HEARSAY II:

The Children of *Adam*

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In the prequel, *Hearsay*, which I gave to this conference last year, I told many of you, and reminded some of you, about the response of many practitioners to the introduction of the *Evidence Act* in 1995. It was generally regarded with fear and loathing among criminal defence lawyers, and the attitudes of many practitioners might be summarised as "the sky has fallen in – anything is admissible now!" This was particularly true about section 60, which, as I pointed out last time, presented a significant change to the common law hearsay rules.

Then came the case of *Lee v The Queen* [1998] HCA 60, which re-established some strictures on the admissibility of hearsay, and which I discussed at some length last time. *Lee's* case is one of the first, if not the first, wherein the High Court began the process of teaching us all what the *Evidence Act* actually says, and how to read it. The floodgates of the admissibility of evidence, particularly hearsay, seemed to have been closed, a little.

Then, in the years following *Lee*, we had a series of cases that seemed to come with the brutal regularity of a heavy-weight's body blows, and the world changed forever.

The common law on complaint evidence

Before we turn to consider *Papakosmos –v- The Queen* (1999) 196 CLR 297, I want to give you some idea of the kinds of material that the common law advanced as serious propositions in the law of hearsay, as it related to evidence of complaint in what we would now call sexual assault matters. Evidence of complaint in sexual assault matters was considered to be an exception to the rule against the admitting of evidence of prior consistent statements, in certain circumstances. However, evidence of complaint was admitted not for its hearsay purpose, but only as evidence going to the credibility of the complainant.

In a late 19th century English case called *The Queen –v- Lillyman [1896] 2 QB 167*, the Court referred to this statement of the "ancient law" from *Blackstone's Commentaries*:

> "And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned."

The Court in *Lillyman* went on to explain that the hearsay evidence of complaint was admissible …

> "…only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it?"

The evidence of complaint - hearsay evidence made, as set out in *Lillyman*, not on oath, nor in the presence of the accused, nor forming part of the res gestae - was admissible only on this issue of the assessment of the credibility of the complainant's evidence in the witness box. It was **not** admissible as evidence of the facts asserted. And juries were so warned. What juries made of it is anyone's guess.

This conceptually difficult common law approach is set out neatly in the joint judgment of Gleeson CJ and Hayne J in *Papakosmos* at [20]:

> Evidence of her condition, and her distress, was admissible, and in the circumstances could be considered by the jury in determining whether or not she was telling the truth when she said that she had not consented to what occurred. However, when it came to the matter of her statements that she had been raped, at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what she was asserting, but as evidence which had a bearing upon her credibility, and in particular, upon the consistency of her behaviour and her allegations.

Getting the idea of the common law? I confess to looking back at it now with some dismay, it seems so archaic.

Papakosmos – prior consistent statements

As usual, I think it is very important to get a good grip on the facts of any case, as a starting point to understanding the arguments and principles that emerge.

Mr Papakosmos was producer at a TV station in Wollongong. The complainant was a secretary there. At a Christmas party, both had been drinking, and some sexually suggestive comments were made jocularly between them and in front of other people. Ms Complainant went to the toilet, and, as she was leaving it, Mr Papakosmos spoke to her and guided her into a small room where first he tried to kiss her and then tried to talk her into fellating him. He was unsuccessful on both counts. So much was not disputed in the trial. They then had sexual intercourse; she said, by force and against her resistance and protests; he said, by consent. She then asked him to let her go, and told him she was going to be sick. He left the room, and she fell to the floor and vomited into a rubbish bin. She then went to the bathroom and washed her face and underwear. She came out of the bathroom and immediately complained to a number of witnesses. She was crying, holding her head in her hands, and appeared distressed. The complaint – that the accused had raped her – was made to three different people, each of whom was called to give evidence in the trial.

There was no issue taken by the appellant's lawyers about the witnesses giving evidence about Ms Complainant's *demeanour* on the night. Nor was there an issue about the

evidence being given of *what she said* to the witnesses. The main issue in the High Court appeal was about the Judge's directions to the jury about *what use they could make* of the evidence.

