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**REVIEW OF THE LAW OF EVIDENCE  
(HEARSAY AND RELEVANCE)**

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## INTRODUCTION

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

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## **PREFACE**

This discussion paper (which reflects information gathered up to the end of August 2005) was prepared by Professor PJ Schwikkard on behalf of the project committee to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 June 2008** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position. The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

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# CHAPTER 1

## INTRODUCTION

### BACKGROUND

1.1 This paper is the first in an investigation arising out of a preliminary study conducted in 2002 identifying areas for reform and possible approaches to reforming the law of evidence.<sup>1</sup> The project committee identified relevance and hearsay as the first two topics for investigation, relevance, because it is generally viewed as the most dominant principle underlying the law of evidence, and hearsay, because of the apparent difficulties in the application of Act 45 of 1988. However, the preliminary study pointed to the necessity of taking into account certain structural features of the court system namely, the limited role of lay assessors and the adversarial nature of proceedings. The broader policy considerations underlying criminal and civil trials also need to be considered. Consequently, the first part of this paper will expand on the implications of these structural features for evidence law reform; reiterate the policy considerations identified in the preliminary survey and then proceed to deal specifically with relevance and hearsay.

### **The impact of lay participation and adversarial procedures on the law of evidence**

1.2. Damaska in his comparative work in *Evidence Law Adrift*<sup>2</sup> attempts to identify the '[w]hy is it that the Anglo American fact finding is so peculiar'.<sup>3</sup> He explores two possible explanations: (1) the common law rules of evidence are 'the child of the jury system'<sup>4</sup> and (2) the common rule rules of evidence are the product of the adversarial system.

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<sup>1</sup> South African Law Reform Committee, Committee Paper 1024, Project 126, *Review of the Law of Evidence*, Planning of the investigation - preliminary study by PJ Schwikkard (2003).

<sup>2</sup> M Damaska *Evidence Law Adrift* (1997).

<sup>3</sup> 2.

<sup>4</sup> JB Thayer *A Preliminary Treatise on the Law of Evidence* (1898) 27,266,509 claimed that the rules of evidence were the 'child of the jury'. And Wigmore *Textbook* 13 had this to say: 'The jury trial rules of evidence originated in jury trial, being peculiar to the historical control of the judge over the jury ... Hence they do not, in principle or in policy, apply as a matter of law to bind the judge or presiding officer in any other form of tribunal. But in the course of events, they have come to have an important influence in the procedure of other tribunals. The chief reason was that the study and use of the jury-trial rules led them to be looked upon and venerated by the Bar as the systematic instrument for judicial ascertainment of truth, and that in almost all other tribunals the judges and the counsel were men in whose minds the rules had been indelibly grained.'

1.3 Damaska notes that both inquisitorial and adversarial systems have exclusionary rules. However, it is only common law systems that exclude evidence despite its probative value on the basis that it may be misused.<sup>5</sup>

1.4 One of the reasons for fearing that probative evidence may be misused is the alleged 'intellectual and emotional frailties'<sup>6</sup> of the jury. However, there is significant body of research that would indicate that professional judges are as susceptible as juries to being unduly influenced by certain types of evidence (although probably better able to properly evaluate emotive evidence due to experience).<sup>7</sup> The Australian Law Reform Commission concluded that it was not necessarily correct to assume that judges are better fact-finders and that consequently different rules were required for jury and non-jury trials.<sup>8</sup> Damaska argues that it is not the 'individual cognitive shortcoming' of jurors that require exclusion of relevant but potentially misleading evidence, but rather the dynamic of group decision making which in order to reach consensus may require individual jurors to abandon their personal beliefs, this may be done by invoking the authority of the relevant exclusionary rule.<sup>9</sup> This dynamic of group decision making is not present when you have trial by professional judge alone or where group consensus is not an issue.<sup>10</sup>

1.5 The distinctive exclusionary features of the common law rules of evidence can also be found in the fact that juries deliberate in secret and need give no reasons for their decisions. However, 'persons who exercise authority in a democratic polity are expected to give reasons for what they decide to do'.<sup>11</sup> There are many defensible policy reasons for not requiring juries to give reasons for their final decision. Nevertheless, in order for the justice system to retain democratic legitimacy there must be grounds for challenging the decision and what remains open to

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<sup>5</sup> Damaska op cit 17.

<sup>6</sup> Damaska op cit 29 where he also ironically notes that '[o]ne would expect a legal process that glorifies novice amateurs as fact finders to presume their intellectual and emotional capacity for the job'.

<sup>7</sup> Damaska op cit 30-37.

<sup>8</sup> Australian Law Reform Commission Report 38 para 28. See also J Jackson & S Doran *Judge Without Jury* (1995) 72.

<sup>9</sup> Op cit 37-40.

<sup>10</sup> Damaska op cit 40.

<sup>11</sup> Damaska op cit 41.

challenge in jury trials is ‘the suitability of the database supplied to the inscrutable decision makers’.<sup>12</sup> The exclusionary rules provide a basis for challenging the suitability of this database. On this point Damaska concludes as follows:

‘[W]hereas Continental administration of justice relies on the justification of court decisions ex post facto; the employment of juries in the common law tradition prevented the growth of a comparable practice. This difference plays an important role in explaining why Anglo-American evidence law sets such great store by policing the receipt of evidence. For the law is animated not only by the desire to prevent factual error but also by the desire to shore up ex ante the legitimacy of inscrutable jury verdicts. This desire may indeed be the single most neglected contribution of the jury to the rationale for evidentiary arrangements peculiar to the Anglo-American procedural tradition.’<sup>13</sup>

1.6 It is also argued that the bifurcation of the court into judge and jury is also necessary for the effective enforcement of those exclusionary rules that are peculiar to common law systems of evidence.<sup>14</sup> The use of devices such as a trial-within-a-trial ensures that the jury does not become tainted by the forbidden evidence. Damaska asserts that ‘[i]n unitary courts,... where the same individuals decide the admissibility of evidence and the weight it deserves, the taint from the forbidden but persuasive information cannot be avoided; it always affects the decision makers thinking’. Nevertheless, in unitary courts the exclusionary rules retain a residual effect, counsel may not use the excluded evidence to advance his or her arguments and the presiding officer cannot use the evidence to justify a decision.<sup>15</sup>

1.7 Another source of the distinctive common law exclusionary rules is the (at

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<sup>12</sup> Damaska op cit 44.

<sup>13</sup> Op cit 46.

<sup>14</sup> Op cit 47.

<sup>15</sup> Damaska op cit 50. Damaska anticipates the argument that the distinction between unitary and bifurcated courts is diminished in practice because jurors are frequently exposed to inadmissible evidence and responds as follows at 48:  
 ‘[A]lthough the point must be conceded, a significant difference between the two forensic environments still remains. In the first place, the bifurcated court makes it possible to keep inadmissible evidence away from the decision maker in many situations where the unitary court milieu does not permit this solution. And even when the insulation of the fact finder from forbidden information fails in common law courts, the judicial instruction that an item of information be ignored retains a significant residual effect....the judge’s charge places a constraint on the debate in the jury room: inadmissible evidence is ‘excluded’ in the sense of becoming unusable as a legitimate weapon of argumentation. And in a setting in which a body of occasional, lay judges struggles to arrive at a verdict, the foreclosure of specific lines of argumentation gains mightily in importance and cannot be dismissed as inconsequential. By way of contrast, consider the enforcement of exclusionary rules in Continental unitary courts. Even if lay persons sit on these courts - and this happens more frequently in criminal than in civil cases - there is very little division of labour between amateur and professional decision makers. The former are not separated from the latter, and admissibility issues are decided either jointly or - when in the hands of the presiding judge alone - within the hearing of lay judges. Under these circumstances, the demand that probative information be excluded easily produces an excruciation into unreality.’

least theoretical) emphasis on the concentration of trial proceedings in Anglo-American procedural systems.<sup>16</sup> A characteristic of these procedural systems is that fact finding occurs over an extremely short period of time at a climatic trial. In contrast to the Continental system where proceedings are episodic, the hearing before the decision merely been 'one stage of a procedural sequence'.<sup>17</sup> Damaska reasons that compressed proceedings intensify the need to limit the scope of the inquiry and material presented to the court.<sup>18</sup> It is not merely time constraints that give rise to this need but also the reality that there is a limit to how much information adjudicators (be they lay or professional) can absorb in a short space of time.<sup>19</sup> It therefore becomes necessary to jettison evidence of disputable quality. Where the proceedings are episodic these pressures are greatly decreased. The quality of the evidence is not so crucial, 'further hearings can be scheduled to take another look at this material; additional information can easily be obtained; findings already made can be reconsidered at a later stage of the proceedings.'<sup>20</sup>

1.8 In terms of this argument it is the concentrated nature of Anglo-American proceedings that require the exclusion evidence on that basis that it might require an investigation into collateral issues or cause undue delay.<sup>21</sup>

1.9 Damaska traces the roots of the concentrated trial proceedings to the fact that in England the jury system did not develop in tandem with the creation of professional administrative agencies<sup>22</sup>. Whatever the historical reasons might be for concentrated trial proceedings, many law reform initiatives in Anglo-American systems are directed at concentrating the proceedings even further in order to enhance efficiency (an important component of legitimacy) and to preserve limited resources.

1.10 The adversarial system has also had a marked influence on the common law

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<sup>16</sup> Op cit 58-61.

<sup>17</sup> Damaska op cit 59.

<sup>18</sup> Op cit 61.

<sup>19</sup> Damaska op cit 61.

<sup>20</sup> Ibid.

<sup>21</sup> Damaska op cit 62. See also J McEwan *Evidence and the Adversarial Process* (1998) 39.

<sup>22</sup> Op cit 58.

rules of evidence. When defining ‘adversarial system’, Damaska disregards the existence or non-existence of the jury, and defines an adversarial system as ‘a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive’.<sup>23</sup> He argues that ‘party control over evidence gathering and proof taking ... affects the fundamental of evidentiary thought’.<sup>24</sup> For example the rule prohibiting a party from impeaching his or her own witness has its roots in party control; it can only arise if a witness is seen as ‘belonging’ to one of the parties. It also contributes to the difficulties of envisaging any witness called by a party as being impartial.<sup>25</sup> It is this suspicion that makes the right to challenge evidence such a hallowed feature of common law evidentiary systems.<sup>26</sup> Exclusionary rules are also necessary to ensure the partisan and competitive parties present the best available evidence. Jackson & Doran<sup>27</sup> note that ‘many rules of evidence serve the purpose of not only preventing prejudice on the part of the trier of fact but also, ... of preventing parties from taking unfair advantage over one another either before or during the trial. The rules governing confessions, for example, restrain police abuse of suspects prior to trial and thereby help ensure that only reliable confessions are obtained.’<sup>28</sup>

1.11 In many common law countries the use (and right to) trial by jury has greatly diminished.<sup>29</sup> Consequently, the existence of a bifurcated court be used justify many of the exclusionary rules. Unitary courts limit the effectivity of the exclusionary rules as the presiding officers’ mind will inevitably be tainted by the excluded evidence, and dangers of improper use are guarded against by the requirement that unitary courts give reasons for their judgments and articulate the factor underlying the weight attached to the evidence.<sup>30</sup>

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<sup>23</sup> Op cit 74.

<sup>24</sup> Op cit 75.

<sup>25</sup> Damaska op cit 76.

<sup>26</sup> Damaska op cit 79.

<sup>27</sup> Op cit 72.

<sup>28</sup> Damaska op cit 26 notes that he favouring of free testimonial narratives in Continental systems also has an impact on application of the exclusionary rules. It means that objections to evidence are frequently made after the fact finder has heard it and consequently its exclusion makes little sense.

<sup>29</sup> Damaska 127. See also K Culp Davis ‘An approach to rules of evidence for non-jury cases’ 1964 (50) *American Bar Association Journal* 723 .

<sup>30</sup> See generally Damaska 127-129.

1.12 The concentration of trial proceedings has also been diluted by the introduction of extensive discovery proceedings in both civil and criminal matters and in some instances increased powers of the judiciary has resulted in a decline in the party's control over the proceedings.

1.13 If the common law rules of evidence are to be explained by the existence of the following three characteristic (1) a bifurcated court; (2) concentrated trial proceedings and (3) the adversary system, we must ask what the implications are if we delete or diminish anyone of these characteristics.

1.14 However, before examining these characteristics in the South African context it is worth taking heed of Damaska's warning against simply borrowing from the Continental procedural tradition and notes:

[T]he importation of Continental fact-finding arrangements would require acceptance of an institutional infrastructure and traditions of government that are deeply alien to English speaking countries. The most important elements of this infrastructure are a civil service judiciary and a body of investigative officials perceived by the prevailing political consciousness as neutral. Observe, in addition, that Continental arrangements are subject to serious re-examination in their native habitat; with the accelerando of social change, dissatisfaction with many traditional rules and practices of both civil and criminal justice is growing. This feeling is seriously aggravated by the growing backlog of cases. Ironically, in their search for new solutions, Continental lawmakers are frequently attracted to the Anglo-American procedural culture.<sup>31</sup>

### **Lay participation in South Africa**

1.15 Lay participation in the formal judicial system in South Africa dates back at least to the nineteenth century where justices of the peace and occasionally elected veldcornetten "administered law in many frontier areas".<sup>32</sup> Modelled on English law structures the jury system was adopted in South Africa in 1827.<sup>33</sup> Although prior to 1954 there was not an absolute colour bar in the vast majority of cases the jury was

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<sup>31</sup> Damaska op cit 150.

<sup>32</sup> J Seekings & C Murray *Lay Assessors in South Africa's Magistrates' Courts* (1998) 16. Seeking and Murray note at 16 "The involvement of chiefs, headmen and elders in sanctioned chiefs' courts might be considered a form of lay participation, but their significance was greatly reduced by both their subordination to district and commissioner's courts and their restriction to parts of the reserves of bantustans."

<sup>33</sup> JJ Joubert ed *Criminal Procedure Handbook* 2001 (5 ed) 191.

compromised of nine white men.<sup>34</sup> Trial by jury in civil cases was abolished in 1926 and there was a steady decline of the use of juries in criminal trials and by the 1960's less than one percent of criminal trials was by jury.<sup>35</sup> Jury trials were abolished by the Abolition of Juries Act 34 of 1969. In the 1970's and 80's there was no lay participation in the formal judicial system. The 1990's saw the re-emergence of the use of lay assessors in both the magistrates and superior courts. Section 34 of the Magistrates' Court Act 32 of 1944 permits the court in civil actions, "upon the application of either party, to summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity".<sup>36</sup> Section 93*ter* makes provision for the use of lay assessors in criminal trials. A magistrate presiding over a criminal trial may if he deems it expedient for the administration of justice, before any evidence has been led or in considering a community-based punishment in respect of any person who has been convicted of any offence, summon one or two assessors to assist him or her at the proceedings. However, the provisions is more peremptory in respect of murder trials in the regional court where the presiding officer must summon two assessors to assist him or her, unless the accused requests that the trial be proceeded with without assessors, in such a case the use of assessors is within the discretion of the presiding officer. In the High court it is generally within the presiding officer's discretion whether to sit with an assessor in criminal matters.<sup>37</sup> Lay assessors are used in a number of civil tribunals.

