

Credibility Evidence
in
Criminal Proceedings

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This is an “entry level” paper, written from the defence perspective.

What is Credibility Evidence? – The Definition in Section 101A

“Credibility evidence” is defined by [s.101A](#) of the Evidence Act 1995 (NSW) in the following terms:

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.

Put more simply, the only evidence that satisfies the definition of “credibility evidence” is that which is admitted **solely** on the basis that it is credibility evidence, and not on any other basis. If it is admitted on some other basis, it is not considered credibility evidence under the Evidence Act (even if it is capable of going to issues of credibility). Whilst this distinction may seem somewhat academic, it becomes of importance in relation to other provisions dealing with credibility evidence.

The above definition is of course circular, in that it twice refers to the “credibility of the witness or person” in defining “credibility evidence”.

The Evidence Act Dictionary offers some assistance.

“credibility” of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person’s ability to observe or remember facts and events about which the person made the representation.

“credibility” of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness’s ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

Again the definition is circular. To put things more simply (again) the Macquarie Dictionary defines “credibility” as: “1. The quality or state of being credible. 2. The capacity to believe”. The same dictionary defines “Credible” as “1. Capable of being believed; believable. 2. Worthy of belief or confidence, trustworthy.”

In *R v Milat* NSWSC 19 April 1996 unrep. BC9607038 Hunt CJ at CL commented upon the Evidence Act Dictionary definition of credibility, and stated at p.6:

“That definition, it seems to me, does include reliability as well as truthfulness within its terms,…”

The Credibility Rule – Section 102

The [Evidence Act Dictionary](#) offers the following definition:

"credibility rule" means section 102.

[Section 102](#) of the Evidence Act 1995 (NSW) is in the following terms:

102 The credibility rule

Credibility evidence about a witness is not admissible.

Note 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.

Note 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.

The credibility rule will often be invoked as grounds for objection during examination in chief of a witness. (This is because of the nature of the exceptions to the credibility rule, which will be discussed below).

The rule prohibits a party asking questions during evidence in chief having the effect of bolstering the credibility of the party's own witness. A typical example would be to ask of a witness in chief question affirming their sober state, the capacity for clear and accurate observation and / or recall of events.

The objection will typically take the form of words to the following effect during the evidence in chief of your opponent's witness:

"I object on the grounds that my friend is leading evidence going to the credibility of his / her own witness."

The obvious policy rationale for the prohibition against this type of evidence is that it is highly likely to be self-serving.

The Exception for “Roll-Overs”

The position with respect to witnesses called by the Crown who have received an indemnity from prosecution or a discount on sentence in return for assistance is curious. The case law imposes a clear obligation on the Crown to lead in chief evidence to the effect that the Crown’s witness has received a benefit, what that benefit is, and the fact that they may be liable to prosecution or re-sentence (as the case may be) for failure to comply with the terms of any undertaking given to the Crown. Cases that make this point abundantly clear include *R v Sullivan* [2003] NSWCCA 100, *R v Chen* [2002] NSWCCA 174 and *R v Gonzales-Betes* [2001] NSWCCA 226. Whilst these decisions are clearly correct in they ensure the Crown complies with the requirements of procedural fairness, and follow principles established in the pre-Evidence Act case law, it seems that the drafting of s.102 of the Evidence Act failed to contemplate this type of evidence.

In [R v Sullivan \[2003\] NSWCCA 100](#) Buddin J stated:

“[95] There has been a consistent line of authority since *Booth* ([1982] 2 NSWLR 847) to the effect that the Crown has a duty to reveal to the jury all of those matters which are relevant to the position of the witness vis-à-vis the Crown. The underlying assumption in *Booth* however was that the witness’ status or circumstances had effectively been finally determined prior to his or her being called as a witness. However the landscape has been materially altered by those legislative amendments which empower the Crown to review a sentence, which has been reduced because of assistance to the authorities, in the event that a witness fails to fulfil an undertaking to give evidence. In that sense the position of the witness will not have been completely finalised until the evidence which is the subject of the undertaking has been given (and even, if required, repeated). Those legislative developments have cast an even greater responsibility upon the Crown. It must first of all make full disclosure of all matters which relevantly pertain to the witness to be called. Then, in further discharge of its obligations, it ought to lead in evidence all material of that kind which is relevant in order that the jury is fully informed of those matters which would enable it to make a proper assessment of the witness’ credibility. I respectfully agree with what was said by this Court in *Chen* that the evidence should be led by the Crown without having to be “dragged out in cross-examination”. I would only add this. Material of the kind to which I have made reference is far too significant for it to emerge, as it did in this case, for the first time only in re-examination. All that the jury was told in evidence in chief in the present case was that the witness was serving a term of imprisonment by reason of his having pleaded guilty to various offences about which he then proceeded to give evidence.”