The directions were, in part, as follows:

> …the hearsay evidence, as it is called, is some evidence of the fact that the incident did take place. Once again, you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie but, if you are telling the truth about it, then it is some evidence of the fact. It is a matter for you as to whether you accept it or not, but it is evidence of the fact of the proof of the truth of the allegation that was being made - that is, that she had not consented to having intercourse with this man, that she had been raped.

These directions, everyone agreed, indicated that the trial Judge had admitted the evidence of complaint per section 66. I reproduce section 66 in the Appendix. (Note: all section numbers in this paper refer to the *Evidence Act 1995*, unless otherwise stated.)

Two of the arguments advanced by the appellant in the High Court were:

- that the Judge was in error by telling the jury that the hearsay evidence of complaint was evidence that the complainant did not consent to the intercourse.

- that the Judge should have directed the jury that they were limited to using the complaint evidence only in their assessment of the credibility of the complainant.

The basis for this argument was an assertion that the *Evidence Act* ought to be read in a manner that conforms to the pre-existing common law; in other words, evidence of complaint is relevant only to the credibility of the complainant's evidence in the witness box. The arguments were soundly and unanimously rejected. One of the major propositions to emerge from this case is that the *Evidence Act* is to read and applied in its own terms, and is not to be constrained by references to common law rules "which the legislature has discarded" [at 39]. Justice McHugh even went as far as to say that if the appellant's argument succeeded, it would subvert the intention of the *Evidence Act* [at 96].

The High Court said that the first issue about the evidence is its **relevance**. No one could sensibly argue that the evidence of complaint in the circumstances of this case would not rationally affect the assessment of the probability of the existence of *the* fact in issue – whether or not the complainant consented to sex. If it is relevant, then it is admissible, unless it is caught by one of the exclusionary rules. The rule against hearsay contained in section 59 is one such rule, but it has exceptions. In this case, the relevant exception is section 66.

Section 66 was examined by the High Court in terms of the policy that lies behind it. As discussed in the first paper, hearsay was regarded by the common law as inherently unreliable, because of its remoteness, the possibility of invention or mistake, and the unfairness to the accused, who cannot cross-examine on it. This is why it was thought to be inadmissible. However, many of the common law exceptions to the rule were attempts to allow into evidence types of hearsay evidence that **were** inherently reliable. An examination of section 66 discloses the thinking. It is limited to "first-hand hearsay". It is limited to evidence of a witness who is to be called to give evidence in the proceedings. It is limited to previous representations by the witness of facts that were, at the time of the making of the representations, fresh in the witness' memory. All the hurdles put up by section 66 were crossed, and so the evidence is admissible for its hearsay purpose.

The High Court also helpfully points out that Section 66 is not limited to evidence of complaint in sexual assault trials.

Gilbert Adam – prior inconsistent statements

It is difficult to overstate the impact that this single case – **Adam –v- R** [2001] HCA 57 - had on the conduct of criminal trials. Its impact still is being felt, and its implications still are being played out daily.

The facts in this difficult case are complex and demand close scrutiny.

A police officer, Constable Carty had been drinking with other off-duty police in a Fairfield pub late one night and, in the early hours of 18 April 1997, he left the pub with two other officers and went to the carpark. One of the officers drove off, leaving Carty and a female officer named Auld. Somehow, Carty got involved in an altercation with a man in the carpark. It quickly escalated into a scuffle with a number of men. Carty was stabbed once to the chest. He fell to the ground, and was kicked and stomped by the men. Auld tried to come to his aid, but she was knocked to the ground and injured. Carty died almost immediately from the wound to his chest.

During the conflict in the carpark, another man, Thaier Sako, was badly wounded in the neck. Sako went to hospital that early morning. There was some evidence in the trial that Sako was actually the man with whom Carty first had the altercation. Police went to see him in hospital on 21 April 1997, where he declined to be interviewed. He and his brother Thamir Sako were arrested and charged with the murder.

On 17 June 1997, investigating police were told that Sako wanted to be interviewed. Police interviewed him on ERISP in custody on 2 July 1997. On 17 July 1997 the brothers Gilbert and Richard Adam were charged with the murder of Constable Carty.

