The Three C's –
Competence, Compellability and Credibility of Witnesses

by John Nicholson SC and Elizabeth Nicholson

There is little to link competence, compellability and credibility together, except, for some intertwining of and exclusion running between competence and compellability; they all begin with the letter "C"; all occupy more than one section of the Evidence Act 1995 [hereafter EA], and Matt Dimech, from the Children's Legal Service nominated the three "C" as topics to be included in the one paper.

Competence of witness

In what must be one of the shortest judgments (one page) upholding a conviction appeal, the conviction was set aside and a new trial ordered because of a failure of the presiding judge[1] to make an order that the eight-year old complainant in a child sexual assault case was incompetent to give sworn evidence but competent to give unsworn evidence warnings pursuant to s.13 (4) EA. The Crown had conceded the appeal from the outset, because, absent such an order, the child is presumed competent to give sworn evidence, and absence such an order his/her unsworn evidence is not sworn evidence on the record, available to the jury for its consideration.

The relevant sections of the EA dealing with competence are found in ss.12 – 19. As is consistent with the general structure of the EA, s.12 states the default position, and subsequent sections provide exceptions, modifications, amplifications and refinements. The default position provides every person is competent to give evidence, and a person who is competent to give evidence about a fact is compellable to give that evidence. As will be noted the second default position leaves open the proposition that not all persons are competent to give evidence about a fact. At first blush it may seem to be inconsistent with the opening default position. Clearly the first default position, expressed as a universal absolute, as a matter of logic cannot possibly apply to all people. New born babies, persons suffering high levels of dementia, persons with profound disabilities, persons in comas and the like are, in reality not competent to give evidence.

As Odgers points out: the section establishes a primary position in all proceedings, all witness are both competent to give evidence and compellable to give evidence. The succeeding provisions (ss. 13 to 19) provide exceptions to those general propositions.[2] Competence is to be presumed unless the party asserting incompetence, or limited incompetence proves the contrary on the "probabilities" and an appropriate order is made by the court acknowledging a rebutting of the presumption and permitting an unsworn or otherwise modified position.

What are the limits in respect of a lack of competence

[1] Nicholson DCJ

[2] Odgers, Stephen; *Uniform Evidence Law* 10th Edition, Thompson Reuters, Pyrmont, 2012; p.60.

Lack of competence is defined in EA s.13 as limited to situations where a person is not competence to give evidence about a fact; or, although competent to give evidence about a fact is not competent to give sworn evidence about a fact. As to the first group, the section recognises, that a person may be competent to give evidence about a particular fact, but not competent to give evidence about other facts. The simplest example of that may be a person who as a consequence of severe mental impairment, may be able to give evidence of his name, and his place within a family structure, where he lives, that he saw an accused before standing outside his home, but unable to give evidence about any conversations that he may have heard outside his home a week, or a year ago. Another example of partial competence may be found in those who suffer from traumatic amnesia. This group can comprise both victims and accused persons. Yet another example may be those who during the course of giving their evidence lose competence part way through the evidence say, because of some intervening event.

What inhibits a person who, while competent to give evidence about a fact is incompetent to give sworn evidence about that fact? The answer is a lack of understanding about the obligations arising from the taking of an oath or making of an affirmation to tell the truth. It is essential that a person have a capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. Such a person, however, may be competent to give unsworn evidence about a fact. The largest group of persons in the category of being incompetent to give sworn evidence, but competent to give evidence about a fact are children of tender age.

However, before such a person will be permitted to give evidence, the presiding judge must prepare the witness in the presence of the jury and/or parties. That preparation will include and admonition that it is important for the witness to tell the truth; that there may be questions asked that the witness will not know, or cannot remember the answers to, and that he or she should tell the court if this occurs; and that he/she may be asked questions that suggest certain statements are true or untrue, and in those circumstances the witness should agree with the statements the he/she believes to be true, and should feel no pressure to agree with any statements that he/she believes are untrue. Although, not clearly stated in the one page judgment referred to above, it may have been in this last area, of dealing with Browne v Dunne type allegations, and similarly framed questions, that error was made by the trial judge in the child sexual assault trial referred to. In the A.C.T. in addition to telling the person to tell the truth, the court needs to be satisfied the witness not only accepts the instruction but also understand it. Odgers disputes the soundness of the A.C.T. position[3]. In NSW the position is different.

Obtaining assistance of an expert

Apropos of determining whether a witness is incompetent and any extent of incompetency, EA s. 13 (8) makes provision of a court informing itself as it thinks fit, including accepting submission by counsel, and obtaining information from an expert with relevant specialised knowledge. This may be particularly useful in cases of young children with learning difficulties, impoverished development, and in cases of gross disabilities such as speech impairment, deafness, muteness and the like. In one case known to the authors, a young woman suffering MS, suing in negligence, was

[3] See f.n. 2 at 67.

assisted in giving evidence by one of her carers who was able to translate for the court her answers, otherwise unintelligible to all others in the court, but understood by the carer from their many years of association. She succeeded in obtaining several million dollars in damages.

