being hearsay.
- 2.15 The rule does not apply to “real” evidence such as documents produced by machines which automatically record some process or event: like a print-out from a device in a telephone-exchange which records the telephone-calls made from a given number,¹⁹ or an Intoximeter which records the level of alcohol in breath,²⁰ or where a machine simply carries out arithmetical procedures.²¹ In such a case the

¹⁵ Formal documents of this type potentially come within certain of the exceptions to the rule; see paras 3.54 and 4.4 below.

¹⁶ In *Chandrasekera* [1937] AC 220 the Judicial Committee of the Privy Council regarded as hearsay signs which had been made by a woman, whose throat had been cut. The evidence was, however, admitted under the Sri Lankan equivalent to the English dying declarations exception. See para 3.29 below.

¹⁷ Eg *Dodson* (1984) 79 Cr App R 220 in which the two accused were photographed by security cameras during their attempted robbery of a building society; see also *Taylor v Chief Constable of Cheshire* [1987] 1 WLR 80 in which officers were permitted to give evidence recounting what they had seen on a video-recording of the crime, although the recording itself no longer existed.

¹⁸ *The Statue of Liberty* [1968] 2 All ER 195. A cinematographic record of radar traces made wholly automatically was held to be real evidence. Sir Jocelyn Simon P pointed out that it makes no sense to insist on rules devised to cater for human beings in areas in which human beings had been replaced by machines.

¹⁹ *Neville* [1991] Crim LR 288; *Spiby* (1990) 91 Cr App R 186.

²⁰ *Castle v Cross* [1984] 1 WLR 1372. In that case, the disputed statement from the machine was not a blood-alcohol reading, but a statement that the defendant had failed to provide a sample of his breath large enough for it to analyse. See also *Owens v Chesters* (1985) 149 JP 235 where not only was the machine reading held to be direct evidence, but so, too, was the oral evidence of the officer recounting what the reading had been, so long as it could be proved that the machine was properly calibrated.

²¹ See, eg, *Wood* (1982) 76 Cr App R 23.

court is not being asked to accept the truth of an assertion made by any person and no question of hearsay arises.

- 2.16 By contrast, evidence will be hearsay where there has been human intervention,²² for example, where an employee had previously compiled the records and someone else had transferred the information to the computer.²³
- 2.17 The distinction has not always been observed by the courts. In *Pettigrew*, where the machine not only automatically recorded numbers on banknotes, but also sorted the notes according to the numbers, and the only human activity was to feed the notes into the machine and the number of the first note in the bundle, it was held by the Court of Appeal that the print-out from the machine was hearsay.²⁴ It now seems to be accepted that this decision was mistaken because it ignored the difference between real and hearsay evidence.²⁵
- 2.18 In *Rice*²⁶ both the accuracy of the document and the implications to be drawn from it were relevant. The document in question was a used airline ticket where such tickets were normally returned after use. The objection to the document was that the words in the ticket were hearsay. The Court of Appeal held that the document was real evidence, but that the words in it were indeed hearsay, saying, “the document must not be treated as speaking its contents for what it might say could only be hearsay.”²⁷ As hearsay, the ticket could not be admissible evidence that it was issued to a person bearing the name on the ticket; nevertheless, the jury was permitted to infer from the ticket that it had been used by someone bearing the name on the ticket. The distinction between these two uses of the ticket by the jury, one impermissible and the other permissible, is artificial.²⁸
- 2.19 We should make two further points at this stage. First, when a document is relevant because of an inference which the court is invited to draw from it, questions of the admissibility of implied assertions will arise.²⁹ Second, if the document was

²² *R v Coventry Justices ex p Bullard* (1992) 95 Cr App R 175.

²³ *Minors* [1989] 1 WLR 441.

²⁴ *Pettigrew* (1980) 71 Cr App R 39. *Pettigrew* was applied by the Crown Court in *Wiles* [1982] Crim LR 669.

²⁵ See C Tapper, *Computer Law* (4th ed 1989) p 374-5 and JC Smith, “The Admissibility of Statements by Computer” [1981] Crim LR 387, and JC Smith, *Criminal Evidence* (1995) p 68-9.

²⁶ *Rice* [1963] 1 QB 857.

²⁷ *Rice* [1963] QB 857, 872 *per* Winn J.

²⁸ R Cross, “The Periphery of Hearsay” (1969) 7 Melb U L Rev 1, 7-11.

²⁹ We discuss implied assertions in more detail at paras 2.20-2.25 below.

produced by a computer, section 69 of PACE³⁰ requires evidence to be given that the machine was functioning properly before it can be put in evidence,³¹ whether it is hearsay admissible under some exception to the rule, or real evidence which falls outside it.³² Thus, where the computer produces hearsay evidence, both section 69 of PACE and the appropriate hearsay exception will have to be satisfied.

The extent of the rule: “implied assertions”

- 2.20 The expression “implied assertion” is the rather misleading shorthand term which we take to mean: “an utterance or behaviour from which a fact (including a state of mind or intention) may be inferred”. The process is one of inference by the court rather than of implication by the witness at the date of the relevant action or words. We shall continue to use the term “implied assertion” because it is the one commonly used. Readers may, however, find this section easier to understand if they regard it as dealing with “inferred assertions”.
- 2.21 There is said to be an “implied assertion” when a person asserts, in words, one fact, from which another fact can be inferred.³³ It may be that the asserted fact is of peripheral importance, and it is the inference which is crucial. For example, where a child describes a room where she or he claims an assault took place, the express assertion is the colour of the carpet and so on, but the inference drawn by the court, from the accuracy of the description, is that the child really has been in the room in question.
- 2.22 It was formerly open to argument whether there was an implied assertion where the speaker did not assert anything at all, in other words, where he or she has said something which cannot be analysed as true or false, such as a question or a greeting. *Kearley*³⁴ is now authority for the proposition that, in English courts, there is an implied assertion in such utterances. For example, where a child says “Hello daddy”, the child is not “asserting”: “I am speaking to my father”, but a listener will be able to infer that fact, and that may be a significant inference in the case.³⁵

³⁰ Set out at Appendix A.

³¹ This provision is considered in more detail in Part XIV below.

³² *Shephard* [1993] AC 380.

³³ Eg *Teper v The Queen* [1952] AC 480 in which the bystander was heard to say to someone, allegedly the accused, “Your place burning and you going away from the fire!” from which the jury was expected to infer that the defendant was present at the scene, which he had denied.

³⁴ *Kearley* [1992] 2 AC 228.

³⁵ As was the case in *Walton* (1989) 166 CLR 283, where the identity of the killer was in issue. The prosecution sought to prove that the accused, the estranged husband of the deceased, had arranged to meet her on the day she was killed and the child’s words tended to show that he had indeed made such an arrangement.

- 2.23 As a result of the approval of the dicta of Parke B in *Wright v Doe d Tatham*³⁶ by the House of Lords in *Kearley*, the rule applies to implied or inferred assertions even where the witness is not expressly asserting anything at all by his or her behaviour.
- 2.24 As the rule applies to express assertions, so, too, it has been held, it must apply to facts which were not expressly asserted since in both cases the original declarant is not available to the court. Lord Bridge held the authorities to be “clear and unequivocal” on this point,³⁷ although commentators³⁸ had appeared to think there was room for argument. *Kearley* is now authority for the proposition that the hearsay rule applies where the “implied assertion” consists of an assertion inferred from behaviour or words which were intended to be assertive in a different way.³⁹ (The majority of the judges in *Kearley* held the evidence in question to be inadmissible as being irrelevant in any event.)⁴⁰
- 2.25 Thus, having decided that the callers’ words in *Kearley* were covered by the hearsay rule as being implied assertions, and being unable to find any applicable exception to the rule, the majority of the House of Lords ruled that the evidence was inadmissible.⁴¹ We return to consider whether the present law on these matters is satisfactory in Part VII below and the options for changing it in Part IX below.

The extent of the rule: negative hearsay

- 2.26 “Negative hearsay” is an expression used to describe a case where the fact that something has not occurred is proved by hearsay evidence. The evidence to be relied on may be written or oral. Negative hearsay is akin to implied assertions, because there is no positive assertion about the fact in question and either the

³⁶ *Wright v Doe d Tatham* (1837) 7 Ad & El 313 HL(E); 112 ER 488. In *Wright* the issue was whether letters written to a man in which the writers appeared to assume the sanity of the recipient could be evidence of his sanity. Parke B held that the hearsay rule applied to the letters; an assertion could be inferred from them and the documents themselves were not facts from which an inference could reasonably be drawn. Parke B explained his interpretation of the law with a now notorious illustration of a sea-captain who boards a ship, from which a court might be tempted to infer that the ship was sea-worthy. The hearsay rule would apply to such conduct and evidence of it would be inadmissible. In the latest edition of *Cross*, Professor Tapper points out, at p 531, that Parke B did not need that illustration, extending the rule from documents to conduct, for his conclusion, and it is unsupported by other authority.

³⁷ In *Kearley* [1992] 2 AC 228, 243H.

³⁸ Eg *Cross* p 531; Keane, *The Modern Law of Evidence* (2nd ed 1989) p 185; cf *Phipson* para 21-23;

³⁹ Eg *per* Lord Bridge of Harwich at p 244 where he approves the judgment of Parke B in *Wright v Doe d Tatham* 7 Ad & E (1837) 313, 386-387.

⁴⁰ *Per* Lord Ackner at 253E-254A, Lord Oliver of Aylmerton at 271, and Lord Bridge of Harwich at 243C-G.

⁴¹ JR Spencer makes the point (in “Hearsay, Relevance and Implied Assertions” (1993) 52 CLJ 40) that it is anomalous for the legislature to pass Acts facilitating the reception of hearsay evidence, while the judiciary interprets the hearsay rule restrictively.

witness or the court has to infer that it did not happen. Strictly speaking, the hearsay rule should apply equally whether the fact to be proved is positive or negative,⁴² but not where the *truth* of the fact is not in issue.

- 2.27 In relation to written records, the issue is whether, when an event would normally have been recorded if it had happened but it does not appear in the record, the record itself is admissible to show that the event did not happen. The record does not contain a statement by the record compiler or by anyone else that the event did not happen. It reveals that the compiler failed to note the event, and it is therefore assumed that the compiler did not know about it; from this *and also* from the presumption or fact that he or she almost certainly would have recorded it if he or she had known about it, it can be further inferred that the event did not take place.
- 2.28 The settled common law rule is that if a positive fact is to be proved by documents, then the documents themselves have to be proved, and when it is sought to establish the truth of the facts related in them the compiler has to be called⁴³ unless the documents fall within a recognised exception to the rule.⁴⁴ Logically, the same rule should apply to negative facts, since the rationale behind excluding hearsay evidence, that the source of the information cannot be cross-examined, applies with equal force or lack of force whether the party is seeking to establish a positive fact or a negative fact.⁴⁵ There are, however, difficulties in the application of the rule to negative facts.
- 2.29 In *Shone*,⁴⁶ for example, the evidence of a stock clerk and a sales manager that the workers would have made entries on the record cards if the parts had been lawfully disposed of, that there were no such entries and that therefore the parts had been stolen was held not to be hearsay by the Court of Appeal, but to be “direct evidence”.⁴⁷

⁴² *Cross* (5th ed 1979) p 466: “If it were sought to establish that A was not employed by B, the production of a list of B’s employees, not containing A’s name, would infringe the hearsay rule just as much as that rule would be infringed by the production of such a list containing A’s name as evidence that A was employed by B.” See also TRS Allan, “Inferences from the Absence of Evidence and the Rule Against Hearsay” (1984) 100 LQR 175.

⁴³ Eg *Gillespie and Simpson* (1967) 51 Cr App 172.

⁴⁴ *Myers v DPP* [1965] AC 1001. For the facts of the case see para 3.60 n 109 below.

⁴⁵ As held by the Court of Appeal in *Patel* (1981) 73 Cr App R 117.

⁴⁶ *Shone* (1983) 76 Cr App R 72.

⁴⁷ The conflict of authorities which results is illustrated by the following example. K takes an item from a shop, having switched its price label with that on a cheaper item, and therefore paid the wrong price. L simultaneously leaves the shop with items she has not paid for, and later claims that she has paid. The till roll which is produced at K’s trial is held to be a hearsay statement which must be brought within an exception; according to *Shone*, the till roll at L’s trial can be admitted as original evidence. *Shone* was the subject of academic criticism, and in *R v Coventry Justices ex p Bullard* (1992) 95 Cr App R 175,

2.30 A second example is found in *Muir*⁴⁸ where non-existence was treated as a matter of “real” evidence, and not as a hearsay problem. The accused’s defence to a charge of stealing a video recorder which he had hired was that it had been repossessed. The Court of Appeal held that the manager of a branch office of the rental company could give evidence that there had been no repossession of the video recorder because he was proving a fact, not a document. Dunn LJ said:⁴⁹

This is not a case of a document having to be produced from which an inference might be drawn to prove a particular fact, as in *Patel, Shone* and *Abadom*.⁵⁰ There was no document in existence.

2.31 It seems that, if an inference is drawn from a document, it is hearsay, but if an inference is drawn from the non-existence of a document or entry, it is direct evidence.⁵¹ In both *Shone* and *Muir* the defence were deprived of the right to cross-examine the person with direct knowledge to establish the truth of what was said. The law is in an unsatisfactory state and shows the difficulty of applying the hearsay rule. We consider the law on negative hearsay further when we consider the different options for reform.⁵²

2.32 The hearsay rule may also not apply where the inference of a negative fact is drawn from oral evidence.⁵³

179 Mann LJ declined to discuss the scope of that decision, noting that it had been the subject of adverse academic criticism, eg, in *Cross* p 632.

⁴⁸ *Muir* (1983) 79 Cr App R 153.

⁴⁹ *Ibid*, at p 156.

⁵⁰ *Abadom* (1982) 76 Cr App R 48 (footnote added). See para 15.6 below.

⁵¹ Matters were made worse by the way in which the manager was allowed to “prove” that there had been no repossession by his head office. He knew this merely because he had telephoned the Head Office and asked someone else. This is hearsay upon hearsay.

⁵² See para 9.35 below.

⁵³ *Harry* (1988) 86 Cr App R 105, where the accused’s counsel sought to ask police witnesses about seven telephone calls made to the premises which Mr Harry had occupied with the co-accused (P). None of the callers had asked for the appellant, and most had asked for P by his nickname. Not only was the fact of them asking for P inadmissible as evidence against P, it was held inadmissible to exculpate the appellant. The inference which the defence wanted to invite the jury to draw was that the drug-dealing from the premises was being run by P and that there was not enough evidence to link Mr Harry to it. At the trial, Judge Butler QC excluded the contents of the telephone calls on the grounds that they were hearsay, but allowed defence counsel to establish, by cross-examination, that there was a number of telephone calls and that none of the callers had asked for Mr Harry. The defence appealed on the basis, *inter alia*, that the fact that P had been asked for should have been admissible. The Court of Appeal confirmed that the judge had correctly applied the law. *Harry* was approved by Lords Ackner and Oliver of Aylmerton in *Kearley* [1992] 2 AC 228.

Summary of the rule

2.33 If evidence falls within the hearsay rule it will be inadmissible unless it is covered by an exception. The main implications of the rule are that:

- (a) witnesses must give oral evidence and their written statement cannot be a substitute for their personal appearance in the witness-box;
- (b) witnesses must give evidence from first-hand knowledge and may not repeat what other people have told them;
- (c) records are not admissible evidence of the matters they contain;
- (d) where a witness gives oral evidence, the oral evidence is the only thing that counts: his or her previous statements do not count as evidence.

We deal with this last implication in the part entitled “the rule against previous consistent statements”.⁵⁴ We now proceed to examine the various exceptions to “the rule proper”.

⁵⁴ See Part XIII below.

PART III

THE HEARSAY RULE TODAY (II): EXCEPTIONS TO THE HEARSAY RULE CREATED BEFORE 1988

Introduction

- 3.1 The hearsay rule has never been absolute and many items of evidence which on the face of it fall foul of one of the four prohibitions contained in the rule,¹ can be admitted by virtue of one, or more, of the common law or statutory exceptions to the rule.
- 3.2 By the 19th century many exceptions to the rule had become well established, developed partly by legislation and, for the most part, by judicial activity. They developed in a haphazard manner, as Lord Reid has described:²
- It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle.
- 3.3 In *Myers*,³ the majority of the House of Lords⁴ put an end to piecemeal changes when they held that no further judicial development of the exceptions to the law of hearsay was permissible and that further correction was to be left to the legislature, partly on constitutional grounds, and partly on the pragmatic grounds that any change should be comprehensive.⁵ Ironically, the legislative changes that have been made to the operation of the hearsay rule since 1965 have themselves been piecemeal.

A. Common law exceptions to the hearsay rule

- 3.4 Broadly speaking, judges developed exceptions where it seemed to them that they were warranted by the circumstances. Two characteristics which were generally present, however, were, first, that there was some special need to admit the evidence—many of the exceptions are limited to cases where the declarant is dead—and, second, there was some factor which tended to give the evidence a measure of trustworthiness not found in the general run of hearsay evidence. Where

¹ See para 2.33 above.

² *Myers* [1965] AC 1001, 1020B-C.

³ [1965] AC 1001.

⁴ Lords Reid, Morris of Borth-y-Gest and Hodson.

⁵ See para 1.9 above. Notwithstanding *Myers*, some exceptions have been developed judicially; see A Ashworth and R Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, and para 7.9 below.

a statement has been reduced to writing, any common law exception that would justify its admission is likely to be included within the broad statutory exceptions considered below, but this will not always be the case. In any event, the common law exceptions remain good law so that, where they overlap the statutory rules, there are two separate grounds of admissibility. More importantly, some of the common law exceptions apply also to oral declarations.⁶

3.5 As might be expected where exceptions were developed on a case by case basis, there are anomalies, overlaps and points where the exception does not seem to go far enough. We shall try to identify these weaknesses.

3.6 Phipson divides up the cases in accordance with what appears to be their governing rationales:⁷

- (a) cases based on the assumption that what a person says against his or her own interests is likely to be true;
- (b) cases where it is recognised that where a witness is dead, it may be better to admit evidence of what she or he said than to deprive the court of all proof;
- (c) cases which recognise the force of common knowledge, where a fact is reputed among those who ought to know it but its source is unknown;
- (d) cases based on the intrinsic reliability of public records;
- (e) cases where the contemporaneity of the statement is itself some guarantee of its reliability.

3.7 As a result of the application of these principles, the common law exceptions to the rule against hearsay can be grouped as:

- (a) admissions and confessions of parties⁸
- (b) statements by deceased persons⁹
 - (i) declarations against interest;¹⁰

⁶ JC Smith, *Criminal Evidence* (1995) p 71.

⁷ *Phipson* para 21-24.

⁸ See paras 3.9-3.25 below.

⁹ See paras 3.26-3.33 below.

¹⁰ See para 3.26 below.

- (ii) declarations in the course of duty;¹¹
 - (iii) declarations as to public rights;¹²
 - (iv) dying declarations (in the case of homicide);¹³
 - (v) declarations as to pedigree;¹⁴
 - (vi) declarations by testators as to their wills.¹⁵
- (c) reputation (in all but (i), family tradition);
- (i) of bad character;
 - (ii) of pedigree;
 - (iii) of the existence of a marriage;
 - (iv) of the existence or non-existence of any public or general right;
 - (v) to identify any person or object.
- (d) public documents;¹⁶
- (e) statements admitted as part of the *res gestae*.¹⁷

3.8 There is also expert evidence. This exception seems to have evolved of necessity.¹⁸

Admissions and confessions

3.9 The defendant's confession was an ancient exception to the hearsay rule. It was amended and codified by section 76(1) of PACE, which provides that:

In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

3.10 Under section 76(2) of PACE, the court is obliged to rule a confession inadmissible which was or may have been obtained by oppression or as a result of anything which was likely to render a confession unreliable. Once such a suggestion is made, it is for the prosecution to prove beyond reasonable doubt that it was not obtained in the manner alleged. In addition to this statutory obligation to exclude certain confessions, the court has two discretions, one under section 78 of PACE,¹⁹ to

¹¹ See para 3.27 below.

¹² See para 3.28 below.

¹³ See paras 3.29-3.32 below.

¹⁴ See para 3.33 below.

¹⁵ See para 3.33 below.

¹⁶ See paras 3.34-3.37 below.

¹⁷ See para 3.38-3.49 below.

¹⁸ See Part XV below.

¹⁹ Set out at Appendix A.

exclude a confession if the effect of admitting it would make the trial unfair; and another under common law (as expressly preserved by section 82(3))—a distinct but largely overlapping discretion—to exclude a confession if it finds that it is more prejudicial than probative.

- 3.11 By section 77 of PACE, judges must warn juries about, and magistrates must treat with caution, confessions made by mentally handicapped persons with no supportive adult present. In *Mackenzie*,²⁰ it was held that where a judge was confronted with a case where the whole of the evidence against a mentally handicapped person consisted of his confession and the confession was unconvincing to the point where the jury could not properly convict, he should have stopped the case, and not limited himself to warning the jury of the dangers of relying on the confession.
- 3.12 Where a defendant remains silent when an accusation was made in a situation where he or she could reasonably have been expected to respond, evidence of the accusation and of the response is admissible, although the accusation itself is not evidence of its truth.²¹ Because the defendant has to be present, or within hearing distance at least, for his or her reaction to be admissible there is a commonly-held view that anything said in his or her presence is not hearsay. This view is incorrect and can result in the admission of inadmissible evidence.
- 3.13 There is a substantial body of case law²² explaining when confessions are to be excluded because of the way the defendant was treated by the police. These cases are important, but we consider that police powers and the rights of defendants under interrogation fall outside the scope of our present reference²³ and we will not discuss these matters further.

Denials, and neutral and mixed statements

- 3.14 In theory, it is only the out-of-court statements of the defendant in which he or she incriminates himself or herself which are admissible as evidence of the truth of their contents.²⁴ This rule is based on the assumption that what a person says against his or her own interest is likely to be true.²⁵ The reliability of this assumption has long

²⁰ *Mackenzie* (1992) 96 Cr App R 98.

²¹ *Christie* [1914] AC 545.

²² See, eg, *Blackstone*, paras F17.5-F17.8.

²³ For the terms of the reference see para 1.1 above.

²⁴ An exculpatory account is obviously not being put in as evidence of the truth of its contents by the prosecution and therefore is not strictly speaking hearsay when adduced by the Crown: see *Mawaz Khan* [1967] 1 AC 454 at para 2.7 above.

²⁵ Professor Sir John Smith cogently disputes this theory. He says that this reasoning is mistaken in that it was often in the defendant's interest to make the statement at the time he did so, but it was against his interest at the time of the trial: JC Smith, *Criminal Evidence* (1995) p 97.

been doubted, and recent research casts doubt on this “common sense” idea. There may be reasons other than guilt which prompt people to confess to crimes they have not committed.²⁶

3.15 Purely “self serving statements”, such as denials in the police station, are not admissible as evidence of innocent action at the trial.²⁷ This rule raises a problem where the defendant’s statement contains both admissions and denials. In *Sharp*,²⁸ the House of Lords held that where the defendant has made a “mixed” statement, the self-serving parts do count as evidence in his or her favour but that it is proper for the judge to make disparaging remarks about them, at any rate where the defendant does not give evidence at the trial.²⁹ If the accused person makes exculpatory statements and incriminating statements at different times then it may be that only the incriminating ones will be admissible as an exception to the hearsay

²⁶ See the Report of the Royal Commission, para 32; and also GH Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992), who identifies four distinct categories of false confession:

- (i) people may make confessions entirely voluntarily as a result of a morbid desire for publicity or notoriety; or to relieve feelings of guilt about a real or imagined previous transgression; or because they cannot distinguish between reality and fantasy;
- (ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution;
- (iii) people may see a prospect of immediate advantage from confessing (eg an end to questioning or release from the police station), even though the long-term consequences are far worse (the resulting confessions are termed “coerced-compliant” confessions); and
- (iv) people may be persuaded temporarily by the interrogators that they really have done the act in question (the resulting confessions are termed “coerced-internalised” confessions).

²⁷ “No comment” interviews obviously can have no evidential value under the present scheme, but they are nevertheless not always excluded: M McConville, A Sanders and R Leng, *The Case for the Prosecution* (1991) p 75.

²⁸ *Sharp* (1987) 86 Cr App R 274, affirming *Duncan* (1981) 73 Cr App R 359.

²⁹ The recommended form of direction for mixed statements where the accused does not give evidence is as follows: “The defendant’s statement to the police contains both incriminating parts and [excuses] [explanations]. You must consider the whole of the statement in deciding where the truth lies. You may feel that the incriminating parts are likely to be true—for why else would he have made them? You may feel that there is less weight to be attached to his [excuses] [explanations]. They were not made on oath, have not been repeated on oath and have not been tested by cross-examination”.

rule.³⁰ Part of the reason for this may be to prevent the accused being able to put forward a defence while avoiding cross-examination on it.

3.16 In practice the court is always told what the defendant said on arrest and on being charged, even if it was “purely self-serving”, when it will be evidence of the reaction of the accused when first taxed with the incriminating facts.³¹ If the defendant does not give evidence, the judge is not obliged to remind the jury of a statement made by the defendant to the police exonerating himself or herself.³² This principle is not limited to statements made on the first encounter. In *Pearce*,³³ the Court of Appeal held that the trial judge ought to have admitted in evidence the denial made by the defendant on arrest, a voluntary statement made by him two days later, and comments adverse to his interest made at an interview with the police immediately after making the statement as well as a voluntary exculpatory statement made three days after the arrest. A carefully prepared exculpatory statement by the accused is not admissible.³⁴ Whether or not an accused’s exculpatory account is put in evidence by the prosecution currently varies according to local practice, but practice may become more uniform with the advent of sections 34 to 37 of the Criminal Justice and Public Order Act 1994.³⁵

3.17 The general rule is that an out-of-court confession is evidence only against the person who made it.³⁶ Even though the confession by one defendant is not evidence against another, where two defendants are tried together it may be permissible for the statement of one defendant to be read notwithstanding it implicates the other.³⁷

³⁰ *Steel* (1981) 73 Cr App R 173. The accused had made admissions when interviewed by the police. When he saw his solicitor about two hours later he told the solicitor that the confession was untrue. The judge ruled that the conversation with the solicitor was inadmissible. The Court of Appeal approved the judge’s ruling, distinguishing *Pearce* (1979) 69 Cr App R 365 where the admission and denial were made in the course of the same interview on the grounds that, in the words of Lord Lane CJ at p 185, “It is entirely different from the situation here. There was no effort to exclude part of what this man said to the police and to include the other.”

³¹ *Storey* (1968) 52 Cr App R 334, 337-338.

³² *Barbery* (1975) 62 Cr App R 248 and *Tooke* (1989) 90 Cr App R 417.

³³ *Pearce* (1979) 69 Cr App R 365.

³⁴ *McCarthy* (1980) 71 Cr App R 142, 144 *per* Lawton LJ.

³⁵ If adverse inferences may be drawn from a failure to put forward a defence pre-trial, it is possible that it will be seen to be fair for the Crown to put in evidence whatever the accused says pre-trial, unless *McCarthy* applies (see n 34 above).

³⁶ *Gunewardene* (1951) 35 Cr App 80; *Lowery* [1973] 58 Cr App R 35; *Spinks* (1981) 74 Cr App 263. The last-mentioned case shows that the principle applies even when the commission of an offence by one defendant is relevant to the guilt of the other as, for example, where the other is charged with assisting an offender.

³⁷ *Dibble* (1908) 1 Cr App R 155. The problem for the implicated accused is that he or she may not be able to cross-examine the maker of the admission. In the United States, the Supreme Court held this concern to be sufficiently important to justify excluding the evidence, as the defendant’s right of confrontation under the Sixth Amendment had not

In those circumstances the judge should warn the jury that the statement of one defendant, which is not made on oath, in the course of the trial, is not evidence against another.³⁸

- 3.18 Where one co-defendant implicates another in the course of giving evidence at the trial, this counts as evidence against the co-accused.³⁹ Section 74 of PACE now provides that the fact that a co-defendant (or third party) has pleaded guilty may be used in evidence against another defendant, but the judge may use his or her discretion under section 78 of PACE to exclude it.⁴⁰
- 3.19 The basic rule is that the defendant “can confess as to his own acts, knowledge or intentions, but he cannot ‘confess’ as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay”.⁴¹ This approach has been followed by the Court of Appeal which has stated that “the primary rule is that a defendant can only make a valid and admissible admission of a statement of fact of which the accused could give admissible evidence”.⁴²
- 3.20 A quasi-exception to this rule is the rule about “common purpose”. Where it can be shown that two people were acting in concert the acts of one party or his or her statements about the common purpose may be used in evidence against the other.⁴³ The “common purpose” exception is limited to the case where there is also independent evidence tending to show that A and B were involved in the offence together.⁴⁴ It is also limited to statements made while the conspirators were allegedly formulating and carrying out their plans.⁴⁵ *Arlidge and Parry*⁴⁶ criticise this exception on the ground, amongst others, that it allows hearsay evidence to be

been respected: *Lee v Illinois* (1986) 576 US 530; see paras 4.18-4.21 in Appendix B below.

³⁸ *Gunewardene* (1951) 35 Cr App R 80.

³⁹ *Rudd* (1948) 32 Cr App R 138 where the Court of Criminal Appeal called the defendant’s argument to the contrary “astonishing”.

⁴⁰ For the cases see *Blackstone* F.11.3.

⁴¹ *Per* Lord Tucker giving the decision of the Judicial Committee of the Privy Council in *Surujpaul* [1958] 1 WLR 1050, 1056. In that case, the appellant had been convicted as an accessory before the fact of murder but his co-defendants had been acquitted either as principals or accessories. The appellant contended that the verdicts were inconsistent since there could be no accessory without a principal. The prosecution sought to rely on an admission which was based on hearsay that one of the co-defendants had committed the murder. This argument was rejected.

⁴² *Per* Lord Lane CJ in *Attorney-General’s Reference (No 4 of 1979)* [1981] 1 WLR 667, 676E.

⁴³ *Blake and Tye* (1844) 6 QB 126; 115 ER 49.

⁴⁴ *Donat* (1985) 82 Cr App R 173.

⁴⁵ *Blake and Tye* (1844) 6 QB 126; 115 ER 49.

⁴⁶ *Arlidge and Parry on Fraud* (1985) para 13.05ff.

adduced against defendants who are charged with conspiracy where it could not be adduced against them on a joint charge of committing the substantive offence. The exception therefore enables the prosecution to circumvent the exclusionary rule.

Admissions by a third party

- 3.21 It is only the defendant's own confession which counts as evidence. It therefore follows that he or she may not put forward as evidence the confession that X, a third party, has made to the crime, however plausibly X may have confessed to committing on his or her own a crime with which the accused is charged.
- 3.22 The rationale which is employed to explain why an accused person's admissions may be heard (that a person is unlikely to say something contrary to his or her own interest unless it is true)⁴⁷ is not applied to admissions made by people who are not before the court.
- 3.23 It is not only a third party confession which is inadmissible hearsay, but any statement made by a witness who is not called, even though it may appear to disclose pertinent knowledge.
- 3.24 A further difficulty is apparent from the confusion that now surrounds the related question whether one defendant (D1) can put in evidence the fact not only that a stranger (X) has confessed to committing the offence unaided but that such a confession has been made by the person who is a co-defendant, D2. The prosecution may not be able to adduce evidence of the confession if it is ruled inadmissible. May D1 then introduce evidence of the confession?
- 3.25 If D2 gives evidence, the confession will obviously come out in cross-examination of D2 by D1.⁴⁸ If D2 does not give evidence and it is therefore not possible for D1 to cross-examine him or her, the authorities are conflicting on the question whether or not D1 may adduce D2's confession.⁴⁹

⁴⁷ Eg *Sharp* [1988] 1 WLR 7, 11H *per* Lord Havers.

⁴⁸ *Rowson* [1986] QB 174.

⁴⁹ *Beckford and Daley* [1991] Crim LR 834. Cf *Campbell and Williams* [1993] Crim LR 448. We return to this conflict of authority at paras 7.37 and 7.48 below.

*Statements by deceased persons: declarations against interest*⁵⁰

- 3.26 The same psychological rationale which permits an admission by a defendant to be adduced lies behind this common law exception.⁵¹ The interest involved must, however, be pecuniary or proprietary. No other kind of interest (even of a penal nature) will suffice.⁵²

Statements by deceased persons: declarations in the course of duty

- 3.27 Section 24 of the 1988 Act would usually cover such a statement⁵³ and this exception is little used.⁵⁴ Further information about it can be found in textbooks on evidence.⁵⁵

Statements by deceased persons: declarations as to public or general rights

- 3.28 Declarations made by deceased persons who could be expected to have had knowledge of the relevant facts⁵⁶ are admissible in proof of ancient rights of a public or general nature, provided that they were made before the commencement of any controversy, and not merely before the commencement of any suit, involving the same subject matter.⁵⁷ This exception evolved in the context of property disputes in the civil courts and has very little relevance to criminal cases. We will not therefore discuss it in any further detail. Further details are to be found in standard textbooks on evidence.⁵⁸

Statements by deceased persons: dying declarations in cases of murder or manslaughter

- 3.29 In trials for murder or manslaughter,⁵⁹ oral or written declarations of the deceased person are admissible to prove the cause of the impending death provided that (1)

⁵⁰ The conditions of this exception were reiterated by the Court of Appeal in the recent case of *Rogers* [1995] 1 Cr App R 374.

⁵¹ "...it is very unlikely that a man would say falsely something as to which he knows the truth, if his statement tends to his own pecuniary disadvantage...", *per* Hamilton LJ in *Lloyd v Powell Duffryn Steam Coal Co* [1913] 2 KB 130, 138.

⁵² *The Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034. Cf the position in the United States: *Chambers v Mississippi* (1973) 410 US 284.

⁵³ See paras 4.28-4.39 below.

⁵⁴ Eg *Price v Earl of Torrington* (1703) 1 Salkeld 285; 91 ER 252; *The Henry Coxon* (1878) 3 PD 156.

⁵⁵ *Phipson* para 30; *Cross* pp 646-650.

⁵⁶ *Crease v Barrett* (1835) 1 Cr M & R 919; 149 ER 1353.

⁵⁷ *The Berkeley Peerage Case* (1811) 4 Camp 401, 417; 171 ER 128.

⁵⁸ See, eg, *Phipson* paras 30-27 - 30-41; *Cross* p 565.

⁵⁹ *Mead* (1824) 2 B & C 605; 107 ER 509; *Hutchinson* (1822) 2 B & C 608; 107 ER 510(a). Whether or not the exception would apply in a case of causing death through dangerous driving or by careless driving while under the influence of drink or drugs is not certain. There is a Canadian case in which the exception was extended where the charge was criminal negligence causing death: *Jurty* (1958) 121 CCC 403 (Ontario CA).

the declaration was made “when the party is at the point of death, and when every hope of this world is gone”⁶⁰ and (2) the declarant was competent.⁶¹ The jury must be warned to approach such evidence with caution.⁶²

- 3.30 The rationale which is usually put forward for this exception is that imminent death is as good a form of pressure to be truthful as an oath because no one would wish to die with a lie on his or her lips.⁶³ If that is the true reason, it is strange that this exception does not apply to offences other than murder or manslaughter because it could hardly be the case that people are unwilling to die with lies on their lips about homicide, but would be prepared to do so if the lies are about, say, arson, rape or multi-million pound fraud.⁶⁴
- 3.31 There is an alternative rationale which has greater appeal nowadays: there are no third party witnesses to the crime and the victim is dead so a murderer would benefit from the murder if the victim’s words were not admitted in evidence.⁶⁵
- 3.32 If the statement were made in a document, then section 23 of the 1988 Act is more likely to be relied upon than this common law exception. This exception has also been made largely redundant by the development of the *res gestae* exception.⁶⁶

Statements by deceased persons: declarations as to pedigree

Statements by deceased persons: declarations by testators as to their wills

- 3.33 As these declarations have only very limited value in criminal cases we will not consider them here. Further information is set out in all the major textbooks.⁶⁷

⁶⁰ *Woodcock* (1789) 1 Leach 500, 502; 168 ER 352, *per* Eyre CB.

⁶¹ *Pike* (1829) 3 Car & P 598; 172 ER 562.

⁶² *Nembhard v The Queen* [1981] 1 WLR 1515 (PC), in which the only evidence against the accused was an identification of him as the murderer by the deceased. The Privy Council held that there need not be corroboration of the dying declaration and, as the jury had been warned to assess its significance with care, the conviction could stand.

⁶³ *Woodcock* (1789) 1 Leach 500, 502; 168 ER 352, *per* Eyre CB.

⁶⁴ R Munday explains the limitation of the exception to homicide cases as arising from the misreading of an ambiguous phrase in *East’s Pleas of the Crown*: R Munday, “Musings on the Dying Declaration” (1993) 22 *Anglo-Am LR* 42, 50. We consider the validity of this limitation at paras 7.17-7.18 below.

⁶⁵ *East’s Pleas of the Crown* (1803) vol I, p 353.

⁶⁶ See paras 3.38-3.49 below.

⁶⁷ See, eg, *Phipson* paras 30-43 - 30-58 (declarations as to pedigree), paras 30-68 - 30-71 (statements of character) and ch 13; *Cross* pp 563-564 (declarations as to pedigree).

Public documents

- 3.34 At common law, a document was admissible evidence of the facts stated in it if it was a “public document”, which meant that the document:⁶⁸
- (a) had to be part of a record made by someone who held a public office which obliged him to enquire and record facts. Thus although this rule covered the parish registers of the established church it did not cover records of other sects, faiths or denominations.⁶⁹ The rule covers statutory returns of a company kept in the Companies Register where the officer making the return has a duty to satisfy himself or herself as to the facts stated and the person recording it has a duty to record the results of the inquiry;⁷⁰
 - (b) must concern a “public matter”;
 - (c) must be compiled as what was intended to be a permanent record; and
 - (d) must be available for public inspection. This principle excludes many of the documents that are kept by those who hold a public office.⁷¹
- 3.35 This rather narrow common law exception has been supplemented by a large number of very specific statutory rules which make particular documents, or certified copies of them, admissible in evidence.
- 3.36 There are also numerous other statutory exceptions which permit evidence to be adduced of, amongst other things, fingerprints;⁷² certain certificates issued under the Companies Act 1985 as conclusive⁷³ or *prima facie*⁷⁴ evidence of various matters

⁶⁸ *Cross* pp 576-578.

⁶⁹ *Re Woodward* [1913] 1 Ch 392.

⁷⁰ *Halpin* [1975] QB 907.

⁷¹ Such as regimental records: *Lilley v Pettit* [1946] KB 401.

⁷² The Criminal Justice Act 1948, s 39 as amended by the Criminal Justice Act 1961 Sched 4.

⁷³ Section 13(7) Certificate of Incorporation; ss 50(3), 52(3), 55(3) Certificates of Re-registration; s 401(2) Certificate of Registration of Charges; s 688(3) Certificate of Registration.

⁷⁴ Section 186 (Share Certificate).

contained in them;⁷⁵ and excerpts of entries in registers of births and deaths.⁷⁶ Further details can be found in standard textbooks.⁷⁷

- 3.37 A record of conviction is a public document and can obviously be relied upon to prove the fact that someone was convicted of a particular offence. Section 74 of PACE takes the matter further and allows the conviction to be admitted to prove that the convicted person actually committed the offence.

Statements admitted as part of the res gestae

- 3.38 We deal with this exception in some detail because of its practical significance. At first this exception⁷⁸ only covered the words which people said whilst the offence was taking place, with the result that later assertions were inadmissible.
- 3.39 The present test, however, is not whether the words were said when the offence was actually taking place, but whether the person when he or she made the statement was so emotionally overpowered by the event that he or she is almost certain to have been telling the truth as he or she perceived it.⁷⁹ Thus the res gestae exception covers not only what the victim of an attack said at the time but also what he or she told the police about it immediately afterwards.⁸⁰
- 3.40 The primary test for admissibility as part of the res gestae is now “can the possibility of concoction or distortion be disregarded?”⁸¹ Thus the less dramatic the event and the longer the interval before the statement was made, the less likely it is that the res gestae exception will be applied. It was held not to apply to remarks made 20 minutes after a not particularly dramatic traffic accident. The event which had occurred was not so unusual or dramatic as to have dominated the thoughts of the victim 20 minutes after it took place.⁸²

⁷⁵ Eg, reg 17 Uncertificated Securities Regulations 1992 (SI 1992 No 225) provides that an entry in the appropriate register for an uncertificated security shall be *prima facie* evidence of ownership.

⁷⁶ Births and Deaths Registration Act 1953, s 34.

⁷⁷ Eg *Phipson* para 13-41, *Cross* ch XX.

⁷⁸ There has long been a dispute as to whether or not res gestae amounts to an exception from the hearsay rule or itself falls outside it. (Contrast Lord Wilberforce in *Ratten v The Queen* [1972] AC 378, 387 with PB Carter “Hearsay: Whether and Whither?” (1993) 109 LQR 573, 585.) We take it as settled that the latter view prevails. For further details of this argument see A Zuckerman, *The Principles of Criminal Evidence* p 204 and *Cross* pp 657-658.

⁷⁹ See *Ratten* [1972] AC 378.

⁸⁰ *Andrews* [1987] AC 281.

⁸¹ *Andrews* [1987] AC 281, 300 *per* Lord Ackner.

⁸² *Tobi v Nicholas* (1987) 86 Cr App R 323.

3.41 In theory, this exception opens the door to eye-witness statements being admitted without the eye-witness being cross-examined. Lord Ackner limited the use of the exception, however, when he observed that he would “strongly deprecate any attempt in criminal prosecutions to use [res gestae] as a device to avoid calling, when he is available, the maker of the statement”.⁸³ This means that the court has to rely on judicial discretion to prevent this misapplication of the rule and its exceptions, which inevitably involves the judge, or the magistrates, in an assessment of the credibility of the witness in question.

The following exceptions are also usually connected with the res gestae exception.

(i) *Statements about the maker’s physical condition or mental state*

3.42 As a further exception to the hearsay rule, evidence of what a person said may be given to prove his or her physical sensations, if they are in dispute or are relevant to a matter in dispute: for example, that a person was in pain⁸⁴ or was hungry.⁸⁵ The rationale for this exception is that such evidence will be the best and (usually) the only way of proving the physical sensation; similar considerations apply to proving a mental state.

3.43 It is usually said that this exception permits evidence of what a person said his feelings were, but not of their cause. “If a man says to his surgeon, ‘I have a pain in the head’...that is evidence; but, if he says to his surgeon, ‘I have a wound’; and was to add, ‘I met John Thomas, who had a sword, and ran me through the body with it,’ that would be no evidence against John Thomas”.⁸⁶

3.44 In the case of *Gilbey*,⁸⁷ Lord Cozens-Hardy MR held that although contemporaneous assertions made concerning physical sensations were admissible, statements made attesting to the *cause* of those sensations were not.⁸⁸

⁸³ [1987] AC 281, 302.

⁸⁴ *Aveson v Kinnaird* (1805) 6 East 188; 102 ER 1258.

⁸⁵ *Conde* (1867) 10 Cox CC 547.

⁸⁶ *Nicholas* (1846) 2 Car & K 246, 248; 175 ER 102, *per* Pollock CB.

⁸⁷ *Gilbey v Great Western Railway* (1910) 102 LT 202.

⁸⁸ In the case of *Gloster* (1888) 16 Cox CC 471, the deceased had died from injuries alleged to have been caused by an abortion. Counsel for the Crown contended that the statements of the deceased, which gave both the cause of her injuries and the name of the doctor who had performed the termination, were admissible as they contained evidence of the bodily feelings of the deceased and that the statements could not be admitted in part and excluded in part, and they must therefore be admitted whole. He also argued that some of the relevant statements were admissible as part of the res gestae, by analogy to the “excited utterances” of the victim of an assault. His arguments were rejected, and Charles J held that “admissible statements were to be confined to contemporaneous symptoms”.

3.45 Such evidence may also be given to prove mental states, such as disgust⁸⁹ or fear.⁹⁰ In addition, the existence of states of mind other than emotions may also be adduced under this exception. For example, a statement made by a person showing knowledge of insolvency is admissible as evidence of the person's knowledge,⁹¹ but not as evidence of the insolvency itself, as this is the *cause* of the knowledge and thus inadmissible on the general principles we outlined in paragraphs 2.42-2.44 above.

(ii) *Statements of the maker's intention*

3.46 This exception may allow a person's intention to be proved by evidence of what that person had earlier said that he or she intended to do. If the question is who broke X's window, the fact that Y has been heard to say that he intends to break it does not conclusively prove that he did it, but it is reasonable grounds for suspecting him, and is something which could be fairly be considered together with the other evidence.⁹²

3.47 The cases are not easy to reconcile.⁹³ The principle that emerges from the case law would seem to be that while evidence of the existence of a physical sensation or a mental state is clearly admissible, nothing in the nature of a *narrative* is acceptable.⁹⁴

⁸⁹ As in the blasphemy case of *Gott* (1922) 16 Cr App R 87, where evidence was given of a member of the public who saw Gott's pamphlets, said "Disgusting!" and walked away.

⁹⁰ *Vincent* (1840) 9 CAR & P 275; 173 ER 833.

⁹¹ *Thomas v Connell* (1838) 4 M & W 267; 150 ER 1429.

⁹² As long as it is relevant. Evidence that a person intended to do a particular act may not be admissible if the court holds that it does not go to prove that the person did the act, where it is the doing of the act which is significant and not merely the intention.

⁹³ See *Buckley* (1873) 13 Cox CC 293; *Wainwright* (1875) 13 Cox CC 171; *Thomson* [1912] 3 KB 19; *Moghal* (1977) 65 Cr App R 56; *Cross* pp 671-673. In *Buckley* the statement of a deceased police officer to his inspector to the effect that he intended to watch over the accused man's property on the evening of the alleged murder was held to be admissible; but in *Wainwright* the statement of a witness as to the intended destination of the deceased (the address occupied by the alleged murderer) was held to be inadmissible. In *Thomson* the defendant was accused of performing an abortion. The woman upon whom the abortion was allegedly carried out by the defendant had died before the trial. Counsel for the accused had proposed to ask a witness whether the woman had made a statement in February 1912 to the effect that she intended to perform an operation in order to procure her own miscarriage, and a statement in March 1912 to the effect that she had done so, but was prevented from doing so on the basis that her statements were inadmissible hearsay. This decision was upheld on appeal. Lord Alverstone CJ held that the evidence was inadmissible for hearsay, and approved the decision in *Gloster*.

⁹⁴ However, in the much-discussed case of *Edwards* (1872) 12 Cox CC 230, a neighbour was allowed to give evidence that a week before she died the murder victim deposited with her a carving knife and axe, saying "my husband always threatens me with these and when they're 'out of the way I feel safer". This looks like evidence of a state of fear, coupled with evidence of the reason for it, and therefore an unwarranted extension of the common law rule from the admission of evidence of a state of mind to the admission of evidence of the *reason* for the state of mind.

- 3.48 Evidence of physical sensations or mental states may also be admitted under the “explanatory acts” doctrine of the *res gestae* rule.⁹⁵ However, as the House of Lords held in *Kearley*,⁹⁶ the act must itself be relevant and evidence of it admissible independently of the words spoken. Their Lordships therefore declined to follow Commonwealth authorities where this exception had been used to admit evidence of the contents of telephone calls.⁹⁷ The mere act of dialling is rarely relevant irrespective of the content of the call, and the Commonwealth authorities were for this reason not followed.
- 3.49 In summary, the case law on the scope of the *res gestae* exception is convoluted, and it is difficult to extract clear principles from it. As Pollock CB wrote to Holmes J, “the unmeaning term [*res gestae*] merely fudges the truth that there is no universal formula for all the kinds of relevancy”.⁹⁸

B. Statutory exceptions created before 1988

*Depositions*⁹⁹

- 3.50 There are some statutory provisions of fairly ancient origin¹⁰⁰ under which someone who is a potential future witness can be invited or required to make a formal deposition, usually before a justice of the peace. If the witness is unable to give evidence at trial, the deposition is then sometimes admissible in evidence—and

⁹⁵ See *Cross* pp 658-661. The rule was referred to by Parke B in *Wright v Doe d Tatham*, and explained by Grove J in *Howe v Malkin* (1878) 40 LT 196 thus: “though you cannot give in evidence a declaration *per se*, yet when there is an act accompanied by a statement which is so mixed up with it as to become part of the *res gestae*, evidence of such statement may be given.”

⁹⁶ See paras 7.56-7.62 below.

⁹⁷ Such as *Davidson v Quirke* [1923] NZLR 552, *McGregor v Stokes* [1952] VLR 347 and *Police v Machirus* [1977] 1 NZLR 288.

⁹⁸ *Pollock-Holmes Letters*, 23 April 1931 vol 2 pp 284-285 cited in JD Heydon, *Evidence: Cases and Materials* (3rd ed 1991) at p 349.

⁹⁹ For the status of depositions see *Phipson* para 34-14.

¹⁰⁰ Starting with a statute passed in 1772-3, 13 Geo III c 63 s 40, a series of statutes allowed depositions taken abroad to be used in certain kinds of criminal proceedings in England. These culminated in a general provision in the Merchant Shipping Act 1854, which is still in force as s 691 of the Merchant Shipping Act 1894 which sometimes makes admissible depositions made before magistrates and consular officials overseas. In 1894, the Prevention of Cruelty to Children (Amendment) Act 1894 enabled a magistrate to take a deposition from a prospective child witness where a court appearance “would involve serious danger to his life or health”. This provision is still in force as ss 42 and 43 of the Children and Young Persons Act 1933. There are those who believe that ss 42 and 43 would be more useful if they were amended to permit video evidence, but the Government has so far resisted this proposal: JR Spencer, “Reformers Despair” (1991) 141 NLJ 787. Section 105 of the Magistrates’ Courts Act 1980 allows a magistrate to take a deposition from a person who is dangerously ill. Common law exceptions which allowed depositions to be admitted in evidence had been partly codified by the Indictable Offences Act 1848, and were subsequently fully codified by s 13(3) of the Criminal Justice Act 1925 which was repealed by the Criminal Justice and Public Order Act 1994, Sched 11.

unlike “section 9 statements” these depositions can be used even where the other side objects.¹⁰¹

- 3.51 Of the various types of hearsay, a deposition taken before a justice of the peace under the ancient statutory provisions is in some ways the least objectionable. The statement is made before a person who is neutral, the maker is on oath, and the defendant has the chance to cross-examine the witness. Yet the range of circumstances which they cover is very limited and in recent years the thrust of legislative change has been to move to a system under which the prosecution can use a written witness statement taken down by a police officer instead.¹⁰²
- 3.52 This is a matter of some concern, because there is some evidence that the quality of the statements taken by the police, in terms of their accuracy as representations of what the witness has told the police officer, is poor.¹⁰³ These statements are relied upon by the witness and their contents may affect his or her later recollection of the incident.
- 3.53 There has not been so far a comprehensive review of these statutory provisions or a unifying principle behind the reforms which have taken place.

Written evidence at trial

- 3.54 Under section 9 of the Criminal Justice Act 1967 a party wishing to tender a written statement as evidence (rather than calling the maker of the statement) may adduce evidence to the extent that oral evidence by the maker of the statement could have been adduced provided that certain conditions are satisfied: these include the

¹⁰¹ See para 3.54 below.

¹⁰² When the Criminal Justice Act 1967 allowed magistrates to commit for trial on the basis of *written* statements which the witnesses had earlier given to the police, these statements were deemed to be depositions if they had been used at the committal and so there need not have been any cross-examination. As a result of s 44 of the Criminal Justice and Public Order Act 1994, committal proceedings no longer exist and there is no possibility of a witness being cross-examined when the case is transferred to the Crown Court. On transfer the written witness statements will be attached to the notice of the prosecution case which is served on the court, and copies of which are served on the defence.

¹⁰³ M McLean, “Quality Investigation? Police Interviewing of Witnesses” (1994) in *A New Look at Eye-Witness Testimony* (The British Academy of Forensic Sciences, 1994). This study concluded that a large amount of information provided by witnesses to officers was not noted, and sometimes the statement contradicted what the witness had said.

absence of any objection by an opposing party.¹⁰⁴ This procedure is used frequently for undisputed evidence.

- 3.55 Although it is theoretically possible for a party not to object to a statement being read pursuant to section 9, but then to attack its contents as untrue, confident in the knowledge that the absent witness cannot respond, this practice has been criticised by the courts.¹⁰⁵

Sundry statutory provisions

- 3.56 Under section 46(1) of the Criminal Justice Act 1972, written statements made in Scotland or in Northern Ireland may be admitted as evidence in criminal proceedings on the same terms as statements made in England and Wales admitted under section 9 of the Criminal Justice Act 1967.
- 3.57 At a retrial, a transcript of the record of the evidence given by any witness at the original trial may be read as evidence if the parties agree or if the witness is dead, unfit or all reasonable efforts to bring him or her to court have failed. The judge's leave is required. Although the provision does not make it explicit, leave would not be granted if it were not in the interests of justice to adduce this evidence.¹⁰⁶
- 3.58 Other, less well-known, statutory provisions which allow for the admission of hearsay in criminal proceedings in particular circumstances are listed at Appendix C.

Private documents

- 3.59 These were generally inadmissible at common law. For reasons of convenience, the courts created two exceptions where the compiler of the record had died: where the declaration was a "statement against interest" or a "declaration in the course of a duty".¹⁰⁷ Special statutory exceptions were made in some cases, such as bankers'

¹⁰⁴ Criminal Justice Act 1967, s 9(2) and (3). The basic requirements are that the statement has to be signed by the person who made it and contain a declaration that it is true to the best of his knowledge and belief and that he made it knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true. It is also a requirement that the statement should have been served on the other parties to the proceeding and that none of them have, within seven days of the service on them of a copy of the statement, served a notice on the other party objecting to the statement being tendered in evidence.

¹⁰⁵ In *Lister v Quaije* [1983] 1 WLR 48, 54 the Divisional Court suggested that where this is done the court should exercise its power to adjourn the case and have the witness called.

¹⁰⁶ Criminal Appeal Act 1968, Sched 2 paras 1 and 1A. Para 1A was inserted by the 1988 Act, s 170(1) and Sched 15, para 32.

¹⁰⁷ See para 3.27 above.

books,¹⁰⁸ which are receivable in legal proceedings as *prima facie* evidence of the entries or of the matters, transactions and accounts therein recorded.

3.60 When, in *Myers*, it was made clear that no other common law exceptions would be created, however cogent the evidence,¹⁰⁹ the task of extending exceptions to the hearsay rule passed to Parliament. The Criminal Evidence Act 1965 was the first statutory attempt to grapple with the problem. This was replaced in 1984 by section 68 of PACE. This provision in turn was repealed and replaced by the 1988 Act. We consider these provisions fully in the following Part.

¹⁰⁸ Bankers' Books Evidence Act 1879 (as amended by Sched 6 of the Banking Act 1979) ss 3 and 4 of which require as conditions of the material being receivable in evidence proof that (1) the book was at the time of the entry, one of the ordinary books of the bank; (2) it was in the custody or control of the bank; and (3) the entry was made in the ordinary course of business. The new s 9 inserted into the 1879 Act by the Banking Act 1979 provides that "bankers' books" includes records used in the ordinary business of the bank, "...whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism".

¹⁰⁹ *Myers v DPP* [1965] AC 1001. The defendants were charged with conspiracy to receive stolen cars and conspiracy to defraud. The prosecution sought to prove the identities of various cars. To do this they called the keepers of the manufacturer's records of the cars who produced those records to the court. The compilers of the records were not identifiable. By the time the case came to trial, the records were themselves the best evidence of what was known about the vehicles. There was nothing at the time the records were made to make the details stand out in the memories of the workers and therefore no realistic expectation that they would be able to tell the court anything even if they had been identifiable. There was no existing exception to the hearsay rule under which the records could be admitted and, in a majority decision, the House of Lords refused to recognise a new common law exception, which resulted in the exclusion of evidence whose reliability was not in question.

PART IV

THE HEARSAY RULE TODAY (III): THE CRIMINAL JUSTICE ACT 1988

Introduction

- 4.1 As we have said,¹ in *Myers*² Lord Reid recommended a major statutory revision of the law of hearsay. At that time the whole question of hearsay was under review by the CLRC. In 1972 that Committee made major recommendations for change in its Evidence Report,³ in which it adopted to a substantial extent the pattern established for civil proceedings in the Civil Evidence Act 1968. These recommendations were not accepted but instead a series of piecemeal measures were adopted.⁴ The question of hearsay evidence was, however, subjected to further examination by the Roskill Committee⁵ which was charged with examining the conduct of trials for fraud. One important aspect of this review was the admissibility of documentary evidence.⁶ The Committee's main conclusion was that "the basic rule should be that in criminal proceedings arising from fraud, documents should be allowed to speak for themselves and thus become admissible without further proof".⁷ This was however subject to a inclusionary discretion of the judge to be exercised at a special hearing in advance of the trial.⁸
- 4.2 When the Bill which led to the 1988 Act was drafted the opportunity was taken to attempt as far-reaching a reform as it was thought that Parliament would accept.⁹ Thus the new provisions not only replace the provision about documentary records in section 68 of PACE with something wider, but make changes that go beyond what the phrase "documentary evidence" would normally suggest.

¹ See para 1.9 above.

² *Myers v DPP* [1965] AC 1001, 1022.

³ See paras 8.6-8.16 below.

⁴ Eg, the Criminal Evidence Act 1965 had admitted business records of a broadly defined character on the satisfaction of certain conditions, of which the most important were that the record should be documentary in character, that the supplier of information contained in it had, or could be reasonably expected to have had, personal knowledge of the truth of that information, and that there should be some acceptable reason for not calling the supplier. This legislation was repealed and replaced by PACE, s 68 which was in turn repealed and replaced by Part II and Sched 2 of the 1988 Act. See also para 8.16 n 38 below.

⁵ See Abbreviations at p xiii above and paras 8.17-8.28 below.

⁶ See paras 8.19-8.21 below.

⁷ Roskill Committee Report, para 5.35.

⁸ *Ibid*, para 5.36.

⁹ The Bill originally applied to oral as well as written hearsay evidence. See Professor Birch, "The Criminal Justice Act 1988 (2) Documentary Evidence" [1989] Crim LR 15 and *Blackstone* F8.2.

- 4.3 Part II of the 1988 Act adds important new exceptions but leaves untouched many old ones even though some of them have become practically redundant.

The structure of the hearsay exceptions in the 1988 Act

- 4.4 These provisions are limited to hearsay which is contained in documents.¹⁰ They relate to “statements”, a word which is given a wide meaning. It “includes any representation of fact, whether made in words or otherwise”.¹¹

- 4.5 A very important word in this part of the 1988 Act is the word “document”. This is very widely defined and includes:¹²

in addition to a document in writing

- (a) any map, plan, graph or drawing;
 - (b) any photograph;
 - (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
 - (d) any film [that is also defined as including microfilm], negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.
- 4.6 When we consider the options for reform we will bear in mind that the 1988 Act is limited to hearsay in documents and we will consider whether these provisions should be extended to oral hearsay. We will also have this in mind when we comment on the provisions of the Act.

- 4.7 In deciding whether a statement is admissible in pursuance of the 1988 Act the following requirements must be satisfied:

- (a) the relevant material must be a “statement” within the meaning of the Act;¹³
- (b) the statement must be contained in a “document” as defined in the Act;¹⁴

¹⁰ The relevant part of the 1988 Act is entitled “Documentary Evidence in Criminal Proceedings”.

¹¹ See the 1988 Act, Sched 2, para 5 which provides that expressions in the Act are to be construed in accordance with s 10 of the Civil Evidence Act 1968. The definition of “statements” emanates from s 10(1) of that Act.

¹² The definition of “document” also derives from s 10 of the Civil Evidence Act 1968.

¹³ See para 4.4 above.

¹⁴ See para 4.5 above.

- (c) it must be a statement of a type which is covered by either section 23 (that is, first-hand documentary hearsay) or by section 24 (business documents);
- (d) in the event that the provisions only apply where the maker of the statement is unavailable then (i) he or she must be unavailable for one of the specified reasons listed in the Act and (ii) the judge must not exclude the statement or refuse to admit it under sections 25 and 26.¹⁵

First-hand hearsay: section 23

4.8 Section 23 of the 1988 Act¹⁶ provides that a statement made by a person in a document shall be *prima facie* admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if the case falls within one of a list of specified categories. The categories cover cases in which for four different reasons witnesses may not be available to give evidence in person: because the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness; because he is outside the United Kingdom and it is not reasonably practicable to secure his attendance; because all reasonable steps have been taken to find the person who made the statement, but he cannot be found; or, if the statement was made to a police officer, because the person who made it does not give oral evidence through fear or because he is kept out of the way. Multiple hearsay is not admissible under section 23 (although see paragraph 4.11 below). We shall now turn to consider the material words of the section.

“a statement made by a person in a document”

4.9 The critical factor in deciding whether something is a “statement” is whether it was approved by the person concerned. Where it was, the statement will fall within section 23. Thus a witness statement written by a police officer but signed by the witness in his or her handwriting would be such a statement, but the notes which a solicitor takes in the interview and which have not been seen or signed by the client do not constitute such a statement.¹⁷ It will suffice if the person whose statement is tendered “clearly indicates, by speech or otherwise, that the record... is accurate”.¹⁸

¹⁵ The judge has additional statutory (s 78(1) of PACE) and common law discretions to exclude prosecution evidence. See paras 4.42 and 4.43 below.

¹⁶ The text of the section is set out in Appendix A.

¹⁷ See *Re D (A Minor)* [1986] 2 FLR 189 which was decided under the provisions of the Civil Evidence Act 1968.

¹⁸ *McGillivray* (1993) 97 Cr App R 232, 237, *per* Watkins LJ. A victim had made a statement which had been contemporaneously recorded and read back to him by a police officer. It had not been signed but it was admissible because there was evidence that the victim had clearly indicated in the manner suggested that the record was accurate. The reason why the victim was unable to sign was because of the injuries he had received in the incident which led to the charges. It would therefore have been cruelly ironic if his statement had not been even *prima facie* admissible because he could not sign it, and the Court of Appeal was not willing to give the subsection a construction which would have

“admissible...as evidence of any fact of which direct oral evidence by him would be admissible”

4.10 Under section 23, the statement the person makes in the document is only admissible evidence “of any fact of which direct oral evidence by him would be admissible”. Thus the person who makes the statement must be a competent witness. If it is not known whether or not he or she would be competent to give evidence, because he or she is mentally incapacitated, then a court would have to hear evidence before it could decide whether section 23 applies.

4.11 A possible problem arises because some witnesses are, as we have seen, entitled to give oral evidence on matters which are not within their personal knowledge by way of exception to the hearsay rule. Examples are a statement which forms part of the *res gestae*¹⁹ or the dying declaration of a homicide victim²⁰ which can be given in court by someone who heard it. In those circumstances it has been suggested that such evidence can be given although it would amount to second-hand hearsay.²¹

Reasons why the maker is unavailable

4.12 The section only operates where the maker of the statement is unavailable to give evidence for one of the reasons set out in detail in subsections (2) and (3). The provisions of subsections (2)(c) and (3) mean that the statement can be read under section 23 where the witness has vanished without trace, and also, if the statement was one made to the police, where he “does not give evidence through fear or because he is kept out of the way”. There is nothing, however, to cover the case of the witness who is protected by immunity²² or privilege and unavailable for one of those reasons.²³

The witness “...is dead or by reason of his bodily or mental condition unfit to attend as a witness”: section 23(2)(a)

4.13 The phrase “by reason of his bodily or mental condition unfit to attend as a witness” has been interpreted by the Court of Appeal to cover the situation where the witness attends court but is then unable to give coherent evidence because of a mental condition.²⁴ This is comparable to the interpretation of section 23(3)(b).²⁵

had this effect.

¹⁹ See paras 3.38-3.49 above.

²⁰ See paras 3.29-3.32 above.

²¹ See the approach adopted in *The Ymnos* [1981] 1 Lloyds Rep 550, a case decided under the Civil Evidence Act 1968 which supports that interpretation. However, it has been suggested that this “interpretation is nevertheless questionable and...that the marginal heading [ie ‘first-hand hearsay’] correctly states the scope of the section”: Andrews and Hirst, *Criminal Evidence* (2nd ed) para 18.19.

²² *Jiminez-Paez* (1994) 98 Cr App R 239.

²³ We consider this limitation of the section at para 7.20 below.

²⁴ *Setz-Dempsey* (1994) Cr App R 23.

The witness "...is outside the United Kingdom; and...it is not reasonably practicable to secure his attendance": section 23(2)(b)

- 4.14 In *Maloney*²⁶ the Court of Criminal Appeal considered the interpretation of the word "practicable" and held that it "was not equivalent to physically possible. The phrase must be construed in the light of the normal steps which would be taken to arrange the attendance of a witness at trial." Further, it had to be "reasonably" practicable, an expression which meant that regard should be had to the means and resources available to the parties.
- 4.15 It is not clear exactly what needs to have been done for the court to be satisfied that it is "not reasonably practicable" to produce a witness. The extent to which the resources of the party can be taken into consideration is also a moot point. The duty of taking reasonable steps falls on the accused's solicitors and, where the solicitor fails in that duty, that failure may rebound on the accused.²⁷
- 4.16 To prove that it is "not reasonably practicable" to produce a witness who is abroad, the party who wishes to put the written statement in evidence must give evidence of trying to locate the witness and trying to make him or her attend court. The language of section 23(2)(b), the clause which refers to witnesses abroad, says nothing about proving that reasonable steps were taken, unlike section 23(2)(c), which does so in the context of witnesses who are unavailable because they have disappeared. Thus the prosecutor is not allowed to say it is impracticable to produce the witness because it has suddenly been discovered, on the day of the trial, that the witness has gone abroad, and the application must be assessed "against the background of the whole case".²⁸
- 4.17 The subsection was considered in *French and Gowher*²⁹ where it was held that the application must be assessed as at the date it was made and not with regard to the future.³⁰

²⁵ See para 7.23 and n 51 below.