1.16 Professor SE van der Merwe succinctly summarises the distinction between jurors and assessors as follows:

"Assessors in lower courts and in the Supreme Court can to some extent be compared with jurors as they are all finders of fact and do not decide legal issues. But our system of adjudication differs materially from trial by jury. The role of jurors can briefly be summarized as follows: jurors are lay people and sole finders of fact. They listen to the evidence and hear arguments, and they receive a summing-up and instructions from the presiding judicial officer: They are then called upon in their capacity as sole finders of fact to consider and reach their verdict in the absence of the presiding judicial officer. And they are

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<sup>34</sup> See Joubert op cit, Seekings & Murray op cit 17. Prior to 1931 women could not serve as jurors. As a result of women been enfranchised in 1930, in 1931 it became theoretically possible for all women juries to be appointed - however no such jury was ever appointed.

<sup>35</sup> Seekings & Murray op cit 17.

<sup>36</sup> S. 34 has been substituted by s. 1 of the Magistrates' Courts Amendment Act 67 of 1998, a provision which will be put into operation by proclamation.

<sup>37</sup> See s 145 of the Criminal Procedure Act 1977.

not required to advance reasons in support of their verdict. But in our system the judge or magistrate is at all times either a sole finder of fact or, where assessors are involved, a co-finder of fact.<sup>38</sup> A judge must give reasons for his verdict.<sup>39</sup> Magistrates almost invariably do give reasons for their verdict and, failing which, they may in certain circumstances be legally required to do so. It is true that the function of assessors can be compared with the function of jurors, because the function of assessors is - with one exception<sup>40</sup> - also limited to fact finding. But assessors - unlike a jury - must give reasons for their verdict.<sup>41</sup> They either agree or disagree with the presiding judicial officer's reasons and finding, and in the event of a disagreement must furnish their own reasons in a separate judgment which is read out in court by the presiding judicial officer. And assessors - unlike jurors - are under constant and immediate judicial guidance in the sense that a judge (or magistrate) and the assessors involved in the trial have joint deliberations in reaching their respective verdicts. During these deliberations the presiding judicial officer can and must draw the attention of assessors - who of course may be lay people - to certain rules which govern the evaluation of evidence, for example, the cautionary rule, the rules governing inferences drawn from circumstantial evidence, and those rules which determine the effect of an accused's silence on the evaluation of the prosecution's prima facie case."<sup>42</sup>

1.17 The absence of a jury and the somewhat different role of lay assessors in our courts as joint fact finders who are subject to the continual guidance of the court and who are required to give reasons for their decisions calls into question whether our jury based rules of evidence remain appropriate.

1.18 It would seem that a distinction between lay and professional fact finders cannot be made on the basis of intellectual or emotional frailties'. In a unitary system the judge is frequently exposed to the prohibited evidence and this undermines the effectiveness of the exclusionary rules, nevertheless they still serve to exclude the evidence from being used to justify a decision. Both these factors suggest that there is some value in retaining the exclusionary rules. The counter argument is that because presiding officers and South African lay assessors are required to give reasons for their decisions, the dangers of the improper use of evidence are greatly diminished. However, this is only true if the rationale of each exclusionary rule is taken into account. This could be accommodated by recognising the rationale of the

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<sup>38</sup> See generally s 145(4)(a) of the Criminal Procedure Act 51 of 1977 and s 93ter(3)(e) of the Magistrates Court Act 32 of 1944.

<sup>39</sup> See s 146(b) of the Criminal Procedure Act.

<sup>40</sup> See s 93 ter (1)(b) of the Magistrates Courts Act 42 of 1944.

<sup>41</sup> See s 146(d) of the Criminal Procedure Act 1977 and s 93ter(3)(e) of the Magistrates Court Act 1944.

<sup>42</sup> SE van der Merwe in Schwikkard et al *Principles of Evidence* 2 ed (2002) 13-14.

exclusionary rules as something that must be taken into account when assessing weight.

1.19 The above argument is also only applicable to those exclusionary rules whose sole purpose is to guard against the misuse of the evidence by the decision maker. The form of lay participation (or its absence) is irrelevant to those exclusionary rules that are based on other policy considerations - for example, the rules governing admissions and confessions. However, there is nothing prohibiting the re-evaluation of these 'policy' based exclusions in order to examine whether a specific exclusionary rule does indeed protect or promote an identified interest.

### **Concentrated trial proceedings**

1.20 Pre-trial disclosure is relatively well developed in civil proceedings, this is facilitated by the form of the pleadings, discovery procedures for documentary and expert evidence and the provisions governing pre-trial conferences.<sup>43</sup> A further incentive for compliance with discovery and notice procedures in civil trials is the possibility of an adverse costs order if a postponement is deemed necessary as a result of non-compliance. The equivalent incentive is not found in criminal trials. Discovery in criminal trials is a relatively new phenomenon - prior to the interim Constitution and the adoption of the principle of constitutional supremacy the state relied largely on docket privilege to resist disclosure and at common law the accused could rely on the right to remain silent and the presumption of innocence to resist disclosure. The constitutional right to access to information<sup>44</sup> and the right to a fair trial<sup>45</sup> have been interpreted as requiring prosecutorial disclosure of the police docket (subject to limitations).<sup>46</sup> However, to date there remains no duty on the accused to disclose. The Commission, in its report *A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials*, has made recommendations which whilst not compelling the accused to disclose, certainly provide strong incentives to do so as

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<sup>43</sup> See for example, Supreme Court Rules 35, 36 & 7 and Magistrates Courts Rules 23, 24 & 25.

<sup>44</sup> Section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution.), s 23 of the Constitution of the Republic of South Act 200 of 1993 (the interim Constitution.)

<sup>45</sup> Section 35(3) of the 1996 Constitution, 25(3) of the interim Constitution.

<sup>46</sup> See *Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593 (CC). For a general discussion of the implications of *Shabalala* see SE Van der Merwe in Schwikkard & Van der Merwe op cit 157-162.

the failure to disclose in certain circumstances could attract significant procedural and tactical disadvantages.<sup>47</sup>

1.21 Pre-trial disclosure certainly diminishes the possibility of disadvantages accruing as a result of 'surprise' or 'ambush' at concentrated trial proceedings. However, pre-trial disclosure is not only directed at enhancing the truth seeking function of the court, but also at limiting the scope of inquiry and material presented to the court. Nevertheless, it may be useful to take the fact of pre-trial disclosure into account in determining the extent of procedural prejudice that will ensue if a particular item of evidence is admitted. This has been a factor taken into account by the courts in determining the extent of the prejudice that may be incurred by the admission of hearsay evidence.<sup>48</sup>

### **The adversarial nature of the proceedings**

1.22 As noted in the Commission's report examining a more inquisitorial approach to criminal procedure, in criminal proceedings, judicial officers are able to exercise a number of powers that are inquisitorial in nature. For example, they may call and examine witnesses in specified circumstances.<sup>49</sup> In sentence, appeal and bail proceedings presiding officers are required to actively engage in the proceedings.<sup>50</sup> However, in civil proceedings party control is even more dominant, but, contrary to Damaska's thesis, the rules of evidence are less rigidly enforced. For example, the courts are more reluctant to admit hearsay evidence in criminal proceedings than in civil proceedings.<sup>51</sup> Perhaps this can be attributed to the fact that although in criminal cases presiding officers may exercise some 'inquisitorial powers', the proceedings remain under the control of the parties and the departure from adversarial principles is more apparent than real. In bail proceedings, where the inquisitorial powers of presiding officers have been given express judicial approval,<sup>52</sup> there is a significant

<sup>47</sup> See South African Law Commission, Project 73, Fifth interim report on simplification of criminal procedure, *A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials*, August (2002).

<sup>48</sup> See *Hewan v Kourie* NO 1993 3 SA 233 (T); *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T).

<sup>49</sup> See for example s 167 and 186 of the Criminal Procedure Act 51 of 1977.

<sup>50</sup> *A more inquisitorial approach to criminal procedure* (2002) 3.10 - 3.21.

<sup>51</sup> *Metedad v National Employer's General Insurance Co Ltd* 1992 (1) SA 494 (W). See generally Schwikkard & Van der Merwe op cit 260.

<sup>52</sup> Kriegler J in *S v Dlamini* 1999 (7) BCLR 771 (CC) at [10] held: Although society interests may demand that persons suspected of having committed crimes

relaxation of the exclusionary rules.<sup>53</sup> However, it is likely that administrative convenience and the fact that bail hearings are not directed at a determination of guilt or innocence have had a stronger influence on the courts' approach to the exclusionary rules. Nevertheless, it is worth examining specific rules of evidence in order to determine the extent to which their existence can be attributed to party partisanship and whether an exclusionary rule is the most effective means of balancing the need to guard against such dangers and the truth seeking function of the court.

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forfeit their freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising oversight in regard to bail the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court as essential, it must itself take the initiative. Even where the prosecution concedes bail, the court must still make up its own mind. In principle, that policy of the CPA, and the consequential provisions mentioned, are in complete harmony with the Constitution.

<sup>53</sup> *S v Yanta* 2000 (1) SACR 237 (Tk); *S v Tshabalala* 1998 (2) SACR 259 (C); *Elish v Prokureur-Generaal, Witwatersrand Plaaslike Afdeling* 1994 (4) SA 835 (W); *S v Mbele* 1996 (1) SACR 212 (W).

## CHAPTER 2

### Policy considerations underlying criminal and civil trials

#### Background

2.1 The function of the law evidence in civil and criminal trials may be distinguished on the basis that they attract different policy considerations. In this regard the nature and purpose of civil and criminal trials need to be considered.

2.2 A civil trial may be viewed both as a mechanism for resolving disputes between parties and ordering relationships. However, its efficacy in performing either function requires just decision making. The Australian Law Reform Commission found that the following factors had to be present if civil trials were to have the respect and confidence of the parties.<sup>54</sup>

“(A) Although a civil trial is not a “search for truth”, it is nonetheless of critical importance that the courts make a genuine attempt to find the facts. If this is not done, the system will be seen to be at best arbitrary and at worst biased and will lose the confidence and respect of the community. Any limitation on the attempt to find the facts requires justification.

(B)The parties must be given, and feel they have had, a fair hearing. This will depend in part on the extent to which they have been able to present their case ... It will also depend upon the extent to which they have been able to challenge and meet the case presented against them. Again limits require justification....The fairness of the proceedings will also depend on the conduct of the judicial officer - the more arbitrary or subjective it appears to be, the less acceptable to all concerned. It is also important that there be the appearance and, if possible, the reality of control by law rather than judicial whim. Detailed rules of evidence lend to trial the appearance of proceedings controlled by the law, not by the individual trial judge’s discretion, and reduce the scope for subjective decisions.

(C) The parties and the community will judge the civil trial system in part by considering its efficiency. Any rules or proposals must be evaluated in the light of their effect on the time and cost of the trial.

(D) To the extent that the system operates under rules, the more anomalous technical rigid and obscure the rules seem, the more the system’s acceptability is lessened. The parties in a case can meet the situation by agreeing to ignore or waive the more unsatisfactory rules, ... This, however only results in the rules lying in wait for the unwary and the party who does not have legal representation. Rules or proposals that are complicated, difficult to understand or apply, produce anomalies, lack flexibility where this is needed or are very technical, require justification.”

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Op cit 34.

2.3 Although the objectives of a criminal trial include those that pertain to civil trials, (and the pre-requisites for a fair criminal trial also include those listed above in respect of civil trials) there is a fundamental distinction. Roberts in asserting that “criminal evidence and procedure is a (very) applied branch of moral and political philosophy”<sup>55</sup> notes “[c]riminal law is amongst the principal public institutions in which the rights and responsibilities of citizenship are articulated, contested, elaborated and enforced. Criminal procedure, as the adjectival counterpart of substantive criminal law, is directly concerned with basic rights and liberties in the performance of an essential public function - censure and sanction of criminal wrongs”. The relative strength of the state’s resources and the drastic nature of the criminal sanction require a more cautious approach to fact finding. It is the very policy choice that underlies the presumption of innocence and requires proof beyond a reasonable doubt which demands greater certainty in fact finding. In a number of jurisdictions (including South Africa) these policy choices have been reflected in the recognition of specific fundamental rights which have been accorded constitutional recognition. The constitutional recognition of these rights acts as a barrier against their infringement on the basis of utilitarian arguments alone.

2.4 The most important factors influencing the distinction between the policies underlying criminal and civil trials would appear to be the relative strength of the parties, the nature of the criminal sanction and the consequential disparate application of constitutional rights. These require a more cautious approach to be taken to the admissibility of evidence in criminal trials. Nevertheless, the following questions can be raised to get the measure of a rules’ efficacy in both civil and criminal proceedings:

- \* does the rule facilitate the fact finding function of the court?
- \* does the rule give rise to uncertainty?
- \* can the rule be easily understood?
- \* what are the particular time and cost implications of any particular rule?
- \* does public policy require the exclusion of probative and relevant evidence in the particular circumstance?
- \* what (if any) constitutional values underpin the rule.

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<sup>55</sup> P Roberts “Rethinking the Law of Evidence: A twenty-first Century Agenda for Teaching and Research” 2002 (55) *Current Legal Problems* 297.

## CHAPTER 3

### RELEVANCE

#### Introduction

3.1. It is widely accepted that a system of evidence that is directed at promoting the rational ascertainment of facts is going to adopt the general principle that relevant evidence is admissible.<sup>56</sup> In terms of the general rule evidence that is irrelevant or lacks sufficient relevancy is inadmissible. However, because the law of evidence is subject to a number of policy considerations which may require the exclusion of relevant evidence, the general principle that relevant evidence is admissible, is qualified.

3.2 The common law relevance rule has been codified. Section 210 of the Criminal Procedure Act 51 of 1977 provides: “No evidence as to any fact matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings”. Section 2 of the Civil Proceedings Evidence Act 25 of 1965 contains a substantially similar provision. However, neither Act codifies a definition of relevance.

3.3 A frequently cited definition of relevance is that found in Stephen’s *Digest of the Law of Evidence* in terms of which relevance means that

“... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.”<sup>57</sup>

3.4 Delisle and Stuart explain the concept as follows;

“We know that evidence is relevant if it has any tendency to make the proposition for which it is tendered more probable than that proposition would be without the evidence. For evidence to have any value there must be a premise, a generalization that one makes, allowing the inference to be made. Borrowing from Professors’ Binder and Bergman, evidence that roses were in bloom, when tendered to prove that it was then springtime, has meaning only if we adopt the premise or generalization that roses usually bloom in the spring. The tendency of evidence to prove a proposition, and hence its

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<sup>56</sup> C Tapper *Cross and Tapper on Evidence* 9 ed (1999) 55. See *R v Trupedo* 1920 AD 58 at 62.