Sako was released on bail at some stage, and some time after his release he made another ERISP on 1 September 1997. Sako had been present in the carpark for all or most of the events surrounding the murder, and was severely wounded during those events. While the wounding itself may have had some effect on the accuracy of his account, he was on any view present and able to make observations of what happened. The charge of murder against Sako was withdrawn on 29 September 1997.

Sako's account of the events given in the two ERISPs supported the prosecution case against Gilbert Adam. But by the time the trial had started a year or so later, it was clear that Sako was extremely unwilling to give sworn evidence consistent with his account in the ERISPs. Well into the trial, and before he was called, Sako was given an indemnity against prosecution for "any associated offence" except murder arising out of the proceedings against Adam, and Sako's evidence in those proceedings. The conditions of the indemnity were that he actively co-operate in the proceedings and give truthful evidence.

The trial Judge – Justice Wood, then CJ at CL – decided to hold a Basha inquiry to review Sako's evidence in the absence of the jury, essentially to see what he was going to say. Sako had not given evidence in committal proceedings. Justice Wood also proposed to give Sako a section 128 certificate before he gave evidence on the voir dire, so that his Honour could determine whether Sako should be required, in the interests of justice, to give evidence in the trial.

Sako was called and examined by the prosecutor on the voir dire. During the examination, the prosecutor sought and was granted leave to cross-examine Sako under section 38 on the material in the ERISP of 2 July 1997. Leave was granted on the basis that the evidence given by Sako was ruled to be unfavourable to the Crown. Sako was also cross-examined on the voir dire by counsel for Adam.

The difference in the evidence on the voir dire and the statements made in the ERISP was this: in the ERISP, Sako said that he was relating his memory of his own observations of what took place in the car park; on the voir dire, he said that he did not see anything of any importance in the car park, and that what he told police in the ERISP was what other people had told him.

The trial judge then essentially granted leave in advance for the prosecutor to cross-examine Sako per section 38 if, in front of the jury, Sako gave evidence consistent with his evidence on the voir dire. I hasten to add that this was done after his Honour heard argument on the issue and published detailed reasons why he would grant leave. In that judgement, his Honour said that he would not confine the evidence of Sako's previous representations to the issue of his credibility, per section 136, but would allow the evidence "to be available as going to proof of the facts asserted."

Sako was called to give evidence before the jury. The indemnity and the section 128 certificate were explained to the jury. As expected, Sako's evidence was consistent with what he had said on the voir dire. The prosecutor was granted to leave to cross-examine him, and evidence of what he had told police in the ERISPs was admitted.

Before we go to the main issue in the appeal – was the trial judge correct in allowing that procedure in that way? – there is another interesting issue that the Court dealt with, and put another common law rule to sword.

Intentionally calling a "hostile" witness

The common law thought that it was improper for a prosecutor to call "…a witness known to be hostile for the sole purpose of getting before the jury a prior inconsistent statement which is inadmissible to prove facts against the accused…" – *Blewitt v The Queen* [1988] HCA 43, quoted in *Adam* at [18]. This tactic was based on the common law rule that permitted you to lead evidence of a prior inconsistent statement in the cross-examination of a witness, but only on the issue of the *credibility* of the witness, not on the facts the witness intended to assert in the prior statement. Your hope was that the jury would ignore the directions about the use to which they could put the prior statement, and regard it as evidence of the facts.

Adam's counsel in the appeal argued that this was precisely what the Crown did with Sako's evidence in the trial. There even seemed to be some acknowledgement in the trial Judge's ruling on the issue that the Judge recognised this was the purpose of the Crown calling Sako. But, as the High Court pointed out (although not quite in these terms), here is where the dreaded section 60, which we dealt with last time, comes into play.

But first, and this is important, the High Court looked at whether the evidence of Sako was **relevant**. Again, this is the starting point for the High Court in analysing evidence, and it must therefore be our starting point whenever we sit down to try to analyse a piece of evidence. Clearly, evidence of Sako's prior representations in the ERISP was relevant to his credibility – whether he is to be believed in the witness box. But clearly, **what** he said in the ERISPs was also relevant to the crucial issues in the trial: the circumstances of Carty's death.