²⁶ *Maloney* [1994] Crim LR 525.

²⁷ *Mattey and Queeley*, *The Times* 13 October 1994 (CA).

²⁸ *Bray* (1988) 88 Cr App R 354, a decision on the equivalent language in PACE s 68(2)(a)(ii), approved in *Minors* [1989] 1 WLR 441.

²⁹ *French and Gowher* (1993) 97 Cr App R 421.

³⁰ In this case the alleged victim of a robbery had attended once for a trial which was aborted and at the retrial did not appear because he was sitting an examination in Mexico. It appears that he would have been able to attend a relisted trial in the future, but despite his future availability the judge acceded to the prosecution application to read his witness statement.

4.18 It is clear from *Gonzales de Arango and others*³¹ and from *Mattey and Queeley*³² that more than minimal steps must be taken. In the former case it was not good enough for the party seeking to use the section to tell the court that the Colombian booking clerks would not travel to England to give evidence, without having established why not and made further efforts to bring them to court. In the latter case the Court of Appeal confirmed that a recorder was right to refuse an application where the information provided to the court was out of date and the party's solicitors had not taken any steps themselves to secure the witness's attendance, although there was evidence before the court that neither the witness nor the accused could afford the costs the witness would incur in travelling to England from France.

"...all reasonable steps have been taken to find the person who made the statement, but...he cannot be found": section 23(2)(c)

4.19 This subparagraph is of less value than may at first appear, because witnesses may well become untraceable before they have put what they would say into the form of a statement. We understand from our preliminary consultation that this is particularly so in the case of defence witnesses. We also understand that where there is a written statement, but no definite reason can be given to the court for the witness's absence, there is a fear that judges are sceptical about the reliability of the statement itself and less inclined to admit it than they are where a "good" explanation is given for the absence of the witness.

The witness "...does not give oral evidence through fear or because he is kept out of the way": section 23(3)(b)

4.20 There is some evidence that the reluctance of witnesses to give evidence because they are frightened is now a serious problem for the criminal justice system.³³ Is section 23 the right way to tackle this problem?³⁴ Some people have welcomed the "frightened witness" aspect of section 23 as offering a "sanctuary for the witness in distress",³⁵ and the Royal Commission suggested its wider use as a means of improving the position of the intimidated witness in criminal procedure.³⁶

4.21 The phrase "through fear, or because he is kept out of the way" is read disjunctively, so that it may be proved either that the witness is in fear, or that he

³¹ (1993) 96 Cr App R 399.

³² *Mattey and Queeley*, *The Times* 13 October 1994 (CA).

³³ *The Guardian* 5 October 1994 p 6, *Police Review* 2 December 1994 p 22.

³⁴ The Home Office Police Research Group has recently published a report suggesting various ways of reducing the scope for witness intimidation, some of which are a matter for police practice and beyond the ambit of this paper: "Witness Intimidation. Strategies for Prevention" (Home Office Police Research Group, 1994).

³⁵ J McEwan, "Documentary Hearsay Evidence - Refuge for the Vulnerable Witness?" [1989] Crim LR 629, 642.

³⁶ Report of the Royal Commission, ch 8, paras 43 and 44.

or she has been kept out of the way.³⁷ It is significantly wider than the equivalent phrase in section 13 of the Criminal Justice Act 1925, which allowed a deposition to be read where the witness had been “kept out of the way by means of the procurement of the accused or on his behalf”. It now seems to be sufficient that the witness, if unable to testify because he or she is “kept out of the way”, is kept out of the way by anyone.

4.22 Various details are at present left unclear by the available case law, for example, whether a witness who does “not give oral evidence” through fear includes the witness who starts to give oral evidence but is unable to continue. On the face of the section the accused need not have played any part in causing the witness to be afraid, but the frightened witness’s statement may nevertheless be admitted against the accused. Nor is it specified in the section exactly what the witness need be afraid of, nor that the fear need be a reasonable one. In theory the section could be used to admit the statement of an anonymous witness.³⁸ We consider these problems at paragraphs 7.21-7.24 below.

4.23 Where the statement is admitted because the witness is in fear, the judge must be careful not to cause prejudice to the accused in the explanation given to the jury for the witness’s absence.³⁹

³⁷ *R v Acton JJ ex p McMullen* (1990) 92 Cr App R 98.

³⁸ It seems unlikely, however, that the court would permit this to be done.

³⁹ *Churchill* [1993] Crim LR 285, where the conviction was quashed because, although the judge had not explained why the witness had not appeared in person, he had said that it did not reflect badly on the witness, which seemed to be an endorsement of the absent witness’s credibility to some extent. He should simply have refused to explain to the jury why the witness was not present. Of course, in a magistrates’ court, any prejudicial information will be known to the fact-finders and they must warn themselves against misusing that information.

Proving the foundation requirements for section 23

- 4.24 The fact that the witness is unavailable for one of the reasons listed must be proved:⁴⁰ in the case of a prosecution witness, beyond reasonable doubt,⁴¹ and in the case of a defence witness, on the balance of probabilities.⁴²
- 4.25 A sizeable and growing body of case law is concerned with the question of exactly what it is that must be proved, and how.⁴³ If the witness is present in court but refuses to give evidence, allegedly through fear, the court can act on the evidence of its own senses.⁴⁴ If the witness is absent, his state of fear may be proved by a witness who testifies orally to the court that the absent witness has said that he is frightened—hearsay evidence of the absent witness’s statement being admissible to prove his state of mind under a common law exception to the hearsay rule which has been discussed above;⁴⁵ but it may not be proved by hearsay upon hearsay, for example, by the testimony of witness X, who says that Y told him that the absent witness says he is too frightened to come to court.⁴⁶
- 4.26 Section 23 does not, and probably cannot, solve all the difficulties in obtaining oral evidence from a frightened individual. Where a witness does not tell someone that he or she is frightened (which the witness may be fearful of doing), section 23 cannot be used to admit the evidence.⁴⁷

⁴⁰ When the Criminal Justice Bill 1988 was being considered by Parliament, concern was expressed by Peter Archer QC MP about the standard of evidence required to explain to a court why a witness was not present: *Hansard* (HC) 1987-8 Standing Committee H, vol IX col 108. Although the standard is supposed to be high, there is one reported case where those fears may have been borne out. In *Ricketts* [1991] Crim LR 915, the witness was supposedly absent because he was frightened of giving evidence. The evidence called to establish this consisted of a letter allegedly written by the accused which appeared to contain threats to the witness and one other, and evidence from a police officer of the witness saying, in effect, that he feared for his safety if he gave evidence. The judge admitted the statement of the witness. The witness subsequently arrived at court and said he had been away and out of contact, but that he was not afraid to give evidence. It is not clear from the report whether the accused admitted being responsible for the letter which had been put in. If he had, then it is understandable that the judge should accept that the witness was afraid.

⁴¹ *Case* [1991] Crim LR 192.

⁴² *Mattey and Queeley*, *The Times* 13 October 1994 (CA).

⁴³ The ambiguity of the term “reasonably practicable” is discussed at para 4.16 above.

⁴⁴ *R v Ashford Justices ex p Hilden* [1993] QB 555.

⁴⁵ See para 3.45 above.

⁴⁶ *Neill v North Antrim Magistrates’ Court* [1992] 1 WLR 1221 (House of Lords); a decision on the equivalent provision in Northern Ireland.

⁴⁷ See para 7.21 below.

4.27 Even if the absent witness is proved to be unavailable for one of the stated reasons, the judge can still refuse to allow the evidence to be given in his or her discretion. We discuss this further below.⁴⁸

“Business etc documents”: section 24

4.28 Section 24 of the 1988 Act⁴⁹ is headed “business etc documents” as it covers documents which were created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office. Statements admitted under section 24 may include multiple hearsay as the information may pass through more than one person before it is recorded in the document which is then presented to the court. The person who supplied the information must have had, or be reasonably supposed to have had, personal knowledge of the matters dealt with.

“...a statement in a document...”

4.29 The courts have adopted a broad brush approach to the meaning of “statement” in section 24. In *Carrington*⁵⁰ a worker at a supermarket observed the number of a car used by a customer who was behaving suspiciously, which she passed via an intermediary to a supervisor, who scribbled it down on a memo-pad; the pad with the note on it was held to fall within section 24.⁵¹ There is an obvious anomaly that a note made by a friend or bystander would not fall within the exception, although there is no reason to think it would be any less useful to a court, or less reliable, than the note made by the supervisor in *Carrington*.

“...evidence of any fact of which direct oral evidence would be admissible...”

4.30 The words “by him” do not appear in section 24.⁵² Section 24 can be used where several degrees of hearsay are involved, subject to the requirement that each of the persons to whom the information was supplied received it in the course of a trade etc. Remote (that is, not first-hand) hearsay adduced in this way must not infringe other rules of evidence.

“...created or received by a person in the course of a trade, business, profession [etc]...”

4.31 As the marginal note in the statute—“business etc documents”—suggests, this provision was drawn up with the idea of making readily admissible the sort of documents which are generated in the course of running a business or government department or other similar organisation. It was meant, in other words, for what non-lawyers would loosely call “records”, although that word, which section 68 of

⁴⁸ See paras 4.40-4.62 below.

⁴⁹ The text of the section is set out in Appendix A.

⁵⁰ *Carrington* [1994] Crim LR 438.

⁵¹ Section 24(4)(b)(iii) was the precise subsection under discussion.

⁵² Cf s 23; see para 4.10 above.

PACE had used, was avoided because the courts had interpreted it rather narrowly.⁵³ But the sentence which the section uses instead of “records”—“the document was created or received by a person in the course of a trade, business, profession [etc]”—extends the reach of the provision very far beyond the general idea of records, even records in the layperson’s sense of the term.⁵⁴ Read literally, as Professor Sir John Smith has pointed out,⁵⁵ all letters to the editor of *The Times* are admissible, although it would have to be shown that their authors had personal knowledge of their contents.

4.32 Whether or not statements written down by police officers fall within section 24 is not clear.⁵⁶ The question whether section 24 as well as section 23 applies to witness-statements is important. In the first place, statements made with a view to criminal proceedings can be put in evidence under these provisions when one of a number of conditions applies, and the range of possible conditions is wider under section 24 than it is under section 23. Secondly, section 23 only lets in evidence which the maker of the statement could have given orally, whereas section 24 is not so limited.⁵⁷

4.33 Where the document was not prepared with an eye to criminal proceedings⁵⁸ section 24 makes it freely admissible, unless the judge excludes it in his or her discretion under section 25. If it was prepared with criminal proceedings in mind, however, section 24(4) provides that it is admissible only if one of a series of preconditions is present, unless it falls within one of the three special cases listed at the beginning of the subsection.⁵⁹ These preconditions are the “unavailability” conditions of

⁵³ Eg *Tirado* (1975) 59 Cr App R 80, where it was held that the word “record” in the Criminal Evidence Act 1965, s 1 did not cover correspondence files.

⁵⁴ Transcripts of interviews between a liquidator of companies and persons involved with the companies are admissible: *Clowes* [1992] 3 All ER 440.

⁵⁵ See Professor Birch, “The Criminal Justice Act 1988 (2) Documentary Evidence” [1989] Crim LR 15, 25.

⁵⁶ See JC Smith, “Sections 23 and 24 of the Criminal Justice Act 1988: (1) Some Problems” [1994] Crim LR 426 and D McEvoy, “Sections 23 and 24 of the Criminal Justice Act 1988: (2) A Reply” [1994] Crim LR 430.

⁵⁷ In s 23 the key words are “a statement made by a person in a document shall be admissible...as evidence of any fact of which direct oral evidence by him would be admissible”. In s 24 they are “a statement in a document shall be admissible...as evidence of any fact of which direct oral evidence would be admissible”. Thus s 24 could let in the written statement of X, in which he repeated what Y had told him. Further, does the difference between the sections mean that in s 24 the source of the information need not have been competent to give evidence? See J McEwan, “Documentary Hearsay Evidence—Refuge for the Vulnerable Witness?” [1989] Crim LR 629.

⁵⁸ See para 4.48 below.

⁵⁹ Letters of request pursuant to orders made under Sched 6 para 13; expert reports under s 30 and glossaries under s 31; or documents prepared pursuant to the Criminal Justice (International Cooperation) Act 1990 s 3 (which is set out in Appendix A).

section 23,⁶⁰ plus an additional one: that “the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement”.⁶¹

4.34 The conditions relating to unavailability or inability to remember refer to “the maker” of the statement. Some difficulty has been encountered over the interpretation of this phrase, which we discuss in detail at paragraph 7.26 below. In *Bedi*,⁶² the Court of Appeal held that the compiler of a record, rather than the originator of the information, was the “maker” of the statement, and in *Field*,⁶³ where a police officer had written down a witness’s statement the Court of Appeal held that the police officer was “the maker” of the statement. The result of this interpretation is that it is the recollection of the scribe which will be at issue in proving the foundation requirements of section 24, whereas it would make more sense if it were the reliability of the source of the information which was the focus of attention.

4.35 Since section 24 applies only to documentary evidence, the compiler of documents for use in criminal proceedings cannot supplement the record with oral hearsay testimony.⁶⁴

Proving the foundation requirements for section 24

4.36 The usefulness of section 24 in allowing business documents to be admitted is sometimes offset by the need to prove that a particular document falls within the section. The reason for this is that it may well be necessary to call the creator of the document to prove the origin of the document, in which case section 24 does not facilitate matters. However, it clearly is useful where one representative of a company, for example, can confirm the provenance of a number of documents which are then all admissible.⁶⁵

4.37 Some have argued that there should be no need to prove the circumstances surrounding the origins of the documents which obviously satisfy the section on

⁶⁰ See para 4.8 above.

⁶¹ The 1988 Act, s 24(4)(b)(iii).

⁶² *Bedi* (1992) 95 Cr App R 21.

⁶³ [1992] Crim LR 299; *Brown v Secretary of State for Social Security*, *The Times* 7 December 1994.

⁶⁴ *Hinds* [1993] Crim LR 528, in which a schedule, which was admitted under s 24, was compiled by a DSS officer on the basis of telephone enquiries, but the officer was not permitted to give supplementary oral evidence obtained in the same way which had been omitted from the schedule. See the commentary of Professor Birch at [1993] Crim LR 530.

⁶⁵ These points were made to us in the course of the preliminary consultation.

their face. Indeed, in the recent Court of Appeal decision of *Foxley*⁶⁶ it was held that oral evidence is not always essential and that courts may infer from the documents themselves and from the method by which they have been produced before the court that the foundation requirements of section 24 are met.

4.38 The standard of proof for the defence is, as for section 23, lower than for the prosecution. We understand that the principle of giving the accused the benefit of the doubt is frequently put into practice and documents produced by the defence are readily admitted.

4.39 If the document to be adduced under section 24 was produced by a computer then section 69 of PACE will also need to be satisfied.⁶⁷

Discretion and leave requirements

4.40 The court, as has already been mentioned,⁶⁸ has a discretion to disallow documentary hearsay which is in principle admissible under sections 23 and 24. It has, in fact, not one discretion but four different discretions, and one of the problems in this area is that the relationship between them is not clear.

4.41 Under section 25 the court has a general discretion to exclude any statement to which sections 23 and 24 apply. Under section 26 the court must give leave before a statement which was made with a view to use in criminal proceedings is put in evidence, and it has a discretion to refuse to grant such leave. It is not stated in the Act how sections 25 and 26 interrelate, and this has been left to the courts. So far, there has been one Court of Appeal decision on the point when it was held that where a statement falls within section 26, it is unlikely that separate consideration of section 25 will be necessary.⁶⁹

4.42 There is also the general discretion contained in section 78 of PACE to exclude prosecution evidence which would make the trial unfair

...if...the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

4.43 Finally, the court has a discretion at common law⁷⁰ to exclude evidence where the prejudicial effect of the evidence outweighs its probative value as part of its duty to

⁶⁶ *Foxley*, *The Times* 9 February 1995.

⁶⁷ See paras 14.3-14.9 below.

⁶⁸ See para 4.7(d) and n 15 above.

⁶⁹ *Grafton* [1995] Crim LR 61.

⁷⁰ *Collins* (1938) 26 Cr App R 177; *Sang* [1980] AC 402; *Blithing* (1983) 77 Cr App R 86; *Scott v The Queen* [1989] AC 1242; *Henriques v The Queen* (1991) 93 Cr App R 237.

ensure the accused has a fair trial.⁷¹ How this discretion is applied depends on the context in which it arises.⁷²

Sections 25 and 26

4.44 Section 25 provides that the court may exclude a statement “in the interests of justice”, and then adds that “without prejudice to the generality” of that provision, it shall be its duty to have regard

- (a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;
- (b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;
- (c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and
- (d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

4.45 Under section 26 the court is once again directed to consider the interests of justice, “and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard

- (i) to the contents of the statement;
- (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

⁷¹ This discretion is preserved by PACE, s 82(3). Academic and judicial opinion seems to be divided as to whether the common law discretion adds anything. Eg see *Matto v Wolverhampton Crown Court* [1987] RTR 337, *McDonald* [1991] Crim LR 122, *Khan* [1994] 4 All ER 426. For the academic views see *Cross* p 189, P Murphy, *A Practical Approach to Evidence* (4th ed 1994) p 25, A Keane, *The Modern Law of Evidence* (3rd ed 1993) p 37, Heydon, *Evidence: Cases and Materials* (3rd ed 1991) p 7, R May, *Criminal Evidence* (3rd ed 1995) para 10-55.

⁷² Eg when it was applied to exclude depositions which were in principle admissible under the Criminal Justice Act 1925, s 13, the Privy Council held that it was to be exercised “with great restraint”: *Scott v The Queen* [1989] AC 1242, 1258, per Lord Griffiths.

(iii) to any other circumstances that appear to the court to be relevant.”

- 4.46 One commentator⁷³ has suggested that the differences between the two lists mean that under section 25 the court *must* be satisfied as to the authenticity of the document and any serious doubt about it should lead to the document being excluded, whereas section 26 makes no explicit mention of this. There is no authority expressly on this point.
- 4.47 The overall purpose of the provisions of sections 25 and 26 of the 1988 Act is ...to widen the power of the court to admit documentary hearsay evidence while ensuring that the accused receive[s] a fair trial. In judging how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public in enabling the prosecution case to be properly presented and the interest of a particular defendant in not being put in a disadvantageous position, for example by the death or illness of a witness. The public of course also has a direct interest in the proper protection of the individual accused. The point of balance, as directed by Parliament, is set out in the sections.⁷⁴
- 4.48 A preliminary problem in applying section 26 is knowing when it comes into play. Is a statement prepared by a social worker for use in family proceedings, investigating alleged assaults, one made with a view to criminal proceedings? Or a statement prepared as a result of an internal investigation when it is not known whether or not a suspected offence will be reported to the police?
- 4.49 These sections raise two general concerns, apart from raising the question why there are differences between the two lists of factors, and whether these differences matter.
- 4.50 The first is that the factors listed tend to cancel each other out, which means that where a lot of different factors are present the judge is left without clear guidance. They are in effect reminder lists, not guides. This must create uncertainty ahead of trial, and afterwards opportunities for appeals.
- 4.51 The second concern is that these sections give no real guidance on what might be thought the really central issue, which is whether or not, and if so when, it can ever really be “in the interests of justice” to admit against the defendant a key piece of evidence when the defence has had no chance either to confront the maker with its

⁷³ R Munday, “Hostile Witnesses and the Admission of Witness Statements under Section 23 of the Criminal Justice Act 1988” [1991] Crim LR 349, 356.

⁷⁴ *Per* Ralph Gibson LJ in *Cole* [1990] 2 All ER 108, 115; see also *Lockley and Corah* (unreported, 26 May 1995, CA).

side of the story, or to probe the accuracy of the statement by asking questions. The statute leaves the question open, thereby accepting that it *may* be in the interests of justice to admit such evidence and, indeed where documents have not been prepared for criminal proceedings, the onus is on the accused to show why they should be excluded. The judicial emphasis is slightly different:

It behoves judges always, seeing that using this power can bring obvious unfairness to a defendant, to exercise the discretion to admit with extreme caution.⁷⁵

4.52 In *Scott*⁷⁶ Lord Griffiths made it clear that there is no single objection of principle which will automatically lead to hearsay evidence being excluded:

...neither the inability to cross-examine,⁷⁷ nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.⁷⁸

Lord Griffiths went on to say “it is the quality of evidence in the deposition that is the crucial factor that should determine the exercise of the discretion”.

4.53 Indeed, it has been held by the Court of Appeal that where the evidence is of considerable significance in implicating the accused, the judge is entitled to take this into account in support of its admission.⁷⁹

4.54 One might therefore expect that where a witness statement is of poor quality it would be very unlikely to be admitted. In the case of *Kennedy and Burrell*,⁸⁰ however, the facts that the alleged victim was very drunk at the time of the incident and that there were inconsistencies between his statement and the evidence of other witnesses were held to be factors to be weighed with the others, but *not* sufficient in themselves to justify automatic refusal of leave.

⁷⁵ *McGillivray* (1993) 97 Cr App R 232, 239 *per* Watkins LJ.

⁷⁶ *Scott v The Queen* [1989] AC 1242. The facts of this case pre-dated the 1988 Act, and it related to the discretion under the Criminal Justice Act 1925, s 13(3) but it has been applied in cases decided under the 1988 Act, namely *Cole* [1990] 2 All ER 108 and *Henriques v The Queen* (1991) 93 Cr App R 237.

⁷⁷ Whether or not the accused’s representative has had an opportunity to question the absent witness is not specifically mentioned in the list but the absence of such an opportunity will certainly be one of the planks in the submission of a defence advocate under s 25 or s 26. The defence may even argue that the absence of an opportunity to cross-examine at trial justifies the exclusion of a statement where the defence has had the opportunity of putting questions to the accused before the trial, but did not do so (footnote added).

⁷⁸ *Scott v The Queen* [1989] AC 1242, 1259.

⁷⁹ *Batt* [1995] Crim LR 240.

⁸⁰ *Kennedy v Burrell* [1994] Crim LR 50.

- 4.55 The significance of the evidence to the case is obviously an important factor, and its significance may depend on what the defence is. For example, where the charge is rape and the defence is alibi, there may be no dispute that the victim was raped. The issue will be “by whom?”. If the victim’s statement is not crucial to establish the identity of the attacker, it will not matter a great deal if it is read.
- 4.56 We are aware from our preliminary consultation that this could mean, in this example, that there is a temptation for the accused to change his defence, once he learns that the witness is unavailable, from alibi to consent. If the victim is to be cross-examined on the issue of consent, it is much more unlikely that a judge would allow her statement to be read under section 23.⁸¹ This possible manipulation of the system is a reason why the defence should be obliged to make clear which issues are in dispute at an earlier stage of the proceedings.⁸²
- 4.57 In practice, where the statement which the prosecution wish to have admitted under section 23 constitutes the central or the only evidence against the accused, the Crown may not seek to adduce it at all and may discontinue the case instead. To a certain extent, this is a pragmatic anticipation of the reaction of the judge on being asked to admit the statement, or of the Court of Appeal on considering the safety of any resulting conviction, but it is also a recognition of the difficulties inherent in such a situation.
- 4.58 In the course of our preliminary consultation we learnt of the following case which serves as an example of what we have just said. A man was charged with murder. The only evidence to put him at the scene came from W who claimed to have seen him there. W had made a statement, but then refused to attend court, making it clear that she stood by the content of her statement but that she was too unwell to attend court. The Crown could have sought to put her statement in under section 23(2)(a) but did not do so. It was felt that while it may have been fair to invite the jury to convict on the strength of the identification evidence once W had been seen and cross-examined, it would not be so where W’s evidence was untested but the temptation for a jury to convict might be strong.⁸³
- 4.59 The burden of proof remains on the prosecution. The courts have resisted any argument that the admission of a witness statement where the only way for an

⁸¹ Earlier disclosure by the defence of witness statements might benefit the defence, in that the court would feel happier about admitting statements under s 23 where the prosecution had had an opportunity to check them out than about admitting those which are sprung on the prosecution at trial.

⁸² This has been provisionally recommended by the Home Office: Home Office, “DISCLOSURE, A Consultation Document” (HMSO, 1995) para 51.

⁸³ In that case it was also anticipated that even if the judge did allow the statement to be read (which was unlikely), the case could not have gone to the jury because, following *Turnbull* [1976] 3 WLR 445, a conviction would have been unsafe.

accused to controvert it is to give evidence in person is tantamount to a reversal of the burden of proof.⁸⁴ By way of contrast, it was held to be against the interests of justice to admit a statement in *Keenan*⁸⁵ where the evidence which would force the accused to testify had itself been improperly obtained.

- 4.60 Indeed, the fact that the accused can testify about the fact in issue was a reason in favour of the admission of the witness statement in *Samuel*,⁸⁶ where the alleged victim of a fraud was too infirm to attend court. Yet in *Neshet*,⁸⁷ an almost identical situation, a conviction was quashed because the prosecution had been permitted to read the witness-statements taken from two women who were too infirm to come to court, whom the defendant had allegedly defrauded.
- 4.61 As ever, where there is more than one defendant, the determination of where the interests of justice lie is particularly difficult. It may be in the interests of one accused's defence that a statement is admitted, but that statement may incriminate a co-accused.⁸⁸ In *Henriques v The Queen*⁸⁹ it was held that the jury could be directed that if it is not sure whether the hearsay evidence is credible, it may acquit D1 for that reason (that is, it may assume it is true), but it should not make that assumption when considering the evidence against D2, if to do so would mean that D2 would be convicted. This is a difficult mental exercise.
- 4.62 All these considerations show that the provisions of sections 25 and 26 may create difficult decisions for a judge or for magistrates. As Watkins LJ has said, the tests of admissibility and discretion "call for the most careful and scrupulous exercise of judgment and discretion".⁹⁰ This raises the question of how wise it is for difficult questions of admissibility to be resolved by means of judicial discretion. We will revert to this question in Part IX below.⁹¹

Attacking the credit of an absent witness

- 4.63 Where "documentary hearsay" is admitted in evidence under either section 23 or 24, Schedule 2 of the Act expressly permits the other side to lead evidence of

⁸⁴ *Moore* [1992] Crim LR 882 and *Price* [1991] Crim LR 707.

⁸⁵ *Keenan* (1990) 90 Cr App R 1.

⁸⁶ *Samuel* [1992] Crim LR 189.

⁸⁷ *Neshet* [1990] Crim LR 579.

⁸⁸ Eg in *Aziz, Yorganci and Tosun*, 4 March 1994 (unreported), the Court of Appeal approved the trial judge's decision to admit a statement of an accomplice who was abroad which supported one defendant's defence at the expense of another's.

⁸⁹ *Henriques v The Queen* (1991) 93 Cr App R 237 (PC).

⁹⁰ *R v Acton JJ, ex p McMullen* (1990) 92 Cr App R 98, 104.

⁹¹ See paras 9.11-9.25 below.

various matters which, had the maker of the statement given evidence orally, could have been used to attack his or her credibility.⁹²

- 4.64 One problem which flows from the wording of this provision is that it may be the credibility of the supplier of the information, and not the maker of the statement, which the opposing party wishes to attack.⁹³
- 4.65 Another consequence of this provision in the Schedule is that if an absent witness's credibility is attacked in this way by a defendant who testifies, the defendant will not "lose the shield"⁹⁴ provided by section 1(f)(ii) Criminal Evidence Act 1898 since a witness who is not called is not a "prosecution witness".⁹⁵

The weight of hearsay evidence

- 4.66 Where hearsay is admitted the law in principle treats it as of equal weight with any other type of evidence. In *Kennedy*⁹⁶ the Court of Appeal expressly held that it would not have been right for the trial judge to direct the jury that less weight was to be given to a statement admitted under section 23 than to the testimony of live witnesses. Since in English law the defendant can generally be convicted on any single piece of evidence, this means that theoretically he or she can be convicted on a single piece of hearsay, if it is of a kind which falls within any one of the exceptions.
- 4.67 If the real foundation for the hearsay rule is that hearsay evidence is always inherently unreliable, then it may be a matter of concern that a person can be convicted on that evidence alone, as happened in *Nembhard v The Queen*,⁹⁷ for example, where the Privy Council upheld a conviction in a murder case despite the fact that the only piece of evidence against the defendant was the victim's dying declaration. However, if some kinds of hearsay are not inherently unreliable, then it may be acceptable that hearsay alone can be the basis for conviction in some

⁹² Sched 2, para 3 provides that "In estimating the weight, if any, to be attached to such a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise". This does not give the court firm guidance.

⁹³ See para 7.28 below.

⁹⁴ A defendant may not be cross-examined on his or her previous convictions or bad character by virtue of the Criminal Evidence Act 1898, s 1(f) unless, amongst other reasons "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution" (s 1(f)(ii)), in which case he or she may be cross-examined on such matters, if the leave of the court is given. This is referred to as "losing his shield".

⁹⁵ *Biggin* [1920] 1 KB 213.

⁹⁶ *Kennedy* [1992] Crim LR 37.

⁹⁷ *Nembhard v The Queen* [1981] 1 WLR 1515.

cases, but not in others. We consider this issue at paragraphs 5.34-5.36 below in the light of the provisions of the Convention.

The rule in practice

4.68 We trust that it is now clear that the law of hearsay is complex and uncertain. Fine lines have to be drawn between statements which are hearsay and statements which are real evidence, between implied assertions and non-assertive statements, and between statements that are relevant because of the assertions they contain and those which are relevant independently of their contents. These are matters on which learned academics have written erudite articles, and on which senior judges have often disagreed. Yet this is the law which must be applied, on the spot and off the cuff, by recorders and assistant-recorders, by stipendiary magistrates and lay magistrates, and by justices' clerks, not to mention the full-time professional judiciary. Moreover, it does not seem unreasonable to require that the rules by which someone is tried should be within the understanding of the average person who stands in the dock. It does not seem to us that the rules of hearsay pass this test.

PART V

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

- 5.1 The United Kingdom has not yet incorporated the provisions of the European Convention on Human Rights into English domestic law, so as to give individuals direct rights under the Convention against the national state; but it ratified the Convention as long ago as 1951, and has thus undertaken obligations in international law that it will conform in its domestic practice with the terms and principles of the Convention.¹ It follows that whenever it contemplates any particular measure of law reform the United Kingdom, and therefore this Commission, should do its best to ensure that any law which it proposes should be created or retained does indeed conform with the requirements of the Convention.²
- 5.2 At present, where there is ambiguity or uncertainty in a statutory provision or a point is not covered by the common law or statute, the domestic courts will look to the Convention and construe the law in accordance with it, but where the domestic legislation or common law is clear, it will be upheld even if this entails a contravention of the Convention.³
- 5.3 We put forward our views with great diffidence as it is difficult, for three reasons, to predict with confidence the attitude of the Strasbourg Court.⁴ In the first place, as we shall see, the terms of the Convention are vague. Secondly, on many issues there is a dearth of decided cases. And finally, perhaps because the Strasbourg

¹ For that obligation, see Brownlie, *Principles of Public International Law* (4th ed, 1990). As the Strasbourg Commission has put it, in the specific context of the Convention: "the Contracting Parties have undertaken, ...to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end": (1958-9) 2 YB ECHR 234.

² The UK is also a party to the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly in 1966. Individuals cannot petition the Human Rights Committee directly to consider claims of violations of rights set forth in the Covenant because the United Kingdom is not party to the Optional Protocol. If the United Kingdom did adhere to this protocol, then the individual would have to choose between applying under the Convention or the Covenant. He or she would not be able to use both: ECHR Art 27(1)(b) and Optional Protocol Art 5(2)(a).

Article 14 of the Covenant sets out the right to a fair trial. 14(3)(e) is drafted in similar terms to Article 6(3)(d) of the Convention:

14(3) "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

³ *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL).

⁴ See Abbreviations at p xiii above. The European Commission of Human Rights is referred to as "the Strasbourg Commission".

Court aims to interpret the Convention as a “living” and developing document, the doctrine of precedent weighs less heavily with the Strasbourg Court than it does in English law, and the Court appears to be changing its attitude towards hearsay.

Article 6

5.4 The principal provision of the Convention which protects the rights of the defendant at trial is Article 6, the relevant parts of which read as follows:⁵

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to *a fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law...

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:...

(d) *to examine or have examined witnesses against him* and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;... .

5.5 The requirements of Article 6(3)(d) comprise one of the factors to be considered when the Strasbourg Court decides whether or not there has been a fair trial within the meaning of Article 6(1); the two provisions are not considered independently of each other.⁶

5.6 In *Blastland*⁷ the Strasbourg Commission found that what it understood to be the purposes of the hearsay rule of English law, namely ensuring that the best evidence is before the jury and avoiding undue weight being given to evidence which cannot be tested by cross-examination, were legitimate and that in principle the rule did not entail a breach of Article 6(1). The Commission did not discuss the legitimacy of the exceptions to the rule.

5.7 The impact of these provisions on the use of hearsay evidence by the prosecution has been the subject of several judgments of the Strasbourg Court in the last ten years. None of these cases came from the United Kingdom, but the decisions have given rise to much discussion on the Continent, and, to a lesser extent, in this

⁵ Emphasis added.

⁶ “The purpose of 6(3)(d) is to put the accused person on an equal footing with the prosecution”; *X v FRG* Appl 1151/61, (1962) 7 Collection of Decisions of the European Commission of Human Rights 118. See also *Barberà, Messegué and Jabardo v Spain* (1989) 11 EHRR 360 and *Ochensberger v Austria* (1995) 18 EHRR CD170, 171.

⁷ *Blastland v United Kingdom* Appl 12045/86; (1988) 10 EHRR 528.

country.⁸ Whilst these decisions do provide some important guidance, several of them are hard to reconcile with each other. In consequence, it is not possible to be completely certain what sort of reform of the hearsay rule would be permitted by the Convention.

- 5.8 The phrase which determines whether Article 6(3)(d) might apply is the phrase “witnesses against him”. If the evidence to which the defendant objects is not the evidence of a “witness against him”, he cannot complain that his right “to examine or have examined the witnesses against him” has been infringed.
- 5.9 A series of decisions of the Strasbourg Court makes it plain that the word “witness” goes beyond its usual meaning (to an English lawyer) of someone who attends the trial to give oral evidence. It also includes a person who has made a formal statement to the police, which the prosecution has then put in evidence at trial.⁹ All the people whom the Strasbourg Court has so far categorised as “witnesses”, however, are people who have fed information, consciously and voluntarily, into the criminal justice system. In English parlance, the cases are concerned with depositions and police witness-statements. It does not necessarily follow that a casual remark allegedly made by a third party, which a live witness repeats in evidence, counts as a statement of a “witness”, thus triggering the defendant’s right to question the witness—for instance, where a policeman giving evidence says “The landlord of the Red Lion told me that Smith had said he had gone to the church with a ladder, so I went there, and found him on the roof stripping the lead.” This remark would fall foul of the hearsay rule in England, but it would be considered unobjectionable in most Continental systems, and whether or not it breached Article 6(3)(d) would probably depend on all the circumstances taken together.
- 5.10 The use of documentary evidence such as trade or business records, as evidence of transactions which are ingredients in the offence charged appear to be less likely to be in breach of Article 6(3)(d) than the use of depositions and police witness-statements in place of calling the witness.¹⁰

⁸ A conference was held on the subject in Linz, the proceedings of which are published as *Verwertbarkeit von Ausserungen gegenber Polizeiorganen in der Hauptverhandlung: Verhandlungen des Elften Osterreichischen Juristentages*, Linz 1991. The case law is discussed in English by C Osborne, “Hearsay and the European Court of Human Rights” [1993] Crim LR 255, and by A Beyer, C Cobley and A Klip, “Witness Testimony, Article 6 of the Convention on Human Rights and the Principle of Open Justice” in C Harding, P Fennell, N Jörg and B Swart (eds), *Criminal Justice in Europe, A Comparative Study* (1995).

⁹ This is implicit in the judgment in *Unterpertinger v Austria* (1991) 13 EHRR 175. The Strasbourg Court made the point explicitly in *Kostovski v The Netherlands*; (1990) 12 EHRR 434, para 40; *Delta v France* (1993) 16 EHRR 574, para 34; *Artner v Austria* (1992) Series A No 242, para 19; *Windisch v Austria* (1991) 13 EHRR 281, para 23.

¹⁰ See *Lüdi v Switzerland* (1993) 15 EHRR 173.

5.11 It is also unlikely that the Strasbourg Court would find that a trial had been unfair where a hearsay statement had been admitted merely to prove that it had been made, and not for the purpose of proving that it was true.¹¹

5.12 When will a trial be found to be unfair? The Strasbourg Court has said that the general principle of fairness is that all the evidence should be produced in the presence of the accused at a public hearing with a view to adversarial argument.¹² However, the cases show that this principle is not invariably observed to the letter. In the context of the discussion of possible reforms to the English hearsay rule, the significance of the rule that the accused should have the opportunity to put questions to the “witnesses against him” raises the following three issues:

- Does the right to question mean a right to put questions to the witness directly, or is it enough that the defence can put questions to the witness via a magistrate or judge?¹³
- Is the right to question a right to put questions to the witness orally at the trial, or is it enough for the defence to be given an opportunity to put their questions at an earlier stage in the proceedings?¹⁴
- Is the right to question “witnesses” an absolute one? Can the prosecution use in evidence the statement of a witness whom the defence have been unable to question, if it is genuinely impossible for this to be arranged (for example, because the witness is dead), or if there is nothing that could be gained from asking the witness questions?¹⁵

Is there a right to put questions directly?

5.13 The right “to examine or have examined witnesses against him” could be read as requiring the questions to be put directly by the defence: the defendant has the right “to examine witnesses”—by putting questions himself or herself where unrepresented—or “to have witnesses examined” by getting the defending lawyer to put them, where the defendant is represented. If it is read in this way then it is understandable that Article 6(3)(d) was not found to have been violated where the lawyer was allowed to put questions to the witnesses, although the accused himself

¹¹ In *Unterpertinger v Austria* the Strasbourg Court distinguished between the reading out of statements and their use as evidence, holding that it is where they are used as evidence that the rights of the defence come into play: (1991) 13 EHRR 175, para 31. For discussion of this distinction see paras 2.5-2.8 above.

¹² *Windisch v Austria* (1991) 13 EHRR 281.

¹³ See paras 5.13-5.14 below.

¹⁴ See paras 5.15-5.17 below.

¹⁵ See paras 5.18-5.25 below.

was not allowed to be present while the evidence was given.¹⁶ It may seem surprising, however, that the Strasbourg Commission was satisfied that Article 6(1) was satisfied in these circumstances.

- 5.14 It is much more likely, however, that the phrase “examine or have examined” was used to take account of the two different methods which the different European legal systems use for the examination of witnesses—the common law method, where witnesses are examined directly by the parties, and the method used in France, Germany and many other countries, where it is the presiding judge who examines the witnesses, and who can insist on the parties putting any questions they may have through the judge.¹⁷ Thus, for example, it would not offend against Article 6(3)(d) to provide that certain kinds of highly vulnerable witness should have the questions of both sides put to him or her through a single neutral person.¹⁸

Must the defence be able to put its questions at the trial itself, or may the questions be put at an earlier stage?

- 5.15 It is clear that the questions need not be put during the course of the trial itself. While the Strasbourg Court has said that it is preferable for the witnesses to be questioned orally at trial, the defendant’s rights are not infringed if the court hears or reads the statement of an absent witness, provided the defence had an

¹⁶ *X v Denmark* Appl 8395/78, (1982) 27 Decisions and Reports 50.

¹⁷ In *X, Y and Z v Austria* Appl 5049/71, (1973) 43 Collection of Decisions 38 (a case before the Strasbourg Commission which was declared inadmissible), important witnesses were heard “on commission” abroad. Neither the prosecutor nor, despite requests, the defendants’ representative were allowed to be present. Article 162 of the Austrian Code of Penal Procedure expressly provides for this procedure. Supplementary questions were put to the witnesses on the same basis at the request of the defence after they had studied the record of the first examination. The Commission therefore found that the accused’s right “to have examined witnesses against him” had been respected. Because Article 6(1) did not apply to the proceedings, the Commission was not able to go on to consider whether the trial as a whole was fair. Commissioner Trechsel has said extra-judicially that the defendant’s rights under the article are met if he can put questions through the judge: “Gerade die Form des Kreuzverhrs durch den Verteidiger schreibt Art. 6 Ziff 3 d EMRK aber nich vor—es gengt ja wenn die Mglichkeit besteht, Fragen (durch den vorsitzenden Richter) stellen zu lassen.” “Die Garantie des ‘fair trial’ nach Art. 6 EMRK und das strafprozessuale Vorverfahren”, speech to the Ministry of Justice in Vienna, 17 September 1992.

¹⁸ As the Pigot Committee proposed for very young or seriously traumatised children: Report of the Advisory Group on Video Evidence (Home Office, 1989), pp 27ff. On the other hand, s 34A of the 1988 Act (inserted by the Criminal Justice Act 1991, s 55), which deprives the unrepresented defendant of the right to question child witnesses in certain types of case, without providing for such a defendant’s questions to be put through someone else, could well fall foul of the Convention.

opportunity to put its questions to him or her at an earlier stage.¹⁹ In *Kostovski v The Netherlands*, the Court unanimously held:²⁰

In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument... . This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings... .

5.16 In *Isgro v Italy*,²¹ Isgro was charged with kidnapping and murder. The key evidence came from D, who made statements to the police and was also examined by an investigating judge (*giudice istruttore*) who arranged a confrontation between the accused and D. D had disappeared by the time of the trial and the trial court relied on his earlier statements. The Strasbourg Court rejected the convicted defendant's complaint that Article 6(3)(d) had been breached on the grounds, amongst others, that he knew the identity of the witness, and he *had* been able to put his questions to the witness at the confrontation which had taken place ahead of trial, despite the fact that his lawyer had not been present and he had therefore had to put his questions without the benefit of legal advice.

5.17 From this it follows that there could be no objection under Article 6(3)(d) of the Convention to an English court hearing the deposition of an absent witness which had been taken before a magistrate with the defence present, using provisions such as sections 42 and 43 of the Children and Young Persons Act 1933. Nor would there be any objection to the sort of procedure which the Pigot Committee proposed for taking the evidence of children ahead of trial.²² On the other hand, provisions like section 23 of the 1988 Act, which make potentially admissible the statements which witnesses give to the police on an occasion when the accused is neither present nor represented, may not be compatible with the Convention. Whether there is in fact a violation will depend, of course, on all the circumstances of the case.

¹⁹ If the witnesses are questioned at a pre-trial hearing in the absence of the accused, this will not necessarily be unfair where the witnesses were heard again at trial when they could be questioned by the defence: *X v FRG* Appl 6566/74, 1 D & R 84; *Liefveld v The Netherlands* (1995) 18 EHRR CD103. The same approach is taken in Canada: *Potvin* [1989] 1 SCR 525.

²⁰ *Kostovski v The Netherlands* (1990) 12 EHRR 434 para 41. The Strasbourg Court repeated this statement in *Delta v France* (1993) 16 EHRR 574, para 36, and in *Asch v Austria* (1993) 15 EHRR 597, para 27, and *Saïdi v France* (1994) 17 EHRR 251, para 43.

²¹ *Isgro v Italy* (1991) Series A No 194.

²² See n 18 above.

Will a statement be inadmissible if the accused never had a chance to question the witness?

5.18 Is it ever possible to put before the court the statement of an absent witness whom the defence has never had a chance to question without infringing the defendant's rights under Article 6(3)(d)?

5.19 Two views are possible. On a literal reading of Article 6, the answer might well be in the negative. Article 6(1) guarantees the defendant a trial that is in broad terms fair, and Article 6(3) gives him or her certain minimum rights without which the trial cannot be fair. Thus if the evidence in question counts as the statement of a "witness" it may not be used in evidence unless the defence had a chance to put its questions, however inconvenient that may be for the prosecution. This is the line the Strasbourg Court took in *Unterpertinger v Austria*,²³ where it held that the use of the statements the witnesses had earlier given to the police infringed the defendant's rights. It was irrelevant that it was impossible to arrange a confrontation between the witnesses and the defence because the witnesses decided to exercise their privilege, as relatives of the defendant, to refuse to give any further evidence. The Court took a similar approach in *Windisch v Austria* when it said:²⁴

The [Austrian] Government referred to the legitimate interest of the two women in keeping their identity secret. In its judgment the Regional Court stated that they were trustworthy persons and were afraid of reprisals on the part of the suspects. It added that the police depended on the co-operation of the population in investigating crimes.

This collaboration of the public is undoubtedly of great importance for the police in their struggle against crime. In this connection the [Strasbourg] Court notes that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to found a conviction is another matter. The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed.

5.20 This was also the approach of the court in *Lüdi v Switzerland*²⁵ and the same principle was reiterated in *Saïdi v France*²⁶ where the accused had been convicted

²³ *Unterpertinger v Austria* (1991) 13 EHRR 175. The accused was charged with assault on his wife and step-daughter. Although they had made statements to the police, by the time of the trial they refused to testify. They claimed a privilege which would not be available to them under English law. However, the scenario of alleged victims of assault refusing to testify is a familiar one.

²⁴ *Windisch v Austria* (1991) 13 EHRR 281, para 30.

²⁵ *Lüdi v Switzerland* (1993) 15 EHRR 173 in which the accused had been convicted of drug trafficking on evidence which included statements by an anonymous witness, an undercover police officer, who was never examined by the presiding judge, let alone by the defence, to preserve his anonymity. The Strasbourg Court found that Article 6(3)(d) had been breached.

²⁶ *Saïdi v France* (1994) 17 EHRR 251.

of drugs offences and involuntary homicide on identification evidence. The witnesses were examined by the *juge d'instruction*, but the defendant was not present and his request for a confrontation was refused. The Strasbourg Court held that the accused had not been given an "adequate and proper opportunity to challenge and question a witness against him".

5.21 It might be legitimate, however, to take an alternative view. This would involve saying (contrary to the literal wording of the Convention) that the rights expressly conferred by Article 6(3) are not absolute rights: they are merely factors which have to be considered in deciding a broader question—"Did the defendant receive a fair trial as required by Article 6(1)?" On this view it is proper for the court to allow in evidence the pre-trial statement of an absent witness whom the defendant has had (and will have) no chance to question, provided first that it is genuinely impossible to produce the witness for defence questioning, and secondly that this evidence is supported by other evidence against the defendant.

5.22 Although this line of reasoning is not really compatible with the dicta we have cited from the *Unterpertinger* and *Windisch* cases, it is the line which the Strasbourg Court has taken in a number of other cases.²⁷ *Unterpertinger* has not been reversed or overruled, but its effect has been diluted. In at least three later decisions the court has accepted that criminal proceedings can be "fair" despite the use of statements from witnesses whom the defence was unable to question.²⁸

5.23 Thus in one case the Strasbourg Court condoned the use of the statement where the witness was excused from the further questioning which the defence had requested partly because of his age and ill-health.²⁹ In another case, it condoned the use of the statement where the key witness, who had been questioned by the police and by the presiding judge, but not by the defence, could not be heard because she had

²⁷ The court has followed an approach taken by the Strasbourg Commission in a 1972 decision: *X v Austria* Appl 4428/70, (1972) 15 YB ECHR 264, in which the Commission rejected the appellant's complaint as inadmissible on the ground that there was no absolute right to examine opposition witnesses. Part of the evidence against the appellant had consisted of hearsay evidence of a former Czech diplomat and an anonymous German secret service agent. The conviction nonetheless stood.

²⁸ *Bricmont v Belgium* (1990) 12 EHRR 217; *Asch v Austria* (1993) 15 EHRR 597; *Arner v Austria* (1992) Series A No 242. See also *Liefveld v The Netherlands* (1995) 18 EHRR CD103, a decision of the Strasbourg Commission in which it was held that a trial was fair, although the identity of a witness ("Bravo") who was questioned by the defence was kept secret, and a statement by an anonymous informer whom the defence did not have an opportunity to question was admitted. The trial was held to be fair because "Bravo" was justified in wishing to keep his identity secret, there were opportunities to cross-examine him, the statement of the informer was supported by other evidence, and neither the statement of "Bravo" nor that of the informer constituted the only or main item of evidence on which the applicant's conviction was based.

²⁹ *Bricmont v Belgium* (1990) 12 EHRR 217, although we note that in the case of Mr Bricmont, who was co-accused with his wife, his complaint succeeded. As there was no other evidence against him, the Strasbourg Court held that the trial had not been fair.

vanished without trace.³⁰ The majority of the court found that the existence of other incriminating evidence, coupled with the accused's role in avoiding a confrontation with the witness at the pre-trial stages, justified the reception of the statement. One of the dissenting judges, Judge Vilhjálmsson, held that such a breach of the defendant's rights could not be justified in this way, because Article 6(3)(d) provided a "minimum" right.

5.24 In a third case the Strasbourg Court condoned the use of the statement where the witnesses as relatives of the accused (as in the *Unterpertinger* case) had exercised their privilege not to testify, saying "...the right on which [the witness] relied in order to avoid giving evidence cannot be allowed to block the prosecution, ...".³¹ This ruling conveys the impression that, when striking the balance between the public interest in securing convictions of the guilty and the public interest in the adequate protection of the accused, the Strasbourg Court has had regard on occasion to the practicalities of criminal procedure, which must, nonetheless, remain fair.³²

5.25 In each of these cases the Strasbourg Court thought it was an important element in making the trial a fair one that the national court had been able to base its guilty verdict on other evidence as well, even though it is very hard to see how the other evidence which justified the proceedings in *Asch* (medical evidence and evidence of the accused's disposition) differed in quality from the "other evidence" (medical evidence, the accused's accounts, the divorce file) in *Unterpertinger*, where it did not justify the proceedings. In these later cases the Strasbourg Court has, in effect, accepted that there can be derogations from a strict interpretation of Article 6(3)(d) on grounds of sufficiency of other evidence.³³ This must necessarily entail the Strasbourg Court not only deciding which items of evidence carried weight with the

³⁰ *Artner v Austria* (1992) Series A No 342. Both the Commission and Court made their decisions in this case by majorities, of 9-7 and 5-4 respectively.

³¹ *Asch v Austria* (1993) 15 EHRR 597, para 28, another majority decision.

³² The same balancing act can be seen in the reasoning in a Commission decision, *X v Belgium* Appl 8417/78, (1979) 16 D & R 200, where the accused was charged with arson occasioning loss of life. His brother had died in a house fire which the police originally thought was accidental. However, an unnamed person told the police that the accused and his brother had a row on the night of the fire. A police witness repeated in court what the anonymous informer had said. It was plain that the accused would not have been prosecuted if it were not for the remark of the informant. The Strasbourg Commission approached the question thus (at p 208):

The question which arises in the present case is therefore not so much that of the accused's right to have an informant summoned to appear in court as that of weighing the court's use of statements made by an informant against the applicant's right to a fair trial...

³³ This was part of the reasoning in *Isgrò* also. See n 21 above.

regional court, but also engaging in the exercise of assessing that evidence, as Judge Thór Vilhjálmsson said was being done in *Artner v Austria*.³⁴

The use at trial of a witness's previous statements

- 5.26 There is a case of the Strasbourg Commission which indicates that, in certain circumstances, it is not unfair for the court to rely on the contents of previous statements of witnesses who testify in court.³⁵ In *X v FRG*³⁶ two witnesses, A and W, had made statements to the police that they had received heroin from the accused. These statements were read out at trial. The witnesses were called and they both denied that they had received heroin from the accused. On appeal, their statements were read out again, W gave oral evidence again and still denied that the statement was true, whereas A was not heard (and the accused did not object). The Strasbourg Commission held that there was nothing wrong with the court relying on the original statements "as long as the use of such evidence is not in the circumstances unfair". It found there was no unfairness because: the accused had the opportunity to put questions to both witnesses at trial and to one of them on appeal; the accused had not objected to A's statement being read at the appeal without A being called; it was not the only evidence, the other evidence consisting of oral evidence from two police officers and a third civilian witness; and the court had carefully considered the issue of W's and A's credibility.

Victims of crime and the Convention

- 5.27 Most of the case law of the Strasbourg Court on issues of criminal procedure has arisen from the parts of the Convention which provide guarantees for defendants. However, victims of crimes have human rights as well, and if a country's rules of criminal law, procedure or evidence are ineffective to protect such victims, this deficiency sometimes enables them to complain that their rights under the Convention have been infringed.
- 5.28 In *X v The Netherlands*,³⁷ for example, the Strasbourg Court upheld a complaint by a mentally handicapped woman that, in effect, Dutch criminal procedure was not adequate to protect her. At the age of 16, she had sexual intercourse forced upon her by the son-in-law of the directress of the privately-run home for mentally incapacitated children where she lived. As Dutch law then stood, this man could not be prosecuted, because the offence which he had apparently committed could only

³⁴ *Artner v Austria* (1992) Series A No 242. The two dissenting judges in *Edwards v United Kingdom* 1993 15 EHRR 417, took a similar view of what was happening where the Court made an assessment of the likely effect on the credibility of police witnesses of evidence which emerged after the trial.

³⁵ See also a comparable case of the Canadian Supreme Court: *R v KGB* (1993) 79 CCC (3d) 257; para 13.46 below.

³⁶ *X v FRG* Appl 8414/78, (1980) 17 D & R 231.

³⁷ *X v The Netherlands* (1985) Series A No 91.

be prosecuted where the victim had made a formal complaint, and the girl was considered too seriously handicapped to do this. In consequence, the Netherlands were held to be in breach of Article 8(1) of the Convention.³⁸ This provision, said the Court, required the contracting States to provide their citizens with effective protection against being sexually abused, which, in the context of Dutch law as a whole, meant the possibility of criminal sanctions.

5.29 Although English law differs from Dutch law in that a formal complaint from an alleged victim is not essential, and a case could proceed if there were sufficient evidence from sources other than the victim, there is no doubt that English law is at present vulnerable to the same criticism so far as mentally incapacitated people are concerned. If they complain about a sexual assault, the hearsay rule prevents their complaint being put in evidence, and they must give their evidence orally to the court. In order to do this, however, they must satisfy a competency requirement, which means that they must show they understand “the nature of an oath”, something which many such people would find impossible to do.³⁹ As a result, there is sometimes no legal way in which the complaint of a mentally incapacitated person can be put before a criminal court, and if the other evidence is not strong enough by itself (as it may not be where, for example, there is inconclusive medical evidence) a prosecution cannot proceed.

5.30 English law is arguably open to criticism, too, to the extent that it sometimes gives a vulnerable complainant the right in theory to be heard, but extracts for this right a price which many reasonable people in that category (or those whose job it is to care for them) might find so high that they would prefer to let the offender get away with it. In one recent case a woman who was both mentally handicapped and epileptic was obliged to give evidence in open court, and undergo a prolonged cross-examination which caused her to collapse in epileptic fits.⁴⁰ In another, a sex case, a child of 12 was cross-examined for over a week.⁴¹ The requirement to give oral evidence is a greater obstacle for mentally incapacitated people than for others.

The application of the hearsay rule to the defence as to the prosecution

5.31 In the United Kingdom all official proposals to reform the hearsay rule have proceeded on the basis that the rule, and any exceptions to it, must operate in the same way for the prosecution as for the defence.⁴² As far as the Convention is

³⁸ Article 8(1) provides that: Everyone has the right to respect for his private and family life, his home and his correspondence.

³⁹ *Bellamy* (1985) 82 Cr App R 222. For a case where the victim was not permitted to testify, see *Richardson*, *The Independent*, 5 October 1989.

⁴⁰ *Stretton* (1988) 86 Cr App R 7.

⁴¹ A child sexual abuse case in South Wales: *Daily Telegraph* 10 August 1994.

⁴² Eg, the proposals of the CLRC Evidence Report, para 250. See para 12.10 below.

concerned, this is clearly not the case: although Article 6(3)(d) puts limits on the extent to which the prosecution may make use of hearsay evidence, nothing in Article 6 restricts the use of hearsay evidence by the defence. However, the second part of Article 6(3)(d) requires the attendance and examination of witnesses called against the accused *under the same conditions*, and some dicta of the Strasbourg Court⁴³ describe the aim of Article 6 as being to put defence and prosecution on an equal footing.

The right of the defendant to adduce hearsay evidence

5.32 In Part VII we discuss cases such as *Sparks*⁴⁴ in which the Judicial Committee of the Privy Council held that a trial judge had rightly rejected the hearsay evidence of a victim of indecent assault (who was then about three years old) who had said to her mother that the wrongdoer was a coloured man, whereas the accused was white. Since Article 6(3)(d) does not apply to the defence in the same way as to the prosecution, it does not follow that evidence which the prosecution could not adduce should be excluded if tendered by the defence. The exclusion of cogent exculpatory evidence could constitute a violation of the right to a fair trial under Article 6(1).

5.33 A more difficult problem arises when there are a number of defendants. The exercise by one defendant of his or her right to put in hearsay evidence might be fair under the Convention from that individual's point of view, but yet be unfair as against another defendant.

Conclusions

5.34 If a complaint is made that there has been a breach of the Convention, the Strasbourg Commission and the Court will look at all the circumstances of a case, and consider the proceedings as a whole, in order to decide whether there has been a violation of Article 6(1) or Article 6(3)(d). In *Saïdi v France*⁴⁵ it was held that:

...the taking of evidence is governed primarily by the rules of domestic law and...it is in principle for the national courts to assess the evidence before them. The [Strasbourg] Court's task...is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair.

5.35 There seem to be five main conclusions that can be drawn from all this when we consider possible reforms to the hearsay rule in England. First, the use of hearsay evidence is compatible with the Convention if it consists of the statement of a witness whom, in the pre-trial phase, the defence has had a chance to question. Secondly, the use of hearsay evidence which consists of statements from people

⁴³ Eg, *X v FRG* Appl 1151/61, (1962) 7 Collection of Decisions 118.

⁴⁴ *Sparks* [1964] AC 964; see para 7.36 above.

⁴⁵ *Saïdi v France* (1994) 17 EHRR 251, para 43.

whom the defence has had (and will have) no chance to question is probably compatible with the Convention where questioning by the defence is genuinely impossible, but such evidence should not found a conviction if it stands alone.⁴⁶

5.36 This is important, because these principles are inconsistent both with the hearsay rule as it has evolved at common law, and with recent Government-inspired attempts to reform it. As far as the common law is concerned, a single piece of hearsay evidence, if it is admissible, is something upon which the court is entitled to convict, however weak it may be, and whether or not the defence had the chance to put any questions.⁴⁷ A series of reforms has destroyed such machinery as ever did exist in England to provide for the pre-trial questioning of witnesses before a magistrate with the participation of the defence. The evidential gap where the witness later goes missing has been filled by allowing the prosecution to use in evidence the statement the missing witness gave—without defence questioning—to the police.⁴⁸

5.37 Thirdly, there would apparently be no breach of Article 6(3)(d), where a witness does appear in court, if the court were to accept an earlier statement made by the witness as evidence of the truth of its contents, even where the witness has later contradicted that statement in the course of the oral evidence he or she has given on oath.⁴⁹

5.38 Fourthly, although it is not necessary for the rules of evidence to apply in the same way to the prosecution and to the defence, the Convention requires that the accused should not be in a less advantageous position than the prosecution.

⁴⁶ This was a significant factor in *Delta v France* (1993) 16 EHRR 574, and in *Saidi v France* (1994) 17 EHRR 251.

⁴⁷ See paras 7.80-7.82 below.

⁴⁸ See paras 3.50-3.53 above.

⁴⁹ See para 5.26 above.

5.39 Finally, if a defendant were not allowed to use a cogent piece of evidence because it fell foul of the hearsay rule, he or she might be able to complain successfully that this infringed the right to a fair trial under Article 6(1) and the present operation of the rule leaves it open to this criticism.⁵⁰

⁵⁰ The defendant in *Blastland v United Kingdom* 12045/86; (1988) 10 EHRR 528 (para 5.6 above) ran this argument, but the Strasbourg Commission declared his complaint inadmissible partly because, although Mr Blastland was not permitted to lead hearsay evidence of what the third party had said, he knew who the person was and there was (theoretically) nothing to stop him calling him as a defence witness, and partly because B had the right to challenge the hearsay ruling, and it could not therefore be said that there was not "equality of arms". This consideration weighed heavily with the Commission; and if this possibility had not existed it looks as if the answer might have been different. See *Vidal v Belgium* (1992) Series A No 235-B, where the Strasbourg Court upheld the defendant's complaint that he had not received a fair trial where the Brussels Court of Appeal had refused to allow the defendant to call possibly relevant defence evidence, because they had given no reason for their refusal.

PART VI

JUSTIFICATIONS OF THE HEARSAY RULE

Introduction

- 6.1 This Part sets out the arguments which are (or have been) advanced in favour of the rule excluding hearsay. Lord Normand summarised the weaknesses of hearsay evidence, and we take this summary as our starting point:¹

[Hearsay] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

- 6.2 The purpose of this analysis of the justifications of the rule is to see whether, individually or cumulatively, they should lead to hearsay being barred, or whether they are instead factors to be taken into account when deciding on the weight to be given to hearsay evidence.

“[Hearsay] is not the best evidence...”²

- 6.3 Hearsay, it is said, is inferior to direct evidence (for the reasons which are examined in detail below) and it should therefore not be admitted.³ It is true that people act on such evidence every day of their lives, but the decisions that fall to be made in criminal proceedings are altogether more important than ones we make in everyday life, and should only be made upon evidence of the highest quality.
- 6.4 However, if most hearsay is inferior to most direct oral testimony, this is not always so, and some pieces of evidence which are legally classed as hearsay are plainly superior to oral testimony. The classic example is *Myers v DPP*⁴ where a contemporaneous record on which car workers had recorded the cylinder-block and chassis numbers of the cars they were assembling was not admitted, even though such evidence would have been much more reliable than the oral recollection of the

¹ *Teper v R* [1952] AC 480, 486, per Lord Normand, cited by Lord Oliver of Aylmerton in *Kearley* [1992] 2 AC 228, 259, and in *Blasland* [1986] AC 41, 54, per Lord Bridge of Harwich, with whom Lords Fraser of Tullybelton, Edmund-Davies, Brightman and Templeman agreed. See para 1.19 above.

² Per Lord Normand in *Teper v R* [1952] AC 480, 486; para 6.1 above.

³ This argument is related but not identical to the “best evidence rule”. The basis of the rule is that “there is but one general rule of evidence, *the best that the nature of the case will admit*”: *Omychund v Barker* (1744) 1 Atk 21, 49; 26 ER 15; per Lord Hardwicke LC (emphasis in original). Times have changed and the best evidence rule is said to be applied so rarely that it is virtually extinct: *Kajala v Noble* (1982) 75 Cr App R 149. The issue now is whether the evidence is admissible and relevant. The best evidence rule, even if it still survives, has no relevance to hearsay.

⁴ “It would be no advantage, if [the workman] could have been identified, to put him on oath and cross-examine him about one out of many hundreds of repetitious and routine entries made three years before”: [1965] AC 1001, 1036, per Lord Pearce. For the facts of *Myers* see para 3.60 n 109 above.

workers of what they had seen three years later, assuming it had been possible to trace such workers.⁵

6.5 Hearsay may well be the “best evidence” in the sense of the best that is available, because the original source of the information can no longer be produced: because he or she is dead, for example. Moreover, although it is second-hand, some hearsay evidence may be almost as good as the first-hand account would have been. In this situation, the choice is between hearsay evidence and none at all. It is not obvious that the best solution lies in a blanket refusal to hear the hearsay evidence.

6.6 The argument that hearsay is not the best evidence falls down when applied to the exceptions to the rule. As Lord Reid said:⁶

The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far *the best evidence available*.

6.7 Our provisional conclusion is that **some hearsay evidence is the best evidence and some is not; and that, where it is, the rule operates irrationally to prevent its admission.**

The danger of manufactured evidence⁷

6.8 In *Kearley* Lord Ackner gave, as an additional reason for excluding evidence of telephone calls where the callers were not produced in court, that it was the sort of thing that could easily be invented by the police:

Professor Cross in *Cross on Evidence*, 5th ed (1979), p 479 stated that a further reason justifying the hearsay rule was the danger that hearsay evidence might be concocted. He dismissed this as “simply one aspect of the great pathological dread of manufactured evidence which beset English lawyers of

⁵ These records would now be admissible under s 24 of the 1988 Act; see paras 4.28-4.35 above.

⁶ *Myers v DPP* [1965] AC 1001, 1024 (emphasis added).

⁷ See CLRC Evidence Report, para 229. Fear of falsehood and concoction has, in the past, been used to justify the exclusion of a number of kinds of evidence which are now admissible, and which everyone now accepts it is right to admit. Thus in the seventeenth century fear of concoction was the reason why trade and business records were excluded, and more recently, conservatively-minded lawyers opposed giving defendants the right to testify on the ground that their evidence would probably be lies. Still more recently, the courts routinely refused to admit the evidence of young children on the ground that their word could not be trusted: *Wallwork* (1958) 42 Cr App R 153.

the late 18th and early 19th centuries”. Some recent appeals, well known to your Lordships, regretfully demonstrate that currently that anxiety, rather than being unnecessarily morbid, is fully justified.⁸

It is open to both prosecution and defence witnesses to manufacture evidence. Prosecution witnesses other than police officers may be motivated to lie to secure a conviction. For example, if there were no exclusionary rule, police records of spurious complaints by one neighbour against another would be admitted as evidence. Cross-examination might not uncover a grudge as a reason for making false allegations, but such a motive would be far more difficult to demonstrate to the court if the complainant were not called to court to be questioned.