EA sections 30 and 31 are about removing incompetence caused by language barriers and disabilities experienced by deaf and mute witnesses.

Where the Court has investigated competence of a witness and permitted the witness to give unsworn evidence of facts, the court's decision and reasons for it should be expressed clearly. In the absence of any finding of some level of incompetence a witness must be sworn before his/her evidence becomes part of the record of proceedings. In the absence of an order of the court permitting unsworn evidence, that unsworn evidence is incapable of playing any part in the proceedings.

Where for any reason (such as death or stroke) a witness ceases to be competent before finishing his/her evidence, such evidence as has been received, remains admissible. Of course, questions of unfairness may arise, particularly if the evidence in chief has not been completed, or where there remains substantial matters left to test in cross-examination. In such cases, applications may be made for exclusion of the evidence upon some discretionary ground (e.g. EA s. 135 and s. 137).

Judges and jurors involved in proceedings are not competent to give evidence in those proceeding; but a juror is competent to give evidence in the proceeding about matters affecting the conduct of the proceeding (e.g. foreperson informing the judge of an inability to reach a verdict; a juror reporting misconduct by himself/herself or some other juror). (See EA s.16).

Compellability

Again the starting point, in respect of compellability, is to be found in EA s.12 (b). It sets the default position, namely: the measure of compellability is set by the measure of a person's competence to give evidence about a fact. Thus, if a person is competent to give evidence about a fact but not other facts, he/she is only compellable to give evidence in respect of the fact or facts within his/her competence. Thus where a person has limitations on his/her competence to give evidence about a fact, it is the limitation of the competence that sets the borders of compellability. A witness whose competence is limited to giving unsworn evidence, can only be compelled to give the unsworn evidence he/she is competent to give.

The default position having been set, along come the exceptions. A person will not be compellable to give evidence on a particular matter in circumstances where adequate evidence on the matter has already been given, or will be given from one or more other persons or sources <u>and</u> substantial delay or substantial cost would be incurred in ensuring that the would-be witness would have the capacity to understand a question about the matter and give an answer that can be understood. It frequently happens for one reason or another that the interpreter does not turn up to court. In such a case an argument can be made of a would-be witness's reduced capacity pursuant to EA s.14.

Circumstances in which persons may be excused from compellability
EA s. 15 – s. 19 delineate the circumstances in which a person may be excused from compellability. There are numerous persons who by virtue of their office enjoy an absolute or limited right of non-compellability. The Sovereign Queen, the Governor-General; the Governor of a State or Administrator of a Territory, a foreign sovereign or Head of State of a foreign country all enjoy absolute non-compellability.

Members of the various parliaments of Australia enjoy a limited non-compellability. This limited non-compellability operates if compelling the member to give evidence would prevent the member from attending sittings of the House, joint sitting of the Houses of the Parliament; or committee meeting of the a House or Parliament. To the extent that judges and jurors are incompetent to give evidence in proceedings they are not participating in, then neither are they compellable. A person who is, or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court that is hearing the evidence gives leave.

Compellability of accused and associated accused persons
Section EA 17 is targeted solely at criminal proceedings. It deals with the right of an accused person to give evidence. The section only applies in criminal proceedings. Firstly, the EA pronounces an accused person as being incompetent to give evidence for the prosecution. Thus, those prosecutors who would wish to grandstand by calling the accused, are not permitted to do so. Likewise an associated accused is not compellable to give evidence for or against an accused, unless that associated accused is being tried separately. Where a co-accused in a trial chooses to give evidence, the trial judge, in the absence of any jury hearing the matter, must satisfy himself/herself that the co-accused witness is aware he/she is not compellable to give evidence for or against the associated accused who is not in the witness box, regardless of the party (prosecutor, associated accused or own counsel) questioning the witness.

Of course, when an associated accused witness enters the witness box in his own case, and voluntarily chooses to answer questions from the prosecutor in cross-examination about his associated accused – a situation which often happens – that witness is not "a witness for the prosecution". In those circumstances no question about his competence arises. But, in the absence of any earlier explanation by the trial judge as to the limits of compellability, a prudent counsel for the maligned accused would seek to raise the matter in the absence of the jury.

Yes, there is an EA Dictionary definition of '**associated accused**'. It also is confined to criminal proceedings. In relation to a defendant in a criminal proceeding it means a person against whom a prosecution has been instituted, but not yet completed or terminated for either:- an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; **or** that relates to or is connected with the offence for which the defendant is being prosecuted.

Compellability of spouse (including de facto partners) and their children
EA s. 18 makes significant changes to the common law concepts of compellability of witnesses having what we are describing as a special relationship with an accused person. The section only applies in criminal proceedings. Yes, there is also an EA Dictionary definition of ' **criminal proceeding'.** It defines the term to mean

prosecution for a criminal offence, committal proceedings, bail proceedings, and sentencing proceedings. Thus, those having a relevant special relationship with the accused are not compellable witness in those proceedings. Importantly the section limits the special relationship category of persons to spouse, de facto partner[4], parent or child of an accused, who objects to giving evidence. The objection is to be made by the person prior to giving evidence, or as soon as practical after the person has become aware of the right to object to giving evidence, whichever is the latter. Further, if no objection has been made, and the Court becomes aware the witness falls into one of these special relationship categories, then the Court must satisfy itself that the person is aware of the effect of the section as it may apply to him/her.