“[96] The jury was informed, as I have said, that the witness’ sentence had been “substantially” reduced. Such a description would not necessarily

have been of much assistance to them. Evidence quantifying the discount would undoubtedly have been more comprehensible to the jury. As the authorities to which I have referred show such evidence is frequently led. In my view it should have been led in the present case by the Crown. The fact that a person has received a benefit in the form of a discount on sentence is, as I have observed, clearly capable of bearing on that person's credibility because it provides them with an incentive or motive to give false evidence. In the same way the extent of that discount is similarly relevant and important evidence because it is capable of affecting the degree to which the witness has an incentive or motive to give false evidence. The Crown should also in my view have led evidence of the undertaking given by the witness as well as evidence, in clear and explicit terms, as to the consequences of a failure on the part of the witness, to fulfil that undertaking. It is true that counsel for the appellant at trial did not ultimately press the question concerning the extent of the discount which Mr Evans received. In the light of what I have said upon the subject, I do not regard that as fatal to the appellant's argument. As I have already said, this evidence should have been led by the Crown. Moreover it is not possible to ascertain from the transcript what prompted counsel not to press the question."

Cross-examination as to Credibility of Witnesses – Sections 103 and 104

The credibility rule can still have work to do during the course of cross-examination. Whilst cross-examination as to credit is permitted, it must be such as "could substantially affect the assessment of the credibility of the witness". Also, there are additional protections with respect to the accused.

Section 103

[Section 103](#) is in the following terms:

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.*

The essence of section 103 is that the credibility rule (i.e. s.102) has no

application if the evidence could substantially affect the assessment of the credibility of the witness.

It is important to note that an earlier form of this section referred to "...could have substantial probative value...". Odgers (9th edition) regards the case law on the earlier form of the section as being applicable to the current form of the section.

As to what "could" substantially affect the assessment of the credibility of the witness, it is important to note the decision of ***R v Beattie (1996) 40 NSWLR 155 at 163***. The accused had been arrested for guns and drugs. The defence case that the guns and drugs were planted by police, that alleged oral admissions were a fabrication or "verbal" and that the police had in fact stolen a significant sum of cash from the accused. A police officer was cross-examined as to whether he had ever illicitly seized money from others during the course of investigations. His Honour James J stated at 163:

"In my opinion, an admission made by the witness in an answer to either of the questions I am now dealing with would have had substantial probative value on the question of the witness' credibility and the fact that the witness might have been unlikely to make any such admission did not affect the admissibility of the questions."

Later at 163 his Honour stated:

"...a judge should be slow to reject an otherwise admissible question on the ground that the judge anticipates that the answer the witness will give will not assist the questioner's case."

Defence practitioners should resist objections to cross-examination on the basis the potential to substantially affect the assessment of credibility of the witness should be taken at its highest in light of this authority.

So what does "substantially affect" mean? In ***R v El Azzi [2004] NSWCCA 455*** Simpson J commented on the earlier form of the section concerning "substantial probative value" in the following terms at [183]:

"...for this evidence to have substantial probative value within the meaning of s.103(1), it must have had the potential to have a real bearing upon the assessment of the appellant's credibility – and, particularly, to the appellant's credibility in relation to the evidence he had given, or would give, at the trial. It cannot have had substantial probative value for the purposes of s.103(1) unless it was capable, in a significant way, of bearing upon that assessment."

It is also important for defence practitioners to note that they are entitled to some leeway in cross-examination as to credit. In this regard, the decision of ***R v RPS (unreported, NSW CCA, 13 August 1997) BC9703571*** is of assistance. In this decision his Honour Hunt CJ at CL (Gleeson CJ and Hidden J concurring) stated:

“Counsel must, however, be given some freedom in cross-examination — whether it relates to a fact in issue or to credit. They are not obliged to come directly to the point; they are entitled to start a little distance from the point and to work up to it.”

“Some counsel are more succinct than others. Some will put the point quickly and clearly. Others will worry the point, like a dog with a bone, and will set the teeth of everyone (including the jury) on edge. Trial judges are expected to have the patience (but, hopefully, not the poverty) of Job. That is not always an easy role to perform. Counsel will sometimes - either through incompetence or quite deliberately - stretch a trial judge's patience to the extent that it will produce an adverse reaction. These are things which we have all faced at one time or another, and no doubt we have all succumbed to that temptation or lost our patience at times. That is only human nature, but if the consequence is unfairly to influence the jury's verdict then a miscarriage of justice may well result.