6.9 If there were no hearsay rule, the defence could produce in evidence a letter or a witness-statement in which the declarant—alas, now unavailable—claims to have seen the offence being committed by someone other than the defendant, or claims that he saw the defendant somewhere else at the time when the offence was committed. Such evidence, even if obviously weak, might nevertheless be enough to persuade a tribunal of fact that there was a reasonable doubt about the accused’s guilt. Fears of this sort pervade the CLRC Evidence Report,⁹ and led it to qualify its proposal to relax the hearsay rule with a ban on statements which came into existence only after the suspect knew that he or she would be prosecuted.¹⁰ The Bar Council also expressed these fears in its official response to the CLRC Report.¹¹

6.10 The fear of manufactured evidence produced by the defence rests on the notion that it is somehow unfair to expect the Crown to disprove every possible explanation of the facts other than that the defendant is guilty of the charge. The standard of proof means that, where there is a reasonable doubt, there should be an acquittal. If it is made too easy for the defence to introduce all sorts of “red herrings”, it becomes easy for defence counsel to point to potential reasonable doubts. Relaxing the exclusionary rule would make it easier for this to occur. Against this it might be said that the prosecution must be able to satisfy the jury that the charge is made out, come what may, and if the Crown cannot show the jury why they should ignore the “red herrings”, then it is just for there to be an acquittal, since no one has shown that the “red herrings” are indeed spurious.

⁸ [1992] 2 AC 228, 258. The facts of the case are given at para 7.56 below.

⁹ See paras 8.10 and 8.15 below.

¹⁰ CLRC Evidence Report, para 229; Draft Criminal Evidence Bill, cl 32(1).

¹¹ “Not the least of the arguments against the Committee’s proposals is the advantage that would be taken by such criminals of the opportunities afforded them by this part of the Bill”: General Council of the Bar, *Evidence in Criminal Cases: Memorandum on the Eleventh Report of the Criminal Law Revision Committee* (1973).

- 6.11 The real issue is whether the risk of manufactured evidence should mean that the evidence is automatically inadmissible or whether the risk of manufacture should go to its weight.
- 6.12 The risk of manufacture increases if the source of the original information is not available for cross-examination. This risk could be reduced by limiting any new exceptions to the rule to first-hand hearsay and by a number of other methods, such as a requirement that advance notice be given of any hearsay evidence.
- 6.13 Such additional requirements, which may be desirable in certain contexts, do not settle the central question. This is whether there should be a filter on evidence put before a court, so that the jury only hears evidence of a certain minimum standard, or whether all types of evidence should be freely admissible. In the latter case, a judge can draw a jury's attention to, and magistrates can remind themselves of, the defects of hearsay evidence. The answer to this question depends, as we point out at paragraphs 6.63-6.65 below, on whether a lay tribunal is assumed to be able to identify fabricated evidence correctly. The present rules do not, of course, succeed in keeping all manufactured evidence out of court, nor in preventing questionable verdicts being reached as a result.
- 6.14 Judicial warnings are used to ensure the jury is aware of the weakness of other types of evidence, and these warnings appear to work. Magistrates already evaluate hearsay evidence in criminal proceedings, and in the non-criminal proceedings which take place in their courts.¹² We believe that in the case of first-hand hearsay, where the witness can be identified, the safeguard set out at paragraph 9.9 below together with the procedures considered at paragraphs 11.41 and 11.46-50 below, accompanied by an appropriate judicial warning,¹³ would be adequate to reduce the risks of manufactured evidence to an acceptable level.
- 6.15 Our provisional view therefore is that **this is a good justification only for excluding *multiple* hearsay and the hearsay evidence of *unidentified* witnesses.**

The risk of errors in transmission

- 6.16 Hearsay often carries the risk of errors appearing as the evidence is repeated by different people. The person who reports the words of another may have misheard

¹² Magistrates deal with licensing, family proceedings (under the Domestic Proceedings and Magistrates Court Act 1978), and cases under the common law and sundry statutes, eg local government, planning and public health.

¹³ See paras 6.65-6.80 below, where such warnings are discussed.

them or misinterpreted them.¹⁴ This risk is all the greater if the reporter had a preconceived idea of what the other person was going to tell him or her.¹⁵

6.17 This objection to hearsay evidence does not in itself justify retaining the hearsay rule in its present form, because it excludes as “hearsay” not only statements where the risk of invention or distortion is a real one, but also certain statements where there can be no doubt at all about what was said. Thus, as we saw earlier,¹⁶ the hearsay rule not only prevents a witness repeating what a third party allegedly told him, but also renders inadmissible a letter from the third party giving an account of the event, or a tape-recording of him actually describing it.

6.18 We take the view that, once again, as with the fear of manufactured evidence, the central issue is whether the existence of such risks should go to admissibility or to weight.¹⁷ Our provisional view is that certain procedural safeguards can reduce the risks,¹⁸ but only in the case of first-hand hearsay; and therefore **this is a good justification only for excluding *multiple* hearsay.**

6.19 Even if we can be certain of the words the third party used, there are other tests which cannot be applied to the evidence.

“...the light which his demeanour would throw on his testimony is lost.”¹⁹

6.20 It is widely believed that a witness’s “demeanour”—that is, the unconscious behaviour of the witness in the course of giving evidence—gives important clues as

¹⁴ A Trankell, *Reliability of Evidence* (1972) pp 56-64.

¹⁵ An example appears in Professor La Fontaine’s study of cases in which children had allegedly suffered “ritual” abuse, *The Extent and Nature of Organised and Ritual Abuse* (HMSO 1994). In one case the “specialist” gave as a reason for considering that the children had been involved in ritual abuse that “the children described going to the woods at night”. This was inaccurate: one little girl was asked by the interviewer: “Where were you when it [the sexual abuse] happened?” She answered “in the shadow” and then “in the trees”. Three weeks later at another interview the girl was told that she had said that it happened “in the dark”. She tried to correct this by referring to shadows and trees (which implied daylight) but made no impression on the adults’ conclusions.

¹⁶ See para 2.33 above.

¹⁷ Compare our approach to similar issues in civil proceedings in *The Hearsay Rule in Civil Proceedings* (1993) Law Com No 216, paras 4.5-4.6.

¹⁸ See paras 9.9 and 11.41 below.

¹⁹ *Per* Lord Normand in *Teper v R* [1952] 2 AC 480, 486.

to whether he or she is telling the truth.²⁰ In *Collins*,²¹ for example, Humphreys J said:

The result [of reading the depositions instead of hearing the witnesses live] was to deprive the jury of the inestimable advantage—the one great advantage to which those who uphold the system of trial by jury always point—of the opportunity of not only seeing the witnesses who give evidence and hearing what they have to say, but also of observing their demeanour in the witness-box.

6.21 Other judges have disagreed with this, and have doubted whether the demeanour of a witness is really much of a clue as to whether he or she is telling the truth.²² In an extra-judicial writing, MacKenna J said:²³

I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. ...For my part I rely on these considerations as little as I can help.

6.22 Psychological research suggests that it is the doubters who are right.²⁴ Studies indicate that if observers are familiar with a speaker, they will be better able to tell when that speaker is lying. This fits with common sense. It also means that the chances of a liar being detected will be lower in a courtroom because a juror or magistrate will, as a matter of law, be a stranger to the witness.

²⁰ Eg, the NZLC thought the ability to observe the demeanour of a witness “undoubtedly important” (NZLC Preliminary Paper No 10 (1989) p 3). During the Committee Stage deliberations on the 1988 Act it was pointed out, by Peter Archer MP, that the presence of a witness in court meant that “the jury can actually see someone in the witness box giving evidence and use their common sense and experience and know what they make of the witness”: (1988) HC Standing Committee H col 199-120.

²¹ *Collins* (1938) 26 Cr App R 177, 182.

²² Eg Lord Roskill: “The picture of the lynx eyed judge who can always detect truth from falsity at a glance is not one which I would ever have claimed for myself, and I do not believe it is realistic.” *Hansard* (HL) 20 October 1987, vol 489, col 82; Henry Cecil (Judge Leon) *Just Within the Law* (1975) pp 179-80; Lord Wigoder speaking in a House of Lords debate on the Criminal Justice and Public Order Bill 1994: “The problem is how does one decide which is the truth. It is not by looking at the witness and judging by his or her demeanour. That is no test and we all know the dangers of that” *Hansard* (HL) 5 July 1994, vol 556, col 1261. Lord Wigoder was speaking during the debate on corroboration about witnesses who relate sexual episodes, ie complainants.

²³ Mr Justice MacKenna, “Discretion” (1974) 9*ns* Irish Jurist 1, 10, adopted by Lord Devlin in *The Judge* (1979) p 63.

²⁴ Reviews of the literature can be found at OG Wellborn, “Demeanor” (1991) 76 Cornell LR 1075, and JA Blumenthal, “A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993) 72 Neb L Rev 1157.

- 6.23 Research tends to show that the ability to deceive varies widely between individuals. Some will be much more successful at it than others.²⁵ The court, of course, will not know which type of communicator each witness is.
- 6.24 It appears that although there are physical signs of the truthfulness of a speaker, they are not the signs which are commonly assumed to denote a liar.²⁶ A sizeable body of research indicates that the physical signs which people often think are indicators that a person is telling lies are really signs of stress;²⁷ and as a witness may be stressed because he finds it uncomfortable to tell a lie, or because she finds it uncomfortable to tell the truth, the chances of an observer correctly guessing that someone is lying from his or her “demeanour” are little better than the chance of doing so by tossing a coin.²⁸
- 6.25 Research also indicates that observers appear to be even worse at assessing a witness’s accuracy than at assessing a witness’s sincerity. It has been found that a witness’s manner did indeed affect the observer’s perception, but not in a way that improved the observer’s judgment: “The confidence of the witness, rather than accuracy, was the major determinant of juror belief.”²⁹
- 6.26 After reviewing the available psychological literature, JR Spencer and Rhona Flin conclude:³⁰
- The most that can be said for the value of the demeanour of a witness as an indicator of the truth is that it is one factor, which must be weighed up together with everything else. It would be quite wrong to promote it to the level where we use it to accept or reject the oral testimony of a witness in the face of other weighty matters all of which point the other way.
- 6.27 To make matters worse, other studies indicate that many people believe, wrongly, that their ability to detect lies from visual clues of this sort is considerably better

²⁵ P Ekman, *Telling Lies: clues to deception in the marketplace, marriage and politics* (1986) pp 162 and 185.

²⁶ JA Blumenthal, “A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993) 72 Neb L Rev 1157, 1192.

²⁷ Eg GR Miller and JK Burgoon, “Factors affecting assessments of witness credibility” *Psychology in the Courtroom* ch 6, pp 172-3.

²⁸ P Ekman, *Telling Lies: clues to deception in the marketplace, marriage and politics* (1986); OG Wellborn, “Demeanor” (1991) 76 Cornell LR 1075; M Stone, “Instant lie detection? Demeanor and credibility in criminal trials” [1991] Crim LR 821.

²⁹ OG Wellborn, “Demeanor” (1991) 76 Cornell LR 1075, 1089, referring to GL Wells, RCL Lindsay and TJ Ferguson, “Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification” (1979) 64 Journal of Applied Psychology 440.

³⁰ JR Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) pp 280-281.

than chance.³¹ This means, as some psychologists have pointed out, that seeing and hearing a witness give live evidence can actually be a source of error.³²

- 6.28 If it really is important for the court to be able to observe the demeanour of a witness³³ this could justify some kind of rule excluding hearsay evidence, but it clearly does not justify the details of the present hearsay rule, because this excludes, among other things, interviews with absent witnesses recorded on film or video³⁴ although in such cases the court is able both to see and hear the witness giving evidence.
- 6.29 We have found it difficult to come to a provisional conclusion in answer to the contention that a major shortcoming of hearsay evidence is that the jury or magistrates are deprived of the opportunity to observe the demeanour of a witness. We note that some judges reject this contention,³⁵ and that the psychological research contradicts it.³⁶
- 6.30 **Insofar as a witness's demeanour does help the fact-finders to reach an accurate verdict, our preliminary conclusion is that it is not so significant a factor in itself as to justify the exclusion of hearsay evidence.** Warnings given to the jury can draw their attention expressly to the fact that they have not seen how the witness gives evidence, nor how he or she would have stood up to cross-examination.

"...it is not delivered on oath."³⁷

- 6.31 The oath historically had a central place in a system of justice based on a belief that God would punish the liar.³⁸ Thus the idea persisted that oaths were an effective

³¹ P Ekman, *Telling Lies: clues to deception in the marketplace, marriage and politics* (1986) p 186; G Köhnken, "The evaluation of statement credibility: social judgement and expert diagnostic approaches" in Spencer, Nicholson, Flin and Bull (eds), *Children's Evidence in Legal Proceedings: an International Perspective* (1990); G Köhnken, "Glaubwürdigkeit: Empirische und theoretische Untersuchungen zu einem psychologischen Konstrukt" (Dissertation, University of Keil, 1988).

³² "The importance of hearing and cross-examining witnesses is not in the opportunity it gives the judge to detect whether the witnesses are telling the truth or lying from their tone of voice, choice of words or expressions. The chances of doing this, as we know from research, are limited—though certain judges think otherwise, as a result of which the 'immediacy' of the proceedings can itself be a source of error..." Crombag, Van Koppen and Wagenaar, *Dubieuze Zaken—de Psychologie van Strafrechtelijke Bewijs* (1992) p 246.

³³ It is arguable that observing a witness's demeanour may be helpful if the fact-finders' attention is directed to the most likely physical indicators of truthfulness: JA Blumenthal, "A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72 Neb L Rev 1157, 1198-1200.

³⁴ See paras 13.21-13.24 below which set out an exception which may cover such evidence in certain circumstances.

³⁵ See the views of Lords Roskill and Devlin and McKenna J referred to at para 6.21 above.

³⁶ See paras 6.22-6.27 above.

³⁷ *Per* Lord Normand in *Teper v R* [1952] 2 AC 480, 486.

³⁸ Thus when imposing a prison sentence for blasphemy, Ashurst J said that "if the name of our Redeemer were suffered to be traduced, and his holy religion treated with contempt, the solemnity of the oath, on which the due administration of justice depends, would be

way to make a witness tell the truth. Historically, the fact that the statement was not made on oath has usually been given as the main reason for justifying the rejection of hearsay evidence.³⁹

- 6.32 It is clear that nowadays an oath is no kind of guarantee that the witness will tell the truth and there is widespread scepticism about the utility of oaths. In 1972 the CLRC commented,⁴⁰ “The oath has not prevented an enormous amount of perjury in the courts.” Some European legal systems have abolished the oath; several responsible organisations in England have called for the oath to be abolished here;⁴¹ only one exception to the hearsay rule in the United States Federal Rules of Evidence depends on the oath;⁴² and the fact that they are on oath probably makes little difference to many people’s truthfulness.⁴³
- 6.33 It may well be that any responsible person would be more careful about the accuracy of what he or she said in court than in casual conversation, but this may have more to do with the public nature of the proceedings or the prospect of being closely cross-examined than with being on oath.⁴⁴ On the other hand, the stress of testifying may affect the witness’s ability to recall and communicate facts accurately.⁴⁵
- 6.34 If the absence of an oath justifies scepticism about the weight of some hearsay evidence, once again it does not justify the details of the present English hearsay rule. For instance, the rule excludes as hearsay statements made by witnesses to the police, yet responsible people would usually take care in what they said in such circumstances, and the danger of liability under section 89 of the Criminal Justice Act 1967 is drawn to their attention when they sign such statements.

destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments”: *Williams* (1798) 26 St Tr 644.

³⁹ It was a principal reason given by Gilbert: “...if a man had been in Court and said the same thing and had not sworn it, he had not been believed in a court of justice...” *Law of Evidence* (2nd ed 1760, written before 1726) p 152.

⁴⁰ CLRC Evidence Report, para 280 (vi).

⁴¹ Including JUSTICE, *Witnesses in the Criminal Courts* (1986) p 7, citing the Magistrates’ Association, the Justices’ Clerks’ Society and the Law Society as generally supporting this approach; and a majority of the CLRC in its Evidence Report (paras 279-281).

⁴² This exception is prior testimony: Federal Rules of Evidence, Rule 804(b)(1). See Appendix B, para 4.12 below.

⁴³ In *Hayes* the Court of Appeal stated that “It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised”: [1977] 1 WLR 234, 237, *per* Bridge LJ.

⁴⁴ Wigmore suggests that the oath adds little to cross-examination, which is the real test: *Wigmore on Evidence* vol 5, § 1362.

⁴⁵ JR Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) p 268. See also para 13.33 n 65 below.

rule. For instance, the rule excludes as hearsay statements made by witnesses to the police, yet responsible people would usually take care in what they said in such circumstances, and the danger of liability under section 89 of the Criminal Justice Act 1967 is drawn to their attention when they sign such statements.

- 6.35 Our provisional conclusion is that **there is no clear evidence which indicates that an oath or affirmation in itself promotes truthful testimony.**

The absence of cross-examination: “The jury would have no opportunity to judge the way in which [the prosecution witnesses] stood up to that testing process.”⁴⁶

- 6.36 The absence of the opportunity for cross-examination is the objection to hearsay evidence which is most strongly pressed today.⁴⁷ Lord Irvine of Lairg put the case in the House of Lords debate on the Criminal Justice Bill 1988.⁴⁸

There is no advocate who has not experienced countless cases where a story that seemed consistent and watertight when set down on paper was destroyed by a proper and skilful cross-examination.

- 6.37 In the same debate Lord Hutchinson of Lullington gave the following illustration. Referring to a letter in which the writer said “I saw so-and-so through a window threatening his wife with a knife” he argued:⁴⁹

How could that be disputed? How could the identification be disputed? How did the writer of the letter know that it was the wife? How did he know it was a knife? As an historic document⁵⁰ that could not be disputed.

- 6.38 These two views depend on the assumption that the weaknesses in hearsay evidence would not be appreciated by juries or magistrates if there were no cross-examination. As we mention at paragraphs 6.67-6.68, almost no research has been

⁴⁶ *Per* Kenneth Jones J in *O’Loughlin and McLaughlin* [1988] 3 All ER 431, 436.

⁴⁷ The Pigot Report (Report of the Advisory Group on Video Evidence (Home Office, 1989)) (see para 13.22 below) for example, describes cross-examination as “essential” at para 2.22. Zuckerman describes it as “[t]he most effective method for testing a witness’s evidence” in *The Principles of Criminal Evidence* (1989) p 93. We note in passing that it is not unknown for the jury to be allowed to take account of a witness’s evidence, even though cross-examination was not completed, where the witness is unable to continue: *Stretton and McCallion* (1986) 86 Cr App R 7 and *Wyatt* [1990] Crim LR 343. Cf *Lawless and Basford* (1994) 98 Cr App R 342, where the convictions were quashed because, *inter alia*, it was very doubtful whether any direction from the judge could overcome any prejudice arising from the evidence in chief of a witness who had not been cross-examined because of illness.

⁴⁸ *Hansard* (HL) 20 October 1987, vol 489, col 78.

⁴⁹ *Hansard* (HL) 20 October 1987, vol 489, col 90.

⁵⁰ The term “historic documents” was used in the debate to describe documents other than those which had been brought into existence with an eye to use in criminal proceedings.

undertaken on the ways in which juries and magistrates assess evidence and it is therefore difficult to test the validity of this assumption.

6.39 Lord Hutchinson gave an example of evidence which is untestable, but on which a skilled cross-examiner might have been able to make some impression. It may not always be the case that cross-examination is or could be useful. This point can be taken in three stages: what are the defects which cross-examination is supposed to expose; how effective a tool is it; are there are other ways of bringing out those defects? We will now consider the merits of cross-examination in the light of these three questions.

6.40 The defects which may exist in a person's account of an incident are:⁵¹

- that the person does not have personal knowledge of it;
- that the person did not perceive it accurately;
- that the person does not recall accurately what he or she perceived;
- that the language in which the witness describes the event is ambiguous;
- that the witness might not be sincere: he or she might be unconsciously biased, or deliberately lying.

The possible defects interact. For example, unconscious bias could have affected the witness's perception, or judgment of the incident, or recollection of it, as well as the way it is recounted in court.

6.41 Psychological research reveals some of the dangers associated with hearsay testimony where eye witness testimony is concerned. The weakness of identification evidence was thoroughly rehearsed in the Devlin report⁵² (which led to the *Turnbull* guidelines),⁵³ but it is worth pointing out that it is not only identification evidence which may be faulty. The ALRC conducted a review of psychological research into perception and recall and concluded: "The experiments demonstrate the incompleteness and inaccuracy of perception, memory, and recall and, therefore, of testimony."⁵⁴ It is these weaknesses which need to be probed or examined in some way.

⁵¹ E Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 *Harv L Rev* 177.

⁵² *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (The Devlin Report)* (1976).

⁵³ These guidelines set out when a prosecution case which is based solely or substantially on identification evidence should be dismissed because of the quality of that evidence. They are set out in the case of *Turnbull* [1977] QB 224, 228-230.

⁵⁴ ALRC Research Paper No 3 Hearsay Evidence Proposal (1981) ch 2, para 11. See also DP Farrington and K Hawkins, "Psychological Research on Behaviour in Legal Contexts" in Farrington, Hawkins and Lloyd-Bostock (eds) *Psychology, Law and Legal Processes* (1979) p 12.

6.42 To what extent can cross-examination tease out these defects? Sheriff Stone claims that:⁵⁵

Sound judgment is helped by contentious advocacy, which directly tests evidence for accuracy, and exposes errors or lies. The opposing points of view must actually meet head-on in confrontation, as occurs in cross-examination. Sir Matthew Hale, 250 years earlier, wrote that cross-examination “beats and bolts out the Truth”.⁵⁶ We will now examine to what extent this is indeed the case.

6.43 The answer depends in part on how much faith we have in cross-examination: and about this, different views are possible. For many common lawyers, its complete efficiency as a means of detecting mistakes and falsehoods is an article of faith.⁵⁷ Others are more sceptical,⁵⁸ including the ALRC which, having reviewed the available literature, commented: “So far as obtaining accurate testimony is concerned, it is arguably the poorest of the techniques employed at present in the common law courts.”⁵⁹

6.44 The foundation of a trial is that each party will search for evidence to prove its own case. This does not mean either that all relevant material will be uncovered, nor that all that is uncovered will be put before the court; this will only happen if it furthers the case of one of the parties. The questioning of witnesses, in chief as in cross-examination, proceeds upon the same basis. As Sheriff Stone explains:⁶⁰

⁵⁵ M Stone, *Cross-examination in criminal trials* (1988) p 3.

⁵⁶ Sir Matthew Hale, *The History of the Common Law of England* (3rd ed 1739, reprinted 1971).

⁵⁷ “[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment’s doubt upon this point in the mind of a lawyer of experience. ...If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.” *Wigmore on Evidence* vol 5, § 1367.

⁵⁸ Cross-examination merely demonstrates “the power of a skilful cross-examiner to make an honest witness appear at best confused and at worst a liar”: DJ Birch, “The Criminal Justice Act 1988: (2) Documentary Evidence” [1989] *Crim LR* 15, 17. For a fictional example, see A Trollope, *Orley Farm*: “When first asked, Kenneby [a witness for the prosecution] had said that he was nearly sure that Mr. Usbech had not signed the document. But his very anxiety to be true had brought him into trouble. Mr. Furnival [cross-examining for the defence] on that occasion had taken advantage of the word “nearly,” and had at last succeeded in making him say that he was not sure at all. Evidence by means of torture,—thumbscrew and suchlike,—we have for many years past abandoned as barbarous, and have acknowledged that it is of its very nature useless in the search after truth. How long will it be before we shall recognize that the other kind of torture is equally opposed both to truth and civilization?”; first published 1862, OUP edition 1985, p 316.

⁵⁹ ALRC Research Paper No 8 *Manner of Giving Evidence* (1982) chapter 10, para 5.

⁶⁰ M Stone, *Cross-examination in criminal trials* (1988) p 50.

Advocates prefer strictly controlled interrogation, without the risks of unexpected adverse evidence. Judges, being impartial, do not ask open-ended questions. It is not the practice, after a witness has been questioned, to invite him to add anything further which he thinks may be helpful. As a result, vital facts may slip through the net.

If evidence in chief were not so strictly controlled, perhaps there would be less need for cross-examination.

- 6.45 Psychological research shows that the most accurate account is given when “free report” is encouraged, and that direct questions and leading questions produce less accurate answers, although they stimulate recall so a witness may cover a point omitted from the free account. However, witnesses are not invited to give a free narrative. Examination in chief and cross-examination are controlled by the questioner.⁶¹
- 6.46 The cross-examiner is not necessarily aiming to elicit the truth, but to challenge or correct what has just been heard.⁶² The advocate seeks to bring out the weakness in the testimony, and to reveal the true facts to that extent, but not necessarily to go further and establish exactly what happened. It has been said that the golden rule of cross-examination is not to ask a question to which you do not know the answer, in case the answer is unfavourable.⁶³
- 6.47 It is not obvious that the use of leading questions in cross-examination is designed to obtain an accurate answer. Generally speaking, leading questions are unrestricted in cross-examination. They may elicit inaccurate answers. Some research shows that respondents’ answers can be affected by subtle differences in the phrasing of the question, and that adult witnesses tend to be suggestible, although the extent to

⁶¹ This may be particularly detrimental in the case of expert evidence, as the result may be that the expert is not allowed to explain an interpretation of the evidence to the court. See para 3.9 of the Home Office Evidence to the Royal Commission, *Forensic Science Service Memorandum* (1991). The Royal Commission accepted the validity of this criticism: see its Report, ch 9, para 73 and Recommendations 298 and 299.

⁶² As described by Judge Harris in “The art of the advocate (2)” (1994) 138(29) SJ 769: “...you must make clear what is challenged or not accepted in a witness’s evidence, you must put your own case, and you should attempt to undermine and if possible alter to your advantage what he has said in chief. Doing this well is a considerable art, devastating if aptly deployed.”

⁶³ Richard Du Cann, *The Art of the Advocate* (1980) p 109: “...no question should be asked unless the cross-examiner knew what the answer was going to be. This does not mean that the advocate should shun his duty to put his client’s case. Nor does it mean that he should only put questions which must receive favourable answers... . What it does mean is that the cross-examiner must avoid asking the witness why he says white is white (the answer to which he cannot know in advance) unless he proposes to use the answers he gets to his client’s advantage. He must never give a witness an opportunity to elaborate on the evidence he has already given so as to bolster and support what he has previously said.”

which this occurs may vary depending on the detail of the evidence in question,⁶⁴ and on the occasion when the leading questions are put.

- 6.48 The traditional cross-examination is a blend of questions seeking further information, leading questions, and “putting it” to the witness that he or she is honestly mistaken, or else telling lies. Questions may be put in a gentle, neutral or overtly aggressive manner.⁶⁵ Even professional witnesses can find it an arduous process. It is the evidence which ought to be able to stand up to the “testing process”, not the witness.
- 6.49 If this is a good way of testing the evidence of a witness who is normally robust, this technique of cross-examination can easily confuse and frighten a witness who has learning difficulties, or is very young, with the result that the witness starts agreeing with every suggestion the questioner makes, or simply becomes incoherent.⁶⁶ The effect of this kind of effect of cross-examination can be mitigated by the judge,⁶⁷ although only up to a point.
- 6.50 We have touched on the unwelcome effects in the courtroom of cross-examination as it is sometimes practised. There are ramifications outside the courtroom, too. It discourages some witnesses from ever going into the witness box in the first place, and this means that crimes go unprosecuted and victims unprotected. Such consequences are only justifiable if there is no other way of making a trial fair.
- 6.51 We now return to the question of the effectiveness of cross-examination as a tool for testing evidence.
- 6.52 Let us assume that counsel has just elicited an answer from a witness which contradicts an answer given earlier by that witness, or an account given in a statement to the police. This may be very significant, if the evidence is on an

⁶⁴ Eg, how central the evidence is to the case, and how easy it was to remember in the first place: for example, it is possible to convince someone that the green car she saw was actually blue, but not that it was a bicycle.

⁶⁵ The manner of the questioner does not affect the accuracy of the answers greatly except to encourage greater caution, but it does seem to affect the perception of the observer as to the accuracy of the answers: KH Marquis, J Marshall and S Oskamp, “Testimonial Validity as a Function of Question Form: Atmosphere and Item Difficulty” (1972) 2 *Journal of Applied Social Psychology* 167, cited at ch 3, para 5 of ALRC Research Paper No 8. When interviewers question respondents in a suspicious manner, the observers tend to view the answers as deceptive even when they are honest. This is known as “the Othello error”, a term coined by P Ekman.

⁶⁶ JR Spencer and R Flin, *The Evidence of Children—the Law and the Psychology* (2nd ed 1993) ch 10. See also “Bearing Witness” *Community Care* w/e 30 April 1994, 20.

⁶⁷ That a judge has authority at common law to disallow oppressive or unfair questions is implicit in *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 359, *per* Viscount Sankey LC, approving Lord Hanworth MR; and see *Re Mundell* (1883) 48 LT 776, *Mooney v James* [1949] VLR 22, 28, and *Bradbury* (1973) 14 CCC (2d) 139, 140.

essential fact in the case, but the mere fact that a witness has contradicted himself or herself on a non-essential point does not always help the jury to decide which version is to be believed.

6.53 There are other checks which fact-finders may apply to the evidence which is presented. Professor Eggleston sets out features of a witness's story which may indicate it is reliable:⁶⁸

- (1) the inherent consistency of the story, and the absence of internal contradictions;
- (2) consistency (compatibility) with other witnesses, depending on how they are rated;
- (3) consistency (compatibility) with undisputed facts;
- (4) the "credit" of the witness: in addition to his or her performance in the witness box, this includes any physical or mental defect (such as short-sightedness), bias, or general reputation for mendacity;
- (5) the inherent improbability of the tale (weighed against the probability that the narrator is lying or mistaken).

All these factors could be brought out by live questioning of the witness, but (2), (3) and (5) could be apparent without cross-examination.

6.54 Therefore, in cases where the witness's veracity and observational skills are not in doubt or not at issue, little can be gained from cross-examination. The record-cards in *Myers v DPP*,⁶⁹ for example, would only have lost their impact under cross-examination if the workers who compiled them had been prepared to say that they sometimes did not look at the serial-numbers on the parts they were assembling, and that on those occasions they invented the numbers they wrote on the cards; and even then, the cards would still have been powerful evidence if it could have been shown that the sets of numbers on record-cards generally corresponded with the sets of numbers on cars.

6.55 It is not only documentary evidence which can be relied upon without the benefit of cross-examination. In *Hovell*,⁷⁰ a New Zealand case, the accused was charged with the rape and indecent assault of an 82-year old woman, Mrs B. She then died (of natural causes) before the trial. The sole issue in this case was the identity of Mrs B's attacker. In her statement, Mrs B said that she would not have been able to recognise him even on the day after the attack. Her truthfulness and observational powers were not in issue. The Court of Appeal held that there was nothing which the witness *could* have been asked in cross-examination which could have shed light

⁶⁸ R Eggleston, *Evidence, Proof and Probability* (2nd ed 1983) pp 192 and 202.

⁶⁹ *DPP v Myers* [1965] AC 1001. For a full account of the case see para 3.60 n 109 above.

⁷⁰ *Hovell (No 2)* [1987] 1 NZLR 610.

on the live issue of identity, and that it was accordingly fair to admit her statement, even though the conviction of the accused was virtually certain as a result.

- 6.56 A witness's absence can be a double-edged sword for the parties. It may not always be to one's opponent's disadvantage that a witness is not available in person, for example if he or she would have come across very sympathetically to the jury. Similarly, one's opponent may be able to score points which could not be scored if the witness were available for cross-examination. For example, a witness statement may be silent on a fact and the advocate for the other side may be able to suggest all sorts of reasons to the jury for that omission, reflecting poorly on the witness's credibility, when the witness could have covered the point quite adequately if he or she had been in court.
- 6.57 We have seen that cross-examination is supposed to be able to expose the internal inconsistencies in a witness's account which arise out of misperception or partiality. It may be successful with some witnesses, but this is not invariably the case, and there is often a price to pay. There may be alternative ways of assessing the evidence.
- 6.58 Where hearsay evidence which could have been productively tested, like the letter in Lord Hutchinson's example,⁷¹ is introduced, not only is its use potentially unfair to the side against which the evidence is led, but there is also the further problem that such evidence is difficult for the court to evaluate, because there is usually no means of determining what basis the person who made the statement had for saying what he or she said.
- 6.59 Although there will be situations where cross-examination will not be helpful, the fact that a hearsay statement cannot be tested by questions—whoever puts them, and however they are put—can be a serious objection to hearsay evidence. It is one that is made against hearsay, furthermore, in those legal systems where (unlike ours) the witnesses are questioned not by the opposing advocates but by the presiding judge.⁷² Some writers hold that it is wrong to deny the accused the opportunity to cross-examine even where it is unlikely to provide a useful test of reliability.⁷³
- 6.60 If the “no cross-examination” objection to hearsay is more powerful than the objections based on the absence of an oath and the inability to observe demeanour,

⁷¹ See para 6.37 above.

⁷² Wariness of “derivative” testimony can be found in the Romano-canonical system since the thirteenth century. For modern reservations, see, eg, Crombag, Van Koppen and Wagenaar, *Dubieuze Zaken—de Psychologie van Strafrechtelijke Bewijs* (1992).

⁷³ E Swift, “Abolishing the hearsay rule” (1987) 75 Calif L Rev 495.

like them it does not justify the whole of the present hearsay rule. As we saw,⁷⁴ English law classifies as “hearsay” various statements made in a formal setting where the person against whom they were made has the chance to put his or her questions, and took it: for example, a deposition given at an “old-style” committal.⁷⁵

6.61 Indeed, as it stands the hearsay rule would exclude a statement that was made on oath, was video-recorded (thus allowing the court to know exactly what the witness said, and to see his demeanour when saying it), and where the witness was subjected to a searching cross-examination: in other words, a statement to which none of the central reasons for excluding hearsay evidence applies. Rationally, evidence taken in this sort of way ought not to be objectionable on the ground that it is hearsay. The exclusion of such evidence would have to be founded on some other basis.

6.62 Our provisional conclusion is that **the absence of cross-examination is the most valid justification of the hearsay rule, but even this justification is not valid for all hearsay, and it does not justify the current form of the hearsay rule.** Our provisional view is that it is only where the witness is genuinely unavailable (or, in very limited circumstances, where the evidence can safely be relied upon even though there has not been any cross-examination), that first-hand hearsay should be admissible, and that the interests of the party against whom the hearsay evidence is admitted can be protected by procedural safeguards which we advocate.⁷⁶

The risk of a lay tribunal being misled

6.63 It is often said that the exclusionary rule was invented out of fear that hearsay evidence would mislead jurors and magistrates since, unlike professional judges, they would be unable to grasp the fact that this sort of evidence is sometimes of little weight, and are therefore likely to be over-persuaded by it.⁷⁷ Whether or not this is historically correct, this argument is often used to justify the existence of the rule, or to oppose its reform.⁷⁸

6.64 Considerations like this give rise to the general question whether preventing a tribunal hearing evidence which is logically relevant to the issue which it has to decide can ever help it to reach the right result.⁷⁹ To support an exclusionary rule

⁷⁴ See para 3.50 above.

⁷⁵ As we note at para 3.51 n 102 above, such committals have been abolished: Criminal Justice and Public Order Act 1994, s 44.

⁷⁶ See paras 9.9 and 11.41 below.

⁷⁷ Eg, Lord Bridge of Harwich in *Blastland* [1986] AC 41, 54: “The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve.” And see para 1.19 above.

⁷⁸ Eg, General Council of the Bar, *Evidence in Criminal Cases: Memorandum on the Eleventh Report of the Criminal Law Revision Committee* (1973) para 176.

⁷⁹ We consider this criticism in more detail at para 10.3 below.

the argument must run that not only will jurors and magistrates overvalue hearsay evidence, but that they will *so* overvalue it that it was better for them never to hear of it at all.⁸⁰

6.65 Juries can, of course, be reminded by the judge, and magistrates can remind themselves, of the weaknesses of hearsay evidence. A critical matter for our readers to determine is whether directions from a judge on hearsay evidence will enable a jury to appreciate fully the weaknesses of the hearsay evidence, and, in particular, to give it the correct weight, or whether the jury would have insufficient intellectual ability to evaluate it even with a judge's help.

6.66 The sort of help which can be given is exemplified by *Cole*⁸¹ in which the Court of Appeal approved a direction of the trial judge when he said of some hearsay evidence:⁸²

As far as [X's] statement is concerned, you have heard it read out. It has these obvious limitations; when someone's statement is read out you do not have the opportunity of seeing that person in the witness box and sometimes when you see someone in the witness box you get a very much clearer opinion of whether or not that person is sincere and honest and accurate. Furthermore, when that evidence is tested under cross-examination you may get an even clearer view. Sometimes cross-examination takes away very much from the witness's reliability, sometimes it adds to it so you can say, "despite the testing I am absolutely certain he is right," but that process cannot happen in the present case because [X] is dead so I would suggest to you that you cannot possibly pay as much attention to [X's] evidence as anybody else [sic] but for what it is worth let me summarise it.

6.67 Quite rightly, the point has been made that there should be research into the effects of judicial warnings.⁸³ Regrettably, as we have already observed,⁸⁴ research into juries is prohibited by section 8 of the Contempt of Court Act 1981. We agree with the view of the Royal Commission that section 8 should be amended to enable research to be conducted into juries' reasons for their verdicts "so that informed debate can take place rather than argument based on surmise and anecdote".⁸⁵

⁸⁰ R Park, "A Subject Matter Approach to Hearsay Reform" (1987) 86 Michigan LR 51, 59.

⁸¹ *Cole* [1990] 1 WLR 866.

⁸² *Ibid*, at p 869.

⁸³ A Ashworth and R Pattenden, "Reliability, Hearsay and the English Criminal Trial" (1986) 102 LQR 292, 331.

⁸⁴ See para 1.22 above.

⁸⁵ Report of the Royal Commission, ch 1, para 8; Recommendation 1, p 188. David Pannick QC has rightly pointed out that "where a Royal Commission has to make policy proposals based on guesswork, the case for law reform is unanswerable": "Juries must stand up and be counted" *The Times* 17 August 1993.

6.68 There is some evidence to show that there are serious doubts as to whether juries fully understand some of the directions in law as they are given.⁸⁶ Other research from Australia suggests that “some juries are capable of responding appropriately to directions, although the result varies”.⁸⁷ There has been some research into the extent to which mock juries seem to follow judicial directions on the use of hearsay evidence. The indications of two studies⁸⁸ were that they did, but this research had its limitations.

6.69 In the absence of any conclusive empirical evidence, there are two different ways to decide whether juries and magistrates can understand the directions that are given to them in respect of hearsay evidence. The first is to consider the views of experts. The other is to examine the kinds of tasks already imposed upon fact-finders who are not legally qualified.

6.70 Dealing with the views of experts, the most important is the conclusion of the CLRC.⁸⁹

We disagree strongly with the argument that juries and lay magistrates will be over-impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can. In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time when the statement is admitted. On the other hand there is some hearsay evidence which would rightly convince anybody. Moreover, juries may have to consider evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence—for example, evidence of other misconduct.

⁸⁶ New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (1986 No 48) para 6.30.

⁸⁷ ALRC, *Evidence (Interim)* (1985 ALRC 26) vol 1, para 75.

⁸⁸ In a study by Landsman and Rakos it was found that although the “jurors” took account of hearsay evidence, it did not seem to affect their verdicts. The verdicts were affected by the strength of the evidence. Even strong hearsay evidence was valued as being of less importance by the jurors than other non-hearsay evidence. The limitation of this study, apart from the fact that the “trial” was not real, was that the “jurors” read the transcript. Thus in a real trial the demeanour of the witness who was recounting the evidence could affect the weight a jury placed on that second-hand evidence. However, a later study reached the same conclusion. See S Landsman & RF Rakos, “Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts” (1991) 15 *Law and Psychology Review* 65; and P Miene, RC Park and E Borgida, “Juror Decision Making and Evaluation of Hearsay Evidence” (1992) 76 *Minnesota LR* 683.

⁸⁹ CLRC *Evidence Report*, para 247. Yet the CLRC also believed that juries were vulnerable to being misled by manufactured hearsay evidence. See para 229 of the Report, and para 6.9 above.

6.71 We would welcome the views of our readers on this point, particularly in the light of the kind of direction which may be given to juries.⁹⁰

6.72 We now consider how fact-finders who are not legally qualified manage the hearsay evidence which they hear under the present operation of the hearsay rule. We are not aware of any miscarriages of justice arising out of the admission of hearsay evidence, as opposed to its exclusion. Some of the hearsay evidence which jurors and magistrates receive under exceptions to the exclusionary rule is probably weaker than much of what the exclusionary rule prevents them from hearing, and it is taken for granted that they cope with this weak evidence. In the case of summary trials, there is the further twist that magistrates are deemed to be capable of putting out of their minds much of the information which they hear.

6.73 This sits oddly with the mistrust of the lay person's ability to give appropriate weight to hearsay. As Glanville Williams put it over 30 years ago:⁹¹

Thus the jury are credited with the ability to follow the most technical and subtle directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge's observations, attach the proper degree of importance to hearsay.

6.74 It is not only weak evidence which is entrusted to the jury: important and complex directions are also addressed to them on the assumption that they will both understand and follow them. It is worthwhile looking at some of the other directions that are given to juries.

6.75 There are close similarities between the warnings about hearsay evidence and the warnings about identification evidence that have to be given to jurors. In the case of identification evidence, it is superficially impressive but experience has shown it to be less reliable and more prone to error than other kinds of evidence.⁹² The same may be said of *some* hearsay evidence.

6.76 A standard direction on identification is as follows:

This is a trial where the case against the defendant depends wholly or to a large extent on the correctness of one or more identifications of him which the

⁹⁰ See *Cole* [1990] 1 WLR 866, and the text of the direction given by the judge in that case which is at para 6.66 above.

⁹¹ Glanville Williams, *The Proof of Guilt: a Study of the English Criminal Trial* (3rd ed 1963) p 207.

⁹² See *Turnbull* [1977] QB 224. In 1972 the CLRC had said in its Evidence Report (at para 196) that "[w]e regard mistaken identification as by far the greatest cause of actual or possible wrong convictions. Several cases have occurred in recent years when a person has been charged or convicted on what has later been shown beyond doubt to have been mistaken identification."

defence allege to be mistaken. I must therefore warn you of the special need for caution before convicting the Defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes. An apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses...

- 6.77 A second example of a potentially difficult direction for juries to understand is that given in a *Subramaniam*-type case.⁹³ Jurors have to understand that some evidence is put before them to show what was said, and not the truth of what was said. Thus where a defendant is charged with handling stolen goods, he may give evidence of what the supplier told him was the source of the goods, but the jury will have to be told that what the supplier said is not evidence of the source of the goods, only of what he said. It is assumed that such a direction is comprehensible to jurors and to magistrates. If this is a legitimate assumption, is it not reasonable to assume that a hearsay direction would also be comprehensible?
- 6.78 One of the more difficult directions for a jury to follow is where it is required both to believe and to disbelieve the same account. For example, in the course of a joint trial for an assault, the jury hears that, in interview, A said it was B who committed the assault alone. When considering the evidence against B, the jury cannot act on what A has said to convict B, despite the fact that it believes it to be true, if there is no other evidence against B. However, if the jury does believe it to be true, it will have to act on it to acquit A.
- 6.79 There are many other areas of evidence in which jurors are assumed to understand directions of substantial importance and of greater complexity⁹⁴ than a direction on hearsay such as that given in *Cole*.⁹⁵

⁹³ For details of the case see paras 2.5-2.6 above.

⁹⁴ Eg, where there are two co-accused, one of bad character and one of good character, the judge must give the following directions: of the accused with a criminal record: "...you must not assume that a defendant is guilty or that he is not telling the truth because he has previous convictions. Those convictions are not relevant at all to the likelihood of his having committed the offence. They are relevant only as to whether you can believe him. It is for you to decide the extent to which, if at all, his previous convictions help you about that"; of the accused without a criminal record: "In the first place, the defendant has given evidence, and as with any man of good character it supports his credibility. Credibility simply relates to the confidence which you may have in the truthfulness of his evidence, that is whether you can believe him... In the second place, the fact that he has not previously committed any offence...may mean that he is less likely than otherwise might be the case to commit this crime now...".

⁹⁵ *Cole* [1990] 1 WLR 866, 869. See para 6.66 above.

6.80 Our provisional view is that, in the case of first-hand hearsay, juries and magistrates are capable of understanding and following a direction which draws the defects of the hearsay evidence to their attention.

The hearsay rule protects the accused

6.81 One reason that has been suggested for the emergence of the hearsay rule was the “unprepared nature” of the criminal trial. As there was no requirement to disclose evidence in advance, so there was a real danger of the accused being taken by surprise if hearsay evidence were given.⁹⁶ Now there is a duty on the prosecution to disclose evidence on which it proposes to rely in advance.⁹⁷

6.82 The hearsay rule is often justified as being necessary to make sure that the defendant has a fair trial. Without it, it is said, the prosecution could use against him or her evidence which is of dubious value—for all the theoretical reasons which have been discussed above.

6.83 This concern comes sharply into focus when we find that in some jurisdictions where hearsay evidence is admissible, the prosecution is allowed to use hearsay statements of anonymous witnesses against defendants, particularly in serious cases.

6.84 The court of trial is presented with the statement of somebody—a police officer, for example—who says that X, an agent or informer whom he is not prepared to name, saw the defendant commit an offence, and that evidence is admissible. This has happened in Denmark,⁹⁸ the Netherlands⁹⁹ and Germany,¹⁰⁰ and such cases have also been brought to the attention of the Strasbourg Court.¹⁰¹ It is not the practice for the prosecution to use hearsay statements of anonymous witnesses in England and Wales,¹⁰² although the Court of Appeal recently held that the judge has a

⁹⁶ M Damaška, “Of Hearsay and its Analogues” (1992) 76 Minn LR 425.

⁹⁷ At least in the case of indictable offences or offences which are triable either way. See the Magistrates’ Courts (Advance Information) Rules 1985 (SI 1985 No 601) (offences triable either way); Magistrates’ Courts Act 1980, s 5 as substituted by Criminal Justice and Public Order Act 1994, Sched 4 (cases which are transferred to the Crown Court); and *Brown (Winston)* [1994] 1 WLR 1599 (indictable offences). In practice, the prosecution frequently, but not invariably, gives disclosure of evidence in summary only cases.

⁹⁸ JP Andersen, “The Anonymity of Witnesses—a Danish Development” [1985] Crim LR 363.

⁹⁹ GJM Corstens, *Het Nederlandse strafprocesrecht* (1993) 618–622.

¹⁰⁰ N Joachim, “Anonyme Zeugen in Strafverfahren—Neue Tendenzen in der Rechtsprechung” StV 1992, 245.

¹⁰¹ See paras 5.19 and 5.22 n 27 below.

¹⁰² Technically, it seems that the 1988 Act could make it possible to use hearsay evidence of an anonymous prosecution witness’s statement if he or she did not give evidence at trial “through fear” (see paras 4.20–4.23 above), but it seems hardly likely that a judge would grant the necessary leave.

limited discretion to allow the identity of a live witness to be kept from the defendant at the trial¹⁰³ and other details of evidence may also be kept from the accused.¹⁰⁴

6.85 It is not necessary to keep the hearsay rule in its present form in order to prevent the use of anonymous witnesses by the prosecution. Their use could also be prevented by a “directness principle”, a rule requiring the original source of a statement to be identified and produced, if available, although “availability” would have to be defined with care, as illustrated by what has occurred in Germany. German law does recognise the “directness principle”, but the use of anonymous witnesses became possible when the courts were prepared to treat the risk of reprisals against an anonymous witness as something which made him “unavailable” to give his evidence directly to the court, thus side-stepping the directness principle.¹⁰⁵

6.86 It should also be borne in mind that although the present hearsay rule is often justified as necessary to make sure that defendants have a fair trial, in fact it may operate against defendants as well as in their favour. One of the strongest criticisms of the hearsay rule is that it sometimes prevents defendants putting cogent evidence of their innocence before the court.¹⁰⁶ This consideration undermines the notion that “the rule has been evolved and applied over many years in the interest of fairness to persons accused of crime”.¹⁰⁷

6.87 Our provisional view is that **the hearsay rule does not always operate to protect the accused: the accused may be prevented from adducing exculpatory evidence, and he or she is not protected from the jury or magistrates treating hearsay as being of equal weight to non-hearsay evidence.**

The right to confront one’s accusers¹⁰⁸

6.88 Although not black-letter law, there is a strongly-held view that it is somehow fundamental to justice that an accused person should be able to confront the

¹⁰³ *Taylor*, *The Times* 17 August 1994; *The Independent* 12 September 1994.

¹⁰⁴ Eg *Blake v DPP*, *Austin v DPP* (1993) 97 Cr App R 169, where the location of the vantage point of the police witness was kept from the accused, thus limiting the cross-examination, even though there was no other incriminating evidence.

¹⁰⁵ See para 5.36 in Appendix B below.

¹⁰⁶ See *Sparks* [1964] AC 964 (see para 7.36 below); *Blastland* [1986] AC 41 (see paras 7.38-7.41 below); *Harry* (1988) 86 Cr App R 105 (see para 2.32 and n 53 in Part II above); *Wallace and Short* (1978) 67 Cr App R 291 (see para 7.47 below); *Beckford and Daley* [1991] Crim LR 833 (see para 7.48 below).

¹⁰⁷ Per Lord Oliver of Aylmerton in *Kearley* [1992] AC 228, 278C.

¹⁰⁸ “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak...”: *Richard II*, Act 1 Sc 1.

accusers: that the witness should be obliged to say what he or she has to say to the accused's face.¹⁰⁹ It is sometimes said that this encourages the witness to tell the truth.¹¹⁰ We are not aware of any evidence which supports this common assumption. Such research as there is points in the opposite direction, showing that stress can inhibit coherent thought in adults as well as in children.¹¹¹

6.89 Sir Rupert Cross thought that the "right to confrontation" was a hangover from the pre-1898 days when the accused was not allowed to give evidence, and that such a right is not justified now that the accused has an opportunity to refute the accusations by giving evidence, whether they are repeated in court by the original accuser or at one remove.¹¹²

6.90 There is also a belief that to bring the witness and accused together makes the accused and the public feel that justice is being done.¹¹³ This may be true, but if it is, it is surely a less important consideration than the need to make sure that the courts, as far as possible, reach the correct result. They can only do this if witnesses are able to give their testimony freely, and the court is able to receive other forms of relevant evidence.

6.91 The "right" of confrontation has been expressed¹¹⁴ and put on a statutory footing in various jurisdictions.¹¹⁵ Although the defendant will almost always have the right

¹⁰⁹ See, eg, Sir Matthew Hale, *The History of the Common Law of England* (3rd ed 1739, reprinted 1971).

¹¹⁰ Eg, *Coy v Iowa* (1988) 487 US 1012, 1018, per Scalia J:
It is always more difficult to tell a lie about a person "to his face" than "behind his back".
See also *Herbert v Superior Court* (1981) 117 Cal App 3d 850.

¹¹¹ HR Dent and GM Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses" in D Farrington, K Hawkins and S Lloyd-Bostock (eds) *Psychology, Law and Legal Processes* (1979) p 195.

¹¹² R Cross, "The Evidence Report: Sense or Nonsense—A very wicked animal defends the 11th Report of the Criminal Law Revision Committee" [1973] Crim LR 329, 334.

¹¹³ The right to confrontation is said to have a "psychic value to litigants, who feel that those giving evidence against them should do it publicly and face to face": Weinstein, "Some difficulties in devising rules for determining truth in judicial trials" (1966) 66 Co L Rev 223, 245, cited at A Zuckerman, *The Principles of Criminal Evidence* (1989) p 182.

¹¹⁴ The right to confront an adverse witness was "basic to any civilised notion of a fair trial," per Richardson J in *Hughes* [1986] 2 NZLR 129, 148. See also JR Spencer and R Flin, *The Evidence of Children: the Law and the Psychology* (2nd ed 1993) pp 277-279. In *Herbert v Superior Court* (1981) 117 Cal App (3d) 850, it led to the conviction being quashed where the judge had permitted the five-year-old witness to turn her chair away from the accused.

¹¹⁵ Eg s 25 of the Bill of Rights Act 1990, New Zealand: see para 3.14 in Appendix B. In the United States the Sixth Amendment to the Constitution guarantees the right of a defendant "to be confronted with the witnesses against him": see para 4.18 in Appendix B. In *Chambers v Mississippi* (1973) 410 US 284, the United States Supreme Court held that the constitutional right also entailed the right to cross-examine the accuser. Article 6(3)(d) of the Convention also addresses this issue: see para 5.12 below.

to be present at the trial,¹¹⁶ it has never been a rule of English law that the defendant has a right to insist on a confrontation with the prosecution witnesses.¹¹⁷ Thus procedures exist to separate the witness from the accused, such as screens, or allowing the witness to give evidence via Closed Circuit Television.¹¹⁸

6.92 Where an application is made for the witness to give evidence from behind a screen, the decision is a matter for the discretion of the judge or magistrates who decide according to the interests of justice. In 1919 it was held that the defendant can be removed from a witness's presence if the judge considers that his or her presence will intimidate the witness.¹¹⁹ Not all practitioners are convinced that the practice is fair to the accused,¹²⁰ and the courts are generally reluctant to allow the alleged victim to be screened from the accused,¹²¹ as then the interaction between the witness and the defendant is lost.

¹¹⁶ Circumstances must be "very exceptional" to justify the accused being removed from the trial; *Lee Kun* (1915) 11 Cr App R 293, 300, *per* Lord Reading CJ. Such circumstances will tend to arise where the accused's behaviour in the court room disrupts the trial.

¹¹⁷ Note, however, the Treason Act 1554 1 & 2 Philip and Mary (c 10) (now repealed), which stipulated that where someone was charged with treason he could insist, as long as the accusers (of which there had to be at least two) were alive and within the Realm, on their being brought before him where they were to "say openly in his hearing" what they knew against him.

¹¹⁸ In this context, it may be helpful to consider briefly the experience of other countries. There was some trepidation about the use of Closed Circuit Television ("CCTV"). Courts have wondered whether a screen image of a witness lacks the power of a present witness (see SB Smith, "The child witness" in National Association of Councils for Children, *Representing Children: Current Issues in Law, Medicine and Mental Health* (1987) p 13) or has more power because the screen gives a greater appearance of credibility (see *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 95). It was also feared that there would not be the same pressures on the witness. This depends upon the validity of the argument that giving evidence in public in intimidating surroundings and the presence of the accused are incentives to tell the truth. Nevertheless, CCTV is used in New South Wales, Canada and some states within the United States. The Scottish Law Commission reviewed the practice of using CCTV six years ago and reported that it was working to a certain extent: Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (1989) Scot Law Com No 125, paras 4.8-4.33. In "An Evaluation of the Live Link for Child Witnesses" (HMSO 1991) at p 138 G Davies and E Noon conclude that CCTV "has been demonstrated to have positive and facilitating effects on the courtroom testimony of children...". However, it appears that some judges are reluctant to allow its use: J Plotnikoff and R Woolfson, "Prosecuting Child Abuse" (1995).

¹¹⁹ *Smellie* (1919) 14 Cr App R 128; see also *X, Y and Z* (1990) 91 Cr App R 36.

¹²⁰ The Scottish Law Commission regards screens as worthwhile; Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (1989) Scot Law Com No 125 paras 4.17-4.27.

¹²¹ In *Cooper and Schaub* [1994] Crim LR 531 the Court of Appeal held that where the witness is an adult, screens should only be used in the most exceptional cases. However, in *Foster* [1995] Crim LR 333 the Court of Appeal confirmed that the correct test is that set out in *X, Y and Z* (see n 119 above): "the court must be satisfied that no undue prejudice is caused to the defendant".

6.93 It might be expected that, in those countries where a right of confrontation is enshrined in a statute or in the constitution, this would operate as an absolute bar against hearing evidence of an absent witness without the consent of the accused. However, this is not the case.¹²²

6.94 Even though there is no “right of confrontation” enshrined in English law, the question whether it is in principle desirable for prosecution witnesses to be obliged to give their evidence in the defendant’s physical presence should not be overlooked. Our provisional view is that **it is desirable for witnesses to give their evidence in the presence of the accused if possible, but there are other factors which may outweigh the need for this to happen, such as the impossibility of obtaining the evidence directly from the witness in the courtroom.**

“If hearsay were admitted, valuable court time would be wasted hearing evidence of little weight”

6.95 This is one of the standard justifications for the hearsay rule,¹²³ and it is also sometimes used as an argument against reform. There is, however, reason to doubt whether making hearsay evidence more readily admissible would produce this particular result.

6.96 We are not aware of any complaints that the English civil courts have been overwhelmed with poor-quality evidence since the hearsay rule was relaxed by the Civil Evidence Act 1968. Nor, we understand, has this been the experience of the Scottish courts since the Civil Evidence (Scotland) Act 1988 abolished the hearsay rule for civil proceedings in that jurisdiction.

6.97 It would be nearer the truth, perhaps, to say the opposite: that the existence of the hearsay rule consumes some court time (and public money) by making courts hear oral evidence which could be more easily, quickly and cheaply presented in written form. The complexities of the rule can also be responsible for using up court time, since the courts have to spend time hearing argument about whether evidence is legally admissible.¹²⁴ Indeed, the driving force behind a whole series of statutory inroads on the hearsay rule has been the desire to avoid the waste of time and money.¹²⁵

¹²² For an account of the non-literal interpretation of the Sixth Amendment in US case law see T Patton, “Sixth Amendment’s Confrontation Clause—Is a Showing of Unavailability Required?” (1993) 17 South Illinois Univ LJ 573. See *White v Illinois* (1992) 116 L ed 2d 848 (US Supreme Court) and *R v L* [1994] 2 NZLR 54 (New Zealand Court of Appeal). See further paras 4.19-4.21 in Appendix B.

¹²³ Eg R May, *Criminal Evidence* (3rd ed 1995) para 9-03.

¹²⁴ See paras 7.31-7.33 below.

¹²⁵ For example, the Bankers’ Books Evidence Act 1879, ss 3 and 4; the Criminal Justice Act 1925, s 13 (reading depositions of witnesses whose evidence was not contested); Criminal Justice Act 1967, s 9 (allowing the same to be done with the statement a witness had

6.98 It might also be said that this objection overlooks the argument that sufficiently relevant evidence ought to be heard, and insufficiently relevant evidence can and should be excluded by the judge.¹²⁶

6.99 Our provisional view is that **although the rule does exclude some evidence which would be of little or no assistance to the court, the time thus saved is outweighed by the time spent on legal argument made necessary by the uncertainty of the rule and the degree to which it depends on the exercise of judicial discretion.**

Conclusions

6.100 It is clear that the main reason why hearsay evidence is inferior to non-hearsay evidence is that it has not been tested by cross-examination.¹²⁷ This in itself may justify requiring the witness to attend where this is possible. The danger that first-hand hearsay will be manufactured is less than the danger that second-hand hearsay will be manufactured. Our provisional view is that, in the case of first-hand hearsay, the jury can be warned about this danger as well as about the significance of the lack of cross-examination. Our provisional view is that juries and magistrates would understand such warnings: as we have shown, our system expects them to understand many complex warnings in other fields of evidence and we find it difficult to see why they should not understand the warnings about the weaknesses of first-hand hearsay evidence.

made to the police); and Criminal Justice and Public Order Act 1994, s 44 (abolishing committal proceedings where oral evidence might be taken).

¹²⁶ As stated in *Cross* p 51.

¹²⁷ See para 6.62 above.

PART VII CRITICISMS OF THE HEARSAY RULE

Introduction

- 7.1 In this Part we examine the criticisms, both theoretical and practical, which can be made of the hearsay rule. The most prominent defect of the rule is its complexity, and this is the criticism which we address first.¹ This complexity leads to the waste of court time, a problem which we look at next.² Thirdly, we consider the exclusion of reliable evidence which the rule can cause.³ We then look at the way in which it can confuse witnesses who give oral evidence.⁴ Fifthly, we examine the arbitrary way in which the rule can be applied.⁵ Sixthly, we examine its indiscriminating nature.⁶ Last, but by no means least, we consider the ways in which the application of the rule can lead to the contravention of the Convention.⁷

The complexity of the rule

- 7.2 Overenforced and abused,—the spoiled child of the family,—proudest scion of our jury-trial rules of evidence, but so petted and indulged that it has become a nuisance and an obstruction to speedy and efficient trials.⁸ In the current edition of *Cross* the complexities of the hearsay rule take 228 pages to explain.⁹ Large sections of practitioners' books are also devoted to the hearsay rule: it takes up some 115 pages of the current edition of *Blackstone*, for example.¹⁰
- 7.3 The law on hearsay is often uncertain. As we saw in Part II, there is uncertainty about the dividing lines between hearsay and real evidence, and between statements which fall foul of the hearsay rule and those which do not because the purpose of adducing them is merely to show the fact that they were made.¹¹
- 7.4 The application of the hearsay rule is also difficult. One consequence is that complex (or even impossible) directions are given to the lay tribunal. For example:

¹ Paras 7.2-7.30 below.

² Paras 7.31-7.33 below.

³ Paras 7.34-7.73 below.

⁴ Paras 7.74-7.75 below.

⁵ Paras 7.76-7.79 below.

⁶ Paras 7.80-7.82 below.

⁷ Para 7.83 below.

⁸ J Wigmore, *A Student's Textbook on the Law of Evidence* (1935) p 238.

⁹ *Cross* pp 508-736.

¹⁰ *Blackstone* pp 1914-1935, 2036-2132.

¹¹ See paras 2.5-2.7 and 2.13-2.19 above.

“Disregard the evidence of X insofar as it points to guilt; you may regard it only as evidence of consistency” or “You must ignore the evidence of Z when you consider Y’s guilt, but you must take account of it when you consider Z’s guilt”. It is not known whether juries or lay magistrates are able or willing to follow such directions.¹²

- 7.5 Even where the rules are neither difficult nor uncertain, they are daunting simply because they are so complicated. Many of the people who have to apply this collection of rules in practice are not legally trained and find them too complicated and obscure to understand. We understand that one consequence of this, particularly in the lower courts, is that evidence is quite frequently objected to when it is in reality admissible,¹³ and that what are strictly speaking invalid objections sometimes succeed where they ought to fail. Consequently the courts are deprived of relevant evidence to an even greater extent than they should be, or hear evidence when they should not.
- 7.6 Of course, it is not merely students and the lower courts who find the law confusing. As we have shown,¹⁴ *Kearley* is an example of the intricacies of the hearsay rule taxing very experienced judges.
- 7.7 Perhaps most importantly, witnesses and defendants are unlikely to understand the rule. Natural justice would seem to dictate that the rules by which a person is tried should be, as far as is consistent with justice, comprehensible to the person on trial. They should also be comprehensible to those who have to try that person.
- 7.8 The convoluted nature of the rule has been a recurring theme in this paper. Professor Cross described the hearsay rule and its exceptions as “a morass of authority and example, quite devoid of clear and consistent holding.”¹⁵ The exceptions have arisen and been developed in a haphazard way in the sense that “when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle”.¹⁶ We will now examine examples of the confusions and anomalies engendered by the present hearsay rule.

¹² For further examples see P Murphy, “Previous Consistent and Inconsistent Statements: A Proposal to Make Life Easier for Juries” [1985] Crim LR 270.

¹³ An inaccurate “rule of thumb” is often used in place of the hearsay rule: “if it was said in the defendant’s presence, then do not object; if it was not, then do”.

¹⁴ See para 1.4 above.

¹⁵ Cross p 515.

¹⁶ *Myers* [1965] AC 1001, 1020C *per* Lord Reid.

(i) *Judicial interpretation of the exceptions*

7.9 Although the House of Lords in *Myers*¹⁷ held that there was to be no further judicial development of exceptions to the rule, there have been several situations where the courts have significantly extended the scope of an exception, on the basis of reliability, with the effect that evidence is now admissible which would have formerly been excluded, as Professors Ashworth and Pattenden pointed out nine years ago.¹⁸ For example, in *Halpin*¹⁹ the Court of Appeal decided that it was no longer necessary for a public document to be prepared by a public official from personal knowledge or in pursuance of a public duty to ascertain the accuracy of the facts; *Kelsey*²⁰ allowed the fiction of a memory refreshing document to extend to a note which the witness had not personally checked, except by having it read back to him; *Abadom*²¹ permitted facts which form the basis of an expert opinion to be used for the opinion without their being proved by anyone with direct knowledge of them; *Muir*²² approved the practice where a manager repeated what his staff had claimed about the non-appearance of an entry on a record as evidence that something had not happened.

(ii) *The use of the res gestae exception*

7.10 Whether or not the excitement of an incident means that spontaneous exclamations are reliable²³ has long been doubted. There may be little opportunity for concoction, but the witness may have only partial information. Their actual reliability will vary with the facts of each case. In *Benz v The Queen*,²⁴ Mason CJ concluded that the criticism of the doctrine was not that it had led to miscarriages of justice but that it lacked a theoretical and principled foundation and this made it difficult to apply. He suggested that the principle required “re-examination” in the same manner as the rule itself. Our provisional view is that this is a justifiable criticism.

7.11 If the term “res gestae” were restricted to spontaneous exclamations where “the possibility of concoction, distortion or error [can] be disregarded”,²⁵ then the exception would be workable, but the term has been used to encompass associated

¹⁷ *Ibid* [1965] AC 1001. For the facts of the case see para 3.60 n 109 above.

¹⁸ A Ashworth and R Pattenden, “Reliability, Hearsay Evidence and the Criminal Trial” (1986) 102 LQR 292.

¹⁹ *Halpin* (1975) 61 Cr App R 97.

²⁰ *Kelsey* (1981) 74 Cr App R 213.

²¹ *Abadom* (1982) 76 Cr App R 48.

²² *Muir* (1983) 79 Cr App R 153.

²³ This is the alleged justification of the res gestae doctrine.

²⁴ *Benz v The Queen* (1989) 168 CLR 110.

²⁵ *Andrews* [1987] AC 281.

exceptions²⁶ to the point where it obscures rather than clarifies the extent and rationale of the exception.²⁷ Lord Tomlin describes the phrase as one “adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied”.²⁸ Wigmore went further and said:²⁹

The phrase *res gestae* has long been not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as part of some other well-established principle and can be explained in terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both.