<sup>57</sup> JF Stephen *Digest of the Law of Evidence* 12 ed (1907) art 1.

relevance, depends on the accuracy of the premise which supports the inference.”<sup>58</sup>

3.5 McEwan, an English writer, favours the definition found in rule 401 of the American Federal Rules of Evidence on the basis of its clarity.<sup>59</sup> Rule 401 defines relevant evidence as ‘Evidence having any tendency to make the existence or any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’<sup>60</sup>

3.6 Relevance is not an absolute concept, in that an assertion that the proof of one fact makes another more probable does not in itself guarantee a finding of relevance. In addition it would seem that a minimum threshold of cogency is required<sup>61</sup> in order to make the evidence legally relevant. The factors affecting cogency and their relationship to legal relevance were aptly described by the New Zealand court in *R v Wilson*<sup>62</sup> as follows

“[L]ack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection is considered to be too remote. Once it is regarded as a matter of degree, competing policy considerations can be taken into account. These include the desirability of shortening trials, avoiding emotive distractions or marginal significance, protecting the reputations of those not represented before the Courts and respecting the feelings of deceased’s family. None of these matters would be determinative if the evidence in question were of significant probative value.”

### Legal relevance

3.7 It has been held that in order for evidence to be sufficiently relevant it must sustain a reasonable inference.<sup>63</sup> What constitutes a reasonable inference is inevitably the product of common sense reasoning.<sup>64</sup> The reasonable inference must

<sup>58</sup> R Delisle & D Stuart *Evidence Principles and Problems* 6 ed (2001) 98. See also C Boyle, MT MacCrimmon, D Martin *The Law of Evidence Fact Finding: Fairness and Advocacy* (1999) at 48.

<sup>59</sup> J McEwan *Evidence and the Adversarial Process - The Modern Law* (1998) 33.

<sup>60</sup> For a discussion of the meaning of relevance generally see P Schwikkard & SE Van der Merwe *Principles of Evidence* (2002) 45 et seq and D Zeffertt, A Paizes and A Skeen *The South African Law of Evidence* (2003) 219 et seq.

<sup>61</sup> Tapper op cit 56.

<sup>62</sup> [1991] 2 NZLR 707, at 711.

<sup>63</sup> *Hollingham v Head* (1858) 27 LJCP 241 at 242.

<sup>64</sup> The dangers of common sense reasoning are discussed below.

pertain either to the facts in issue or “else to such subordinate facts such as those relating to the credibility and admissibility of evidence”.<sup>65</sup> This is illustrated by the following dictum of Jones J in *S v Mayo*<sup>66</sup>:

‘It is not in the interests of justice that relevant material should be excluded from the Court, whether it is relevant to the issue or to issues which are themselves relevant to the issue but strictly speaking not in issue themselves, and this includes the credibility of witnesses, provided that the question of their credibility is in some way related to the issues or matter relevant to the issues. ...There remains the question of relevance. I am not satisfied on the information which is presently before me that the pocket book in question is relevant to any of the issues in the case. It is certainly not relevant to the main issues. Their contents do not appear to me to be relevant to issues which are relevant to those issues and they are not presently at any rate even relevant to credibility because it has not anywhere been suggested that the witness has said anything which will be contradicted by accused No 1, insofar as the content of his pocket book is concerned. It is not in the interest of justice that irrelevant information should be made available to the defence and used for the purposes of cross-examination, because justice requires that there be an end to cross-examination and that only relevant matter should in fact be canvassed. It seems to me therefore, that, insofar as the issue of relevance is concerned, the application should fail and I should rule against the applicant at this stage.’

3.8 The requirement that the probative value of the evidence must relate to an issue before the court is sometimes referred to as the requirement of materiality.<sup>67</sup>

3.9 The logical relevance of the evidence must also be balanced against competing considerations effecting the efficiency and integrity of the justice system. For example evidence that may require the investigation into a number of collateral

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<sup>65</sup> Tapper op cit 63.

<sup>66</sup> 1990 (1) SACR 659 (E) 661f-662e.

<sup>67</sup> See Delisle & Stuart op cit 98-99. See McEwan op cit 36-7 who comments on Zuckerman’s approach as follows:

‘Zuckerman has argued that “materiality” is an unnecessary concept; whether or not a certain fact can affect a legal result is not a question of evidence but of interpreting the substantive law. Zuckerman is right to point out the trier of fact is concerned only with those facts which the substantive law allows to have legal effect. But it is still within the power of the parties to exclude elements of the substantive law altogether by choosing not to rely on them. It is for the parties to decide upon which planks (depending on the evidence and the law) to rest their case. They many find that they lose the opportunity to introduce an item of evidence if they fail to raise the issue which would render it material, either because they have not satisfied the required procedures or because the evidential burden has not been discharged. Thus the concept of materiality does exist independent of the effect of the substantive law; it is a creature of adversarial theory. Objective facts and operation of law are far from being the only influences on the conduct and outcome of trials; choices made by individual have an important part to play too.’

See A Zuckerman ‘Relevance in Legal Proceedings’ in W Twining (ed) *Facts in Law* (1993). See also JL Montrose ‘Basic Concepts of the Law of Evidence’ 1954 (70) *The Law Quarterly Review* 527 ; GF James ‘Relevancy, Probability and the Law’ 1941 (29) *California Law Review* 659.

issues, although logically relevant, may be found to lack legal relevance as it would unduly prolong a trial. (Other competing considerations include; undue prejudice, confusion of issues, unfair surprise to a witness or to the opposite party.<sup>68</sup>)

3.10 Legal relevance may also be determined by judicial precedent.<sup>69</sup> Therefore '[a] decision that certain legal consequences follow from certain facts is binding in a subsequent case that raises substantially similar facts'.<sup>70</sup> However, as Van der Merwe cautions: 'a cautious approach is necessary before boldly invoking judicial precedent to decide on admissibility where relevance is in issue. Facts differ from case to case and precedent can therefore at most provide useful guidelines'.<sup>71</sup>

3.11 The rationale for codifying the relevance principle in a negative formulation in the Criminal Procedure Act and the Civil Proceedings Evidence Act becomes apparent - an assertion that relevant evidence is admissible is inaccurate. Logically relevant evidence does not guarantee admissibility. In order to be admissible the evidence must be legally relevant, not be subject to an exclusionary rule or fall to be excluded on any other grounds of policy.<sup>72</sup> Legal relevance requires that the probative value of the evidence outweigh any prejudice that may accrue as a result of its admission. Prejudice in this context does not refer to the possibility of a finding of fact been made against a particular party,<sup>73</sup> it refers to unfair prejudice which at common law includes not only procedural prejudice but also prejudice that arises out of the possibility of the fact finder being misled or unduly swayed by a particular item of evidence. Zeffertt et al argue that it is questionable whether this latter aspect of unfair prejudice should be maintained in the absence of a jury system.<sup>74</sup>

3.12 Once relevant evidence is admitted a court will determine what weight to give it. The admissibility of the evidence is said to be a matter of law whilst the determination of weight is a matter of fact.<sup>75</sup> However, if the admissibility of relevant

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<sup>68</sup> Delisle & Stuart op cit 105.

<sup>69</sup> See Schwikkard & Van der Merwe op cit 54.

<sup>70</sup> Zeffertt et al op cit 220.

<sup>71</sup> Schwikkard & Van der Merwe op cit 55.

<sup>72</sup> See Boyle et al op cit 45.

<sup>73</sup> See Schwikkard & Van der Merwe op cit 51.

<sup>74</sup> Op cit 222.

<sup>75</sup> Tapper op cit 65.

evidence is dependent on the balancing of probative value and potential prejudice, weight may well be a factor taken into consideration in determining admissibility, in so far as probative value requires a threshold of reliability. However, it will be a provisional weight which will be re-evaluated when the court considers the totality of the evidence in making its final determination.

3.13 Damaska views the separation of the inquiries into relevance and weight as being a consequence of the distinct functions of judge and jury. He explains the distinction between the two concepts as follows: '[relevance] depends solely on the cognitive potential of the information, whereas [weight] also depends on the credibility of the information's transmitter.'<sup>76</sup> He notes that in outside Anglo-American jurisdictions this distinction is seldom made, probative value and credibility are considered together<sup>77</sup>. He argues that it is the bifurcated court that makes the distinction important in Anglo-American jurisdictions. The judge decides whether the evidence has sufficient probative value to be considered by the jury, it is the jury's task alone to decide on the credibility of the 'transmitter'.<sup>78</sup>

3.14 It is submitted that there is another rationale for separating probative value and weight (other than the existence of a bifurcated court) and that is that weight can only be properly assessed once all the evidence has been heard and challenged.

### **Some difficulties in ascertaining relevance**

3.15 The anomaly with this 'rule' of relevance that underpins the law of evidence is that there is no test for determining relevance.<sup>79</sup> Thayer noted:

"There is a principle - not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical system - which forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience, - assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."<sup>80</sup>

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<sup>76</sup> Op cit 55.

<sup>77</sup> Op cit 55.

<sup>78</sup> Op cit 56.

<sup>79</sup> R Delisle & D Stuart *Evidence Principles and Problems* 6 ed (2001) 97.

<sup>80</sup> JB Thayer *Preliminary Treatise on Evidence at the Common Law* (1898) 264-69.

3.16 A presiding officer determines relevance through the application of common sense reasoning which has been shaped by his or her personal experience.<sup>81</sup> Consequently, “relevance will vary depending on the judge’s culture, gender, background, social origin and age”.<sup>82</sup>

3.17 Boyle, MacCrimmon and Martin note that ‘generalisations underlying relevance assessments must be scrutinized for discriminatory and egalitarian reasoning’<sup>83</sup> and assert that underlying generalizations must ‘reflect the beliefs of a reasonable person’.<sup>84</sup> Of course this begs the question as to how we determine the beliefs of a reasonable person. Boyle et al views the reasonable person as a member of the community who ‘supports the fundamental principles entrenched in the constitution’. They refer to the Canadian case of *R v R.D.S*<sup>85</sup> in which the Canadian Supreme Court “held that the knowledge of this reasonable person includes ‘societal awareness and acknowledgement of the prevalence of racism and gender bias in the particular community’.<sup>86</sup>

3.18 Another difficulty may arise in that the same piece of evidence may be logically relevant to more than one issue before the court. Consequently, it is possible that the same evidence may be admissible for one purpose but inadmissible in relation to a different purpose. For example, evidence of a previous conviction may be admissible to refute a defence (for example ignorance) but may not be used to establish propensity to commit the crime charged.

3.19 Zeffertt et al<sup>87</sup> note that ‘[f]or some purposes a distinction is drawn between evidence which is relevant to an issue and evidence which is relevant only to

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<sup>81</sup> Delisle & Stuart op cit 97. See also J Sopinka, SN Lederman & AW Bryant *The Law of Evidence in Canada* (1999) 24.

<sup>82</sup> Delisle & Stuart op cit.98.

<sup>83</sup> Op cit 49.

<sup>84</sup> Ibid.

<sup>85</sup> (1997) 10 Cr (5<sup>th</sup>) 1.

<sup>86</sup> Op cit 49. See also JB Weinstein ‘Some difficulties in devising rules for determining truth in judicial trials 1966 (66) *Columbia Law Review* 223 at 246 who discusses the effect of societal assumptions and values on the triers view of the existential world and notes: ‘Where the rules of evidence conflict “the court’s truth finding function should receive primary emphasis except where a constitutional limitation requires subservience to some extrinsic public policy.’

<sup>87</sup> Op cit 224-5.

credibility, but there is no doubt that evidence falling within the latter category is frequently admissible.’ This distinction has the potential to give rise to some confusion and consequently it may be desirable to clarify the circumstances in which evidence not directly linked to an issue before the court will nevertheless be regarded as relevant.

### **Approaches in other jurisdictions**

3.20 This section does not purport to be an extensive comparative study. Three jurisdictions have been chosen on the basis that their relevance rules have been codified or codification has been proposed and on the basis of accessibility.

#### **United States**

3.21 In the United States Rule 401 of the Federal Rules of Evidence reads as follows:

“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

3.22 Rule 401 must be read together with Rules 402 and 403 which provide:

Rule 402:

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”

Rule 403:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

3.23 Wiessenberger describes Rules 401 and 402 as the ‘cornerstone of the Federal evidentiary system’.<sup>88</sup> In terms of the rules evidence must be relevant to be admissible but once relevance has been established the evidence may nevertheless be excluded on the basis of any of the rules identified in Rule 402.<sup>89</sup> Once the party who seeks to have the evidence admitted has established relevance, an opposing

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<sup>88</sup> G Wiessenberger *Federal Rules of Evidence* (1987) 57.

<sup>89</sup> Ibid.

party who wishes to have it excluded must establish the existence of one of the grounds mentioned in Rule 402.<sup>90</sup> Provided a party establishes that evidence is likely to alter the probabilities it will meet the requirements of relevance no matter how slight its probative value is.<sup>91</sup> However, the lower its probative value the more likely it is to be excluded under Rule 403 which requires a balancing of probative value and considerations such as trial efficiency and party prejudice.<sup>92</sup>

3.24 The process of establishing relevance under the Federal Rules of Evidence is described by Wiessenberger as follows:

“The establishment of a connection between the evidence and the fact sought to be proved is usually not a scientific process. The Rule is more customarily applied by the trial judge in a highly discretionary manner based upon experiential perceptions of the way in which the world operates. Application of the standard of relevancy consequently calls upon the trial lawyer to use persuasion in establishing the necessary logical or experiential nexus between the offered evidence and the consequential facts sought to be established.”

## **New Zealand**

3.25 In 1999 the New Zealand Law Commission published an Evidence Code and Commentary. The provisions pertaining to relevance are reflected below. The New Zealand Law Commission expressly acknowledges the difficulties of effecting law reform in the absence of ‘a change in approach by practitioners and the judiciary’.<sup>93</sup> To assist in this process the Code is accompanied by a Commentary which ‘discusses the way each Code provision is intended to apply giving, examples.’<sup>94</sup> The intention is that the Commentary will provide ‘an authoritative guide to interpreting the Code’.<sup>95</sup> In this document the Commentary pertaining to the sections is reflected in the footnotes accompanying the relevant sections.

### **7 Fundamental principle - relevant evidence is admissible**

(1) All relevant evidence is admissible in a proceeding except evidence that is

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<sup>90</sup> Ibid 58.

<sup>91</sup> Ibid 59.

<sup>92</sup> Ibid 59.

<sup>93</sup> New Zealand Law Commission *Evidence* Report 55 - volume 1 at 3.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 4.

inadmissible in accordance with this Code or any other Act or is excluded in accordance with this Code or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove anything that is of consequence to the determination of a proceeding.<sup>96</sup>

### **8 General exclusion**

(1) In any proceedings a judge must exclude evidence if its probative value is outweighed by the risk that evidence will

(a) have an unfairly prejudicial effect on the outcome of the proceedings; or

(b) needlessly prolong the proceedings.

(2) When determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect, the judge must take into account the right of a defendant in a criminal proceeding to offer an effective defence.<sup>97</sup>

<sup>96</sup>

Commentary: Report 55 volume (2) 31:

'C53 *Section 7* contains the first principle in evidence law: that all relevant evidence is admissible, and conversely, evidence that is not relevant is inadmissible. 'Relevant' evidence is defined as evidence that according to logic and common sense has a tendency to prove or disprove anything that needs to be decided in order to determine a proceeding, including, for example, the truthfulness of a witness. Whether an item of evidence is relevant depends on the purpose for which it is offered. Thus evidence relevant for one purpose does not become irrelevant just because it may be rebutted or disbelieved; and evidence is not irrelevant merely because it relates to background matters or matter that may not be in dispute. Finally, the relevance of an item of evidence may not be apparent at the time the evidence is tendered. The judge has power under s 14 to admit the evidence provisionally; that is, in anticipation that its relevance will be established in due course.