There is, of course, nothing wrong with an intervention by the judge in order to clarify some ambiguity in the question or the answer. Otherwise, the judge is treading on dangerous ground if it is counsel for the accused who is being challenged and if there has been no objection by the Crown prosecutor.”

Section 104

[Section 104](#) is in the following terms:

104 Further protections: cross-examination as to credibility

- (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.*
- (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.*
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
 - (a) is biased or has a motive to be untruthful, or*
 - (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or*
 - (c) has made a prior inconsistent statement.**
- (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:*

- (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and*
- (b) is relevant solely or mainly to the witness's credibility.*

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

- (a) the events in relation to which the defendant is being prosecuted, or*
- (b) the investigation of the offence for which the defendant is being prosecuted.*

(6) Leave is not to be given for cross-examination by another defendant unless:

- (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and*
- (b) that evidence has been admitted.*

The essence of this section is that:

1. It offers additional protections to an accused person over and above s.103 – see s.104(1).
2. As a general proposition, the prosecution need leave to cross-examine the accused as to credit – s.104(2).
3. However, leave need not be granted in relation to the matters listed in s.104(3). Those matters are whether the accused is:
 - Biased
 - Has a motive to lie
 - Is or was unable to be aware or unable to recall matters to which his or her evidence relates.
 - Has made a prior inconsistent statement.
4. Leave must not be granted unless evidence has been adduced by the defendant that a prosecution witness has a tendency to be dishonest in general terms (i.e. raising bad character of the witness with respect to dishonesty generally) – see s.104(4)
5. Section 104(4) does not refer to dishonesty with respect to the event or the investigation of events in the subject proceedings – see s.104(5).
6. A co-accused needs leave to cross-examine a defendant – see s.104(2).
7. That leave is not to be given unless the defendant has led evidence adverse to the co-accused seeking to cross-examine – see s.104(6).
8. Any grant of leave is subject to the considerations outlined in s.192 of the Evidence Act.

An obvious issue that defence practitioners will consider is that cross-examination of an accused pursuant to this section raises the prospect of the accused being cross-examined on issues that discloses bad character. The relationship between this part of the Evidence Act and the provisions dealing with the character of the accused (ss.110-112) has not been the subject of clear

guidance from the appellate courts. The High Court of Australia in *Stanoevski v The Queen* [2001] HCA 4, (2001) 202 CLR 115 declined to reconcile or “harmonise” the various provisions of the Evidence Act

Simpson J in [R v El-Azzi \[2004\] NSWCCA 455](#) stated:

“[197] The question is whether the conduct of the cross-examination of the prosecution witnesses, alone or in conjunction with other circumstances, warranted a grant of leave under s104(2).

“[198] In this context reference should also be made to s112 of the *Evidence Act* which is in the following terms:

“A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.”

“[199] The “Part” is Part 3.8 of the *Evidence Act*, concerned with character. A question arises as to the meaning of “matters arising out of evidence of a kind referred to in this Part”; in *Stanoevski v The Queen* [2001] HCA 4; 202 CLR 115, the High Court declined to attempt to “harmonise” Part 3.8 with Part 3.7 (concerned with credibility, in which s104 appears). S110, also in Part 3.8, is concerned with evidence adduced on behalf of a defendant intended to establish good character, either generally or in a particular respect. One construction, probably the most obvious construction, of s112 is that it only prohibits cross-examination of a defendant about matters arising out of evidence called on his or her behalf to establish good character. Thus the discretion to grant leave to cross-examine a defendant about character does not exist and is not triggered, unless and until a defendant gives or adduces evidence of good character, either generally or in a particular respect. The alternative construction is that “evidence of a kind referred to in this Part” is character evidence, in which case leave could be given (subject to s192 considerations and ss135 and 137) whether or not the defendant has raised good character. If the latter is the correct construction, then s112 prohibits cross-examination on character whether or not the defendant has raised character, subject to leave being granted. If the former is the correct construction, then there is nothing (other than s102) that expressly prohibits cross-examination of an accused person in relation to previous criminal history. However, even on this construction, s112 is relevant, in my view, to show that the common law resistance to allowing evidence of prior criminal history is still relevant in guiding the exercise of the s104(2) discretion: see *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700; 144 A Crim R 1; *Kevin William Phillips v The Queen* [1985] HCA 79; 159 CLR 45.”