- 7.12 The technicalities of the hearsay rule promote a situation whereby evidence is admitted according to the familiarity of someone in the court with the intricacies of the rule and precedent. The *res gestae* exception and its associated exceptions (statements showing intention, representations of physical sensations, emotions, states of mind, words explaining relevant acts) are the best illustrations of this. As Lord Blackburn put it, “If you wish to tender inadmissible evidence, say it is part of the *res gestae*”.³⁰

(iii) The exception of evidence of physical or mental sensations

- 7.13 While the rule seems to be that statements of intention or of physical and mental sensations and emotions can be given in evidence, as long as no form of narrative is included, the authorities are in conflict.³¹ This confusion should be resolved.

*(iv) The admissibility of evidence of intention in order to prove that the intention was carried out*³²

- 7.14 Statements of intention, whether explaining the intention behind an act which has happened or one which is yet to be carried out, may be the only way of knowing what a person intended, and a statement of someone’s intentions is often admitted as being akin to the “state of mind or emotion” exception. The rationale for

²⁶ See paras 3.38-3.49 above.

²⁷ Professor Morgan observed that seven distinct types of evidence were admissible in United States law under the broad term *res gestae*: EM Morgan, “A Suggested Classification of Utterances Admissible as *Res Gestae*” (1922) 31 Yale LJ 229, 231-33.

²⁸ *Homes v Newman* [1931] 2 Ch 112, 120.

²⁹ *Wigmore on Evidence* vol 6 § 1767 p 255 (1976, Chadbourn revision).

³⁰ Cited in the 5th edition of *Cross*, p 43, n 13.

³¹ *Buckley* (1873) 13 Cox CC 293; *Wainwright* (1875) 13 Cox CC 171; *Thomson* [1912] 3 KB 19; *Moghal* (1977) 65 Cr App R 56; *Edwards* (1872) 12 Cox CC 230.

³² *Cross*, at p 671, describes the authorities on this point as being “in some disarray”. This is not surprising as the rationale for admitting evidence of intentions may sometimes apply and sometimes not, and the courts may therefore have been inclined to extend the exception in some cases and tighten it in others.

excluding declarations of intention is that if a statement that X did something is inadmissible hearsay, then a statement that X planned to do something is even weaker and *a fortiori* should be inadmissible.

7.15 Statements of intention are of varying relevance, and they may be excluded because they do not tend to prove any fact in issue. However, statements of intention can vary from being self-serving and planned to unthinking and reliable. For example, a murder victim may make a note in his diary of an appointment, with no intention of misleading anyone, or even any awareness that someone else might ever read the diary. The murderer, on the other hand, may prepare the ground for an alibi by noting in his diary that he plans to meet someone else at the relevant time. Our provisional view is that where evidence of an intention is relevant, it should not be excluded as hearsay.

7.16 It is not always easy to classify evidence of a person's intention which tends to show that the intention was carried out as either inadmissible hearsay evidence or admissible original evidence, and in Australia³³ and the United States³⁴ the courts have been inclined to treat declarations of intention as original evidence.

(v) Dying declarations

7.17 The rationale for this exception was that no man "who is imminently going into the presence of his Maker, will do so with a lie on his lips".³⁵ Thus "impending death acted as a substitute for the oath".³⁶ The narrow limits of the exception have been criticised extra-judicially by the former Lord Chancellor Lord Maugham,³⁷ who called for substantial relaxation of the rule.

³³ *Hughes v National Trustees Executors and Agency Co of Australasia* (1979) 53 ALJR 249 and *Walton* (1989) 166 CLR 283.

³⁴ Rule 803(3) of the Federal Rules of Evidence adopts the policy of the common law and provides that the hearsay rule would not exclude

A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

The declarant must describe a condition or sensation that exists at the time of the statement. However, once a state of mind is proved to exist at a particular time, the presumption of continuity can allow an inference that the then existing state of mind existed at a time after the statement was made or had existed prior to the making of the statement. The duration of a state of mind will depend on the circumstances and is a matter for the court to decide in its discretion. The rule preserves the doctrine established in *Mutual Life Insurance v Hillmon* (1892) 145 US 285 which allowed evidence of intention as tending to prove the doing of the act intended.

³⁵ *Osman* (1881) 15 Cox CC 1, 3.

³⁶ *Mills* [1995] 1 WLR 511, 521F, *per* Lord Steyn.

³⁷ "Observations on the Law of Evidence with Special Reference to Documentary Evidence" (1939) 17 Can Bar Rev 469, 483.

7.18 Apart from the dubious psychological foundation for the exception, and the difficult requirement for the deceased to have had a settled hopeless expectation of death, the principal illogicality of this exception is its restriction to murder and manslaughter.³⁸ It does not apply to rape or armed robbery, but there is no logical justification for such a restriction. It is also out of step with the modern approach to *res gestae*, in which the emphasis is on probative value.³⁹

(vi) Statements of deceased persons

7.19 Such statements may become admissible by one of a number of routes, but some may slip through the net for no good reason. If it was an oral statement which rendered the speaker vulnerable to prosecution (a “statement against penal interest”) made when the speaker had a reasonable expectation of death but not a settled, hopeless expectation of death, it will not be admissible at all.⁴⁰ It does not qualify as a dying declaration. Because it was oral, section 23 of the 1988 Act⁴¹ will not apply. Statements against penal interest are outside the common law exception of statements against interest.⁴² Yet the statement may be no more or no less reliable than a statement which would be admitted by one of these other routes.

(vii) Difficulties arising out of the Criminal Justice Act 1988⁴³

(a) The limits of the “unavailability” categories in section 23

7.20 The provisions of the 1988 Act do not assist in every case where it is impossible to call a witness, for example, if the witness benefits from diplomatic immunity,⁴⁴ or where the witness attends court but refuses to give evidence, claiming the privilege against self-incrimination.⁴⁵ Such witnesses would not be treated as “unavailable”. Some additional categories of “unavailability” could be added to section 23.

(b) Frightened witnesses: section 23(3)(b)⁴⁶

7.21 This subsection permits statements of witnesses who have been intimidated by the accused, or by others on behalf of the accused, to be adduced. Such admission is

³⁸ See para 3.30 above.

³⁹ *Mills* [1995] 1 WLR 511, 521F-G, *per* Lord Steyn.

⁴⁰ See para 3.29 above.

⁴¹ See para 4.4 above.

⁴² Which is restricted to statements against pecuniary or proprietary interest; see para 3.26 above.

⁴³ See Part IV above for commentary and Appendix A for the text of the statutory provisions.

⁴⁴ *Jiminez-Paez* (1994) 98 Cr App R 239.

⁴⁵ *Garbett* (1847) 2 C & K 474; 175 ER 196.

⁴⁶ The text of the section is set out at Appendix A. See also paras 4.20-4.23 above.

not automatic, as the decision is left to the discretion of the judge or magistrates.⁴⁷ Proving that intimidation has taken place can be difficult.

7.22 The subsection, in its wording, also potentially encompasses statements of witnesses who are so traumatised by the offence or so fearful of the experience of giving evidence, that they cannot or will not give oral testimony. Again, the decision on admissibility will rest with the court, and the part played by a party to the proceedings, if any, in intimidating the witness will no doubt be a factor taken into account by the judge in the exercise of his or her discretion. If the witness's fear has no connection with the accused,⁴⁸ it may not be fair to allow the statement to be admitted without cross-examination of the witness.

7.23 It not only covers the case where the witness fails to show up, but also where she or he comes to court but refuses to be sworn, or where, having entered the witness-box, the witness is so frightened that she or he is incoherent.⁴⁹ However, there is still some potential for confusion in the wording of the subsection since it has been left⁵⁰ unclear at what point a witness does "not give oral evidence".⁵¹ This uncertainty causes or will cause difficulty for judges and magistrates.

7.24 A further complication arising out of this provision is that if a witness is frightened and refuses to give evidence, or clams up while in the witness box,⁵² section 23 will apparently cover the situation, but a witness who is intimidated into telling a false story will be deemed hostile. A hostile witness is one who does not appear to want to tell the truth.⁵³ A previous statement inconsistent with the testimony given from

⁴⁷ Under s 25 of the 1988 Act; see para 4.44 above.

⁴⁸ There is certainly no explicit requirement that the accused (or one of them) be connected in any direct way with the fear. The Divisional Court held in *R v Tower Bridge Justices, ex p Lawlor* (1991) 92 Cr App R 98, 105-6 (on long-form committal hearings) that it is sufficient to prove "that the witness is in fear as a consequence of the commission of the material offence or of something said or done subsequently in relation to that offence and the possibility of the witness testifying as to it", *per* Watkins LJ.

⁴⁹ *R v Acton Justices, ex p McMullen*; *R v Tower Bridge Justices, ex p Lawlor* (1991) 92 Cr App R 98 (on long-form committal hearings); *R v Ashford Justices ex p Hilden* [1993] QB 555.

⁵⁰ *R v Ashford Justices, ex p Hilden* [1993] QB 555. This analysis is set out by R Munday in "The Proof of Fear" (1993) NLJ 542 and 587.

⁵¹ In *R v Ashford Justices, ex p Hilden* McCowan LJ's interpretation was that a witness has not given oral evidence where she or he has not given evidence "of significant relevance" or evidence that "in no real sense did the evidence...placed before the court go to decide the issues of fact in the case". Popplewell J, at p 562, preferred the interpretation that a witness who does not give *further* oral evidence through fear is a witness who does not give oral evidence through fear.

⁵² Although *Thompson* (1976) 64 Cr App R 96 (CA) indicates that a witness who refused to answer questions could be treated as hostile under the common law, the better view probably is that the Criminal Procedure Act 1865, s 3, does not apply, and the 1988 Act, s 23, now being available, does.

⁵³ Criminal Procedure Act 1865, s 3.

the witness box may be put to the witness and proved, but it will go only to the witness's *credit*, and will not be *evidence* of the truth of its contents. By contrast, where a statement is admitted under section 23 of the 1988 Act, it will be evidence of the *truth* of its contents. Thus, whether or not a jury is allowed to have regard to the contents of the previous statement on the issue of guilt may depend on how the individual reacts to intimidation. Our provisional view is that this is not satisfactory.

(c) *Proving the foundation requirements*⁵⁴

- 7.25 In our preliminary consultation,⁵⁵ the point was made to us that the 1988 Act may not succeed in ensuring that the evidence of a genuinely ill or frightened witness will be put before a court because it may be difficult for either party to prove that the witness is unavailable through fear or illness. For example, witnesses are (for obvious reasons) often too frightened to tell the authorities that they have been threatened. Defence advocates told us in our preliminary consultation that it was often difficult to obtain medical evidence in an admissible form in time for the trial where a witness fell ill shortly before the trial. We would be interested in discovering if this is a cogent complaint and, if so, what can be done about it.

(d) *The "maker" of the statement in section 24*⁵⁶

- 7.26 Where there are two people, one who provides the information and another who records it, the "maker" of the statement—the one who must be unavailable or unable to remember—has been defined as the person who did the recording, not the person who supplied the information. This is the effect of the present wording of section 24(1)(ii) which, when setting out the kind of document which comes within the general scope of section, stipulates that "the information contained in the document was supplied by a person (whether or not the maker of the statement) who had...personal knowledge of the matters dealt with."

- 7.27 Thus in *Bedi*⁵⁷ it was held that the employee of the credit card company who records a report of a lost or stolen card is the maker of the statement which may be admitted as a business document, not the card-owner who reports the loss. Therefore, the forms completed by the loser are not admissible. This leads to the anomaly that records which are signed by the loser (and which are therefore more reliable) are *inadmissible* as hearsay, while records which are written by the person to whom the loss is reported are *admissible*.⁵⁸ This appears to be a drafting oversight

⁵⁴ See section 23(2) of the 1988 Act which is set out in Appendix A and referred to in paras 4.24–4.27 above.

⁵⁵ See para 1.31 above.

⁵⁶ See Appendix A and para 4.34 above.

⁵⁷ *Bedi* (1992) 95 Cr App R 21.

⁵⁸ See *Field* (1992) 97 Cr App R 357, 362 where the Court of Appeal held that s 24 enabled the court to receive evidence of a statement that a policewoman had taken from a young child as the effective maker was the policewoman, and not the child. The court thought

and cannot have been the intention of Parliament.⁵⁹

7.28 Professor Sir John Smith suggests that the phrase which is the cause of all the trouble—“whether or not the maker of the statement”—should be replaced by the phrase “whether or not the creator of the document”.⁶⁰ A consequential amendment to Schedule 2 of the 1988 Act would seem to be needed to clarify the identity of the person or persons whose credibility may be attacked. It would also be necessary to provide that where an accused would “lose his or her shield”⁶¹ if the witness had given evidence orally, the fact that the witness does not appear in person should make no difference.⁶²

7.29 The present arrangements favour those who make notes as a matter of course. This tends to be those who appear as witnesses on a professional basis. They disadvantage lay people with more detail to recount than can be retained in the average memory.

(e) The reliance on the exercise of judicial discretion

7.30 Our preliminary enquiries show that some judges are invariably exercising their discretion under sections 25⁶³ and 26⁶⁴ to refuse to admit documents under the provisions of the 1988 Act. This reveals a practical problem with the operation of the Act and is an additional reason for considering reform of the hearsay rule.

The waste of court time

7.31 It is, perhaps, inevitable that the complexity of the rule and its exceptions leaves much scope for argument, which leads to the criticism that court time is wasted.

the point was difficult, but held that: “[The police officer] was making a statement which represented her recollection of her conversation with the child. It follows that for the purposes of the section she is the maker of the statement.” It was therefore the police officer’s recollection that mattered for s 24(4)(b)(iii). This is unlikely to have been what the legislator intended.

⁵⁹ Philip Plowden, “The Curate’s Egg?—Recollection and Hearsay” (1995) 59 *Journal of Criminal Law* 62, 63. The question should be whether the original source of the information is unavailable to testify, or unable to remember, and it is wrong that the issue of admissibility should turn on the availability or powers of memory of the person to whom the original source reported the information rather than the original source itself. Neither the draftsman nor Parliament appears to have realised the incidental effect the drafting has on the identity of the person who must be unavailable or unable to remember.

⁶⁰ JC Smith, “Sections 23 and 24 of the Criminal Justice Act 1988: (1) Some Problems” [1994] *Crim LR* 426, 428.

⁶¹ See para 4.65 n 94 above.

⁶² In other words, an appropriate amendment should be made to the Criminal Evidence Act 1898, s 1(f)(ii).

⁶³ See para 4.44 above and Appendix A.

⁶⁴ See para 4.45 above and Appendix A.

7.32 The exclusionary rule requires a party wishing to adduce hearsay evidence to prove that it falls within one of the exceptions. This entails proving that the foundation requirements are met. This can be lengthy and, in some cases, it may be unnecessary. It is arguable, for example, that, as the Court of Appeal recognised in *Foxley*,⁶⁵ some documents speak for themselves as to their origins, and calling oral evidence to demonstrate that section 24 is fulfilled can be superfluous. Time is also spent hearing argument about the admissibility of particular items of evidence, and lengthy argument is often necessary because the law is so complex.

7.33 It may be that some laws have to be complicated in order to work justice. This is not so, however, with the hearsay rule in its current form because it is plain that for all its complications it is neither rational nor just. The rule can help to cause miscarriages of justice, particularly where it leads to the exclusion of cogent evidence.

The exclusion of cogent evidence

7.34 We now examine the cases where reliable evidence may be excluded by the hearsay rule.

The exclusion of cogent evidence on behalf of the defence

7.35 As we have seen,⁶⁶ the hearsay rule applies equally to both prosecution and defence. The result is that it sometimes makes it impossible for a defendant to put before the court credible evidence which points to his or her innocence.

7.36 The inadmissibility of hearsay evidence can lead to strange and undesirable results.⁶⁷ The exclusion of cogent evidence has been particularly unjust where it is the accused who wishes to adduce hearsay evidence which tends to show that he or she did not commit the crime.⁶⁸ Thus in *Sparks*⁶⁹ it prevented a white man who was accused of assaulting a girl of three, who was not called as a witness, from leading evidence that she had initially described her attacker as “a coloured boy”. In

⁶⁵ *Foxley*, *The Times* 9 February 1995.

⁶⁶ See para 2.11 above.

⁶⁷ Eg, A confesses in writing to the murder for which B is put on trial. He is willing to give evidence for B, but dies before trial. Though not admissible under the rules relating to confessions, A’s confession is (subject to judicial leave) admissible as “documentary hearsay” under s 23 of the 1988 Act. But if A comes to court, and when he has got there refuses to say anything and claims the privilege against self-incrimination, his earlier statement is not admissible in evidence. If he had come to court and there denied making the confession, or said that it was false, it might be a sensible result that the confession should be inadmissible: the hearsay account is trumped by evidence given directly to the court. But the out-of-court confession of someone who then refuses to speak at trial is, as such, no more and no less likely to be true than the out-of-court confession of someone who cannot give evidence because he is dead.

⁶⁸ See also *Harry* (1986) 86 Cr App R 105, discussed at para 2.32 n 53 above.

⁶⁹ *Sparks* [1964] AC 964.

*Thomson*⁷⁰ the accused was charged with using an instrument to procure an abortion. His defence was that the woman had induced the miscarriage herself, but he was not allowed to adduce evidence that she had told others not only that she intended to do this, but also that she had done so.

(i) *Confessions by a co-defendant or non-party*

7.37 The evidence which exonerates the accused may come from a co-accused,⁷¹ or from someone not involved in the proceedings.⁷²

7.38 In *Blastland*,⁷³ B was charged with the buggery and murder of a 12-year-old boy. B's defence was that he had attempted to bugger the boy but had been frightened off by the appearance of a third party who might have been one MH. The defence sought to adduce evidence of statements made by MH showing that he had information at a time when it would not have been generally known, and of a confession made by MH (which he then retracted, remade and again retracted). The trial judge did not allow any of the evidence to be admitted on the grounds that it was all inadmissible hearsay.

7.39 The House of Lords held⁷⁴ that MH's words were irrelevant to the issue of the accused's guilt. It was swayed by the fact that MH's confession to the crime was itself inadmissible, and thus if the fact of his knowledge were admissible, it would, as Lord Bridge, in the leading speech, said:⁷⁵

...lead to the very odd result that the inference that [MH] may have himself committed the murder may be supported indirectly by what [MH] said, though if he had directly acknowledged guilt this would have been excluded.

⁷⁰ *Thomson* [1912] 7 Cr App R 276.

⁷¹ Whether or not a confession by one accused may be adduced by the other is unclear from the authorities. In *Beckford and Daley* [1991] Crim LR 833 the Court of Appeal upheld the judge's ruling that the admission of one accused could not be adduced by the co-accused, but in *Campbell and Williams* [1993] Crim LR 448 a contrary decision was reached.

⁷² However, as long as *Blastland* is authority that third party admissions are *irrelevant* unless the inescapable conclusion is that only the third party could have committed the crime, no relaxation of the hearsay rule would enable a court to hear a third party admission if this authority is followed.

⁷³ *Blastland* [1986] AC 41.

⁷⁴ The House of Lords refused to reconsider the question of the admissibility of the confession by MH, but did consider the following point of law:

Whether evidence of words spoken by a third party who is not called as a witness is hearsay evidence if it is advanced as evidence of the fact that the words were spoken and so as to indicate the state of knowledge of the person speaking the words if the inference to be drawn from such words is that the person speaking them is or may be guilty of the offence with which the defendant is charged.

⁷⁵ *Blastland* [1986] AC 41, 53.

7.40 Their Lordships held that the evidence B sought to have admitted was not of probative value to the issue of whether B had or had not committed the offences. The probative value lay in the truth of MH's knowledge (which could be proved by other means), but it did not follow indisputably that MH could only have acquired this knowledge by committing the crimes himself; he could have acquired it by witnessing the crimes. Therefore, the fact of his knowledge was not sufficiently relevant to the issue of B's guilt.⁷⁶

7.41 Professor Birch⁷⁷ makes the point that
if only two people could have committed an offence, the fact that one of them possessed detailed knowledge about it would normally be highly relevant. However Lord Bridge seems to reason that because [the person who confessed] could have acquired his knowledge as a witness, evidence about it was irrelevant. The short answer to this is that to make such an assumption is to usurp the function of the jury.

7.42 There is a fear that if confessions by third parties were admitted, fabricated confessions would be a regular feature of criminal trials and acquittals would result from the introduction of unworthy evidence. It would be too easy for guilty people to introduce evidence of a fictitious confession, and the jury would have no chance of discerning the real ones from the false ones.

7.43 The counter-argument is that if the evidence shows that there is a possibility that someone else alone committed the crime, and the jury cannot dismiss that possibility, then they cannot be sure that the accused did and they should not convict.

7.44 The fact that someone else has confessed to the offence is logically relevant to the issue of whether the defendant committed it or not: this is so whether the other person is a co-defendant who gives evidence, a co-defendant who exercises his right not to give evidence, a co-defendant who is tried separately, or a person who is never caught or never prosecuted.⁷⁸

⁷⁶ A less strict line was taken by the Australian Supreme Court in *Van Beelen's Petition* [1974] 9 SASR 163, where the court accepted the principle that where only one person could have committed a crime, evidence tending to show that it was not the accused but someone else who committed it is relevant, but is nevertheless hearsay.

⁷⁷ DJ Birch, "Hearsay-Logic and Hearsay-Fiddles: *Blastland* revisited", *Essays in Honour of JC Smih* (1987) p 24.

⁷⁸ In the Scottish case of *McLay v Her Majesty's Advocate* (1994) SCCR 397 the accused had been tried with H. H was acquitted. On appeal, the appellant wished to adduce evidence of confessions allegedly made by H which exculpated the appellant. If the appellant had known of the confession before the trial, it would have been admissible then, but it was not admissible at any rehearing of evidence after H ceased to be a party to the proceedings.

7.45 This point is particularly pertinent because, unlike many pieces of hearsay evidence which a defendant might wish to call, this is one in relation to which it will normally be impossible for him or her to produce direct evidence, because a person who has confessed, if called to give evidence, can rely on the privilege against self-incrimination.⁷⁹

(ii) *An appeal may be allowed on the basis of inadmissible evidence*

7.46 Cogent evidence that someone other than the accused has committed the crime may be inadmissible, but this rule can pose a worrying dilemma for an appellate court. The court may quash a conviction because it knows of this inadmissible evidence, although it may try to disguise the fact that this is what is being done.⁸⁰ On occasion it may “take into account evidence which perhaps on a strict view of the laws of evidence it ought not to take into account”.⁸¹

7.47 In *Wallace and Short*⁸² the appellants asked the Court of Appeal to adopt the same course, because evidence had come to light since the trial that two other people had confessed to the offences for which the appellants were serving prison sentences. The defence accepted that evidence of the alleged confessions would not have been admissible, but relied on *Cooper* and *Hails*. The appeal was rejected.⁸³

7.48 In *Beckford and Daley*⁸⁴ the Court of Appeal upheld the trial judge’s ruling that a co-defendant’s confession could not be adduced, but it allowed the appeal as the hearsay rule could sometimes operate to obscure the truth and a conviction obtained in such circumstances could not be regarded as safe or satisfactory. This implicitly

⁷⁹ See generally *Phipson* paras 20-44 - 20-53.

⁸⁰ Eg *Cooper* [1969] 1 QB 267, where a person who was not charged admitted to a friend that he had been the person who committed the assault. The confessor and the accused were similar in appearance. No objection was taken at trial to the friend recounting this admission in evidence. The jury nevertheless convicted the accused. The Court of Appeal had a lurking doubt about the conviction and allowed the appeal. See also *Hails* (unreported, 6 May 1976, CA) in which a youth with a mental age of 10 was convicted of the murder of a child (to which he had made a confession), but the conviction was quashed when it became known that a man who had been a witness at the trial had himself confessed to the murder. Roskill LJ summarised the facts in *Hails* in his judgment in *Wallace and Short* (1978) 67 Cr App R 291, 297.

⁸¹ *Wallace and Short* (1978) 67 Cr App R 291, 298, *per* Roskill LJ.

⁸² *Wallace and Short* (1978) 67 Cr App R 291.

⁸³ The Court of Appeal held that “...*Cooper* [was] not a case of this Court acting on fresh or indeed inadmissible evidence.” Of *Hails* Roskill LJ said at p 297: “...The whole of that case, in our view, proceeded on the footing not that the Court was dealing with a conviction to be quashed on inadmissible evidence, but with a conviction which it thought was unsafe and unsatisfactory because the doubts which must have already existed as to the weight which could properly be attached to a confession by a youth of intellectual immaturity, were reinforced *when it was known that somebody else, whether truthfully or not, had confessed*” (emphasis added).

⁸⁴ *Beckford and Daley* [1991] Crim LR 833.

illustrates how unsatisfactory the law is. The existing law leads to injustices, which only the Court of Appeal can remedy, and then only after much public money has been wasted and after the defendant might have been deprived of his or her liberty.

7.49 As JUSTICE has commented:⁸⁵

We think that it is a powerful argument against a strict exclusionary rule that miscarriages of justice can be avoided only if the appellant is lucky enough to find a court prepared to decide his case otherwise than according to law.

7.50 It is obviously a very serious objection if the hearsay rule makes it impossible for a defendant to have a fair trial.

The exclusion of cogent evidence tendered by the prosecution

7.51 If the exclusionary rule is capable of causing wrongful convictions by making it sometimes impossible for the defence to lead cogent evidence of innocence, it is no less capable of causing wrongful acquittals by making it impossible for the prosecution to lead cogent evidence of guilt. This is typically so where a key witness, who is often the victim of the offence, is not in a position to come to court to give oral evidence at trial. For example, in a murder case there may be convincing hearsay evidence that the deceased had arranged to meet the accused, and that the deceased had been threatened by the accused, but this evidence may be inadmissible.

(i) It may be impossible to adduce evidence from particular categories of witness

7.52 The courts' insistence on oral evidence poses particular problems for particular categories of people. For example, there are serious problems when a witness—a foreign tourist who has been robbed or raped or cheated on a visit to London, for example—has gone abroad by the time the suspect eventually comes to trial. There are also particular obstacles to adducing evidence under the present system, where the witness is very young, very old, mentally vulnerable,⁸⁶ seriously ill or finds giving oral evidence in public too much of an ordeal.⁸⁷ The existence of the hearsay rule in effect grants a measure of immunity to those who commit offences against such vulnerable people.

7.53 To a very limited extent it is sometimes possible to avoid these difficulties by making use of various ancient statutory provisions that enable magistrates to take

⁸⁵ JUSTICE, *Miscarriages of Justice* (1989) para 3.41, in a part of the report which considered cases such as *Cooper* [1969] 1 QB 267 and *Wallace and Short* (1978) 67 Cr App R 291. For these cases see n 80 to para 7.46 and para 7.47 above.

⁸⁶ We use this term to cover both people who have learning difficulties and those who have mental health problems.

⁸⁷ As happened in a recent case where four men accused of the gang rape of a schoolgirl were acquitted on the direction of the judge because the girl was too distressed to give evidence, despite screens being erected: *The Times* 31 March 1995.

depositions from such witnesses out of court. However, as we have seen,⁸⁸ these provisions have largely fallen into disuse, and some of them have recently been abolished.⁸⁹ The “documentary hearsay” provisions of the 1988 Act were also intended to solve some of these problems.⁹⁰ The evidence these provisions make potentially admissible, however, is usually the absent witness’s statement to the police, which, unlike a deposition taken before a magistrate, means evidence given on an occasion when the defence had no opportunity to put questions to the witness. For this reason, judges often understandably feel obliged to refuse leave for such evidence to be given.

(ii) The exclusion of high quality first-hand oral hearsay

7.54 Section 23 of the 1988 Act⁹¹ provides for the admission of documentary first-hand hearsay in certain cases. There is no equivalent exception for first-hand oral hearsay, however reliable it might be. Our provisional view is that it is difficult to justify this distinction.⁹²

(iii) The contemporaneous note written down by someone else

7.55 There have been several cases where X saw a car registration number and called it out to Y who wrote it down, but did not check the note made by Y for accuracy.⁹³ Strict application of the hearsay rule means that neither X nor Y may give evidence of the registration number.⁹⁴ But if when the independent witness gave the number of the car to a police officer, the latter had written it down in his presence, then the police officer’s note could have been shown to the independent witness and he could have used it, not to say what he told the police officer, but to refresh his memory. We regard this state of affairs as showing, adopting Diplock LJ’s words, “a lack of logic”.⁹⁵

⁸⁸ See paras 3.50-3.53 above.

⁸⁹ Section 44 of the Criminal Justice and Public Order Act abolished committal proceedings, by which depositions taken before magistrates including cross-examination were admissible at trial in the Crown Court, and s 102 of the Magistrates’ Courts Act 1980, which provided for the admission of written statements in committal proceedings.

⁹⁰ See para 4.2 above.

⁹¹ See Appendix A and para 4.9 above.

⁹² This, of course, may be a problem for the defence as much as for the prosecution. Eg a confession by a third party may be admissible under s 24 of the 1988 Act if it is written, subject to the court’s discretion, but it will not be admissible if it is oral.

⁹³ See paras 4.29 above and 13.3 below.

⁹⁴ *Jones v Metcalfe* [1967] 1 WLR 1286.

⁹⁵ To overcome these difficulties, there is a need to reform the law of evidence on the lines which are set out in the report of the LRC; see paras 8.2-8.5 below. Although s 24 of the 1988 Act may permit such types of evidence to be admitted, this does not prevent anomalies arising. See, eg, para 4.29 above.

(iv) *The exclusion of implied hearsay*

7.56 We have previously⁹⁶ referred to the majority decision in *Kearley*⁹⁷ in which the House of Lords held that the hearsay rule extended to implied assertions. This case concerned the hearsay evidence of telephone calls and visits by unidentified people to premises occupied by the accused. The callers believed they were asking the accused to supply them with illegal drugs, but they were speaking to police officers, the accused having been arrested. The decision in *Kearley* to exclude this hearsay evidence has been the subject of much criticism.⁹⁸

7.57 The extent of the decision is very wide as it could be argued that every human statement or act contains an implied assertion of some kind, namely the intention, state of mind or belief of the speaker or actor.⁹⁹ Indeed Lord Browne-Wilkinson pointed out in his dissenting speech in *Kearley* that:

Any action involving human activity necessarily implies that the human being had reasons and beliefs on which his action was based.¹⁰⁰

7.58 As *Kearley* illustrates, identifying implied assertions is not straightforward. It now seems that the concept of “implied assertions” is very wide-ranging but that it stops short of real evidence. The distinction between real evidence and implied assertions is not always easy to identify.¹⁰¹

7.59 In *Cross* the author wrote:

A defensible line can be drawn between evidence of a call explicitly asserting premises to be used for betting, which is hearsay and admissible neither directly as evidence of the nature of the premises, nor circumstantially as

⁹⁶ Paras 2.22-2.25 above.

⁹⁷ *Kearley* [1992] 2 AC 228.

⁹⁸ See, eg, A Rein, “The Scope of Hearsay” (1994) 110 LQR 431, JR Spencer, “Hearsay, Relevance and Implied Assertions” [1993] CLJ 40, and C Tapper, “Hearsay and Implied Assertions” (1992) 108 LQR 524.

⁹⁹ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 para 5.12.

¹⁰⁰ *Kearley* [1992] 2 AC 228, 280.

¹⁰¹ It may also be difficult to identify an implied assertion where the words narrate a fact, but are also themselves an act. Eg, A may send an eviction notice addressed to B. In the body of that notice it is recited that A is the landlord and B is the tenant and A requires B to leave. Could it be used as evidence that B resides at or is the tenant of that particular address? On one view it could be an item of real evidence, which happens to be in the form of words on a paper, like a piece of paper saying “Sean Rules”; on another view it contains an implied assertion that B lives at the address, in which case it is hearsay and inadmissible, like a label which states the origin of goods: *Patel v Comptroller of Customs* [1966] AC 356 (PC).

evidence of the belief of such callers; and evidence of the receipt of calls ostensibly placing bets which is admissible directly to show that such calls were made, and circumstantially to show the beliefs of their makers.¹⁰²

- 7.60 In the former case there are express assertions; the latter is an instance of direct evidence. This distinction would have been based on the case of *Woodhouse v Hall*¹⁰³ where the words of the women offering the sexual services were themselves direct evidence that the premises were being used as a brothel.¹⁰⁴ However, after *Kearley*, the distinction of real evidence from hearsay evidence has become more subtle.
- 7.61 The distinction drawn in *Woodhouse v Hall* has been criticised as being itself ill-founded. Although the offer of sexual services may itself constitute evidence that the premises were used as a brothel, as Peter Carter has pointed out,¹⁰⁵ the genuineness of the offers is crucial, but the women cannot be cross-examined. The distinction between real and hearsay evidence remains blurred.¹⁰⁶
- 7.62 However, where the telephone calls in question are not direct evidence that the accused will supply the drugs, but are relevant because the makers of the calls must have believed that the accused would supply drugs, there is a hidden implied assertion, which was identified by the House of Lords in *Kearley*,¹⁰⁷ although not by the Court of Appeal.¹⁰⁸ Although the caller does not necessarily assert anything at all, the court will infer that he or she assumed a particular fact to be true (that the call placing the bet would be accepted, or that the request for drugs was being made

¹⁰² *Cross* p 525.

¹⁰³ *Woodhouse v Hall* (1980) 72 Cr App R 39.

¹⁰⁴ As JC Smith explains: "There is a difference between 'We offer "hand relief" at the Sauna,' which is hearsay evidence that sexual services are provided and (to a client) 'Would you like hand relief?' which is not hearsay": commentary on *Lawal* [1994] Crim LR 746, at 747.

¹⁰⁵ PB Carter, *Cases and Statutes on Evidence* (2nd ed) 305.

¹⁰⁶ In the recent case of *Lawal* [1994] Crim LR 746, the accused was convicted on three counts of failing to comply with enforcement notices, one of which required him to cease importing stone into his quarry. The local authority's agents were told by the accused's wife that they normally had outside stone in stock and could supply it at the quarry. The Court of Appeal held that her statements were not hearsay and were correctly admitted because they were adduced as direct evidence of the activities carried on in the quarry. It is difficult to see how this is direct evidence in the sense that an offer of sexual services was, as the offence related to stone having already been brought on site.

¹⁰⁷ *Kearley* [1992] 2 AC 228. Lord Ackner held at p 254 that the requests to buy drugs were not direct evidence of Mr Kearley's intention to supply drugs, which was the subject of the charge.

¹⁰⁸ 93 Cr App R 222, *per* Lloyd LJ.

to a person able and willing to supply them) and because the caller cannot be cross-examined about this belief, the hearsay rule operates to exclude the evidence.¹⁰⁹

- 7.63 Where there is an implied assertion an inference is drawn of a fact which is not explicitly asserted from words which may or may not themselves be an assertion. They may be a question or a greeting, for example. Inferring one fact from another is a common reasoning process. It therefore follows that much relevant evidence could be excluded because, upon analysis, it would emerge that a fact was to be inferred, in other words, that the evidence contained an implied assertion.
- 7.64 We are much troubled by the fact that many implied assertions no doubt go unspotted because an express assertion is so much easier to recognize than an implied assertion: the former is more readily detected by an advocate and excluded by a judge. The result must be that the law will be applied differently in different courts.
- 7.65 The rationale for the exclusion of implied assertions is that, as a class of statements, they are generally not to be relied upon. If an out-of-court assertion is repeated in court by the person who heard it, and not by the person who made it, the other party faces difficulties in challenging the credibility of the person who is not in court. Since the hearsay rule prevents A reporting an express assertion made by B, for example that D handles stolen goods, then, the argument goes, an implied assertion to the same effect should also be excluded.¹¹⁰
- 7.66 The counter-argument is that, as a class, implied assertions are more reliable than express assertions. This proposition is sometimes expressed by saying they are “self-authenticating”. It is rather unusual for people deliberately to convey false information indirectly, and this is even more likely to be the case where the inference is drawn from someone’s behaviour. It is therefore safe to rely on indirect evidence of this kind.¹¹¹ People do not usually try to mislead others into thinking something is the case when it is not by acting in a particular way, because there are more certain ways of trying to mislead them. Moreover, if someone acts on a belief in a particular state of affairs, that is a guarantee of sorts that the belief is genuine. For example, one can be confident that a sea-captain genuinely believes the vessel to be seaworthy if he sets sail in it himself.

¹⁰⁹ The minority in *Kearley* held that a question “Can I have some drugs?” is not a statement which makes an assertion. The question was itself a fact and therefore a form of direct evidence: *per* Lord Griffiths at p 238F.

¹¹⁰ *Per* Lord Bridge in *Kearley* [1992] 2 AC 228, 243C-G.

¹¹¹ Lord Bridge saw there was some force in this argument, but felt constrained by the authority of *Wright v Doe d Tatham* (1837) 7 Ad & El 313 HL(E); 112 ER 488 to hold that there was no legal distinction between implied and express assertions.

- 7.67 These factors have led *Cross* to state that
 ...concentration upon the presence of an intention to assert provides the most defensible watershed between hearsay and non-hearsay both as a matter of logical coherence and of practical common-sense.¹¹²
 We find this argument persuasive.
- 7.68 It should be relatively easy to determine what a speaker intended to communicate and whether an actor intended to assert anything at all.
- 7.69 There are two practical problems with this approach. First, admissibility then comes to depend on the chance of how an individual has expressed himself or herself, whether in a question or a direct statement. Secondly, cogent evidence could still be excluded. For example, a caller may say "Can I have my usual stuff?", which would be admissible, as containing no factual assertion, but the words of a caller who says "The stuff you sold me last week was bad," will be inadmissible. Yet there is no obvious reason why the second statement is any less reliable as evidence than the first, if the court is not interested in the quality of the drugs supplied.
- 7.70 The alternative to maintaining the current position or to restricting the scope of the hearsay rule to express assertions is for a court to look at the issue on a case by case basis, deciding in each case whether or not the inference which the court is being asked to draw can safely be drawn, so that it would be fair to dispense with the cross-examination of the speaker or actor. This has the obvious disadvantages of unpredictability and the risk of inconsistency from one court to another.
- 7.71 We have had the opportunity of ascertaining how a legal system copes with the admission of implied assertions. In Scotland, evidence supplied by implied assertions is admissible.¹¹³ It is noteworthy that the question whether implied assertions are hearsay does not seem to have arisen expressly in Scotland, but it is significant that in the case of *Lord Advocate's Reference No 1 of 1992*,¹¹⁴ the Lord Justice-General appeared to indicate approval of the dissenting speeches in *Kearley*.¹¹⁵
- 7.72 Our enquiries indicate that in Scotland no problems appear to have arisen as a result of the admission of implied hearsay. We find this persuasive support for it being admitted in England. On occasions, of course, implied hearsay will be admitted under the present law where it falls within one of the exceptions to the

¹¹² *Cross* p 517.

¹¹³ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 paras 5.11 and 5.13.

¹¹⁴ "...I consider that the views expressed by the dissenting minority in *Myers* and by Lord Griffiths in *Kearley* are more in keeping with the Scottish approach": *Lord Advocate's Reference No 1 of 1992* 1992 SLT 1010, 1016-1017 *per* Lord Hope.

¹¹⁵ Lord Browne-Wilkinson and Lord Griffiths gave dissenting speeches.

hearsay rule or where it is part of the *res gestae*. For all these reasons we provisionally believe that the rule should not extend to implied assertions.

7.73 If cogent evidence can sometimes be excluded by the rule, it is perhaps not surprising that parties sometimes attempt to evade inconvenient exclusions by disguising the true nature of the evidence being presented. The courts have been alert to condemn this practice. Thus Lord Devlin said in *Glinski v McIver*.¹¹⁶

[One] device is to ask by means of “Yes” or “No” questions what was done. (Just answer Yes or No. Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the grounds that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said. He added that such evidence is clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible.¹¹⁷ Despite these admonitions, the practice is alive and well.

“[The hearsay rule] often confuses witnesses and prevents them from telling their story in the witness-box in the natural way.”¹¹⁸

7.74 Even where the rule does not render evidence inadmissible, it needlessly inhibits witnesses in giving their evidence. An illustration is given by Professor Jackson:

A man is giving evidence as to why he remembered the time when he started to drive home. He says: “I had to be home by ten, and it was getting very foggy, so at nine I rang Muriel, and I says, “Muriel, what’s the fog like your end?” and she says...” At this point he is stopped. What Muriel says is hearsay, and not admissible. The poor man is confused and bewildered, because his natural way of speaking is apparently taboo: the proper course is to go in for circumlocution whereby he makes it clear that in consequence of information received he decided to leave earlier than he otherwise would have done...¹¹⁹

¹¹⁶ *Glinski v McIver* [1962] AC 726, 781, affirmed in *Turner* (1974) 60 Cr App R 80, 82.

¹¹⁷ Thus in *Saunders* [1899] 1 QB 490 a conviction for obtaining by false pretences was quashed because in order to help prove that the accused had not carried on genuine business, a witness had been asked:

Q Did you make enquiries as to whether any trade had been done by the business?

A. I did.

Q. Did you as a result of such enquiries find that any had been done?

A. I did not.

As has been pointed out in Andrews and Hirst, *Criminal Evidence* (2nd ed 1992) para 17.26, the questioning was clearly intended to circumvent the hearsay rule which prevented the question, “What was said in answer to your enquiries?”

¹¹⁸ LRC’s 13th Report, Hearsay Evidence in Civil Proceedings Cmnd 2964, para 40.

¹¹⁹ *Jackson’s Machinery of Justice* (8th ed 1989) (ed JR Spencer) p 266.

7.75 The CLRC thought that this was a valid criticism of the hearsay rule,¹²⁰ and one of the leading writers on evidence, Wigmore, thought that this problem was serious enough in itself to justify a major relaxation of the hearsay rule. In his view, witnesses should be allowed to make passing references to what other people told them, subject to the right of either prosecution or defence to have the original source of the statement summoned to give evidence, if he or she was available. The admission of first-hand oral hearsay would overcome much of this difficulty.

The arbitrary nature of the law

7.76 In recent years, Parliament has tended to adopt a legislative structure whereby new and important exceptions to the hearsay rule operate subject to the discretion of the trial judge. As we have seen,¹²¹ this is the case with the “documentary hearsay” provisions of the 1988 Act. The court has a general discretion to exclude statements which the provisions make potentially admissible, and if the statement was made for use in criminal proceedings it is only admissible where the judge grants leave. Similarly, when Parliament made videotapes of interviews with children admissible as evidence in criminal proceedings¹²² it gave the judge a discretion to exclude them. These discretions are in addition to the judge’s general discretions to exclude evidence.¹²³

7.77 The fact that much of the hearsay rule now operates or does not operate according to the trial judge’s discretion lays it open to a further criticism: that it is arbitrary. Although the law is not arbitrary on the face of it, because the 1988 Act uses many words to elaborate the factors which the judge must take into account in exercising his or her discretion, the appearance of certainty is illusory, because when the matters the judge is supposed to consider are examined it is clear that they pull in opposite directions, so leaving the judge more or less free to exercise his or her discretion as he or she thinks fit, so long as the relevant factors are taken into account.

7.78 The consequence, as we explained earlier,¹²⁴ is that different judges reach different conclusions about whether or not untested evidence should be admitted—and a similar divergence of approach appears in decisions of the Court of Appeal.

¹²⁰ CLRC Evidence Report, para 228, adopting the words of the LRC cited at the head of para 7.74 above.

¹²¹ See paras 4.40-4.62 above.

¹²² See paras 13.20-13.24 below.

¹²³ See paras 4.42-4.43 above. We discuss the advantages and dangers of relying on judicial discretion in paras 9.11-9.25 below.

¹²⁴ See para 4.60 above. *Nesher* [1990] Crim LR 579 (CA) and *Samuel* [1992] Crim LR 189 (CA) were concerned with very similar situations, but with opposing results.

7.79 The problem of discretion and arbitrary justice is not an imaginary one. Whether a prosecution is pursued may depend on the admissibility of evidence, and the question of admissibility may depend on the judge's discretion.¹²⁵ As we have said,¹²⁶ a judge has the power to exclude videotapes of previous interviews with children in the interests of justice. A small minority of judges, we have been told, disapprove of this legislation and use their discretionary power to see that videotape evidence is routinely excluded in their court.¹²⁷

The indiscriminating nature of the rule

7.80 A large and complicated body of law has been created on the premise that hearsay evidence is weaker than direct oral testimony, and must therefore be kept out. But once a piece of hearsay passes through one of the exceptions to the rule, the law apparently loses sight of this basic premise, and treats the hearsay as something which is capable of bearing the same weight as any other piece of evidence, irrespective of the reason, theoretical or real, for the exception. This could be criticised as illogical. The rationale which supposedly justified the exception may be in doubt, or it may be clearly inapplicable in the instant case. Alternatively, the exception itself may have been one created out of necessity and not because there is anything inherently reliable about the evidence, for example, section 23 of the 1988 Act.

7.81 Traditionally, the weight to be given to evidence is a matter for the jury, and once the evidence has been admitted by the judge, it is wholly up to the jury what to make of it, subject to the proviso that the judge may have power to intervene if he or she deems the evidence of such little weight that it is unsafe to let the case continue.¹²⁸

7.82 Because the same weight can be assigned to all admissible evidence, a court can base a conviction on hearsay, even if it is the only piece of evidence before it.¹²⁹

¹²⁵ Eg, in a case in 1993, a girl of 16 died of serious injuries deliberately inflicted on her. Before her death, she named the people who had caused them in taped interviews. Whether these tapes were admissible at the trial or not depended on the discretion of the judge. The tapes were admitted, and the defendants were convicted of murder and sentenced to life imprisonment: *Dudson and others*, *The Times* November and December 1993 (conviction reported 18 December).

¹²⁶ Under s 32A of the 1988 Act which is set out in Appendix A. See also paras 13.20-13.21 below.

¹²⁷ For the Court of Appeal's attitude to a comparable approach by a judge to sentencing powers he disliked, see *Scott* (1989) 11 Cr App R (S) 249, 252 *per* Brooke J.

¹²⁸ *Galbraith* [1981] 1 WLR 1039.

¹²⁹ In *Kennedy* [1992] Crim LR 37 the Court of Appeal expressly held that it would not have been right for the trial judge to direct the jury that less weight was to be given to a statement admitted under s 23 than to the testimony of live witnesses.

Thus, as we have seen,¹³⁰ the Privy Council once upheld a murder conviction (and consequent death sentence) where the only piece of evidence against the defendant was an identification in the form of a dying declaration. And an English court may also convict, contrary to the rule in certain other jurisdictions, where the only item of evidence against the accused person is his or her extra-judicial confession.¹³¹ In Germany, for example, hearsay evidence is generally admissible, but a conviction may not be based upon it unless it is corroborated.¹³² Hearsay is also admissible in criminal proceedings in the Netherlands, but if the hearsay evidence is a confession there must be corroboration before the court can convict.¹³³ This feature of the hearsay rule could mean that the rights of a defendant under the Convention are not respected.

Contravention of the Convention

- 7.83 The rules on hearsay under the present law are vulnerable to challenges in Strasbourg on breaches of Articles 6(1) and 6(3)(d). The use against an accused person of statements from people whom he or she has had no chance to question at any stage may not in itself be a contravention, but if there were *no other* corroborative evidence it could well be.¹³⁴ At present, a conviction could be based on such evidence. In addition, if a defendant is not permitted to adduce reliable hearsay evidence, that could mean there might be a breach of Article 6(1).¹³⁵ Lastly, if the system works to prevent certain crimes from being prosecuted because the victim is unable to give oral evidence, and there is no other way in which that essential evidence can be received, it is possible that there could be a contravention of Article 8(1).

Summary of the criticisms of the hearsay rule

- 7.84 There is no unifying principle behind the rule, and this gives rise to anomalies and confusion. Court time is wasted because of the lack of clarity and complicated nature of the rule. Cogent evidence may be kept from the court, however much it may exonerate or incriminate the accused, because the fact-finders are not trusted

¹³⁰ *Nembhard v The Queen* [1981] 1 WLR 1515 (PC). See para 4.67 above.

¹³¹ The majority of the Royal Commission believed that, where a confession is credible and is admitted in evidence after consideration of ss 76 and 78 of PACE, it should be possible for a conviction to be based on the confession alone. The Royal Commission also recommended that *Galbraith* be reversed and that in all such cases the judge should give a strong warning about the danger of convicting on confession evidence alone. See the Report of the Royal Commission, ch 4, paras 77, 85 and 87 and Recommendations numbers 89 and 90.

¹³² See para 5.34 in Appendix B.

¹³³ *Strafvordering* (Code of Criminal Procedure) art. 341(4): "proof that the accused has committed the act alleged cannot be established exclusively on the statements of the accused."

¹³⁴ See para 5.25 above.

¹³⁵ See para 5.32 above.

to treat untested evidence with the caution it deserves, but if hearsay is admitted there is nothing to prevent them convicting on it alone. Witnesses may be put off by interruptions in the course of their oral evidence. Whether evidence will be let in or not is unpredictable because of the reliance on judicial discretion. The admission or exclusion of hearsay evidence could mean that the Strasbourg Court would conclude an accused had not had a fair trial.

PART VIII PREVIOUS REFORM PROPOSALS

Introduction

- 8.1 In 1965, Lord Reid exhorted Parliament to conduct a wide survey of hearsay evidence, to be followed by legislation.¹ Following this call a number of authoritative bodies recommended changes to the rule against hearsay: the LRC in 1966,² the CLRC in 1972,³ the Roskill Committee in 1986,⁴ and the Royal Commission in 1993,⁵ while in 1993 this Commission also published its report recommending the abolition of the hearsay rule in civil proceedings.⁶

The Law Reform Committee's Report on Civil Hearsay

- 8.2 The LRC conducted an exhaustive review of the law of evidence in civil proceedings, publishing its report on hearsay evidence in 1966.⁷ The CLRC agreed with the LRC's basic approach in its own report six years later.⁸
- 8.3 The LRC concluded that the arguments in favour of the hearsay rule were not sufficient to preclude it from recommending that documentary second-hand hearsay evidence should be admissible, with certain safeguards attached.⁹ These precautions were that the leave of the court should be given before previous consistent statements of a witness might be admitted,¹⁰ that the other party should be given notice of the intention to adduce hearsay evidence, containing sufficient information to enable it to assess whether a counter-notice requiring the attendance of the

¹ *Myers* [1965] AC 1001, 1022A *per* Lord Reid, "The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate."

² LRC 13th Report, *Hearsay Evidence in Civil Proceedings* (1966) Cmnd 2964. See paras 8.2-8.5 below.

³ CLRC Evidence Report. See paras 8.6-8.16 below.

⁴ The Roskill Report. See paras 8.17-8.28 below.

⁵ The Report of the Royal Commission. See paras 8.29-8.31 below.

⁶ *The Hearsay Rule in Civil Proceedings* (1993) Law Com No 216 Cm 2321. This study was carried out at the request of the Lord Chancellor pursuant to recommendation no 26 of the Report of the Review Body on Civil Justice (1988) Cm 394.

⁷ The LRC concluded that the arguments for the hearsay rule, insofar as they had any validity at all, were not sufficient to preclude the committee from recommending that hearsay evidence should be admissible, with certain safeguards attached.

⁸ In considering the 1966 report, the CLRC said, at para 228; "We agree with the Law Reform Committee both as to the insufficiency of the reasons for the rule excluding hearsay evidence and as to the disadvantages of the rule."

⁹ LRC 13th Report para 19; cf Civil Evidence Act 1968, s 2(3).

¹⁰ *Ibid* para 35; cf Civil Evidence Act 1968, s 2(2).

witness was needed, and that the other party should have the right to issue a counter-notice.¹¹

8.4 The Committee's recommendations were implemented in respect of civil hearsay by Part I of the Civil Evidence Act 1968.¹² The basic principles underlying this new statutory scheme were that statements made otherwise than by a witness in court were admissible in civil proceedings only by the consent of the parties, or pursuant to the provisions of the Act.¹³

8.5 The Act went somewhat further than the LRC's recommendations, by making provision for the admissibility of evidence produced by computers and by giving the Secretary of State power, which he has never exercised, to extend the provisions of the Act to magistrates' courts.¹⁴

The CLRC's Report on Criminal Hearsay

8.6 The CLRC¹⁵ proposed the reform of the rules on hearsay evidence¹⁶ in criminal trials as part of its much wider review of the law of evidence in criminal cases.¹⁷ The report takes the form of a commentary on a draft Bill¹⁸ (the draft Criminal Evidence Act) prepared for the Committee by Parliamentary Counsel.

8.7 The Committee's most significant conclusion was that it thought that the most common modern justification for the exclusion of hearsay evidence, namely the fear

¹¹ *Ibid* para 24; cf Civil Evidence Act 1968, s 8.

¹² *Cross*, at p 538, describes Part I of the Civil Evidence Act 1968 as "...a completely statutory foundation for the admission of hearsay in civil proceedings".

¹³ See *Cross*, chapter XV.

¹⁴ The LRC had recommended that the new provisions should not apply to magistrates' courts; it was feared that lay justices would be confused by the different rules of evidence applied in criminal and civil proceedings, that they would not exercise discretion as to the admissibility of evidence consistently, and that the proposed notice procedures would be difficult to implement in the magistrates' court. For these reasons, they preferred not to alter the rules of evidence applied in magistrates' courts while the CLRC was considering the matter. For the subsequent history, see the Hearsay Rule in Civil Proceedings (1993) Law Com No 216, paras 3.22-3.30.

¹⁵ The Committee was composed of judges, academics, and prominent practitioners, including Lord Justice Edmund Davies, Lord Justice Lawton, Professor Rupert Cross and Professor Glanville Williams.

¹⁶ The Committee adopted the definition of the hearsay rule proposed by Professor Cross: "Express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted."; *Cross* (3rd ed 1967) p 387. .

¹⁷ CLRC Evidence Report, paras 224-265.

¹⁸ Clauses 30-41 of the draft Bill are concerned with hearsay evidence.

that lay jurors and magistrates would give too much credence to such evidence, was “historically incorrect”.¹⁹

- 8.8 The Committee recognised, however, that, for two reasons, “...there is a case for preserving the rule against hearsay evidence in criminal trials”.²⁰ The Committee considered that the retention of the rule against hearsay could be justified, firstly, by the particular needs of the system of trial by jury, and secondly, by the protection it gives against the fabrication of evidence.
- 8.9 The CLRC thought it important that what has become known as the “principle of orality”²¹ should be maintained in criminal proceedings, that trials on indictment should continue without adjournments for further inquiries, and that preliminary proceedings should be kept to a minimum. In its opinion, these considerations²² formed both the most significant points of difference between civil and criminal proceedings and the essential features of trial by jury. It was for this reason that the CLRC’s proposals permitted the admission of hearsay evidence *only* where the maker of the statement was not available or where it was thought important to augment oral evidence.
- 8.10 The Committee’s awareness of the danger of admitting manufactured evidence into criminal trials seems to have been the main consideration which influenced it in recommending the restrictions it proposed on the admissibility of hearsay evidence.²³
- 8.11 The CLRC concluded that the arguments against the retention of the rule in its present form were extremely strong. It attached a great deal of weight to the enactment of the Civil Evidence Act 1968,²⁴ and to decisions of the courts that have “revealed serious objections to the rule”.²⁵ It had “little doubt”²⁶ that the majority of practitioners favoured “substantial relaxation” of the rule.

¹⁹ CLRC Evidence Report, para 227. The Committee did not explain this assertion.

²⁰ *Ibid*, para 229.

²¹ So described by Lord Hutchinson of Lullington during Parliamentary debates on the Criminal Justice Act 1988: *Hansard* (HL) 17 November 1987, vol 490, col 138.

²² CLRC Evidence Report, para 229.

²³ See para 8.15 below.

²⁴ The CLRC regarded consistency between the rules of evidence in civil and criminal proceedings as desirable, both for its own sake and for the avoidance of incongruous results. For its concern about inconsistent findings of fraud in civil and criminal proceedings, see para 1.12 above.

²⁵ CLRC Evidence Report, para 230. The cases cited by the CLRC were *Myers* [1965] AC 1001, *Thomson* [1912] 3 KB 19, *Jones v Metcalfe* [1967] 1 WLR 1286, and *McLean* (1967) 52 Cr App R 80, which are dealt with at paras 3.60, 7.36, 7.55 above and 13.35 below respectively.

²⁶ CLRC Evidence Report, para 234.

8.12 The CLRC recommended²⁷ four principles for the reform of the law:

- (i) to admit all hearsay evidence likely to be valuable to the greatest extent possible without undue complication or delay to the proceedings;
- (ii) to ensure that evidence should continue to be given for the most part orally by allowing hearsay evidence only if the maker of the statement cannot be called or it is desirable to supplement his oral evidence;
- (iii) to include necessary safeguards against the danger of manufactured hearsay evidence;
- (iv) to follow the scheme of the Civil Evidence Act 1968 as far as the differences between civil and criminal proceedings allow.

8.13 To achieve reform in accordance with these principles, the CLRC proposed a six-part scheme:²⁸

- (i) out-of-court statements should be made admissible if the maker is called as a witness or if the maker is unavailable for one of a number of listed reasons;²⁹
- (ii) statements contained in certain types of records should be made admissible if the information supplied in the statement was provided by a person with personal knowledge of the matter in question and the supplier is called as a witness, cannot be called for one of the listed reasons referred to,³⁰ or cannot be expected to remember the relevant information accurately;³¹
- (iii) special provision should be made for the admissibility of information derived from computers;³²

²⁷ *Ibid*, para 238.

²⁸ *Ibid*, para 236.

²⁹ If where the witness is dead, abroad, impossible to identify or to find, or where a witness is not compellable and refuses to give evidence or is compellable but refuses (in court) to be sworn. A similar provision was enacted in PACE, s 68, now repealed and replaced by s 23 of the 1988 Act; see Part IV above.

³⁰ See n 29 above.

³¹ A similar provision was enacted in PACE, s 68, now repealed and replaced by s 24 of the 1988 Act.

³² Clause 35(2) of the draft Bill sets out the conditions that would have to be fulfilled before a statement contained in a document produced by a computer could be admitted as evidence:

(a) that the document containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or

- (iv) the common law rules pertaining to the *res gestae* should be codified;
- (v) out-of-court statements should be admissible if the parties so agree;³³
- (vi) hearsay evidence should be admissible only under this or other statutory provisions, including rules of the common law preserved by statute.

8.14 As safeguards, the CLRC recommended that there should be a number of restrictions on the admissibility of hearsay evidence:³⁴

- (i) only first-hand evidence of the making of an oral statement would be admissible (unless the statement was made in the course of giving evidence in court);
- (ii) statements contained in a proof of evidence given by a person called as a witness in the proceedings in question would *not* be admissible unless the court grants leave on the ground that it is in the interests of justice in the particular circumstances for the evidence of the witness to be supported by such proof;
- (iii) (*trials on indictment only*) a statement would not be admissible by reason of the impossibility of calling its maker unless the party seeking to adduce such a statement as evidence has given notice of its intention to do so with particulars of the statement and the reason why the maker cannot be called;
- (iv) a statement said to have been made after the accused has been charged, by a person compellable as a witness but who refuses to take the oath or by a

by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operated properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of the period was not such as to affect the production of the document or the accuracy of its contents;

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

PACE, s 69, which contains the modern provisions relating to computer-generated evidence is similar to parts (c) and (d) of the clause; however, under PACE, there is no requirement to show how the computer was used or with what information it was supplied. The clause is also similar, but not identical to, the relevant provision (s 5) of the Civil Evidence Act 1968. See Part IV above.

³³ This provision reflects the Criminal Justice Act 1967, s 9.

³⁴ CLRC Evidence Report, para 237.

person said to be abroad, impossible to identify or find, or to have refused to give evidence, will not be admissible at all; there would have been a similar restriction in the case of the supplier of information contained in a record;

- (v) a statement made by the spouse of the accused (not being jointly tried) would not be admissible on behalf of the prosecution unless the maker is a compellable witness for the prosecution or otherwise gives evidence for the prosecution.

8.15 The Committee stated³⁵ it hoped to achieve four purposes by the introduction of this scheme. Its principal purpose seems to have been the admittance of all hearsay evidence likely to be helpful to the court without inordinate hindrance or delay. Its second purpose was to ensure that evidence in criminal proceedings is given for the most part orally: hearsay evidence would be admitted only if the maker of the statement could not be called or if the court granted leave for his or her oral evidence to be supplemented. The third aim of the scheme was to provide safeguards against the manufacturing of hearsay evidence (see items (iii), (iv) and (v) in paragraph 8.14 above). Its final purpose, as we have explained in paragraph 8.12 above, was to follow the precedent of the Civil Evidence Act 1968 as far as the differences between civil and criminal proceedings allowed.

8.16 Implied assertions³⁶ are not referred to specifically in the CLRC report. Third-party confessions are briefly touched upon.³⁷ Some of the CLRC's recommendations pertaining to hearsay were enacted in 1984,³⁸ albeit in a substantially altered state.

The Roskill Report

8.17 The Roskill Committee was set up in 1983 by the Lord Chancellor and the Home Secretary as an independent committee of inquiry with the purpose of recommending changes to English criminal procedure in cases of fraud in order to secure "the just, expeditious and economical disposal of such proceedings."³⁹ Although its terms of reference did not extend beyond the conduct of proceedings for fraud, the Committee recognised that

³⁵ *Ibid*, para 238.

³⁶ See paras 2.20-2.25 above.

³⁷ A reference to the admissibility of the confessions of a co-accused is made at para 53: the CLRC were in "...no doubt that the rule applies only to admissibility on behalf of the prosecution and that an accused person may, in order to exculpate himself, give in evidence a confession alleged to have been made by his co-accused...".

³⁸ PACE, Part VII. Section 68, the most significant section of that Part, has been repealed and replaced by Part II of the 1988 Act (ss 23-28). See M Zander, *The Police and Criminal Evidence Act 1984* (2nd ed 1990) p 177-183; A Keane, *The Modern Law of Evidence* (3rd ed 1994) p 269-284; *Cross* p 629-634.

³⁹ The Roskill Report, para 1.1.

...if our recommendations are adopted in fraud cases it would be logical for some of them to apply in all criminal cases...we have been careful to ensure that we were not proposing changes in law and procedure which we would not be prepared to see applied to other types of criminal case.⁴⁰

8.18 The Committee⁴¹ regarded the present rules of evidence as inadequate on two counts. An excessive quantity of court time was consumed in proving the authenticity of commonplace documents, and the task of the prosecuting authorities was made unnecessarily difficult.

8.19 In considering "...the use of documents as evidence of the truth of their contents",⁴² the Committee made reference to "substantial" support for a relaxing of the hearsay rules so as to allow a wider⁴³ class of documents to be admitted.⁴⁴ On the other hand, general rules permitting documents to be evidence of their contents, and permitting the court to judge the probative value of the evidence adduced, and permitting the parties to decide themselves the supporting evidence to be put before the court, were rejected.

8.20 Fearing that judges would tend to err on the side of caution and refuse to admit evidence on the ground that its probative value was outweighed by its potentially prejudicial effect, the Committee proposed that⁴⁵

...the basic rule should be that in criminal proceedings arising from fraud documents should be allowed to speak for themselves and thus become admissible without formal proof. Whether or not a particular document which is currently inadmissible should be permitted to be given in evidence should be a matter for the judge to decide by the exercise of a discretion in advance of the trial.

⁴⁰ *Ibid*, para 1.5.

⁴¹ The Committee consisted of 8 members drawn from industry and commerce, local government, the legal profession, the judiciary, and the police.

⁴² The Roskill Report, para 5.33.

⁴³ In effect, admitting all documents as evidence of the truth of their contents, subject to certain notice requirements, as is the case in civil proceedings.

⁴⁴ The Roskill Report, para 5.34.

⁴⁵ *Ibid*, para 5.35. Para 5.36 goes on to say "If one of the parties intends seriously to challenge the authenticity of a document...he must, of course, be allowed to make that challenge...". We assume from this, taken as a whole, that the Committee meant that, generally speaking, documents were to be admissible without formal proof but if, in respect of a document which would have been classified as hearsay, the opponent wished to challenge the authenticity of the document and had a good reason for doing so, the presumption would reverse. Being hearsay, the document would be *prima facie* inadmissible, but on satisfactory proof by the producing party the judge would have a discretion to let it in.

- 8.21 The judge would thus be given an *inclusionary* discretion to admit evidence that would otherwise be excluded,⁴⁶ but most documents would be admitted automatically.
- 8.22 The keystone of the Committee's recommendations was the institution of a system⁴⁷ of preparatory hearings before fraud trials, a recommendation implemented by Parliament in the Criminal Justice Act 1987.⁴⁸ At such a hearing a party might challenge the authenticity of a document and if it satisfied the trial judge that there was good reason for the challenge, the exacting requirements of proof would not be slackened. The judge would not need to be convinced of the lack of credentials of the proffered evidence before ruling that the "strict requirements of proof"⁴⁹ should be maintained; he or she should merely be satisfied that a good reason for doubting the authenticity of the document existed.
- 8.23 Where the trial judge does not accept that the party's reason for challenging the evidence is a good one, the document would be admitted without explicit proof.
A party must be entitled to put his own interpretation upon the contents of a particular document, but the question of the truth of the contents is a matter of weight, and not admissibility, and ultimately will be a matter for the jury.⁵⁰
The Committee specifically recommended that the trial judge should be empowered not merely to direct that the relevant document should be admitted in evidence but that it should be admitted as proof of its contents.
- 8.24 The Committee made one qualification to these recommendations by advocating the retention of the rule in PACE,⁵¹ whereby documents which set out the evidence that a witness could be expected to give in court and which had been prepared for that purpose should not be admitted without the leave of the court. The Committee stressed the importance of the principle that available witnesses should give evidence in court wherever possible.⁵²
- 8.25 The Committee also recommended⁵³ that a party seeking to adduce a document as evidence of the truth of its contents without exhaustive proof should have to provide

⁴⁶ *Ibid*, para 5.35.

