

THE CANONS OF EVIDENCE — RULES OF EXCLUSION OR RULES OF USE?

In a very real sense the entire structure of the modern law of evidence rests on the specialised and limited use of evidence.

1 Wigmore, *Evidence*, (Tillers Rev 1983) 695.

The common law principles of evidence are commonly expounded on the footing that they are dominated by rules of exclusion of evidence. One reads in the most respectable contemporary texts on evidence¹ that the common law rules embody four great canons of exclusion along with a disorderly miscellany of minor principles predicated the rejection of evidence to which they apply. The four "great canons" referred to are the hearsay rule, the opinion evidence rule, the rule against prior consistent statements and the rule expounded in *Makin v Attorney-General (NSW)*.² The characterisation of these canons as rules of exclusion of evidence is probably the source of the conceptual difficulty which most students feel in grasping, and the subsequent discomfort which many practitioners confess to in applying,³ the common law rules of evidence. Their description as principles of exclusion is as illogical and inaccurate as it is confusing. The confusion is exacerbated by the fact that the so-called canons of exclusion are themselves subject to exceptions. The conceptual disorder is compounded by resort in practice by some judges to an overriding "res gestae" principle to justify the admission of evidence which would otherwise be required, by a strict and literal application of the "canons of exclusion," to be rejected, where rejection would be an affront to common sense.

If the common law rules of evidence are dominated by a single principle or set of principles, they are dominated not by canons of exclusion but by the inclusionary principle that all information sufficiently relevant to the facts in issue at a trial is not only admissible but positively required to be admitted if elicited in proper form from a competent witness and for a proper purpose. All other rules of evidence are both conceptually subordinate to and in practical terms dwarfed by this single principle.

Modern perceptions of the inter-relation of the common law principles of evidence are unquestionably clouded by the historical truth that the law has developed without a pre-ordained structure and has, from period to period, appeared to treat one particular rule as ascendant over all others. Some 800 years ago, the common law courts abandoned the primitive, irrational modes of trial by test and ordeal and began to insist that the tribunal of fact determine disputes on the basis of its own

* Barrister (SA); Senior Lecturer in Law, University of Adelaide.

1 See, for example, 1 Wigmore, *Evidence* (Tillers Rev 1983) par 8c; Buzzard et al, *Phipson on Evidence*, (13th ed 1982) 74; Cross, *Evidence* (5th ed 1979) 19; Gobbo et al, *Cross on Evidence* (2nd Aust ed 1979) 18; Thayer, *A Preliminary Treatise on Evidence* (1898) 264-270; Nokes, *An Introduction to Evidence* (3rd ed 1962); Eggleston, *Evidence, Proof and Probability* (2nd ed 1983) chapter 5.

2 [1984] AC 57, 65.

3 Cf Wigmore, *supra* n 1, 631.

collective reasoning powers. That step was the most fundamental to be taken by judges in connection with the system of dispute-resolution in the King's Courts. But, even when that step was taken, there emerged a blend of new rules and old. Certain vestiges of the old scheme of things lingered on with no justification other than a purely historical one.⁴ Then, in the 16th century, came the second revolutionary step: the tribunal of fact ceased to be entitled and required to determine cases on the basis of its collective personal knowledge and was instead required to decide issues on the basis of the admitted evidence only. This step threw the concept of admissibility of evidence to the forefront. The competence and compellability of witnesses and the rules of privilege assumed paramount practical importance and began to be conceptually entangled with the notion of admissibility of information. For approximately 200 years, advocates and judges were obsessed with rules disqualifying witnesses or certain aspects of their evidence. The law of evidence was still developing unsystematically.

The first treatise on the law of evidence was Gilbert's work, published posthumously in 1754.⁵ Perhaps because, in a then recent era, the courts had been agonising over whether to adopt the numerical system of proof in preference to a rational system based on an assessment of the credibility of witnesses and on the inherent cogency of information, Gilbert almost entirely devoted his efforts to laying down rules as to the weight of evidence and to ranking evidence by degrees of acceptability. There was born the "best evidence" rule, which dominated the law to its detriment until the middle of the 19th century.⁶

After the advent of the 19th century, "rules" of evidence began to emerge in unprecedented quantities. To some extent, this was a by-product of the growing number of law reports. And cases whose sole importance to practitioners was a ruling on evidence came frequently to be reported. The right of cross-examination of witnesses called by one's opponent became entrenched and nurtured the hearsay rule and numerous exceptions to it. Cases could be won or lost according to the advocate's knowledge of the fine points of recent rulings; consequently, a large number of treatises on evidence were published early in the 19th century,⁷ largely to serve as practitioners' handbooks. Like all loyal common lawyers, advocates in 19th century England became slaves to precedents. Rulings which were no more than the application of a settled rule to a new fact situation were elevated to the status of independent principles of evidence. Exceptions to accepted principles multiplied when earlier rulings were qualified which, if literally applied to the information presented in the case at bar, would have served no good purpose. The policies of the law of evidence and the objectives of the trial system went unarticulated and were submerged in the maze of particular rulings. The works of Stephen (1876), who emphasised the paramountcy of the concept of relevance, and of Evans and Bentham, had their beneficial effects. But, nevertheless, the law of evidence continued to be haunted

4 Ibid 607.

5 Gilbert, *The Law of Evidence* (1754).

6 Wigmore, *supra* n 1, 609; Twining, "The Rationalist Tradition of Evidence Scholarship" in Campbell & Waller, *Well & Truly Tried* (1981) 211, 212-218. In the intervening years, the best evidence rule has come to be confined to documents: *Garton v Hunter* [1969] 2 QB 37,44.

7 Wigmore, *supra* n 1, 610; Twining, *supra* n 6, 222-234.

by the disorderly maze conceived before the law adopted rational fact-finding as its goal. The common law rules of evidence are now relatively static and it is perhaps opportune to re-examine this strange creature of the past for the purpose of assessing whether the rules of evidence can be reduced to a coherent and internally consistent set of principles.

1. Framework of Rules of Evidence

Since the beginning of the 20th century, it has been true to say that, judged by their practical effect, the common law rules of evidence fall in to the following framework:

1. There is *one principle of inclusion*: evidence is admissible and required to be admitted if sufficiently relevant to the facts in issue between the parties to be capable of assisting a rational tribunal of fact to determine the issues. This rule determines whether, as a matter of substance, information can lawfully be admitted by the tribunal of law and used by the tribunal of fact.
2. There is *one principle of exclusion*: information is not admissible in any form from any witness for any purpose if its reception is contrary to the public interest. This is the only principle which predicates that, as a matter of substance, information cannot be received by the tribunal of law or acted on by the tribunal of fact.
3. There are four principle⁸ rules which, to the extent to which they are independent of the inclusionary rule, restrict the *use of relevant evidence* once admitted:
 - (a) Evidence of an out-of-court assertion cannot in general be tendered to be used for the sole purpose of supporting the credibility of a witness;
 - (b) Evidence of an out-of-court statement cannot in general be tendered to be used for the sole purpose of proving the truth of matters asserted by the statement;
 - (c) Evidence that an actor or witness formed, expressed or holds a particular opinion cannot in general be tendered to be used for the sole purpose of proving the existence of the matter opined;
 - (d) In a criminal case evidence of the misdeeds of a defendant not connected with the events charged cannot in general be tendered to be used for the sole purpose of authorising the inference that the defendant has a bad character and is therefore guilty of the crime presently charged.

It will be suggested that all but the second of these "great canons of exclusion" are merely facets of the inclusionary rule.