“[200]....In the ordinary course, it would seem to me that the danger of unfair prejudice created by evidence of a serious criminal conviction would substantially outweigh its probative value. However, that assessment has to be made in the light of the fairness considerations. I

emphasise that it would not be every case where an attack is made upon the credibility of the Crown witnesses that would warrant the exercise of the 104(2) discretion to grant leave to cross-examine in relation to such a serious matter. Caution would have to be exercised in assessing overall fairness, and in the balancing exercises. Legal representatives of persons charged with serious criminal offences must have substantial flexibility in their approach to cross-examining prosecution witnesses, without fear that attacks on those witnesses, if made within proper limits, will expose their clients to the potential disclosure of their criminal histories, or alternatively, operate as a disincentive to their exercising the option to give evidence.

Odgers (9th Edition) favours the “more obvious” construction set forth by Simpson J, that is, s.112 is the applicable section where the defendant has positively led evidence of his / her good character either generally or in a specific respect. Section 104 is the applicable section where the defendant has not done so.

The granting of leave to cross-examine the accused is always subject to considerations outlined in s.192 of the Act. (which deals with granting of leave under the Evidence Act generally). Further issues include a consideration of whether the evidence should be excluded on the grounds that it is unfairly prejudicial (Evidence Act s.135), or whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the accused (Evidence Act).

The granting of leave should be regarded as exceptional. In [*Phillips v The Queen* \[1985\] HCA 79, \(1985\) 159 CLR 45](#) the High Court of Australia considered this issue with respect to relevantly similar Queensland legislation. at [15] the judgment of Mason, Wilson, Brennan and Deane JJ stated:

“[15]. It is right to stress the exceptional character of a case in which the credibility of an accused person is open to be attacked by reference to his bad character or previous convictions and it is undoubtedly right that the discretion of a trial judge to permit such an attack be sparingly and cautiously exercised. Although the purpose for which such evidence is admitted is confined to questions touching the credibility of an accused person and is not to be accepted by the jury as persuasive of his guilt of the offence charged and notwithstanding that the trial judge will direct the jury clearly as to the use to which the evidence may be put and the use to which it may not be put (cf. *Reg. v. Beech* (1978) 20 SASR 410, at pp 420-423) there will always be a keen appreciation that the admission of the evidence may in the absence of countervailing considerations operate unfairly to his prejudice.”

As to “bias” or “motive to be untruthful” on the part of the accused [see s.104(3)(a)] it is important to be familiar with the decision of [*Robinson \(No.2\) v The Queen* \[1991\] HCA 38; \(1991\) 180 CLR 531](#). This case makes it plain that it is never permissible for an accused person to be cross-examined to the effect

that their evidence is motivated by a desire to be acquitted. The judgment of the Court stated:

“[6]. Notwithstanding the correctness of his Honour's directions concerning the onus and standard of proof, however, it is impossible to escape the conclusion that the fairness of the trial was seriously impaired by the effect of his directions concerning the interest of a witness in the outcome of the case. The jury could hardly escape the conclusion that the appellant had "the greatest interest of all the witnesses" in the outcome of the case. Indeed, his Honour had suggested to the jury that they might think that the appellant had a greater interest than any other witness in the outcome of the case. If the jury accepted that suggestion, as they almost certainly would have, his Honour's directions had the effect that the evidence of the appellant had to be scrutinised more carefully than the evidence of any other witness, including the complainant, for no reason other than that he was the accused. The unfairness of such a direction is manifest, particularly when the outcome of the trial inevitably turned upon the jury's preference for the evidence of the complainant against that of the accused. Moreover, the directions virtually had the effect that the appellant was to be treated as a "suspect witness".... An express direction which had the effect of his Honour's directions would have been a clear misdirection, as Mr Butler, counsel for the Crown, readily accepted. Furthermore, his Honour's directions on the point do not sit well with the presumption of innocence which is the consequence of a plea of not guilty. If that presumption is to have any real effect in a criminal trial, the jury must act on the basis that the accused is presumed innocent of the acts which are the subject of the indictment until they are satisfied beyond reasonable doubt that he or she is guilty of those acts. To hold that, despite the plea of not guilty, any evidence of the accused denying those acts is to be the subject of close scrutiny because of his or her interest in the outcome of the case is to undermine the benefit which that presumption gives to an accused person.”