C54 Relevance is a necessary but not sufficient condition for the admissibility of evidence.

Evidence that is relevant may nevertheless be admissible for other reasons: for example, if its probative value is outweighed by its unfairly prejudicial effect. But evidence that is not relevant is never admissible, the only exception being evidence admitted by the parties consent under s 9.

C55 One important consequence of the fundamental principle in s 7 is that evidence that is admissible is admissible for all the purposes for which it is relevant, unless a specific Code provision excludes its use for a particular purpose. For example, under s 30, the prosecution may not rely on evidence excluded by s 27 (the reliability rule), s 28 (the oppression rule) or s 29 (the improperly obtained evidence rule) if another party offers that evidence.'

'C56 This is the general head under which relevant evidence may be excluded. To a considerable extent, s 8 codifies the existing common law rules for exclusion, embodied in the term "sufficient relevance" or "legal relevance", and makes it clear that relevant evidence can only be excluded if, on balance, its negative effect actually outweighs its probative value.

Section 8 is in addition to - and overrides - specific rules on the admissibility of evidence. Thus, s 8(1) may nevertheless exclude relevant evidence that meets specific admissibility requirements.

C57 *Section 8(1)* removes any doubt about whether the power to exclude unfairly prejudicial evidence applies in civil cases. Both paragraphs of s 8(1) apply to both civil and criminal cases, whether being tried by judge alone or a judge sitting with a jury. In practice, the judge will often have to hear the evidence (or receive a summary of it) to determine whether it is likely to be unfairly prejudicial.

C58 The positive side of the balancing principle is s 8(1) is 'probative value'. Probative value will depend on such matters as how strongly the evidence points to the inference it is said to support, and how important the evidence is to the ultimate issues in the trial.

C59 Under s 8(1)(a) the test for excluding unfairly prejudicial evidence is not met if the evidence is simply adverse to the interests of, say a defendant in a criminal proceeding, since any evidence from the prosecution is going to be prejudicial to the defendant. The evidence must be unfairly prejudicial. There must be an undue tendency to influence a decision on an improper or illogical basis, commonly an emotional one; for instance, graphic photographs of a murder victim when the nature of the injuries is not in issue. Evidence will also be unfairly prejudicial if it is likely to mislead the jury; for example, if it appears far more persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence. The judge will need to consider whether any misleading tendency can be countered by other

### 9 Admission by consent

- (1) In any proceeding, the judge may
- (a) with the consent of all parties, admit evidence that is not otherwise admissible; and
  - (b) admit evidence offered in any form or way agreed by all parties.
- (2) In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.
- (3) In a criminal proceeding, the prosecution may admit any fact so as to dispense with proof of that fact.<sup>98</sup>

### 14 Provisional admission of evidence

If a question arises concerning the admissibility of any evidence, the judge may admit that evidence subject to evidence being later offered which establishes its admissibility.<sup>99</sup>

## Australia

3.26 In 1979 the Australian Law Reform Commission embarked on a comprehensive review of the law of evidence which effectively culminated in the codification of the law of evidence. The most recent formulation of this 'code' is the Evidence Act No 2 of 1995. It contains the following provisions pertaining to relevance.

### Relevant evidence

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evidence that is likely to be available, or by a suitable direction to the jury. Whether evidence has an unfairly prejudicial effect must be considered in terms of the proceeding as a whole, and not just from the point of view of a particular party or a defendant.

C60 *Section 8(1)(b)* recognises explicitly, as the common law recognises implicitly, that sometimes the probative value of an item of evidence may not warrant the time spent in adducing or receiving it, particularly when it would simply repeat earlier evidence.

C61 The power in s 8(1) reforms the law contained in a line of authority (culminating in the decision of the Privy Council in *Lobban v R* [1995] 1 WLR 877) to the effect that in a criminal proceeding a defendant's right to present relevant evidence as part of his or her case is absolute and not subject to discretionary control. Under the Code, that right is not absolute, but is factor the judge must consider in balancing probative value against unfairly prejudicial effect on the outcome of the proceeding - s 8(2). In effect, s 8(2) obliges the judge to weigh the rights of competing parties as justice requires in the particular case.

<sup>98</sup> C62 *Section 9(1)(a)* codifies the convenient practice in both civil and criminal proceedings which allows a judge, with the consent of all parties, to admit evidence that may otherwise not be admissible. For example, in the course of presenting their cases, parties sometimes introduce, without objection from the other side, evidence that is not strictly relevant to determining the proceeding. In the end, it saves time to allow this sort of harmless evidence, rather than disrupt its flow by constant rulings on admissibility. *Section 9(1)(b)* allows a judge to admit evidence in any form (for example, in the form of an affidavit or a written brief) or in any way (for example, in any alternative way permissible under s 105) agreed between the parties.

C63 *section 9(2) and (3)* replace and extend the provisions of s 369 of the Crimes Act 1961 to enable both the prosecution and the defence to admit facts so that they need not be proved.'

<sup>99</sup> C71 *Section 14* recognises that the practicalities of court proceedings are such that, at the time evidence is adduced, other evidence may not have established its admissibility. This section permits the judge to admit evidence when it is tendered, subject to a later ruling on admissibility. If the other evidence is not forthcoming, the provisionally admitted evidence must be excluded from consideration.

55. (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

#### **Relevant evidence to be admissible**

56. (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

#### **Provisional relevance**

57. (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:

- (a) if it is reasonably open to make that finding; or
- (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

#### **Inferences as to relevance**

58. (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

#### **General discretion to exclude evidence**

135. The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

3.27 The above brief survey would indicate that modern evidence codes expressly limit the general principle that logically relevant evidence is admissible. There would appear to be three main grounds on which admissibility is limited; unfair prejudice, time wasting and misleading or confusing effect. The proposed New Zealand Code also expressly states that the defendant's right to present evidence is also subject to the courts discretionary control. In line with practical considerations the codes also make provision for the admission of irrelevant evidence by consent and the provisional admission of evidence the relevance of which may only become apparent

later.

## Conclusion

3.28 The greatest difficulty with the relevance rule is that ultimately its application is determined by each presiding officer's common sense which is shaped by his or her own personal experience and therefore has the potential to be discriminatory. It is submitted that there are two mechanisms for guarding against such inadvertent discrimination. Firstly, a requirement that common sense assumptions accord with the values underlying the constitution and secondly that where problem areas are identified that the courts be subjected to legislative guidelines in the exercise of their discretion. For example the Commission in its Sexual Offences Report has recommended that s 227 of the Criminal Procedure Act 51 of 1977 be amended so as to specify criteria to be taken into account when a presiding officer is required to determine the relevance of prior sexual history in a sexual offence case.<sup>100</sup> This has now been included in the Criminal Law (Sexual Offences and Related Matters) Amendment Bill.<sup>101</sup>

3.29 The question arises whether in the absence of a jury there is any benefit in distinguishing logically relevant evidence and legally relevant evidence. A rationale for requiring something in addition to probative value was the fear that juries might be 'satisfied by matter of slight value, capable of being exaggerated by prejudice and hasty reasoning...'<sup>102</sup> However, as argued above, there is no empirical evidence that professional fact finders are less likely to be unduly prejudiced or confused by logically relevant evidence. On the other hand it was also argued above that the fact that presiding officers are required to give reasons for their judgements is as effective in preventing the misuse of evidence as an exclusionary rule. However, there are other justifications for the requirement of legal relevance namely to enhance trial efficiency and prevent procedural prejudice.<sup>103</sup>

3.30 The absence of a legal definition of relevance does not seem to have given rise to any difficulties in practice. However, there are no apparent disadvantages in defining relevance. The Australian approach has merit in that it makes it clear that a

<sup>100</sup> South African Law Commission Project 107, *Sexual Offences Report* December (2002) para 5.6.1 - 5.6.3.

<sup>101</sup> Second reading on 20/11/07.

<sup>102</sup> Wigmore I *Evidence* 3 ed s 28.

<sup>103</sup> Pre-trial disclosure may be a factor taken into account in assessing procedural prejudice.

link between an item of evidence and the credibility of a witness or the admissibility of other evidence is sufficient to establish relevance.

### **Recommendation**

3.31 It is recommended that section 210 of the Criminal Procedure Act 1977 and section 2 of the Civil Proceedings Evidence Act 1965 be repealed and the following provisions enacted:

- A.** (1) Relevant evidence, is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) Evidence is not irrelevant because it relates only to:
- (a) the credibility of a witness; or
  - (b) the admissibility of other evidence; or
  - (c) a failure to adduce evidence.
- B.** (1) Subject to the provisions of any other law, evidence that is relevant is admissible.
- (2) Evidence that is not relevant is not admissible.
- C.** (1) A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
- (a) be unfairly prejudicial to a party; or
  - (b) cause or result in undue waste of time.
- (2) When determining whether the probative value of evidence is outweighed by the risk that evidence will have an unfairly prejudicial effect, a presiding officer may not adopt assumptions or make generalisations that are in conflict with the constitutional values embodied in the Constitution of the Republic of South Africa Act 108 of 1996.
- D.** A court may provisionally admit evidence subject to evidence being later offered which establishes its admissibility.

## CHAPTER 4

### HEARSAY

#### Introduction

4.1 At common law hearsay evidence was an oral or written statement tendered in order to prove the truth of matters stated and made by a person who was not a party to the case and was not called as witness.<sup>104</sup> A statement made by a non-witness would only be subject to the exclusionary rule if the purpose of such evidence was to prove the truth of its contents. At common law hearsay evidence, no matter how relevant, could only be admitted if it fell within a closed list of exceptions.<sup>105</sup> The inflexibility of the common law led to statutory reform and the Law of Evidence Amendment Act 45 of 1988 provides a declarant-oriented definition of hearsay as well as more flexible criteria for admissibility that allow relevant evidence to be admitted.<sup>106</sup>

4.2 Section 3 of the Law of Evidence Amendment Act 45 of 1988 reads as follows:

- 3 (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
  - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
  - (c) the court, having regard to-
    - (i) the nature of the proceedings;
    - (ii) the nature of the evidence;
    - (iii) the purpose for which the evidence is tendered;
    - (iv) the probative value of the evidence;
    - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
    - (vi) any prejudice to a party which the admission of such evidence might entail; and
    - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such

<sup>104</sup> *S v Holshausen* 1984 (4) SA 852 (A).

<sup>105</sup> *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 3 SA 285 (A). See also A Skeen in PJ Schwikkard and SE Van der Merwe *Principles of Evidence* 266 et seq.

<sup>106</sup> See *Metadad v National Employer's General Insurance Co Ltd* 1992 (1) SA 494 (W) at 498; *Makhatini v Raod Accident Fund* 2002 (1) SA 511 (SCA). This paragraph is extracted from Schwikkard and Van der Merwe op cit 256.

evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.<sup>107</sup>

4.3 Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines hearsay evidence as 'evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

4.4 The 1988 Act rendered the common law exceptions obsolete but not irrelevant in that they remain a factor to be taken into account in determining whether it is in the interests of justice to admit hearsay evidence.<sup>108</sup>

4.5 As section 3 of the Amendment Act is '[s]ubject to the provisions of any other law' the statutory exceptions to the hearsay rule remain in tact. Zeffertt et al assert that section 3 makes it clear that the statutory exceptions 'and the three exceptions created in paragraphs (a), (b) and (c) of section 3(1) are alternative avenues to admissibility'.<sup>109</sup> They argue that although the section is capable of more than one interpretation, if the intention of the legislature is taken into account, section 3 must be seen as alternate route to admissibility where evidence is tendered under a statutory exception and fails to meet the statutory requirements for admissibility. Their argument is articulated as follows:

"If it is in the interests of justice to receive an item of hearsay evidence, it makes little sense to exclude it through a slavish adherence to the more artificial canons of statutory interpretation. The retention of the statutory exceptions may be explained on the grounds of convenience and utility. It would have been a formidable undertaking for the legislature to have identified all these exceptions and to have severed the hearsay component from any other evidentiary considerations."<sup>110</sup>

<sup>107</sup> For a full discussion of the application of this section see Schwikkard & Van der Merwe op cit 255-265; Zeffertt et al op cit 366-368.

<sup>108</sup> *Mnyama v Gxalaba* 1990 (1) SA 650 (C).

<sup>109</sup> DT Zeffertt, AP Paizes & A St Q Skeen *The South African Law of Evidence* (2003) 382.

<sup>110</sup> Zeffertt et al op cit 382.

## The rationale underlying the rule

### *Adversarial systems require a hearsay rule*

4.6 Commenting on s 3(1)(a) of the 1988 Act Zeffertt et al note that:

‘This provision squares with the evolution of the hearsay rule from its original status as the ‘child of the jury’... to its more modern role as the product of the adversarial model of trial procedure. The survival of the hearsay rule after the abolition of jury trials in South Africa points to the fact that our conception of the hearsay rule today is fashioned largely by our concern with guarding the values underpinning the adversary trial, a concern now made even more urgent by the constitutional imperatives relating to a fair trial. To admit hearsay where the adversary consents to its admission leaves these values intact provided that the consent is given with a full and proper appreciation of the nature and extent of the prejudicial consequences.’<sup>111</sup>

4.7 Damaska notes that whilst the hearsay rule is regarded as extremely important in common law systems, in continental systems it generally takes the form of an instruction to presiding officers to use original sources of evidence where reasonable possible and a requirement that presiding officers give reasons for their use and the weight attached to evidence from derivative sources.<sup>112</sup>

4.8 Why this disparity in approach to hearsay in common law and civil systems? As discussed above the argument that presiding officers are less likely to misuse hearsay evidence than jurors is not particularly strong.<sup>113</sup> On the other hand the techniques of taking testimony in continental and common law systems may well have an influence on the different approaches to admissibility. Damaska notes:

‘Continental witnesses are not guided in their narratives by narrow direct questions that can be objected to before they are answered. And because these narratives often contain second hand information, Continental fact finders are continuously awash in hearsay. Due to the joint effect of unitary court ecology and traditional interrogation techniques, the refusal of the Continental systems to adopt the prima facie ban on hearsay can hence be justified by the ban’s impracticability alone: despite the shield of an

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<sup>111</sup> Op cit 369-70.

<sup>112</sup> Damaska op cit 16. However, he notes that a stricter approach to hearsay is taken in Portugal, Italy and Germany and that article 6 of the European Human Rights Convention may require a more stringent approach to be taken to the admissibility of hearsay in criminal trials. See *Kostovski v The Netherlands* 166 ECHR (1990).

<sup>113</sup> See para 1.1.3 above.

exclusionary rule, vast amounts of inadmissible derivative information would still continue to reach the triers of fact, remain lodged in their minds, and influence the outcome'.<sup>114</sup>

4.9 Another influence is the contrast between the concentrated trial proceedings in adversarial common law systems and the more episodic procedures used by the Continental courts.