⁴⁷ *Ibid*, para 5.36.

⁴⁸ Criminal Justice Act 1987, ss 9 and 10.

⁴⁹ The Roskill Report, para 5.36.

⁵⁰ *Ibid*, para 5.36.

⁵¹ PACE, Sched 3, Part I, para 2, now repealed by the 1988 Act, s 170(2) and Sched 16.

⁵² The Roskill Report, para 5.37.

⁵³ *Ibid*, para 5.38.

some information concerning its character and provenance to the other side before the preparatory hearings. The judge would take into account any failure or refusal to provide this information during the exercise of the inclusionary discretion.

8.26 Some of the Committee's recommendations were enacted as Part II of the Criminal Justice Act 1988.⁵⁴ Section 24⁵⁵ of that Act implements the recommendation⁵⁶ that "documents should speak for themselves", in circumstances where this is appropriate or necessary, rather than merely support the oral evidence of witnesses. This section loosens the previous conditions for the admissibility of documents under section 68 of PACE, removes the restrictive concepts of "duty" and "records" from the law and replaces them with the twin tests of "created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office" and "the information...was supplied by a person...who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with."⁵⁷

8.27 Section 25 of the Act provides a "conditional admissibility"⁵⁸ for documentary evidence, thus reversing the previous presumption relating to such evidence. This section implements a recommendation of the Roskill Report⁵⁹ to the effect that a judge should have the power to exclude documentary evidence where that exclusion is thought desirable (and having regard to the considerations listed in section 25(2)), rather than that there should be an absolute rule as to admissibility or that the presumption against admissibility should be retained. Kirk and Woodcock put it thus:

The balance of arguments on admissibility has now shifted away from the concept that statements in documents are "inadmissible unless...", towards the concept that such evidence is "admissible unless...", as recommended by the Roskill Report.⁶⁰

8.28 The report makes it clear that the Committee's recommendations are not intended to supplant other rules of evidence, such as the rule that evidence that is not relevant is not admissible, and also that the judge would retain the overriding power

⁵⁴ See Part IV above.

⁵⁵ Set out in Appendix A.

⁵⁶ The Roskill Report, paras 5.34-5.39.

⁵⁷ The 1988 Act, s 24(1).

⁵⁸ DN Kirk and AJJ Woodcock, *Serious Fraud* (1992) p 100.

⁵⁹ The Roskill Report, paras 5.35-5.36. See para 8.22 above.

⁶⁰ DN Kirk and AJJ Woodcock, *Serious Fraud* (1992) p 100.

to exclude evidence where its probative value was outweighed by its prejudicial effect.⁶¹

The Royal Commission on Criminal Justice

8.29 The Royal Commission was established in June 1991⁶² It was given a wide brief to examine the effectiveness of the criminal justice system:⁶³

...from the stage at which the police are investigating an alleged or reported criminal offence right through to the stage at which a defendant who has been found guilty of such an offence has exhausted his or her rights of appeal.

8.30 The Royal Commission examined the rule against hearsay.⁶⁴ The Commission drew attention to the fact that the exceptions to the rule against hearsay in criminal cases had already been extended in scope by the Criminal Justice Acts of 1988 and 1991, and that it had been pointed out that, provided the judge draws attention to the possible hazards and defects of such evidence, justice would be better served if it were admitted.

8.31 The Royal Commission were of the opinion that:⁶⁵

...the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place.

Recommendation 189⁶⁶ of the Royal Commission was that:

Hearsay evidence should be admitted to a greater extent than at present. But before the present rules are relaxed, the issues should be examined by the Law Commission.

The Law Commission's Report on Civil Hearsay⁶⁷

8.32 Our recent report on the hearsay rule in civil proceedings recommended that Part I of the Civil Evidence Act 1968 should be repealed, and the exclusionary rule abolished.

⁶¹ The Roskill Report, para 5.39.

⁶² The creation of the Royal Commission was announced by the Home Secretary and the Lord Chancellor on 14 March 1991, the day after the "Birmingham Six" had their convictions quashed by the Court of Appeal.

⁶³ The Report of the Royal Commission, ch 1, para 5.

⁶⁴ *Ibid*, ch 8, paras 25-26. The Commission expressed their thanks to Professor Sir John Smith CBE, QC.

⁶⁵ *Ibid*, ch 8, para 26.

⁶⁶ *Ibid*, p 205. See also para 1.3 above.

⁶⁷ The Hearsay Rule in Civil Proceedings (1993) Law Com No 216; Cm 2321. This report has been accepted by the Government, and the Civil Evidence Bill 1995, which implements it, is now before Parliament.

- 8.33 We recommended, however, that hearsay evidence should be retained as a distinct category, and that parties intending to use hearsay evidence in court ought to be placed under obligations to fulfil certain requirements as to notice, although failure would not lead to the exclusion of the evidence altogether.⁶⁸ We also recommended that courts should be given guidelines to enable them to assess the appropriate probative value to be given to hearsay evidence.⁶⁹
- 8.34 The report also contained recommendations which would simplify the procedure for proving business and other records in court,⁷⁰ and remove the special procedures for computer-based records contained in the 1968 Act.⁷¹

⁶⁸ *Ibid*, para 4.8-4.13. Instead, the courts might impose cost sanctions, and the weight to be given to the evidence might be diminished.

⁶⁹ *Ibid*, para 4.17-4.19.

⁷⁰ *Ibid*, para 4.38-4.42.

⁷¹ *Ibid*, para 4.43.

PART IX THE NEED FOR CHANGE AND PRELIMINARY ISSUES

Introduction

- 9.1 In this Part we start by considering whether there should be any change at all, and we conclude that there should. We then discuss three preliminary issues before we go on to set out six different options for reform in the next Part. The first is the effect of the Convention: we suggest that its requirements make it necessary to create an additional safeguard for the accused, whichever option for reform is eventually selected. The second is the extent, if any, to which a court should have a discretion to admit or to exclude hearsay. The third is how the hearsay rule should be formulated in the four options which envisage its retention in some form or another.¹

Option 1: no change

- 9.2 In Part VII we examined the defects of the hearsay rule. They are numerous and serious. The rule is excessively complex; this complexity leads to confusion, anomalies and wasted time, both for the court and for the parties. The rule results in the exclusion of cogent evidence even where it is the defence that seeks to adduce it; this means that where a conviction may be unsafe or unsatisfactory because cogent evidence was not admitted, the conviction may not stand even though the evidence was in fact inadmissible. In many situations, whether or not hearsay will be admitted depends on the exercise of judicial discretion, which leads to inconsistency of decisions from one court to another. Finally, it is possible that the current operation of the rule may involve a breach of Article 6 of the Convention.
- 9.3 For all these reasons we believe that **change is necessary, and Option 1 should be rejected.**

The European Convention on Human Rights

- 9.4 As we have said,² there are certain implications to be drawn for the English law of hearsay from the requirements of the Convention. These requirements demand that our law be amended so as to comply with them, and impose constraints on the ways in which this might be done. The most important implication for this Part of our paper is that the use of hearsay statements from witnesses whom the defence have had (and will have) no chance to question is probably compatible with the

¹ These options are set out at paras 10.36-10.55, 10.56-10.64, 10.65-10.10.72 and 10.73-10.77 below respectively.

² See paras 5.34-5.39 above.

Convention where such questioning is genuinely impossible; but, significantly, such evidence must not found a conviction if it stands alone.³

Additional protection for the accused

- 9.5 We believe the risk of there being a breach of the Convention where a person stands to be convicted on hearsay evidence alone is sufficiently serious to warrant requiring the court to stop the case where hearsay is the *only* evidence of an element of the offence. In our view this duty should be introduced irrespective of any other changes which may be made. This could be done indirectly by means of a provision to the effect that no element of an offence should be regarded as proved on the basis of unsupported hearsay: at the close of the prosecution case, the judge would be obliged to conclude that if there were no further evidence he or she would have to direct the jury that they could not find that element of the offence proved. We provisionally propose that **unsupported hearsay should not be sufficient proof of any element of an offence.**

Judicial discretion

- 9.6 The second general matter is to determine the extent, if any, to which the court should be given a *discretion* to determine whether hearsay is admitted or excluded. The alternative to a discretion-based régime is a category-based régime, in which evidence automatically qualifies for admission if it falls within a particular category—irrespective of its quality.
- 9.7 At present, a court may exercise discretion in the following ways. At common law⁴ the court has a residual discretion to refuse to admit prosecution (but not defence) evidence if its prejudicial effect outweighs its probative value. As Lord Scarman has said,⁵ this discretion is rarely exercised.
- 9.8 Statute has now buttressed the existing common law discretion, which was founded on the duty of the judge or magistrates to ensure that every accused person has a fair trial. Section 78(1) of PACE provides:⁶
- In any proceedings the court may refuse to allow evidence on which the *prosecution* proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an

³ See para 5.35 above.

⁴ See *Noor Mohamed v The King* [1949] AC 182, 192 and *Lobban v The Queen*, *The Times* 28 April 1995.

⁵ *Sang* [1980] AC 402, 456.

⁶ The full text of the section is set out at Appendix A.

adverse effect on the fairness of the proceedings that the court ought not to admit it.⁷

9.9 There is a substantial overlap between this provision and the common law discretion; but, as has been pointed out, the primary importance of the statutory provision is that it extends the common law power in that it makes it possible for evidence obtained by improper or unfair means to be excluded.⁸ We do not propose to consider any amendment to these discretions, since they appear to operate fairly and without undue difficulty. The question with which we are concerned is whether there ought to be an *additional* discretion specifically relating to the admission of hearsay.

9.10 As we have explained,⁹ at present the courts have not only the two general discretions but also the discretion conferred by section 25¹⁰ of the 1988 Act, and the power to grant leave to admit evidence under section 26¹¹ of that Act, where a party tenders evidence under section 23¹² or 24.¹³

Advantages of judicial discretion

9.11 The prime advantage of a judicial discretion is that it enables the judge or magistrates to reach a decision on the facts of the particular case, thus avoiding the injustices which are likely to result from a “blanket rule” approach.

9.12 A second advantage is that if it fell to the judge or magistrates to decide on the basis of fundamental principles whether or not an item of evidence should be admitted, it would shine a spotlight on the real reasons for the admission or exclusion of evidence, and would encourage the courts to return to these first principles in every case rather than adopting a technical approach. It would be, as McLachlin J put it in *Khan*,¹⁴ “a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions”.

9.13 Adrian Zuckerman has argued cogently that if the judge or magistrates had to give reasons for deciding to admit or exclude an item of evidence, and those reasons had

⁷ Emphasis added.

⁸ *Blackstone* F2.4.

⁹ See para 4.40 above.

¹⁰ See Appendix A for its terms and para 4.44 above.

¹¹ See Appendix A and para 4.45 above.

¹² See paras 4.08-4.27 above.

¹³ See paras 4.28-4.39 above.

¹⁴ *Khan* (1990) 59 CCC (3d) 92, a decision of the Supreme Court of Canada.

to be based on the reliability of the evidence in question, such decisions would be less likely to be reached on spurious grounds.¹⁵

Disadvantages of judicial discretion

- 9.14 The responses to our questionnaires to practitioners, and to general enquiries that we have made, indicate that the way in which the discretionary powers conferred by the 1988 Act are in fact exercised varies greatly. Some judges exercise their discretion quite freely in favour of admitting hearsay evidence, whereas others, perhaps steeped in and brought up with the traditional dislike of hearsay, are noticeably reluctant to admit it. This can create great difficulty for the prosecution in cases which depend heavily on documentary evidence, such as those involving fraud.
- 9.15 The existence of a right to appeal against a judge's or magistrate's decision is of limited value. When the evidence sought to be admitted is that of the prosecution, they have no right of appeal.¹⁶ When the defence seeks to challenge a ruling on appeal, the Court of Appeal or the Divisional Court cannot simply substitute its own decision for that of the judge or magistrate.¹⁷ The appellate court can only interfere with a judicial discretion which has not been lawfully exercised, because the judge or magistrates reached a decision which no reasonable tribunal could have reached, or took irrelevant factors into account, or left relevant factors out of account or gave them too little weight.¹⁸ The decision of the trial court will therefore be final in most cases especially where the discretion is exercised against the prosecution.
- 9.16 The responses to our questionnaires and general enquiries confirmed the fears expressed by the CLRC over 20 years ago.¹⁹ The CLRC concluded that while a provision giving the courts a discretion to allow hearsay evidence "would be of the simplest", it should not be adopted because it entailed serious difficulties. Among these were the considerations that "differences of opinion about the value of hearsay evidence...would [lead to] large differences in practice between different courts..."²⁰ it would make it much more difficult for parties to prepare their case, because there

¹⁵ A Zuckerman, *The Principles of Criminal Evidence* (1989) p 12.

¹⁶ Save preparatory hearings in serious fraud trials: Criminal Justice Act 1987, s 9.

¹⁷ Not all common law jurisdictions have this restriction. In New Zealand, for example, the Court of Appeal has the express power to substitute its own decision for that of the lower court: Evidence Amendment Act (No 2) 1980, s 19.

¹⁸ *Ward v James* [1966] 1 QB 273, 293, per Lord Denning MR; R Pattenden, *The Judge, Discretion and the Criminal Trial* (1982) p 24.

¹⁹ CLRC Evidence Report, para 246.

²⁰ And, we believe, between different judges and different benches of magistrates in the same court centre.

would be no way of knowing in advance whether a court would admit a particular piece of hearsay evidence".²¹

9.17 This point is in our view important. Uncertainty as to admissibility of evidence means that the prosecution cannot confidently assess the prospects of a conviction in deciding whether to prosecute, and if so on what charge; and those acting for defendants cannot confidently advise on their plea or on the conduct of their defence. The last reason given by the CLRC referred to a difficulty peculiar to summary trials, that the magistrates, who are the tribunal of fact, will normally have to hear the statement in order to decide whether to exercise their discretion to admit it. Our provisional view is that these are valid concerns. We are worried that there should be such uncertainty in such a vital area of the law of evidence.

9.18 This is not just a problem for the law as it stands at present: it also has implications for possible reform. It is possible that the present hostility to hearsay on the part of some judges would persist, and if the current ambit of judicial discretion were extended to cover new exceptions to the rule, the value of such reforms could be defeated by certain judges exercising their discretion consistently against the admission of hearsay evidence, even though the rules allowed for the greater admissibility of such evidence.

Provisional conclusion

9.19 We consider, taking into account the advantages and disadvantages of judicial discretion as set out above, that it would be preferable to make the law as certain as is practicable, and to allow the admission of hearsay if it falls within certain categories. We do not, however, propose that the common law discretion, or the discretion afforded by section 78(1) of PACE against the admission of prosecution evidence in certain circumstances,²² should be altered.

9.20 Although cases falling around the boundaries of the categories would no doubt still provoke appeals, in the vast majority of cases it should be relatively predictable whether or not evidence falls into one of the identified categories and is therefore admissible.

9.21 Greater certainty in this branch of the law would result in considerable savings in the court time currently spent arguing, both at first instance and in the Court of Appeal, how a discretion like that conferred by section 25 of the 1988 Act should be exercised; and disputes in court about the admissibility of hearsay evidence

²¹ CLRC Evidence Report, para 246 (footnote added). The CLRC also thought a discretion would be exercised differently depending on whether the evidence was tendered by the prosecution or by the defence. The CLRC thought that the rules should apply to all parties equally. We discuss this issue in Part XII below.

²² See paras 4.42-4.43 above.

would be greatly reduced.

- 9.22 An advantage of such an approach is that policy decisions about how the balance should be struck between the admission of hearsay evidence on the one hand and the protection of the accused on the other would have been debated and decided by Parliament, rather than being left to the courts.
- 9.23 However, a disadvantage of this category-based approach is the danger that anomalies would persist. Evidence might be admitted irrespective of its probative value because it fell into a recognised category and was thus automatically admissible. In that event, we believe that a judicial warning would ensure that the balance was maintained. Conversely, probative evidence might not be admitted because no category existed to cover it. To alleviate this second danger we will be considering as a final option²³ a fixed set of categories *coupled* with a discretion to permit further evidence to be adduced in the interests of justice.
- 9.24 We also accept that if a category-based approach were adopted, the categories might need to be complex; but even if all the necessary exceptions were codified, the law would still be simpler than is now the case.
- 9.25 We doubt whether approaches which leave admissibility entirely to the discretion of the judge or magistrates,²⁴ or which operate automatically with no scope for a rule to be shaped to the individual case,²⁵ would be appropriate for England and Wales. **Our provisional view is that it might be best to adopt a hybrid approach with a very limited scope for the exercise of discretion.**

The formulation of a hearsay rule

- 9.26 Since Options 4, 5, 6 and 7 all contain an exclusionary rule, and some of the problems now created by the rule follow from its wording (which Option 5 would retain), we consider here how the rule could be formulated. There are three particular areas we wish to explore in this context: implied assertions,²⁶ the relationship between hearsay and original evidence,²⁷ and negative hearsay.²⁸

²³ Option 7: see paras 10.73-10.77 below.

²⁴ As exists in South Africa where criminal trials are not heard by juries.

²⁵ As in Scotland where the potential for judicial discretion is extremely limited.

²⁶ See paras 9.27-9.32 below.

²⁷ See paras 9.33-9.34 below.

²⁸ See para 9.35 below.

Defining hearsay: implied assertions

- 9.27 We have previously referred to the majority decision of the House of Lords in *Kearley*,²⁹ in which it was held by the majority that the hearsay rule extended to implied assertions,³⁰ with the effect that evidence of telephone calls and visits by unidentified people to the premises of an alleged supplier of illegal drugs in which requests for drugs were made was held to be inadmissible hearsay. We have also referred earlier to the criticism of this ruling.³¹
- 9.28 The principal difficulties with the concept of “implied assertions” are practical: it is hard to recognise such assertions, and the application of the rule leads to the exclusion of cogent evidence.
- 9.29 Our provisional view, as we have already indicated,³² is that implied assertions should lie outside the hearsay rule.³³ It is pertinent to note that this approach is adopted in other modern codes. For example, the United States Federal Rules of Evidence define “statement” as:
- (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.³⁴
- 9.30 In the Evidence Code prepared by the Law Reform Commission of Canada: “statement” means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion.³⁵
- 9.31 In the Evidence Act 1995 of the Commonwealth of Australia, section 59³⁶ sets out the hearsay rule as follows:
- Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
- 9.32 The NZLC expressly recommended that implied hearsay should fall outside the rule, and therefore devised what is probably the narrowest possible definition:

²⁹ [1992] 2 AC 228. For the facts see para 1.4 above.

³⁰ See paras 2.20-2.25 above.

³¹ See para 1.4 above.

³² See para 7.72 above.

³³ As we noted at paras 7.71-7.72 above, implied assertions appear to fall outside the rule in Scotland, and this does not appear to have given rise to any problems.

³⁴ Federal Rules of Evidence (1975), rule 801(a); see also American Law Institute, *Model Code of Evidence* (1942), rule 501(1).

³⁵ Law Reform Commission of Canada *Report on Evidence* (1975), Evidence Code, cl 27(2)(b).

³⁶ See also Appendix B para 1.5 below.

hearsay means a statement that

(a) was made by a person other than a person who is giving evidence of the statement at a proceeding; and

(b) is offered in evidence to prove the truth of the statement;

statement means

(a) a spoken or written assertion by a person of any matter; or

(b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.³⁷

Defining hearsay: the distinction between hearsay and real evidence

9.33 We have already referred³⁸ to the problems which may arise in distinguishing real evidence from hearsay evidence. The most significant element in any definition of hearsay is the phrase which limits the rule to situations where the statement is offered *to prove the truth of* whatever is asserted. If it does not matter whether what was said was true or not, then the statement does not fall within the hearsay rule but is original evidence.

9.34 In its Working Paper the New South Wales Law Reform Commission discussed the difficulty of distinguishing between original evidence and hearsay,³⁹ referring to *Rice*,⁴⁰ *Ratten*,⁴¹ and to the particular complication of hidden implied assertions, but concluded that clearer guidance could not be given to the courts in an amended definition.⁴² We provisionally agree with this conclusion.

Defining hearsay: negative hearsay

9.35 We have discussed⁴³ the extent to which the hearsay rule applies to an assertion of a negative fact. We believe that any problems in this area are really practical ones, because the distinction between original evidence and hearsay can be particularly difficult to spot when what is at issue is a negative, namely an absence of a record. We anticipate that if the hearsay rule is restricted to express assertions these practical problems will become less important, since the number of situations in

³⁷ Draft Sections for an Evidence Code, cl 1(1). Clause 2 states simply that hearsay is inadmissible unless it falls within a statutory exception: NZLC Preliminary Paper No 15, Evidence Law: Hearsay (1991) pp 32-33.

³⁸ See paras 2.13-2.19 above.

³⁹ New South Wales Law Reform Commission, Working Paper on The Rule Against Hearsay (1976) para 1.60.

⁴⁰ *Rice* [1963] 1 QB 857.

⁴¹ *Ratten* [1972] AC 378.

⁴² "...it is doubtful whether a statutory reformulation of the hearsay rule can prevent the recurrence of this kind of error any more effectively than a careful reading of the principal authorities which have avoided it": New South Wales Law Reform Commission, Working Paper on The Rule Against Hearsay (1976) para 1.61.

⁴³ See paras 2.26-2.32 above.

which the hearsay rule will apply will be reduced, and express assertions are easier to identify than implied assertions, whether positive or negative in character.

Conclusion

- 9.36 Our provisional conclusion is that hearsay should be defined so as to cover all that is presently within its ambit except implied assertions. We tentatively suggest that the rule should be phrased as follows:

an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion that the person intended to assert.

PART X

OPTIONS FOR REFORM (I): THE SIX OPTIONS FOR REFORM

Introduction

- 10.1 In this Part we will consider six options for reform: the “free admissibility” approach;¹ the “best available evidence” principle;² an exclusionary rule with an inclusionary discretion;³ adding an inclusionary discretion to the current scheme;⁴ categories of automatic exception;⁵ and finally, categories of automatic exception plus a limited judicial discretion to admit evidence where the justice of the case requires it.⁶

The rationales for admitting hearsay evidence

- 10.2 Underlying each of the options put forward is an inherent justification for admitting hearsay evidence—either that it is sufficiently *reliable* to be safely admitted, or that it is *necessary* to admit it in hearsay form because it would not otherwise be available to the court at all. We try to bring out which rationale underlies which option.

Option 2: the free admissibility approach

- 10.3 A criticism frequently made of the hearsay rule is that it is irrational.⁷ In every scientific discipline, and in every walk of life in which human beings have to ascertain facts as the basis for the decisions they make, it is taken for granted that the only sensible way to proceed is by considering all the evidence that is logically relevant. Relevant evidence may have little weight, but if so, that is usually a reason only for taking less notice of it than of other information that is weightier: no one suggests that it is a valid reason for refusing to consider it at all. Only in a court of law is relevant information ignored for fear that it might be misleading,⁸ or that it might be incorrectly assessed.

¹ Option 2: see paras 10.3-10.27 below.

² Option 3: see paras 10.28-10.35 below.

³ Option 4: see paras 10.36-10.55 below.

⁴ Option 5: see paras 10.56-10.64 below.

⁵ Option 6: see paras 10.65-10.72 below.

⁶ Option 7: see paras 10.73-10.77 below.

⁷ See para 6.64 above.

⁸ This, in essence, was Bentham’s argument about exclusionary rules of evidence: that they could be justified by the need to avoid delay, expense or “vexations”, but not by the fear the information would mislead: J Bentham, *A Treatise on Judicial Evidence* (ed M Dumont 1825, reprinted 1981 by J Rothman & Co, Chicago), ch V.

- 10.4 It is the gradual acceptance of this principle that has led, over the years, to a great erosion of the exclusionary rules—including, in civil proceedings, the rule against hearsay itself.⁹
- 10.5 As we have already said,¹⁰ another important matter to take into account is that the hearsay rule can be truth-defeating. Any rule which tends to foster inaccurate verdicts must obviously be open to criticism.
- 10.6 This option advocates the complete abolition of the hearsay rule. All relevant evidence would be admitted unless excluded on some other ground, for example, because it discloses that the accused has a criminal record, or where it would divert the attention of the jury to collateral issues, or because it adds little and would waste the court's time.
- 10.7 Under this free admissibility scheme, evidence would not need to meet any standard of reliability, or to be unavailable in any other form, in order to be admitted.

Advantages

- 10.8 A whole accumulation of arcane, technical rules and precedents¹¹ would become irrelevant. The fact-finders would have the maximum amount of information before them on which to base their decision.
- 10.9 They would assess evidence in the same way as tribunals and judges in civil cases, where there is comparatively little restriction on the evidence that may be heard. There would be less danger of inconsistencies arising between the decisions of civil trials and criminal trials on the same facts, which can happen at present because not all the facts available to the civil tribunal are available to the criminal court.¹²
- 10.10 The traditional view of the roles of judge and jury distinguishes between the admissibility of evidence, which is a matter for the judge, and its weight, which is a matter for the jury. Where evidence is admitted or excluded according to its weight the judge enters into what has traditionally been the province of the jury. Under this option, the weight of particular items of evidence would be a matter for the tribunal of fact, not a condition of admissibility. Magistrates would no longer be obliged to hear evidence which they must then ignore, because, subject to the

⁹ See Civil Evidence Acts 1968 and 1972, as well as the Civil Evidence Bill presently before Parliament implementing our proposals in *The Hearsay Rule in Civil Proceedings* (1993) Law Com No 216.

¹⁰ See, eg, para 7.36 above.

¹¹ See Parts II and III above.

¹² See para 1.12 above.

remaining common law and statutory discretions, they would not be obliged to ignore it at all.

- 10.11 The scope for the exercise of judicial discretion, with its ensuing disadvantages, would be kept to a minimum. There would be no danger of cogent evidence being kept from the court, whether it was the defence or the prosecution who wished to adduce it. Thus the situation which arose in *Sparks*,¹³ where pertinent evidence which tended to show the defendant's innocence was inadmissible because it was hearsay, would not arise.
- 10.12 This advantage is particularly important in relation to the Convention, as there would be no danger of Article 6(1) being breached where the accused was unable to adduce reliable evidence because it was hearsay.
- 10.13 In Part VII we considered instances where evidence is excluded, such as: some kinds of statement by a person now dead;¹⁴ any note of a registration number or a description of an accused;¹⁵ evidence that someone else had confessed to the crime.¹⁶ Under this option there would be no impediment to the admission of any such evidence.
- 10.14 Difficulties about "implied assertions"¹⁷ and the distinction between real and hearsay evidence¹⁸ would cease to be significant. The rule against previous consistent statements would also have to disappear: it would be incongruous if a jury were allowed to hear all sorts of second-hand and third-hand evidence, but were directed to treat a first-hand account as going to credibility only.

Disadvantages

- 10.15 The disadvantages of this option fall into two groups: those relating to the *quality* of the evidence, and those relating to the *quantity* of the evidence that might be adduced. We start with the criticisms that concern the quality of the evidence.
- 10.16 A critic of this option might not be convinced that a jury could be trusted, using unaided common sense (and maybe not even with judicial guidance), to spot the defects of hearsay evidence—especially of the multiple variety. By contrast, the "free proof" advocates assume that if fact-finders were left to find the truth without

¹³ *Sparks* [1964] AC 964; and see para 7.36 above.

¹⁴ See para 7.19 above.

¹⁵ See para 7.55 above.

¹⁶ See paras 7.37-7.45 above.

¹⁷ See paras 2.20-2.25 and 7.56-7.72 above.

¹⁸ See paras 2.13-2.19 above.

restriction they would succeed. A frequent criticism of this assumption is that it is based on a naïve understanding of how decisions are made about what are “true” facts. As Professor Jackson points out, “The truth is not out there waiting to be picked up; it has to be constructed by a procedure...”¹⁹

- 10.17 As we have seen from the psychological research,²⁰ the risks inherent in the repetition of a narration from one person to another mean that the dangers referred to in the previous paragraph increase with the number of times a story is repeated. The ALRC thought the danger of inaccuracy grave enough to warrant the exclusion of oral hearsay which was second-hand or more.²¹ The option under consideration would let in *all* hearsay, not just the first-hand variety.
- 10.18 Where a particular source of relevant information was the *only* source, the court would have to accept it, however indirectly, and trust that drawing the jury’s attention to its weaknesses would go some way to ensuring that the jury evaluated it correctly. Other protections for the accused would be needed, in addition to judicial warnings.
- 10.19 The weaknesses of second or third-hand evidence would almost certainly still be pointed out by the judge to the jury, even if there were no exclusionary rule. The direction that the judge would have to give could be extremely complicated, especially if the hearsay were, say, partly second-hand and partly third or fourth-hand. A jury could easily become confused.
- 10.20 This option would allow the evidence of unidentifiable persons to be adduced. Little or nothing would be known about them, and their credit could not be challenged.
- 10.21 The danger of fabricated evidence is obvious. In particular, a witness would know, at the time that he or she made a statement to the police, that the contents of the statement would go before the court in any event and that the witness could avoid a court appearance and, above all, cross-examination. The truthfulness of such statements might decline overall as a result.
- 10.22 Another serious criticism of this option is that it is not only unfair to admit evidence which is not sufficiently reliable, but it would not necessarily lead to an accurate

¹⁹ JD Jackson’s review of W Twining’s *Theories of Evidence: Bentham and Wigmore* (1987) 38 NILQ 98.

²⁰ See para 6.16 above.

²¹ ALRC, Evidence Report (1987 ALRC 38) para 139 and ALRC, Evidence (Interim) (1985 ALRC 26) vol 1, para 664ff.

verdict either. The strength of this criticism depends partly on the view taken of the effectiveness of warnings to the jury about the limitations of hearsay evidence.²²

10.23 This option clearly presents the possibility of someone being convicted on the word of someone who cannot be cross-examined. This would logically include a co-accused who refused to give evidence. Under the law as it stands at present, a co-accused's out-of-court admission cannot normally be evidence against another co-accused. If the rule against hearsay were abolished, there might be plenty of evidence before the court from people who could not be cross-examined; a co-accused's accusation would be just another example. The difficulties posed by the lack of opportunity to cross-examine a witness have already been discussed.²³

10.24 The lack of opportunity to cross-examine poses a further and very serious disadvantage of this "free admissibility" option, namely that it would probably infringe the Convention. Article 6(3)(d) could be contravened if hearsay evidence were adduced against an accused person, particularly if such evidence were admitted even though the witness was available but not called.²⁴ In addition we believe it would be a breach of the Convention if someone were to be convicted on unsupported hearsay.²⁵

10.25 We now consider the disadvantages which relate to the *quantity* of evidence. Such a scheme would leave the court open to a large amount of evidence, much of it superfluous. If it were all *prima facie* admissible, a heavy burden would fall on the judge or magistrates to exclude it on the ground that it was superfluous. Judicial suspicion of hearsay evidence might also cause the hearsay rule to resurface in the exercise of the common law discretion.²⁶ Judges might reason that indirect evidence has little probative value, and is unfair because there has been no cross-examination; that its prejudicial effect therefore outweighs its probative value, and that it should be excluded.

10.26 As parties would be alive to the danger that the tribunal of fact would be sceptical of any evidence that was not first-hand, they might wish to bolster their absent witnesses' credibility by convincing the court that there was a genuine reason for their absence, wherever possible. Thus, whereas at present it is the judge who has to be persuaded that a witness who is absent is unavailable for one of the reasons

²² See paras 6.65-6.80 above.

²³ See paras 6.36-6.62 above.

²⁴ See *Saidi v France* (1994) 17 EHRR 251 and para 5.20 above.

²⁵ See para 5.35.

²⁶ See para 9.18 above.

set out in section 23 of the 1988 Act,²⁷ it is conceivable that parties would seek to present evidence about a witness's unavailability to the *jury*. We believe this would be quite inappropriate.

10.27 For all these reasons, we **provisionally reject this option.**

Option 3: the “best available evidence” principle

10.28 The adoption of this principle would require the court to hear first-hand evidence where it was available. This option is very similar to the German approach.²⁸ In Germany the court has a duty to seek out whatever is likely to reveal the truth. If first-hand evidence were available, this would not mean that second-hand evidence was inadmissible, only that the court should seek out the first-hand witness. The directness of the evidence would go to weight, not admissibility.

10.29 This option could be described as “taking the best you can get”. There would be no automatic bar on unreliable evidence.²⁹

10.30 All the advantages of the “free admissibility” option which we have identified would apply to this option too.³⁰ The disadvantages set out at paragraphs 10.15-10.26 would also apply; we shall therefore consider whether the duty to call the first-hand source where available would mitigate any of them.

10.31 There is of course a fundamental difference in approach between the inquisitorial system which pertains in Germany and the accusatorial system employed in England and Wales. The German system is operated by a professional judge who may make his or her own investigations before the trial.³¹ In England and Wales, judges and magistrates do not take a comparable, active role and it is difficult to see how under our system this option could be policed.

10.32 There would be a smaller danger of fabricated evidence under this option than under the free admissibility option. Under this option, witnesses who gave statements to the police might be less sure that they could escape going into the witness box, and for this reason the incentive to make untruthful statements would not be so great.

²⁷ See Part IV above and Appendix A below.

²⁸ See Appendix B, paras 5.22-5.36 below.

²⁹ The common law discretion and s 78(1) of PACE would continue to apply. See paras 9.11-9.13 above.

³⁰ See paras 10.8-10.14 above.

³¹ See Appendix B, paras 5.22-5.36 below for an explanation of the German system.

- 10.33 In paragraph 10.23 we referred to the problem which could arise where the accused or co-accused was the source of the evidence. He or she would in most cases be available to the court in the sense of being present in the court room, but his or her *oral evidence* would be available to the court only if he or she chose to go into the witness box. If the accused did not so choose, the court would not be able to hear the best available evidence; and a policy decision would have to be made on the question whether hearsay evidence should be accepted in such circumstances. The alternative would be to give the court the power to *require* the accused to give evidence, which is not a practical option.
- 10.34 Another significant difficulty with this option is how to ensure that parties would respect the obligation to produce the source of the evidence where possible. If the source was supposed to be available, but failed to attend on the day of the trial, there might be no way of adducing the better evidence.
- 10.35 **Our provisional view is that this option is unacceptable**, but we would be interested in our readers' views.

Option 4: an exclusionary rule with an inclusionary discretion

- 10.36 This is the option recommended by the NZLC.³² Under this option there would be a definition of hearsay and a rule stating that all hearsay is *prima facie* inadmissible. In place of the present categories of exceptions, a particular item of hearsay evidence would be admissible, as a matter of law, where it was sufficiently reliable and it was necessary to admit it in the interests of justice.
- 10.37 If a party wished to adduce hearsay evidence it would have to satisfy the court, to the applicable standard of proof,³³ that the evidence was sufficiently reliable to merit being heard and that it was necessary to admit it in the interests of justice.³⁴

³² NZLC Preliminary Paper No 15, Evidence Law: Hearsay (1991).

³³ I.e., on the balance of probabilities for the defence, and beyond reasonable doubt for the prosecution.

³⁴ This is now the prevailing approach in Canada, pursuant to a revolution effected by the judiciary. In *Smith* (1992) 94 DLR (4th) 590, the Supreme Court held that "Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity." In *Khan* (1990) 59 CCC (3d) 92 the mother's account of a complaint of sexual assault made by a three-and-a-half-year-old girl within 15 minutes of the assault was admitted. *Khan* was distinguished in the Newfoundland Supreme Court case of *Kharsekin* (1992) 74 CCC (3d) 163, in which the deceased's statements identifying the assailant were not admitted, because the requirements of necessity and reliability were not satisfied in that case. There was no need to admit the statements because there was other evidence which pointed to the accused. There was no stamp of reliability because the deceased did not have a settled hopeless expectation of death at the time he made the accusation.

- 10.38 If the evidence was proved to be reliable and necessary, it would be admitted unless the common law discretion or section 78(1)³⁵ led to its exclusion. Once any hearsay evidence was admitted, its hearsay nature would go to its weight, and the jury would be directed accordingly, and the magistrates would so direct themselves.
- 10.39 It could easily happen that evidence which would currently be ruled admissible would be inadmissible under this scheme. For example, a dying declaration by a murder victim could be ruled inadmissible, as could, in an extreme case, a statement which formed part of the *res gestae* where the reliability of the speaker (now unavailable) was questionable because of, say, the extreme fear produced in the witness by the incident. The proponents of the scheme would say that this consequence is not to be regretted because if evidence is not sufficiently reliable it is not worthy of admission, and that this is the inevitable result of correcting an anomalous situation.
- 10.40 Whether or not the difficulties about “implied assertions” would be resolved would depend on the way in which the rule was defined,³⁶ but the resulting anomalies would certainly become less significant. For instance, even if “implied assertions” were left within the scope of the rule against hearsay, if evidence of such an assertion were reliable enough it would be admitted anyway.
- 10.41 A notice requirement could be added to any new rule, to the effect that notice of the intention to adduce hearsay evidence should be given to the other parties.³⁷
- 10.42 A consequence of the adoption of this option would be that not all the exculpatory evidence which the accused might wish to adduce would be admissible: a quality test would be applied. Our readers may think that even the defence should only be allowed to adduce evidence which has some cogency; but it does not necessarily follow that the same high standard of reliability which prosecution evidence must meet should apply to defence evidence.³⁸ If this option were adopted, consideration would have to be given to the criteria for determining whether hearsay evidence is acceptable. Adrian Zuckerman, for example, has suggested:³⁹
- ...that if the prosecution wishes to adduce hearsay evidence it must convince the court that it is of such probative weight that no injustice will be caused to the accused by being deprived of the opportunity of cross-examination. As regards hearsay adduced by the accused, the general principle should be that

³⁵ See paras 9.11-9.13 above.

³⁶ See paras 9.27-9.32 above.

³⁷ As suggested by A Zuckerman, *Principles of Criminal Evidence* (1992) p 217.

³⁸ For a discussion of the question whether the same rules should apply to the prosecution and to the defence see paras 12.2-12.15 below.

³⁹ A Zuckerman, *op cit*, p 221.

it will be admissible whenever exclusion would undermine the interests of justice.

Advantages

- 10.43 The strength of this option is that it provides a qualitative threshold of admissibility: only evidence of a certain quality is admitted. This in itself should protect the scheme against objections that it could permit breaches of Article 6 of the Convention.
- 10.44 The advantages of judicial discretion⁴⁰ apply to this option.
- 10.45 There would be no superfluous evidence. Manufactured evidence would be kept to a minimum.

Disadvantages

- 10.46 Choosing suitable words which were comprehensive and comprehensible to specify a *uniform* criterion of reliability would be difficult, but particularly important under such a scheme.
- 10.47 As an option which is founded on the exercise of judicial discretion, all the disadvantages which accompany schemes based on judicial discretion⁴¹ would apply to this option.
- 10.48 The prospect of a court having to carry out this exercise for every single item of hearsay evidence makes it immediately clear that this could on occasion be unworkable. A “difficult defendant” who puts the Crown to strict proof of everything would be able to insist that the reliability of each item of hearsay evidence be separately demonstrated. A partial answer to this might lie in the use of categories of *presumptively* reliable and unreliable evidence.
- 10.49 In other words, if an item of evidence fell into the former category, the onus would pass to the opposing party to bring forward some evidence or argument to show why it was not reliable, and if no objection was raised the evidence would be admitted without any specific investigation of its reliability. If, on the other hand, the item did not fall into a presumptively reliable category, the party seeking to adduce it would bear the evidential burden.
- 10.50 For example, if the Crown wished to adduce evidence which was “presumptively reliable”, such as a diary entry, as evidence that the diary-keeper planned to meet the accused in accordance with the entry, the presumption would mean that the

⁴⁰ See paras 9.11-9.13 above.

⁴¹ Set out at paras 9.14-9.18 above.

evidential burden would pass to the accused to show that the evidence should not be relied upon.

- 10.51 People's representations of their physical, mental and emotional states might be included in a category of presumptively reliable evidence. Thus evidence that a person said "I have a headache" would be admissible (if that person were not available), unless the other side objected and was able to show that the speaker had a motive at that time for lying to the listener.
- 10.52 By contrast, an account of an event given over the telephone would not be presumptively reliable, and the proponent would therefore have to demonstrate that whatever was said was likely to have been true.
- 10.53 The advantage of introducing such presumptions, apart from saving court time, would be their flexibility. Whereas at present the boundaries of the different categories are fairly rigid, the introduction of presumptive, rather than conclusive, categories would still draw attention to the quality of the particular evidence.
- 10.54 If the rule against previous statements was retained (which would seem to be optional under Option 4), and a witness's previous statements were found not to be sufficiently reliable to be admitted, the present unsatisfactory position would persist, in that the witness would be allowed to memorise the contents of the statement before giving evidence, but not to look at it while in the witness-box.
- 10.55 **Our provisional view of this option is that it is not acceptable** because all the disadvantages of relying on judicial discretion would apply.⁴² we consider these to be sufficiently serious to disqualify this option in this country. Further, it would be difficult to decide what should be included in the categories of presumptively reliable evidence; but if there were no such categories, the task of determining the admissibility of evidence would become impracticable.

Option 5: adding an inclusionary discretion to the current scheme⁴³

- 10.56 One of the most forceful criticisms of the current operation of the hearsay rule is that reliable evidence can be excluded because it does not fall within any of the pre-existing categories. This is what happened in *Myers*.⁴⁴ As a result, courts may feel obliged to construe the categories in ingenious ways.

⁴² See paras 9.14-9.18 above.

⁴³ Sir Rupert Cross thought it the least amendment that should be made to the hearsay rule. R Cross, "The scope of the rule against hearsay" (1956) 72 LQR 91, 115.

⁴⁴ For a full account of the case see para 3.60 n 109 above, and note that it has been reversed by statute; but it is still possible for cogent evidence to be excluded.

- 10.57 This option tries to address this defect by retaining the hearsay rule we have at present and the existing categories of exceptions, but adding a residual judicial discretion, to be used only in exceptional circumstances, to admit an item of hearsay evidence which does not fall within any of the existing categories, but which is nevertheless sufficiently reliable and necessary to warrant admission, a “safety valve” provision.⁴⁵
- 10.58 Instead of allowing courts to admit evidence falling outside the existing categories on an ad hoc basis, a variant of this idea would be to allow the courts to create *new categories* where it was deemed necessary. This would amount to a simple reversal of that part of the decision in *Myers* which precluded the judicial creation of further exceptions or the extension of existing exceptions.⁴⁶ Any such extensions would, however, encompass only the present case, and would go no further even if logic demanded it; and piecemeal variation of the rule in this way would in principle be undesirable.
- 10.59 A further variation, suggested by Peter Carter, would be not only to reverse *Myers*, thus allowing courts to create new categories of exceptions, but also to permit courts to admit a piece of evidence even if it is hearsay, and even if it does not fall within any established exception to the hearsay rule, and even if the creation of a new exception to cover it would not be appropriate, provided its reception is warranted by reference to the criteria of necessity and reliability as explained in *R v Smith*.⁴⁷
- 10.60 There is support for a re-examination of *Myers* in the speech of Lord Griffiths in *Kearley*,⁴⁸ in the stances adopted in other common law jurisdictions,⁴⁹ and in the

⁴⁵ As, for example, in the Canadian case of *R v D (D)* [1994] CCL 5873 (North West Territories Supreme Court), where a child who had been sexually abused identified the abuser to various adults, but was too traumatised to give live testimony. The hearsay statements to the adults were admitted because the child was not available and because, having regard to the age and development of the child, the consistency of the repetition, the absence of a reason to fabricate, and the absence of indicia of prompting or manipulation, the evidence met the test of reliability.

⁴⁶ And have the same effect as *Ares v Venner* (1970) 14 DLR (3d) 4 in Canada. See Appendix B, para 2.4 n 33 below.

⁴⁷ PB Carter, “Hearsay: Whether and Whither?” (1993) 109 LQR 593.

⁴⁸ *Kearley* [1992] 2 AC 228.

⁴⁹ New Zealand: *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (Court of Appeal). Australia: Of the seven judges who are at present members of the High Court, four (Mason CJ, Deane, McHugh and Gaudron JJ) have delivered judgments in favour of a more liberal hearsay rule—see *Walton v R* (1989) 166 CLR 283, 292-293, *The Queen v Benz* (1989) 168 CLR 110, 144, *Pollitt v The Queen* (1992) 66 ALJR 613, 628. Canada: *Ares v Venner* (1970) 14 DLR (3d) 4 (Supreme Court). In Scotland, for example, the categories of exceptions to the hearsay rule may be extended by judicial decisions, within the limits of established principles: *Lord Advocate’s Reference (No 1 of 1992)* 1992 SCCR 724, per Lord Hope at 743-744, per Lord Allanbridge at 745.

theory (articulated by Lord Devlin)⁵⁰ that the judiciary may not be entitled to make new laws but are better placed than the legislature to make new rules governing the admissibility of evidence.

Advantages

- 10.61 Such a scheme could permit evidence to be adduced, if it were sufficiently reliable, in the following cases where it would currently be inadmissible: implied assertions; a third party's admission to the crime or to the possession of incriminating knowledge; an oral dying declaration where the charge was not one of homicide, or where the deceased had not known death was imminent; the contents of a note of a detail made by a witness at the time of the incident which the witness cannot remember at the trial; and exculpatory evidence falling outside the existing exceptions.⁵¹ The anomaly whereby written first-hand hearsay is admissible under section 23 of the 1988 Act, but reliable oral first-hand hearsay may not be admissible at all, would be removed.⁵²

Disadvantages

- 10.62 The critical questions would be the appropriate standard of reliability, and what would count as "necessary" for the purpose of this residual discretion. We believe that there would be serious problems in ensuring that the appropriate standards of reliability and necessity were consistently applied in different courts. This would make it difficult to predict in advance what evidence will be admissible.
- 10.63 There are fears that such a scheme would restrict the operation of judicial discretion considerably, as compared, for example, with Option 4.⁵³
- 10.64 This option does not address any of the other problems identified in Part VII as arising from the current form of the rule. **Its uncertainty leads us to the provisional view that it should be rejected.**

Option 6: categories of automatically admissible evidence

- 10.65 The basic feature of this approach is that if hearsay falls within a specified exception, it will automatically be admitted, subject only to the two general and

⁵⁰ Lord Devlin, "Judges and Lawmakers" 39 MLR 1, 13.

⁵¹ As in *Sparks* [1964] AC 964 (where the exculpatory evidence was a description of the assailant by the victim which exonerated the accused—see para 7.36 above) and *Harry* (1988) 86 Cr App R 105 (where the exculpatory evidence was of telephone callers asking for someone else, from which it could have been inferred that the accused was not the drug dealer; see para 2.32 n 53 above).

⁵² See para 7.54 above.

⁵³ See ALRC Paper No 9 pp 31-32 and Research Paper No 3 pp 95-8, 111-112, 118-119.

established discretions, at common law and under section 78(1) of PACE, to exclude prosecution evidence.⁵⁴

Advantages

- 10.66 This option assumes the ability of the jury or magistrates to appreciate the weaknesses of hearsay evidence and properly to appraise its weight. It would mean that if hearsay evidence fell within one of the defined categories it could be automatically adduced, and the tribunal of fact would be invited to form an opinion on its merits. The exceptions might be designed so as to cover cases where direct evidence was unavailable as well as hearsay evidence of a kind likely to be reliable.
- 10.67 This option would have the great advantage that the parties would be able to know in advance what evidence would be admissible, subject to the two discretions in respect of prosecution evidence. There would be a more uniform approach throughout all courts of criminal jurisdiction. Court time would not be wasted, and magistrates would not hear evidence which they would then have to ignore.
- 10.68 We are encouraged to adopt this approach by the fact that we are not aware of any miscarriages of justice arising from the admission of hearsay evidence under the 1988 Act.⁵⁵ This suggests to us that juries are able to appreciate the weaknesses of hearsay evidence and to give it such weight as it deserves. The workability of the system would of course depend to a great extent on the categories selected.

Disadvantages

- 10.69 The principal disadvantage is that it is quite likely that some unforeseeable cases of cogent hearsay evidence might fall outside the categories, however carefully drafted they were. The current problems would be perpetuated, although in a much more restricted way, and we are very conscious that the hearsay rule can be truth-defeating.⁵⁶ We are influenced by the recent case⁵⁷ in which the Court of Appeal held that evidence had correctly been regarded as inadmissible at trial but went on to quash the resulting conviction because its knowledge of the existence of the evidence left it with a "lurking doubt".
- 10.70 This option does not allow for any inclusionary discretion, and we believe that if it were adopted there might be more cases of this sort. We are disturbed by the inflexibility of Option 6, and we endeavour to address this problem in Option 7.

⁵⁴ See paras 9.7-9.10 above. There is of course no discretion to refuse to admit defence evidence.

⁵⁵ See Part IV.

⁵⁶ See paras 7.34-7.73 above.

⁵⁷ *Beckford and Daley* [1991] Crim LR 833. See para 7.48 above.

10.71 It would also still be possible that the Convention would be breached where a defendant sought to adduce exculpatory hearsay evidence but was unable to do so because it did not fall within a specific category.

10.72 For these two reasons we **provisionally reject this option.**

Option 7: categories of automatic admissibility plus a limited inclusionary discretion⁵⁸

10.73 This is, in essence, the same as the previous option, save that the inflexibility of that option would be remedied by the addition of a very limited discretion to admit what would otherwise be inadmissible hearsay, which we call the “safety valve” provision. In other words, the defects of option 6 would be removed without re-introducing all the disadvantages that we have described⁵⁹ as attending judicial discretion. The discretion we have in mind would be very limited, and clearly defined so as to avert possible injustice. It would act as a safety valve.

10.74 The additional inclusionary exception would extend to multiple hearsay. As we have previously said, we do not think that multiple hearsay should be admissible as of right because of the inherent difficulties and problems that this would cause. We are conscious, however, that there may be cases in which the exclusion of such evidence would cause serious injustice. Professor Glanville Williams has given the illustration⁶⁰ of A and B, elderly sisters who are both lying ill when they hear that their acquaintance X has been arrested on a serious charge. A realises that she saw X board a train at a place and time which are inconsistent with his guilt, and she tells this to B just before she dies. B tells this to C, a parson, just before she, too, dies. The information coincides exactly with X’s alibi defence at the trial. We believe that such evidence⁶¹ of double hearsay would be probative and of value to the court.

10.75 It is easy to envisage other cases. For example, a confession to a crime by a person not charged in the proceedings might not be admissible in any other way, but it could in appropriate circumstances be cogent evidence.

⁵⁸ Such an option would be similar in structure to the scheme of the Federal Rules of Evidence of the United States, which consists of an exclusionary rule, categories of exceptions, and a residual inclusionary discretion.

⁵⁹ See paras 9.14-9.18 above.

⁶⁰ Glanville Williams, “The new proposals in relation to double hearsay and records” [1973] Crim LR 139.

⁶¹ Another illustration given by Professor Glanville Williams was of a police officer interviewing a suspect whose language he does not understand. The interview is conducted through an interpreter with the officer writing down the interpreter’s account of the suspect’s replies. The interpreter keeps no notes, does not read the officer’s notes and has completely forgotten about this episode before the trial. The interpreter must be assumed upon the particular facts to be a man of integrity and competence. *Ibid*, 147.

- 10.76 We believe that the residual discretion should be very limited and should apply only where the court is concerned that a miscarriage of justice might otherwise result. *Beckford and Daley*⁶² illustrates the problem that arises if a trial judge cannot take account of cogent hearsay, whereas an appellate court can (after a fashion). We believe that steps should be taken to avoid this anomaly if it is possible to do so.
- 10.77 Our provisional view is that **there should be an inclusionary discretion of the kind we have described, and that an option along these lines is to be preferred.**
- 10.78 We now go on in Part XI to consider the details of our preferred option (option 7)—that is, how the categories of automatic admissibility and the safety valve discretion might operate.

⁶² *Beckford and Daley* [1991] Crim LR 833. See para 10.69 above.

PART XI OPTIONS FOR REFORM (II): THE PREFERRED OPTION - HOW IT MIGHT WORK

The provisional proposals

11.1 We make the following provisional proposals:

1. **As a general rule, hearsay should remain inadmissible.¹**
2. **To this general rule there should be certain categories of automatic exception, subject to the existing statutory and common law discretions to exclude prosecution evidence.² Where the evidence falls within one of these categories:**
 - (a) **its admissibility should not depend on whether it is documentary or oral;**
 - (b) **it should not be admissible unless it is *first-hand* hearsay;**
 - (c) **it should not be admissible unless the witness is identified to the satisfaction of the court; and**
 - (d) **it should not be admissible as evidence of any fact of which the witness's oral evidence would not have been admissible.**
3. **The categories of automatic exception should be as follows:**
 - (a) **where the witness is dead, or too ill to attend court;**
 - (b) **where such steps have been taken as are reasonably practicable to secure his or her attendance, but without success; *and***
 - (i) **he or she is outside the United Kingdom, *or***
 - (ii) **he or she cannot be found;**
 - (c) **where the witness refuses to give (or to continue giving) evidence although physically present in court.**

Subject to proposal 2 above, hearsay evidence falling within one of these categories should be automatically admissible.
4. **None of these categories of exception should permit a party to adduce a statement where that party is responsible for the fact that the witness cannot or will not give oral evidence.**
5. **The following statutory exceptions should be preserved (or re-enacted) with consequential amendments:**

¹ See the suggested definition at para 9.36 which excludes implied assertions from the ambit of the hearsay rule.

² See paras 4.40-4.43 and 9.11-9.13 above.

- (a) section 24 of the Criminal Justice Act 1988;³
- (b) section 9 of the Criminal Justice Act 1967;⁴
- (c) sections 3 and 4 of the Bankers' Books Evidence Act 1879;⁵
- (d) section 46(1) of the Criminal Justice Act 1972;⁶ and
- (e) paragraphs 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968.⁷

6. Confessions should continue to be admissible against their makers, subject to section 76 of PACE and the existing discretions to exclude prosecution evidence.

7. There should be a further limited exception (the "safety valve" provision) to the general rule, in the form of a residual discretion to admit hearsay falling outside the recognised categories and the preserved exceptions which:

- (a) should extend to oral as well as documentary hearsay;
- (b) should extend to multiple as well as first-hand hearsay;
- and
- (c) should be available if (but only if) it appears to the court that
 - (i) the evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with;⁸ and
 - (ii) the interests of justice require that it be admitted.

11.2 We now examine these proposals in detail. We begin by considering what *kinds* of hearsay evidence should automatically be accepted if certain conditions are satisfied, subject to the existing discretions (both at common law and by statute)⁹ to exclude certain types of prosecution evidence.

11.3 We then move on to consider the situations in which our proposed exception would arise. Next we suggest a safeguard against abuse of the exception where it is the person tendering the hearsay statement who has caused the witness to be unavailable. We then propose a limited discretion to admit hearsay evidence where the interests of justice so require.

³ See paras 4.28-4.39 above. The text is set out at Appendix A.

⁴ See paras 3.54 and 3.55 above.

⁵ As amended by Sched 6 of the Banking Act 1979. See para 3.59 and n 108 above.

⁶ See para 3.56 above.

⁷ See para 3.57 and n 106 above.

⁸ The test extracted by PB Carter in "Hearsay: Whether and Whither?" (1993) 109 LQR 573, 578, from the Canadian Supreme Court case of *Smith* (1992) 94 DLR (4th) 590.

⁹ See paras 4.40-4.43 and 9.11-9.13 above.

- 11.4 We next turn to procedural matters, starting with the procedure for an application to admit a hearsay statement and the way in which the conditions of admissibility should be proved. We then look at the extent to which it should be possible to attack the reliability of the statement and the credibility of the witness, or to lead additional evidence in the light of such an attack. We put forward a suggestion which would in certain limited circumstances allow witnesses not to be unnecessarily interrupted for fear that they are giving hearsay evidence. We also discuss the direction to be given to the jury by the trial judge.
- 11.5 Having set out in some detail how the proposals provisionally made in this Part might work, we then consider how the existing exceptions would be affected. Finally, we explain why we believe that our proposals comply with the Convention.

Admissible hearsay

- 11.6 As we have said, our approach is that parties should if possible rely on direct evidence: unlike hearsay, it can be the subject of cross-examination and therefore has the merit of being tested. We accept, however, that in many cases a party has good reasons for being *unable* to adduce direct evidence.
- 11.7 At present, as we have pointed out, only documentary hearsay can be admitted under the 1988 Act;¹⁰ there is no comparable provision in respect of oral first-hand hearsay. We readily accept that oral evidence may on occasion be less cogent than documentary evidence, but our provisional view is that the law should not be limited in this way.¹¹ There is no reason to believe that all documentary hearsay is more cogent or reliable than oral evidence. Oral and documentary hearsay may possess the same limitations.
- 11.8 We have considered, but rejected, the admission of multiple hearsay.¹² There are critical differences between first-hand and multiple hearsay. In the case of first-hand hearsay it is possible to question and challenge the person who heard the relevant statement being made, and then assess the weight to be attached to his or her evidence. This is not possible in the case of multiple hearsay. We believe that there is a substantial risk, if any degree of hearsay more remote than first-hand hearsay were to be admissible, that unreliable or manufactured evidence might be admitted. In addition the jury would have to be given much more complex directions for multiple hearsay than for simple hearsay, and different tailor-made directions would have to be given for each degree of hearsay. This might result in the jury being misled or distracted; in any event, disproportionate time and expense would be

¹⁰ See para 4.4 above.

¹¹ See the similar view of DJ Birch, "The Criminal Justice Act 1988: (2) Documentary Evidence" [1989] Crim LR 15, 20.

¹² Except under the "business documents" exception (see para 11.59 below) and the "safety valve" provision (see paras 11.36-11.38 below).

spent not only on receiving such evidence but also on submissions as to its origins and weight.

- 11.9 A fundamental feature of the exception we propose is that the witness would have to be identified to the satisfaction of the court, as this would enable the opposing party to challenge his or her credibility and reliability. Our provisional view is that it would not be desirable to allow the admission of a statement by a person about whose identity no, or no adequate, information was available. Otherwise, it would be possible to call a witness to say that when he was in a train in a particular foreign city, he heard two men he did not know talking about how they had carried out a murder for which X was being charged and saying that X had not been there. We believe that the person tendering this statement should be required to attribute the statement to a particular individual, with sufficient detail of his or her identity for the judge hearing the application to be satisfied that the individual exists and that the other side have enough information to enable them to make enquiries about him or her and to attack his or her credibility at the trial, if they think it appropriate to do so.¹³
- 11.10 Following the pattern of recent legislation¹⁴ admitting hearsay, any statement admissible under our proposals would be admissible as evidence of any fact, opinion or other matter contained in it, but only to the extent that the maker of the statement could have given unobjectionable evidence. So if any part of the statement admissible under our proposals *itself* contained hearsay, it would be admissible if (but only if) it fell within any exception to the rule.¹⁵ Thus if the statement of a deceased person referred to a statement made to that person by another deceased person, the latter statement would be admissible.
- 11.11 **Our provisional view is that where a party is unable to adduce direct evidence, that party should be entitled to adduce first-hand hearsay evidence, whether oral or documentary, as evidence of any fact of which the witness's oral evidence would have been admissible, provided that the witness can be identified, and provided that the party seeking to adduce the evidence is not responsible for the witness being unavailable.**¹⁶

The new exception

- 11.12 We now consider the situations in which we propose that a new statutory exception to the hearsay rule should make first-hand hearsay automatically admissible. In our

¹³ See paras 11.47-11.50 below for the right to attack credibility.

¹⁴ See the 1988 Act, ss 23(1) and 24(1); Civil Evidence Act 1968, ss 2(1), 3(1), 4(1), 5(1), and Civil Evidence Act 1972, s 1(2).

¹⁵ See *The Ymros* [1981] 1 Lloyd's Rep 550, decided under the Civil Evidence Act 1968.

¹⁶ See paras 11.30-11.33 below.

view the exception should apply where the witness is unavailable for one of the following reasons.

Death

- 11.13 Under the present law,¹⁷ a written statement by the deceased person is admissible if it complies with the provisions of the 1988 Act. In addition, the evidence may also be admissible if it falls within one of various common law exceptions,¹⁸ but not otherwise. It is interesting to note that under Scottish law a statement by a deceased person is admissible unless the circumstances raise a presumption that it does not truly reflect what was in his mind.¹⁹ We do not believe that this or any other qualification should be imposed, since there is no reason to suppose that the rules for the admission of evidence of a deceased person under the 1988 Act have proved to be unsatisfactory, and the foundation of this part of the preferred option is that the unavailability of the witness justifies the admission of the first-hand hearsay. We provisionally propose that **any statement by a deceased person, whether oral or written, should be admissible in any criminal proceedings.**

Illness

- 11.14 At present, certain types of documentary hearsay can be admitted under the 1988 Act (subject to the exercise of discretion) where the witness is unfit to give evidence "by reason of his bodily or mental condition."²⁰ **We have no reason to suppose that this wording has caused difficulties, and we provisionally propose retaining it.**

Absence abroad

- 11.15 At present, a statement made by a person in a document which satisfies the requirements of sections 23 or 24 of the 1988 Act is admissible (subject to the leave and discretion provisions) if the person is outside the United Kingdom and it is not reasonably practicable to secure his attendance.²¹ Only people within the United Kingdom can be compelled to attend court to give evidence.²²

¹⁷ See paras 4.4 and 4.13 above.

¹⁸ See paras 3.26-3.33 above.

¹⁹ See *Walker and Walker, The Law of Evidence in Scotland* (1964), para 372.

²⁰ The 1988 Act, s 23(2)(a). The text of the section is set out at Appendix A.

²¹ The 1988 Act, s 23(2)(b). The text of the section is set out at Appendix A.

²² Writ of Subpoena Act 1805, s 3 and Criminal Procedure (Attendance of Witnesses) Act 1965, Sched 2, Part I. Further, by virtue of s 29(1A) of the Criminal Justice Act 1961, a person detained in a prison, young offender institution, remand centre or detention centre in the Channel Islands or the Isle of Man may be compelled to appear before a court in the United Kingdom to give evidence as long as the Secretary of State is satisfied that the attendance of that person is desirable in the interests of justice, or for the purposes of any public enquiry.

- 11.16 **The first condition which we propose should apply to this category is that the person concerned should be outside the United Kingdom.**
- 11.17 **The second condition we propose is that the party wishing to tender the statement should have made serious efforts to secure the personal attendance of the witness.** This is consistent with our provisional view that evidence ought where possible to be given in person rather than in a hearsay form.
- 11.18 We must therefore address the question of the test by which the efforts made to secure the witness's attendance are to be judged. We have considered, but rejected, a test of practicability, which we think would be unduly onerous. For example, it might be literally practicable for a foreign witness to give evidence by live television, but the expense might not be justified if the evidence was only on a minor issue.
- 11.19 Our provisional view is that **the best test would be one of reasonable practicability.** This would require the party to make realistic efforts to obtain the evidence of the person concerned,²³ but would also enable the court to take account of all the circumstances of the case.²⁴ These circumstances might include the expense of adducing the evidence by alternative procedures,²⁵ the seriousness of the case and the importance of the information in the statement. Another factor to be considered is whether it would be reasonably practicable to secure the evidence at or for a trial at a later date, if that possibility is raised by either party.²⁶ We would welcome the views of our readers on these points, and also on whether these or any other factors should be listed in any legislation.

Disappearance

- 11.20 Under section 23 of the 1988 Act, a statement made by a person in a document is admissible, if all reasonable steps have been taken to find the person but he or she cannot be found.²⁷ Our provisional view is that the same approach should be adopted in this category. We believe that the present provision has worked satisfactorily, and would be interested to hear if anybody disagrees (for example, on the ground that it is open to abuse).

public enquiry.

²³ *Gonzales de Arango* (1991) 96 Cr App R 399, 403 and 404, *per* McCowan LJ.

²⁴ *Hurst* [1995] 1 Cr App R 82, 91-93, *per* Beldam LJ.

²⁵ *Maloney* [1994] Crim LR 525.

²⁶ *Cf French and Gowher* (1993) 97 Cr App R 421.

²⁷ The 1988 Act, s 23(2)(c) (and see para 4.19 above), but this is subject to the judicial discretion and leave provisions in sections 25 and 26 of the 1988 Act. See Appendix A.

11.21 We have also considered section 23(3) of the 1988 Act, which allows the admission, subject to the exercise of judicial discretion, of a statement in a document made to a police officer or other official investigator by a person who “does not give oral evidence through fear or because he is kept out of the way”. This provision has been criticised because it has “let loose one or two potentially unruly horses which the courts will have to be vigilant to control”.²⁸ Our provisional view is that **it is the fact that the person cannot be found (or does not attend after reasonable steps have been taken) that should determine whether his or her evidence is admissible, rather than the reason for his or her non-appearance.** We consider in the next section the circumstances in which a previous statement should be admissible where the witness does come to court but refuses to give evidence.

Refusal to give evidence

11.22 Until now, we have been dealing with the case where the witness who made the statement is not in court. We now move to consider the case of the witness who *is* in court but does not give evidence on matters upon which he or she has previously made a statement. These cases arise when (i) the witness has been called and has refused to be sworn; or when, having been sworn, he or she either (ii) has refused to give (or to continue giving) evidence about any matter in the statement, or (iii) has successfully claimed the privilege against self-incrimination. This is not an exhaustive list but it raises problems that may and do arise.²⁹ Our provisional view is that **each of these cases should be a category of automatic exception.**

11.23 The first case with which we are concerned is that of a person who is compellable to give evidence, and attends court, but refuses to be sworn or to affirm. Refusal to take the oath or affirm is contempt of court.³⁰ Nevertheless we believe that the witness’s statement should be admitted if it is relevant. Not only would it be better than no evidence at all, but the fact that the witness refuses to give evidence might well suggest that the statement is likely to be true. In adopting this approach we are following the views of the CLRC, who recommended that hearsay should be admissible when the maker of the statement refuses to be sworn.³¹ This is also the approach of the Scottish Law Commission.³²

²⁸ *R v Acton Justices, ex p McMullen* (1990) 92 Cr App R 98, 104 *per* Watkins LJ, and see para 7.23 and n 49 above.