“[7]. Nothing in the above is intended to suggest that the evidence of an accused person is not subject to the tests which are generally applicable to witnesses in a criminal trial. Thus, in examining the evidence of a witness in a criminal trial - including the evidence of the accused - the jury is entitled to consider whether some particular interest or purpose of the witness will be served or promoted in giving evidence in the proceedings. But to direct a jury that they should evaluate evidence on the basis of the interest of witnesses in the outcome of the case is to strike at the notion of a fair trial for an accused person. Except in the most exceptional case, such a direction inevitably disadvantages the evidence of the accused when it is in conflict with the evidence for the Crown.”

The Common Law Prohibition Against Cross-Examining A Witness To Comment on the Credit of Another Witness

The drafting of the Evidence Act 1995 (NSW) also leaves aside an important

common law rule – it is impermissible to ask a witness a question that has the effect of inviting the witness to comment on the credit of another witness. Some practical example follows:

Assume witness A has made assertions of fact X in their evidence. Witness B then gives evidence. The following line of questioning is impermissible:

Q. Witness A has given evidence that X occurred.

A. Yes.

Q. And you say X did not occur?

A. Yes.

Q. So do you say witness A is lying?

Similarly a question to the following would be inadmissible:

Q. What do you say about the A's evidence that X occurred?

A similar course in cross-examination that is permissible would be as follows:

Q. I put it to you that X occurred.

A. No

Similarly:

Q. What do you say to the suggestion that X occurred?

A. No, I disagree

A leading pre-Evidence Act authority on this point can be found in ***R v Pratulon NSWCCA 29 November 1985 unrep. BC8500376***. In that case Street CJ stated at pp.6-7:

“...what the Crown Prosecutor did was contrary to a comparatively elementary rule of cross-examination, namely that it is not permissible to put to one witness the proposition that the evidence of that witness is contrary to the evidence of other witnesses, so as in effect to invite a witness to express an opinion as to whether other witnesses are telling the truth.....That principle is, I repeat, elementary and is fundamental to the fair and proper conduct of cross-examination”

R v Pratulon has since been cited in the post-Evidence Act context in the decision of ***R v Rich (1998) 102 A Crim R 165*** where Hidden J stated at 169:

“The situation is analogous to cross-examination of an accused in a case of alleged sexual misconduct about whether he can attribute any motive to the complainant to fabricate the evidence against him: a practice condemned in a number of decisions of this Court and, more recently, by the High Court in *Palmer v Reg* (1998) 151 ALR 16, (1998) 72 ALJR 254.”

Further, *R v Pratulon* has also been cited without disapproval in *Choi v R* [2007]

NSWCCA 150 and *Gonzales v R* [2007] NSWCCA 321.

Rebutting Denials By Other Evidence – Section 106

Section 106

[Section 106](#) is in the following terms:

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:

(a) in cross-examination of the witness:

- (i) the substance of the evidence was put to the witness, and*
- (ii) the witness denied, or did not admit or agree to, the substance of the evidence, and*

(c) the court gives leave to adduce the evidence.

(2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:

(a) is biased or has a motive for being untruthful, or

(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

The “Collateral Evidence Rule” or “Finality Rule”

The section deals with the area of law that under the common law was known as the “collateral evidence rule” or “finality rule”. In order to gain a better understanding of the section and how it works from a policy perspective, it is worthwhile to have an understanding of the common law position. A useful authority in that regard is the High Court of Australia decision of [Nicholls & Coates v The Queen \[2005\] HCA 1, \(2005\) 219 CLR 196](#). This case was on appeal from Western Australia, a non-uniform Evidence Act state. The judgment of McHugh J states:

“[37] The central thesis of the common law concerning the admissibility of evidence is that it is admissible only when it is relevant, that is: "if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or

makes probable the past, present, or future existence or non-existence of the other fact." (footnote omitted) In other words, evidence is relevant "if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding." In a trial, a balance must be struck between considerations of justice and matters of practicality. Consequently, the general rule concerning admissibility is qualified by other rules of evidence. One qualification concerns evidence of matters collateral to the issues in the case.

"[38] The collateral evidence rule declares that answers given by a witness to questions put to him or her in cross-examination concerning collateral matters are final. Those answers cannot be contradicted or rebutted by other evidence. Hence, the rule is often referred to as the "finality" rule. Collateral facts are "facts not constituting the matters directly in dispute between the parties" or "facts that are not facts in issue or facts relevant to a fact in issue". In most cases, a fact that affects the credibility of a witness is a collateral fact. Hence, an answer given by a witness to a matter that relates to credibility alone - in other words, a collateral matter - is final and cannot be rebutted. "

"[39] Policy considerations provide the rationale for the collateral evidence rule. The reasons for the rule are generally practical: it is based on principles of case management, such as the desirability of avoiding a multiplicity of issues and of protecting the efficiency and cost-effectiveness of the trial process by preventing the parties from litigating matters of marginal relevance. The rule is also based on the need to be fair to the witness."