Any objection that is made must be determined in the absence of any jury hearing the matter. In determining an objection the court concerns itself with whether there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and accused if he/she gives evidence; and whether the nature and extent of that harm outweighs the desirability of having the evidence given. EA s.18 (7) prescribes a list of five matters that must be taken into account – but specifically indicates it is not limiting the consideration of the court to those five matters. Relevantly, the five matters to be considered are: the nature and gravity of the offence(s) charged; the substance and importance of any evidence the person might give and the weight likely to be attached to it; whether any other evidence concerning matters to which that evidence may relate is reasonable available to the prosecutor; the nature of the accused's relationship with the person; and whether the person is being called upon to disclose in evidence any matter received in confidence from the accused.

Where an accused's child is to be called as a witness, it is important that independent legal representation be obtained for the child. Sometimes the child may be the victim, sometimes the child may be a sibling of the victim; sometimes the child may be an eyewitness. This audience would not doubt that giving evidence for a child may be stressful, indeed traumatic. The giving of evidence, without any other consideration may be harmful to a child. The giving of evidence against a parent's whose reputation, wealth, forced absence from the family unit or liberty may, as a result of the child's evidence be at risk is an obvious source of potential harm to the child. These matters and the child's right to object need to be explained by a legal representative with no conflict of interest arising from the outcome of the proceedings, that is an independent legal advisor.

Compellability of spouses (including de facto partners) in domestic violence
EA s. 19 however institutes a compellability of accused's spouses (including de facto partners) and others who might have enjoyed a benefit from an EA s. 18 objection, in circumstances where certain prescribed offences are before the court. Using a fairly broad-brush approach those offences included endangering children in employment;

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[4] 'de facto partner' is defined in Cl. 11 of Part 2 of EA Dictionary. It distinguishes between 'de facto relationship' and 'de facto partner'. Simply because one is in a de facto relationship, does not mean that the other party is regarded by the EA as a 'de facto partner.' It is a question of fact for the court. To be taken into consideration are the following: duration, nature and extent of common residence; degree of financial dependence or interdependence and any arrangements of financial support between them; ownership, use and acquisition of their property; degree of mutual commitment to a shared life; care and support of children; reputation and public aspects of the relationship.

unauthorized employment of children; child and young person abuse; neglect of children and young persons, domestic violence offences; contravening apprehended violence order offences and child assault offences as prescribed in s. 279 (1)(d) Criminal Procedure Act 1986 (hereafter CPA).

However, CPA s. 279 (4) permits the court to entertain an application excusing a spouse (including a de facto partner) from giving evidence in those offences covered by that section. Clearly, notwithstanding any urging from an accused to encourage a any his advocate to participate in, or encourage a spouse/partner to make or pursue an objection, all advocates for an accused person should recognise his/her involvement in such an application would involve an ethical conflict of interest. A genuine question of whether such instructions could be given by a client to his/her advocate would seem to be an insuperable hurdle for the advocate.

Credibility of witnesses and persons.
No issue is more important to a plaintiff, prosecution or defence than the credibility status of a witness. Proof – or inability to prove at the end of the hearing the relevant cause of action, or the extent of damages, or the essential elements of an offence invariably depends, at least in part if not entirely, upon the credibility status of the witnesses for plaintiff, prosecution or defence. In our system of justice, proof of the things almost invariably depends upon oral evidence that has withstood the test of cross-examination.

Frequently, person who have not given oral sworn evidence in court, have still, in one way or another contributed to the evidence received by the court during a trial hearing; for example hearsay evidence may have been admitted, telephone taps of an accused's dealing and discussions with a person, sometimes known, sometimes unknown; the reception of a record of interview that is relied upon by an accused in lieu of attending the witness box to give sworn evidence. As will be seen, there is scope for dealing with the credibility of persons who have contributed to the received evidence without being sworn witnesses.

While not all court proceedings involve the reception of evidence, (for example most appellate cases before the intermediate and ultimate appeal tribunals), in those court hearing where evidence is to be received and acted upon, it is trite law that only relevant evidence can be admitted. What constitutes relevant evidence is described in EA s. 55. EA s. 56 provides that relevant evidence is admissible in proceedings – unless otherwise provided.

S. 55 EA sets, as it were, the default position in respect of what constitutes relevant evidence. The test of relevancy created by s.55 EA is sufficiently wide to embrace mechanisms which test or challenge the credibility status of a witness. The phrase, "evidence that if it were accepted could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue" recognises evidence going to the topic of believability a witness as affecting (directly or indirectly) the assessment of the probability of a fact in issue. If the witness can be believed, that will have a positive impact on such an assessment; if the witness is unbelievable, that would have a negative impact on that assessment. In any event, the relevancy rule created by s. 55 EA makes clear evidence relating only to the credibility of a witness is not to be taken as irrelevant on the basis only that it is credibility evidence.