'When a witness reproduces any person's out-of-court statement, or when that statement is contained in a document, there is enough time in the unhurried atmosphere of Continental litigation to seek out this person for presentation in court - at the next procedural instalment, if necessary. And if this person's court testimony differs from that quoted by the hearsay witness, the court has heard them both and is thus in position to evaluate relative trustworthiness. Due to the comparatively informal style of adducing evidence that prevails on the Continent - - the hearsay witness and the declarant can even be made to confront each other. And if the declarant turns out to be unavailable, normally there is sufficient time before the next instalment to collect the information necessary to gauge his credibility. Also, if hearsay evidence is relied upon by the court of first instance, the retrial of factual issues on appeal in Continental courts provides yet another opportunity to check the information bearing on the reliability of derivative statements. A relatively more lenient approach to the use of potentially treacherous derivative proof seems justified.'<sup>115</sup>

This process set out by Damaska is clearly far removed from the concentrated adversarial trial proceedings characteristic of our courts.

4.10 It is also the party driven nature of common law adversarial proceedings that leads to a resistance to the admission of hearsay. As discussed above the dominant and partisan role of the parties increases the possibility of misleading evidence been introduced and there must be an immediate mechanism for testing evidence, and this mechanism is cross-examination.<sup>116</sup> It is the absence of the opportunity to cross-examine the declarant on whom the probative value depends which makes hearsay unreliable in common law systems. The hearsay rule also acts as an incentive for parties to produce the best evidence available - whereas a less optimal source might otherwise favour their interests.<sup>117</sup>

4.11 Damaska's argument that the rules of evidence are shaped by their institutional environment can be summarised in respect of hearsay as follows:

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<sup>114</sup> Op cit 49.

<sup>115</sup> Damaska op cit 64-5.

<sup>116</sup> Damaska op cit 79-80. See also para 4.2.2.1 below.

<sup>117</sup> Damaska op cit 85.

‘[T]he characteristic organization of the common law trial - its internal division ... makes exclusion of derivative information a practical proposition: in a divided court, the judge is in position to exclude second hand information before it reaches the triers of fact...[T]he temporal compression of proceedings provides good reasons for the prima facie ban on hearsay. If derivative information were freely usable in court, time pressures would in most cases prevent the opponent of hearsay from locating and challenging the credibility of the out-of-court declarant. ..[T]he logic of the adversary system reinforces the desirability of excluding derivative information. Where evidence-gathering is the responsibility of the parties, the opponent of hearsay has plausible grounds to object to the reliance on extra-judicial testimony: the out-of-court declarant appears to him an informant of his adversary capable of escaping standard courtroom tests of credibility...’<sup>118</sup>

4.12 A number of institutional characteristics identified by Damaska as justifying the hearsay rule all exist to varying extents in South African criminal and civil procedural systems. While our courts are not bifurcated, proceedings remain substantially party driven and trial proceedings are concentrated. However, the unitary nature of our courts leaves the question open as to whether the hearsay rule could be formulated as a directive applied in assessing weight as opposed to admissibility. It is also necessary to consider the distinction between civil and criminal procedure. For example, in civil proceedings there may well be other mechanisms for guarding against surprise at trial as a result of the admission of hearsay evidence. In civil trials it may be more appropriate to use notice requirements and costs incentives to guard against such surprises. However, it is acknowledged that similar mechanisms are not found and would be more difficult to introduce in criminal trials.<sup>119</sup>

*The hearsay rule enhances accurate decision making*

4.13 The rationale for the hearsay rule is deeply embedded in the adversarial belief that the trier of fact is best able to make accurate decisions of fact where the witness upon whom the probative value of the evidence depends testifies in open court.<sup>120</sup> A witness who testifies in open court does so in circumstances in which the solemnity of proceedings is reinforced by potential liability for perjury. The presence

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<sup>118</sup> Damaska op cit 125-126.

<sup>119</sup> See RC Park ‘A subject matter approach to hearsay reform (1987) 51 *Michigan Law Review* 86. (Check ref) CB Mueller op cit 411. Cf B Robertson ‘What is left of hearsay’ 2001 (November) *New Zealand Law Journal* 421.

<sup>120</sup> See R Delisle & D Stuart *Evidence: Principles and Problems* 6 ed (2001) 485-6; Weissenberger op cit 331.

of the party against whom the testimony is given also encourages circumspection on the part of the witness. The court's ability to observe the witnesses demeanour contributes to a more reliable assessment of credibility. However, the central objection is embedded in the belief in the effectiveness of the adversarial mechanism for truth finding - cross-examination.<sup>121</sup> When hearsay evidence is admitted these advantages of testifying in open court are lost. Consequently the 'four "dangers" of faulty perception, erroneous memory, insincerity, and ambiguity in narration' are inherent in the admission of hearsay.<sup>122</sup>

4.14 This traditional rationale must be assessed in light of a significant body of research that indicates that the observation of demeanour does not necessarily contribute to an accurate assessment of credibility, and that there is little certainty as regards the efficacy of cross-examination in enhancing the reliability of decision making.<sup>123</sup> Furthermore it is 'questionable whether the oath discourages untruthfulness to the extent to which it has traditionally been assumed to do'.<sup>124</sup> Consequently, Choo concludes that 'whilst it may be true that hearsay evidence is likely, in many circumstances, to be less reliable than non-hearsay evidence, the actual extent to which it is less reliable can only be a matter of speculation, and must be dependent on the particular circumstances'.<sup>125</sup>

4.15 Historically the exclusionary rule was viewed as necessary to guard against the danger that the trier of fact might place undue weight on hearsay evidence despite its inherent weaknesses. The counter argument is that we all use hearsay statements in making decisions in everyday life and in doing so take into account its potential unreliability consequently there is no reason to assume that either juries or professional judges lack the necessary sophistication to accord hearsay evidence its appropriate weight.<sup>126</sup> This line of reasoning leads to the assertion that 'it is better to

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<sup>121</sup> See *S v Ndlovu* 2002 (2) SACR 325 (SCA).

<sup>122</sup> A Choo *Hearsay and Confrontation in Criminal Trials* (1996) 42. See also Delisle & Stuart op cit. J Sopinka, S Lederman & A Bryant *The Law of Evidence in Canada* 2 ed (1999) 174. C Tapper *Cross & Tapper on Evidence* 9 ed (1999) 291-294. MS Raeder 'Finding the proper balance in hearsay policy'. The uniform rules attempt to stem the hearsay tide in criminal cases without prohibiting all nontraditional hearsay' (2001) 54 *Oklahoma Law Review* 631. See also Zeffert et al op cit 378; Schwikkard 'The challenge of hearsay' (2003) 120 *SALJ* 63; *S v Ndlovu* 2002 (2) SACR 325 (SCA).

<sup>123</sup> Choo op cit 43.

<sup>124</sup> Choo op cit 43.

<sup>125</sup> Choo op cit 43. See also CB Mueller 'Post modern hearsay reform: the importance of complexity' (1992) 76 *Minnesota Law Review* 367 at 380.

<sup>126</sup> CB Mueller op cit 373-4. See also DA Nance 'Commentary: A response to Professor

admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information'.<sup>127</sup>

4.16 Although not conclusive, empirical research indicates that juries are not unduly influenced by hearsay evidence<sup>128</sup> and consequently it can be assumed that a unitary court is even less likely to accord inappropriate weight to hearsay evidence. In a unitary system there is a further safeguard in that the court must give reasons for its judgment and would have to justify its reliance on hearsay in reaching a decision. Consequently, if the danger of undue weight being accorded to hearsay was the sole rationale of the hearsay rule, it would make little sense to retain the hearsay rule as an exclusionary rule; the hearsay rule as a 'decision' rule requiring a justification for reliance of hearsay would provide the necessary safeguard.

*The hearsay rule is cost effective*

4.17 The hearsay rule has also been justified on an utilitarian basis. The argument is that it pays for itself 'because it is cheaper to test witnesses in court than prepare and offer evidence bearing on the credibility of remote declarants'<sup>129</sup> (a questionable assertion as it would no doubt frequently be cheaper to offer a report of what a witness said than to call the witness.<sup>130</sup>) Allen argues vociferously against the cost justification and points to the time spent litigating the rule because it relates to a cost which is not only borne by the parties but also by the public as it increases the costs in running the courts. Allen also notes that the hearsay rule also imposes costs on academic institutions as a disproportionate amount of time is spent teaching and writing about the hearsay rule.<sup>131</sup>

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Damaska: Understanding responses to hearsay: an extension of comparative analysis' (1992) 76 *Minnesota Law Review* 459 at 463 expresses his skepticism as follows: 'The difficulty for a taint theory is explaining why being exposed to admittedly relevant information, which may be very probative, should lead to greater inaccuracy, especially when the information carries on its fact a consumer warning ... by virtue of its derivative status'. See also P Miene, RC Park & E Borgida 'Juror decision making and the evaluation of hearsay evidence' (1992) 76 *Minnesota Law Review* 683.

<sup>127</sup> M Bull Kovera, RC Park, SD Penrod 'Juror's perceptions of eyewitness and hearsay evidence' (1992) 76 *Minnesota Law Review* 703 at 704. See also RA Shapiro 'Saving Desdemona' (2001) 22 *Cardozo Law Review* 1771; CR Callen 'Othello could not optimize: economics, hearsay, and less adversary systems' (2001) 22 *Cardozo Law Review* 1791.

<sup>128</sup> See generally RC Park op cit, CB Mueller op cit.

<sup>129</sup> CB Mueller op cit 376.

<sup>130</sup> Mueller ibid.

<sup>131</sup> RJ Allen 'Commentary: A response to Professor Friedman. The evolution of the hearsay rule to

*The hearsay rule encourages the production of the best evidence*

4.18 Another justification for the hearsay rule is that it is necessary to encourage parties to call the original declarant.<sup>132</sup> The counter argument is that the risk of low weight being attached to the hearsay evidence should act as a sufficient incentive to call the original declarant. It can also be argued that if the original declarant is available there is nothing prohibiting the party against whom the hearsay is admitted from calling the original declarant.<sup>133</sup>

*The hearsay rule is too complicated to merely be subsumed under a relevance inquiry*

4.19 An argument can be made that in effect the hearsay rule merely requires the court to engage in the same exercise as it would in determining legal relevance i.e. does the probative value of the evidence exceed its prejudicial value. What then is the utility of the hearsay rule? Zeffertt et al<sup>134</sup> justify a separate hearsay rule on the basis that hearsay attracts specific prejudicial qualities and challenges that are not necessarily features of other types of evidence - and to include these in the legal relevance inquiry 'would be to over-burden that doctrine and to encumber it unnecessarily with principles applicable only to a particular kind of evidence'.<sup>135</sup>

4.20 It has also been argued that if the hearsay rule is subsumed under a general relevance inquiry, this will discourage settlement as parties are unlikely to be able to predict the outcome on the basis of what evidence is likely to be admitted.<sup>136</sup> In response it might be asserted that the hearsay rule is so poorly understood that parties are unable to predict admissibility in any event.

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a rule of admission' (1992) 76 *Minnesota Law Review* 797 at 800.

<sup>132</sup> DA Nance 'Commentary: A response to Professor Damaska: Understanding responses to hearsay: an extension of the comparative analysis' (1992) 76 *Minnesota Law Review* 459. See also RD Friedman 'Toward a partial economic, game theoretic analysis of hearsay' (1992) 76 *Minnesota Law Review* 723 at 728.

<sup>133</sup> Nance op cit 463. This assumes that it is justified to place the costs of calling the original declarant on the party against whom the hearsay is admitted.

<sup>134</sup> Op cit 377.

<sup>135</sup> Ibid.

<sup>136</sup> Raeder op cit 516.

4.21 Another objection against relying on the application of the relevance rules to determine the admissibility of hearsay is that it is difficult to base an appeal on the 'abuse' of such a wide judicial discretion'.

4.22 Conversely, it is argued that if hearsay was properly subjected to the relevance inquiry i.e. admitted when probative value exceeds prejudicial effect the truth seeking function of the court would be better advanced. Friedman argues as follows: 'if live testimony by the declarant would be more probative than prejudicial then most often ... hearsay would be more probative than prejudicial'.<sup>137</sup> Consequently, to presumptively exclude hearsay is not rational: if probative value exceeds prejudicial effect 'then the burden of producing the declarant should be placed on the person objecting to the hearsay'.<sup>138</sup> Friedman concludes: 'as with other types of evidence having significant probative value, the opponent has the burden of showing why it should be excluded. Also, as with other evidence, the opponent ordinarily is left with the burden of presenting evidence that he thinks might rebut the evidence offered by the proponent.'<sup>139</sup>

*The hearsay rule has an important societal dimension.*

4.23 It is argued that the societal dimension of the hearsay rule 'centres on two accusatorial relationships. First, there is the relationship between the accused and the individual who makes the statements offered against the accused. Secondly, there is the relationship between the accused and the formal accusers, in the form of the prosecution and the power of the state'.<sup>140</sup> In a civil context the societal dimension is inevitably diminished, the primary focus being on the relationship between a party and the hearsay declarant, who may well be a neutral provider of information.

4.24 Scallen, placing emphasis on the importance of shared responsibility for outcomes and individual consciousness of guilt argues that 'confrontation is necessary as part of the social relationship between the individual defendant and the

<sup>137</sup> RD Friedman 'Toward a partial economic, game theoretic analysis of hearsay' (1992) 76 *Minnesota Law Review* 723 at 724.

<sup>138</sup> Friedman op cit 724. However Friedman notes that other considerations may require a departure from this approach - 'such as whether the proponent has a substantial advantage in satisfying all or part of the burden of producing the declarant, or whether the proponent has given late notice of his intention to offer hearsay'.

<sup>139</sup> Op cit 729.

<sup>140</sup> EA Scallen 'Constitutional dimensions of hearsay reform: Toward a three dimensional confrontation clause' (1992) 76 *Minnesota Law Review* 623 at 635.

accusing witness'.<sup>141</sup> She argues that the societal dimension of confrontation strengthens the legitimacy and integrity of adversarial processes<sup>142</sup> and that 'participation in decision making is critical to the perception of procedural justice'.<sup>143</sup> However, Scallen also acknowledges that in certain circumstances there may be no societal value in confrontation. For example, '[b]ecause of the difference in vulnerability and power between the individuals, a confrontation between child and adult may be qualitatively and ethically different than a confrontation between two adults'.<sup>144</sup>

*The hearsay rule is necessary to prevent the abuse of state power*

4.25 The hearsay rule can also be viewed 'as a way of protecting individual rights from the intrusion of government, or as a way of influencing the conduct of police and prosecutors in the process of preparing and preserving evidence'.<sup>145</sup> (This rationale also supports an argument that the standard for admissibility for hearsay should be lower for defendants than the prosecution in criminal trials).<sup>146</sup> Raeder argues that although a relaxation of the hearsay rule might allow defendants to make greater use of hearsay it 'is also likely to result in prosecutors deluging the trial with hearsay' and that 'such wholesale use of hearsay would change the way criminal trials look and might lower public acceptance of verdicts'.<sup>147</sup>

*The hearsay rule is constitutionally required*

4.26 Section 35(3)(i) of the Constitution includes the right to challenge evidence as

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<sup>141</sup> Op cit 644.

<sup>142</sup> Op cit 646.

<sup>143</sup> Op cit 647. See also RD Friedman ' "Face to face": Rediscovering the right to confront prosecution witnesses' (2004) 8 *International Journal of Evidence and Proof* 1.