²⁹ The case of the witness who, although willing to give evidence, is unable to remember a detail contained in a previous statement by the witness is covered in Part XIII. See paras 13.42 and 13.53.

³⁰ *Hennegal v Evance* (1806) 12 Ves 201, 33 ER 77; Magistrates’ Courts Act 1980, s 97(4).

³¹ CLRC Evidence Report, paras 236 and 249. See para 8.13 n 29 above.

³² Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 para 5.58.

- 11.24 Moving to the second case, where the witness is sworn but unlawfully refuses to answer any (or any particular) admissible questions, this too would be a contempt of court.³³ We believe that the same consequence should follow as in the case of the person who refuses to be sworn.
- 11.25 Another example of the second category is the witness who is sworn and starts to give evidence, but is unable to continue because he or she is too frightened or distressed. McCowan LJ has held³⁴ that the provisions under the 1988 Act for the admission of documentary first-hand evidence where a witness “does not give evidence through fear”³⁵ apply only where the witness has given “evidence of no significant relevance to the case” up to the point where he or she is deterred by fear; but Popplewell J has held³⁶ that if a witness is affected by fear, it is irrelevant what stage the evidence has reached. Our provisional view is that the exception should cover a witness who refuses to continue giving evidence, on the grounds that, as with a witness who refuses to give any oral evidence at all, the testimony is otherwise unavailable to the court.
- 11.26 Finally we consider the witness who has been brought to court by the defence but who then successfully claims the privilege against self-incrimination.³⁷ We are concerned in the present context with a witness in this category who has made a statement on some previous occasion in which he or she had admitted the offence with which the present defendant is charged.³⁸
- 11.27 We provisionally propose that, where a witness for the defence claims the protection of his or her right not to incriminate himself or herself, the party calling that witness may then put in evidence a statement which that witness has made on a previous occasion.³⁹ (If consultees consider that a former statement of witness called by the prosecution should be admissible in these circumstances also, we should be

³³ *A-G v Clough* [1963] 1 QB 773, *A-G v Mulholland and Foster* [1963] 2 QB 477; Magistrates’ Courts Act 1980, s 97(4). It is likely to be punished with an immediate custodial sentence, eg, *Montgomery* [1995] 2 All ER 28.

³⁴ *R v Ashford Justices, ex p Hilden* [1993] QB 555, 560.

³⁵ Section 23(3)(b); see paras 4.20-4.22 above.

³⁶ *R v Ashford Justices, ex p Hilden* [1993] QB 555, 563.

³⁷ *Garbett* (1847) 2 C & K 474; 175 ER 196.

³⁸ This may have been in casual conversation, in an interview with a police officer after caution, in an interview with a “person charged with the duty of investigating offences” (PACE, s 67(9)) where no caution was given but should have been, or in an interview with an investigating officer where an answer had to be given. (See, eg, Insolvency Act 1986, s 236, Financial Services Act 1986, s 105(3), Financial Services Act 1986, s 177(3) and s 178(2), Criminal Justice Act 1987, s 2(2). This list is not exhaustive.)

³⁹ Even if, when making the earlier statement, the witness waived his or her privilege against self-incrimination, or was for some reason not entitled to the protection afforded by that privilege.

interested to hear from them.) The circumstances in which the witness admitted the offence may well be a factor the jury or magistrates would be entitled to consider when assessing the reliability of the earlier statement, but this should not affect its status as admissible evidence. It is likely, of course, that this situation would only arise where the admission that the witness had made also tended to exculpate the accused. Once the earlier statement had been put in, it would become evidence in the present case. Since it is not given on oath, however, and is merely a repetition of what was said in other circumstances, there should be a rule that its status as evidence in the present trial may not of itself be used to establish its status as evidence in any future proceedings against the witness in question.⁴⁰

Witnesses whose evidence could not be adduced under our proposals

11.28 Our provisional proposals mean that two particular types of evidence would continue to be inadmissible (unless they could be adduced under the safety valve provision).⁴¹ First, a statement would be inadmissible if made by a witness who is not satisfactorily identified. We are troubled that the opposing party would be unable to challenge the credibility and reliability of such a witness, and we regard this as an important safeguard.⁴² If any of our consultees disagree, we would be interested in hearing their views, and in particular why they do not regard the safety valve provision as adequate for this situation.

11.29 The second type of inadmissible evidence is the out of court statement of a co-accused who does not give evidence at trial. Under the present law, such a statement is not admissible against a co-accused unless it is made in the presence of that co-accused and he or she acknowledges the incriminating parts so as to make them admissible against him or her.⁴³ We provisionally take the view that such evidence should continue to be excluded: the co-accused making the statement might well have substantial reasons of his or her own for implicating another defendant; yet his or her credibility and reliability could not be challenged by cross-examination.

⁴⁰ We have in mind the type of case where the defence has come into possession of answers given by the witness in the course of an investigation by the Serious Fraud Office pursuant to s 2(1) of the Criminal Justice Act 1987. Under s 2(8) of that Act, those answers cannot normally be used as evidence against the witness, and the fact that some other person may, under our proposal, put those answers in evidence at his or her trial should not be allowed to alter the protection given to the witness by the 1987 Act. This protection ought not to prevent an accused person putting evidence of the witness's admission before the court where it tends to exonerate him or her of the crime with which he or she has been charged; see the Scottish proposals in *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995) Scot Law Com No 149 para 5.61.

⁴¹ See paras 11.36-11.38 below.

⁴² See paras 11.47-11.50 below.

⁴³ *Rhodes* (1959) 44 Cr App R 23.

Safeguard against abuse of the exceptions: where the person tendering the statement has caused the witness's unavailability

11.30 The problem with which we are now concerned arises where the circumstances rendering the evidence *prima facie* admissible under our proposals have been brought about by the very person seeking to adduce it. If, for example, the person seeking to rely on the hearsay statement has caused the witness to disappear or to refuse to give evidence, our provisional view is that **the person so responsible should not be entitled to adduce the statement.**

11.31 In adopting this view we are following the example of other countries. Under the Federal Rules of Evidence, for example:⁴⁴

...a declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

11.32 Similarly the Law Reform Commission of Canada's Evidence Code contains a provision⁴⁵ which enables hearsay evidence to be adduced in the form of a statement of a person unavailable as a witness, but stipulates that:⁴⁶

...[a] statement is not admissible under this section if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying.

11.33 The Scottish Law Commission in its recent report⁴⁷ considered that a similar safeguard should be included in respect of any attempt to adduce hearsay evidence under any of the heads referred to in this chapter. As we have said, our provisional view is the same. We would welcome the views of our readers on these points.

A possible further safeguard

11.34 The fear of manufactured evidence led the CLRC to recommend a bar on the admission of statements which came into existence after the defendant was charged.⁴⁸ An alternative would be to have a bar on statements created after criminal proceedings could reasonably have been known by the witness to be contemplated.⁴⁹ Such a safeguard would restrict the potential for the admission of

⁴⁴ Federal Rules of Evidence, Rule 804(a).

⁴⁵ Law Reform Commission of Canada Report on Evidence (1977) s 29.

⁴⁶ *Ibid*, s 29(3).

⁴⁷ Evidence: Report of Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 para 5.64.

⁴⁸ CLRC Evidence Report, para 237(iv). See para 8.14 above.

⁴⁹ As is currently the case in some circumstances in New Zealand by virtue of the Evidence Amendment Act (No 2) 1980, s 3(2)(a).

fabricated evidence, but it would apply regardless of the reliability of the evidence and would lead to the exclusion even of cogent hearsay evidence. **Our provisional view is therefore that such a safeguard would not be desirable.**

A possible additional power to exclude evidence

- 11.35 Consultees may believe that the risk of superfluous evidence being called would justify a further power being given to the court to exclude evidence of little probative value. We note that in the Evidence Act 1995 of the Commonwealth of Australia section 135 gives the judge a discretion to exclude evidence tendered by either party “if its probative value is substantially outweighed by the dangers that the evidence might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time”.⁵⁰ Rule 403 of the United States Federal Rules of Evidence is similar: evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or of confusion of the issues, or of misleading the jury, or of considerations of undue delay, waste of time or needless presentation of cumulative evidence.⁵¹ If consultees believe that such a discretion would be valuable, within the scheme we provisionally propose in Part XI or within a different scheme, we should be interested to hear from them.

The residual inclusionary discretion (the “safety valve” provision)

- 11.36 We have explained⁵² why our provisional view is that **there should be a residual discretion to admit reliable hearsay which would otherwise be inadmissible where the interests of justice so require.** We have in mind a provision similar to Rules 803(24) and 804(b)(5) of the United States Federal Rules of Evidence, which provide for the admission of

a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

- (a) the statement is offered as evidence of a material fact;
- (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

- 11.37 We suggest that both the prosecution and the defence should be able to apply to the court for hearsay to be admitted, and that the discretion should not be limited to first-hand hearsay, nor to hearsay in a document.

⁵⁰ This came into force on 18 April 1995. See Appendix B para 1.14 below.

⁵¹ See Appendix B para 4.17.

⁵² See paras 10.73-10.76 and 11.1(7) above.

11.38 We consider this “safety valve” to be essential to prevent potential injustices,⁵³ but we envisage that the parties would only *exceptionally* be permitted to have recourse to it. We would be interested in the views of consultees, not only on whether this safety valve should exist but also on the circumstances (if any) in which it should be available.

Procedural matters

11.39 In this section, we deal first with the procedure for an application to admit a hearsay statement and for proving the conditions of admissibility. Then we look at the extent to which it should be possible to attack the credibility and reliability of the maker of the statement, and the circumstances in which additional evidence may be led on these matters after the hearsay statement has been admitted. Finally we deal with the trial judge’s direction to the jury.

Evidence taken “on commission”

11.40 There are at present a number of disparate, little-known, provisions allowing for depositions to be taken from certain kinds of witness in certain ways.⁵⁴ It might be desirable to rationalise these provisions so that a single procedure is available, taking advantage of technological advances, along the lines of that recommended by the Pigot Report⁵⁵ for children’s evidence and along the lines already operating in Scotland.⁵⁶

11.41 We have argued⁵⁷ that there is no justification for the exclusion of hearsay where the other party or parties have had an opportunity to cross-examine the witness. Evidence on commission would not suffer from this defect. However, we believe that the introduction of a system for taking evidence on commission would constitute a radical change to English criminal procedure, and should perhaps be considered in the context of a separate enquiry into the evidence of vulnerable witnesses, such as children, or people with learning difficulties or people with mental health problems. If anybody disagrees, we would be interested in their views, including their proposed régime for evidence taken “on commission”.

⁵³ It would prevent the situation arising where an appellate court quashes a conviction because it has a “lurking doubt” about the safety of the conviction on the basis of evidence which was available but inadmissible at trial. See the discussion of *Beckford and Daley* [1991] Crim LR 833 at para 7.48 above.

⁵⁴ Eg, Merchant Shipping Act 1894, s 691; Children and Young Persons Act 1933, ss 42 and 43; (see para 3.50 and n 100 above); the 1988 Act, s 32A.

⁵⁵ The Pigot Report, (Report of the Advisory Group on Video Evidence (Home Office, 1989)) as described at para 13.22 below. The full scheme was not implemented, but the issue was raised again in Parliament during the passage of the Criminal Justice and Public Order Act 1994 and subsequently: *Hansard* (HC) 13 December 1994, vol 251, cols 893-902.

⁵⁶ Prisoners and Criminal Proceedings (Scotland) Act 1993, ss 33 and 35.

⁵⁷ See paras 6.60 and 6.61 above.

The application to admit the statement

- 11.42 If the parties cannot agree that a statement should be admitted, an application would have to be made to the court. Our provisional view is that, **where possible, this application should be made before the trial and, where this is not possible, at the start of the trial.**
- 11.43 In the case of a trial on indictment, the appropriate time and place for this would (if possible)⁵⁸ be at the Plea and Directions Hearing.⁵⁹ In the case of a summary trial the application could be made at the pre-trial review where one is held, and at the beginning of the trial when there is no pre-trial review. We would be interested in the views of our readers on these proposals.
- 11.44 There are two advantages in having a ruling on admissibility at a pre-trial stage. First, if the statement is ruled admissible, the other party or parties will then have the opportunity to investigate its accuracy and the credibility and reliability of the witness; secondly, if the admission or exclusion of the statement affects the plea or the question of whether the proceedings are to continue, an early ruling may lead to an earlier conclusion of the case.

The burden and standard of proof of the conditions of admissibility

- 11.45 The present position is that the burden of proving facts which render hearsay admissible is on the party seeking to adduce it; the *standard* of proof is the same as for any other item of evidence adduced by that party. Thus, when the prosecution wishes to adduce hearsay evidence, it must satisfy the judge beyond reasonable doubt that the necessary conditions have been satisfied,⁶⁰ whereas the defence need only satisfy the judge of this on the balance of probabilities.⁶¹ Our provisional view is that **this approach is consistent with general principles and should apply to the exception proposed in this Part.**
- 11.46 An ancillary point relates to the burden and standard of proof on a contention that the unavailability of the witness has been procured by the party tendering the

⁵⁸ It may be that in some cases it will not be known that the witness is unavailable until the trial itself, or that the practicability of producing the witness needs to be assessed at the trial date, in which case the application would have to be made at the trial.

⁵⁹ These will be in place by the end of 1995, pursuant to recommendation 92 of the Royal Commission. At such a hearing the prosecution and defence will be expected to inform the court of, amongst other things, the issues in the case, any questions as to the admissibility of evidence which appear on the face of the papers, any applications for evidence to be given by Closed Circuit Television or to put a pre-recorded interview with a child witness in evidence: Plea and Directions Hearings in the Crown Court Practice Rules October 1994.

⁶⁰ *Case* [1991] Crim LR 192.

⁶¹ *Mattey and Queeley*, *The Times* 13 October 1994 (CA).

hearsay statement.⁶² Our provisional view is that **the standard of proof should be the same as for the other conditions of admissibility, but that the burden of proof should rest on the party who opposes the admission of the evidence on this ground.** Thus the prosecution would have to prove beyond reasonable doubt that the defence is responsible for the unavailability of a witness whose evidence it seeks to introduce; but if the roles were reversed, the defence would need only to prove on the balance of probabilities that the prosecution was responsible. If the burden were on the party seeking to *adduce* the evidence, that party would have to prove a negative, namely that he or she was *not* responsible. We think this would be undesirable, but would welcome the views of consultees.

Challenging the credibility and the reliability of the maker of the statement

11.47 As we have already said,⁶³ we believe that the main justification for the hearsay rule is that the maker of a hearsay statement cannot be cross-examined so as to undermine his or her credibility and reliability in general, as well as the truth of the particular statement in question. We believe that if hearsay evidence is admitted, the party against whom it is used should be entitled to show that the statement is inaccurate or to cast doubt on its accuracy. This could be done, for example, by showing that the witness was unlikely to have known the matters stated, or by adducing cogent evidence to the contrary.

11.48 The position under the 1988 Act is that a party against whom hearsay evidence has been admitted under that Act may adduce contradictory evidence in circumstances⁶⁴ akin to those in which contradictory evidence would have been permitted had the witness given oral evidence.

11.49 Our provisional view is that **the same principles should apply in respect of hearsay evidence adduced under our proposal.** We ought, however, to draw the attention of our readers to one matter which has caused us some concern. There are two ways in which the rule might be adapted where hearsay evidence is adduced against a party who would have wished to cross-examine the witness had he or she been called. By analogy with section 7 of the Civil Evidence Act 1968, evidence might be excluded of any matter as to which the witness's denial would have been *final*. The contrary view is that such a rule places the opposing party at an unfair disadvantage where the witness, had he or she appeared in person, would have admitted the discreditable conduct or denied it in an unconvincing way; and that

⁶² See para 11.30 above.

⁶³ See para 6.62 above.

⁶⁴ The 1988 Act, s 28(2), Sched 2, para 1(c) which is set out in Appendix A.

evidence to the witness's discredit *should* therefore be admissible.⁶⁵ These suggestions were put forward and considered by the Scottish Law Commission.⁶⁶

- 11.50 As we have shown, the position under the 1988 Act is to allow the evidence, subject to the leave of the court.⁶⁷ The purpose of the requirement of leave was to avoid the admission of evidence which might be unfair to the witness, who could not personally defend his or her credibility, or which might be presented at such length that the trial would be unduly protracted.⁶⁸ Our provisional view is that the reasoning behind the provisions of the 1988 Act is to be preferred, and we have no reason to believe that these provisions have caused any problems in practice. Accordingly, as we have indicated, our provisional view is to **recommend their incorporation into our new proposals**. If any readers disagree with this view, we would be interested to know their reasons.

Additional evidence

- 11.51 We now consider whether a party should be entitled to lead additional evidence where the credibility or reliability of the witness has been attacked under the proposals made above. In Scotland, where a statement in a business document has been admitted and evidence has been led challenging the credibility of the maker of the statement or the supplier of the information, the judge may permit either party to lead additional evidence of such description as the judge may specify.⁶⁹ Our provisional view is that **such a procedure would also be useful and appropriate in our proposed scheme and should apply to all hearsay statements**. The views of our readers would be appreciated.

The avoidance of unnecessary interruptions to a witness's evidence

- 11.52 We have criticised the current operation of the rule because one consequence of it is that witnesses are frequently interrupted in the giving of their evidence when they say "and he said...", although the hearsay is often quite innocuous.⁷⁰ We do not find it possible to deal with this problem except in limited circumstances. We provisionally suggest that **if a witness, while giving oral evidence at trial, gives**

⁶⁵ See paras 4.63-4.65 above for a brief discussion of the current provisions.

⁶⁶ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 para 6.16.

⁶⁷ The 1988 Act, s 28(2), Sched 2, para 1 (b). See Appendix A.

⁶⁸ CLRC Evidence Report, para 263.

⁶⁹ Criminal Procedure (Scotland) Act 1975, s 149(1) (substituted by the Criminal Justice (Scotland) Act 1980, s 30(1) and amended by the Criminal Justice (Scotland) Act 1987, s 70(1) and Sched 1, para 9) and s 350(1) (substituted by the 1980 Act, s 30(2) and amended by the Prisoners and Criminal Proceedings (Scotland) Act 1993 Sched 5 para 1(31)). See Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149 paras 6.21-6.23.

⁷⁰ See para 7.74 above.

inadmissible hearsay evidence, that is not to be treated as hearsay if it has already been given in some other admissible form in the course of the same trial.

The judge's direction to the jury

- 11.53 As we have indicated,⁷¹ a judge may direct the jury that hearsay evidence is different from other evidence and that they must remember, when assessing such evidence, that it has not been subject to cross-examination, and they have not had the opportunity of seeing the maker of the statement in the witness box.⁷²
- 11.54 We now consider whether it is necessary or desirable to impose a *statutory* duty on the trial judge to direct the jury in any particular way. We raise this point because there is such a provision in the Evidence Act 1995 of the Commonwealth of Australia.⁷³ In jury trials, if a party requires that a warning be given, section 165 of the Act obliges the judge to warn the jury that hearsay evidence may be unreliable, to inform them of the matters that may cause it to be unreliable, and to warn them of the need for caution in deciding whether to accept it and the weight to be given to it. The judge is not required to use a particular form of words.
- 11.55 The duty of a judge in summing up the evidence is not merely to remind the jury of the evidence but also to use his or her experience and judgment to help them assess it and to do so in such a way that ensures the trial is fair.⁷⁴ The judge has a particular duty to put the defence case to the jury.⁷⁵ That duty entails, in respect of doubtful prosecution evidence, the use of his or her judgment to warn the jury of possible reasons why they should not rely on that evidence, or ways in which they should scrutinise or test it before relying on it. Subject to this basic duty the judge has a wide discretion in deciding how to sum up.⁷⁶
- 11.56 Our provisional view is that it would be undesirable to fetter this discretion and that there is no need to do so by a specific statutory provision, since the rules as to

⁷¹ See para 6.66 above.

⁷² See *Scott v The Queen* [1989] AC 1242, 1259 and *Cole* [1990] 1 WLR 866, 869. But see also para 4.66 above and *Kennedy* [1992] Crim LR 37 in which the Court of Appeal held that a judge should not direct the jury that less weight was to be given to a hearsay statement than to evidence given in the witness box.

⁷³ This provisions implements recommendations made by the ALRC: Evidence (1987 ALRC 38) Evidence Bill 1987, cl 140(1)-(3). A commentary is contained in the Interim report, Evidence (1985 ALRC 26) paras 1015-1020.

⁷⁴ See *Sparrow* [1973] 1 WLR 488, 495G-H, *per* Lawton LJ.

⁷⁵ *Dinnick* (1909) 3 Cr App R 77, 79, *per* Lord Alverstone CJ.

⁷⁶ *McGreevy* [1973] 1 WLR 276, 281F-G, *per* Lord Morris of Borth-y-Gest. See also *Lawrence* [1982] AC 510, 519-20, *per* Lord Hailsham of Marylebone.

directions to juries are already sufficiently clear. We would be interested in the views of any of our readers who might disagree with this.

Existing law

- 11.57 We considered, but rejected, the idea of retaining the *res gestae* and associated exceptions.⁷⁷ Much of the evidence covered by *res gestae* will fall within our proposed new exception if the witness is unavailable; if the witness *is* available, he or she ought to be called even if the statement is at present admissible as part of the *res gestae*.⁷⁸ Our régime would exclude the statement of an unidentified witness unless the party seeking to adduce it successfully invokes the safety valve provision. Accordingly our provisional view is that these exceptions should be abolished. The views of our readers would be appreciated.
- 11.58 Our provisional view is that **confessions should continue to be admissible⁷⁹ against their makers, and that the existing principles on admissibility should continue to apply;**⁸⁰ they fulfil a useful function.
- 11.59 We believe that there should continue to be a comparatively relaxed régime for the admission of business documents, and that **section 24 of the 1988 Act ought to be re-enacted with the following amendments:**
- (a) Steps should be taken to eliminate the present problem where if one person provides the information to another, the “maker” of the statement (that is, the person who must be unavailable or unable to remember) is regarded as being the person who did the recording and not the person who supplied the information.⁸¹ We believe that this should be changed so that the “maker” of the statement within the meaning of section 24(1)(ii)⁸² is the supplier *or* the recorder of the information.⁸³ Consequential amendments should be made to the Schedule to the 1988 Act to identify more clearly the person whose credibility may be attacked.

⁷⁷ See paras 3.38-3.49 above.

⁷⁸ *Andrews* [1987] AC 281, 302, *per* Lord Ackner, who “strongly deprecate[d] any attempt in criminal prosecutions to use the doctrine [of *res gestae*] as a device to avoid calling, when he is available, the maker of the statement”.

⁷⁹ Against the person who makes the confession; see PACE, s 76(1) and para 3.17 and n 36 above.

⁸⁰ See PACE, s 76(2).

⁸¹ See paras 7.26-7.29 above.

⁸² The wording of the provision is set out at Appendix A.

⁸³ See JC Smith, “Sections 23 and 24 Criminal Justice Act 1988: (1) Some Problems” [1994] Crim LR 426, 428 where he suggests replacing the phrase “whether or not the maker of the statement” at s 24(1)(ii) with “whether or not the creator of the document”.

- (b) Subsection (4) should be amended to provide that, where a business document was prepared with a view to use in criminal proceedings, the party tendering the evidence has to prove that the creator of the document is unavailable (as defined by the categories set out above), or the creator cannot reasonably be expected (having regard to the time which has elapsed since he or she made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement.
- (c) The discretionary provisions in sections 25 and 26 of the 1988 Act should be repealed. As we have explained, the court would still retain its discretion to exclude prosecution evidence, either at common law (on the ground that its prejudicial value exceeds its probative value) or by statute.⁸⁴
- (d) It should be made clear that statements made by witnesses to police officers do not fall within this exception.⁸⁵

11.60 We also believe that **there are certain statutory provisions dealing specifically with hearsay which should be retained**, such as section 9 of the Criminal Justice Act 1967;⁸⁶ sections 3 and 4 of the Bankers' Books Evidence Act 1879;⁸⁷ section 46(1) of the Criminal Justice Act 1972, which is a provision equivalent to section 9 of the Criminal Justice Act 1967 for written statements made in Scotland or Northern Ireland and some statements made outside the United Kingdom;⁸⁸ and paragraphs 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968, which provide for the admissibility of a transcript of evidence given at an earlier trial.⁸⁹ At Appendix C there is a list of a number of less well-known statutory provisions which permit hearsay evidence to be adduced. Our provisional view is that those provisions which are obsolete should be repealed, and those which are still relevant should be preserved, but it would be premature to say at this juncture which provisions fall into which category.

Compliance with the Convention

11.61 We believe that the option we prefer would not lead the English law of evidence into conflict with the Convention. Although we are making provision for hearsay evidence to be admitted, and in a wider range of circumstances than at present, we

⁸⁴ For these discretions see paras 9.7-9.8 above.

⁸⁵ See para 4.32 above.

⁸⁶ See para 3.54 and n 105 above. This provision enables evidence to be adduced in the absence of an objection by the opposing party.

⁸⁷ As amended by Sched 6 of the Banking Act 1979. These sections permit bankers to put in a copy of an entry in a banker's book as *prima facie* evidence of the entry as long as certain conditions are complied with. See para 3.59 and n 108 below.

⁸⁸ See para 3.56 above.

⁸⁹ For circumstances in which such a transcript would be admissible see para 3.57 above.

believe that the following factors would together ensure that the accused has a fair trial.

- (a) In order to ensure that a defendant is not convicted solely on the basis of unsupported hearsay evidence,⁹⁰ where the evidence of a particular element of the offence includes hearsay, that element should not be regarded as proved unless the hearsay is supported by direct evidence.⁹¹
- (b) The accused would still be protected by the existing common law discretion and the discretion in section 78(1) of PACE 1984.⁹²
- (c) Hearsay evidence would be permitted only where the only alternative is for the evidence not to be adduced at all, because the witness is unavailable—provided that the person seeking to rely on it is not responsible for that fact.
- (d) Statements of unidentified witnesses will not be permitted.
- (e) Even if a statement does not fall within any of our categories of automatically admissible hearsay, it would still be admissible under our “safety valve” provision if its exclusion might lead to injustice.⁹³
- (f) The accused would normally have advance notice of hearsay evidence which it is sought to adduce against him or her.⁹⁴
- (g) The accused would be able to challenge the substance of hearsay evidence adduced against him or her by calling contradictory evidence, or evidence which undermines the credibility of the absent witness, as if the witness had been present.
- (h) An accused person would not be prevented from adducing reliable exculpatory evidence by the fact that it is hearsay.

⁹⁰ See paras 5.35 and 5.36 above.

⁹¹ Including an admission or confession. The effect of this would be that a defendant could not be convicted solely on the basis of his or her confession.

⁹² See paras 9.7-9.8 above.

⁹³ See paras 11.35-11.38 above.

⁹⁴ Although the accused may not have notice of hearsay if it is adduced by a co-accused.

PART XII OPTIONS FOR REFORM (III): SHOULD THE SAME REFORMS TO THE HEARSAY RULE APPLY (A) TO THE PROSECUTION AND TO THE DEFENCE; AND (B) IN COURTS-MARTIAL, PROFESSIONAL TRIBUNALS AND CORONERS' COURTS?

Introduction

- 12.1 In this paper, we have hitherto assumed that the same hearsay rules will apply both to the prosecution and to the defence. In this Part we consider whether this should be the case.¹ We also discuss whether our provisional proposals should apply to courts-martial, professional tribunals and coroners' courts.²

A. Should the same rules apply to the prosecution and to the defence?

The current position

- 12.2 The hearsay rule ordinarily operates with equal severity against both the prosecution and the defence on the grounds that "the cause of justice is...best served by adherence to rules which have long been recognised and settled".³ In consequence in 1975, the Court of Appeal said,⁴ "The idea, which may be gaining prevalence in some quarters, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous."
- 12.3 This notion of a "level playing field" approach is at variance with the view of Lord Oliver of Aylmerton⁵ that "the [hearsay] rule has been evolved and applied over many years in the interest of fairness to persons accused of crime". This dictum suggests that there are different rules for the prosecution and the defence in hearsay matters. We do not believe that to be so, although there are some differences between the rules applicable to the prosecution and the defence in the admission of

¹ See paras 12.2-12.15 below.

² See paras 12.16-12.20 below.

³ *Sparks* [1964] AC 964, 978, *per* Lord Morris of Borth-y-Gest.

⁴ *Turner* (1975) 61 Cr App R 67, 88, *per* Milmo J. In that case the Court of Appeal held that the refusal of a trial judge to receive evidence that a third party, not called as a witness, had admitted to having committed the offence charged, was correct. The decision would have been the same if the person who had made the admission had died or become unavailable as a witness for some other reason without having withdrawn it; see *Cross*, p 522.

⁵ *Kearley* [1992] AC 228, 278C.

evidence under the 1988 Act.⁶

- 12.4 There are statutory provisions which only apply to the prosecution and not to the defence. For example, section 78(1) of PACE⁷ only allows evidence which the prosecution wishes to adduce to be excluded: it does not apply to the defence. By the same token the defence, but not the prosecution, is protected against certain use of hearsay evidence under Articles 6(1) and (3)(d) of the Convention.⁸ Again, there is the common law discretion which precludes the prosecution (but not the defence) from adducing evidence where the probative value is outweighed by the prejudicial effect.⁹

The issue

- 12.5 We are very conscious that the legal rules of evidence should have as their highest aim the need to protect an innocent person from being wrongly convicted. As we have said,¹⁰ we regard this as a greater wrong than a guilty person being acquitted. Consequently extra efforts should be directed towards preventing unreliable evidence being adduced by the prosecution than by the defence.¹¹ This might suggest that there should be a harsher rule for the prosecution than for the defence.

Options for Reform

- 12.6 We now consider the options.

Option 1: Different rules for the defence and for the prosecution

- 12.7 It has been suggested that a court should have the power to receive hearsay evidence at the request of the accused and should do so if it considers it reasonable in the interests of justice in the circumstances of a particular case.¹²

⁶ In order to take advantage of the exceptions to the rule against hearsay in s 23 (first-hand hearsay) or s 24 (business documents) a party has to establish that one of the grounds of unavailability of the maker applies. The standard of proof depends upon whether it is the prosecution or the defence that is seeking to invoke the provision. If it is the prosecution, they must establish the unavailability of the witness for one of the reasons listed beyond reasonable doubt (*Case* [1991] Crim LR 192), but the defence only need to prove such matters on the balance of probabilities: *Mattey and Queeley*, *The Times* 13 October 1994 (CA).

⁷ This states that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

⁸ See para 5.31 above.

⁹ See 9.7-9.9 above.

¹⁰ See para 1.10 above.

¹¹ Glanville Williams, *The Proof of Guilt: a Study of the English Criminal Trial* (3rd ed 1963) pp 209-211.

¹² JUSTICE, *Miscarriages of Justice* (1989) para 3.31-3.44.

- 12.8 Another proposal is that in the Evidence Act 1995 of the Commonwealth of Australia, which allows the prosecution to lead hearsay in only a limited number of circumstances but generally entitles the accused to adduce evidence of a hearsay representation where the maker of the representation is not available, either by adducing oral evidence from a witness to the making of the representation or by tendering a document containing the representation.¹³ These provisions followed recommendations by the ALRC which were founded on a wish to reduce the risk of conviction of the innocent.¹⁴ Thus it was envisaged that the defence would be entitled to adduce an exonerating statement of the alleged victim or a confession by a third party, where the victim or third party was not available, and also statements of deceased persons who could have given evidence.¹⁵
- 12.9 It has been suggested¹⁶ that a further argument for giving the defence wider rights than the prosecution to adduce hearsay is that while the prosecution has to prove its case beyond reasonable doubt, the defendant generally does not have to prove any defence but only has to raise a doubt by pointing to evidence in support of the doubt: thus evidence which may be quite insufficient to establish the prosecution case beyond reasonable doubt, but may be sufficient to raise a doubt should be admitted.
- 12.10 The CLRC accepted that there was a case in principle for wider admissibility of evidence of behalf of the defence and on behalf of the prosecution, but the majority of the CLRC were¹⁷ “strongly of the opinion that the interests of justice require that the parties should in general be treated alike in this respect.”
- 12.11 Our provisional view is to reject this option, for three reasons. In the first place, we are very conscious that a defendant can ensure his or her acquittal by raising a reasonable doubt. We are concerned that if greater latitude was allowed to the defence than the prosecution, manufactured hearsay evidence or very low quality hearsay evidence could be used with ease to ensure that a doubt would arise.
- 12.12 In the second place, our provisional view that there should be some form of safety valve for both the prosecution and the defence for cogent and credible testimony in

¹³ Evidence Act 1995 (Commonwealth), s 65(8).

¹⁴ ALRC, Evidence (Interim) (Report No 26, 1985), Vol 1, paras 679 and 692 and ALRC, Evidence (Report No 38, 1987), paras 139 and 141.

¹⁵ ALRC, Evidence (Interim) (Report No 26, 1985), Vol 1, para 692.

¹⁶ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149, para 4.29.

¹⁷ CLRC Evidence Report, para 246, n 2.

the interests of justice¹⁸ means that many of the problems of defendants being at a disadvantage because of the existence of the hearsay rule would disappear.

- 12.13 The third reason is, as the Scottish Law Commission states,¹⁹ the existence of different rules would produce a curious and unsatisfactory result. The prosecution might be entitled to cross-examine a defence witness on hearsay evidence he had given in chief which the prosecution, had they led him as a witness, would not have been entitled to elicit from him. An accused, where there was a co-accused, might be entitled to elicit from a defence witness hearsay evidence implicating a co-accused which the prosecution would not have been able to lead.²⁰

Option 2: To preserve the same rules in respect of hearsay evidence for defence and prosecution, save in respect of different standards of proof

- 12.14 As we have pointed out above,²¹ the standards of proof are different in respect of establishing the foundation requirements for satisfying the unavailability provisions of the 1988 Act. These differences are a consequence of the different standards of proof in criminal proceedings. We do not believe that there is anything wrong with this principle and we advocate it for our reforms. Our provisional view is that, subject to this point, **the same rules on hearsay should apply to the defence as to the prosecution.**

- 12.15 We would welcome the views of our readers. If they disagree, we would be particularly interested in knowing the respects in which they believe there should be different rules for defence and prosecution.

B. Should the same reforms to the hearsay rules apply in courts-martial, professional tribunals and coroners' courts?

The current position

- 12.16 At present the hearsay rules apply not only in magistrates' courts and the Crown Courts, but also in other courts and tribunals.

¹⁸ See paras 10.77 and 11.36-11.38 above.

¹⁹ Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149, para 4.32.

²⁰ Eg, there is a fight in a public place. Andy and Ben are charged with affray. A witness (W) called by Andy says that, during the course of the fight a person whom he cannot identify shouted, "Watch out, Ben's going for him." A police officer (O), who is a witness for the Crown, also heard the shout. The prosecution could not adduce evidence of this cry from O in chief or from W in cross-examination under the exception in the preferred option, because it does not allow first-hand hearsay where the original witness cannot be identified. If the suggested residual discretion (see paras 11.36-11.38 above) is not available at all to the prosecution but only to the defence, and then only if the evidence is reliable, Andy would be able to adduce it if it were reliable by calling W or raising it in cross-examination of O.

²¹ See paras 4.24 and 4.38 above.

Courts-martial

- 12.17 The most important of these are courts-martial, the disciplinary courts of the Armed Services. By virtue of section 99(1) of the Army Act 1955,²² section 99(1) of the Air Force Act 1955, and regulation 73 of the Naval Courts-Martial Regulations, the rules of evidence applicable to summary trials and courts-martial in the armed forces are the same as those employed in ordinary English criminal proceedings.

Professional tribunals

- 12.18 Certain professional tribunals established by statute are also governed to a considerable extent by the rules of evidence in criminal proceedings. The regulatory bodies for²³ doctors;²⁴ nurses, midwives and health visitors;²⁵ dentists;²⁶ and opticians²⁷ have been created and are governed by statute, and the procedures followed by the professional conduct committees of these bodies are broadly similar to those followed at summary trials. These committees may not receive evidence of complaints which would not be admissible in ordinary criminal proceedings, unless the legal assessor serving on the committee is satisfied that the duty of the committee to make thorough and proper inquiries makes such receipt desirable.²⁸

Coroners' courts

- 12.19 There are no exclusionary rules of evidence in the Coroners Rules 1984,²⁹ save for certain rules relating to documentary evidence pertaining to a matter which is under dispute. If such evidence is in dispute it will not be admitted,³⁰ unless the maker of the document is unable to give evidence orally within a reasonable period.³¹

²² Section 99(1) of the Army Act 1955 provides that "The rules as to the admissibility of evidence to be observed in proceedings before courts-martial shall be the same as those observed in civil courts in England..."; s 99(1) of the Air Force Act 1955 is in identical terms. The phrase "civil court" is defined in s 225(1) of the Army Act 1955 and in s 223(1) of the Air Force Act 1955 as "a court of ordinary criminal jurisdiction".

²³ This list is not exhaustive.

²⁴ The General Medical Council.

²⁵ The United Kingdom Central Council for Nursing, Midwifery, and Health Visiting.

²⁶ The General Dental Council.

²⁷ The General Optical Council.

²⁸ General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Council 1988 (SI 1988 No 2255) r 50(1); Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1987 Approval Order 1987 (SI 1987 No 2156) r 18(1); General Dental Council Professional Conduct Committee (Procedure) Rules Order of Council 1984 (SI 1984 No 1517) r 26(2); General Optical Council (Disciplinary Committee) (Procedure) Order of Council 1985 (SI 1985 No 1580) r 14.

²⁹ SI 1984 No 552.

³⁰ *Ibid*, r 37(1).

³¹ *Ibid*, r 37(2).

12.20 There is no compulsion on the coroner to observe the rules of evidence applicable to criminal proceedings (as is appropriate, given the inquisitorial nature of the inquest). However, they may be applied where a matter is in dispute,³² or where there is a likelihood of criminal proceedings arising from the death or even, perhaps, where there is a serious dispute over the facts of the death.³³ *Halsbury's Laws of England* sets out the position in these terms:³⁴

A coroner's inquest is not bound by the strict laws of evidence. In practice, however, the laws of evidence are usually observed by coroners especially in cases where the coroner's inquisition may charge a person with murder, manslaughter or infanticide.

The issue

12.21 Parliament has decided that the criminal rules of evidence should apply in the above tribunals and in courts-martial as they would if an individual were being prosecuted in the ordinary criminal courts; further, those rules may be applied in coroners' courts. We have not carried out any preliminary consultation on this issue but our provisional view is that **any reformed hearsay rule should apply in places where the criminal rules of evidence currently apply, namely courts-martial, professional tribunals established by statute, and coroners' courts in certain circumstances.** We invite comment from those of our readers who have experience of these courts and tribunals. If there are any features peculiar to those courts or tribunals which would make our provisional proposals inappropriate, then we should be interested to hear of them.

³² JDK Burton, DR Chambers, PS Gill *Coroners' Inquiries; a guide to law and practice* (1985) p 56:

Hearsay evidence is admissible at inquests. People naturally act and speak in accordance with things said to them by other people. There is no logical reason why a police officer should not say that he was called to a house because the neighbours had noticed bottles of milk on the doorstep and the curtains still drawn at lunch time. *If any matter is in dispute, then the original source of the evidence must be called.* In the case of fire fatalities and hospital deaths, most of the witnesses are acting in accordance with things that have been told to them by others and they have to give evidence accordingly. (emphasis added)

³³ "The coroner should always have in mind the rules of evidence when permitting relaxation, especially when criminal proceedings may arise from the incident. If there is to be a committal for trial from the coroner's court strict rules must be observed": G Thurston, *Coronership* (1st ed 1976) p 115.

³⁴ *Halsbury's Laws of England* (4th ed 1974) vol 9, para 1105.

PART XIII

THE RULE AGAINST PREVIOUS CONSISTENT STATEMENTS

The rule¹

- 13.1 A witness giving evidence may not make use of his or her previous out-of-court statements in order either to supplement or support his or her oral testimony. Nor may evidence about them be given by other people.²
- 13.2 A previous consistent statement can, however, be admitted if it falls within one of the exceptions to the hearsay rule, for example, if it forms part of the *res gestae*.³ Most of these exceptions presuppose the unavailability of the witness at the trial, which means that they obviously do not apply to the previous statements of someone who does testify.
- 13.3 A witness is, however, allowed to use his or her previous statement to “refresh his or her memory”—though this expression may be misleading as the witness may no longer have any independent recollection of the events, and may only be able to speak from what is in the statement.⁴ When outside the witness box the witness may read his or her own statement irrespective of when it was made,⁵ but when actually giving evidence the witness may refer to it only if it is “contemporaneous”—in other words, only if it was made when the matter was still fresh in his or her mind.⁶ It suffices if the note was written down by someone else at the witness’s dictation, provided it was verified by the witness afterwards.⁷

¹ This is sometimes known as “the rule against self-serving statements” or “the rule against narrative”: R May, *Criminal Evidence* (3rd ed 1995) para 18.23.

² *Roberts* (1942) 28 Cr App R 102.

³ See paras 3.38-3.49 above.

⁴ *Doe d Church and Phillips v Perkins* (1790) 3 Term Rep 749; 100 ER 838.

⁵ This does not apply, it appears, if the witness is young. Presumably the fear is that if an eight-year old is shown her statement before she gives evidence, she may fail to appreciate that she should give her evidence according to what she remembers, not as a recital of the statement: *Thomas* [1994] Crim LR 745. The result is that giving evidence is more of a memory-test for a child than for an adult.

⁶ *Richardson (David)* (1971) 55 Cr App R 244 (CA). For further details see paras 8-61 to 8-76 in *Archbold*. It is desirable, but not compulsory, for the defence to be informed that the witness has been given an opportunity to re-read his or her statement before stepping into the witness box, when this has happened: *Worley v Bentley* [1976] 2 All ER 449. The defence is free to cross-examine on a document used in this way just as if the witness had refreshed his or her memory from it while in the witness box: *Owen v Edwards* (1983) 77 Cr App R 191.

⁷ *McLean* (1967) 52 Cr App R 80; *Townsend* [1987] Crim LR 411; *Eleftheriou* [1993] Crim LR 947. Cf *Kelsey* (1982) 74 Cr App R 213 in which the witness was allowed to “refresh his memory” about a car registration number from the statement he had given to the police which had been read back to him at the time. The note itself would have been admissible under the 1988 Act (had that Act been in force) if the person making it had

- 13.4 Where the witness is allowed to refer to a previous note, it is still the oral testimony which counts as the evidence, not the note. This is often a fiction because the note may not have prompted any detailed recollection at all.⁸

Exceptions to the rule

- 13.5 There are five specific exceptions to the rule against previous consistent statements.⁹

Recent complaint

- 13.6 The first and the best-known is “recent complaint”.¹⁰ Where the defendant is charged with a sexual offence¹¹ the court can hear the terms in which the alleged victim originally complained, provided he or she did so spontaneously and at the first reasonable opportunity;¹² the court may also hear evidence to explain why the alleged victim did *not* tell anyone, if that is an issue.¹³
- 13.7 The law on recent complaint has been criticised.¹⁴ One objection is that it is unnecessarily limited to complaints in sexual cases. The rationale for this limitation has been put as follows:

...more hinges on the question of the credibility of the participants than in most other areas, just because sexual activity tends to take place in private and is usually kept secret, thus restricting the amount of other evidence which is likely to be available.¹⁵

done so in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office, even though the number was both unverified and passed on through an intermediary: *Carrington* [1994] Crim LR 438, in which s 24 of the 1988 Act was considered, discussed in more detail at para 4.29 above. If s 24 applies to statements written by police officers, then evidence of registration numbers could be admissible if the person who wrote the number down was a police officer.

⁸ Wigmore thought that a distinction should be drawn between documents which do in fact evoke a recollection (admissible) and documents which do not (inadmissible hearsay): *Wigmore on Evidence* vol 3 § 754, 754A. However, this distinction may not be practical.

⁹ Some say there are more: see RN Gooderson, “Previous Consistent Statements” [1968] CLJ 64.

¹⁰ *Osborne* [1905] 1 KB 551; *Blackstone* F6.14; *Archbold* paras 8.90-8.93.

¹¹ This exception extends to *any* sexual offence, whether committed against a male or a female, and whether or not consent is in issue: eg *Osborne* [1905] 1 KB 551.

¹² In *Hedges* (1909) 3 Cr App R 262 a complaint made after a week was admitted as having been made at the first reasonable opportunity.

¹³ *Greenwood* [1993] Crim LR 770 (CA).

¹⁴ JR Spencer and RH Flin, *The Evidence of Children - the Law and the Psychology* (2nd ed 1993) p 142.

¹⁵ *Cross* p 284.

It might be thought equally important for the court to know the terms in which the alleged victim complained, whatever the nature of the offence.¹⁶ This limitation gives rise to the anomaly that if, for example, a burglar enters a house and sexually assaults the complainant, evidence can be given of the original complaint; whereas, if the burglar steals property from the premises, it cannot.

13.8 The second objection is that it is limited to complaints made “at the first opportunity after the offence which reasonably offers itself”.¹⁷ This rule seems to be based on the idea that the natural reaction of any genuine victim of a sexual offence is to tell someone immediately; but research evidence clearly shows that most victims are too embarrassed to tell anyone, let alone to do so spontaneously and early.¹⁸

13.9 A third objection is that the nature of the evidence might not be properly understood by the jury. In *Kilby*¹⁹ the High Court of Australia stressed that a previous statement of complaint could not be taken to amount to evidence of the absence of consent, nor the absence of a complaint to amount to evidence of consent: otherwise the hearsay rule would be seriously undermined by such evidence. As the editor of *Cross* states, “the correct view is that the victim’s testimony is evidence of lack of consent, and the complaint does no more than support the credibility of the victim in so testifying.”²⁰

Previous identification

13.10 A second exception is that “evidence has been admitted in criminal trials from time immemorial of the identification of the accused [by witnesses] out of court”.²¹ The reason for this exception is that it overcomes the argument that between the offence and the trial the witness’s recollection of the defendant’s features has been dulled.²² Thus in *Christie*²³ the House of Lords held admissible statements by a boy’s mother and a policeman that they had seen the boy approach the defendant to a charge of indecent assault and identify him by saying “that is the man”. The rationale for admitting evidence of such identifications is “to show that the [witness] was able to

¹⁶ This exception used to extend beyond sexual offences to those involving violence against the person (see *Wink* (1834) 6 C & P 397; 172 ER 1293), but it is clear this is no longer so in England (*Jarvis* [1991] Crim LR 74), although it is the case in Scotland: McPhail, *Stair Memorial Encyclopedia* (1991) Vol 10, § 707.

¹⁷ *Osborne* [1905] 1 KB 551, 561 *per* Ridley J.

¹⁸ J Temkin, *Rape and the Legal Process* (1987) pp 145 and 146.

¹⁹ *Kilby* (1973) 129 CLR 460.

²⁰ *Cross* p 286.

²¹ *Fannon* (1922) 22 S NSW 427, 429-430, *per* Ferguson J.

²² *Ibid.*

²³ *Christie* [1914] AC 545.

identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake”.²⁴

- 13.11 Even if the identifying witness is unable to identify the defendant in court and does not recall the identification he or she has made, another witness may give evidence that the identifying witness picked out the defendant at an identification parade. In *Osbourne and Virtue*²⁵ the Court of Appeal said it could see no reason in principle why such evidence should not be admitted. *Christie*²⁶ was cited as authority for the proposition that “evidence of identification other than identification in the witness box is admissible”.²⁷
- 13.12 We note by way of contrast that if the earlier identification is of a vehicle registration number, rather than of a person, the court will not allow a second witness to supplement the evidence of an eye-witness if the eye-witness is unable to recite the number in the witness box. The exception to the hearsay rule only extends to identifications of people.²⁸
- 13.13 Strictly speaking, the hearsay rule should exclude such evidence, and *Osbourne and Virtue* must be taken as confirming that these circumstances warrant the existence of a pragmatic exception to the rule.²⁹
- 13.14 In classifying what is said outside the courtroom as inferior to what is said in the witness box, the hearsay rule assumes that the truth of the earlier identification is immaterial as it only supports the evidence in court. This is a fiction because it is really at the earlier identification (whether immediately after the crime, at an identification parade or in the course of one of the other procedures set out in the

²⁴ *Ibid*, at p 551.

²⁵ *Osbourne and Virtue* [1973] QB 678, in which there were two eye-witnesses who had attended identification parades. Neither of them identified the accused at court. One could not remember having picked out anyone at the parade, but did not explicitly deny that she had done so. The second witness’s evidence about what had happened at the parade was very contradictory and confused, saying both that she had and that she had not picked out one of the accused. The defence objected to the evidence of the Police Inspector about what had happened at the parades.

²⁶ See n 23 above.

²⁷ The Court of Appeal in *Osbourne and Virtue* was taking a common sense approach: “One asks oneself as a matter of commonsense why, when a witness has forgotten what she did, evidence should not be given by another witness with a better memory to establish what, in fact, she did when the events were fresh in her mind”, *per* Lawton LJ at [1973] QB 678, 690.

²⁸ See *Jones v Metcalfe* [1967] 1 WLR 1286, *McLean* (1967) 52 Cr App R 80 and *Kelsey* (1981) 74 Cr App R 213.

²⁹ DF Libling argues that *Osbourne and Virtue* is a misstatement of the law: “Evidence of Past Identification” [1977] Crim LR 268.

Code of Practice)³⁰ that the witness makes the judgment that the person picked out is the offender. The subsequent identification in court is more of a formality. Indeed, the courts have cautioned against *permitting* identifications made in court for the first time,³¹ let alone relying on them. So it is the out-of-court identification which is significant. If the witness can pick out the accused in court, that may or may not enhance the earlier identification, depending on the circumstances.

- 13.15 The essence of an identification is an assertion, by words or by conduct. The truth of the assertion goes to the heart of the trial. If it was made outside court then it is a hearsay statement. However, the person making the identification is available to be asked about the circumstances of the original sighting (and about any loss of memory) and pertinent cross-examination is therefore possible. The probative value of any in-court identification will be very low, so that there does not seem to be any sound reason for excluding available evidence of the earlier identification, whether or not it is repeated in court.
- 13.16 In recent years, this exception has been extended to the case where the victim composed a Photofit that looked just like the accused,³² or guided a police artist to draw the person's likeness in a sketch.³³ These developments make it seem distinctly anomalous that the court is not permitted to receive evidence of the words the witness used to describe what the attacker looked like, evidence which the hearsay rule would certainly exclude.

To rebut a suggestion of afterthought

- 13.17 Thirdly, evidence of what a witness said early on may be given to rebut a suggestion that his or her story is a "recent fabrication".³⁴ (It may of course be an old, pre-planned, fabrication rather than a recent one.) In this case, the previous statement is not evidence of the truth of its contents, and it is only supposed to be used if an issue is raised as to the witness's credibility. Some think that this distinction is an unreal one in that it is impossible for the fact-finders to ignore the contents of the statement, because the question whether or not the witness is lying may be inextricable from the question whether or not what he or she said happened did in fact happen.³⁵

³⁰ Code of Practice for the Identification of Persons issued by the Secretary of State under PACE, s 66(b).

³¹ See *Eatough* [1989] Crim LR 289.

³² *Cook* [1987] QB 417; *Constantinou* (1990) 91 Cr App R 74.

³³ *Smith* [1976] Crim LR 511.

³⁴ *Oyesiku* (1971) 56 Cr App R 240.

³⁵ Eg, P Murphy, "Previous Consistent and Inconsistent Statements" [1985] Crim LR 270, 272.

- 13.18 This exception is of limited value, as the mere fact that a witness's testimony is impeached in cross-examination will not automatically make such evidence admissible.³⁶ This remains true "even if the impeachment takes the form of contradiction or inconsistency between the evidence given at the trial and something said by the witness on a former occasion".³⁷

The accused's response

- 13.19 Evidence of what the accused said before the trial may be admissible as evidence of reaction, led by the prosecution, or as evidence of the truth of its contents under an exception to the hearsay rule.³⁸ Where the accused does give evidence, it may increase the credibility of the defence if the magistrates or jury know that the accused's account has remained consistent, but it is not automatically open to the accused to adduce an exculpatory account given before the trial; it must fall within one of the above categories.

A pre-recorded interview with a child

- 13.20 Fifthly, there is a new and important exception, created by Part III of the Criminal Justice Act 1991,³⁹ concerned with the evidence of children. Provided that a child is available to come to court to give live evidence, a previous interview with the child, if video-recorded, may be put in evidence.
- 13.21 This new provision lays down very detailed restrictions on the courts in which the procedure may be used,⁴⁰ the type of offence for which the defendant must be facing trial,⁴¹ and the age of the child (which varies according to the nature of the offence).⁴² The videotape is admissible only where the judge grants leave.⁴³
- 13.22 This scheme was introduced by the Government as a scaled-down version of the more ambitious scheme proposed by the Pigot Committee,⁴⁴ which was that the whole of a child's evidence, cross-examination and all, should be carried out ahead of trial, videotapes of the evidence replacing the child's live examination and

³⁶ *Fox v General Medical Council* [1960] 1 WLR 1017.

³⁷ *Coll* (1889) 24 LR Ir 522, 541, *per* Holmes J.

³⁸ The admissibility of admissions, denials, neutral and mixed statements is set out at paras 3.14-3.20 above.

³⁹ Hereafter "the 1991 Act". Part III of this Act inserts a new section 32A into the 1988 Act. This section is set out at Appendix A.

⁴⁰ Section 32(A)(1).

⁴¹ Section 32(2).

⁴² Section 32A(7).

⁴³ Section 32A (2).

⁴⁴ Report of the Advisory Group on Video Evidence (Chairman Judge Pigot), Home Office 1989.

cross-examination.⁴⁵ As the alternative scheme introduced by the 1991 Act requires the child to go to court for a live cross-examination, it does not provide the child with the main benefit of the Pigot scheme, namely to relieve him or her of the need to come to court. In an attempt to relieve the child of some of the burden of giving evidence, however, the legislation provides:⁴⁶

Where a video recording is admitted under this section...[the child] shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with adequately in his recorded testimony.

13.23 The idea is to spare the child at least an examination in chief.⁴⁷ The provisions thus go further than the other exceptions to the rule against previous consistent statements, in that in this case the witness's previous statement does not merely supplement his or her main evidence, but actually replaces it. Whilst this was intended to help the child, judges have told us that it sometimes has the opposite effect: because there is no examination in chief the child, once called to give evidence, is thrust immediately into a hostile cross-examination, and this experience gives the witness the impression that the court is against him or her.⁴⁸ It is ironical that a child is able to give his or her own story in examination in chief in an atmosphere less formal and pressured than that prevailing in the court, yet he or she has to endure the much more traumatic and fraught experience of being cross-examined in the formal court atmosphere.

13.24 As the child's evidence in chief is recorded in a permanent form, it is possible for the jury to watch the video again, with the leave of the judge. This obviously poses the risk that the child's version of events will make more of an impression on the jury than the defendant's, particularly as the cross-examination is not recorded. (This may not always be to the accused's disadvantage.) The Court of Appeal has directed that, if the jury are interested in the *manner* in which the child gave evidence, then they can watch the video again, at the judge's discretion, and with suitable reminders of the defence case.⁴⁹

⁴⁵ Some respondents to our Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview (1991) Consultation Paper No 119, suggested that more flexible and accessible court procedures for the giving of evidence for people with learning difficulties or mental health problems may be beneficial, and that consideration could be given to adopting some of the procedures which are available or which have been proposed for children's evidence, such as that proposed by the Pigot Committee (for which see n 44 above).

⁴⁶ The 1988 Act, s 32A(5)(b), as amended by Criminal Justice and Public Order Act 1994, s 50.

⁴⁷ See "Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings" (HMSO 1992) p 1.

⁴⁸ See also the contribution of the Minister of State for the Home Office, Mr David Maclean MP, to a Parliamentary debate on child witnesses: *Hansard* 13 December 1994, vol 251, col 900.

⁴⁹ *Rawlings and Broadbent (Practice Note)* [1995] 1 WLR 178.

Summary of the exceptions

- 13.25 The exceptions to the rule against previous consistent statements, like the exceptions to the hearsay rule, are complicated. There is a further complication, too, which relates to the legal status of the witness's previous consistent statement in the cases where, exceptionally, it is admitted. Whereas in some cases (such as the videotapes of earlier interviews with children) the previous statement is formally evidence of the facts stated in it,⁵⁰ in others it is, in theory, something less than evidence. In the case of a "purely self-serving" statement made on arrest, for example, the judge may direct the jury that "such a statement, while being admissible for the jury's consideration as to the consistency of an accused's defence, [is] not admissible as evidence of the truth of the contents."⁵¹ In cases of "recent complaint" the judge is required to direct the jury that a "recent complaint" in a sex case is not evidence that the alleged victim was assaulted, but merely evidence that she is now telling the truth when she says she was; but the judge has to tread carefully, because it is a misdirection to tell the jury that the complaint amounts to corroboration.⁵² The CLRC described the convoluted direction which these rules make necessary as "wholly unrealistic and difficult for a jury to appreciate".⁵³
- 13.26 The Strasbourg Commission held that there had been no breach of Article 6(3)(d) of the Convention⁵⁴ where, in the Danish Court of Appeal, a witness's earlier statement made at the City Court was simply read out and he was asked to confirm or deny that he stood by the statement. The Commission held that this practice might reduce the value of the evidence but was not impermissible because there was an opportunity to ask further questions at the appeal stage.⁵⁵
- 13.27 We consider at paragraphs 13.35-13.38 below whether these rules should be changed.

Cross-examination on previous inconsistent statements

- 13.28 A witness may be cross-examined on an oral or written statement made before the trial which is contradicted by his or her oral testimony.⁵⁶ If such a statement is in

⁵⁰ The 1988 Act, s 32A(6)(a).

⁵¹ *Barbery and Others* (1976) 62 Cr App R 248 (CA), *per* Eveleigh J approving dictum of Widgery J in *Storey* (1968) 52 Cr App R 334 (CA).

⁵² *Whitehead* [1929] 1 KB 99. The strict corroboration requirement in sexual cases has now been removed by statute: Criminal Justice and Public Order 1994, ss 32 and 33.

⁵³ CLRC Evidence Report, para 232.

⁵⁴ See para 5.4 above.

⁵⁵ *Hauschildt v Denmark* Appl 10486/83, 49 Decisions and Reports 86, 102.

⁵⁶ See Criminal Procedure Act 1865, ss 4 and 5, which provide:

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be

a document and the witness accepts it as being true, the contents of the document become evidence; but where the witness does not accept that the contents are true, they are not evidence, being nothing but hearsay.⁵⁷

- 13.29 Where a previous inconsistent statement is put to a witness, the tribunal of fact is supposed to treat the statement as relevant only to the witness's credibility, and not to treat it as evidence in itself. That means that a jury would hear about one previous inconsistent statement but not about a large number of previous consistent statements which might redress the balance— particularly where (for example) the inconsistent statement was a retraction made under pressure but the consistent statements were freely made.⁵⁸ We will consider this issue in due course.⁵⁹

Justifications and criticisms of the rule against previous consistent statements

- 13.30 A number of reasons have been put forward to justify the primary rule that previous consistent statements cannot be used in a criminal case. First, it has been said⁶⁰ that the justification is the ease with which evidence of previous statements can be manufactured. This argument would appear to apply to all evidence, but is of particular importance when the witness is a party or interested in the outcome of the case. However, in our provisional view, the ease with which evidence can be fabricated is a matter which should affect its weight rather than its admissibility.

given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

⁵⁷ *Gillespie and Simpson* (1967) 51 Cr App R 172.

⁵⁸ See *Beattie* (1989) 89 Cr App R 302, 307 *per* Lord Lane LJ. Or, for example, consider the case where the accused telephones the witness and threatens him. During the course of the telephone conversation the witness agrees to tell the court he lied to the police. The accused has been tape-recording the conversation and it is played to the court during the witness's evidence. The statement the witness made to the police the day after the telephone call, retracting the statement is also admitted, but the subsequent statements in which the witness explained to the police what had happened and maintained that his original story was true are not.

⁵⁹ See para 13.36 below.

⁶⁰ In *Roberts* [1942] 1 All ER 187, 191E, *per* Humphreys J, and in *Jones v The South Eastern Chatham Railway Company's Managing Committee* (1918) 87 LJKB 775, 778, *per* Swinfen Eady LJ.

- 13.31 Second, and more convincing, is the reason given by Sir William Evans in his notes to *Pothier on Obligations*⁶¹ when he said that in an ordinary case the evidence would be at least superfluous, as the assertions of a witness would be regarded as true until there was some particular reason for regarding them as false. As *Cross* points out,⁶² “The necessity of saving time by avoiding superfluous testimony and sparing the court a protracted inquiry into a multitude of collateral issues which might be raised about such matters as the precise terms of the previous statement is undoubtedly a sound basis for the general rule”.⁶³ We believe there is force in this argument.
- 13.32 The argument loses its force, however, where the integrity of the witness is challenged and his or her consistency is relevant. For example, in *Jones v South Eastern and Chatham Railway Company’s Management Committee*⁶⁴ a charwoman sought damages for an injury which had occurred at work. Her employers alleged that she had injured herself at home. She was cross-examined on an alleged admission made to other witnesses, who were subsequently called to give evidence that she had said that the injury had occurred at home. She sought to lead evidence of occasions when she had told people that she had sustained the injury at work, but she was not permitted to do so. It was held that statements may be used against a witness as admissions, but not in confirmation of her testimony. Thus they could not be used, even though they might have helped to give a clearer picture.
- 13.33 A third possible justification for the rule is that if witnesses tell their story afresh from the witness box it is more likely that they will tell the truth. Interestingly, research into the workings of the memory reveals that the most accurate account is likely to be given shortly after the event rather than at trial.⁶⁵ This is particularly so in the case of young children.⁶⁶ In addition there is a risk that in later accounts a witness might overlay the earlier accounts with altered versions as he or she tells the relevant facts first to the police, then, perhaps, to his or her friends and family, and then perhaps to a legal adviser and in some cases to other professionals as well.

⁶¹ *Pothier on Obligations* (1806 edition) vol 2, p 289.

⁶² *Cross* p 281.

⁶³ This argument is, as we have seen, used as a justification of the rule against hearsay: see para 6.95 above.

⁶⁴ See n 60 above.

⁶⁵ “If there are two scientific facts about the psychology of human memory which are clear beyond any doubt, one is that memory for an event fades gradually with time, and the other is that stress beyond a certain level can impair the power of recall”: JR Spencer and RH Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) p 268.

⁶⁶ Children are quicker to forget than adults, and so the younger they are the faster the memory fades: Brainerd, King and Lowe “On the development of forgetting” (1985) 56 *Child Development* 1103. This makes the decision in *Thomas* [1994] Crim LR 745 particularly harsh (see para 13.3 n 5 above).

- 13.34 Although there are differing theories about how the memory works, it seems clear that a memory is not a fixed idea which resides in the human brain until called up. The very act of remembering and articulating an experience can change the memory of it, and the more a tale is repeated the more likely it is that the memory will be changed. Thus the danger in accepting a later account from a witness is that the original recollection will have been overlaid with a number of later, altered versions. If the witness is initially questioned in particular ways, the witness's first recollection of the incident can be made less susceptible to the distortion which would usually result from repetition.⁶⁷
- 13.35 We now move on to consider the deficiencies of the rule. In the first place, it is difficult to understand why a witness can give evidence of a prior identification but not of a prior description. This limitation may work a serious injustice. Thus, where it is sought to establish the registration number of a car involved in an incident, and an eye-witness A, who saw the incident, related the number to B, who did not, it is hearsay for B to tell the court what the number was for the purpose of proving the identity of the car.⁶⁸ In Scotland the law has been extended so that evidence of a prior description can be given.⁶⁹
- 13.36 Second, the exception that a previous consistent statement may be admitted to rebut the suggestion of afterthought is a very limited one, and arises only when the witness is in effect asked the direct question "When did you first invent this story?"⁷⁰ It does not arise if the attack takes the form of showing a contradiction or inconsistency between the evidence given at the trial and something said by a witness on a former occasion.⁷¹ This means that there is a paradox: evidence of a previous inconsistent statement can be used against a witness to discredit him, but he cannot in return refer to previous consistent statements. This can and does produce arbitrary results and might be unfair to the accused.

⁶⁷ For a summary of recent research see G Davies, "Contamination of witness memory in theory and practice" in The British Academy of Forensic Sciences, *A New Look at Eye-Witness Testimony* (1994).

⁶⁸ *Jones v Metcalfe* [1967] 1 WLR 1286, where the Divisional Court reached its decision with reluctance (see Diplock LJ and Widgery J at 1290C); *McLean* (1967) 52 Cr App R 80; A Ashworth and R Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, 298-300.

⁶⁹ See *Frew v Jessop* [1989] SCCR 530.

⁷⁰ *Flanagan v Fahey* [1918] 2 IR 361.

⁷¹ *Coll* [1889] 24 LR Ir 522, 541.

13.37 Thirdly, there is the exception of recent complaints.⁷² As we have pointed out, this exception is limited to sexual cases, but it is difficult to see why it should not apply to any complaint of violence, as has been suggested.⁷³

13.38 Another defect is that previous consistent statements could be of relevance where a witness finds it difficult to give evidence in court (for example, because his or her memory of events is no longer clear, or because of the unpleasant or embarrassing nature of the evidence), provided of course that the witness accepts that he or she made a statement and adopts it as his or her evidence. (At present the law goes some way towards enabling this to be done because outside court a witness can refresh his or her memory of a statement that he or she has previously made.)