Later his Honour stated:

"[47] Because of what Starke J said in *Piddington*, I have long thought that the rule that answers in cross-examination on collateral questions are final is a rule of convenience, not a rule of law or a principle. In *Palmer*, I said that evidentiary rules based on the distinction between issues of credit and facts in issue "should not be regarded as hard and fast rules of law but should instead be seen 'as a well-established guide to the exercise of judicial regulation of the litigation process'." In *Goldsmith*, I said: "Despite the longevity of the finality rule, it has increasingly come to be regarded more as a flexible standard than a fixed rule of law. Starke J recognised this in *Piddington v Bennett and Wood Pty Ltd* when he said that the finality rule was 'a rule of convenience, and not of principle'. Similarly, in *Natta v Canham*, the Full Court of the Federal Court said that the rule should be regarded 'as a well-established guide to the exercise of judicial regulation of the litigation process'."

"[48] As a result:

"For reasons of convenience, it is necessary to maintain the rule that independent evidence rebutting the witness's denials on matters going to credibility is not ordinarily admissible. ... If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it

ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in-issue." (*Palmer v The Queen* [1998] HCA 2 per McHugh J at [55])

Later, his Honour also stated:

"[55] The finality rule is important to the efficient conduct of litigation. Without it, the principal issues in trials would sometimes become overwhelmed by charge and counter-charge remote from the cause of action being litigated. In many cases, the finality rule also protects witnesses from having to defend themselves against discreditable allegations that are peripheral to the issues. But the common law should not have any *a priori* categories concerning the cases where the collateral evidence rule should or should not be relaxed. It should be regarded as a flexible rule of convenience that can and should be relaxed when the interests of justice require its relaxation. Avoiding miscarriages of justice is more important than protecting the efficiency of trials. And in cases where the rule needs to be relaxed, it is unlikely that any question of potential unfairness to a witness will arise. That is because the allegations will be inextricably connected with the issues. If unfairness to a witness is likely to arise - for example, because the witness is not in a position to meet the allegation - the trial judge can take steps to ensure that no unfairness arises...."

"[56] The collateral evidence rule should therefore be seen as a case management rule that is not confined by categories. Because that is so, evidence disproving a witness's denials concerning matters of credibility should be regarded as generally admissible if the witness's credit is inextricably involved with a fact in issue. Consistently with the case management rationale of the finality rule, however, a judge may still reject rebutting evidence where, although inextricably connected with a fact in issue, the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. In such cases, the interests of justice do not require relaxation of the general rule that answers given to collateral matters such as credit are final."

Note that if the court is to grant leave under s.106(1) then this will require a consideration of s.192 of the Evidence Act.

Note the additional requirements of ss.43 and 45 of the Evidence Act when putting a prior inconsistent statement to the witness.

Note the provisions pertaining to proof of prior convictions found in ss.178-180 of the Evidence Act 1995(NSW).

Re-establishing Credibility – Section 108

Section 108

[Section 108](#) is in the following terms:

108 Exception: re-establishing credibility

(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) (Repealed)

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

(a) evidence of a prior inconsistent statement of the witness has been admitted, or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

and the court gives leave to adduce the evidence of the prior consistent statement.

With respect to re-establishing credibility pursuant to s.108(1), it is always important to bear in mind that the matters being adduced in re-examination must “arise” from cross-examination – see Evidence Act s.39.

Section 108(3)(b) has what might be considered an unusual application with respect to complaint evidence in sexual assault matters. Section 66 of the Evidence Act allows first hand hearsay complaint evidence to be admitted as evidence of the truth provided that the evidence was “fresh in the memory” of the complainant – see Evidence Act s.66(2). Where complaint evidence is not otherwise admissible under s.66 of the Evidence Act, it is open to the Crown to make application under s.108(3) to lead the compliant evidence in chief. This usually involves the trial judge asking defence counsel whether any of the matters under s.108(3)(b) will be suggested by the defence.

In [Graham v The Queen \[1998\] HCA 61, \(1995\) 195 CLR 606](#) the High Court of Australia determined that “fresh in the memory” meant “recent” or “immediate” and contemplated “hours or days”, not “years”. Section 66(2A) of the Evidence Act was enacted to overcome the effect of this decision. What constitutes “fresh in the memory” now permits a consideration of the nature of the event, the age and health of the person making the assertion, as well as the time between the occurrence of the asserted fact and the making of the

representation pursuant to the new subsection (2A).