<sup>144</sup> Op cit 653.

<sup>145</sup> RC Park 'The new wave of hearsay reform scholarship' (1992) 76 *Minnesota Law Review* 363 at 365. See also Choo op cit; RD Friedman 'Face to face: rediscovering the right to confront prosecution witnesses' 2004 (8) *International Journal of Evidence and Proof* 1. CB Mueller op cit 384 notes that other grounds for objecting to hearsay include 'concerns about concocted or exaggerated statements, and the use of trained investigators to exact statements by trickery and offers of immunity or leniency.'

<sup>146</sup> See Scallen op cit 649.

<sup>147</sup> MS Raeder 'Commentary: A response to Professor Swift: The hearsay rule at work: has it been abolished de facto by judicial discretion' (1992) 76 *Minnesota Law Review* 507 at 512. See also E Swift 'The hearsay rule at work: has it been abolished de facto by judicial decision?' (1992) 76 *Minnesota Law Review* 473.

a component of the right to a fair trial. In *S v Ndhlovu*<sup>148</sup> the Supreme Court of Appeal considered whether cross-examination of the hearsay declarant was an indispensable component of the right to challenge evidence. The court held that whilst the unregulated admission of hearsay evidence might infringe the right to challenge evidence, section 3 of the 1988 Act, which is primarily an exclusionary rule, provides legislative criteria which protect against any infringement of the right to challenge evidence.<sup>149</sup> Cameron JA held as follows:

'It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.'<sup>150</sup>

4.27 The court also pointed to a number of other safeguards that contributed to the constitutionality of section 3. Namely: (a) presiding officers have a duty to exclude hearsay evidence and may not passively admit it in the absence of an objection from the parties; (b) presiding officers also have a duty to properly explain the significance and contents of section 3 to an unrepresented accused; (c) presiding officers must

<sup>148</sup> 2002 (2) SACR 325 (SCA).

<sup>149</sup> Cf Schwikkard *SALJ* op cit; Schwikkard & Van der Merwe op cit 263-4; Zeffertt et al op cit 378-9. The Canadian hearsay rule has similarly passed constitutional muster. In terms of the Canadian rule '[w]ritten or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceedings in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein'. This exclusionary rule is then subject to a number of exceptions. See J Sopinka, SN Lederman & AW Bryant *The Law of Evidence in Canada* (1999) 173 et seq. See also R Delisle & D Stuart *Evidence Principles and Problems* (2001) 481 et seq.

<sup>150</sup> At [24]. Schwikkard & Van der Merwe op cit 264 note that '[t]he Supreme Court of Appeal chose a line of reasoning that avoided the two stage limitations analysis generally adopted by the Constitutional Court; and by concluding that the right to cross-examine is not an essential component of the right to challenge evidence also departed from a generous interpretation of rights. However, the approach of the Supreme Court of Appeal finds resonance in the decisions of the United States Supreme Court (see *Ohio v Roberts* 448 US 56 (1960) which is constrained from engaging in a two stage approach in the absence of a limitations clause. See also Schwikkard *SALJ* op cit.

also protect the accused from ‘the late or unheralded admission of hearsay evidence’.<sup>151</sup> Another important consideration identified by the Supreme Court of Appeal was that the decision to admit hearsay evidence was one of law and not of discretion.<sup>152</sup>

4.28 The right to challenge evidence is only specified in relation to criminal trials. The dangers inherent in hearsay arise in both criminal and civil hearings and it can be argued that the right to challenge evidence in civil trials can be read into the right to a *fair* public hearing specified in section 34 of the Constitution. Nevertheless, it is also clear that the role the hearsay rule plays as a constraint on government power is far more dominant in the criminal than civil context. Unlike, the civil courts the criminal justice system is a direct expression of the exercise of state power and it is in the criminal context that there is more likely to be a significant disparity in the resources of the parties.<sup>153</sup> Consequently, the constitutional threshold for determining whether the right to challenge evidence has been met is likely to be substantially lower in civil proceedings than in criminal proceedings.<sup>154</sup>

4.29 The next question that arises is would the admission of hearsay be

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<sup>151</sup> Op cit [18].

<sup>152</sup> See also *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1997 (1) SA 1 (A); *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA).

<sup>153</sup> See MA Berger ‘The deconstitutionalization of the confrontation clause: a proposal for a prosecutorial restraint model’ (1992) 76 *Minnesota Law Review* 557 at 561 where she (writing in an American context) notes that: ‘In a criminal trial, the government’s might gives an enormous advantage to the prosecution, an advantage that many of the provisions of the Bill of Rights are designed to keep in check. Allowing the government to use evidence obtained through private interviews markedly enhances the potential for abuse. The prosecution has the incentive and the power to shape the witness’ answers in accordance with its theory of the case. The opportunity to cross-examine the government agent to whom the out-of-court statement was made does not provide adequate protection. The agent will often be both a professional investigator with experience in obtaining statements and a professional witness adept at preserving the secrecy of the government’s operations... Furthermore, the creation of evidence in secret hinders the jury from scrutinizing a process in which jurors should play a role as political participants. The means used by the government to prosecute a crime is a matter of public concern.’ She consequently argues that ‘[h]earsay statements procured by agents of the prosecution or police should therefore stand on a different footing than hearsay created without governmental intrusion’. See RN Jonakai ‘A response to Professor Berger: The right to confrontation: not a mere restraint on government’ (1992) 76 *Minnesota Law Review* 615 at 619 who argues that if the accused has a positive right to confront - the treatment of hearsay will not necessarily depend on whether or not it was made to a government agent.

<sup>154</sup> EJ Imwinkelried ‘The constitutionalization of hearsay: The extent to which the Fifth and Sixth Amendments permit or require the liberalization of the hearsay rules’ (1992) 76 *Minnesota Law Review* 521 at 522 writing in the American context notes that ‘[t]he Supreme Court has never held that the Constitution constrains the admission of hearsay testimony in civil actions’ Consequently, it is possible to argue that there is no constitutional bar to abolishing the hearsay rule in civil cases subject to the constraints of the due process clause which requires fairness.

unconstitutional if not subjected to the rigours of an exclusionary rule?<sup>155</sup> For example, if the threshold for admission was set by the test for legal relevance and specific criteria set for establishing weight rather than having a separate exclusionary rule, would this pass constitutional muster? Again it could be argued that parties are always free to challenge the admissibility of evidence on the basis that it is irrelevant thereby retaining the right to challenge evidence. However, the legal relevance test, unlike section 3, involves only a cursory inquiry into reliability. Reliability in terms of section 3 is playing an important role in determining admissibility.<sup>156</sup> Cameron JA in *S v Ndhlovu*<sup>157</sup> identifies the conflation of admissibility of evidence and reliability as a problem, but does not spell out why it is a problem. (Although once evidence has been admitted in terms of section 3 - its weight is again assessed in the totality of the evidence.<sup>158</sup> ) If admissibility was restricted to a determination of legal relevance, then reliability would primarily go to the weight of the evidence not its admissibility. As weight is best assessed when the totality of the evidence is considered, this route may well have some advantages. However, it arguably removes an additional safeguard (the double assessment of weight) and it would also be out of kilter with other practices in other democratic societies employing an adversarial procedural system and against the Continental drift towards the exclusion of hearsay in criminal proceedings.<sup>159</sup>

<sup>155</sup> The approach of the Canadian courts cannot be distilled from any one case. In *S v Potvin* [1989] 1 SCR 525 the court held that the exceptional admission of hearsay evidence did not infringe the fundamental principles of justice guaranteed by s 7 of the Charter nor the constitutional right to a fair trial and to be presumed innocent (s 11(d)) provided, the accused had an earlier opportunity to cross-examine the declarant at the preliminary hearing. However, it is clear that the hearsay rule envisages the admission of evidence in circumstances where there was no prior opportunity to cross-examine. (See *R v Khan* [1990] 2 SCR 531) The Canadian Supreme Court while placing substantial emphasis on an prior opportunity to cross-examine has retained a degree of flexibility to meet the dictates of necessity. However, even where hearsay evidence falls to be admitted by virtue of the fact that it meets the criteria of reliability and necessity the court retains a discretion to exclude it if its admission would result in a Charter violation (J Sopinka, S Lederman & A Bryant *The Law of Evidence in Canada* (1999) 6.96) The Supreme Court while developing the common law so as to permit the admissibility of hearsay to be determined by the more flexible criteria of reliability and necessity (*Ares v Venner* [1970] SCR 608); has avoided conflating the hearsay rule with the scope of the right to challenge evidence. (See also *R v Smith* [1992] 2 SCR 915; *R v Finta* [1994] 1 SCR 701; *R v B (KG)* [1993] 1 SCR 740; *R v U (FJ)* [1995] 3 SCR 764.)

<sup>156</sup> It seems that the weight of the evidence may be a component of both the nature of the evidence and the probative value of the evidence. See Schmidt & Rademeyer *Bewysreg* (2000) 477-8; Schwikkard & Van der Merwe op cit 261; *Hewan v Kourie NO* 1993 (3) SA 233 (T); *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA).

<sup>157</sup> 2002 (2) SACR 325 (SCA) at [16].

<sup>158</sup> See *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) at 522.

<sup>159</sup> Damaska op cit 16 notes that a stricter approach to hearsay is taken in Portugal, Italy and Germany and that article 6 of the European Human Rights Convention may require a more stringent approach to be taken to the admissibility of hearsay in criminal trials. See *Kostovski v The Netherlands* 166 ECHR (1990); *Unterperinger v Austria* (1986) 13 EHRR 175; *Saidi v United Kingdom* (1993) 17 EHRR 251.

4.30 Shifting the emphasis from admissibility to weight undermines another safeguard identified in *Ndhlovu*, namely, that the decision to admit hearsay evidence is one of law and not of discretion. The weight of evidence is something traditionally determined by the jury and therefore is considered a question of fact rather than law.

4.31 Following *Ndhlovu*, it would appear that making the hearsay rule one of weight rather than admissibility, removes two important factors contributing to the Supreme Court of Appeal finding that section 3(1)(c) did not infringe the accused's right to challenge evidence. Consequently, it is highly likely that a restructuring of the hearsay rule so as to put the emphasis on weight rather than admissibility, will infringe the right to challenge evidence.

4.32 The next question is whether this could constitute a justifiable limitation in terms of section 36 of the Constitution. It is submitted that there is a much higher risk of such an amendment failing to meet the requirements of section 36 in respect of criminal proceedings than civil proceedings. In respect of criminal proceedings it would be a departure from the approach taken in other democratic societies with similar procedural systems. It would constitute an infringement of a right which is historically viewed as representing an essential component of a fair trial in an adversarial system and the purpose of the limitation is simply one of convenience i.e. not substantial enough to justify the limitation. On the other hand the hearsay rule in respect of civil trials is not concerned with protecting the individual from the abuse of state power and has been greatly diminished in a number of democratic, adversarial jurisdictions.<sup>160</sup>

4.33 A Constitutional challenge could also arise where the hearsay rule restricts an accused's right to adduce evidence. The English Law Commission commenting in relation to the European Convention of Human Rights noted that: 'if a defendant were not allowed to use a cogent piece of evidence because it fell foul of the hearsay rule, he or she might be able to complain successfully that this infringed the right to a fair trial...'<sup>161</sup> This might support an argument in favour of adopting the hearsay rule as a

<sup>160</sup> See para 4.26 above.

<sup>161</sup> Law Commission (No 245) *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997).

Article 6 of the European Convention on Human Rights includes the following provisions:

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

...

'decision' rule in respect of hearsay adduced by the defendant in criminal trials whilst retaining it as an exclusionary rule in respect of the prosecution. However, in the absence of a clearly unjustifiable constitutional breach<sup>162</sup> this would most likely result in the introduction of unnecessary complexities.

### Approaches in some common law jurisdictions

4.34 Once again it should be noted that this section does not purport to be a comprehensive survey of approaches taken in other jurisdictions. They have merely been selected as examples of Anglo-American jurisdictions that have engaged in the process of codification of the rules of evidence.

#### United States

4.35 In the United States hearsay evidence is presumptively inadmissible and will only be exceptionally admitted.<sup>163</sup> Rule 802 of the Federal Rules of Evidence reads as follows: 'Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. Rules 803 and 804 then list categories of exception. These are not repeated here as the Commission, in its 1986 *Review of the Law of Evidence*,<sup>164</sup> rejected the categorisation approach of the common law and introduced a more principle approach. There is nothing to indicate that a departure from a principled approach is merited.

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(3) Everyone charged with a criminal offence has the following minimum rights:..  
 (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...

The right to examine witnesses is a factor to be considered in conjunction with the right to a fair trial ie it will not be considered in isolation. (*Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360; *Ochensberger v Austria* (1995) 18 EHRR CD 170, 171.) Consequently, the Strasbourg Court has admitted into evidence statements from witnesses whom the defence was unable to question where it has been impossible to produce the witness for questioning and the hearsay evidence is corroborated by other evidence. (*X v Austria* (1972) 15 YB EHRR 264, *Bricmont v Belgium* (1990) 12 EHRR 217, *Asch v Austria* (1993) 15 EHRR 597; *Liefveld v The Netherlands* (1995) 18 EHRR CD 103. Cf *Unterpertinger v Austria* (1991) 13 EHRR 175, *Windisch v Austria* (1991) 13 EHRR 281.)

<sup>162</sup> The Ontario Court of Appeal in *R v Williams* (1985) 18 CCC (3d) 356, 44 CR (3d) 351 held that the hearsay rule although possibly restricting an accused's right to adduce evidence was not contrary to the accused's Charter right to make a full answer and defence.

<sup>163</sup> Wissenberger op cit 331.

<sup>164</sup> South African Law Commission Report, Project 6 *Review of the Law of Evidence* (1986). Referred here after as the 1986 Report.

4.36 Nevertheless Rule 804(b)(1) is worth noting in that it provides that the hearsay rule will not apply if the declarant is unavailable as a witness to '[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.'

4.37 This provision clearly does away with the potential anomaly arising out of the *Hollington v Hewthorn*<sup>165</sup> rule which prohibited the record of the witness's testimony being admitted in subsequent civil proceedings. However, it is submitted that there is no need to adopt a similar legislative provisions as the rationale underlying this exception is that it is justified on basis of necessity and reliability and if s 3(1)(c) of the 1988 Act is properly applied it will also address the hearsay aspect of the *Hollington v Hewthorn* rule.<sup>166</sup>

4.38 As regards the constitutionality of the hearsay rule it would appear that the requirements of the Confrontation Clause<sup>167</sup> will be met if the hearsay evidence in question fits into one of the recognised exceptions to the rule.<sup>168</sup> If a hearsay statement does not fit an exception it will meet the requirements of the Confrontation Clause if it possesses sufficient indicia of reliability.<sup>169</sup> Although not absolute, a showing that the hearsay declarant is unavailable is usually a requirement for

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<sup>165</sup> 1943 All ER 35.