Once the evidence is relevant, then "[it's] admissibility turned largely on the way in which the hearsay rule [section 59], the credibility rule [section 102], and the provisions about unfavourable witnesses [section 38] are to be understood as operating" - at [23].

The Court carefully considered the argument that the trial judge should not have granted leave to the prosecution to cross-examine Sako, and rejected it. This argument does not really bear on the issue of the application of the hearsay rule in this case, so I shall simply gloss over it. Essentially the Court found that his Honour had properly considered all the relevant issues in sections 38 and 192. One important consideration was that there was no unfairness to the defence in the trial in that they had an opportunity to cross-examine Sako

themselves, and, that his evidence was somewhat favourable to the defence – see [28] – [30].

The main issue – the credibility rule

The appellant's main argument was that, per section 102 (as it then provided), evidence that is not admissible for any purpose other than the credibility of a witness should not be admitted, and that, in this case, the evidence of Sako's prior inconsistent statements in the ERISPs should not have been admitted as they were admissible only on this basis. The argument was that it would be an absurd or bizarre result that hearsay evidence which was inadmissible because it only went to credibility per section 102, could be admitted by section 60 because it could be characterised has having another – that is, hearsay - purpose. The common law would not have allowed the evidence to be used in this way, for the hearsay purpose as proof of the facts intended to be asserted. The Court was critical of this argument, in that it conflated the *use* to which the evidence was to be put with the *relevance* of the evidence. In other words, it confused admissibility with relevance – they are two separate things.

The Court rejected the appellant's argument that section 102 should not be read literally. The Court said that effect should be given to section 102 "according to its terms" – at [35]. Section 102 spoke then, not any more in terms of evidence that is **relevant** only to credibility, not **admissible** only on credibility. If the evidence is relevant to credibility, and relevant to some other issue, then section 102 would not exclude it.

Once the evidence of the prior inconsistent statement is **relevant** for more than one purpose – like going to the assessment of Sako's credibility **and** to a fact in issue in the trial – then section 60 renders it admissible for **both** purposes.

This outcome is entirely different to the common law, and, the High Court points out, this outcome was entirely the intention of the *Evidence Act* :

> No longer were tribunals of fact to be asked to treat evidence of prior inconsistent statements as evidence that showed no more than that the witness may not be reliable. The prior inconsistent statements were to be taken as evidence of their truth. - at [37].

The Court very helpfully summarised the steps in the reasoning at [39]:

> (a) The evidence that Thaier Sako had given prior inconsistent statements was relevant to his credibility.
>
> (b) The evidence of what he had said in those statements related not only to his credibility but also to other issues in the case.
>
> (c) The decision to grant leave to cross-examine Thaier Sako about his prior inconsistent statements was not attended by error.
>
> (d) Because the evidence of what he had said in the earlier statements was relevant to more than his credibility (that is, it was not relevant *only* to his credibility) the credibility rule in s 102 was not engaged.
>
> (e) It was, therefore, unnecessary to consider the operation of the exception to the credibility rule provided by s 103. It is unnecessary to consider what is meant by "substantial probative value".
>
> (f) The evidence being relevant for purposes which included the attack on Thaier Sako's credibility, but extended to its direct relevance to the facts in issue, it was therefore within the exception to the hearsay rule provided by s 60 and admissible as evidence of the truth of the contents of the statements.

(g) It was, therefore, unnecessary to consider other exceptions to the hearsay rule such as s 66.

I should not leave this discussion without pointing out that the decision in *Adam* is a majority decision of Gleeson CJ, McHugh, Kirby and Hayne JJ. There is an interesting and strong dissenting decision by Gaudron J.

The Children of *Adam*

Adam seemed to change the rules forever. Here was a witness who, on any view, had some role in the events surrounding a murder, and against whom the charge of murder had originally been laid, giving evidence in a trial of another person now accused of the same murder, giving an account in the witness box that was exculpatory of himself, and referring to an earlier ERISP with police that was both exculpatory of himself and inculpatory of the accused in the trial, but avowing now on oath that the earlier version was not his own observations but what he had been told by others. Because his account in the ERISPs was inconsistent with the account given in the witness box, the Crown was permitted to cross-examine the witness, and put his earlier account to the jury as evidence not just relevant to his credibility in the account he gave in the witness box, but as evidence of facts he intended to assert in the earlier account. It all just felt wrong. But the High Court said, that is what the *Evidence Act* says, and no amount of pointing at common law rules will change the simple fact that the *Evidence Act* provisions are not the common law. They are to be read, understood and applied in their own terms.