If one looks closely at the structure of the EA it become apparent the EA is comprised of five Chapters : Preliminary; Adducing Evidence; Admissibility of Evidence; Proof; and Miscellaneous. Within Chapter 3 **Adducing Evidence** there are eleven Parts. Included among these Parts are the workhorses of the EA: Relevance; Hearsay; Opinion; Admissions; Tendency and Coincidence; **Credibility**; Character and Identification Evidence.

So it is, that within Chapter 3 Adducing Evidence is Part 3.7 Credibility. Stephen Odgers gives a useful overview of the Part;

> This Part deals with "credibility evidence", defined in s.101A. Section 102 creates the "credibility rule" that "credibility evidence about a witness is not admissible. However s. 108C creates an exception for expert evidence concerning the credibility of a witness. Further, under s. 103, credibility evidence may be adduced in cross-examination of a witness if the evidence "could substantially affect the assessment of the credibility of the witness". Section 104 imposes further restrictions on cross-examination of a defendant in criminal proceedings about a matter that is relevant to the defendant's credibility. If the witness denies what is put in cross-examination, or does not admit it, the credibility rule will not prevent evidence being adduced to prove it, if the court gives leave under s. 106 (1). Leave is not required if the evidence falls into one of the listed categories in s. 106(2). Section 108 regulates credibility evidence adduced by the party calling the witness for the purpose of re-establishing the credibility of the witness (although credibility evidence intended to support the credibility of a witness may also be admissible under s. 106, s. 108C and s. 110). In Div 3, s. 108A deals with the less common situation of the credibility of persons who are not witnesses, but who made an out-of court representation that has been admitted into evidence and provides that "credibility evidence" about such a person is inadmissible "unless the evidence could substantially affect the assessment of the person's credibility." Section 108B imposes further restrictions on admission of such evidence where the person who made the representation is a defendant in criminal proceedings.[5]

Credibility in all its forms and definitions

The EA Dictionary defines **credibility** of a witness to "mean 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."

For reasons beyond comprehension, the definition of **credibility evidence** is not to be found in the EA Dictionary other than by way of a reference back to EA s. 101A. found in Part 3.7 Credibility. It 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/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"

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[5] See f.n. 2 at p.536

It has been understood to include all evidence bearing on the reliability of a witness generally as well as evidence bearing on the reliability of particular testimony of the witness.[6] Potentially, it includes truthfulness or veracity, intelligence, bias, motive to lie, opportunities of observations, reasons for recollection or belief, powers of perception and memory, any particular special circumstances affecting competency, prior inconsistent statements, prior consistent statements, internal inconsistencies and ambiguities in testimony and direct contradiction of testimony. It includes evidence adduced to discredit a witness on these bases, but also evidence supporting credit of the witness.

As is consistent with the general structure of the EA a default position is set in respect of credibility evidence by the credibility rule. The credibility rule section of the EA is one of the shortest in the Act: "*Credibility evidence about a witness is not admissible.*" It is easy to reconcile s.55 and s.102. Section 102 has the effect of making any relevant credibility evidence about a witness inadmissible. But not for long. Having stated what appears to be a categorical position refinements to that position begin to appear from s. 103 through to s.108C. The common law rule was that evidence going solely to the credibility of a witness was not permitted while the witness was giving evidence in chief.

That rule appears to be reflected in EA Part 3.7's structure. We highlight this because it is a frequent mistake of many leading evidence in chief from a witness to ask witness credibility questions in an attempt to defuse or hopefully persuade the cross-examiner to drop a credibility attack in cross-examination. Sometime the witness credibility questioning may be a matter of little moment, on others in is an attempt to steal thunder of the cross-examiner.

But coming back to EA s.56 for a moment. If the evidence that is sought to be tendered, is being tendered for a purpose that is not caught by the credibility rule, but is being tendered for some other relevant purpose, usually going to a fact in issue, then by virtue of s.56, the evidence remains admissible. Part 3.7 of the EA would not catch such evidence.

It may also be useful to expose examples of circumstances where the credibility rule does apply. Credibility rule does apply:

- if the evidence is relevant only to credibility and not to any fact in issue;[7] or
- if the evidence is relevant to credibility and a fact in issue, but it is inadmissible for its fact in issue purpose (for example because of the hearsay rule, or the tendency and coincidence rule);[8] and
- where the evidence does not otherwise fall within an exception provided by the Act. While questions going solely to a witness's credibility are caught by the credibility rule, if they are asked in chief. Re-examination is another matter. Where a witness's credit has been maligned in cross-examination there is scope to ask questions seeking to restore credit.