<sup>166</sup> The 1986 Report also considered the *Hollington v Hewthorn* rule in terms of which a conviction in a criminal case is not admissible evidence in a subsequent civil action for damages. The court took cognisance of the many arguments directed at this rule and the fact that it has resulted in law reform in a number of jurisdictions which now expressly permit evidence of such a conviction to be admitted in a civil trial. But concluded that any disadvantages suffered by parties as a result of the rule could be ameliorated by adopting a more flexible approach to hearsay evidence (which presumably would allow the record of the proceedings to be admitted). However, it felt that there were nevertheless good reason for excluding evidence of the conviction itself for the following reasons:

"... a conviction is essentially hearsay opinion; the issues and parties in the criminal proceedings and subsequent civil proceedings are not necessarily identical, in criminal proceedings there are a number of statutory provisions relating to presumptions and the burden of proof which do not apply in civil proceedings and which might make it unreasonable to admit evidence of convictions without exception in civil proceedings; a civil court might attach too much weight to a conviction; the decision of the criminal court as such has no evidential value in the next court; to attach evidential value to the decision of the first court would in effect mean declaring something that is irrelevant to be relevant."

<sup>167</sup> Sixth Amendment.

<sup>168</sup> *White v Illinois* 112 S.Ct 736 (1992).

<sup>169</sup> *Idaho v Wright* 110 S.Ct 3139 (1990). See generally MA Berger op cit 558-559.

admissibility.<sup>170</sup>

## New Zealand

4.39 As in 3.4.2 the commentary pertaining to the relevant sections of the proposed New Zealand Code is reflected in the footnotes.

4.40 Section 4 of the proposed New Zealand Code<sup>171</sup> defines hearsay evidence as ‘a statement that (a) was made by person other than a witness; and (b) is offered in evidence at the proceedings to prove the truth of its contents.’ Admissibility of hearsay evidence is dealt with in Subpart 1<sup>172</sup> which includes the following sections:

### 16 Interpretation<sup>173</sup>

<sup>170</sup> *United States v Inadi* 475 US 387 (1986). Cf *California v Green* 399 US 149 (1970); *Ohio v Roberts* 448 US 56 (1980). See generally EJ Imwinkelried op cit 531-2.

<sup>171</sup> Op cit.

<sup>172</sup> C74 This part substantially reforms the law on hearsay. The overall purpose of the hearsay provision the Code is to simplify and rationalise the law in civil as well as criminal proceedings.

<sup>173</sup> C75 The definition of circumstances relating to the statement set out the factors to be considered in deciding whether there is reasonable assurance that a hearsay statement is reliable in terms of s 18 (hearsay in civil proceedings) and s 19(a) (hearsay in criminal proceedings). The factors are cumulative but may, on occasion, overlap. They do not include either the truthfulness of the witness who relates the hearsay or the consistency of the statement with other evidence not directly related to the statement. The truthfulness of the witness who relates the hearsay can be tested before, and assessed by, the fact-finder. It is important to distinguish between circumstances relating to the statement and other evidence in the case: hearsay that the circumstances relating to the statement indicate to be reliable should be held inadmissible because it contradicts other evidence.

C76 In s 16(1)(a) the nature of the statement could include, for example, whether the statement was first-hand hearsay or multiple hearsay. A hearsay statement is more likely to be reliable if the maker of the statement had personal knowledge of the matters dealt with in the statement, than if the maker of the statement has merely repeated what he or she heard from someone else. Generally, the probability of error increases with the number of times an oral statement has been transmitted.

C77 In s 16(1)(b) the circumstances in which the statement was made could include, for example, the physical environment (including noise level), the mental alertness of both the maker and receiver of the statement, or the conduct of the person to whom the statement was made. It may also be relevant to consider the time when the statement was made in relation to the events it refers to.

C78 Section 16(1)(c) and (d) enable questions to be raised about any motive the maker of the statement might have to lie, or the reliability of his or her observation.

C79 The term ‘maker of the statement’ is not defined. Whether a person is the maker of a statement is a question of fact. The question is likely to arise only in cases where more than one person was involved in preparing a statement, as when a police officer records the statement of a person being interviewed.

The principle is stated in *Cross on Evidence*:

The key question in any doubtful case involving collaboration in preparing some written statement is whether the alleged statement maker has unequivocally adopted it as a statement for whose accuracy he or she is responsible. (para 17.24)

C80 The combined effect of the definitions of ‘witness’ and ‘give evidence’ is that a person is only unavailable as a witness if he or she cannot give evidence in any of the ways provided for in the Code, or cannot be cross-examined in a proceeding even in an alternative way, such as by close-circuit television or videolink. The categories of ‘unavailability’ listed in s 16(2) follow those in s 2(2) of the Evidence Amendment Act (No 2) 1980, extended to cases of extreme youth as well as old age. Paragraph(b) assumes that persons within New Zealand would not be prevented by practicalities from being witnesses. Advancing technology may mean that this will increasingly be the case for overseas residents as well. Trauma, or the severe impairment of a

- (1) In this Subpart, circumstances relating to the statement include
  - (a) the nature and contents of the statement; and
  - (b) the circumstances in which the statement was made; and
  - (c) any circumstances that relate to the truthfulness of the maker of the statement; and
  - (d) any circumstances that relate to the accuracy of the observation of the maker of the statement.
- (2) The maker of a statement is unavailable as a witness for the purposes of the Subpart if the maker
  - (a) is dead; or
  - (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
  - (c) is unfit to be a witness because of age or physical or mental condition; or
  - (d) cannot with reasonable diligence be identified or found; or
  - (e) is not compellable to give evidence.
- (3) Notwithstanding subsection(2), the maker of a statement is not be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.

#### *17 Hearsay rule*<sup>174</sup>

Hearsay is not admissible except

- (a) as provided by this Subpart or any other Act; or
- (b) where this Code provides that this Subpart does not apply and the hearsay is both relevant and not otherwise inadmissible under this Code.

#### *18 Hearsay in civil proceedings*<sup>175</sup>

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statement maker's emotional state will make it necessary for the judge to consider under para(c) whether the maker is unfit to attend because of this or her mental condition, particularly if the maker is a child. There is a new category for those who are not compelled as witnesses; for example, a defendant in a criminal proceeding - s 75.

C81 Hearsay evidence may be offered to prove the factors that constitute circumstances relating to the statement under s 16(1), and the unavailability of witnesses under s 16(2). The hearsay rule will apply to such evidence

C82 Section 16(3) covers the situation where a party offering a hearsay statement induces the unavailability of the maker of the statement (for example, the party kidnaps or kills the maker of the statement, or pays him or her to go into hiding). Such a party will not be able to have a hearsay statement admitted on the ground that the maker of the statement is unavailable.

<sup>174</sup> C83 Section 17 sets out the hearsay rule for the purposes of the provisions that follow: hearsay is inadmissible unless allowed by this Subpart or by any other Act. The reference to 'this Subpart' in para(a), in conjunction with the terms of para(b), means that hearsay made admissible by other Code provisions (eg visual identification evidence under para(b) of the definition) must nevertheless comply with the hearsay rules unless the operation of the hearsay rules is expressly excluded (eg, in a number of Code provisions dealing with documentary evidence: ss 115, 116, 122, 123, 124, 125 and 126). The reference to 'any other Act' means that a miscellany of hearsay statements will continue to be admissible under their own statutory schemes (for example, certificates in blood-alcohol proceedings...). The effect of s 5(1) is that if a hearsay statement fails to comply with the statutory regime governing the admissibility of the particular class of hearsay to which the statement belongs, the statement will not be admissible under the Code's hearsay rules.

C84 In both civil and criminal proceedings, hearsay may be admitted by consent under s 9.

<sup>175</sup> C85 The effect of s 18 is that (in the absence of consent - s 9) two conditions must be present before a hearsay statement is admissible as evidence. First the judge must be satisfied that the circumstances in which the statement was made were such that it ought to be reliable. Second, either there must be proof that the maker of the hearsay statement is unavailable as a witness, or the expense or delay involved in calling the maker of the statement as a witness is not warranted - for example, if a

In a civil proceeding, hearsay is admissible if the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable and

- (a) the maker of the statement is unavailable as a witness; or
- (b) requiring the maker of the statement to be a witness would cause undue delay or expense.

*19 Hearsay in criminal proceedings*<sup>176</sup>

In criminal proceedings, hearsay is admissible if

- (a) the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable; and
- (b) either
  - (i) the party who proposes to offer the hearsay as evidence gives notice of the proposal in accordance with section 20(1); or
  - (ii) the requirement to give notice is waived by all other parties to the proceeding; or
  - (iii) in accordance with section 20(3), the judge dispenses with the requirement to give notice; and
- (c) either
  - (i) no party has given notice of objection under section 20(2) or otherwise objects to the admission of the statement as evidence; or
  - (ii) the maker of the statement is unavailable as a witness; or
  - (iii) requiring the maker of the statement to be a witness would cause undue delay or expense.

Note: This section does not apply to evidence of a defendant's statement offered by the prosecution in a criminal proceeding. Subpart 3 applies in that

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party intends to prove a minor issue about which there is unlikely to be any real doubt. If the conditions for admissibility are not met, the party wanting to offer the hearsay must either call the maker of the statement as a witness to give that evidence, or do without the hearsay.

C86 It is anticipated that a party would give notice voluntarily in relation to significant hearsay in civil proceedings, in order to give other parties sufficient time to consider whether to consent. Such notice would be similar to the notice required in criminal proceedings, and it is expected that it will come to be routinely given - for example, as part of the process of exchanging briefs or evidence before trial - so that cases can be heard efficiently and without unnecessary delays. Costs sanctions might follow if the proceeding has to be adjourned (for example, to allow rebuttal evidence to be called) or abandoned and recommenced.

<sup>176</sup> C87 In criminal as in civil proceedings, there is an overriding requirement that hearsay evidence should meet a threshold of reliability. In addition, at least one of the factors listed under s 19(b) and at least one of those listed under(c) must be present.

C88 A judge may be expected to take different factors into account, depending on whether the prosecution or the defence is offering the hearsay. If a hearsay statement forms part of the prosecution case and is crucial to proving a defendant's guilt, a judge will want to ensure that the circumstances relating to the statement give such assurance of reliability that the defendant's right to a fair trial will not be jeopardised by his or her inability to cross-examine the maker of the statement.

C89 Section 19(c)(i) The words 'otherwise objects' allow a party to object without having given notice under s 20(2). This is likely to arise in one of two situations. First, if the judge has excused the failure to give notice of intention to offer hearsay and a party wishes to object to the hearsay; or second, if the judge excuses the failure to give notice of objection.

C90 Section 19(c)(ii) A defendant in a criminal proceeding is 'unavailable' for the purposes of this section because 'unavailable' is defined to include a statement maker who is not compellable to give evidence. Under s 75(1) a defendant is not compellable for either the prosecution or the defence.

C91 Section 19(c)(iii) In a criminal proceeding, those who are available to give evidence should normally do so in open court in the presence of the judge, jury and defendants. It is expected, therefore, that the discretion will only be exercised to avoid unjustifiable delay or expense in proving a point that is not important to determining the proceeding and about which there is unlikely to be any real doubt.

case.<sup>177</sup>

*20 Notice of hearsay in criminal proceedings*<sup>178</sup>

(1) A notice of a proposal to offer a hearsay statement as evidence in a criminal proceeding must be given:

(a) in writing to every other party to the proceeding and include the contents of the statement and, subject to the terms of any witness anonymity order, the name of the maker of the statement; and

(b) a sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.

(2) A party to a criminal proceeding who is given notice of a proposal to offer a hearsay statement as evidence must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.

(3) The judge may dispense with the requirement to give notice under subsection (1) or (2)

(a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection(1); or

(b) if giving notice was not reasonably practicable in the circumstances; or

(c) in the interests of justice.

4.41 The proposed New Zealand Code clearly retains the hearsay rule as primarily an exclusionary rule. Hearsay evidence is exceptionally admissible in both civil and criminal proceedings. However, a distinction is made between the admissibility requirements in civil and criminal trials. In civil proceedings hearsay is admissible provided there are indicia of reliability, the maker of the statement is unavailable as a witness or requiring the maker of the statement to be a witness would cause undue delay or expense. In criminal proceeding there is a formal requirement that a party who intends to introduce hearsay evidence must given notice of his or her intention to do so, and a party who is given notice and wishes to object must give notice of his or her intention to do so. In addition there must be assurances of reliability and no objection to its admission, if there is an objection the party who seeks to have it admitted must in addition establish that the maker of the statement is unavailable as

<sup>177</sup> Subpart 3 deals with Defendant's statements, improperly obtained evidence, silence of parties in proceedings and admissions in civil proceedings.

<sup>178</sup> C92 Section 20(1) The notice requirements are intended to apply with a degree of flexibility. Thus the prosecution can comply by making disclosure in the usual way, so long as the prosecution makes its intention to offer a hearsay statement as evidence clear. The defence will need to give a simple notice. However, a defendant who gives notice of an intention to offer hearsay evidence should not be treated as having elected to call evidence, and there should be no adverse comment about any later decision not to offer the evidence. A notice should identify by name all persons whose statements are to be offered as hearsay evidence, except in cases where an anonymity order has been made. C93 The requirement to give notice of objection under s 20(2) enables disputes about the admissibility of hearsay to be determined before trial.

C94 Section 20(3) In excusing a party from having to give notice, it is open to a court exercising its inherent powers to allow any other party to call or recall a witness to rebut unexpected hearsay. One situation where a judge may appropriately apply the exemption in the interest of justice under para (c) is where the hearsay evidence was not known to counsel and is unexpectedly disclosed while a witness gives evidence at trial.

a witness or that requiring the maker to testify would cause undue delay or expense.

### **Australia**

4.42 Sections 59-75 of the Evidence Act 2 of 1995 contain extensive provisions regulating the admission of hearsay. The provisions retain an exclusionary rule subject to exceptions. The provisions also reflect a distinction between firsthand hearsay and more remote hearsay and are a reflection of the of the following summary provided by the Australian Law Reform Commission<sup>179</sup>

‘As to firsthand hearsay, the following applies:

(i) *Civil proceedings*. In civil proceedings, where the maker of the out of court statement is unavailable, firsthand hearsay should be admissible on notice to the other parties. Where the maker of the statement is available, evidence should be admitted without calling the maker, notwithstanding the hearsay rule, if to do so would involve undue delay or expense or would be reasonable practicable. Where the maker is or would be called as a witness, the hearsay evidence should be limited to that made at the time or shortly after the events referred to in it.

(ii) *Criminal proceedings*. Hearsay evidence should not be admitted against an accused person unless it is the best evidence that is available and it can be shown to have reasonable guarantees of reliability. On the other hand, an accused should be allowed to lead hearsay when it is the best evidence he has available to him. So, where the maker of the statement is not available, the hearsay rule should not exclude firsthand hearsay led by the prosecution on notice provided it satisfies specified guarantees of reliability. The rule should not exclude it when led by the accused if notice is given. Where the maker is available, he or she must be called and only statements made at or shortly after the relevant events should be admitted.

As to more remote hearsay, specific categories of evidence should be admissible notwithstanding the rule on the basis of their reliability or necessity, or on both grounds. Categories include government and commercial records, reputation as to family relationships and public rights, telecommunications, commercial labels and tags and evidence in interlocutory proceedings. The rules relating to hearsay evidence and all other rules of admissibility are subject in both civil and criminal proceedings to the abovementioned exclusionary discretions which will enable the court to exclude evidence after comparing the probative value of the evidence and the disadvantages of receiving it.’