It has to be acknowledged that the trial Judge gave the jury very careful warnings about Sako's evidence, and put the Crown case to the jury in these terms: "the prosecution's case depended, essentially, upon the jury *believing* what three witnesses had said in Court (Tony Bakos, Dennis Oshana and the appellant's cousin, Mrs Salwa) and *disbelieving* any earlier inconsistent statements they had made to police. It depended, as well, upon the jury *disbelieving* what Thaier Sako (and another man, Bashar Hurmiz) had said in Court but *believing* at least part of what they had said on earlier occasions to police"(at [15]).

There was also some comment in the High Court about the way the defence case for Adam was conducted in the trial, at least as it related to the evidence given by Sako. I do not mean to imply there was any criticism, indeed, there was not. But the Court noted that it was not any part of the defence case in the trial to put to Sako some alternative version of Adam's role in the events – alternative, that is, to the role attributed to Adam by Sako in the ERISP. To do so risked appearing to accept the possibility that Sako *had* given a first-hand account of what happened. The defence could have, but did not, cross-examine Sako to support his account in the witness box, or to suggest that he was too affected by alcohol or his wounds to be able to give a reliable account. Or to suggest motives he may have had for giving an account to police that exculpated himself and his brother Thamir.

Since *Adam*, there have been a number of cases where the evidence of one co-accused's account given to police has been used by the Crown against other accused. Indeed, this pathway seemed to be getting wider. It became a road.

Suteski

In *R –v- Suteski* [2002] NSWCCA 509, the co-accused, who pleaded guilty to a murder, refused to give evidence in the trial of the woman who, on the Crown case, had organised the murder. He had made an ERISP in which he made some inculpatory representations about Ms Suteski. The CCA found that the trial Judge was correct to allow the Crown to put the ERISP video into evidence in Ms Suteski's trial (along with a transcript as an aide memoir!) on the basis that the witness was "unavailable" per section 65 (2) (d). In other words, they did not even need to get him in the witness box to see if he would stick to his story, and, if he did not, seek leave under section 38 to cross-examine him, and put his ERISP in that way as a prior inconsistent statement.

Aslett

In *Aslett –v- Regina* [2006] NSWCCA 49 the accused was tried for a very nasty home invasion that involved, among other offences, a number of sexual assaults of a 16 year old girl by the accused and three men while her parents were tied up in the next room. One of the co-accused, Bonham, had made two ERISPs after his arrest. In the ERISPs he made representations about the co-offenders that implicated the accused Aslett, as well as the others. He signed a statement that adopted the ERISPs as the evidence he would be prepared to give in court against the co-offenders, and he also signed each page of the ERISP transcripts. Apart from the accused Aslett, the guilt of Bonham and the other two could be proved by DNA and some fingerprint evidence, as well as Bonham's confession. All of them pleaded guilty, except for Aslett, against whom virtually the only evidence of his part in the home invasion and sexual assaults was Bonham's ERISPs. When Bonham was called to give evidence at the trial, he said that Aslett was not involved in the offences. The Crown applied for and was granted leave over objection to cross-examine him about what he told police in the ERISPs. The ERISPs were tendered into evidence over objection. Bonham gave evidence that what he told police in the ERISPs about Aslett being involved was a lie. There were, and he admitted, other representations that were provable lies in the ERISPs.

The trial judge was taken to section 66 (3) as the basis for the defence application that Bonham's ERISPs not be admitted. At trial that argument was overcome by the Crown's response that, regardless of what s 66 (3) says, the material is independently admissible via the route of sections 38, 103 (as it then was) and 60 – what I might call the *Adam* roadway. The CCA said the judge was correct, and applied *Adam*, and said that section 66 "by its terms … does not purport to concern itself with all the circumstances in which the Act makes hearsay evidence admissible notwithstanding s59. Nothing in s66 or in the Part in which it lies, Part 3.2, purports to limit the effect of ss38, 103 or 60." - at [72].