Options for Reform

Option 1: Retain the present law

13.39 We have set out the defects of the present law above.⁷⁴ They are:
its inconsistency with other rules, its illogicality, its capacity to prejudice the accused, its arbitrary scope, and the resentment created by allowing the credibility of one of the parties to the dispute to be bolstered, but not that of the other.⁷⁵

We agree with those criticisms for the reasons we have set out, and provisionally **reject this option.**

Option 2: All previous statements to be admissible

13.40 The CLRC recommended that the rule against use of previous consistent statements should be abrogated.⁷⁶ It has been abrogated in Canada⁷⁷ and has been abolished or severely restricted in other Commonwealth jurisdictions.⁷⁸

13.41 We are troubled by this option, since we believe that it would allow no end of previous consistent statements to be admitted whether or not they had any probative value. Defendants might also be tempted to make many denial statements in the hope that the volume of them would impress a lay tribunal. In many cases, the fact-finding body would not be assisted by the statements, and our provisional view is therefore to **reject this option also.** We now turn to our preferred option.

⁷² See paras 13.6-13.9 above.

⁷³ See *Jones v South Eastern and Chatham Railway Company's Management Committee* (1918) 87 LJKB 775, 778 *per Swinfen Eady LJ*.

⁷⁴ See paras 13.35-13.38 above.

⁷⁵ *Cross* p 288.

⁷⁶ CLRC Evidence Report, para 232.

⁷⁷ Canadian Criminal Code, s 275.

⁷⁸ See Appendix B.

Option 3: Previous consistent statements to be admitted as evidence of the truth of their contents in certain circumstances

13.42 It has been suggested that a witness's previous statement should be admissible, as evidence of the truth of its contents, in the following circumstances:

- (a) to rebut any suggestion of afterthought;
- (b) as evidence of previous identification or description;
- (c) on accusation, save for prepared self-serving statements,⁷⁹ or
- (d) where the witness cannot remember details in a statement which he or she made or adopted when the details were fresh in his or her memory and the details are such that the witness cannot reasonably be expected to remember them.

13.43 The first feature of this proposal is that, when a previous statement is admitted, the jury or magistrates would not be limited to considering it as relevant only to the credibility of the witness; they could accept the statements as evidence of the facts. We adopt this suggestion for the following reasons.

13.44 One of the more difficult directions given to juries is that given when a previous inconsistent statement is put to a witness in cross-examination:

X has admitted that he had previously made a statement which conflicted with his evidence. You may take into account the fact that he made such a statement when you consider whether he is believable as a witness. However, the contents of the statement are not part of the evidence in the trial, except for those parts of it which he has told you are true.

13.45 We have seen above that the value of observing someone's demeanour is usually over-estimated,⁸⁰ and it is the opportunity to ask a witness questions which is the most weighty justification of the hearsay rule. Once a witness is present at the trial, he or she can be asked about any previous accounts. If a jury is trusted to decide that a witness has lied throughout, and therefore to disregard that witness's evidence, why should it not be free to decide that the witness has only lied at certain times and to take as reliable the parts which it finds convincing? Or as the Ontario Law Reform Commission put it:⁸¹

If the previous statement and the circumstances surrounding its making are sufficiently probative to lead the jury to disbelieve the story of the witness on the stand, they should be sufficient to justify the jury's believing the statement itself.

⁷⁹ As in *McCarthy* (1980) 71 Cr App R 142.

⁸⁰ See paras 6.22-6.27 above.

⁸¹ Ontario Law Reform Commission, *The Law of Evidence* (1976) p 43.

13.46 For example, in *R v KGB*⁸² identification evidence alone was insufficient for a conviction, and the prosecution sought to rely on admissions which the accused had allegedly made to three friends and which they had repeated to the police. At the trial the friends repudiated the stories they had told the police. The trial judge held that the previous statements could only be used as to credibility and there was therefore insufficient evidence. The Supreme Court held that the truth of the previous statements could be considered by the jury because there were sufficient indications that the statements were reliable.⁸³

13.47 We therefore suggest that, when a previous statement of a witness is put in, the jury may consider the contents of the statement as evidence, whether or not the witness's oral testimony is consistent with it.

13.48 We now consider in turn each of the specific circumstances in which a previous consistent statement would be admissible.

To rebut suggestion of afterthought

13.49 Our provisional view is that, if it is suggested that an allegation is an afterthought, the witness should be entitled to have any previous statement put before the court so that the fact-finders will have all available information before them and will be able to ascertain whether an allegation is a recent invention.⁸⁴

13.50 We also consider that where a previous inconsistent statement is put to a witness in cross-examination, *all* that witness's previous statements should also be admitted, and the jury or magistrates should be permitted to have regard to the truth of the contents of the statement. This would address the potential unfairness we have discussed at paragraph 13.29 above.

Evidence of previous identification or description

13.51 We believe that cases such as *Jones v Metcalfe*⁸⁵ illustrate the serious inadequacies of the present law. The members of the Divisional Court were extremely reluctant to reach the decision which in fact they did reach because they considered it to be

⁸² *R v KGB* (1993) 79 CCC (3d) 257 Canadian Supreme Court.

⁸³ Indications that the contents of the interviews could be relied upon were found in the fact that they had been videotaped and that the circumstances of the interviews would have impressed upon the interviewees the importance of telling the truth. Lamer CJ also referred to the hearsay danger that there has been no cross-examination of the witness at the time the statement is made, but held that the possibility of cross-examination at the trial mitigated this danger sufficiently: *R v KGB* (1993) 79 CCC (3d) 257, 286-294. See also *Biscette* (1994) 28 CR (4th) 78, a case of the Alberta Divisional Court in which an unadopted previous inconsistent statement was admitted in evidence when, on a *voir dire*, the judge was satisfied of its reliability.

⁸⁴ As suggested by *Cross* at p 288.

⁸⁵ See para 13.35 above.

unjust. The adoption of our proposal would overcome this problem. We envisage that this exception could extend to a note taken of a description at the dictation of an eye-witness. Such a note may well be the best evidence available to the court, and could be admitted as an exception to the hearsay rule—either on this basis or on the basis that it is sufficiently reliable to be admitted as evidence of the detail (say the car registration number) that the witness saw.

On accusation, save for prepared self-serving statements

13.52 This would preserve the present position.

Where a witness is unable to remember details contained in a statement which the witness had made or adopted when the details were fresh in his or her memory, and it is unreasonable at the date of the trial to expect the witness to be able to recall them

13.53 We believe that the adoption of this option would ensure that evidence which is of sufficient importance to be worthy of consideration by the tribunal of fact would be admissible. It would also be a recognition of the difficulty that witnesses have in remembering evidence.⁸⁶

13.54 In all such circumstances, the witness could of course be cross-examined as to the truth of the contents of the earlier statement and the circumstances in which it was made, and contradictory evidence could be led about the matters dealt with in the statement. Any objection could be taken, to the statement or any part of it or any question recorded as having been put to the witness, which could properly have been taken if oral evidence had been given of the contents of the statement.

Summary of Option 3

13.55 We provisionally propose that a **witness's previous statement should be admissible, as evidence of the truth of its contents,**

- (a) to rebut any suggestion of afterthought;**
- (b) as evidence of previous identification or description;**
- (c) on accusation, save for prepared self-serving statements (preserving the present position); or**
- (d) where the witness cannot remember details in a statement which he or she made or adopted when the details were fresh in his or her memory and the details are such that the witness cannot reasonably be expected to remember them.**

⁸⁶ A similar provision exists in Rule 803(5) of the United States Federal Rules of Evidence which provides that: "a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly" is not excluded by the hearsay rule. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. This is intended to prevent the record being in the jury room during deliberation.

PART XIV COMPUTER EVIDENCE

Introduction

14.1 We have already dealt with the circumstances in which computer evidence is real evidence and when it is hearsay.¹ We now turn to consider section 69 of PACE,² which imposes *additional* requirements that must be satisfied before computer evidence is adduced³—whether it is hearsay or not. As so much hearsay evidence is now generated by computer,⁴ the provisions of section 69 warrant careful examination.

14.2 We are very conscious that:⁵

Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. ...If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have “bugs”. ...Realistically, therefore, computers must be regarded as imperfect devices.

The aim of a modern legal system must be to devise a régime which facilitates the use of computer evidence while at the same time recognising that computers are fallible.⁶

Section 69 of PACE⁷

14.3 Section 69 is set out at Appendix A. In essence it provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was properly operating and was not being improperly used.

¹ See paras 2.15-2.17 above.

² The text of the section is set out at Appendix A.

³ See paras 14.5-14.9 below.

⁴ Such as intoximeter readings (eg, *Burditt v Roberts* [1986] RTR 391), shop till rolls (eg, *Shephard* [1993] AC 380), and building society records (eg, *Minors* [1989] 1 WLR 441).

⁵ *Minors* [1989] 1 WLR 441, 443D-E, per Steyn J.

⁶ We are also aware of the desirability of making regulations across different jurisdictions more uniform.

⁷ Rules for computer evidence were first proposed by the CLRC in its Evidence Report in 1972: see para 8.13 n 32 above. The detail of s 69 resembles the proposals of the CLRC up to a point. The principal difference is that the CLRC envisaged that computer evidence would be inherently less reliable if it was based on information different from that which the computer normally handled, and it therefore put forward clauses 35(2)(b) and 35(2)(d) of the Draft Bill attached to the Report. These two clauses have no equivalent in s 69.

The scope of section 69: what is a “computer”?

- 14.4 The word “computer” is not defined in section 69 or elsewhere in PACE.⁸ The Court of Appeal, in *Shephard*,⁹ presumed that the omission was deliberate and gave the word its natural meaning.¹⁰ Our provisional view is that nothing has happened to cause us to depart from the view in our report on computer misuse¹¹ that it would be unnecessary, and indeed might be foolish, to attempt to define the word “computer”, since “rapid scientific advances would soon render any definition obsolete”.¹² The question would not arise if section 69 were repealed, as we provisionally propose below.¹³

Complying with section 69

- 14.5 Whether the document is real evidence or hearsay, the conditions set out in section 69 must be satisfied by evidence.¹⁴ If there is any issue to be decided, the court must hold a trial within the trial to decide whether the party seeking to rely on the document has established the foundation requirements of section 69. The ordinary standards of proof apply.¹⁵
- 14.6 The party relying on computer evidence must first prove that the computer is reliable—or, if the evidence was generated by more than one computer, that *each* of them is reliable.¹⁶ This can be proved by tendering a written certificate¹⁷ or by

⁸ It is not defined in the 1988 Act (see para 4.39 above), the Data Protection Act 1984 or the Computer Misuse Act 1990. It is, however, defined in s 5(6) of the Civil Evidence Act 1968 as meaning “any device for storing and processing information”. This definition seems to have been incorporated by accident into the 1988 Act: Sched 2 para 5 provides that expressions used both in the 1988 Act and in the 1968 Act are to be construed in accordance with s 10 of the 1968 Act, which in turn incorporates the definition in s 5(6). See C Tapper, “Evanescent Evidence” (1993) 1(1) *International Jo of Law and Information Technology* 35, 47. In *Golizadeh* [1995] Crim LR 232 the Court of Appeal referred to the definition in the Civil Evidence Act in order to determine whether a particular device was a computer for the purposes of s 69.

⁹ *Shephard* (1991) 93 Cr App R 139, 142, *per* Lloyd LJ.

¹⁰ Although the court did not give a definitive view, it indicated that it is very unlikely that a word processor qualifies as a computer for the purposes of s 69, although it is a device which stores and processes information. See *Blackburn and Wade*, *The Times* 1 December 1992.

¹¹ *Criminal Law: Computer Misuse* (1989) Law Com No 186, para 3.39.

¹² Professor DJ Birch, in her commentary on *Golizadeh* at [1995] Crim LR 233.

¹³ See paras 14.27-14.32 below.

¹⁴ *Shephard* [1993] AC 380, 386B.

¹⁵ *Minors* [1989] 1 WLR 441, 448D-F. Thus if the evidence is tendered by the prosecution, they must prove it beyond reasonable doubt; but if it is tendered by the defence, the required standard of proof will presumably be that of the balance of probabilities. See *Carr-Briant* [1943] KB 607, 612.

¹⁶ *Cochrane* [1993] Crim LR 48 and see n 36 below.

¹⁷ PACE, Sched 3, para 8.

calling oral evidence.¹⁸ It is not possible for the person relying on the computer evidence to rely on a presumption that the computer is working correctly.¹⁹

14.7 When a certificate is relied upon, it must show on its face that it is signed by a person who, from his or her job description, can confidently be expected to be in a position to give reliable evidence about the operation of the computer.²⁰ The nature of the evidence necessary to discharge the burden of showing that there has been no improper use of the computer, and that it was operating properly, will inevitably vary from case to case; but Lord Griffiths has said²¹ that

it will very rarely be necessary to call an expert and...in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

14.8 A party relying on documentary hearsay generated by a computer may in any event have to call a live witness to demonstrate that the requirements of section 23 or 24²² of the 1988 Act are satisfied: those requirements, unlike those of section 69, cannot be proved by certificate.

14.9 Alternatively, the reliability of the computer may be proved by oral evidence. Even if a certificate is tendered, the court may require oral evidence of the matters which could otherwise be proved by a certificate;²³ but this evidence can itself be hearsay.²⁴ This is perplexing, since it would seem to undermine the requirement that someone who is familiar with the computer should give evidence about its operation.

Problems with the present law

14.10 In 1988 and 1989, this issue was on the periphery of our law reform study of computer misuse.²⁵ On consultation, we received a number of criticisms of the

¹⁸ PACE, Sched 3, para 9, and see para 14.9 below.

¹⁹ *Shephard* [1993] AC 380, 384E, *per* Lord Griffiths, with whom Lords Emslie, Roskill, Ackner and Lowry agreed.

²⁰ *Ibid*, at p 386F.

²¹ *Ibid*, at p 387C.

²² *Minors* [1989] 1 WLR 441, 447F.

²³ PACE, Sched 3, para 9.

²⁴ In *Neville* [1991] Crim LR 288 the Court of Appeal permitted evidence to be given by a witness who was not an employee in the company which owned one of the two computers concerned, and had no position of authority in relation to the other. Much of her evidence was hearsay; but the court observed that para 8 permits hearsay, and took this as an indication that "first-hand evidence from the live witness [under para 9] is not essential either": commentary by JC Smith at p 290.

²⁵ Computer Misuse (1988) Working Paper No 110, and Criminal Law: Computer Misuse (1989) Law Com No 186.

general operation of section 69; but as those matters did not fall within the remit of the project,²⁶ we made no attempt to assess their merits.

- 14.11 We are, however, bound to consider these criticisms carefully in the context of the present project, when we also have the benefit of more than five years' additional experience. This has shown that section 69 presents two types of problems.
- 14.12 The first lies in the way the section was drafted. This is illustrated by *McKeown v DPP*,²⁷ where it was held that if it cannot be proved that the computer was functioning properly, the computer evidence will be inadmissible—even though the expert evidence in that case showed that the malfunction of the computer (the clock part of an Intoximeter machine) had had no effect on the accuracy of the material part of the print-out (the alcohol reading). There was no reason to doubt the reliability of the evidence, but the mandatory requirements of section 69(1)(b) had not been complied with.
- 14.13 Another illogicality arising from the drafting of section 69 is the fact that it applies only where the document is tendered in evidence²⁸—not where it is used by an expert in arriving at his or her conclusions,²⁹ nor even where a witness uses it to refresh his or her memory.³⁰ If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible.³¹
- 14.14 The second type of problem lies in the nature of computers themselves. It is becoming increasingly difficult to comply with the provisions of section 69:³²
- ...developments in computer networking...and the difficulty of adequate access control, monitoring and systems security are likely to make it increasingly impractical to examine (and therefore certify) all the intricacies of computer operation.

²⁶ Which was to review the nature and extent of computer misuse as it affects criminal law and to make proposals for reform.

²⁷ *McKeown v DPP* [1995] Crim LR 69 (Divisional Court).

²⁸ *Shephard* [1993] AC 380.

²⁹ *Golizadeh* [1995] Crim LR 232.

³⁰ *Sophocleous v Ringer* [1988] RTR 52.

³¹ See Professor DJ Birch's commentary on *Sophocleous v Ringer* at [1987] Crim LR 423.

³² S Castell, "Evidence and Authorisation: is EDI [Electronic Data Interchange] 'legally reliable'?" (1990) 6(5) Computer Law and Security Report 2.

14.15 Problems existed even before networking became common:³³

The Data Processing Manager, when producing, as evidence, a print-out from the computer he is in charge of, frequently says in a deposition that the computer was working properly. This is an opinion and, with a large and complex computer system, it is doubtful whether such a manager could have sufficient knowledge about the computer system to be capable of forming such an opinion based on fact. In any event it has been pointed out that computer malfunction or an act of unauthorised tampering might be almost impossible to detect by all but experts in the field.

14.16 This point has additional force when it is recollected that in the vast majority of cases it is not envisaged that an expert will be called.³⁴ A recent Crown Court case³⁵ mentioned to us illustrates how costly it may be for the parties and for the court for section 69 to be complied with. In this case prosecution evidence had been generated by three types of computers. These computers turned out, in the course of the trial, to be linked to computers in four different English towns or cities and to one in Oklahoma. Between 15 and 20 hours of a five-week trial were spent satisfying section 69. The time would not be wasted if it were necessary to establish the quality of the evidence, but section 69 does not appear to serve this purpose.³⁶

14.17 We believe that a major problem with computer evidence also arises where incorrect data have been fed into the computer, as opposed to there being a defect in the software. We were not surprised when people told us that this sometimes happened. This evidence lends support to Professor Tapper's view that "most computer error is either immediately detectable or results from error in the data entered into the machine".³⁷ Thus section 69 fails to address the main problem with computer evidence, that is, data errors. Instead it deals with matters which would usually be apparent in any event.

³³ A Kelman and R Sizer, *The Computer in Court* (1982) p 19.

³⁴ See para 14.7 above.

³⁵ *Newbury and Teal* Isleworth Crown Court, 1995.

³⁶ See also *Cochrane* [1993] Crim LR 48 in which the prosecution wanted to prove that a number of cash withdrawals had been made from an Automatic Teller Machine ("ATM"), or, as they are often called, a "cashpoint". In order to withdraw cash the card holder had to key into the machine a Personal Identity Number, and the machine would dispense money only if the number keyed in matched the number held by the bank. This matching process was carried out not by the ATM (which was itself a computer) but by a mainframe computer. Thus the court required evidence of the correct operation of the mainframe computer. The prosecution did not adduce this evidence and the conviction was set aside on appeal. If the prosecution does not know how the computer system works, it may be impossible for the defence to find out.

³⁷ C Tapper, "Discovery in Modern Times: A Voyage around the Common Law World" (1991) 67 *Chicago-Kent Law Review* 217, 248.

14.18 A further problem with the operation of section 69 is that it may often be the *recipient* of a computer-produced document who wishes to tender it in court; but he or she may be in no position to satisfy the court about the operation of the computer. It may well be that his or her opponent is better placed to do that.³⁸

14.19 Another significant criticism that has been made of the present law is that it can be effectively exploited by the defence so as unjustly to undermine a prosecution. Thus when Dr Castell delivered *The VERDICT* report to the Treasury in 1987,³⁹ he was troubled that there would be “open season” on challenges to computer evidence admissibility once there had been a sufficiently high profile case illustrating the inherent difficulties in truly satisfying section 69. He wrote:⁴⁰

...because computer systems are not generally speaking, designed, operated and managed according to a rigorous set of acknowledged standards of security ensuring the reliability and “trustedness” of their transactions and output at all times, the ability of the appropriate person honestly to verify and certify such evidence in the manner formally laid down by Statute is actually readily open to challenge.

14.20 Dr Castell’s view is borne out by comments from judges to the effect that determined defence lawyers can and do cross-examine the prosecution’s computer expert at great length. The complexity of modern systems makes it relatively easy to establish a reasonable doubt in a juror’s mind as to whether the computer was operating properly. Bearing in mind the very technical nature of computers, the chances of this happening with greater frequency in future are fairly high. We are concerned about smoke-screens being raised by cross-examination which focuses in general terms on the fallibility of computers rather than on the reliability of the particular evidence. The absence of a presumption that the computer is working means that it is relatively easy to raise such a smoke-screen.

14.21 For all the above reasons, we maintain the view we expressed in our report on the hearsay rule in civil proceedings,⁴¹ that “it is not possible to legislate protectively” with regard to computer evidence. We agree with the commentator who said recently that “the only effective course is to weigh evidence according to its reliability, and to rely upon specific challenges to the cogency or accuracy of

³⁸ C Tapper, “Evanescent Evidence” (1993) 1(1) *International Jo of Information and Technology Law* 35, 52.

³⁹ In 1987 Dr Castell presented to the Treasury a report called *The VERDICT Report*, which addressed the legal admissibility of digitally transmitted and processed data and information in the United Kingdom. He had consulted, amongst others, trade and professional organisations, legal practitioners, European and international organisations, and police and investigative or enforcement agencies. This report was followed up in 1990 by a second report, *The APPEAL Report*, which confirmed the conclusions of the first.

⁴⁰ *The VERDICT Report*, para 7.4.

⁴¹ *The Hearsay Rule in Civil Proceedings* (1993) Law Com No 216, para 4.43.

computer evidence in cases where misuse, system failure or operator error is suspected.”⁴² Where there are specific reasons to doubt the reliability of a particular document generated by a computer, those doubts should in our view go to weight, and not to admissibility.⁴³

Options for Reform

14.22 In this section, we consider the possible options for reform and invite the views of our readers on them.

Option 1: Do nothing

14.23 Before accepting this option, our readers will have to be satisfied that there is a need for a separate régime for the admissibility of computer documents over and above the general rules about hearsay, and that the benefits of such a régime justify the extra time and costs incurred in implementing it. It is noteworthy that in Scotland, some Australian states,⁴⁴ New Zealand, the United States⁴⁵ and Canada⁴⁶ there is no separate scheme for computer evidence.

14.24 The justification for this is that computer records are usually business records and as such are often admitted as an exception to the hearsay rule on the grounds that they are intrinsically likely to be reliable.⁴⁷ We note also that the ALRC,⁴⁸ the Canadian Uniform Law Conference and the NZLC all deliberately chose not to introduce specific *additional* tests for admissibility of computer evidence when they considered reform in this area of the law.

⁴² M Hirst, “Computer Statements in English Civil Proceedings” (1994) 3(1) Law, Computers & Artificial Intelligence 3, 13.

⁴³ This view is in accordance with our preferred option in which we propose that admissibility should be (almost) automatic in certain defined cases, and that any criticisms of the quality of the evidence should be a matter of weight for the fact-finders.

⁴⁴ New South Wales and Tasmania, as well as the Commonwealth (federal) jurisdiction.

⁴⁵ See *Westinghouse Electric Supply Co v BL Allen* (1980) 413 A 2d 122.

⁴⁶ Computer bank records have been admitted under s 29 of the Canada Evidence Act 1970 (which provides for the admission of copies of entries in records kept in a financial institution) provided that the reliability of the computer system is proved; *McMullen* (1979) 47 CCC (2d) 499. Some courts have admitted computer print-outs under section 30 without stipulating any such pre-conditions; *Vanlerberghe* (1979) 6 CR (3d) 222.

⁴⁷ “...arguments for a level of authentication greater than that regularly practiced by the company in its own business activities go beyond the rule and its reasonable purpose to admit truthful evidence.” *US v Vela* (1982) 673 F 2d 86, 90 (5th Cir) cited in C Tapper, *Computer Law* (4th ed 1989) p 371.

⁴⁸ ALRC Evidence Interim (1985 ALRC 26) vol 1 pp 388-389. The Commission noted those jurisdictions which did impose independent conditions on the admission of computer evidence, for example, Queensland, Victoria, and the Australian Capital Territory. It considered these provisions to be complex and difficult to satisfy. It accepted that errors could occur at every stage of record-keeping by computers but it believed that these errors would be identified if the Commission’s proposal were adopted.

14.25 Professor Colin Tapper, a leading expert on hearsay and computer evidence in this country, has concluded that those jurisdictions which rely on the common law cope perfectly well without a statutory rule and that it is section 69 itself which causes problems in England and Wales.⁴⁹ He also states that, in principle, additional hurdles are not justified:⁵⁰

The importance of stressing the distinction between weight and admissibility is that it allocates genuine concerns about the ease of altering records held in computers to their proper place, namely the weight to be attached to the evidence once adduced. It must, in principle, be preferable to have any such concern addressed in the context of the particular record-keeping system involved and the particular circumstances of that system, rather than to apply necessarily blanket and general overall provisions at the stage of admissibility. No other solution gives adequate recognition of the versatility and diversity of computer application.

14.26 All this evidence tends to suggest that there is no need for any special rules on computer evidence. We also take into account the problems created by the present law which we have set out in paragraphs 14.10 to 14.21 above. For these reasons our provisional view is that **this option should be rejected.**

Option 2: Repeal section 69 and leave it to the common law, relying on the presumption that the machine works

14.27 In paragraphs 14.23 to 14.25 we have shown that we are not aware of any problems arising in countries which do not have a special régime for computer evidence.

14.28 If there were no pre-condition for the admission of computer records, the parties would be able to rely on the presumption of regularity.⁵¹ According to *Phipson*.⁵²

In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time.

This passage was approved by the Divisional Court in *Castle v Cross*,⁵³ where it was observed that *Phipson's* formulation (unlike that in *Cross*⁵⁴) included no requirement that the instrument in question should be of a kind which is commonly known to

⁴⁹ *The VERDICT Report* (1987) p 84. See n 39 above.

⁵⁰ *The VERDICT Report* (1987) p 85.

⁵¹ Sometimes expressed by the maxim *omnia praesumuntur rite esse acta* ("things are presumed to have been done properly"); but the maxim is sometimes confined to the context of action by officials in the course of their duties.

⁵² Para 23-14.

⁵³ *Castle v Cross* [1984] 1 WLR 1372, 1377B, *per* Stephen Brown LJ.

⁵⁴ 5th ed (1979) p 47.

be in working order more often than not.⁵⁵ The principle has been applied to such devices as speedometers,⁵⁶ traffic lights⁵⁷ and Intoximeters;⁵⁸ we see no reason why it should not apply to computers. The prosecution would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been—in which case the prosecution would have to prove beyond reasonable doubt that it was.

14.29 Such an approach would be consistent with the judgment of the Divisional Court that:⁵⁹

where a lengthy computer printout contains no internal evidence of malfunction and is retained, eg by a bank or stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly.

14.30 We note that important authorities⁶⁰ were not cited in this case, but we think that the court's view is not without merit. As a statement of the current law it was implicitly disapproved in *Shephard*,⁶¹ but only on the ground that section 69 imposes an affirmative duty to *show* that the computer was working properly: Lord Griffiths said⁶² that this duty could not be discharged without evidence by the application of the presumption of regularity. He did not suggest that even in the absence of section 69 the presumption would not apply. We note that in the United States there is no presumption that computer records are unreliable.⁶³

14.31 It may be said that in many cases it would be unfair to expect the defence to know whether or not the computer was working properly, particularly when the prosecution took place months or years after the creation of the evidence. In very many cases the computer in question might not belong to, or have been operated

⁵⁵ Stephen Brown LJ said that the principle stated in *Phipson* was in the court's view accurately set out in *Cross*; but the court did not consider whether it was common knowledge that Intoximeters are in working order more often than not. The current edition of *Cross* concedes (at p 31) that the court omitted the proposed qualification, but argues that some such qualification is necessary.

⁵⁶ *Nicholas v Penny* [1950] 2 KB 466.

⁵⁷ *Tingle Jacobs & Co v Kennedy* [1964] 1 WLR 638n.

⁵⁸ *Castle v Cross* [1984] 1 WLR 1372.

⁵⁹ *R v Governor of Pentonville Prison, ex p Osman* [1990] 1 WLR 277, 306H, *per* Lloyd LJ and French J.

⁶⁰ Such as *Minors* [1989] 1 WLR 441.

⁶¹ *Shephard* [1993] AC 380, 384, *per* Lord Griffiths, and see *Connolly v Lancashire County Council* [1994] RTR 79 for an example of the application of the dictum of Lord Griffiths in *Shephard*.

⁶² *Ibid*, at p 384E. Lords Emslie, Roskill, Ackner and Lowry agreed.

⁶³ *United States v Scholle* (1977) 553 F 2d 1109, 1124.

by, the defendant. We do not seek to minimise these difficulties, but they are not in our view peculiar to computer evidence. Where the defence claims that it would be unfairly disadvantaged by a particular item of evidence because it is not in possession of information that might enable it to discredit that evidence, it can apply for an order that such information be disclosed. Where the prosecution is not in possession of the necessary information either, the evidence can ultimately be excluded if it would be unfair to admit it.⁶⁴

14.32 Our provisional view is that section 69 fails to serve any useful purpose. Other systems operate effectively and efficiently without it. We provisionally propose that **section 69 of PACE should be repealed without replacement.**

⁶⁴ PACE, s 78.

PART XV EXPERT EVIDENCE AND THE HEARSAY RULE

Introduction

- 15.1 In this part, we examine the impact of the hearsay rule on expert evidence. The Royal Commission on Criminal Justice set out its concerns in the following terms:¹

It has been brought to our attention that, because of the rules on hearsay evidence, an expert witness may not strictly speaking be permitted to give an opinion in court based on scientific tests run by assistants unless all those assistants are called upon to give supporting evidence in court. It seems to us that this rule is badly in need of change and we recommend that it be considered by the Law Commission as part of the review of the rules of evidence that we recommend in chapter eight.² Meanwhile, although the defence must have the right to examine the assistants of expert witnesses if it so chooses, we look to the courts and to the parties to make maximum use of the facility to present the evidence of assistants in written form until such time as the law is changed. Any unreasonable exploitation of the system should be met by sanctions against the counsel concerned if he or she is found to be responsible.

- 15.2 We believe that the problem goes beyond scientific tests. It also includes many other types of expert evidence, (such as accountancy evidence), in which the expert has relied on work carried out by other people. In all these cases there is the risk that the defence will insist on the prosecution calling everybody who carried out any work that was relied on by the expert in his or her report.³

The present law

- 15.3 Sometimes the information on which an expert relies is properly admitted in evidence, either because it is verified in an appropriate form by another witness or because it falls within one of the exceptions to the hearsay rule—for example, where it is recorded in business documents.⁴ Where, however, the information relied on by the expert is outside the expert's personal experience and is not proved by other admissible evidence, that information is inadmissible unless it falls within an exception to the hearsay rule.

¹ Report of the Royal Commission, ch 9, para 78.

² See para 1.3 above (footnote added).

³ We have been assisted by an article by R Pattenden, "Expert Opinion Evidence Based On Hearsay" [1982] Crim LR 85.

⁴ See paras 4.28ff above.

15.4 Thus in the civil case of *English Exporters Ltd v Eldonwall Ltd*⁵ Megarry J drew a distinction between a valuation based on a valuer's general experience of comparable transactions and one based on specific transactions of which the valuer has no personal knowledge: the latter is hearsay and inadmissible. Similarly in a criminal case the Court of Appeal has observed:⁶

It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is often overlooked.

15.5 However, the courts have also accepted that the evidence of experts is usually based either on primary facts not personally observed by them or on the conclusions and opinions of other experts,⁷ and there are two common law exceptions peculiar to experts.

15.6 The first provides that, once the primary facts on which the expert's opinion is based have been proved by admissible evidence, the expert is entitled to draw on the work of others as part of the process of drawing conclusions from those facts. Thus in *Abadom*⁸ the Court of Appeal held admissible the evidence of an expert who had measured the refractive index of certain fragments of glass found on the defendant's shoes and compared it with that of broken glass found at the scene of the crime. The expert was able to refer to statistics collated by the Home Office Central Research Establishment in order to demonstrate that the refractive index found in both samples was uncommon, thus suggesting that the defendant was there when the window was broken. This exception extends to any technical information widely used by members of the expert's profession and regarded as reliable.⁹

15.7 The second exception relates to knowledge which forms part of the expert's professional expertise although he or she has not acquired it through personal

⁵ *English Exporters Ltd v Eldonwall Ltd* [1973] Ch 415, 419-423.

⁶ *Turner* [1975] QB 834, 840B-C, *per* Lawton LJ. "Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician": *Ramsey v Watson* (1961) 108 CLR 642, 649, *per* Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ.

⁷ *Eg Golizadeh* [1995] Crim LR 232 (CA) in which Morland J held, "In every case where an expert is giving evidence as an expert and giving his expert opinion, almost inevitably he will rely on primary facts which may be provided to him. They may be provided to him by a device or machine..., or they may be derived from the evidence of other witnesses who have made primary findings of fact or, as experts themselves, have made earlier expert conclusions and opinions on findings of fact presented to them."

⁸ *Abadom* (1983) 76 Cr App R 48.

⁹ In *Rowley v London and North West Railway* (1873) LR 8 Ex 221 an accountant who had personal knowledge of the insurance business was allowed to give evidence of the average duration of life of two people by reference to the Carlisle Actuarial Tables.

experience. The approach adopted by courts possessing a common law jurisdiction is that.¹⁰

The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the *reported data of fellow-scientists*, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men.

- 15.8 Similarly in the civil case of *Seyfang v G D Searle & Co*¹¹ Cooke J expressed surprise at the proposition that the law of Ohio would not permit a medical expert to refer to articles in medical journals.

The...articles...form part of the corpus of medical expertise on this particular subject. I apprehend that in England a medical expert witness with the proper qualifications would be allowed to refer to the articles as part of that corpus of expertise, even though he was not the author of the articles himself. It does appear to me with the greatest respect that a system which does not permit experts to refer in their expert evidence to the publications of other experts in the same field is a system which puts peculiar difficulties in the way of proof of matters which depend on expert opinion.

- 15.9 Thus an expert has been permitted to give evidence that in a standard pharmaceutical guide, kept in every pharmacy, a particular drug was described as a form of penicillin.¹² Similarly, an anthropologist was been permitted to give evidence about the indigenous peoples in a particular region even though this evidence was founded partly upon statements made to the anthropologist by Australian aboriginals.¹³

- 15.10 Section 30(1) of the 1988 Act¹⁴ allows an expert report¹⁵ to be adduced in criminal proceedings as evidence of any fact or opinion of which the person making it could have given oral evidence,¹⁶ subject to the proviso that the court's leave is required

¹⁰ *Wigmore on Evidence* vol 2 § 665b(3), p 784 (emphasis in original).

¹¹ *Seyfang v G D Searle & Co* [1973] QB 148, 151B-C.

¹² *Borowski v Quale* [1966] VR 382. The Federal Rules of Evidence include a specific exception for learned treatises: Rule 803(18).

¹³ *Milirrpum v Nobalco Property Ltd* (1971) 17 FLR 141, 161.

¹⁴ See Appendix A.

¹⁵ Is a written report by a person dealing wholly or mainly with matters on which he or she is (or would if living be) qualified to give expert evidence: s 30(5).

¹⁶ Section 30(4).

if it is proposed to put in the report without calling its maker.¹⁷ In deciding whether or not to give leave, the court is required by section 30(3) to have regard:

- (a) to the contents of the report;
- (b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
- (c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (d) to any other circumstances that appear to the court to be relevant.

15.11 We are not aware of any authorities on the manner in which the discretion conferred by section 30 should be exercised,¹⁸ but we would regard it as extremely unlikely that the courts would allow such evidence to be adduced without calling the maker if the opposing party had a genuine wish to cross-examine on it.

Options for reform

Option 1: Make no change

15.12 The arguments against this option have been set out clearly by the Royal Commission.¹⁹ We are concerned that the present rules enable a determined defendant to require the attendance of people who helped the expert by carrying out routine tests or performing routine calculations, notwithstanding that there is no real likelihood that this will achieve anything other than the unnecessary expenditure of time and money on the strict proof of purely formal evidence.

Option 2: Retain the present system and impose cost sanctions against the counsel concerned

15.13 As we have said in paragraph 15.1, this possibility was suggested by the Royal Commission. It does, however, raise important issues about the circumstances in which counsel can be held personally liable for costs. At common law there is no such power.²⁰

¹⁷ Section 30(2). In Crown Court trials advance notice must be given of the intention to adduce expert evidence: PACE, s 81; Crown Court (Advance Notice of Expert Evidence) Rules 1987 SI 1987 No 716. If advance notice is not given, the leave of the court must be obtained before the evidence is adduced.

¹⁸ In *Hurst* [1995] 1 Cr App R 82 it was held that the trial judge had rightly refused to admit a psychiatric report under s 30, but on the ground that it went no further than a speculative opinion and was therefore inadmissible anyway. The psychiatrist had in fact been available to give evidence.

¹⁹ See para 15.1 above.

²⁰ *R v Horsham DC, ex p Wenman* [1995] 1 WLR 680, 697C, per Brooke J.

15.14 Section 19A of the Prosecution of Offences Act 1985²¹ empowers a criminal court to order a party's legal representatives to meet the whole or part of any "wasted costs". This expression is defined to mean:

any costs incurred by a party:

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or any employee of a representative; or
- (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

15.15 In *Re a Barrister (Wasted Costs Order) (No 1 of 1991)*²² the Court of Appeal described this power as "draconian"²³ and stressed that the grounds for its exercise must be clear and particular. In *Ridehalgh v Horsefield*²⁴ it was said that conduct is "unreasonable" within the meaning of the section if it is

vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive.

This option presupposes that unreasonable insistence on the personal attendance of expert witnesses can be dealt with by an order for costs against the counsel responsible. However, there are two major obstacles to the making of such an order.

15.16 First, a legal representative does not act improperly, unreasonably or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to failure. In *Ridehalgh v Horsefield*²⁵ the court went on to point out that

clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. ...

15.17 The problem is greater in criminal cases because of the importance of the liberty of the individual. In the context of expert evidence, the legal representative would not be liable for pursuing a cross-examination doomed to failure.

²¹ Inserted by Courts and Legal Services Act 1990, s 111. See Part VIII of the *Practice Direction (Crime: Costs)* [1991] 1 WLR 498, and *A Guide to the Award of Costs in Criminal Proceedings* (HMSO, 1991).

²² *Re a Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293.

²³ But it has been pointed out that Draco, the Athenian law-maker who fixed the penalty of death for almost all crimes, including petty theft, would have been surprised to find his name attached to it: *R v Horsham DC, ex p Wenman* [1995] 1 WLR 680, 702E, per Brooke J.

²⁴ *Ridehalgh v Horsefield* [1994] Ch 205, 232F-G, per Sir Thomas Bingham MR.

²⁵ *Ibid.*, at 234C-D.

- 15.18 Problems arise from the nature of the advocate's job, and in particular from the specific task of deciding whether to cross-examine a particular witness.

Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.²⁶

- 15.19 The second obstacle follows from the first. A court cannot normally decide whether sanctions should be imposed on the lawyers involved without looking closely at their client's instructions—which the doctrine of legal professional privilege will preclude it from doing unless the client waives the privilege.

Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is...only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.²⁷

- 15.20 **In practice, we do not believe that it would be possible or desirable for sanctions to be imposed against counsel for requiring the attendance of people whose evidence was relied upon by an expert in his or her report, except in the very clearest cases of obvious time-wasting.**

Option 3: Permit cross-examination only with the leave of the court

- 15.21 Another possibility is to require the leave of the court for the cross-examination of experts' assistants. The expert's report would be accompanied by a list of the persons involved in its preparation, together with a description of the tasks carried out by each of them; the onus would then pass to the other side to indicate which of them it proposes to cross-examine, and why. The court would then determine

²⁶ *Ridehalgh v Horsefield* [1994] Ch 205, 236F-H. This authority was applied in *Sampson v John Boddy Timber Ltd, The Independent* 17 May 1995 (CA) where the majority held that if a point was fairly arguable then it could not be "quite plainly unjustifiable" for counsel to pursue it.

²⁷ *Ridehalgh v Horsefield* [1994] Ch 205, 237D, per Sir Thomas Bingham MR. See also *Orchard v South Eastern Electricity Board* [1987] QB 565, 579-580, per Dillon LJ, 572, per Lord Donaldson MR; and *R v Horsham DC, ex p Wenman* [1995] 1 WLR 680, 702G, per Brooke J.

whether a triable issue had been shown. It would be necessary to require the leave of the court because otherwise there would be no effective sanction where no, or inadequate, reasons were given.

- 15.22 **We are attracted by this option, but do not feel able to propose its adoption because it would mean that the defence would have to disclose the nature of its case before it could cross-examine on the issues properly raised.** The whole question of disclosure by the defence has recently been reviewed by the Home Office, but its implications go well beyond the rule against hearsay, and we do not think it appropriate to put forward proposals in this limited context which would presuppose a particular view on that wider issue. Obviously if the law were changed so as to require disclosure by the defence, this would become an attractive option.²⁸

Option 4: An exception to the hearsay rule for information relied on by an expert

- 15.23 This option would involve the creation of a further exception to the hearsay rule, in addition to those that may already apply.²⁹ A starting point for this might be Rule 703 of the Federal Rules of Evidence, which provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to* the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.³⁰

To adopt such a rule would lead to evidence being received which the jury or magistrates then had to ignore, because it was not itself admissible evidence. To avoid this, the rule might be adapted so as to provide, not just that the expert's report may refer to information which is inadmissible, but that the information referred to *is* admissible as evidence of the facts stated.

- 15.24 Our provisional view is that the consequence of such a change would be to deprive the opposing party of the right to cross-examine the person providing the information in *every* such case. If the change were made the judge, as well as counsel, would certainly be able to comment on the fact that the evidence has not been tested in that way; but the central objection would remain, that the opposing party would have been deprived of its right to destroy or weaken the evidence by cross-examination. **We do not believe that this option should be adopted because it would entail the removal of the right to cross-examine.**

²⁸ The Home Office recommends that the defence be required to provide sufficient particulars of its case to identify the issues in dispute before the start of the trial, and that the defence should provide the name and address of any witness it proposes to call. It does not, however, specify that the defence must give notice of any hearsay which it proposes to adduce: Home Office, "DISCLOSURE, A Consultation Document" (HMSO, 1995) para 51.

²⁹ See para 15.3-15.8 above.

³⁰ Emphasis added.

Option 5: An exception to the hearsay rule for information relied on by an expert and provided by someone who cannot be expected to have any recollection of the matters stated

15.25 This option would involve the creation of an additional exception to the hearsay rule which would be more limited than that involved in Option 4: it would apply only where the person concerned could not be expected to have any recollection of the matters dealt with in the information provided by him or her. This would prevent the waste of court time and expense that would result if that person were required to attend, since he or she would be unable to add to the evidence before the court. The other exceptions to the hearsay rule would also apply. Our provisional view is that this option is to be preferred.

15.26 We therefore provisionally propose that **information relied upon by an expert should be admissible not only where it is admissible at present, or would be admissible under any of the exceptions to the hearsay rule provisionally proposed above,³¹ but also where it is provided by a person who cannot be expected to have any recollection of the matters stated.**

³¹ See Part XI above.

PART XVI

SUMMARY OF PROVISIONAL PROPOSALS AND ISSUES FOR CONSULTATION

In this paper we have raised a large number of questions on this complex topic, and have formed a provisional view on many of them. We summarise here our provisional conclusions and proposals, and invite consultees to indicate whether they agree. More generally, we invite comments on *any* of the matters contained in, or on the issues raised by, this paper, and any other suggestions that consultees may wish to put forward.

The need for separate rules governing hearsay in criminal cases

1. We provisionally propose that the admissibility of hearsay evidence in criminal cases should continue to be governed by rules separate from those applicable to civil cases.

(paragraphs 1.10-1.15)

Justifications for the rule

Hearsay is not the best evidence

2. Our provisional view is that some hearsay evidence is the best evidence and some is not; and that, where it is, the rule operates irrationally to prevent its admission.

(paragraphs 6.3-6.7)

The danger of manufactured evidence

3. Our provisional view is that this is a good justification only for excluding *multiple* hearsay and the hearsay evidence of *unidentified* witnesses.

(paragraphs 6.8-6.15)

The risk of errors in transmission

4. Our provisional view is that this is a good justification only for excluding *multiple* hearsay.

(paragraphs 6.16-6.18)

The value of seeing the witness's demeanour

5. Insofar as a witness's demeanour does help the fact-finders to reach an accurate verdict, our provisional view is that it is not so significant a factor in itself as to justify the exclusion of hearsay evidence as contrasted with admitting first-hand hearsay subject to a judge's warning.

(paragraphs 6.20-6.30)

The fact that hearsay evidence is not given on oath

6. Our provisional view is that there is no clear evidence that an oath or affirmation in itself promotes truthful testimony.

(paragraphs 6.31-6.35)

Cross-examination

7. Our provisional view is that the absence of cross-examination is the most valid justification of the hearsay rule, but that it is not valid for *all* hearsay and does not justify the current form of the hearsay rule, since a jury would understand, and give adequate consideration to, a warning about the shortcomings of hearsay evidence.
(paragraphs 6.36-6.62)

The risk of a lay tribunal being misled

8. Our provisional view is that, in the case of first-hand hearsay, juries and magistrates are capable of understanding and following a direction which draws to their attention the defects of the hearsay evidence.
(paragraphs 6.63-6.80)

Protection for the accused

9. Our provisional view is that the hearsay rule does not always operate to protect the accused: he or she may be prevented from adducing exculpatory evidence, and is not protected from the jury or magistrates treating hearsay as being of equal weight to non-hearsay evidence.
(paragraphs 6.81-6.87)

Confrontation

10. Our provisional view is that it is desirable for witnesses to give their evidence in the presence of the accused if possible, but there are other factors which may outweigh the need for this to happen, such as the impossibility of obtaining the evidence directly from the witness in the courtroom.
(paragraphs 6.88-6.94)

Waste of time

11. Our provisional view is that, although the rule does exclude some evidence which would be of little or no assistance to the court, the time thus saved is outweighed by the time spent on legal argument made necessary by the uncertainty of the rule and the degree to which it depends on the exercise of judicial discretion.
(paragraphs 6.95-6.99)

Criticisms of the rule

12. Our provisional view is that the rule in its present form
- (a) is unnecessarily complex;
(paragraphs 7.2-7.29)
 - (b) wastes court time;
(paragraphs 7.31-7.33)
 - (c) excludes cogent evidence, whether tendered by the prosecution or by the defence;
(paragraphs 7.34-7.73)

- (d) confuses witnesses and prevents them from telling their story in the natural way;
(paragraphs 7.74-7.75)
- (e) is arbitrary in its effects;
(paragraphs 7.76-7.79)
- (f) is undiscriminating in nature;
(paragraphs 7.80-7.82)
- (g) probably contravenes the European Convention on Human Rights;
(paragraph 7.83)
- and
- (h) causes injustice.

The need for reform

13. We provisionally conclude that for these reasons the present law is unsatisfactory and that Option 1 (no change) must be rejected.
(paragraphs 9.2-9.3)

Unsupported hearsay

14. We provisionally propose that, where the evidence of a particular element of the offence includes hearsay, that element should not be regarded as proved unless the hearsay is supported by direct evidence. We believe that such a rule is necessary to ensure compliance with the Convention.
(paragraph 9.5)

Judicial discretion

15. Our preliminary enquiries have revealed reluctance on the part of many judges to exercise their discretion under the 1988 Act in favour of admitting hearsay, and also that that discretion is exercised inconsistently. These factors and the difficulty of predicting whether evidence will be admitted lead us to the provisional view that judicial discretion to exclude hearsay should be restricted to the existing common law and statutory discretions.
(paragraphs 7.30, 7.77 and 9.6-9.25)

The definition of hearsay

16. We provisionally propose that, if there are to be any rules peculiar to hearsay evidence, the definition of hearsay for the purpose of such rules should include all that is presently within its ambit except implied assertions. Our proposed formulation of the hearsay rule is:
an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion that the person intended to assert.
(paragraphs 9.27-9.36)

Free admissibility

17. We provisionally conclude that the justifications for excluding hearsay in certain circumstances are strong, and that Option 2 (free admissibility) should therefore be rejected.

(paragraphs 10.3-10.27)

Best available evidence

18. Our provisional view is that it would not be practicable to introduce in England and Wales a régime under which the court would be obliged to seek out the best evidence available, and that Option 3 should therefore be rejected.

(paragraphs 10.28-10.35)

The options for a hearsay rule

19. The remaining options would involve preserving a rule that would exclude hearsay evidence in certain circumstances. They are as follows:

Option 4—an exclusionary rule with an inclusionary discretion;

Option 5—the current scheme plus an inclusionary discretion;

Option 6—categories of automatic admissibility; and

Option 7—categories of automatic admissibility plus a limited inclusionary discretion.

We provisionally conclude that, of these, Option 7 is to be preferred for the reasons set out in Part X.

(paragraph 10.36-10.55—Option 4)

(paragraph 10.56-10.64—Option 5)

(paragraphs 10.66-10.72—Option 6)

If consultees disagree we would be particularly interested to know whether this is because they do not accept our analysis of the advantages and disadvantages of judicial discretion.

(paragraphs 9.10-9.25 and 10.73-10.77)

Admissible hearsay

20. If the admissibility of a hearsay statement were to continue to depend (at least in part) on whether it falls within one of certain recognised categories of admissibility, but the existing categories set out in section 23 of the 1988 Act were to be replaced by a wider set of categories (in other words, if option 6 or 7 were adopted), our provisional view is that, where the evidence falls within a recognised category,

(a) its admissibility should not depend on whether it is documentary or oral;
(paragraph 11.7)

(b) it should not be admissible unless it is *first-hand* hearsay;
(paragraph 11.8)

(c) it should not be admissible unless the witness is identified to the satisfaction of the court;
(paragraph 11.9)

and

(d) it should not be admissible as evidence of any fact of which the witness's oral evidence would not have been admissible;
(paragraph 11.10)

subject to the existing statutory and common law discretions to exclude prosecution evidence.¹

The categories of admissibility

21. If the admissibility of a hearsay statement were to continue to depend (at least in part) on whether it falls within one of certain recognised categories of admissibility, but the existing categories set out in section 23 of the 1988 Act were to be replaced by a wider set of categories (in other words, if option 6 or 7 were adopted), our provisional view is that those categories should be as follows:

(a) where the witness is dead, or too ill to attend court;
(paragraphs 11.13 and 11.14)

(b) where such steps have been taken as are reasonably practicable to secure the witness's attendance, but without success, and

(i) he or she is outside the United Kingdom, *or*

(ii) he or she cannot be found;

(paragraphs 11.15-11.21)

or

(c) the witness refuses to give (or to continue giving) evidence although physically present in court.

(paragraphs 11.22-11.27)

¹ See paras 4.40-4.43 and 9.11-9.13 above.

Hearsay adduced by party responsible for unavailability of witness's oral evidence

22. We provisionally propose that hearsay evidence should not be admissible on any of these grounds if the party adducing it is responsible for the fact that the witness cannot or will not give oral evidence.

(paragraphs 11.30-11.33)

Statements made in contemplation of criminal proceedings

23. Our provisional view is that, where a hearsay statement falls within one of the proposed categories, it would not be desirable to exclude it solely on the ground that it was made after the defendant was charged, or at a time when criminal proceedings could reasonably have been known to be contemplated.

(paragraph 11.34)

An additional power to exclude evidence?

24. We would be interested in hearing from anybody who believes that the court should have further powers to exclude evidence of little probative value and, in particular, the nature of such powers and the bases on which they should be exercised.

(paragraph 11.35)

Existing statutory exceptions

25. If the existing categories of admissibility set out in section 23 of the 1988 Act were to be replaced with a wider set of categories as we propose, we further propose

1) that the following statutory exceptions to the hearsay rule should be preserved (or re-enacted) with consequential amendments:

- (a) section 24 of the Criminal Justice Act 1988;
- (b) section 9 of the Criminal Justice Act 1967;
- (c) sections 3 and 4 of the Bankers' Books Evidence Act 1879 as amended;
- (d) section 46(1) of the Criminal Justice Act 1972; and
- (e) paragraphs 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968;

(paragraphs 11.59-11.60)

2) that confessions should continue to be admissible against their makers, subject to section 76 of PACE and the existing discretions to exclude prosecution evidence.

(paragraph 11.58)

The limited inclusionary discretion (the "safety valve" provision)

26. If option 7 were to be adopted, our provisional view is that the proposed residual discretion to admit hearsay falling outside the recognised categories and the preserved exceptions

- (a) should extend to oral as well as documentary hearsay;
(paragraphs 11.7 and 11.37)
- (b) should extend to multiple as well as first-hand hearsay;
(paragraph 11.37)
- and
- (c) should be available if (but only if) it appears to the court that
 - (i) the evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with, and
 - (ii) the interests of justice require that it be admitted.
 (paragraph 11.36)

Procedural matters

27. We provisionally propose

- (a) that, where possible, an application for a hearsay statement to be admitted should be made before the trial;
(paragraphs 11.42-11.44)
- and
- (b) that the burden of proving facts which render hearsay admissible should be on the party seeking to adduce it and the standard of proof should be the same as for any other item of evidence adduced by that party;
(paragraph 11.45)
- and
- (c) that the burden of proving that the party seeking to adduce hearsay is responsible for the fact that the witness will not or cannot give oral evidence should be on the party who opposes the admission of the evidence;
(paragraph 11.46)
- and
- (d) that the opposing party should be allowed to adduce evidence challenging the contents of the hearsay statement, or the credibility of the absent witness, as if the witness were present
(paragraphs 11.47-11.50)
- and
- (e) that where the credibility of an absent witness has been attacked, the judge or magistrates may permit either party to lead additional evidence of such description as the judge or magistrates may specify.
(paragraph 11.51)

The avoidance of unnecessary interruptions to a witness's evidence

28. We provisionally suggest that if a witness, while giving oral evidence at trial, gives inadmissible hearsay evidence, that is not to be treated as hearsay if it has already been given in some other admissible form in the course of the same trial.
(paragraph 11.52)

Previous consistent statements

29. Our provisional view is
- (a) that the present law on the previous statements of witnesses who attend court is in need of reform;
(paragraph 13.39)
 - but
 - (b) that it would be undesirable to allow such statements to be adduced without restriction.
(paragraphs 13.40-13.41)

30. We provisionally propose that a witness's previous statement should be admissible, as evidence of the truth of its contents,

- (a) to rebut any suggestion of afterthought;
(paragraphs 13.49-13.50)
- (b) as evidence of previous identification or description;
(paragraph 13.51)
- (c) on accusation, save for self-serving statements;
(paragraph 13.52)
- or
- (d) where the witness is unable to remember details contained in a statement which the witness had made or adopted when the details were fresh in his or her memory, and it is unreasonable at the date of the trial to expect the witness to be able to recall them;
(paragraph 13.53)

but in no other circumstances.

Computer evidence

31. Our provisional conclusion is that there is no need for a special rule governing the admissibility of documents produced by computer. We therefore propose that section 69 of PACE should be repealed without replacement, leaving computer evidence to be governed by the common law presumption that, in the absence of evidence to the contrary, a device of a kind which normally works properly may be assumed to have been working properly at a particular time.
(paragraphs 14.23-14.32)

32. If, however, special requirements for the admission of computer evidence were to be retained, our provisional view is that no attempt should be made to define the term “computer” for this purpose.

(paragraph 14.4)

Expert evidence

33. Our provisional conclusion is

- (a) that the problem of experts being unnecessarily required to attend for cross-examination cannot be satisfactorily resolved under the existing law, for example by the use of wasted costs orders;

(paragraphs 15.13-15.20)

but

- (b) that it would be undesirable simply to allow the admission of *any* hearsay information relied on by an expert witness.

(paragraphs 15.23-15.24)

We therefore propose that information relied upon by an expert should be admissible not only where it falls within some other exception to the rule but also where it is provided by a person who cannot be expected to have any recollection of the matters stated.

(paragraphs 15.25-15.26)

Uniformity of rules

34. We provisionally propose that (subject to the existing discretions to exclude prosecution evidence, and to the difference in the standard of proof) the same rules of evidence should apply to the defence as to the prosecution.

(paragraphs 12.7-12.13)

35. We provisionally propose that any reformed hearsay rule should apply in places where the criminal rules of evidence currently apply, namely courts-martial, professional tribunals established by statute, and coroners’ courts in certain circumstances.

(paragraph 12.18-12.21)

APPENDIX A

STATUTORY PROVISIONS IN ENGLAND AND WALES

CIVIL EVIDENCE ACT 1968, s 10

10 Interpretation of Part I, and application to arbitrations, etc

(1) In this Part of this Act-

“computer” has the meaning assigned by section 5 of this Act;
“document” includes, in addition to a document in writing-

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

“film” includes a microfilm;

“statement” includes any representation of fact, whether made in words or otherwise.

(2) In this Part of this Act any reference to a copy of a document includes-

- (a) in the case of a document falling within paragraph (c) but not (d) of the definition of “document” in the foregoing subsection, a transcript of the sounds or other data embodied therein;
- (b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within

that paragraph, a reproduction of that image, whether enlarged or not, and any reference to a copy of the material part of a document shall be construed accordingly.

POLICE AND CRIMINAL EVIDENCE ACT 1984
ss 69-72, s 78, s 118, Sched 3 paras 8-12, 14 and 15

PART VII
DOCUMENTARY EVIDENCE IN CRIMINAL PROCEEDINGS

69 Evidence from computer records

(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown-

- (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;
- (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
- (c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.

70 Provisions supplementary to sections 68 and 69

- (1) ...
- (2) Part II of Schedule 3 shall have effect for the purpose of supplementing section 69 above.
- (3) Part III of that Schedule shall have effect for the purpose of supplementing both sections.

71 Microfilm copies

In any proceedings the contents of a document may (whether or not the document is still in existence) be proved by the production of an enlargement of a microfilm copy of that document or of the material part of it, authenticated in such manner as the court may approve.

72 Part VII - supplementary

(1) In this Part of this Act-
“copy” and “statement” have the same meanings as in Part I of the Civil Evidence Act 1968 ...

(2) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

78 Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

118 General interpretation

(1) In this Act-
“document” has the same meaning as in Part I of the Civil Evidence Act 1968...

SCHEDULE 3

PROVISIONS SUPPLEMENTARY TO SECTIONS 68 AND 69

PART II

PROVISIONS SUPPLEMENTARY TO SECTION 69

8. In any proceedings where it is desired to give a statement in evidence in accordance with section 69 above, a certificate-

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters mentioned in subsection (1) of section 69 above; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,

shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

9. Notwithstanding paragraph 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph.

10. Any person who in a certificate tendered under paragraph 8 above in a magistrates' court, the Crown Court or the Court of Appeal makes a statement which he knows to be false or does not believe to be true shall be guilty of an offence and liable-

- (a) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both;
- (b) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum (as defined in section 74 of the Criminal Justice Act 1982) or to both.

11. In estimating the weight, if any, to be attached to a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular-

- (a) to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information; and

- (b) to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.

12. For the purposes of paragraph 11 above information shall be taken to be supplied to a computer whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment.

**PART III
PROVISIONS SUPPLEMENTARY TO SECTIONS 68 AND 69**

13. ...

14. For the purpose of deciding whether or not a statement is admissible in accordance with section 69 above the court may draw any reasonable inference-

- (a) from the circumstances in which the statement was made or otherwise came into being; or
- (b) from any other circumstances, including the form and contents of the document in which the statement is contained.

15. Provision may be made by rules of court for supplementing the provisions of section 68 or 69 above or this Schedule.

CRIMINAL JUSTICE ACT 1988, ss 23-28, 30-32A, Sched 2

**PART II
DOCUMENTARY EVIDENCE IN CRIMINAL PROCEEDINGS**

23 First-hand hearsay

- (1) Subject-
 - (a) to subsection (4) below;
 - (b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968 (evidence given orally at original trial to be given orally at retrial); and

- (c) to section 69 of the Police and Criminal Evidence Act 1984 (evidence from computer records),

a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if-

- (i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or
 - (ii) the requirements of subsection (3) below are satisfied.
- (2) The requirements mentioned in subsection (1)(i) above are-
- (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
 - (b) that-
 - (i) the person who made the statement is outside the United Kingdom; and
 - (ii) it is not reasonably practicable to secure his attendance; or
 - (c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.
- (3) The requirements mentioned in subsection (1)(ii) above are-
- (a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
 - (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.
- (4) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

24 Business etc documents

- (1) Subject-
 - (a) to subsections (3) and (4) below;
 - (b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968; and
 - (c) to section 69 of the Police and Criminal Evidence Act 1984,

a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied-

- (i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and
- (ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Subsection (1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it-

- (a) in the course of a trade, business, profession or other occupation;
or
- (b) as the holder of a paid or unpaid office.

(3) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

(4) A statement prepared otherwise than in accordance with [section 3 of the Criminal Justice (International Co-operation) Act 1990] or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below for the purposes-

- (a) of pending or contemplated criminal proceedings; or
- (b) of a criminal investigation,

shall not be admissible by virtue of subsection (1) above unless-

- (i) the requirements of one of the paragraphs of subsection (2) of section 23 above are satisfied; or
- (ii) the requirements of subsection (3) of that section are satisfied; or
- (iii) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to

have any recollection of the matters dealt with in the statement.

25 Principles to be followed by court

- (1) If, having regard to all the circumstances-
 - (a) the Crown Court-
 - (i) on a trial on indictment;
 - (ii) on an appeal from a magistrates' court; or
 - (iii) on the hearing of an application under section 6 of the Criminal Justice Act 1987 (applications for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or
 - (iv) on the hearing of an application under paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (applications for dismissal of charges in certain cases involving children transferred from magistrates' court to Crown Court); or
 - (b) the criminal division of the Court of Appeal; or
 - (c) a magistrates' court on a trial of an information,

is of the opinion that in the interests of justice a statement which is admissible by virtue of section 23 or 24 above nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1) above, it shall be the duty of the court to have regard-

- (a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;
- (b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;
- (c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and

- (d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

26 Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations

Where a statement which is admissible in criminal proceedings by virtue of section 23 or 24 above appears to the court to have been prepared, otherwise than in accordance with [section 3 of the Criminal Justice (International Co-operation) Act 1990] or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below, for the purposes-

- (a) of pending or contemplated criminal proceedings; or
- (b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard-

- (i) to the contents of the statement;
- (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (iii) to any other circumstances that appear to the court to be relevant.

27 Proof of statements contained in documents

Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved-

- (a) by the production of that document; or

- (b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve; and it is immaterial for the purposes of this subsection how many removes there are between a copy and the original.

28 Documentary evidence - supplementary

- (1) Nothing in this Part of this Act shall prejudice-
 - (a) the admissibility of a statement not made by a person while giving oral evidence in court which is admissible otherwise than by virtue of this Part of this Act; or
 - (b) any power of a court to exclude at its discretion a statement admissible by virtue of this Part of this Act.

(2) Schedule 2 to this Act shall have effect for the purpose of supplementing this Part of this Act.

PART III

OTHER PROVISIONS ABOUT EVIDENCE IN CRIMINAL PROCEEDINGS

30 Expert reports

(1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.

(2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.

(3) For the purpose of determining whether to give leave the court shall have regard-

- (a) to the contents of the report;
- (b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
- (c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.

(5) In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

31 Form of evidence and glossaries

For the purpose of helping members of juries to understand complicated issues of fact or technical terms Crown Court Rules may make provision-

- (a) as to the furnishing of evidence in any form, notwithstanding the existence of admissible material from which the evidence to be given in that form would be derived; and
- (b) as to the furnishing of glossaries for such purposes as may be specified;

in any case where the court gives leave for, or requires, evidence or a glossary to be so furnished.

32 Evidence through television links

(1) A person other than the accused may give evidence through a live television link [in proceedings to which subsection (1A) below applies] if-

- (a) the witness is outside the United Kingdom; or
- [(b) the witness is a child, or is to be cross-examined following the admission under section 32A below of a video recording of testimony from him, and the offence is one to which subsection (2) below applies,]

but evidence may not be so given without the leave of the court.

[(1A) This subsection applies-

- (a) to trials on indictment, appeals to the criminal division of the Court of Appeal and hearings of references under section 17 of the Criminal Appeal Act 1968; and

(b) to proceedings in youth courts and appeals to the Crown Court arising out of such proceedings.]

(2) This subsection applies-

- (a) to an offence which involves an assault on, or injury or a threat of injury to, a person;
- (b) to an offence under section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16);
- (c) to an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978; and
- (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above.

(3) A statement made on oath by a witness outside the United Kingdom and given in evidence through a link by virtue of this section shall be treated for the purposes of section 1 of the Perjury Act 1911 as having been made in the proceedings in which it is given in evidence.

[(3A) Where, in the case of any proceedings before a youth court-

- (a) leave is given by virtue of subsection (1)(b) above for evidence to be given through a television link; and
- (b) suitable facilities for receiving such evidence are not available at any petty-sessional court-house in which the court can (apart from this subsection) lawfully sit,

the court may sit for the purposes of the whole or any part of those proceedings at any place at which such facilities are available and which has been appointed for the purposes of this subsection by the justices acting for the petty sessions area for which the court acts.

(3B) A place appointed under subsection (3) above may be outside the petty sessions area for which it is appointed; but it shall be deemed to be in that area for the purpose of the jurisdiction of the justices acting for that area.]

(4) Without prejudice to the generality of any enactment conferring power to make rules to which this subsection applies, such rules may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this section.

(5) The rules to which subsection (4) above applies are-

- (a) Crown Court Rules; and
- (b) Criminal Appeal Rules.

[32A Video recording of testimony from child witnesses

(1) This section applies in relation to the following proceedings, namely-

- (a) trials on indictment for any offence to which section 32(2) above applies;
- (b) appeals to the criminal division of the Court of Appeal and hearings of references under section 17 of the Criminal Appeal Act 1968 in respect of any such offence; and
- (c) proceedings in youth courts for any such offence and appeals to the Crown Court arising out of such proceedings.

(2) In any such proceedings a video recording of an interview which-

- (a) is conducted between an adult and a child who is not the accused or one of the accused ("the child witness"); and
- (b) relates to any matter in issue in the proceedings,

may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under subsection (3) below.

(3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise admissible) give leave under subsection (2) above unless-

- (a) it appears that the child witness will not be available for cross-examination;
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court; or
- (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted;

and where the court gives such leave it may, if it is of the opinion that in the interests of justice any part of the recording ought not to be admitted, direct that that part shall be excluded.