4. There are rules as to the *competence and compellability of witnesses*: at common law, the parties and their spouses, children, lunatics, convicts and atheists were incompetent as witnesses.⁹ The

⁸ This list is not intended to be exhaustive. There are other rules which are characterised as rules of exclusion of evidence but which, in their practical operation, immediately restrict the use which can be made of evidence of relevant facts. For example, the parol evidence rule forbids the use of material extrinsic to a contract as an aid in the construction of the contract and the interpretation of words used by the contracting parties.

⁹ *Phipson on Evidence*, supra n 1, 691-693.

competence and compellability of witnesses is now regulated by statute.

5. There are rules conferring *privileges* on competent and compellable witnesses to withhold relevant information: into this category falls the privilege against self-discrimination and the rules regulating legal professional privilege.¹⁰
6. There are rules as to the *form* of evidence: for example, evidence of the contents of a document must, in general, be given in the form of the original document itself.¹¹
7. There are rules regulating *the manner of giving evidence*: for example, in general, a witness must give evidence on oath from memory¹² and, in general, examination in chief cannot be conducted by the use of leading questions.¹³
8. There are rules qualifying or restricting *the powers of the tribunal of fact*: into this category fall the rules as to presumptions, the rules as to burden and standard of proof, and rules of law requiring corroboration as a condition of conviction in certain criminal cases.¹⁴ In addition, there is the fundamental rule that the tribunal of fact must act on the evidence alone and not on its own knowledge.¹⁵
9. There are rules of law and of practice conferring powers or imposing obligations on trial judges: for instance, the judge presiding over a criminal trial by jury has a duty to warn the jury as to its assessment of the credibility of the evidence of certain witnesses (complainants in sexual cases, children, and accomplices),¹⁶ and as to the manner in which it uses evidence which lends itself to a proper use and to an improper use.¹⁷ In addition, the judge in a criminal trial has the power to reject relevant evidence pursuant to the judge's obligation to ensure that the trial is fair to the defendant.¹⁸

10 The decision of the majority of the High Court of Australia in *Baker v Campbell* (1983) 57 ALJR 749 may, if taken to its logical conclusion, transform legal professional privilege from a genuine privilege to a substantive rule of law of uncertain status and effect. Legal professional privilege is treated as a rule of exclusion of evidence in *Pieris*, "Legal Professional Privilege" (1982) 31 ICLQ 609.

11 *Phipson on Evidence*, supra n 1, 884.

12 J.H. Wigmore, *A Treatise on Evidence* (3rd ed 1940) para 725, 734.

13 *Phipson on Evidence*, supra n 1, 775.

14 Eg at common law, a defendant could not be convicted of perjury solely upon the evidence of a single witness, as far as concerned the falsehood of the perjured evidence: *Muscott* (1713) 10 Mod Rep 192.

15 *Phipson on Evidence* supra n 1, 26-27; *Swarbrick v Swarbrick* [1964] WAR 106.

16 See eg, *The People v Casey (No 2)* [1963] Ir R 33, 38; *Beck* (1982) 74 Cr App R 221; *Knowlden* (1983) 77 Cr App R 94; contrast *Vetrovec v The Queen* (1982) 67 CCC (2d) 1, 17-18; *R v James* (1983) 111 LSJS 422,446-448. And see *Phipson on Evidence*, supra n 1, para 32-02.

17 Eg *R v Gunewardene* [1951] 2 KB 600; *R v Golder* (1960) 45 Cr App R 5; *Corak and Palmer v The Queen* (1982) 101 LSJS 1, 10, 22-23; *Donnini v The Queen* (1972) 128 CLR 114; *Pemble v The Queen* (1971) 124 CLR 107, 117-118; *Phipson*, supra n 1, 76; *Barca v The Queen* (1975) 133 CLR 82, 107.

18 *R v Christie* [1914] AC 544; *Noor Mohammed v The Queen* (1949) AC 182, 192.

2. The Inclusionary Rule

It is now well established that the cardinal rule of evidence which regulated trials in common law systems is the rule that evidence is admissible and required to be admitted if and only if it is sufficiently relevant to a fact in issue to be capable of assisting the tribunal of fact rationally to resolve the issues between the parties.¹⁹ As Professor Cross has demonstrated, this rule has both a positive and a negative aspect.²⁰ In its negative aspect, it requires the exclusion by the tribunal of law (the judge) of information which is incapable, as a matter of law, logic or experience, of assisting a properly instructed and rational decision-maker or which is too remote from the facts in issue to deserve any place in the deliberations of a rational tribunal of fact. Its negative aspect is subject to no genuine exceptions whatsoever, at common law.²¹ In its positive aspect, the cardinal rule requires the tribunal of law — the judge — to admit relevant evidence elicited from a competent witness in proper form for a proper use. In its positive aspect, the rule is subject to the single exclusionary principle referred to in section four of this article, and it is also subject to the qualification that where, in a criminal trial, the judge forms the view that there is a substantial danger that the jury will put particular information to an irrational use (to the exclusion of its proper use) the judge should exclude. This positive aspect of the cardinal rule has been obscured by the “great canons of exclusion”. Nevertheless, it must be remembered that it is as much an error of law for a trial judge to reject admissible evidence as it is for the judge to admit inadmissible information.²² The inclusionary rule does not merely confer a power on the trial judge to admit relevant information as a matter of discretion. It confers on parties the right to require the judge to accept relevant material which is elicited from a competent witness in proper form for a proper purpose.

It has often been, and it continues to be, stated or implied that this fundamental rule is supplemented by an inclusionary principle styled “res gestae”.²³ This is incorrect. The phrase “res gestae” or “res gesta pars rei

19 *Kuruma v The Queen* (1955) AC 197; *Wilson v The Queen* (1970) 123 CLR 334; *Markby v The Queen* (1978) 52 ALJR 626; *Blake v Albion Life Assurance Society* (1878) 4 CPD 94, 109; *Thompson and Wran v The Queen* (1968) 117 CLR 313, 317; *Gregory v The Queen* (1983) 57 ALJR 629, 631; Eggleston, “The Relationship between Relevance and Admissibility in the Law of Evidence” in Glass (ed) *Seminars on Evidence* (1970) 53,61.

20 Cross, *supra* n 1, 17.

21 One apparent exception is the anachronistic rule which permits a defendant to adduce evidence of good character to be used by the jury as material relevant to the defendant’s innocence. This rule stems from *Rowton v The Queen* (1985) Le & Ca 520; [1861-1873] A11 ER 549. The practice of adducing good character evidence is now being discouraged and this apparent exception will probably wither. Cf *Manwaring* [1983] 2 NSWLR 82.

22 Wigmore, *supra* n 1, 226; *Curneen v Sweeney* (1969) 103 ILTR 29; *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533; *Hally v Starkey* [1962] Qd R 474; *Stokes v The Queen* (1960) 105 CLR 279; *In re van Beelan* (1974) 9 SASR 163, 193; *Woodhouse v Hall* (1981) 72 Cr App R 39; *R v Collins* (1976) 12 SASR 501; *R v Toohey* [1965] AC 595; *Commissioner of Railways v Young* (1962) 106 CLR 535, 546, 553, 559.