At trial and in the appeal, Aslett's lawyers took the court to section 43 (2). The argument was simple, section 43 (2) makes evidence of a prior inconsistent statement admissible only if the witness did not admit making it. In the trial, Bonham admitted making the statement, but said that it was a lie. The CCA dealt with this argument by pointing out that section 43 occurs in a Chapter of the *Evidence Act*, Chapter 2, which is about **adducing** evidence, it is not concerned with **admissibility**, which is what Chapter 3 is about. It is nothing more than a rule that a witness who is to be attacked on credit is to be fairly dealt with. Nothing in section 43 purports to limit the effect of sections 38, 103 and 60. The CCA reminds us in this case that section 60 represents "the modern law", which allows such evidence to be used for a purpose other than an attack on credibility – at [76].

Tan

Tan –v- R [2008] NSWCCA 332 is interesting for matters beyond the hearsay questions. It contains a cast of characters involved in a drive-by shooting that includes someone known only as "Mini Me" (or "Minnie Me"), and a give-up who refers to himself as Papa Smurf. The accused was alleged to have organised the drive-by shooting, carried out by Mini Me as the actual shooter, and the driver was a man called Lenati. Lenati was ERISPed by investigating police in New Zealand, during which he made assertions about Tan's role in the drive-by, including things said by Tan to the co-offenders. Lenati was to be called to give evidence in the Crown case, and without Lenati, there was no Crown case.

The Crown knew that Lenati did not intend to give evidence consistent with his ERISP account, and so it was proposed to hear evidence from him on a voir dire to find out what he would say. His evidence was that he could not recall the events surrounding the drive-by. The Crown was granted leave to cross-examine him per section 38, during the course of which the ERISP was played. The trial judge purported to allow the evidence of the ERISP to be led before the jury on a basis founded upon *Suteski* - that Lenati was an unavailable witness, due to his inability to remember the events, which the judge found to be unbelievable. A great deal of the appeal is about the error of the trial judge in making that

finding. However, the CCA said the evidence was admissible anyway on other bases, via the *Adam* pathway. There is a great deal of discussion in the case about the application of the exclusionary sections, 135 and 137, on the basis of unfair prejudice to the accused.

There is an argument in the CCA that involves the correct application of *Lee –v- The Queen* that is important for our purposes, and shows how conceptually difficult the struggle can be with hearsay. The argument was that, even if the ERISP was admissible, those parts of it that contained representations by Lenati of what Tan had said were inadmissible per section 59, and did not come into any of the exceptions to section 59 because the ERISP evidence of Tan's admissions was second-hand hearsay. This argument is based precisely on the principle in *Lee*.

However, the CCA said that it was not second-hand hearsay at all. The ERISP video recording was **direct evidence** of Lenati's first-hand hearsay account of Tan's admissions, as direct as if he were sitting in the witness box giving the evidence. It is not the same as *Lee*, where the evidence was contained in a written statement signed by the witness, and the evidence was the statement, tendered through the police officer who took the statement. In *Lee* the statement itself was the first hand hearsay of what the witness stated in the presence of the police officer. The evidence of what the witness said Lee had said would have been admissible as first-hand hearsay if the witness had given the evidence in the witness box, but not where it is tendered as a statement through another witness.

I confess to struggling with the conceptual difference, but I recognise there is a difference.

The change to the Credibility Rule – the end of the road, *Adam*?

Coming into force on 1 January 2009 were some amendments to the Credibility rule in the *Evidence Act* that sought specifically to reverse the affect of the High Court decision in *Adam*. The new section 101A offers a definition of "credibility evidence" that includes an expanded form of the old definition, that is, evidence that "is relevant only because it affects the assessment of the credibility of the witness", but then extends the definition to include evidence that is "relevant … because it affects the assessment of the credibility of the witness…; **and…for some other purpose for which it is not admissible, or cannot be used, because of the provisions of Parts 3.2 to 3.6**" (my emphasis).

Parts 3.2 to 3.6 cover these areas: Hearsay, Opinion, Admissions, Evidence of Judgments and Convictions, Tendency and Coincidence.