(4) In considering whether any part of a recording ought to be excluded under subsection (3) above, the court shall consider whether any prejudice to the accused, or one of the accused, which might result from the admission of that part is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(5) Where a video recording is admitted under this section-

- (a) the child witness shall be called by the party who tendered it in evidence;
- (b) that witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.

(6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony; and accordingly-

- (a) any such statement shall be admissible evidence of any fact of which such testimony from him would be admissible;
- (b) no such statement shall be capable of corroborating any other evidence given by him;

and in estimating the weight, if any, to be attached to such a statement, regard shall be had to all the circumstances from which any inference can reasonably be drawn (as to its accuracy or otherwise).

(7) In this section "child" means a person who-

- (a) in the case of an offence falling within section 32(2)(a) or (b) above, is under fourteen years of age or, if he was under that age when the video recording was made, is under fifteen years of age; or
- (b) in the case of an offence falling within section 32(2)(c) above, is under seventeen years of age or, if he was under that age when the video recording was made, is under eighteen years of age.

(8) Any reference in subsection (7) above to an offence falling within paragraph (a), (b) or (c) of section 32(2) above includes a reference to an offence which consists of

attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within that paragraph.

(9) In this section-

“statement” includes any representation of fact, whether made in words or otherwise;

“video recording” means any recording, on any medium, from which a moving image may by any means be produced and includes the accompanying sound-track.

(10) ...

(11) Without prejudice to the generality of any enactment conferring power to make rules of court, such rules may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this section.

(12) Nothing in this section shall prejudice the admissibility of any video recording which would be admissible apart from this section.]

SCHEDULE 2

DOCUMENTARY EVIDENCE - SUPPLEMENTARY

1. Where a statement is admitted as evidence in criminal proceedings by virtue of Part II of this Act-

- (a) any evidence which, if the person making the statement had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;
- (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and
- (c) evidence tending to prove that that person, whether before or after making the statement, made (whether orally or not) some other statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself.

2. A statement which is given in evidence by virtue of Part II of this Act shall not be capable of corroborating evidence given by the person making it.

3. In estimating the weight, if any, to be attached to such a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

4. Without prejudice to the generality of any enactment conferring power to make them-

- (a) Crown Court Rules;
- (b) Criminal Appeal Rules; and
- (c) rules under section 144 of the Magistrates' Courts Act 1980,

may make such provision as appears to the authority making any of them to be necessary or expedient for the purposes of Part II of this Act.

5. Expressions used in Part II of this Act and in Part I of the Civil Evidence Act 1968 are to be construed in Part II of this Act in accordance with section 10 of that Act.

6. In Part II of this Act "confession" has the meaning assigned to it by section 82 of the Police and Criminal Evidence Act 1984.

CRIMINAL JUSTICE (INTERNATIONAL CO-OPERATION) ACT 1990, s 3

3 Mutual provision of evidence

- (1) Where on an application made in accordance with subsection (2) below it appears to a justice of the peace or a judge or, in Scotland, to a sheriff or a judge-
- (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
 - (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,

he may issue a letter ("a letter of request") requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.

- (2) An application under subsection (1) above may be made by a prosecuting authority or, if proceedings have been instituted, by the person charged in those proceedings.
- (3) A prosecuting authority which is for the time being designated for the purposes of this section by an order made by the Secretary of State by statutory instrument may itself issue a letter of request if-
- (a) it is satisfied as to the matters mentioned in subsection (1)(a) above; and

- (b) the offence in question is being investigated or the authority has instituted proceedings in respect of it.
- (4) Subject to subsection (5) below, a letter of request shall be sent to the Secretary of State for transmission either-
 - (a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or
 - (b) to any authority recognised by the government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies.
- (5) In cases of urgency a letter of request may be sent direct to such a court or tribunal as is mentioned in subsection (4)(a) above.
- (6) In this section "evidence" includes documents and other articles.
- (7) Evidence obtained by virtue of a letter of request shall not without the consent of such an authority as is mentioned in subsection (4)(b) above be used for any purpose other than that specified in the letter; and when any document or other article obtained pursuant to a letter of request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned.
- (8) In exercising the discretion conferred by section 25 of the Criminal Justice Act 1988 (exclusion of evidence otherwise admissible) in relation to a statement contained in evidence taken pursuant to a letter of request the court shall have regard-
 - (a) to whether it was possible to challenge the statement by questioning the person who made it; and
 - (b) if proceedings have been instituted, to whether the local law allowed the parties to the proceedings to be legally represented when the evidence was being taken.
- (9) In Scotland evidence obtained by virtue of a letter of request shall, without being sworn to by witnesses, be received in evidence in so far as that can be done without unfairness to either party.
- (10) In the application of this section to Northern Ireland for the reference in subsection (1) to a justice of the peace there shall be substituted a reference to a resident magistrate and for the reference in subsection (8) to section 25 of the Criminal Justice Act 1988 there shall be substituted a reference to Article 5 of the Criminal Justice (Evidence, Etc) (Northern Ireland) Order 1988.

APPENDIX B

THE HEARSAY RULE IN OVERSEAS JURISDICTIONS

A. Common law jurisdictions

Australia

- 1.1 The law of evidence in the Australian jurisdictions is governed by common law principles supplemented by statute.¹

State courts

- 1.2 Each State or Territory has a principal Evidence Act which is applied in the State or Territory courts. These principal Acts are supplemented by numerous other statutes. The evidence statutes differ from state to state, but as a rule the differences are a matter of terminology and not substance.

Federal courts or courts exercising federal jurisdiction

- 1.3 On 18 April 1995 the Evidence Act 1995 (Commonwealth) came into effect. This applies in federal courts and in State courts when exercising federal jurisdiction. The Act provides for both civil and criminal proceedings, but there are differences in the rules which apply in each type of proceedings.

The Evidence Act 1995

- 1.4 The following is a brief summary of the most relevant provisions of the Act.
- 1.5 The rule is expressed as follows:²
Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
Thus only express assertions are excluded by the rule.
- 1.6 Specific exceptions to the rule are: business records;³ tags and labels;⁴ telecommunications;⁵ marriage, family history or family relationships;⁶ public or

¹ The common law is substantially uniform between the states. The decisions of the High Court are a unifying influence. There is scope for divergence if there is no High Court decision on an issue.

² Section 59(1).

³ Section 69.

⁴ Section 70.

⁵ Section 71.

⁶ Section 73.

general rights;⁷ use of evidence in interlocutory proceedings;⁸ admissions;⁹ representations about employment or authority;¹⁰ evidence of judgment and convictions;¹¹ character of and expert opinion about accused persons.¹² None of these exceptions applies if the maker of the representation was not competent at the time of making the representation.¹³

- 1.7 A specific exception is made for contemporaneous statements about a person's mental or physical feelings, whether or not that person was competent.¹⁴
- 1.8 In addition, evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made¹⁵ is admissible where the maker is not available and the representation was:¹⁶
- (a) made under a duty to make that representation or representations of that kind; or
 - (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication;¹⁷ or
 - (c) made in circumstances that make it highly probable that the representation is reliable;¹⁸ or
 - (d) against the interests¹⁹ of the person who made it at the time it was made.

⁷ Section 74.

⁸ Section 75.

⁹ Section 81.

¹⁰ Section 87(2).

¹¹ Section 92(3).

¹² Sections 110 and 111.

¹³ Section 61(1). Competence is presumed, unless the contrary is proved: s 61(3).

¹⁴ Section 72. This section includes representations about a person's health, feelings, sensations, intention, knowledge or state of mind.

¹⁵ Evidence of a representation made in a document may only be given if the making of the representation was perceived by the person who then gives evidence.

¹⁶ Section 65(1) and (2).

¹⁷ This is similar, but not identical, to the common law *res gestae* exception.

¹⁸ The focus is on the circumstances in which the representation was made, not whether the statement is in fact reliable.

¹⁹ Section 65(7) defines this as including a representation which tends to damage the person's reputation, or to show that he or she has committed an offence for which he or she has not been convicted, or to show that he or she is liable in an action for damages.

In any of these circumstances the hearsay is only admissible if reasonable notice is given of the intention to adduce it.²⁰

- 1.9 First-hand hearsay evidence may be adduced of a previous representation made in the course of giving evidence in legal proceedings, whether in Australia or abroad, if the defendant in the instant proceedings had a reasonable opportunity to cross-examine the person who made the representation about it.²¹
- 1.10 The defence may also rely on section 65(8) which allows first-hand oral evidence of a previous representation or a document containing a previous representation to be adduced by a defendant if the original witness is unavailable and reasonable notice has been given of the intention to adduce the hearsay evidence.²²
- 1.11 If a person has been or is to be called as a witness, he or she may give evidence of a previous representation he or she made, as may someone else who perceived it being made, if the fact asserted in the representation was fresh in the witness's mind at the time it was made.²³ If the previous representation is contained in a document, it must not be tendered until the end of the examination in chief of the witness without leave of the court.²⁴
- 1.12 Section 66(2) allows a witness to give evidence that he or she identified someone, or the terms in which a complaint was originally made. It also allows an observer to give evidence of an identification made before the hearing.
- 1.13 The hearsay rule does not apply to evidence of a previous representation admitted because it is relevant for a non-hearsay purpose.²⁵ For example, if a statement is admitted merely to show the words that were used, or as the basis of an expert opinion, the fact-finders are not thereby prevented from considering the contents of the statement as evidence. This provision covers previous statements of a witness who gives oral evidence, whether consistent or inconsistent with the oral evidence.
- 1.14 Evidence falling within any of the above categories is automatically admissible unless it is excluded by the court in the exercise of its discretion under sections 135 or 137. Section 135 provides that evidence may be excluded "if its probative value is

²⁰ Section 67(1).

²¹ Section 65(2)-(6).

²² Section 65(8) and s 67(1).

²³ Section 66(1) and (2).

²⁴ Section 66(4).

²⁵ Section 60.

substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time.” Section 137 gives additional protection to the accused by providing that the court *must* refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Canada

- 2.1 The hearsay rule in Canada is mainly governed by the common law and, until recently, the exclusionary rule, and its strictly-defined categories of exceptions, remained largely intact.²⁶ This is in spite of the thorough review of the rule which has been undertaken and the extensive reform proposals which have been made, for instance by the Canada and Ontario Law Reform Commissions,²⁷ and also by the Federal/Provincial Task Force on Uniform Rules of Evidence.²⁸ Both bodies proposed the retention of the rule, and clarification and revision of the exceptions. These proposals have not been put into effect and, in practice, reforms to the rule have emanated from the judiciary.²⁹

The rule and the exceptions

- 2.2 The rule against hearsay in Canada can be stated as follows:³⁰

Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

²⁶ Subject to the introduction of one new exception: see *Ares v Venner* [1970] SCR 608.

²⁷ Law Reform Commission of Canada, *Report on Evidence* (1975), pp 68-70; Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), chapters 1 and 2 (although most of the recommendations of the Ontario Law Reform Commission relate to hearsay evidence in *civil* proceedings).

²⁸ The Federal/Provincial Task Force on Uniform Rules of Evidence was established in August 1977, with six jurisdictions (Canada, Ontario, Québec, Nova Scotia, British Columbia and Alberta) participating on a part-time basis. Its terms of reference were to attempt to bring about uniformity among the provincial and federal rules of evidence by stating the present law; studying the major reports on evidence produced in Canada, the USA, England and the other Commonwealth countries; setting out alternative solutions to the various problems in the law of evidence; and recommending the preferred solutions among those alternatives. The Task Force reported its findings in 1982 (see *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982)) and at the same time produced a draft Uniform Evidence Act which contains provisions modifying the hearsay rule and its exceptions to some extent. The Bill was introduced into Parliament as a Senate Bill, but in the face of opposition from the Bar to a comprehensive revision of the rules of evidence it was never enacted and there has been virtually no expression of interest in reviving it. There has been no further attempt at legislative reform at either the federal or provincial level.

²⁹ See paras 2.4-2.12 below.

³⁰ Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992) p 156.

- 2.3 The exceptions to the hearsay rule differ in their detail from the exceptions available under English law. The most significant development has been an extension of the discretion of the court to admit evidence even where it does not fall within an existing exception.

A discretion to admit hearsay

- 2.4 In contrast to the position taken by the House of Lords in *Myers v DPP*³¹ and reaffirmed in *Blastland*³²—that only legislative reform could create a new exception to the rule—the Supreme Court of Canada has shown itself willing to create new common law exceptions.³³
- 2.5 The most important development regarding hearsay in Canada has been the introduction of a discretion to admit otherwise inadmissible hearsay evidence where it satisfies the conditions of necessity and reliability.³⁴
- 2.6 In *Smith*, where the defendant was charged with murder of a Ms King, the Supreme Court was concerned with the admissibility of three telephone calls made by the deceased to her mother shortly before her death. Lamer CJC stated that although evidence of the calls would be excluded by the hearsay rule if it were adduced as proof of the facts stated, such evidence *would* be admissible, under the exception for statements of intention, to prove the state of mind of the declarant. Thus, evidence of the first two calls would be admissible to prove that the deceased woman wanted to return home, but not to prove the factual assertion that the accused had abandoned her at the hotel at which they were staying. Evidence of the third call would not be admissible for any purpose. If the evidence were adduced to prove the deceased's intention to obtain a lift from the defendant, this would imply that he had in fact returned to the hotel.

³¹ *Myers v DPP* [1965] AC 1001; see also Part I, para 1.9 above.

³² *Blastland* [1986] 1 AC 41, 52.

³³ *Ares v Venner* (1970) 14 DLR (3d) 4; *Khan* (1990) 59 CCC (3d) 92.

³⁴ *Smith* (1992) 75 CCC (3d) 257. The evidence suggested that the defendant and Ms King had driven from Detroit to Canada together and spent the weekend at a hotel. The prosecution case was that Ms King had refused to smuggle cocaine back to America and that Smith had consequently abandoned her at the hotel, but he returned later to collect her and took her to a service station, where he strangled her. The Crown relied on the evidence of four telephone calls made by Ms King in Canada to her mother in Detroit. Three of these calls were the subject of the appeal to the Supreme Court of Canada. In the first call, Ms King said that Smith had abandoned her at the hotel and that she wanted a ride home. In the second call, she said that Smith had still not returned. Her mother testified that she had called a taxi company in Canada to arrange a ride home for Ms King. A taxi did arrive at the hotel to collect Ms King but refused to take her as her credit card had been confiscated by the hotel. In the third call, Ms King told her mother that she would no longer need a lift, since Smith had come back for her.

- 2.7 Having given this traditional interpretation of the law, Lamer CJC went on to say that the fact that part of the Crown's evidence could not be brought within an established exception to the hearsay rule was not fatal to the Crown's case. Lamer CJC repeated the view taken by the Supreme Court of Canada in *Khan*³⁵ that:
the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid.³⁶
- 2.8 The Supreme Court's view was that juries are capable of deciding what weight should be attached to such statements and of drawing reasonable inferences from them. The Court held that, rather than be confined by the fixed exceptions, a trial judge should have a discretion to admit hearsay evidence where:³⁷
the circumstances under which the statements were made satisfy the criteria of necessity and reliability..., and [this would be] subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused.
Lamer CJC stated that the criterion of necessity would be satisfied where, for example, the declarant was dead, insane, out of the jurisdiction, or otherwise unavailable to testify. The criterion of reliability would be satisfied where the circumstances in which the statement was made ensured that it was unlikely that the declarant was lying or mistaken.
- 2.9 Applying these principles to the facts of the case, Lamer CJC said that the first two telephone calls satisfied the criterion of necessity, since Ms King was dead, and also satisfied the criterion of reliability since there was no reason why she should lie to her mother regarding what she said in these two calls.
- 2.10 With respect to the third call, however, although it satisfied the criterion of necessity, it was insufficiently reliable, since the evidence suggested that Ms King may have been untruthful or mistaken.³⁸

³⁵ *Khan* (1990) 59 CCC (3d) 92.

³⁶ *Smith* (1992) 75 CCC (3d) 257, 267.

³⁷ *Ibid*, at p 274.

³⁸ Firstly, she had been seen to walk to the telephone booth from which the call was made immediately after the taxi had refused to take her. Thus, it was unlikely that she would have had time to see Smith return, and she may have simply seen a car similar to his. Even if she did see him return, it would have been strange for her to make the third call without first determining that Smith was willing to give her a lift. Lamer CJC also said that it was significant that, in the earlier calls, Ms King's mother had suggested that a particular person whom Ms King intensely disliked should give her a ride to Detroit. It was thought that Ms King may have lied about having a lift with Smith in order to avoid having to go with this person. Lamer CJC also pointed out that the facts that Ms King had been travelling under an assumed name and using a stolen or forged credit card showed that she was capable of deceit and implied that she may have lied to her mother in order to conceal some of her activities.

- 2.11 The two criteria of necessity and reliability had earlier been expressed as the correct conditions for admissibility by the Supreme Court in *Khan*,³⁹ where the Court admitted hearsay evidence of a statement made by a child about sexual abuse. McLachlin J was critical of the inflexible approach taken to the hearsay rule in the past.⁴⁰

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

- 2.12 In *Smith*, the Court stressed that *Khan* should not be understood as turning on its particular facts,⁴¹ but rather that it:⁴²

signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

An exclusionary discretion

- 2.13 There is a common law discretion to exclude hearsay evidence which is otherwise admissible.⁴³

The Canadian Charter of Rights and Freedoms

- 2.14 The Canadian Charter of Rights and Freedoms⁴⁴ provides at section 7 that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

³⁹ *Khan* [1990] 2 SCR 531.

⁴⁰ *Ibid*, at p 540.

⁴¹ The same view was also taken by the Ontario Court of Appeal in *Müller* (1991) 68 CCC (3d) 517, 533-534. Cf *Kharsekin* (1992) 74 CCC (3d) 163, 170g (Newfoundland Supreme Court).

⁴² *Smith* [1992] 75 CCC (3d) 257, 270.

⁴³ *Potvin* [1989] 1 SCR 525.

⁴⁴ Constitution Act 1982, Schedule B.

The Ontario Court of Appeal has held that the hearsay rule does not contravene this provision since an accused person is not precluded from making full answer and defence simply because he or she is prevented from adducing hearsay evidence.⁴⁵

New Zealand

3.1 In *Jorgensen v News Media (Auckland) Ltd*⁴⁶ the Court of Appeal preferred the dicta of the dissenting law lords in *Myers*⁴⁷ and was therefore prepared to create a new exception to the hearsay rule.

3.2 The New Zealand courts have shown a willingness to eschew strict rules and to refer to the underlying principles in attempting to achieve just results.⁴⁸ The rationale for this approach was explained by Cooke P in *Baker*:⁴⁹

it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards.

Implied assertions

3.3 Although the New Zealand courts give careful consideration to English authorities, they are free to diverge from them and do so in the context of the hearsay rule and implied assertions.

3.4 For example, there are a number of authorities which relate to the content of telephone calls adduced to prove that premises are being used as a bookmaker's.⁵⁰ Evidence of these calls was held not to contravene the hearsay rule by courts in Australia and New Zealand, but the House of Lords declined to follow these authorities in *Kearley*.⁵¹ In the New Zealand edition of *Cross*,⁵² the dicta of Parke B

⁴⁵ *Williams* (1985) 50 OR (2d) 321. Conversely, at least one of the exceptions to the rule has been held not to be in contravention of the Charter: *Potvin* [1989] 1 SCR 525. In that case, the Supreme Court of Canada held that the Charter is not infringed where the Crown is permitted to introduce hearsay evidence (which the accused has not been able to confront or test by cross-examination at trial) pursuant to an exception to the hearsay rule so long as the accused had an earlier opportunity to cross-examine the declarant at the preliminary hearing.

⁴⁶ *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961

⁴⁷ *Myers v DPP* [1965] AC 1001: Lords Pearce and Donovan.

⁴⁸ Eg, *Ria* [1994] 2 NZLR 212.

⁴⁹ *Baker* [1989] 1 NZLR 738, 741.

⁵⁰ See *Davidson v Quirke* (1923) 42 NZLR 552, *McGregor v Stokes* [1952] VLR 347 and *Police v Machirus* [1977] 1 NZLR 288.

⁵¹ *Kearley* [1992] 2 AC 228. The Court of Appeal in *Davidson v Quirke* (1923) 42 NZLR 552, 556 held that "notwithstanding the rule against hearsay, where the purpose or meaning of an act done is relevant, evidence of contemporaneous declarations

in *Wright v Doe d Tatham*⁵³ to the effect that the hearsay rule extends to non-assertive conduct, are criticised, and the author writes:

It is submitted that it is better to accept the dictates of common sense, and to restrict the definition of implied hearsay to that implied by conduct itself intended to be assertive.

It seems likely that the hearsay rule would not be extended to non-assertive conduct and *Kearley* would not be followed if the point arose before the New Zealand Court of Appeal.

- 3.5 The New Zealand Law Commission has recommended that the hearsay rule be restricted to express assertions.⁵⁴

The Evidence Amendment Act (No 2) 1980

- 3.6 The Evidence Amendment Act of 1945 provided in a limited way for the admission of hearsay in civil and criminal proceedings. The Evidence Amendment Act 1966 followed, abrogating the House of Lords decision in *Myers v DPP*.⁵⁵ In July 1967 the Torts and General Law Reform Committee issued a report accompanied by a draft Bill which, after much redrafting, eventually became the Evidence Amendment Act (No 2) 1980.

- 3.7 If as a result of the provisions of another statute or of the common law, evidence is admissible, then it remains so; the 1980 Act does not alter the position. Conversely, if evidence is prohibited by another statute, then it remains prohibited, irrespective of the 1980 Act.⁵⁶

- 3.8 Certain (but not all) common law exceptions to the hearsay rule were revised and brought under statutory control. The overall effect of the statute is that oral or written statements are admissible in broadly the same circumstances as apply in sections 23 and 24 of the 1988 Act,⁵⁷ except that there is no additional discretion

accompanying and explaining the act is admissible in proof of such purpose or meaning". The words spoken in the course of the calls were held admissible to explain the purpose of the calls. As Lord Bridge of Harwich held in *Kearley* at p 246, this reasoning is circular, as the act of dialling is not itself relevant evidence; only the words make the calls relevant.

⁵² DL Mathieson, *Cross on Evidence* (4th New Zealand edition, 1989) p 468.

⁵³ *Wright v Doe d Tatham* (1837) 7 Ad & El 313 HL; 112 ER 488. See para 2.23 in Part II above.

⁵⁴ NZLC Preliminary Paper No 15 (1991), para 16.

⁵⁵ *Myers v DPP* [1965] AC 1001.

⁵⁶ Evidence Amendment Act (No 2) 1980, s 20.

⁵⁷ See paras 4.8, 4.28 and 4.33 in Part IV above.

or leave, comparable to those contained in sections 25 or 26,⁵⁸ which must be exercised or given.⁵⁹ Further, if the document consists of the record of an oral statement section 3 of the 1980 Act provides that it is inadmissible if it was made when it was known, or reasonably ought to have been known, to the declarant that criminal proceedings were being contemplated,⁶⁰ and it “[i]s otherwise inadmissible in the proceeding.”⁶¹

- 3.9 There have been several difficulties with the interpretation of section 3, not least of which is the meaning of section 3(2).⁶² A natural reading of this subsection would lead to the exclusion of all witness statements written down by police officers based on what the witness told the officer. However, in *Hovell (No 1)*⁶³ the majority of the Court of Appeal took a purposive approach and held that the subsection did not apply to such a statement unless that statement recorded the words of a third party, and that the third party knew that criminal proceedings were contemplated.⁶⁴
- 3.10 Section 15 provides for parties to proceedings to consent to the admission of hearsay evidence, subject to the proviso that an accused person cannot “admit” something of which he or she does not have personal knowledge.⁶⁵ This does not prevent the accused appealing against conviction on the basis that inadmissible evidence was adduced. Section 16 expressly permits a court to draw inferences from the circumstances in which a statement was made and to rely on those inferences when deciding on the admissibility of the statement.
- 3.11 Section 18 gives the court an overriding discretion to exclude evidence if its prejudicial effect would outweigh its probative value or if “for any other reason the Court is satisfied that it is not necessary or expedient in the interests of justice to

⁵⁸ See paras 4.44-4.47 in Part IV above.

⁵⁹ Evidence can always be excluded under the 1980 Act by exercise of the judicial discretion pursuant to s 18. An example of the exercise of this discretion, considered by the Court of Appeal, is to be found in *Hovell (No 2)* [1987] 1 NZLR 610.

⁶⁰ Evidence Amendment Act (No 2) 1980, s 3(2)(a).

⁶¹ *Ibid*, s 3(2)(b).

⁶² *Ibid*, s 3(2):

Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that-

- (a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been known by him to be contemplated; and
- (b) Is otherwise inadmissible in the proceeding.

⁶³ *Hovell (No 1)* [1986] 1 NZLR 500.

⁶⁴ It is likely that the section was not intended to be limited in this way; see NZLC Preliminary Paper No 10, Hearsay Evidence (options paper), para 19.

⁶⁵ *Police v Coward* [1976] 2 NZLR 86.

admit the statement". It appears from the authorities that the discretion is exercised with reference to the weight and cogency of the evidence, traditionally questions for the tribunal of fact.⁶⁶

- 3.12 Section 19 expressly allows the Court of Appeal to substitute its own discretion for that of the trial judge. Contentious issues of admissibility are expected to be dealt with by means of pre-trial applications, the point being settled, if necessary, before the trial.⁶⁷

Other statutory exceptions

- 3.13 A number of diverse provisions have made inroads on the hearsay rule in specific circumstances.⁶⁸ As part of the rules of criminal procedure, section 184 of the Summary Proceedings Act 1957 allows for depositions taken at a preliminary hearing to be read at the trial in certain circumstances, analogous to the circumstances provided for in the now repealed section 13 of the Criminal Justice Act 1925 (England and Wales).⁶⁹

The Bill of Rights Act 1990

- 3.14 Where a written statement is admitted and the witness does not give oral evidence, the defendant may seek to assert a right given to him or her by section 25 of the Bill of Rights Act 1990 which sets out the right to confront one's accusers and the right to present a defence.

⁶⁶ See, eg, *R v L* [1994] 2 NZLR 54, in which the accused was charged with the rape of his estranged wife and aggravated burglary. There was a history of assaults by him on her within the marriage. She had obtained an injunction against him and he had already been arrested once by the police in breach of that injunction. The defence was that she had consented to intercourse and thus he had not entered with intent to commit a crime and had not raped her. The victim had committed suicide after the depositions had been taken at the preliminary hearing. The precise words of her suicide note are not given; it appears she reproached the defendant but said she could not live knowing that her evidence had put him in prison. The defence objected to the admission of her deposition at the trial as she was not available for cross-examination, particularly on the issue of consent. The Court of Appeal approved the admission of her statement because: it was made on oath; it contained a clear and unequivocal narrative and addressed the relevant issue; there were no apparent weaknesses in it; there were no obvious inconsistencies between the deposition and the victim's original statement to the police; her evidence was supported by other evidence (including medical evidence); there was nothing in the other depositions to raise doubts about the accuracy of her evidence.

⁶⁷ Crimes Act 1961, s 344A.

⁶⁸ Eg, s 5 of the Banking Act 1982 allows banking records to be proved by the production of copies; s 16(3) of the Transport Act 1962 allows the truth of the contents of the register of motor vehicles to be proved by the production of a signed, stamped certificate; s 42 of the Evidence Act 1908 allows the court to take judicial notice of facts not proved in the court room (eg, *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641).

⁶⁹ See Part IV para 4.21 above.

- 3.15 It was held by the Court of Appeal in *R v L*⁷⁰ that section 25 did not elevate cross-examination into an absolute right to confront and question the witness at the trial itself. The opportunity had existed at the preliminary hearing but the defence had not taken the opportunity at that stage as it was not anticipated that the witness would not be available at the trial.

United States of America

- 4.1 The law of evidence was traditionally established by judicial decisions although most states adopted statutes which dealt with specific issues. The content of the law varied between the states. An element of uniformity has been introduced by the promotion of comprehensive evidence codes.⁷¹ For the sake of brevity, we give here an outline of the position under the Federal Rules.
- 4.2 The Federal Rules of Evidence, which were adopted in 1975, apply in federal courts in both criminal and civil cases. A substantial number of states have adopted a code of evidence which follows the pattern established in the Federal Rules.⁷² In addition, the Federal Rules have been quoted with approval or adopted outright on a case-by-case basis in a number of states where the Rules themselves have not been formally adopted.

The definition

- 4.3 Rule 801(c) defines hearsay in the following terms:
‘Hearsay’ is a statement,⁷³ other than one made by the declarant⁷⁴ while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

⁷⁰ *R v L* [1994] 2 NZLR 54. The right of confrontation was the basis of the second limb of the appeal. The facts are set out at n 66 above.

⁷¹ Some states have adopted their own independent codes, for example, the Californian Evidence Code.

⁷² The states with codes based on the Federal Rules include: Alaska, Arkansas, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Wisconsin, Washington, Wyoming. It is understood that the New York State Law Revision Committee has recently reviewed the Federal Rules of Evidence for adoption in that state.

⁷³ “A ‘statement’ is
(1) an oral or written assertion or
(2) nonverbal conduct intended by the person as an assertion”: Rule 801(a).

⁷⁴ “A ‘declarant’ is a person who makes a statement”: Rule 801(b).

It is clear from the Advisory Committee's⁷⁵ notes, which accompany the Rules,⁷⁶ that it was intended that the Rules should not apply to statements or actions which were not intended to be assertions of the proposition in issue.

- 4.4 A statement which falls within Rule 801(c) is inadmissible⁷⁷ unless it is defined as non-hearsay by Rule 801(d), or it falls within an exception defined by Rules 803 and 804, or within an exception created by the Supreme Court, or within an exception created by Act of Congress.⁷⁸

Prior statements

- 4.5 Rule 801(d)(1) provides that certain prior statements shall not be within the definition of hearsay.⁷⁹
- 4.6 Rule 801(d)(1)(A) provides for the introduction of certain prior inconsistent statements as substantive evidence. This Rule furnishes the opportunity, through cross-examination and re-examination, for the reason for the inconsistency evidence to be explored, thus enabling the court to get closer to the truth.
- 4.7 Rule 801(d)(1)(B) provides for the substantive admission of prior consistent statements "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence and motive". The Rules are predicated on the view that on these occasions the witness will be cross-examined and, therefore, there is no reason to deny substantive effect to a statement which is otherwise admissible. One area of concern that has emerged since the adoption of the Rules is whether prior consistent statements which fall outside the terms of this Rule are

⁷⁵ The Advisory Committee formulated the Rules. It consisted of practitioners, judges and academics appointed by the Supreme Court. It took eight years and two drafts before a version was accepted by the Supreme Court and transmitted to Congress for their consideration.

⁷⁶ Notes of the Advisory Committee found in United States Code (1988), Title 28, p 772.

⁷⁷ "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress": Rule 802.

⁷⁸ Acts of Congress tend to be narrow in focus. Eg, copies of schedules filed with the Interstate Commerce Commission have been made admissible by legislation.

⁷⁹ "A statement is not hearsay if—

(1) Prior statement by witness.— The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at the trial, hearing, or other proceeding, or in a deposition, or
(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence and motive, or

(C) one of identification of a person made after perceiving the person,..": Rule 801(d).

still admissible for credit purposes.⁸⁰

- 4.8 A prior identification is classified as non-hearsay by virtue of Rule 801(d)(1)(C).

Admissions

- 4.9 Rule 801(d)(2) excludes admissions by or attributable to a party opponent from the definition of hearsay.⁸¹

Exceptions

- 4.10 The Federal Rules have organised the exceptions into two groups. In the first group,⁸² the exceptions are not defeated by the availability of the declarant. In the second group,⁸³ the exception will not apply unless the declarant is unavailable within the terms of the Rule. The exceptions classified under Rule 803 are admitted irrespective of availability on the understanding that the evidence they admit is believed to be as reliable as testimony in court and, therefore, production of the witness would waste time and incur unnecessary expense. The theory behind Rule 804 is that whilst live testimony would be preferable because hearsay evidence cannot be considered equal to testimony, if it is not possible because the declarant is unavailable an out-of-court statement will be accepted. Despite this clear theoretical distinction Judge Weinstein has argued that there is an element of arbitrariness as to where an exception comes within the scheme.⁸⁴
- 4.11 Rule 803 provides for exceptions to cover part of what an English lawyer would recognise as *res gestae*,⁸⁵ bodily sensations or states of mind (including intention),⁸⁶

⁸⁰ In some cases it has been held that statements are either admissible under Rule 801 or are inadmissible. In others it has been held that the traditional rules apply to statements outside the Rule.

⁸¹ Rule 801(d) provides that a statement is not hearsay if:
(2) The statement is offered against a party and is
(A) the party's own statement in either an individual or representative capacity, or
(B) a statement of which the party has manifested an adoption or belief in its truth, or
(C) a statement by a person authorised by the party to make a statement concerning the subject, or
(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

⁸² Rule 803.

⁸³ Rule 804.

⁸⁴ *Weinstein's Evidence* (1979) p 804-32. The classification of the exceptions is not always consistent. This reflects the piecemeal development of the common law.

⁸⁵ Rules 803(1) and (2).

statements related to medical diagnosis or treatment,⁸⁷ where the witness has an insufficient recollection of the contents of a document,⁸⁸ documents kept in the course of a regularly conducted business activity,⁸⁹ public records,⁹⁰ family history,⁹¹ documents affecting an interest in property,⁹² ancient documents,⁹³ market information,⁹⁴ learned treatises,⁹⁵ certain kinds of reputation evidence,⁹⁶ and previous court judgments.⁹⁷

4.12 Rule 804 defines five occasions when the testimony of a witness will be considered unavailable.⁹⁸ Each of the paragraphs is independently sufficient to meet the condition of unavailability. A witness will be classified as “unavailable” if he or she is protected by privilege from testifying,⁹⁹ refuses to testify,¹⁰⁰ suffers a lapse of memory,¹⁰¹ is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity,¹⁰² or a party has attempted, but failed, to call him or her.¹⁰³ If the declarant is unavailable, testimony given at an

⁸⁶ Rule 803(3).

⁸⁷ Rule 803(4).

⁸⁸ Rule 803(5).

⁸⁹ Rule 803(6). As a corollary to Rule 803(6), Rule 803(7) explicitly covers the situation where a record reveals that something did not occur or does not exist.

⁹⁰ Rule 803(8).

⁹¹ Rule 803(13).

⁹² Rules 803(14) and (15).

⁹³ Rule 803(16).

⁹⁴ Rule 803(17).

⁹⁵ Rule 803(18).

⁹⁶ Rules 803(19) to (21).

⁹⁷ Rule 803(22).

⁹⁸ It is the testimony of the witness which must be unavailable. There may be occasions where the witness is physically present in court, but his or her testimony remains unavailable.

⁹⁹ Rule 804(a)(1).

¹⁰⁰ Rule 804(a)(2).

¹⁰¹ Rule 804(a)(3).

¹⁰² Rule 804(a)(4).

¹⁰³ Rule 804(a)(5).

earlier hearing of the same or different proceedings,¹⁰⁴ dying declarations,¹⁰⁵ and statements against interest¹⁰⁶ will not be excluded by the hearsay rule.

- 4.13 None of these grounds of unavailability may be relied on by a party responsible for the unavailability.

Hearsay within hearsay

- 4.14 If one hearsay statement, which is admissible as an exception to the rule, contains a separate hearsay statement, which does not fall within the same exception but does fall within another exception, the evidence will be admissible under Rule 805.

A general inclusionary exception

- 4.15 To take account of cases where evidence is sufficiently trustworthy to be admissible but does not fall within the terms of established exceptions, Rules 803(24) and 804(b)(5) create general inclusionary provisions, unknown in common law, suspending the operation of the hearsay rule from:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness,¹⁰⁷ if the court determines that

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;¹⁰⁸ and
- (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

¹⁰⁴ Provided that the party against whom the testimony is now offered had an opportunity to cross-examine the declarant. Rule 804(b)(1).

¹⁰⁵ Rule 804(b)(2). If he or she has survived despite the settled and hopeless expectation, and is unavailable for some other reason within Rule 804, his or her evidence will be not be excluded by the hearsay rule.

¹⁰⁶ Rule 804(b)(3). It was feared that this exception would enable an accused to adduce a fabricated confession by a third party, who was now unavailable, as a defence. To meet this fear, the rule requires the evidence to be corroborated: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement". Where the person making the admission is a party in the case against whom the admission is offered Rule 801(d)(2) applies to exclude such admissions from the definition of hearsay.

¹⁰⁷ Factors relevant to this decision include: certainty that the statement was made; assurance of the declarant's personal knowledge of the event; the circumstances in which the statement was made; and the incentive for the declarant to speak the truth.

¹⁰⁸ Whether a particular effort to secure alternative proof will be considered reasonable will depend upon the fact in issue. Factors which will influence this decision include: the importance of the evidence; the means available to the proponent; and the degree of controversy surrounding the evidence.

The application of the rule is made subject to a notice provision.

Impeaching the credibility of an absent witness

- 4.16 The credibility of the declarant may be attacked, or if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.¹⁰⁹

An exclusionary discretion

- 4.17 Evidence admitted as an exception to the hearsay rule is subject to Rule 403. This provides that a court is entitled to exclude any evidence if its probative value is substantially outweighed by the danger of unfair prejudice, or of confusion of the issues, or of misleading the jury, or of considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The Sixth Amendment: the confrontation clause

- 4.18 The Sixth Amendment to the US Constitution¹¹⁰ provides that:
In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.¹¹¹
- 4.19 The admission of a hearsay statement may violate this clause. McCormick defines the present approach in the following terms.¹¹² If the hearsay evidence falls within a traditional exception to the rule, its admission will not contravene the confrontation clause. If the exception is not founded on the unavailability of the witness, it is unlikely that the witness will have to be proved to be unavailable to satisfy the Sixth Amendment.¹¹³ If the exception does require the declarant to be unavailable, then the fact of the unavailability will have to be proved before the court will dispense with confrontation. Where admission is sought under the terms

¹⁰⁹ Rule 806.

¹¹⁰ Most state constitutions have similar provisions.

¹¹¹ In *Ohio v Roberts* (1980) 448 US 56 a two-part test was laid down. The prosecutor had to produce the declarant or demonstrate that the declarant was unavailable. If this was satisfied, the statement had to have been made in circumstances with sufficient "indicia of reliability". The court in *United States v Inadi* (1986) 475 US 387 indicated that there was no need to produce the declarant or to prove his or her unavailability if unavailability was not a condition of the exception.

¹¹² *McCormick on Evidence* (4th ed 1992) p 441-3.

¹¹³ *White v Illinois* (1992) 112 S Ct 736. The decision of the court indicates that the Constitution does not require the declarant to be unavailable when spontaneous declarations are adduced.

of the residual exception in the Federal Rules,¹¹⁴ the court will test the evidence for particular guarantees of trustworthiness.¹¹⁵

4.20 The confrontation clause may also affect the way in which witnesses who do give oral evidence may give that evidence. In *Coy v Iowa*¹¹⁶ the Supreme Court held on the facts of the case that permitting a child witness to give evidence from behind a screen violated the defendant's constitutional right to confront his accuser, but recognised that there could be derogations from the right.¹¹⁷

4.21 Two years later, in *Maryland v Craig*¹¹⁸ and *Idaho v Wright*¹¹⁹ the Supreme Court held that protecting child witnesses in abuse cases is a sufficiently important state interest to justify overriding the constitutional right. A child witness may testify without confronting the accused if the prosecutor shows that the defendant's presence would traumatise the witness and the right of cross-examination is preserved.¹²⁰ Child witnesses may now testify via one-way videolink in most states in some circumstances.¹²¹

The Fifth Amendment: the due process clause

4.22 The Fifth Amendment to the US Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law". Whereas the Sixth Amendment may operate to exclude evidence made admissible by the exceptions to the rule against hearsay, the Fifth Amendment may require hearsay evidence to be admitted in the interests of a fair trial for the accused.

4.23 In *Chambers v Mississippi*¹²² the US Supreme Court ruled that the right to the due process of law in a criminal prosecution had been violated by the rigid application

¹¹⁴ Rules 803(24) and 804(b)(5).

¹¹⁵ This test is more exacting than the test imposed in the Federal Rules of "equivalent circumstantial guarantees of trustworthiness". In *Idaho v Wright* (1990) 497 US 805 the Supreme Court held that, in looking for these guarantees, only the circumstances surrounding the making of the statement should be looked at.

¹¹⁶ *Coy v Iowa* (1988) 487 US 1012.

¹¹⁷ *Ibid*, pp 1020-1022.

¹¹⁸ *Maryland v Craig* (1990) 497 US 836.

¹¹⁹ *Idaho v Wright* (1990) 497 US 805.

¹²⁰ *Maryland v Craig* (1990) 497 US 836, 855-857. It was a majority decision, Justices Scalia, Brennan, Marshall and Stevens dissenting.

¹²¹ For a list of the states where this is permitted and the relevant statutes, see n 120 of MF Sopher, "The Best of All Possible Worlds': Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case" (1994) 63 Fordham LR 633, 649.

¹²² *Chambers v Mississippi* (1973) 410 US 284.

of the rule against hearsay in the State of Mississippi. The defendant sought to call and cross-examine one MacDonald, who had repeatedly confessed to the crime but retracted his confessions. This was not permitted because the common law of Mississippi deemed that a party calling a witness vouched for the veracity of that witness, and was not permitted to attack the witness's testimony. The defendant was also not allowed to adduce the evidence of several witnesses to the alleged confessions, despite circumstantial indications of their reliability, because the exception permitting hearsay evidence of a statement against interest did not extend to a statement against penal interest.

4.24 The court held:¹²³

In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

B. Civil law jurisdictions: France and Germany

Introduction

- 5.1 English lawyers sometimes think there is no point in looking at criminal procedure and evidence on the Continent when considering reforms here. On the other side of the Channel, they say, there is something called "the inquisitorial system", which is so different from what we have here that no comparisons are useful. This is, in fact, misleading: our system and the systems on the Continent have converged to quite a large extent, and useful comparisons are possible.
- 5.2 It is true that the Civil Law systems started out with a very different concept of criminal procedure from the one which underlies a trial at common law. At common law the original idea was that of a contest between two sides, over which a neutral umpire presides, ruling at the end which side has won. In the Civil Law systems, on the other hand, the basic idea was that of an inquiry. Instead of being a neutral umpire, the judge's job was to get to the bottom of the matter. His method was to interrogate the witnesses and the defendant, to record their statements in writing, and on the basis of this written *dossier* to make up his mind whether the defendant was guilty or not. Continental criminal procedure, unlike criminal procedure in the common law, was also secret, and written. Until the late eighteenth century it was highly oppressive, too, because the judge's powers of investigation went as far as enabling him to examine the suspect under torture.
- 5.3 From the late eighteenth-century onwards, however, the Civil Law systems, led by France, have been borrowing ideas from the common law. After the Revolution the French at first abolished their old inquisitorial criminal procedure in favour of one closely modelled (so they thought) on the common law. When this soon proved

¹²³ *Ibid*, p 484.

disastrously inefficient, it was in turn replaced in 1808 with a new procedure which was a cross between the new system and the old. Under Napoleon's *Code d'instruction criminelle*, for serious cases a secret pre-trial investigative stage was reintroduced, which took place before an official with the status of a judge: the *juge d'instruction*. Now, however, the processes of investigating and judging were separated, because the decision on guilt or innocence was not made by the judge who had been in charge of the investigation, but by an independent court, which judged the defendant publicly. To guide the court, however, it had the *dossier* which the *juge d'instruction* had earlier compiled.

- 5.4 This, in essence, is still the shape of French criminal procedure today - although since 1808 there have been many important changes of detail, including various simplified procedures which enable simple cases to be tried without first passing through the hands of a *juge d'instruction*. French criminal procedure, as found in the *Code d'instruction criminelle* of 1808, was also the model upon which Dutch, German and Italian criminal procedures were later based.
- 5.5 Meanwhile, since the eighteenth century English criminal procedure has been moved to some extent in the direction of the Civil Law. English criminal procedure now possesses the following features which were originally absent, or if present not officially recognised: appeals (including, to some extent, appeals by the prosecution); a public prosecutor; a law which permits a suspect to be held pre-trial and compulsorily interrogated; detailed rules about how the prosecution evidence is to be gathered, together with other rules which require or enable the court to reject evidence which was obtained in breach of them; and rules requiring the prosecution to disclose its evidence to the defence ahead of trial, and to some extent vice versa. All these features were characteristic features of the Civil Law "inquisitorial" systems long before they were introduced here.
- 5.6 Despite this convergence, however, there are still a number of features of criminal procedure in the Continental countries which make it rather different from our own. One is the idea that the court is not a mere umpire, but has a duty to get to the truth: an idea which has a number of practical consequences, including the fact that it is not possible for defendants to plead guilty—in principle the court must always examine the evidence against them. Another is the idea of a closely-regulated pre-trial phase, the fruit of which is a written *dossier*, the contents of which—pre-trial statements of witnesses included—are admissible in evidence at the trial. A third is a reluctance to accept restrictive rules of evidence. Very broadly speaking, Continental courts are prepared to exclude evidence because of the way it was obtained, but they do not exclude evidence because of what it is. Thus hearsay evidence is usually admissible, and so is evidence of the defendant's previous misconduct.

- 5.7 Even these differences have been toned down by reforms in some of the Continental systems. Thus the Germans modified their French-based system many years ago by introducing a “directness principle”, which requires the court of trial to hear oral evidence from the witnesses where possible. This fulfils some of the same functions as the hearsay rule does here. More recently, they abolished their version of the *juge d’instruction*.¹²⁴ In 1988 the Italians went much further, and replaced their French-style code of criminal procedure with a new one allegedly on “anglo-saxon” lines, complete with guilty pleas, witnesses examined by the parties instead of by the judge, and a general requirement that witnesses testify orally at trial. But the common law rules of evidence were too much for them to swallow, and as in France and Germany, the Italian court is not prohibited from hearing evidence of the defendant’s previous misconduct, and it does not have the near-total ban on hearsay evidence which exists at common law.
- 5.8 Contrary to what seems to be widely believed by common lawyers, it is certainly not the case that in the Continental systems the burden of proof is reversed, and the defendant is presumed guilty until he proves his innocence.¹²⁵ Nor is it true, as English people are also inclined to believe, that the standard of proof is something significantly less stringent than proof beyond reasonable doubt.¹²⁶ It is undoubtedly the case that at French trials, at any rate, the acquittal rate is significantly lower than it is in England, but in France, as elsewhere on the Continent, this may well reflect the fact that there is a complicated pre-trial phase. This weeds out many weak cases which in England would result in an acquittal at the final trial.

France

- 5.9 The main rules of criminal procedure and evidence are contained in the *Code de procédure pénale* of 1958 (CPP). This contains three sets of procedural rules, applied by three levels of first-instance court, each competent to try a different category of crime. The lowest level is the *tribunal de police*, where a single professional judge tries the least serious offences, *contraventions*. The middle level is the *tribunal correctionnel*, where a panel of three professional judges tries *délits*—the middle range

¹²⁴ See para 5.17 below.

¹²⁵ In France, for example, the presumption of innocence is actually incorporated in the Constitution. The presumption is also written into the Convention, which in many European countries—but not in the United Kingdom—is incorporated into national law.

¹²⁶ In France the standard is “*intime conviction*”—the tribunal of fact must be personally convinced of the defendant’s guilt—a formula which most other Continental jurisdictions have copied. Furthermore, some of them go further than the common law, at least in formal terms, in trying to prevent the tribunal of fact from reaching a finding of guilt on some piece of insubstantial evidence. Dutch law, for example, prohibits the court from convicting on certain types of evidence unless they are corroborated, and a number of systems require the court of trial to give a reasoned verdict explaining what evidence it accepted, and how this led to a conclusion that the defendant was guilty.

of offences. The top level is the *Cour d'assises*, where a combined panel of nine laypeople and three professional judges tries the most serious offences, *crimes*.

5.10 In each of these courts the rules of evidence are broadly similar. Evidence may be *frappé de nullité*—that is, objected to, and excluded, because it was obtained in breach of the rules which govern the way in which such evidence is meant to be obtained. But in principle any piece of information which is relevant is admissible in evidence. Thus there are no exclusionary rules in the English sense, nor are there any rules about the weight of particular forms of evidence (corroboration requirements). French legal writers usually assert that French criminal procedure recognises a “principle of orality”.¹²⁷ On examination, however, this expression means different things in different courts, and in none of them does it produce the same effect as the rule against hearsay and rule against narrative in England.

5.11 In the *tribunal correctionnel* and the *tribunal de police* the main rule of evidence is set out in article 427 CPP:

Except where the law provides otherwise, offences can be proved by any kind of evidence, and the judge decides according to his personal conviction (*intime conviction*). The judge may not base his decision on anything except evidence which has been put before him in the course of the debates and discussed by both sides in front of him.

5.12 Although not expressly stated anywhere in the CPP, to French lawyers it is axiomatic that one piece of evidence which can be used in these courts are the *procès-verbaux*—the written records of the pre-trial questioning of the defendant and the witnesses which were conducted by the police, and by the *juge d'instruction* if the case was sufficiently serious to involve one. And the same goes for what might be called casual hearsay: oral evidence from a witness in the course of which he says “...and then X told me that such and such happened”. French legal tradition, however, would treat the *procès-verbal* of an interrogation of a witness as a piece of evidence much superior to the oral evidence of another person who incidentally repeats what that witness allegedly told him.

5.13 In the *tribunal correctionnel* and in the *tribunal de police*, the “principle of orality” seems to mean the following. First, that both prosecution and defence are free to have any witness summoned to come to court and be examined orally, and secondly, that the court may not decide the case on any evidence—whether oral evidence or a *procès-verbal*—which has not been put to the defendant at the trial, to give him the chance to dispute it. In these courts the principle certainly does not mean that the judge is forbidden to decide the case on the *procès-verbaux* of the earlier examinations of witnesses who do not give oral testimony at trial. If witnesses are summoned and fail to appear, the court can—and often does—go ahead on the

¹²⁷ Merle and Vitu, *Traité de droit criminel: procédure pénale* (4th ed 1989) para 612.

basis of the *procès-verbaux*. And quite often, neither side even bothers to summon them.¹²⁸

5.14 Before the *Cour d'assises* the "principle of orality" means something a little more like "orality" in the common law tradition. Witnesses are routinely summoned, and the expectation is that they will come and testify orally. As in other courts, however, the president of the court has before him the *dossier* containing the *procès-verbaux*, including those of any witnesses who are absent. In this case, however, several sections of the CPP were designed with the aim of making sure that the court decides the case on the oral testimony rather than on the *procès-verbaux*. In particular, there is article 347, which provides that when the combined panel of judges and jurors retire to consider their verdict, they may not take the *dossier* with them (although there is a power to send for it and inspect it in the presence of the parties). These rules may be overridden, however, by article 310(1), which provides:

The president is invested with a discretionary power by virtue of which he may, in honour and good conscience, take any measure which he considers useful to discover the truth.

5.15 The case-law makes it clear that this power enables him to read to the jury in open court the *procès-verbal* of any witness who is absent. This means, in effect, that the status of the earlier statements of absent witnesses is not so very different from what it is in the *tribunal correctionnel* and the *tribunal de police*, except that the combined panel of judges and jurors, unlike the judges in the lower courts, cannot have these documents to read and re-read when deliberating on their verdict.

Safeguards

5.16 If the French courts are free to admit hearsay evidence and act on it, that does not mean that French law completely fails to recognise the problem that hearsay evidence has a number of inherent weaknesses.

5.17 This is addressed, with respect to the written *procès-verbaux* of previous interrogations which the police and the *juge d'instruction* have carried out, by the provision of a number of procedural rules which regulate the conduct of these pre-trial interrogations. Whereas in England there have traditionally been no official rules about how the police are to interrogate witnesses, the pre-trial interrogation which the *juge d'instruction* conducts is controlled by articles 101-113 of the CPP. Furthermore, if the witness is an adult, he or she must depose before the *juge d'instruction* on oath. Although the hearing is in private, an official clerk, the *greffier*, is present at the interview. The witness's statement must be recorded in writing, each page must be read by (or read back to) the witness, and signed as correct by the witness, by the *greffier*, and by the *juge d'instruction* himself, and the defence are given access to the statements well in advance of trial. Where a witness is

¹²⁸ Merle and Vitu, *ibid*, para 652.

interrogated by the police section 62 CPP imposes certain safeguards (but less stringent ones).

5.18 The second safeguard is *la confrontation*. Where a *juge d'instruction* is involved, he will nearly always arrange a *confrontation* between the defendant and any witness whose evidence he disputes, at which the defendant will have some sort of opportunity to impeach the witness. However, in a simpler case, where no *juge d'instruction* is involved, there will usually be no *confrontation*.

5.19 The third is that, as previously mentioned, the defendant (and of course the prosecutor) has the right to require a witness—including of course one who has previously been examined—to come to court to give live evidence. The effectiveness of this provision is limited, however, in that the witness may disobey the summons. If he does so, although the court has power to enforce his attendance, and adjourn the hearing while it does so, it may decide to refuse the adjournment and go ahead with such evidence as it has before it. This will probably be the *procès-verbal* of the witness's previous interrogation which is contained in the *dossier*. At one time, this could easily result in the defendant being found guilty on the basis of a written statement from a witness whom the defence had had no chance to question, either at the trial or before it. In recent years, however, the French courts have adapted their procedure to comply with a number of judgments of the Strasbourg Court,¹²⁹ and as things stand today, a French defendant can insist on the court hearing a witness whose presence it is possible to secure, unless he has already had a chance to put his questions to him at an earlier stage of the proceedings, usually at a *confrontation* arranged by the *juge d'instruction*.

5.20 What is the position if it is genuinely impossible to arrange a *confrontation* with the witness—for example, because he or she has died? Case-law in France during the 1990s has made it plain that the court “must hear witnesses who have never been confronted with the accused whose evidence is of capital importance in establishing the truth; it cannot avoid doing this except where it gives the reason why there are insurmountable difficulties in doing this, for example the failure to locate him after a search has been ordered, his deportation, or his imprisonment abroad,”¹³⁰ and also where there are particular circumstances “which work against having a confrontation, or which are likely to deprive one of any probative value if it were held”.¹³¹ (As we saw earlier,¹³² in the *Saïdi*¹³³ case the French courts went further,

¹²⁹ See Part V above.

¹³⁰ Stefani, Levasseur et Bouloc, *Procédure Pénale* (15th ed 1993) para 688.

¹³¹ *Ibid*, para 678.

¹³² See para 5.20 in Part V above.

¹³³ *Saïdi v France* (1994) 17 EHRR 251.

and thought it was also in order to refuse a confrontation between an alleged drug-dealer and some witnesses who had identified him as their supplier, because this was unnecessary. This ruling was later condemned by the Strasbourg Court.)

- 5.21 Finally, the defendant has a safeguard of some sort in French legal tradition. Although hearsay is freely admissible in France, French judges tell us that they are fully aware of its weaknesses, and in practice it is unlikely that a court would base a conviction solely upon hearsay. However, it must be remembered that French lawyers have a reduced concept of what amounts to hearsay. Although in English law a formal written statement which a witness made to the police or in committal proceedings is as much a piece of hearsay as is the oral evidence of witness A that B told him something, French legal tradition views them differently. The second type of statement is *oui-dire*, to be treated with great caution. The first is a *déposition* and entitled to much greater respect.

Germany

- 5.22 German criminal procedure is derived from French criminal procedure, and its evidential rules share some of its more important features. Thus evidence can be excluded because of the illegal or improper way it was obtained, but subject to this all relevant evidence is in principle admissible. Like French law, German law does not have any rules excluding particular categories of evidence, like hearsay or evidence of bad character. Nor does it have any particular rules about how evidence must be weighed.

- 5.23 During the nineteenth century, however, German writers became increasingly critical of the prominent place which the contemporary German rules of evidence, like the rules in France, gave to the *Protokolle*, which are the German equivalent of *procès-verbaux*. When a new Code of Criminal Procedure was drawn up after German unification in 1870 it contained a provision designed to promote the use of oral testimony. This provision is still in force today as article 250 of the *Strafprozessordnung* (StPO):

The Principle of Personal Examination (Grundsatz der persönlichen Vernehmung)

If the evidence of a fact is based upon a person's observation, this person shall be examined at the trial. The examination may not be replaced by reading the record of an earlier examination, or by reading a written statement.

- 5.24 This provision is (and always has been) subject to certain explicit exceptions. These are contained in article 251 I, which in its current form is as follows:

Reading of Records (Verlesung von Protokollen)

(1) The examination of a witness, expert or co-accused may be replaced by the reading of the notes of his former examination by a judge, if

1. the witness, expert or co-accused has died or become insane, or if his whereabouts cannot be discovered.

2. the witness, expert or co-accused cannot appear at the trial for a long or indefinite time because of illness, infirmity, or other impediments that cannot be overcome.
3. the witness or expert cannot be expected to appear at the trial on account of great distance, having regard to the importance of the testimony.
4. the prosecutor, defence counsel and accused agree to the reading.

5.25 This part of article 251 only applies if the witness, expert or co-accused has been examined before a judge. In Germany, the pre-trial judicial examination of witnesses ceased to be routine when the German version of the *juge d'instruction* was abolished in the 1970s, but it is still possible, exceptionally, for a witness to be judicially examined. First, article 168(c) StPO creates a procedure under which a witness may be examined by a judge ahead of trial (with the defence having the right to be present), and secondly, article 223 StPO allows the presiding judge at trial to order the evidence of an absent witness or expert to be taken (to put it in common law terms) on commission. Article 223 is as follows:

Witness examination by an appointed judge (Zeugenvernehmung durch beauftragten oder ersuchten Richter)

- (1) When the appearance of a witness or expert in the main trial for a long or indefinite time is uncertain because of illness or infirmity or other impediments, the court can then appoint a judge to do the examination.
- (2) The same applies when a witness or expert cannot appear because of the great distance.
- (3) The examination of the witness should be done under oath, unless an exception is prescribed or allowed.

5.26 Where the statement was not one the witness made before a judge, a reading of the statement can replace the witness's live evidence in a narrower range of circumstances which are set out in article 251 II StPO:

If the accused has a lawyer, the examination of a witness, expert or co-accused can be replaced by reading notes of another examination or by reading a document containing a written statement by that person, if the prosecutor, the defence lawyer and the accused agree. In other cases, reading is only permitted when the witness, expert or co-accused has died or for some other reason cannot be examined in the foreseeable future by a judge.

5.27 If none of the exceptions in article 251 StPO apply, and the witness who made the earlier statement comes to court and testifies orally, the court never hears the contents of his earlier statement, and it is only his oral testimony that counts.¹³⁴

¹³⁴ A previous statement made by a witness or by the accused may be read at trial in the following circumstances. Article 253 I empowers the judge to read out earlier statements of a witness or expert should he or she declare at the trial that he or she cannot remember a fact. Article 253 II StPO gives the same right where there are contradictions between the

This, at least, is the official position. In practice, the presiding judge has access to the file in which the original statements are contained, and he is meant to read them ahead of trial, in order to be able to carry out his duty of questioning the witnesses. The president does not show the file to the other members of the court, and when the court gives a reasoned judgment (as it is required to do) it obviously does not mention them as one of the items of evidence which it took into account. But there is always a possibility that, consciously or unconsciously, the president's view of the case is coloured by his knowledge of what is in the *dossier*.

5.28 At first sight, the German "directness principle" looks rather like the English hearsay rule. The resemblance is only superficial, however, because the "directness principle" is an inclusive rule, not an exclusive one. It does not forbid the court to listen to hearsay evidence: it requires the court to seek direct evidence, if available. If a defendant wished to complain that the "directness principle" had not been respected, his complaint would not be that the court had heard inadmissible evidence. It would be that it had failed in its duty to seek direct evidence, which is part of its general duty to take all necessary steps to establish the truth (*Aufklärungspflicht*). Important in this respect is article 244 II of the StPO, which is as follows:

In order to search out the truth the court shall on its own motion extend the taking of evidence to all facts and means of proof that are important for the decision.

5.29 Subject to articles 250 and 251, in Germany, as in France, hearsay evidence is generally admissible.¹³⁵

5.30 This has been affirmed by the German courts on many occasions. In 1951, for example, there was a child abuse case where the question arose as to whether two women could repeat to the court what the child (who later refused to give evidence) had told them. The *Bundesgerichtshof* said:¹³⁶

If the indirect witness cannot be heard, then in his place the witness from hearsay can be heard without restriction. His evidence can even be required under StPO article 244(II) [the *Aufklärungspflicht*]. That what he reports may often be of less worth than the testimony of a direct witness is a question that relates to the assessment of evidence, and has nothing to do with the question of whether or not such evidence may be heard.

former statement and the statement given at trial. Article 254 allows the judge to read out previous statements of the accused made when he or she was examined before the judge in order to take evidence of a confession, or where the earlier statement contradicts what the accused says at trial (article 254 II).

¹³⁵ C Roxin, *Strafverfahrensrecht* (23d ed 1993) p 326-327; K Peter, *Strafprozess* (4th ed 1985) para 39.

¹³⁶ BGHSt 1, 373, 376.

5.31 Thus whether or not a witness has at some time made a formal statement to which article 250 applies, there is nothing to stop another witness repeating to the court what he told him.

Safeguards

5.32 The German courts are aware of the possible risks this creates for innocent defendants, and there are several safeguards.

5.33 The first, as already mentioned, is the general duty of the court to seek the truth. This usually means that if the defendant wants the original maker of the statement produced to give direct evidence to the court, a German court will ensure that this is done.

5.34 The second is, in effect, a corroboration requirement. In a series of cases the *Bundesgerichtshof* has said that hearsay of this sort is not sufficient to found a conviction on its own. In a recent case the court quashed the defendant's conviction for a hold-up because it was based solely on a piece of hearsay evidence, and held:¹³⁷

The evidence of a witness from hearsay can properly found a conviction only when its contents are confirmed by other evidence which is of greater probative value to the court.

5.35 The third is that whilst allowing hearsay evidence to be given, the German courts have refused, in effect, to allow convictions to be based on hearsay upon hearsay:¹³⁸

The evidential value of hearsay evidence is to be weighed carefully. A witness from hearsay can give information about signs and news and reports which have been made known to him by other people from their own perception, but not about information which he has acquired from inspecting written statements of interrogations which he himself did not take part in.

5.36 In the light of all this, it comes as a surprise for the common lawyer to discover that the German courts sometimes allow defendants to be convicted on the evidence of anonymous informants, which other witnesses repeat to the court whilst refusing to give the informant's name. A phenomenon in German criminal procedure is the "V-Mann" (*Vertrauensmann*—"trusted man"): an informer, usually either a "grass" or an undercover police officer, who repeats what he or she has seen and heard to the police officer who is "running" him or her, who in turn repeats his or her evidence to the court suppressing the identity of the informant. As hearsay evidence is in principle admissible in German law, such evidence is not inadmissible as hearsay (as it would usually be in England). One might have thought that in such a case the judge's *Aufklärungspflicht* (duty to get to the truth) would have forced the

¹³⁷ BGH, 08. 01. 1991 (StV 1991, 197).

¹³⁸ NStZ 1990, 24.

judge to find out who the informant was and make him or her come and give evidence. For the moment, however, it is accepted that the judge is not obliged to find the "V-Mann" and force him or her to give evidence if told that disclosing the "V-Mann's" identity would put him or her at the risk of vengeance.¹³⁹ The German courts take the position that the defendant is sufficiently protected by the rule, mentioned above, that the court must not base its decision on hearsay evidence alone. In Germany this is controversial, however. There is a body of legal opinion which says that current German practice over "V-Männer" is inconsistent with Article 6(3)(d) of the Convention.¹⁴⁰

¹³⁹ The "V-Mann" is regarded as an item of "unobtainable evidence" within the terms of article 244 III 2, provided the police are justified in withholding his identity, and by virtue of article 244 III 2, the court's general duty to seek relevant evidence does not apply to "unobtainable evidence".

¹⁴⁰ N Joachim, "Anonyme Zeugen in Strafverfahren Neue Tendenzen in der Rechtsprechung", StV 1992, 245.

APPENDIX C

MISCELLANEOUS STATUTORY PROVISIONS ON THE ADMISSIBILITY OF HEARSAY

The most significant statutory exceptions to the hearsay rule have been mentioned earlier in this paper. There are other less well-known statutory provisions dealing specifically with hearsay in criminal proceedings. We list some of them here in chronological order.¹ This list is not exhaustive.

Pluralities Act 1838, s 122
Land Registration Act 1925, s 126(7)
Land Registration Act 1925, s 113
Land Registration Act 1925, s 68
Evidence (Foreign, Dominion and Colonial Documents) Act 1933, s 1
Criminal Justice Act 1948, s 41
Agriculture (Poisonous Substances) Act 1952, s 6
Post Office Act 1953, s 72
Army Act 1955, s 99A; Air Force Act 1955, s 99A
Public Records Act 1958, s 9
Children and Young Persons Act 1963, s 26
Farm and Garden Chemicals Act 1967, s 4
Courts-Martial (Appeals) Act 1968, Sched 1 Part II Army
Theatres Act 1968, s 9(1)(a)
Theft Act 1968, s 27(4)
Sea Fisheries Act 1968, s 11
Prevention of Oil Pollution Act 1971, s 17(6)
Juries Act 1974, s 2(6)
Health and Safety at Work etc Act 1974, s 41
Magistrates' Courts Act 1980, s 99
Public Passenger Vehicles Act 1981, s 71
Criminal Justice Act 1982, s 19
Video Recordings Act 1984, s 19
Dentists Act 1984, s 14(6)
Road Traffic Offenders Act 1988, s 11(1); Road Traffic Act 1960, s 242(1)
Extradition Act 1989, s 27
Environmental Protection Act 1990, s 119(2)
Environmental Protection Act 1990, s 25(2)
Criminal Justice Act 1991, Sched 3, Part I, Part III
Charities Act 1993, s 93(2)

¹ See also para 3.50 and n 100 and paras 3.56-3.58 and n 106 in the main text.