23 Cross, *supra* n 1, 43-44, 575; *Phipson*, *supra* n 1, 77; *Corak and Palmer v The Queen*, *supra* n 12, 16; *R v Manh* (1983) 107 LSJS 241, 247, 256; Aronson, Reaburn, Weinberg, *Litigation: Evidence and Procedure*, (3rd ed 1982) 803; Waight and Williams, *Cases and Materials on Evidence* (2nd ed 1985) 812, 822-823; *R v Nye* (1977) 66 Cr App R 252.

gestae" was coined as a linguistic alternative to the phrase "relevant facts". It was not coined to describe a substantive alternative to the principle that only relevant facts can be proved in evidence.²⁴ The "principle" continues to find acceptance only because it is in Latin.²⁵ It probably continues to be used as an inclusionary principle by virtue of a combination of misconceptions, namely, a misconception as to the width of the genuine inclusionary rule; the misconception that evidence must be said to be "positively probative" in order to be relevant;²⁶ and a misconception of the true effect of the rules discussed in the next section of this article. The "res gestae" principle is a substitute for analysis and a symptom of superficial thinking. No amount of exegesis of the tenor of "the rule" can predicate whether it is applicable or not in a given fact situation, because it has no tenor or purport and it cannot, therefore, be a rule of law. When invoked in a practical setting, it relies on artificial concepts and fine distinctions.²⁷ But the real objection to it is the disorder which it wreaks on an otherwise coherent set of rules. What proponents of the "res gestae" approach are attempting to state is that particular information is admissible because it is relevant (even if not positively probative of a centrally material fact) and because it is tendered for a lawful and rational purpose, and that the information can be received in evidence despite that its admission apparently flies in the face of a "canon of exclusion".

The use of the cryptic Latin phrase to justify the reception of probative information has three unfortunate consequences. First, it obscures the distinction (which is both forensically and logically clear and wide) between *admitting* evidence (which is the function of the judge) and *acting on evidence* (which is the function of the tribunal of fact). Secondly, it fails to acknowledge that a single item of information more usually than not lends itself to more than one application in the mind of

24 *The Trial of John Tooke* (1794) 25 Howard St Tr 1,440; *Robson v Kemp* (1802) 4 Esp 234; *R v Hardy* (1794) 24 How St Tr 19,453; Manetta, "The Admissibility of Spontaneous Statements in Exception to the Hearsay Rule" (1984) 8 Crim LJ 69, 91, 95.

25 A Latin phrase that cannot be translated into an intelligible English clause can hardly merit acceptance as a rule of law. Unlike the "res acta" maxim, it has never been set in a clause or sentence, even in Latin. The apotheosis of this phrase to a rule of law has been deprecated by so many authoritative jurists that, given its vagueness and weak jurisprudential foundation, one wonders why its use is persevered with. For criticisms, see *Homes v Newman* [1931] 2 Ch 112, 120; Morgan, "Res Gestae" (1922) 31 Yale LJ 229; Stone, "Res Gesta Reagitata" (1939) 55 LQR 66; Wigmore, *A Treatise on Evidence* (3rd ed 1940) vol 6, s 1745, 1757. (The maxim "res acta inter alios alteri nocere non debet" is in substance merely an illustration of the operation of the genuine inclusionary rule.)

26 See *R v Rance* (1976) 62 Cr App R 119,121. Note in this respect the discussion in Eggleston, *supra* n 19, 55-64, especially 61, & Eggleston, *supra* n 1, ch 6.

27 This was frankly admitted by the Privy Council in *Ratten v The Queen* [1972] A.C. 378. The fact that the *res gestae* principle has never been authoritatively characterised as a rule of a particular kind is reason enough to doubt its validity. It is variously treated as an aspect of the cardinal rule, as an overriding and independent inclusionary principle and merely as an exception to the hearsay rule. The first approach is exemplified by what appears to be the general purport of *Phipson*, although there are passages where this approach is departed from. See, in particular, chapter 7; see also Kelly and Sulan, *Wells's Introduction to the Law of Evidence* (3rd ed 1979) 37, 133-146. The second approach is that adopted by Cross: see *Cross on Evidence* (Aust ed) *supra* n 1, ch 19; Cross, *supra* n 1, ch 21. The third approach is taken by *Archbold*: Mitchell et al, *Archbold: Pleading, Evidence & Practice in Criminal Cases* (41st ed 1982), 867-870; see also Eggleston, *supra* n 19, 63.

the tribunal of fact. And thirdly, to the extent that it wears the guise of an overriding inclusionary principle, its employment wrongly creates the impression that the law of evidence imposes no restrictions on the use which can be made, by the tribunal of fact, of information which, because relevant and tendered for a proper use, was required to be admitted by the judge.

3. Rules Restrictive of the Use of Admitted Evidence

Evidence is never tendered or elicited by competent counsel without an end in view. Evidence is adduced by a party intending that it will be put to one or more uses in favour of that party by the tribunal of fact. While admitted information can, in theory, be used by the tribunal of fact in a way unintended by the party tendering it, the law does not permit the unrestricted use of information which is relevant. The modern jury is required to discharge its duties according to the dictates of reason. And, beyond that, some restrictions are imposed by law on the use of received evidence, both to satisfy various policy objectives and to reinforce the adversarial system of dispute-resolution adopted by the common law.

To the extent that they are rules of law independent of the cardinal inclusionary rule, the four principle "canons of exclusion" of the common law of evidence are, in their practical operation, rules restricting the use to which admissible evidence may be put by the tribunal of fact. These rules operate only indirectly to exclude evidence. They so operate solely where relevant evidence is tendered to be used for a purpose prohibited by law, and for that purpose only. Where, on the other hand, evidence is tendered to be used for more purposes than one and where one of the intended uses is a proper use, then the evidence is admissible, and required to be admitted, to be used for that proper purpose. That is, the trial judge is required to admit it. The tribunal of fact — the jury, if there be one, or the judge — is permitted to put the material to its proper use but is prohibited from putting it to an improper use.

These simple propositions have, somewhat unhelpfully, been elevated by text writers to the status of "the principle of multiple relevancy".²⁸ A principle of law has thus been created for the sole purpose of resolving a dilemma created only by lawyers' choice of terminology. This approach can perhaps be explained as symptomatic of a reluctance to accept that the rules of evidence embody principles which are neither rules of admission nor rules of exclusion of evidence, or exceptions to such rules, and to accept that there are rules which, in their practical effect, impose fetters on the tribunal of fact and not merely on the judge. Each of the so called "exclusionary rules" is, in its practical effect, a rule restricting the deliberative freedom of the tribunal of fact.

28 Wigmore, *supra* n 1, vol 1, para 13; Cross, *supra* n 1, 20-21; *Phipson*, *supra* n 1, 76.

Cross describes this "principle" as a "rule" and "doctrine". Cross's characterisation of the proposition as a rule is accompanied by the following statement of dissatisfaction:

"It is, however, difficult to suggest anything better, and, although the term [multiple relevancy] is not employed by English judges, the doctrine it embodies is mentioned in numerous dicta. The application of the doctrine is fraught with danger, but the total exclusion of the evidence could be productive of even greater injustice."(p 21)

(a) The Rule Against Prior Consistent Statements:

At common law, witnesses are not permitted to narrate out-of-court assertions by themselves or by another witness for the purpose of supporting their own credibility or the credibility of the other.²⁹ This rule applies both to express assertions and to assertions which may be implicit in conduct.³⁰ There are two common law exceptions to this rule: an out-of-court assertion can in limited classes of cases be tendered to be used for the sole purpose of supporting the credibility of a complainant of a sexual assault³¹ and of a person alleged to have recently invented evidence.³²