In ***R v BD (1997) 94 A Crim R 131***, his Honour Hunt CJ at CL stated at 141-142:

“The significant words in para (b) are "will be" in the phrase "if ... it is or *will be* suggested". Thus, if it is *going to be* suggested that the complainant has fabricated or deliberately or otherwise reconstructed her evidence of the sexual assault or that her evidence has been the result of suggestion, evidence of "complaint" which she made becomes admissible during her *evidence in chief* — subject only to the grant of leave. 27 The need to rely upon s 108(3)(b) would arise only where the "complaint" was not already admissible pursuant to s 66. The grant of leave may perhaps in some cases depend upon the extent to which the evidence had failed to meet the requirements of s 66, but it should be unusual that leave would be refused.”

“Such is the importance of evidence of "complaint" in sexual assault cases (because of the powerful support which it gives to the complainant's credit), leave should in my opinion usually be granted unless the accused through his legal representative states expressly that no suggestion is to be made that the complainant's evidence has been the result of fabrication, reconstruction (deliberate or otherwise) or suggestion. Such an issue should be raised at a convenient time in the absence of the jury.”

It should be noted that a mere denial of the allegation is insufficient to satisfy the requirements of s.108(3)(b). In this regard the judgment of Greg James J in ***R v Whitmore [1999] NSWCCA 247, (1999) 109 A Crim R 51*** at [39] is instructive. In that case his Honour stated:

“[38]....To hold that every express denial of the events the subject of the charge would provide a basis for the admission of credibility evidence would in my view extend the ambit of the section beyond its true construction.”

“[39] In my view the denial of the events alleged without more does not necessarily suggest, expressly or implicitly, positively, reconstruction, fabrication or suggestion. Even if it did, on the issue of whether leave would be granted, the restraint from attacking credibility by going no further would be a most material matter mitigating against the grant of leave.”

It is important to note that both the legislation and the case law has moved to a broader definition of “fresh in the memory” for the purposes of s.66 of the Evidence Act. This means that in practical terms s.108(3) now has less work to do. Specifically, subsection (2A) of section 66 was enacted to overcome the more narrow definition of “fresh in the memory” determined by the High Court of Australia in *Graham v The Queen* [1998] HCA 61, (1995) 195 CLR 606.

The new subsection (2A) has been directly considered only once by the NSWCCA at the time of writing (May 2011) in the decision ***of R v XY [2010] NSWCCA 181***.

In that case Whealey J (Campbell JA and Simpson J concurring) stated:

“[79] For present purposes, however, it may be seen that the present legislation makes it clear that the context of the phrase "fresh in the memory" no longer is to be taken as an indication that it means "recent" or "immediate". The expression "fresh in the memory" is now to be interpreted more widely than did the High Court in *Graham's* case. No longer is the "core meaning" of the phrase to be interpreted as "essentially confined to an examination of the temporal relationship between the occurrence of the asserted fact, and the time of making of the representation". That temporal relationship remains a relevant consideration but it is by no means determinative of the question. Importantly, the court now must take into account "the nature of the event concerned". In *Graham's* case, that was not seen as a particularly important matter. It now takes its place as an important consideration in the factors to be considered.”

Later, his Honour stated:

“[99] Senior counsel's final argument was that the expression "fresh in the memory" remains in the section, and that therefore the High Court's ruling in *Graham* still has some work to do. For the reasons I have stated, that argument hardly assists the accused in the present matter. His Honour's reasoning was clearly in error for the reasons I have given. But it must also be said that the expression, "fresh in the memory", is now to be interpreted having regard to the considerations specified in s 66(2A) and such other matters as the court considers relevant to the question to be dealt with in the section. In particular, "the nature of the event" looms large in the matters now to be considered. That represents a very significant change to the interpretation given to the phrase "fresh in the memory" determined by the High Court in *Graham's* case.”

The broader definition of “fresh in the memory” will therefore see much more complaint evidence admitted as evidence of the truth under section 66. In that case, the evidence would not be credibility evidence (see s.101A). However, practitioners should remain aware of the credibility provisions with respect to complaint evidence that is not “fresh in the memory.”