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[6] *R v Milat* (unreported, NSWSC, Hunt CJ at CL, 9 April 1996). See also *R v Rivkin* [2004] NSWCCA 7 at [332]

[7] Evidence Act 1995 (NSW) s102

[8] Evidence Act 1995 (NSW) s101A

The remainder of this paper deals with exceptions to the credibility rule for credibility evidence (that is evidence that is not otherwise relevant to a fact in issue and admissible for that purpose, but only relevant to credibility or is inadmissible for a non-credibility purpose).

Exceptions – cross examination

The credibility rule does not apply to evidence adduced in cross-examination, if the evidence could substantially affect the assessment of the credibility of the witness: EA s. 103 (1). Subsection (2) sets out matters that the Court can have regard to in determining whether the evidence substantially affects the assessment of the witness's credibility. Those factors are not limited to but do include:

- whether the evidence tends to prove the witness (knowingly or recklessly) made a false representation while under an obligation to tell the truth; and
- the period elapsed since the acts or events to which the evidence relates were done or occurred.

This section of the EA has recently been amended. Prior to the 2007 EA amendments, the test was whether the (credibility) evidence had substantial probative value. The new provisions shift the focus to whether the evidence substantially affects the assessment of credibility. Clearly the requirement of "substantial/ly" remains the same and reflects the limitations on the common law position.

The use of the word 'could' is also instructive. The Court must consider whether the evidence is capable of substantially affecting the assessment of the credibility of the witness, but it is not required to necessarily reach a finding that it is likely to do so.[9]

It should be remembered that any attack on credibility should be based on evidence that has some reliability.[10]

'Substantially affect'

In his recent paper[11] Tom Quilter of the ALS sought to answer the question: "What does 'substantially affect' mean?" by reference to one of Whealy J's judgments. Whealy J's starting point was to contrast "substantial" with the use of the word "significant" in relation to the probative value of evidence, reminding himself that "significant" has been held to mean "important" or "of consequence"(See *Lockyer*[12]). His Honour then set for himself this test:

> 19. To my mind there must be such a connection between the evidence to be admitted and the credit of the witness at the time of giving the evidence that the former is likely to affect the latter in a substantial way…
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> 20. Those matters set out in sub-ss 2(a) and (b) are not the only matters the Court may take into account when determining whether to admit the evidence, but they do highlight the fact that there must be a real correlation between the evidence to be admitted and the credit of the witness, In addition, they are reliable indications as to the type of evidence that will satisfy the statutory hurdle.[13]

[9] *R v Shamouil* (2006) 66 NSWLR 228

[10] *Campbell v R,* WA CCA 25 August 1993 BC 9301393 (unreported)

[11] Quilter, Tom; *Credibility Evidence – Attack and Defence (EA: S103 & 104)*; 18 May 2013.

[12] (1996) 89 A Crim R 457 at 459.

[13] Regina v Lodhi [2006] NSWSC 670.

Tom Quilter helpfully set out examples that are likely to "substantially affect" an assessment of a witness's credibility. I have set out his list which he credits as being largely based on Odgers' *Uniform Evidence Law* 9th Ed.:

- Bias[14]
- Motive to be untruthful[15]
- Opportunities of observation
- Reasons for recollection
- Powers of perception and memory[16]
- Prior inconsistent statements (which might also include an alibi notice[17])
- Internal inconsistences and ambiguities in testimony
- Prior discussion about the fact of the case[18].

To Quilter's list can be added:

- Evidence of obstructions and absence of lighting (re identification and capacity to observe act constituting the offence/negligent act.
- Intoxication, stress/trauma levels, other mental capacities that may impact upon ability/capacity to have made the observations claimed in evidence.
- Conflict of interest – i.e. the "give up" with a discount for testifying. (probably picked up by "motive to be untruthful").

What about "the lie"?

Another area of credibility cross-examination where advocates are thrilled to venture is the lie. A lie, of course is an untruth deliberately told with an intention to deceive. It is important to remember as a general matter of practice there are three concepts housed in the word "lie". Too frequently the cross-examiner has not set the terrain correctly when seeking to cross-examine on lies. It is not enough to establish the evidence given was untrue. There are two other matters equally important: deliberateness, and intent to deceive. Children, particularly Aboriginal children, do not understand the nuances between a statement being "untrue" and a statement being a "lie". Quite often police don't either. Frequently in ROIs an officer will say "you lied" in circumstances where the child knows what he/she said has been shown to be untrue, but also knows no deception was intended; but yet feels compelled to agree he/she has lied. Likewise, I have read transcripts of court proceedings, where during cross-examination the same mistake is made by the questioner from both defence and prosecution.

Be all that as it may, the real issue for the court to determine in the face of an objection is whether a concession that a lie was told "could substantially affect the assessment of the credibility of the witness". No doubt one question to be determined on the objection would be whether the witness "was under an obligation to tell the truth" at the time of the conceded lie. Tom Quilter again looks to Whealy j's judgment for guidance:

> 23. That brings me then to really the nub of the arguments. The Crown concedes, and I think very fairly so, that not every lie that is told has

[14] Kamm v Regina [2008] NSWCCA 290.
[15] R v Sullivan [2003] NSWCCA 100 at [108].
[16] See paper authored by Phil Strickland SC on Memory.
[17] Regina v Toai Siulai [2004] NSWCCA 152.
[18] Day v Perisher Blue Pty Ltd [2005] NSWCCA 110.