The rule applies only to conduct, verbal or otherwise, which bespeaks or asserts something. It does not apply to conduct, verbal or non-verbal, which does not assert or imply a fact. Conversely, it is quite clear that this rule does not preclude the admission of out-of-court assertions which are themselves relevant facts. For example, an out-of-court complaint by an injured person (who subsequently gives evidence as a plaintiff) as to contemporaneous pain, suffering and distress can be received in evidence; an out-of-court complaint by a worker to an employer that a system of work is unsafe can be received in evidence if the system results in injury to a worker and the question at the trial is whether the employer should have foreseen a particular risk of injury in the system; a pre-contractual statement by one party to a contract as to that person's post-contractual statement intentions (relative to the subject-matter of the contract) can be received in evidence on the issue of quantum of damages; in an action by a tenant against a landlord for breach of the latter's covenant to repair, the tenant's out-of-court complaint of disrepair and notice to repair, which gives rise to the right to sue for damages, can be proved;³³ and out-of-court statements which assist in fixing the time, place and circumstances of relevant conduct can be proved.³⁴ To the extent that the out-of-court assertions are made relevant facts in the assessment of damages or on the issue of liability, by the substantive law, they are required to be admitted by the judge. They must not, however, be used as supporting the credibility of a witness. If the sole purpose of the tender were the proscribed purpose, the information is excluded by the negative aspect of the cardinal rule: the information is unhelpful because it is tendered to be used solely for a purpose to which it cannot lawfully be applied by the tribunal of fact and it must be rejected by the judge.

29 *Jones v S E and Chatham Ry* (1918) 87 LJKB 775, 779; *Gillie v Posho* [1939] 2 A11 ER 196,201; *Corke v Corke and Cooke* [1958] P 93; *R v Roberts* [1942] 1 A11 ER 187; *R v Oyesiku* (1972) 56 Cr App R 240, 245-247; and see the cases cited in *Phipson* supra n 1, 788 and Cross, supra n 1, 236-238.

30 Nokes, supra n 1, 100.

31 *Kilby v The Queen* (1973) 129 CLR 460; see the numerous authorities collected in Waight and Williams, supra n 23, 286-300; *Phipson*, supra n 1, 149-152; Cross, supra n 1, 238-244.

32 See, in particular, *Nominal Defendant v Clements* (1960) 104 CLR 476 and *Fox v General Medical Council* [1960] 3 A11 ER 225.

33 See eg *Wills on Evidence* (3rd ed 1938) 209; *Ramsay v Watson* (1961) 108 CLR 642, 647-649; *Aruna Mills Ltd v Dhanrajmal Gubindram* [1968] 1 QB 655; *Koufos v Czarndnikow Ltd* [1969] 1 AC 350; *Hewitt v Rowlands* (1924) 93 LJKB 1080. The conventional analysis of this process, both in England and Australia, would involve the characterisation of B's assertion as "part of the *res gestae*": See Cross, supra n 1, 244, 463; *Phipson* supra n 1, 83, 789.

34 *R v Kooyman and Brydson* (1979) 22 SASR 376.

In *R v Roberts*,³⁵ Humphreys J said of the rule and of a prior statement relevant only to the credibility of the speaker as a witness:

“[T]he reason for the rule appears to us to be that such testimony has no evidential value. It is because it does not assist in the elucidating of matters in dispute that the evidence is said to be inadmissible on the ground that it is irrelevant. It would not help the jury in this case in the least to be told that the appellant said to a number of persons [before he gave evidence]...that his defence was this, that or the other.”

On this analysis of the rule, it is not an independent rule of evidence at all. That is, it is neither a rule of exclusion nor a rule of use. On this view, the two exceptions referred to earlier can be supported as operating in instances where the credibility of the witness concerned has become a live issue in the trial and is of such importance that no rational tribunal of fact would decide the case without the benefit of the prior consistent statement. However, it is more likely that the foundation of the rule is pragmatism rather than relevance. In some cases, it operates indirectly to exclude evidence which could reasonably be regarded by a lay person as “relevant”,³⁶ because the credibility of the witness was immediately at stake even if that witness’s evidence was not alleged to be concocted.

(b) The Hearsay Rule

The hearsay rule is probably the most difficult rule of the common law of evidence to explain, justify and defend, because it clearly can operate to prevent the use of reliable, relevant information. It is not merely an aspect of the cardinal rule. Because it excludes evidence irrespective of its reliability and relevance, the hearsay rule has some of the trappings of an absolute rule of exclusion. It is, however, important to bear in mind that the modern formulation of the hearsay rule emphasises that the rule operates only on out-of-court assertions and then only where such an assertion is tendered for a particular purpose. As the Privy Council said in *Subramaniam v Public Prosecutor*:³⁷

“Evidence of a statement [made out of court] may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant...”

The point was made even more clearly by the Privy Council in *Ratten v The Queen*:³⁸

35 Supra n 29, 191. This view is supported by Sir W.D. Evans in his notes to *Pothier on Obligations* (1806 ed) vol 2, 189 and by the speech of Lord Radcliffe in *Fox v General Medical Council*, supra n 32, 230, and Cross, supra n 1, 236.

36 See Fox, “Expediency and Truth-Finding in the Modern Law of Evidence,” in Campbell and Waller, *Well & Truly Tried* (1982) 140, 146-147.

37 [1956] 1 WLR 965, 969. This decision was applied by the Supreme Court of Canada in *Phillion v The Queen* [1978] 1 SCR 18,24.

38 Supra n 27, 387. The matter was put most clearly by Lord Reid in argument at 380-381. In *In re Van Beelen* (1974) 9 SASR 163, 200, the Full Court of the Supreme Court of South Australia expressed the position as follows:

“1. Subject to certain exceptions established under the general law or by

"The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimionially", i.e. as establishing some fact narrated by the words..."

The hearsay rule operates as a complement to the rule limiting the use of prior consistent statements. Both rules operate on statements made out-of-court and on non-verbal conduct in which statements are implicit. The hearsay rule precludes the use of out-of-court assertions as a *medium of proof* of relevant facts, unless an exception applies. The other rule precludes the use of out-of-court assertions as a *medium of proof* of the witness's credibility. Statements which are themselves relevant facts are proper *objectives of proof* and can as such be proved. They are not excluded by either rule, but their use may be restricted.

In the context of the hearsay rule, it has become acceptable to describe out-of-court assertions which are relevant facts (rather than means of proof of relevant facts) as "original evidence" or part of the *res gestae*.³⁹ The first label tells us nothing about the practical operation of the hearsay rule. It does not emphasise, as terminology should, that the hearsay rule applies only to out-of-court assertions of fact; that is, to out-of-court words or conduct by which the actor sought to assert a fact expressly or impliedly. The rule does not apply at all to non-assertive conduct. The unhelpful phrase "original evidence" is used to direct the mind indiscriminately both to conduct not intended to be assertive and to evidence of out of court assertions not tendered to be used assertively. It confuses the field of operation of the hearsay rule with its forensic effect. There is an important conceptual distinction between these two phenomena. Conduct not intended to be assertive lies entirely outside the field of operation of the hearsay rule. Out of court utterances not tendered to be used assertively would lie within the reach of the rule but for the fact that the rule is a purposive and not an absolute "rule of exclusion". The relevant distinction is between statements whose tenor is relied upon and those whose truth is relied upon by the party tendering. (By "tenor" is meant "contents" or "purport".)

38 continued. . .

statute, evidence of an extra-judicial statement (oral or written), even where its subject matter is relative to the issue, is inadmissible as hearsay if the sole purpose of introducing the statement is to use the assertions of fact contained in it as proof of the truth of those assertions.