Sections 102 and 103 have been re-drafted – for example you will note that references to "substantial probative value" have been removed from section 103, so that the only issue it relates to is the assessment of the credibility of the witness.

What we are left with now is essentially the position that the appellant argued in *Adam's* case: that evidence that is relevant to a witness's credibility and relevant for some other purpose but inadmissible because of the operation of another rule of evidence, should not be admitted. I confess that my brief researches have not discovered any case that might guide us as to how this change affects the conduct of matters that previously might have used the *Adam* roadway.

A couple of cases where the Evidence Act rules about hearsay and the exceptions have been used in defence cases

Elms

In *R -v-Elms* [2004] NSWCCA 467, the accused was tried on a charge of aggravated break enter and steal. The Crown case was that two fellows, White and Ralph, came back to White's place to find Elms inside, apparently preparing to steal stuff. Elms came towards

them with a knife, whereupon Ralph went towards Elms and punched him several times, causing him to drop the knife, and forcing him up against the wall. Ralph and White then held him until the police arrived. Police recorded a number of injuries on Elms, and blood in parts of the room where he was held. Police noted a knife on the floor, damage to a doorway as a sign of forced entry, and the apparent movement of items such as a TV. No fingerprints of White's were found on the knife or any items in the house, or at the alleged point of entry.

The accused's account was that he knew Ralph, had been directed by Ralph to White''s house as a place to buy cannabis. When he knocked on the door, it was answered by White, who got angry when asked to sell cannabis to the accused. White and another man assaulted Elms in the house, then Ralph turned up, and Elms was assaulted further. Elms said he did not touch anything in the house.

Ralph did not make a statement, could not be located, and did not give evidence in the trial. However, COPS entries recorded an account given to investigating police by Ralph at the scene. That account was similar to the account given by White in the trial, but also different in significant ways. Also in significant ways, White's evidence in the trial was different to his statement, and he was crossed-examined on those inconsistencies.

Defence counsel at the trial sought to tender the COPS entry. The Crown objected to the tender on the basis of unfairness, because Ralph was not available to give evidence, and, anyway, the evidence was not relevant. The judge upheld the objection and refused to admit the evidence, per section 65 (2). However, the CCA said that the evidence ought to have been admitted, and referred to section 65 (8) (to which, the court said, regrettably the trial judge was not taken in the argument in the trial).

Have a good look at 65 (8). It refers specifically to evidence adduced by "a defendant".

Crisologo

Crisologo (1997) 99 A Crim R 178 was a case about an alleged sexual assault. The accused had driven the complainant home, and, on the way, they stopped at some secluded spot. They had sex, by force on her account, by consent on his. One of the issues on appeal concerned the refusal by the trial judge to allow the defence to adduce evidence of a prior consistent statement by the accused. In answer to some questions in cross-examination by the Crown, the accused said that, a day or two after the event, he told his wife, his mother, and his sisters about what had happened between himself and the complainant in the car. He had called a meeting of these people in order to tell them, presumably, a confession of his infidelity. He told the Crown that the account he gave his wife and the others was the same as he had given in evidence.

The defence was prevented from calling evidence from the accused's wife, and his mother, about what he had said to them. In the brief argument, no mention was made of section 66. The CCA ruled that the situation in this case was analogous to complaint evidence, and admissible under the same rules. If the evidence was relevant to an issue in the trial – clearly it was – then section 59 would exclude it, but for the operation of section 66. The conditions for admission set out in section 66 were met in this case, and the evidence ought to have been admitted.

Paul Townsend

1 June 2010.

Appendix:

Relevant Bits of the Evidence Act

38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

(a) evidence given by the witness that is unfavourable to the party, or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note. The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and

(b) the party is a witness in the proceeding.

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Note. Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note. Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3),

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time, and

(b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

(a) the person to whom, or the court or other body to which, the representation was made, or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation, or

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note. Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party, and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person, or

(b) is relevant:

(i) because it affects the assessment of the credibility of the witness or person, and

(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Notes.

[1] Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

[2] Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

102 The credibility rule

Credibility evidence about a witness is not admissible.

Notes.

[1] Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

[2] Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.