> substantial probative value. Far from it. We are all familiar with little white lies that are told, sometimes, to get people out of an embarrassing situation, sometimes even to avoid hurting or confronting other people. Those sort of lies stand at one end of the spectrum. At the other end, there are the types of lies that are envisaged in sub-s (2) of s. 103 of **Evidence Act**. I gave an example during the course of argument…where a person may fill out a form, make deliberately false and misleading statements, in circumstances where if the truth were told the person would not be entitled to the pension or social benefit concerned. Such a lie stands at the opposite end of the spectrum.[19]

Again Tom Quilter has made a list of matters which have satisfied the s.103 test:

- A false statement in a previous job application by the accused.[20]
- Previous fraud charges.[21]
- Previous convictions for dishonesty were allowed (by Majority)[22].
- Prior convictions for "goods in custody" and supply drugs (by majority).[23]
- Lies about other damages in a tort claim.[24]
- A previous criminal conviction for corruption (but not an internal departmental charge).[25]

Accused entitled to further cross-examination protections

In addition to the restrictions imposed in EA 103, further restrictions found in EA s.104 are imposed in criminal proceedings in respect of cross-examination limits qua the credibility of the accused. Leave is required before an accused person can be cross-examined about credibility matters[26], other than:

- bias or motive to be untruthful;
- that the accused is/was unable to be aware of or recall matters to which his/her evidence relates;
- prior inconsistent statements of accused.[27]

Limitations on the granting of leave

Further, leave must not be given unless the accused has adduced evidence (and it has been admitted) that goes to the credibility or tendency towards untruthfulness of a prosecution witness.[28] That threshold will not be met simply by reference to evidence of conduct in relation to the events in question or the investigation of the offence in question.[29] Those counsel appearing for an accused forced to rely upon EA 104 should gain focus by remembering the sections title: "**Further protections**".

In considering whether to grant leave there are matters the court must consider. Leave cannot be granted unless the defendant has adduced evidence tending to prove a prosecution witness has a tendency to be untruthful and that evidence was relevant

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[19] See f.n. 13
[20] See f.n. 13.
[21] R v Ronen & Ors [2004] NSWSC 1290.
[22] Regina v Bradlley Scott Burns [2003] NSWCCA 30.
[23] R v Lumsden [2003] NSWCCA 83.
[24] State Rail Authority of NSW & Anon v Brown [2006] NSWCA 220.
[25] R v El-AZZI [2004] NSWCCA 445
[26] Evidence Act 1995 (NSW) s104(2)
[27] Evidence Act 1995 (NSW) s104(3)
[28] Evidence Act 1995 (NSW) s104(4)
[29] Evidence Act 1995 (NSW) s104(5)

solely or mainly to the witness's credibility. In other words, if the defence has cross-examined a prosecution witness on matters that have a flavour of testing the witness's credibility, but were also directed to some issue of fact or non-credibility matter, then the test to be resolved is whether the sole or main purpose of the cross-examination was to challenge the credibility of the witness. Quilter argues the court must not grant leave to the prosecutor unless the evidence adduced by the defence in cross-examination of the prosecution witness was:

1. actually admitted;
2. relevant mainly or solely to the witness's credibility[30];
3. unrelated to the events surrounding the charge(s);
4. unrelated to the investigation of the relevant charge(s);[31]

So the fact that an accused has cross-examined prosecution witnesses on matters of credibility does not automatically give the prosecution the right to leave – it remains a matter for the Court. The Court of Criminal Appeal has emphasised 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 s104 (2) discretion to grant leave to cross examine… 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*'.[32] (Our emphasis).

EA sections 103 and 104 work together. The Court of Criminal Appeal was critical of a trial judge for not considering rigorously EA s. 103 before granting leave to the prosecution pursuant to s.104[33]. Quilter argues section 104 requires a court to undertake two exercises in order to determine the restrictions that will apply to a prosecutor:

1. First, it requires the court to carefully examine the evidence that the prosecutor intends to adduce; and
2. Secondly, (if necessary) it requires the court to carefully examine the evidence [earlier] adduced by the defence lawyer to impugn the credibility of a crown witness.[34]

Such an exercise, Quilter argues poses a hurdle for the prosecution to stride above:

- Establishing the proposed evidence substantially affects the credibility of the accused - otherwise it will be excluded: s.103; s.104 (1).