"2. Evidence of such an extra-judicial statement is admissible where it is sought to prove, not the truth of the assertions contained in it, but that they were, in fact, made, and either the making of the statement is the, or one of the, facts in issue, or it is open to the tribunal of fact, in all the circumstances, to draw an inference from the character of the statement and the making of it that connects both with, and renders them relevant to the issues."

39 Both *Phipson* and Professor Cross use both labels: see Cross, *supra* n 1, 437; *Phipson on Evidence*, *supra* n 1, 331, 335. In Carter, *Cases and Statutes on Evidence* (1981) 7, the use of the former phrase is defended. *Wells*, *supra* n 27, 134 uses the classification of "primary" and "secondary" statements.

Within the field of operation of the rule, two further distinctions must be drawn, namely between genuine assertions and apparent assertions, and secondly between assertions and operative words. Operative words often wear the trappings of assertions. Operative words are utterances which directly operate on or affect legal rights, such as words of formation of contract, words of libel or slander, words of consent or authority to do what would otherwise be unlawful, words of threat or menace, and words of assignment, disposition or assurance. These are not intended by the speaker to assert facts although they may often appear to be assertions. ("You can have my car for the day", "I want to buy this painting", "I want to place \$10 on Nag in the third at Rosehill").⁴⁰ Such utterances are entirely outside the reach of the hearsay rule, and in any event they are not in practice tendered to be used assertively.

When dealing with genuine out-of-court assertions, it is more useful to adopt the language of Lord Wilberforce in *Ratten*, where his Lordship drew a distinction between the testimonial (or assertive) use of an out-of-court assertion — the proscribed use — and the non-testimonial (eg inferential) use of an out-of-court assertion — a proper use. This terminology emphasises the qualified nature of the prohibition in the hearsay rule, as stressed by the Privy Council in the advices referred to earlier. It is the intended use (not the potential use) of the evidence of the out-of-court assertion which attracts the hearsay rule. The hearsay rule operates on out-of-court assertions according to the purpose of the party tendering, not the purpose of the original speaker. Even out-of-court statements which, when uttered, had purely an assertive function can in theory be tendered to be used non-assertively and if tendered to be so used are not caught by the hearsay rule. If and only if the out-of-court assertion is tendered *solely* to be used testimonially, that is as a means of proof of what is asserted, is the tender objectionable. Evidence of the assertion is, in those circumstances, precluded by the cardinal rule, in its negative aspect, because the evidence is not tendered for a use to which the tribunal of fact can lawfully put it. If the out-of-court statement is tendered to be used as the basis for an inference to which it rationally gives rise whether it is true or false,⁴¹ or if it is tendered merely to be used as a step in the unfolding of the drama which gave rise to the litigation,⁴² or if it is tendered merely because it is part of the background necessary to set the stage, and so add life and colour to the narrative given by the witness, its tender cannot be objected to on the basis of the hearsay rule. Where the out-of-court statement lends itself to both a testimonial and a non-testimonial use, it is still required to be admitted. The judge may have to warn the jury (if there be one) not to put the statement to the proscribed use.⁴³

40 Contrast the reasoning in *McGregor v Stokes* [1952] VLR 347; *Fingleton v Lowen* (1979) 20 SASR 312.

41 See the examples given in *Phipson*, supra n 1, 331, and *Cross*, supra n 1, 473-478, and *Shone* (1983) 76 Cr App R 72.

42 *Ladlow v Hayes* (1983) 8 A Crim R 377, 382-383.

43 *Wilson v The Queen*, supra n 19, 340, 345; *Willis v Bernard* (1832) 8 Bing 376, 383; 131 ER 439, 441; *People v Heiss* 186 NW 2d 63 (1971). Spontaneous utterances have proved problematic because they often have both an assertive and a non-assertive aspect and also an inferential aspect: strictly speaking, such statements should be admissible to be used merely either as a step in the narrative or inferentially. There is, however, in Australia and Canada some authority to the effect that spontaneous

To label as "part of the *res gestae*" material which is inherently not assertive or material which is not tendered to be used testimonially is for reasons already given jurisprudentially indefensible. It is also potentially harmful at a practical level, particularly in criminal cases. For, when an out-of-court utterance is admitted by a judge as "part of the *res gestae*" (or, indeed, as "original evidence") and for as long as the hearsay rule is treated as an exclusionary rule, the hearsay rule is set aside completely on the reception of the information into evidence and such protections as the rule may rightly confer on a party are lost. The consequence is that there are no longer any perceived safeguards on the forensic use of the utterance. This can be counterproductive, unjust and, as Professor Cross has noted, dangerous in particular instances.⁴⁴

If, however, the hearsay rule is treated as a rule restricting, not the admission, but rather the use of *relevant* utterances, the admission of an out-of-court assertion is not the end of the matter. The question of the intended and lawful use of the assertion remains to be the subject of argument or concession, ruling by the judge and, if there is a jury, a direction by the judge to the jury. If, consistently with general principle, the assertion can be used testimonially (because it is, say, an admission by the party against whom it is tendered), the jury should be so directed. If, on the other hand, no relevant exception to the hearsay rule applies so that the assertion can lawfully be used only non-testimonially, then the jury should be given a negative warning not to use the utterance testimonially. Further, in a criminal trial, where the judge is satisfied that there is a substantial danger that, despite a warning, the jury will put the assertion to the proscribed use, and that danger outweighs the tendering party's legitimate need for the evidence, the judge would be

43 continued. . .

statements forming part of or accompanying a relevant fact can be used assertively in exception to the hearsay rule. See the conflicting judgments in *Adelaide Chemical & Fertiliser Co Ltd v Carlyle* (1940) 64 CLR 515; and compare *Ratten v The Queen*, supra n 27, 391; *Hissey v The Queen* (1973) 6 SASR 280, 293. See also *Manetta*, supra n 24, 85, 101. In *R v Mahoney* (1979) 50 CCC (2d) 197, the defendant stood trial charged with the murder of a woman. At the trial, the Crown elicited evidence from a person who testified that he saw the defendant banging on the door of the house in which the victim was murdered, shortly before the murder, and then heard the sound of a window smashing. The witness then testified that he saw the defendant through the broken window smashing at the door of the house with an object in his hand and that, at that time, he heard the deceased utter words to the effect of "Jack, what are you doing" or "no, Jack". The defendant was known as Jack. The witness did not see the murder. The trial judge directed the jury as follows:

"However, if you find that [the deceased] spoke those words, if you find from that, that she believed that the person who was at the door was the accused then you may treat her belief as corroborative of the evidence of the other ones who identify him, *but her evidence as to the person who was at the door may not be used as direct evidence of the identity of that person.*" (Emphasis added).

Both the Ontario Court of Appeal (50 CCC (2d), 392) and the Supreme Court of Canada (67 CCC (2d), 216) regarded this direction as wrong and held that the deceased's utterances could have been used by the jury as evidence of the facts asserted or implied in them. With respect, while the first part of the summing up is incorrect, the second (the underlined portion) is fully consistent with general principle. The case is on all fours with *R v Fowkes* (1856) Steph Dig Art 3 illustration a; cf 9th edition, Part 1, Ch II, 4-5.