Credibility of Persons Who Are Not Witnesses – Sections 108A and 108B

Section 108A

[Section 108A](#) is in the following terms:

108A Admissibility of evidence of credibility of person who has made a previous representation

(1) If

- (a) evidence of a previous representation has been admitted in a proceeding, and*
- (b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,*

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

(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 person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth, and*
- (b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.*

The terms of this section replicate the terms of section 103 regarding the credibility of witnesses. That being so, the same case law applies with respect to key issues. In summary:

- Whether a question “could” substantially affect the assessment of the credibility of the witness – the question must be taken at its highest: *R v Beattie* (1996) 40 NSWLR 155 at 163.
- As to “substantially affect” credibility Simpson J in [R v El Azzzi \[2004\] NSWCCA 455](#) at [183] stated that the question must have “potential to have a real bearing upon the assessment” of credibility.

Section 108B

[Section 108B](#) is in the following terms:

108B Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a criminal proceeding and so applies in addition to section 108A.

(2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:

*(a) is biased or has a motive to be untruthful, or
(b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates, or
(c) has made a prior inconsistent statement.*

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:

*(a) tends to prove that a witness called by the prosecution has a tendency to be untruthful, and
(b) is relevant solely or mainly to the witness's credibility.*

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

*(a) the events in relation to which the defendant is being prosecuted, or
(b) the investigation of the offence for which the defendant is being prosecuted.*

(7) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

The section substantially replicates key concepts in s.104 regarding cross-examination of the accused as a witness. Case law relevant to s.104 is also of assistance in the interpretation of this section:

- The interaction between this provision and the character provisions of the Evidence Act was discussed by Simpson J in [R v El Azzi \[2004\] NSWCCA 455](#) wherein her Honour considered that the “more obvious” view was that s.112 where the accused had positively adduced evidence as to their good character, whereas the credit provisions were relevant where the accused had attacked the general honesty (in general terms and over and above the subject matter of the proceedings) of a witness for the Crown.
- The granting of leave should be regarded as exceptional – [Phillips v The Queen \[1985\] HCA 79, \(1985\) 159 CLR 45](#). It is impermissible to suggest that the accused has a motive to be untruthful in that he has an interest in being acquitted – [Robinson \(No.2\) v The Queen \[1991\] HCA 38; \(1991\) 180 CLR 531](#).

Section 108B is not the subject of any appellate authority at the time of writing (May 2011). The section does, on its face, raise the prospect that the character of the accused can (with leave) be raised even where the accused does not enter the witness box, providing that the accused has adduced evidence that satisfies subsection (4)(a). To take an example – what would have happened to the evidence of Mr El Azzi having a previous conviction for bribery in the event that he had not entered the witness box? This section may have assisted the prosecution – see [R v El Azzi \[2004\] NSWCCA 455](#).

Witnesses with Specialised Knowledge – section 108C

[Section 108C](#) is in the following terms:

108C Exception: evidence of persons with specialised knowledge

(1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

(a) the person has specialised knowledge based on the person's training, study or experience, and

(b) the evidence is evidence of an opinion of the person that:
(i) is wholly or substantially based on that knowledge, and
(ii) could substantially affect the assessment of the credibility of the witness, and

(b) the court gives leave to adduce the evidence.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

The essence of this section is that it creates an exception to the credibility rule for expert witnesses where cross-examination as to credit could substantially affect the assessment of the credibility of the witness.

As to what “could substantially affect the credibility of the witness”:

- Whether a question “could” substantially affect the assessment of the credibility of the witness – the question must be taken at its highest: *R v Beattie* (1996) 40 NSWLR 155 at 163.
- As to “substantially affect” credibility Simpson J in [R v El Azzi \[2004\] NSWCCA 455](#) at [183] stated that the question must have “potential to have a real bearing upon the assessment” of credibility.

The granting of leave under s.108C(1)(b) is subject to the considerations outlined in s.192 of the Evidence Act.

Note that the requirement of “specialised knowledge based on the person’s training, study or experience” as found in s.108C(1)(a) mirrors in terms the requirements to qualify as an expert witness under s.79 of the Evidence Act. The case law on this issue is therefore relevantly the same.

Note also the requirement that the expert opinion be based “wholly or substantially on that knowledge.” Again this mirrors in terms section 79 concerning expert opinions.

An electronic copy of the most recent edition of this paper, complete with hyperlinks to relevant cases and legislation, can be found on the internet at www.CriminalCLE.net.au on the “Evidence Page” of that website.

I am happy to answer any questions you have concerning the content of this paper. I am best caught on my mobile – **0408 277 374**. Please respect the “no fly zone” on my phone between 9.30am-10.00am on a court day – I am about to go into court too!! Other than that, you are fine to call anytime. Alternatively, feel free to drop me an email. I will almost always respond within 24 hours. My email address is dark.menace@forbeschambers.com.au

I have endeavoured to state the law of New South Wales as at 27 May 2011.

Mark Dennis
Forbes Chambers