On the other hand, the prosecutor may be able to:

- Establish the evidence falls within a confined set of subject areas (set out above) thereby vitiating the need to seek leave: s. 104 (3).[35]

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[30] R v Hancock NSWCCA unreported 21/11/1996; R v Diamond NSWCCA (unreported 19/6/1998)
[31] See f.n. 11
[32] *R v El-Azzi* [2004] NSWCCA 455 per Simpson J at [200] (Santow JA agreeing at [12].
[33] See f.n. 30. Observation taken from Quilter T; see f.n.11
[34] See f.n. 11.
[35] See f.n. 11.

Cross examination of accused by co-accused
EA section 104 (2) does not limit the requirement of leave to the prosecution only. If another accused/defendant wishes to cross examine the accused about matters other than those set out in EA s.104 (3), then leave will still be required and subject to considerations under EA s.192.

Further, EA s. 104 (6) provides that leave is not to be given unless the accused to be cross examined has given evidence adverse to the accused who is seeking to cross examine and the Court has earlier admitted that evidence.

Adducing credibility evidence from other sources (not from the witness)
If matters as to his/her credibility have been put to a witness in cross examination and the witness has denied those matters, EA s.106 (1) permits evidence going to that witness's credibility to be adduced otherwise than from the witness.

There are several preconditions that must be met before this can occur:
1. The substance of the evidence must have been put to the witness in cross examination;[36]
2. The witness must have denied, or not admitted, or not agreed to, the substance of the evidence;[37] and
3. The court must give leave.[38]

The precondition (3) above (obtaining leave of the court) is not required only where the evidence sought to be adduced tends to prove that the witness
- is biased or has a motive to be untruthful;
- has been convicted of an offence (including against the law of another country);
- has made a prior inconsistent statement;
- is/was unable to be aware of matters to which his/her evidence relates;
- has (knowingly or recklessly) made a false representation while under an obligation to tell the truth.[39]

Again, leave requires a consideration of EA s. 192 (2) factors. Further, discretionary or mandatory exclusion remains possible under the provisions in Part 3.11 (Discretionary and Mandatory Exclusions).

What about if the accused does not give evidence is he completely safe?
It is not unusual for an accused not to give sworn evidence in a trial. Frequently he/she will rely upon a record of interview, or the cross-examination of his counsel. It may be that in the interview he may describe himself/herself in a self-serving way denying that he would behave as is alleged, or has never been in trouble with the police; that he/she is not a person who tells untruths or lies – that is to say the accused, even before the trial began, raises a "previous representation" that may substantially affect the assessment of his/her credibility on that issue.

[36] Evidence Act 1995 (NSW) s106(1)(a)(i)
[37] Evidence Act 1995 (NSW) s106(1)(a)(ii)
[38] Evidence Act 1995 (NSW) s106(1)(b)
[39] Evidence Act 1995 (NSW) s106(2)(a) – (e).

On the other hand, the definition of **previous representation** leaves open for consideration any representation by a person that has been admitted during the hearing before the accused gives evidence. Thus, if during the course of the hearing, counsel on behalf of the accused puts questions suggesting the witness has a tendency to be untruthful, and that proposition is admitted or conceded, then, subject to leave being given, the prosecution is entitled to lead evidence of the status of the accused's lack of credibility.

EA sections 108A and 108B setup a facility parallel to EA s103 and s.104 for the prosecution to call credibility evidence about the person who made the representation which was admitted in evidence, but has not been called as a witness in the trial. As with EA s.103 and s.104, s. 108A and s.108B follow the same pattern. EA sections 103 and 108A set up a general facility to lead evidence to rebut unfavourable witness credibility status evidence, in circumstances where the person who made the unfavourable witness credibility representation is before the court as a witness (s.103) or is not being called (108A). EA sections 104 and 108B apply only in criminal proceedings to offer some protection for the accused, and place inhibitions in the path of the prosecution in respect of each of the preceding situations.

The additional protections of EA s. 108B apply. They are the same as found in EA s.104 namely that:

1. Leave will be required (unless the evidence is about bias; motive to be untruthful; that the accused is/was unable to be aware of recall matters to which the previous representation relates; or has made a prior inconsistent statement); and
2. Leave must not be given unless evidence adduced by the accused has been admitted that
    a. tends to prove a witness called by the prosecution has a tendency to be untruthful; and
    b. is relevant solely or mainly to the witness's credibility.

Further, where the party seeking to adduce evidence under EA s.108B (2) is a co-accused, he/she must not be given leave unless the previous representation of the accused that was admitted included evidence adverse to the particular accused seeking leave.[40] This is in similar terms to EA s, 104 (6).

If all else fails the final fallback position, argues Quilter are the perennial favourites, EA 192 (leave should not be granted), and/or EA s. 137 (evidence should still not be admitted.[41]

Section 192 of the Act deals with the factors the Court can consider when granting leave and permits leave to be granted "on such terms as the Court thinks fit". The Court must have regard to s192 in any determination of leave to cross-examine an accused on credibility matters.