44 Cross, supra n 1, 21.

empowered to reject the evidence of the assertion at least when it is tendered by the Crown.⁴⁵

In *Hughes v National Trustees Executors and Agency Co (A/Asia) Ltd*⁴⁶, several members of the High Court of Australia expressed concern at the breakdown of the often justifiable safeguards inherent in the hearsay rule which is caused, on the admission of a relevant assertion for a proper purpose, by treating the hearsay rule as an exclusionary rule whose effect is spent once relevant evidence is admitted. Unfortunately, the members of the Court, by treating the hearsay rule as a rule of exclusion of relevant assertions, did not offer a conceptually satisfactory solution to the problems which they perceived. In that case, the Court was required to determine the proper use in evidence of statements of fact made by a testatrix both in a will and verbally which reflected adversely on the character and conduct of the applicant. The will gave rise to an application under the testator's family maintenance legislation of Victoria, which provided that the application might be refused by the Court "if the character or conduct of the applicant" were such as should, in the opinion of the court, disentitle him or her to relief. The executor contended that the testatrix's statements could be used as evidence of the facts asserted. The applicant contended that, at most, the assertions were evidence of the reasons motivating the testatrix, those reasons being, in themselves, a relevant fact. The High Court upheld the latter contention.

Barwick CJ said:⁴⁷

"In the view I take of this appeal, it is not really necessary for me to discuss the admissibility of such statements or the use to which, being admitted, they may properly be used (sic). But as others have expressed a view on these matters, I shall briefly state my own opinion.

"Evidence of the reasons given by a testator or testatrix for making or not making a provision by will are, in my opinion, admissible as evidence of those reasons. Such statements are not evidence of the facts they assert: they provide evidence only of the subjective attitude or beliefs of the testator or testatrix. Of these other facts, the evidence is technically classed as hearsay...What matters, however, it seems to me, is not so much the admissibility of the statements as the use to which they may judicially be put.

"But however that may be, I must concede that, in any case, such statements do not afford any proof of the objective facts they assert."

Gibbs J, (as he then was) with whom Mason and Aickin JJ agreed said:⁴⁸

"In my opinion consistently with principle it is impossible to treat a statement of this kind as evidence of the truth of the matters stated. Unless the statement is admissible to prove that

45 This is one aspect of the exclusionary discretion recognised in the line of cases stemming from *R v Christie* [1914] AC 545; see especially the speech of Lord Atkinson at 554-556. See Wigmore, *supra* n 1, 701.

46 (1979) 23 ALR 321. And see Note: "The status of Hearsay and Other Evidence Admitted Without Objection" (1985) 1 *Aust Bar Rev* 155.

47 *Ibid* 325-326.

48 *Ibid* 336-337. Emphasis added.

what was said was true, it cannot shift the onus of proof. It is admissible only to prove the reasons which actuated the testatrix in making her will. There are no doubt some cases in which inadmissible evidence, having been admitted, may be treated as evidence for all purposes; for example, where one party by his conduct at the trial has led the other to believe the evidence, although hearsay, may be treated as evidence of the facts stated, and the other in reliance on the belief has refrained from adducing proper evidence, the former party is precluded from objecting to the use of the evidence to prove the facts stated. However, in general it is the duty of a judge to reach his decision on evidence that is legally admissible, *and to put evidence only to those uses which the law allows*. When a statement is admitted, not as evidence of its truth but simply as original evidence, *the mere fact of its admission cannot enable it to be given an additional probative value which the law denies it.*"

If the Court had characterised the hearsay rule as a rule restrictive of the use of received relevant evidence rather than as a rule of exclusion, the result of the proper application of the hearsay rule would have been somewhat easier to state — the testatrix's assertions could be proved in evidence because they were relevant facts (being evidence of the reasons which actuated the tenor of the will) but, by virtue of the hearsay rule, could not be used as evidence of the facts asserted.⁴⁹ This method of characterisation has the advantage of conceptual clarity and, in the context of the hearsay rule in particular, tends to preserve the effectiveness of the principle underlying that rule despite the admission of an out-of-court assertion which is a relevant fact.

(c) The Opinion Evidence Rule

"I understand the general rule to be that it is for the court and not the witness to draw inferences of fact from the primary, observed facts; but the difficulty is that this cannot, in the nature of things, be treated as a strict or hard and fast rule without getting in the way of reasonable proof and thus impairing the judicial process."⁵⁰

The hesitation evident in this leading formulation of the "opinion evidence rule" is understandable. It is agreed on all sides that the common law of evidence embodies a canon of exclusion known as the opinion evidence rule. But expressions of the rule reflect no uniformity. Professor Cross states the rule as follows:

"A witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth."⁵¹

49 Emphasis on the impact which the hearsay rule has on the use of evidence can also be found in the judgments in *Trotter* (1982) 7 A Crim R 8, 19, 21; and *Buck* (1982) 8 A Crim R 208, 212-213; see, generally, Eggleston, "Evidence Admitted for a Limited Purpose", in *Judicial Essays*, (Law Foundations of NSW and Victoria) 85.

50 *Sherrard v Jacob* [1965] NI 151, 156 per Lord MacDermott LCJ.

51 Cross, *supra* n 1, 442.

Phipson asserts quite concisely that "the opinion, inferences or beliefs of individuals (whether witnesses or not) are inadmissible *in proof of material facts*".⁵² Other texts insist that the rule is that, in general, witnesses must give evidence of their own perceptions and not of their inferences.⁵³ With respect, *Phipson* is more accurate because the formulation in that text draws attention to the fact that what is prohibited is the use of witness's opinion to prove facts opined, inferred or believed. At common law, information to the effect that an actor or witness formed the opinion or drew the inference or held the belief that fact X obtained at a material time cannot in general be used to prove that X did obtain at that time.

Functionally, two crucial distinctions must be drawn in this context. First, between the expression and formation of opinion in court and the expression and formation of opinion out of court; and secondly, between opinions *about* relevant facts and opinions which *are* relevant facts.

The expression, *in court*, of an opinion, inference or belief that X obtained at a material time can be admitted to be used as evidence that X obtains only if (a) the opinion, inference or belief is one which the tribunal of fact could not rationally hold, or draw from the factual material before it, *without assistance* and (b) the witness is qualified to give that assistance. In other words, like all other evidence, the evidence is admissible only where it is needed and would, if admitted, assist the jury.⁵⁴ If it is not needed or if it would not assist the jury, the negative aspect of the cardinal rule excludes it. Lay opinion, inference or belief is excluded by the cardinal rule either because no rational jury conscientiously discharging its constitutional function as tribunal of fact would seek assistance from it or because (which is the same thing in substance) a rational jury is as capable as the lay witness of drawing inferences from the known facts.

It is entirely otherwise with expert opinion. In so far as it concerns the opinions of experts, it is historically and functionally wrong to regard the "opinion evidence rule" as an exclusionary rule. The reception of qualified opinion evidence represents, in effect, an expansion of the inclusionary rule,⁵⁵ not a qualification on it. Expert evidence is adduced in order to assist the tribunal of fact to draw rational and correct inferences from facts proved by the narrated observations of the witnesses. The reason for the admission of the evidence is that, without it, a lay tribunal of fact (including a judge sitting as tribunal of fact) may be thwarted in the discharge of its constitutional functions or unable to form a correct judgment on the observational material before it.⁵⁶

The *out-of-court expression* of an opinion, inference or belief that X obtained at a material time cannot, in general, be used as evidence that

⁵² Supra n 1, 553. Emphasis added.

⁵³ See, eg Waight and Williams, supra n 23, 549; Aronson, Reaburn and Weinberg, supra n 23, 783. The imprecise nature of the "rule" is demonstrated in Cowen and Carter, "Some Observations On The Opinion Rule", in *Essays on the Law of Evidence* (1956) ch V.