### **United Kingdom**

4.43 The Civil Evidence Act 1995 and the Criminal Justice Act 2003 have greatly altered the hearsay landscape in England and Wales and constitute a marked departure from the common law position.

<sup>179</sup> Australian Law Reform Commission report 38, summary at 12.

4.44 The Civil Evidence Act 1995 jettisons the hearsay rule<sup>180</sup> as an exclusionary rule in civil proceedings, but makes provision for certain safeguards and lists criteria that must be taken into account in determining weight.<sup>181</sup> Section 1(1) provides that '[i]n civil proceedings evidence shall not be excluded on the grounds that it is hearsay.' The Act retains existing statutory exceptions but also makes the 1995 Act applicable where admission is not facilitated by the statutory exception.<sup>182</sup> The safeguards include notice of the intention to adduce hearsay evidence and furnishing of particulars in respect of the evidence on request.<sup>183</sup> Section 5 provides that in order for hearsay to be admissible the hearsay declarant must have been a competent witness at the time he or she made the statement.

4.45 The Criminal Justice Act 2003 adopts an approach similar in structure to that taken by the South African legislature in section 3 of the Law of Evidence Amendment Act 45 of 1988. It provides that hearsay evidence will be admissible in four circumstances: (a) where admissibility is specified in the Act or any other statutory provision; (b) where they fall into a common law category specifically preserved by the Act; (c) by consent and (4) where the court is satisfied that it is in the interests of justice for the evidence to be admitted.<sup>184</sup> The drafters seems to have taken care not to phrase the legislation in the form of an exclusionary rule, instead it makes hearsay admissible subject to certain conditions. The parties may waive the notice requirements and the failure to give notice or supply further particulars will not affect the admissibility of the evidence but will be taken into account in determining the appropriate course of proceedings and cost, it may also be taken into account as an adverse factor effecting weight.<sup>185</sup> If a party adduces hearsay evidence, any other party to the proceedings is entitled to call the hearsay declarant as a witness and subject the declarant to cross-examination 'as if the hearsay statement were his evidence in chief'.<sup>186</sup>

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<sup>180</sup> A similar approach was taken in the Civil Evidence (Scotland) Act 1988.

<sup>181</sup> Section 4.

<sup>182</sup> Subsections 1(3)&(4).

<sup>183</sup> Section 2(1).

<sup>184</sup> Section 114(1).

<sup>185</sup> Subsection 2(4).

<sup>186</sup> Section (3).

4.46 The courts discretion to admit the hearsay is then carefully directed by a detailed list of factors that must be taken into account in determining whether the hearsay evidence should be admitted in the interests of justice.<sup>187</sup> Although making greater use of plain language techniques these factors would appear to address the same concerns as section 3 of the Law of Evidence Amendment Act 45 of 1988 namely, probative value, prejudicial effect including reliability and necessity.

4.47 Sections 116-120 of the Criminal Justice Act 2003 then give detailed provisions pertaining to categories of admissibility. This would appear to be directed at ensuring that the courts discretion to include the evidence is carefully directed. The direction given to the courts is far more extensive and detailed than is to be found in the South African counter part.

### **Conclusion**

4.48 The last two decades has seen a number of law reform initiatives in common law countries directed at addressing the difficulties created by the categorisation approach of the common law. Responses have varied and include: simply codifying and expanding on the common law categories; the adoption of a more principled approach directed at identifying those criteria that can assist the court in addressing the rationale underlying the exclusion of hearsay; drawing a distinction between civil and criminal trials and abolishing the hearsay rule in civil trials. However, it would appear that in criminal trials the admission of hearsay still requires exceptional justification.

### **Recommendations**

4.49 The discussion above indicates that there are a number of competing arguments and consequentially a number of approaches that may be taken in attempting to rationalise the application of the hearsay rule. A number of options are put forward for discussion.

#### **Option one: retain the status quo (with or without the introduction of a notice requirement)**

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<sup>187</sup> Section 114(2).

*Synopsis of arguments in favour of this option*

4.50 The hearsay rule as formulated in Act 45 of 1988 was a product of much research directed at eliminating the inflexibility and complexities of the common law system. These difficulties have continued to plague other common law jurisdictions and in this regard South Africa appears to be more advanced than other jurisdictions. Most common law jurisdictions which have engaged in law reform have retained the hearsay rule as a primarily exclusionary rule subject to exceptions. Given that our procedural systems in both criminal and civil proceedings remain at their core adversarial there would seem to be good reason to retain the safeguards embedded in an exclusionary rule and a strong argument can be made that it is constitutionally necessary to protect the right to challenge evidence.

4.51 Section 3 of Act 45 of 1988 makes it unnecessary to formulate separate rules for civil and criminal trials as one of the criteria the court is required to take into account is the nature of the proceedings.<sup>188</sup> However, there could be advantages to introducing a notice requirement in both civil and criminal trials. The giving of notice by a party of his or her intention to rely on hearsay evidence should be a factor taken into account by the court in determining the prejudicial effect of the hearsay evidence. Notice, would eliminate the disadvantage of 'surprise' and consequently should count as a factor in favour of the admission of the hearsay evidence.

*Synopsis of arguments against this option*

4.52 The hearsay rule as an exclusionary rule makes no sense in the absence of a jury; dangers of misuse could be guarded against by applying the general rules applicable to relevance. In civil matters there are sufficient disclosure mechanisms to minimise potential prejudice arising out of any 'surprise' that may attach to hearsay. The contribution, if any, that the hearsay rule makes to the fact finding function of the court is outweighed by the costs it imposes on the justice system.

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<sup>188</sup> See for example, *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) in which Navsa JA held: 'If the matter is a civil trial a court may consider the absence of the testing power of cross-examination which will always be attendant when hearsay evidence is admitted, but may nevertheless admit hearsay evidence if the party against whom it is sought to be admitted may counter the effect of such evidence by other means. If one is dealing with a criminal trial, with its attendant consequences, the effect of the introduction of hearsay evidence may be such that an accused person may suffer prejudice of a kind such that it would not be in the interests of justice to admit the evidence.'

*Legislative proposal*

4.53 If the status quo without a notice requirement is favoured no legislative changes would be necessary. However, if a notice requirement were adopted the following legislative amendments are suggested:

4.54 Section 3 the Law of Evidence Amendment Act 45 of 1988 be retained subject to the following amendment of s 3(1)(c):

the court, having regard to-

- (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) the notice, if any, given by the party who seeks to adduce the evidence to the party against whom the evidence is adduced;
  - (vii) any prejudice to a party which the admission of such evidence might entail; and
  - (viii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.

4.55 In the absence of an Evidence Code it is proposed that the Criminal Procedure Act 1977 as well as the Rules of the High Court and Magistrates' Court be amended to make provision for the following notice requirements:

- X.(1) A notice of a proposal to offer a hearsay statement in trial proceeding must be given
  - (a) in writing to every other party to the proceeding and include the contents of the statement and the name of the maker of the statement; and
  - (b) a sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.
- (2) A party to the proceeding who is given notice of a proposal to offer a hearsay statement as evidence must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.
- (3) The presiding officer may dispense with the requirement to give notice under subsection (1) or (2)
  - (a) if having regard to the nature and contents of the hearsay statement, no party

- is substantially prejudiced by the failure to give notice under subsection(1); or
- (b) if giving notice was not reasonably practicable in the circumstances; or
  - (c) in the interests of justice.

### **Option 2: Free admission**

4.56 In terms of this approach the hearsay rules in their entirety would be considered obsolete and hearsay would be freely admitted unless excluded on some other ground, e.g. irrelevancy.

#### *Synopsis of arguments in favour of this option*

4.57 A rule directed at including hearsay, except where it falls to be excluded on some other ground, would ensure that all relevant evidence was brought before the court and promote the fact finding function of the court. The relevance test is sufficient to ensure that courts are not flooded by superfluous evidence. There is no empirical research to support the contention that presiding officers will be unduly influenced by the admission of hearsay evidence and unable to accord appropriate weight to the hearsay evidence. Abolishing the hearsay rule will save time and costs by eliminating arguments on the admissibility of hearsay. It would also support the accused's right to adduce evidence in criminal trials.

#### *Synopsis of arguments against this option*

4.58 The free admission of hearsay evidence will infringe the accused's constitutional right to challenge evidence. It may also result in the courts been swamped by low quality evidence which could have negative cost and time implications. Intuitively it must be accepted that the free admission of hearsay evidence carries the risk of undue weight been attached to hearsay evidence.

#### *Legislative proposals*

4.59 See legislative proposal below

### **Option 3: Free admission coupled with decision rules pertaining to weight**

#### *Synopsis of arguments in favour of this option*

4.60 Free admission of hearsay coupled with decision rules pertaining to weight would

eliminate the inefficiencies arising from determining the admissibility of hearsay (as well as doubt in respect of admissibility) but would require presiding officers to articulate the basis on which they have accorded a particular weight to an item of hearsay evidence. This would provide a safeguard against potential misuse of the hearsay evidence.

*Synopsis of arguments against this option*

4.61 While decision rules would guard against the misuse of evidence they do not address the other concerns attached to the free admissibility of hearsay evidence. **See 4.58 above.**

*Legislative proposal*

4.62 A legislative proposal similar to that set out in para 4.67 but excluding section 5, but made applicable to both civil and criminal proceedings would be appropriate if option 3 were adopted. If option 2 were adopted it would be appropriate to exclude sections 2, 4 and 5 whilst make the remaining provisions applicable to both civil and criminal proceedings.

**Option 4: apply different rules in civil and criminal trials**

4.63 It is proposed that the primary approach to hearsay in civil trials should be an inclusionary one subject to safeguards while the admission of hearsay in criminal trials should be subject to provisions substantially similar to those contained in s 3 of the Law of Evidence Amendment Act 1988.

4.64 Due to the plethora of existing statutory exceptions (other than s 3 of the 1988 Act) to the hearsay rule it may well be prudent to retain these exceptions but make it clear that where hearsay evidence is not admissible in terms of the statutory exceptions it may be admitted if it complies with the requirements of the Amending Act.

*Synopsis of arguments in favour of this option*

4.65 It is clear that different procedural and policy concerns arise in civil and criminal trials and these provide sufficient justification for introducing different rules regulating hearsay in civil and criminal trials. In criminal trials s 3 of the Law of Evidence Amendment Act 1988 would appear to comply with constitutional demands as well as providing a sufficiently flexible basis to ensure that justice is done.

*Arguments against this option*

4.66 Distinguishing between civil and criminal trials will introduce unnecessary complexity into the rules of evidence. See also arguments in favour of retaining the status quo set out above.

*Legislative proposal*

4.67 An Amendment Act dealing with hearsay could be enacted containing the following provisions:

*Admissibility of hearsay in civil proceedings*

1.(1) Subject to the provisions of any other law, evidence in civil proceedings shall not be excluded on the ground that it is hearsay.

*Safeguards in relation to hearsay evidence in civil proceedings*

2(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings -

- (a) such notice (if any) of that fact, and
- (b) on request, such particulars or of relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him/her or them to deal with any matters arising from it being hearsay.

2(2) Provision may be made by rules of court -

- (a) specifying classes of proceedings or evidence in relation to which subsection(1) does not apply, and
- (b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1), or with rules under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court -

- (a) in considering the exercise of its powers with respect to the course of

- proceedings and costs, and
- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4.

3. Where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he/she had been called by the first-mentioned party and as if the hearsay statement were his/her evidence in chief.

4(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

4(2) Regard may be had, in particular to the following -

- (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
- (b) whether the evidence involves multiple hearsay;
- (c) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

*The admissibility of hearsay evidence in criminal proceedings*

5.(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal proceedings, unless

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court having regard to -
  - (i) the nature of the proceedings;

- (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail, and
  - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (2) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

*General*

6. For the purpose of this Act -

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution

7. Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness.

8. In this Act 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.

9. Nothing in this Act affects the exclusion of evidence on grounds other than

that it is hearsay.

*Repeals etc*

10. Section 3 of the Law of Evidence Amendment Act 45 of 1988 is hereby repealed.

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**BILL ON THE LAW OF EVIDENCE**

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*(As introduced)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B –2008]**

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REPUBLIEK VAN SUID-AFRIKA

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**WETSONTWERP OP BEWYSREG**

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*(Soos ingedien)*

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(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

**[W –2008]**

**GENERAL EXPLANATORY NOTE:**

[     ] Words in bold type in square brackets indicate omissions from existing enactments.

       Words underlined with a solid line indicate insertions in existing enactments.

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**BILL****The law of Evidence Act**

**To regulate the law of evidence relating to relevance; to regulate the law of evidence relating to hearsay, to repeal legislation relevant to hearsay and relevance and to provide for matters connected therewith.**

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**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:–

**Definitions**

For the purpose of this Act -

‘civil proceedings’ means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.

‘hearsay evidence’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

‘party’ means the accused or party against whom hearsay evidence is to be adduced, including the prosecution

**2. Relevance**

(1) Relevant evidence, is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) Evidence is not irrelevant because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

**3. Admissibility of relevant evidence**

(1) Subject to the provisions of any other law, evidence that is relevant is admissible.

(2) Evidence that is not relevant is not admissible.

**4. Exclusion of evidence on the grounds of relevance**

(1) A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) cause or result in undue waste of time.

(2) When determining whether the probative value of evidence is outweighed by the risk that evidence will have an unfairly prejudicial effect a presiding officer may

not adopt assumptions or make generalisations that are in conflict with the constitutional values embodied in the Constitution of the Republic of South Africa Act 108 of 1996.

#### **5. Provisional admissibility of evidence**

A court may provisionally admit evidence subject to evidence being later offered which establishes its admissibility.

#### **7. Admissibility of hearsay in civil proceedings**

1(1) Subject to the provisions of any other law, evidence in civil proceedings shall not be excluded on the ground that it is hearsay.

#### **8. Safeguards in relation to hearsay evidence in civil proceedings**

(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings -

- (a) such notice (if any) of that fact, and
- (b) on request, such particulars or of relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him/her or them to deal with any matters arising from it being hearsay.

(2) Provision may be made by rules of court -

- (a) specifying classes of proceedings or evidence in relation to which subsection(1) does not apply, and
- (b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1), or with rules under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court -

- (a) in considering the exercise of its powers with respect to the course of proceedings and costs, and
- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4.

#### **9. Calling of witness with leave of the court**

Where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he/she had been called by the first-mentioned

party and as if the hearsay statement were his/her evidence in chief.

#### **10. Weight of hearsay evidence in civil proceedings**

(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular to the following -

- (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
- (b) whether the evidence involves multiple hearsay;
- (c) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

#### **11. The admissibility of hearsay evidence in criminal proceedings**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal proceedings, unless

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court having regard to -
  - (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail, and
  - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

**12. General**

(1) Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness.

(2) Nothing in this Act affects the exclusion of evidence on grounds other than that it is hearsay.

**13. Repeal of legislation**

Section 3 of the Law of Evidence Amendment Act 45 of 1988, Section 210 of the Criminal Procedure Act, 51 of 1977 and section 2 of the Civil Proceedings Evidence Act, 1965, are hereby repealed.

**14. Short title and date of commencement**

This Act is called the Law of Evidence Act and takes effect on a date fixed by the President by notice in the *Gazette*.