It is worth making the point, as Tom Quilter did, that in the event the prosecution is successful in eliciting evidence going to the status of the accused's credibility, that in

[40] Evidence Act 1995 (NSW) s108B(6)
[41] See f.n. 11.

a trial the jury should be directed, and in a summary matter the Magistrate should direct himself/herself that the cross-examination was directed to the accused's credibility only. The evidence generated, if accepted, cannot be used as in anyway persuasive of the accused guilt, or as evidence that he had a tendency to commit offence such as those before the court.[42]

Special Status of Certain Expert witnesses
Notwithstanding the EA section number might be thought to suggest this section is also part of the 108A -108B duopoly, a closer look at the structure of the EA makes clear this section has nothing to do with the previous two section. It is in a Division of its own within the EA – it comprises **Division 4 – Persons with Specialised Knowledge**.

The section deals with the circumstances where an expert witness is called for the purpose of giving credibility evidence about another witness's performance. Assuming the court gives leave to hear the evidence, EA s.108 provides the credibility rule does not apply to evidence given by a person concerning the credibility of another witness if the expert witness has special knowledge based on the person's training, study or experience; and the evidence comprises opinion evidence of the person that is wholly or substantially based on that knowledge and could substantially affect the assessment of the credibility of a witness. Some glimmer of the sort of work the section is designed for is to be found in sub section (2). Special 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). Specialised knowledge also includes either or both knowledge on the development and behaviour of children generally and the development and behaviour of children who have been victims of sexual offence or offences similar to sexual offences.

Re-establishing credibility
The credibility rule does not apply when re-examining a witness: (EA s. 108 (1)). Re-examination is primarily used for two purposes, to clarify and hopefully re-enforce evidence on the issues favourable to the side of the re-examiner, and to re-establish the credit of the witness. Any credibility evidence, i.e. evidence only relevant to credibility of the witness, will now be admissible, even though it was not admissible when the witness was giving evidence in chief.

The credibility rule also does not apply to evidence of a prior consistent statement of a witness in particular circumstances, being either:

a. the witness has been cross examined about a prior inconsistent statement;[43] or
b. with leave only, if it has been or will be suggested in any way (i.e. expressly or by implication) that the evidence of the witness has been fabricated or reconstructed or is the result of suggestion;[44] and
c. in either case above the Court has given leave for the prior consistent statement to be adduced.

[42] See f.n. 11.
[43] Evidence Act 1995 (NSW) s108(3)(a)
[44] Evidence Act 1995 (NSW) s108(3)(b)

Prior consistent statement is defined in the Dictionary to the Act and is a previous representation by a witness that is consistent with the evidence the witness has given.

"Previous representation" is further defined as a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

Finally, 'representation' is also further defined as including:

(a) an express or implied representation (whether oral or in writing); or
(b) a representation to be inferred from conduct; or
(c) a representation not intended by its maker to be communicated to or seen by another person; or
(d) a representation that for any reason is not communicated.

Thus, evidence sought to be adduced of a prior consistent statement could be in many forms, some exampled include:

- notes in a personal journal;
- a signed statement to police, or a signed statement made in preparation of the defence case.
- a notation in a diary;
- a text message or email to another person
- a Facebook status or message
- a conversation had with another person
- actions taken by the person that infer a representation

A not infrequent question in cross-examination – not only in the Children's Court but widespread in the Local and District courts is the cross-examiner's assertion: "You made that up didn't you." Sometime the less subtle question: "You're lying aren't you." Firstly, of course those are the types of questions that require leave. Secondly, in those circumstances a prior consistent statement, such as a signed proof of evidence given to the instructing solicitors is admissible – and has the advantage of being evidence of the whole of the testimony of the witness.

So if there is a suggestion put to the client in cross examination putting or suggesting the witness has fabricated his/her evidence; or if a favourable witness is being cross examined as to a prior inconsistent statement, it is worth considering if there are any items in the brief or otherwise accessible that would amount to a prior consistent statement; or if on your instructions a representation was made orally to another person and evidence (either by way of document or other witness) of that representation could be adduced.

An example of this type of evidence is "complaint" evidence in sexual assault matters. Ordinarily complaint evidence will only be permitted to be adduced in circumstances where the events are fresh in the memory of the complainant and the evidence is to be used as going to the truth of those matters (i.e. admissible as an exception to the hearsay rule under s 66). In such cases it is not within the definition of credibility evidence under s101A and thus the rule in s102 has no application.

However where the complaint evidence (particularly if it is related to an assault, or a theft rather than a sexual assault) is not admissible to prove the existence of the

asserted fact (i.e. it does not come within the EA s. 66 exception to the hearsay rule) then it will fall within the definition of EA s. 101A and be caught by the credibility rule.

That being so – it can be adduced in re-examination subject to the limits of re-examination generally under EA s. 39 and subject to any discretionary exclusion sought. Further, it would meet the definition of a prior consistent statement and could be adduced with leave if the complainant was cross examined about a prior inconsistent statement; or it was suggested that the evidence was fabricated or re-construction or the product of suggestion by others.

Therefore it is important to bear the provisions of EA s. 108 (3) in mind not only as regards prior consistent statements of the client, but also when conducting a cross-examination of a prosecution witness.

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