⁵⁴ See *R v Turner* [1975] QB 834; *Chard* (1972) 56 Cr App R 268; *Schultz* (1981) 5 A Crim R 234, 239-240; *R v Barry* [1984] Qd R 74.

⁵⁵ See Eggleston, supra n 11, 59, 73-74, 145; Wigmore, supra n 1, Vol 7, s 1917; *Folkes v Chadd* (1782) 3 Doug KB 157; *Beckwith v Sydebotham* (1807) 1 Camp 116.

⁵⁶ *Carter v Boehm* 1 Smith LC 7th ed (1876) 577; *Clark v Ryan* (1960) 103 CLR 486, 491; *R v Camm* (1883) 1 QLJ 136; *Phipson* supra n 1, 556;

X obtained at that time; this is a consequence of the operation of the hearsay rule and not of the "opinion evidence rule". The out-of-court formation of an opinion or belief that X obtains cannot be given in evidence unless the relevant fact in issue is the formation of the opinion that X obtains⁵⁷ rather than X itself. This consequence flows not from the opinion evidence rule, but from the cardinal rule: the formation by an actor of an opinion out of court that X does not tend objectively to prove that X obtains; because the information has no probative tendency, and would not be acted on by a rational and conscientious tribunal of fact, it is excluded by the negative aspect of the cardinal rule.

(d) Evidence of bad character

No branch of the law of evidence has become so conceptually obscure in recent times as the rules relating to the admission of evidence of character, and particularly of bad character in criminal cases. This is perhaps due to a movement, late in the 19th century, away from the solid, pragmatic foundations laid in earlier times, a movement stabilised by recent appellate decisions at the highest level.⁵⁸

For most practical purposes, in order to decide whether character and reputation can be proved, one simply applies the cardinal inclusionary rule. That requires that a distinction be drawn between cases where character (or reputation) is in issue and cases where it is not. Reputation is a relevant fact in civil defamation actions and can therefore be the subject of evidence. Character and reputation may be made relevant facts in a criminal trial by operation of statute.⁵⁹ But, in general, neither the characters nor the reputations of the parties are in issue in proceedings, before verdict or conviction. That being so, the cardinal rule of evidence, in its negative aspect, operates in the general run of cases to exclude information the sole rational use of which is to assist the tribunal of fact to form a judgment as to a party's character or reputation. Information cannot be tendered for the sole purpose of assisting a decision as to the existence or non-existence of an immaterial fact.

At common law, however, a defendant in criminal proceedings was entitled, in the defendant's case in chief, to adduce evidence of the defendant's good reputation to be used by the jury as material bearing on the likelihood of the defendant's innocence.⁶⁰ When the accused was made a competent witness by statute, it became accepted that such

57 For example, in a case revolving around a fraudulent misstatement, the victim's belief in the truth of the misstatement when the statement was acted upon (by the victim) is a relevant fact and can as such be proved. A statement by way of identification, that is an out-of-court statement whereby a witness to a crime (or to some other relevant fact) objectively manifests the mental process of identifying a person in a line-up with the criminal (or other involved actor), is an outcome of the drawing by the speaker of a conclusion and can, if it becomes relevant at a particular trial, be proved by the speaker or by direct observation evidence of the making of the statement. Finally, on a charge of larceny, the defendant can give evidence of his state of belief at the moment of asportation of the goods where the defence is claim of right.

58 See the plea for clarification in *Phipson*, supra n 1, 238.

59 See, eg Atomic Energy Act 1953 (Cth) s 47; Summary Offences Act 1953 (SA) s 21; Criminal Law Consolidation Act 1936 (SA) s 200.

60 *Stannard* (1837) 7 C & P 673, 173 ER 296; *Rowton* (1865) Le and Ca 520; 169 ER 1497; *Attwood v The Queen* (1960) 102 CLR 353, 359; *R v Simic* (1980) 54 ALJR 406; *Williams* (1981) 4 A Crim R 441; *Andrews* [1982] 2 NSWLR 116.

evidence could also be used to support the defendant's credibility as a witness.⁶¹ The converse was not true. The prosecution was not entitled, in its case in chief, to adduce evidence of the bad reputation of the accused. However, where, in the course of the defendant's defence, the defendant set up a good character, the prosecution was entitled to adduce evidence (including evidence of convictions) in rebuttal of the defendant's pretended good character.⁶² (The proper use of such evidence from the prosecution is a matter of conjecture at present.⁶³) Thus, good reputation was an acceptable means of proof of innocence, while bad reputation was not an acceptable means of proof of guilt. And while the common law permits evidence to be adduced of the defendant's good reputation, it does not permit good character or innocence to be proved by way of specific good acts not connected with the event giving rise to the charge.⁶⁴

The straightforward approach, outlined above, based on the cardinal rule, is workable only if one accepts four related propositions: first, that character cannot, in any real sense, be "proved": secondly, that even if it can be proved, character is not a logical basis for drawing inferences as to the conduct of an actor on a specific occasion; thirdly that (except where character is a material fact) a rational system of fact-finding requires that the tribunal of fact be forbidden from acting on its estimation of the character of a party as it is forbidden reliance on the party's reputation, and on rumour and suspicion; fourthly, that in our criminal justice system, it is the constitutional function of the judge, as sentencing tribunal, to form a view as to the moral culpability of the defendant's conduct, and that of the jury merely to determine guilt or innocence as a matter of law, not as a matter of morals. If, by way of contrast, one accepts that character can be proved to such a degree of certainty that it can satisfactorily be used as a premise in a chain of reasoning and that a proven character is a secure and rational basis for an inference as to conduct on a particular occasion,⁶⁵ then a more complicated approach is required in order to prevent the reception of information which might subvert the deliberations of a jury. The more complicated approach is manifested by the dictum of Lord Herschell in *Makin v Attorney-General (NSW)*.⁶⁶

The writer has sought elsewhere⁶⁷ to demonstrate that "the rule in *Makin*" is neither more nor less than an illustration of the negative aspect of the cardinal rule of evidence and that the rule articulated in *Makin* was brought about by confusion between means of proof and objectives of proof. It was a premise of the reasoning expressed in that article that "character", as an abstract concept, was not a logical basis for drawing inferences as to conduct on a specific occasion. The decision

61 *Cheatley* (1981) 5 A Crim R 114, 115, 117; *Nilon* (1981) 5 A Crim R 385; *R v Trimboli* (1979) 1 A Crim R 73. The English authorities are collected in *Phipson*, supra n 1, 239-240.

62 *R v Carrol* unreported, SA Supreme Court (1971); *R v Vere* [1981] 75 Cr App R 354; *Gibson* (1930) 30 SR (NSW) 282; *Redd* [1923] 1 KB 104; *Rowton*, supra n 60; *Campbell* (1979) 69 Cr App R 221; *Stalder* [1981] 2 NSWLR 9, 13.

63 *Phipson* supra n 1, 224; Archbold, supra n 27, par 4-436.

64 *Rowton*, supra n 60.

65 See, eg the remarks of Gibbs CJ in *Perry v The Queen* (1983) 57 ALJR 110, 112, and Eggleston, supra n 1, 101-102.

66 [1894] AC 57, 65.

67 "Dissimilar Judgments on Similar Facts" (1984) 58 ALJ 74, and especially at 83-84.

in *Rowton*,⁶⁸ that specific good acts, not connected with the charge, cannot be tendered to prove innocence, appears to be based on that premise. Aggregating *Rowton* with the cardinal rule, the following cumulative rules were accepted as applying to criminal trials governed by the common law in the decades before *Makin*:

- (a) Good character (in the sense of reputation) is a proper objective of proof on the part of a defendant, because good reputation was deemed to be a logical means of proof of innocence.
- (b) Specific good acts are not a proper objective of proof unless connected with the instant charge nor are specific good acts a proper means of proof of good reputation.
- (c) The defendant's bad character (ie bad reputation) is not a proper objective of proof on the part of the Crown except in rebuttal. Whether or not bad reputation is, when proved in rebuttal, a proper means of proof of guilt is not clear.
- (d) Specific bad acts are not a proper objective of proof unless connected with the present charge. Nor are specific bad acts a proper means of proof of bad reputation.

To this, *Makin* added the supererogatory gloss:

- (e) Specific bad acts are not a proper means of proof of guilt where the chain of reasoning underlying the intended use in evidence of those bad acts necessarily includes, as an inevitable intermediate step, a conclusion that the defendant has a bad character and is therefore guilty or more likely to be guilty of the crime charged.

It is contended that this last proposition is unnecessary as an independent proposition of law because it proscribes a chain of reasoning which is inconsistent with a rational system of fact-finding. Proposition (e) is a corollary of our very system of trials.

In any event, specific bad acts not directly connected with the charge are neither in themselves a proper objective of proof nor a means of proof of guilt. Specific bad acts cannot be used in evidence except so far as they are indirectly connected with material facts. They are a proper means of proof when — not their “badness” or criminality — but their objective details, ingredients and constituents assist the tribunal of fact to come to a rational conclusion in the present trial. In other words, where evidence of “bad” acts is tendered which substantially connects D with the crime charged and the evidence merely incidentally *invites* (as opposed to inevitably and exclusively requiring) the conclusion that D is a bad person, at the same time rationally authorising the inference that D is the culprit on the occasion charged (without any considered judgment as to D's “character”), the evidence is, as a matter of law and basic principle, admissible. If it is to be excluded, it is excluded by the exercise of the power of exclusion of relevant evidence which is an incident of the judge's duty to secure a fair trial to the defendant in a criminal case.⁶⁹ This analysis demonstrates that *Makin*, so far as it may

⁶⁸ *Supra* n 60.

⁶⁹ This articulation of principle coincides in substance with the views of the Court of Criminal Appeal of South Australia in *Sutton v The Queen* (1983) 8 A Crim R 276, which must now be considered to be heretical, in the light of the reasons for judgement of the High Court in that case: (1984) 58 ALJR 60. Only the course of decisions will indicate whether the hearsay is formal or material (cf the remarks of Windeyer J in *Iannella v French* (1967-1968) 119 CLR 84, 106).

lay down a rule independent of the cardinal rule, merely proscribes a certain use of admissible information: it proscribes the use of admissible information as a means of proof of bad character which, strictly speaking, is an irrelevant matter.

This approach permits one to reconcile the practical effect of the decisions in the criminal "similar fact" cases with the approach taken in civil cases in which evidence of similar conduct by an involved actor on other occasions is tendered as the basis of an inference as to what was done on the occasion giving rise to the present litigation. Although there has recently been some wavering,⁷⁰ the hallowed approach in civil cases, in reference to evidence of conduct not immediately connected with material facts, is merely to examine its probative force and the *procedural* fairness and convenience of permitting it to be adduced.⁷¹

To sum up: as a matter of fundamental general principle, both in civil cases and criminal, evidence of conduct (good, bad or neutral) of an actor (including a party) on an occasion other than the material occasion is inadmissible unless sufficiently connected with some material fact to assist the jury to resolve the issues in the case. This is one illustration of the cardinal rule in operation. Evidence of conduct on other occasions cannot be tendered to be used for the sole purpose of inviting or compelling an inference as to the character or reputation of an actor (including a party), unless that character or reputation is material. If (character not being in issue) evidence of conduct on other occasions logically invites or supports an inference as to a material fact, it is admissible and *prima facie* required to be admitted even if incidentally it invites the formation of an opinion (favourable or otherwise) as to the actor's character. *Prima facie*, the judge must admit it. The jury must be instructed, and the judge in a civil case should direct himself or herself, to use the evidence only for its proper use.⁷² The fact that the evidence lends itself to an irrational use does not require its exclusion. In a criminal trial, however, this circumstance authorises the rejection of the evidence where a warning to the jury might be ineffective. Thus, the "rule in *Makin*" is not a rule of exclusion of evidence but rather a rule as to the proper use of evidence which is admissible because it is relevant.

4. The Exclusionary Rule

Relevant evidence is required to be rejected as a matter of law if and only if it is contrary to public policy that it be received. Public policy is rightly described as an "unruly horse",⁷³ because its demands appeal to one's moral values, political instincts and prejudices and meet a different response from period to period. This holds true in the realm of adjectival law as in the domain of substantive law. One consequence of

70 *Sattin v National Union Bank* (1978) 122 Sol J 367; contrast the reasoning in *Thompson v Allen* (1983) 48 ALR 675; *Mister Figgins v Centrepoint Freeholds Pty Ltd* (1980) 36 ALR 23; *Gates v City Mutual Life Assurance Society Ltd* (1982) 43 ALR 313; *Berger v Raymond Sun Ltd* [1984] 1 WLR 625.

71 *Mood Music Publishing Co Ltd v de Wolfe Ltd* [1976] 2 WLR 451; *Hollingham v Head* (1858) 4 CBNS 388; 140 ER 1135; *Thompson v Allen* supra n 70.

72 See Wigmore, supra n 1, 695, 697; *Thompson and Wran v The Queen*, supra n 19, 317; the authorities collected in McNamara, supra n 67, n 69; *Conley* (1982) 6 A Crim R 51; *Schlaefler* (1984) 12 A Crim R 345.

73 *Richardson v Mellish* (1824) 2 Bing 229, 252, 130 ER 294, 303 per Burroughs J.

this is that there can be no closed list of categories of evidence whose rejection may be required in the public interest. However, the cases demonstrate that there are three established classes of evidence whose rejection is, in general, required irrespective of the purpose of the tender (or intended use) of the evidence, irrespective of its form and irrespective of the qualifications of the witness. These three classes of evidence comprise documents protected by Crown privilege (or "public interest immunity", as it is now known);⁷⁴ information tending to disclose the identity of police informers;⁷⁵ and information as to the tenor of communications between estranged spouses aimed at achieving a reconciliation of their marital differences.⁷⁶ There is a fourth⁷⁷ class of information (evidence of the tenor of communications made "without prejudice") whose rejection is required by the public interest only if tendered for a certain purpose.

74 Eg *Rogers v Secretary of State for the Home Department* [1973] AC 388; *Sankey v Whitlam* (1978) 53 ALJR 11; *Burmah Oil Co v Bank of England* [1980] AC 1090; *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; *Hughes v Vargas* (1893) 9 TLR 471, 551 (CA); *Chatterton v Secretary of State* [1895] 2 QB 189; *Smith v Johnston* (1957) 75 WN (NSW) 313; *Bercove v Hermes* (3) (1984) 51 ALR 109, 115; Cross, supra n 1, ch 12; *Phipson*, supra n 1, ch 14. In so far as it attaches to documents, the "privilege" extends to prevent forensic uses other than the tendering of the document, eg its use to refresh memory: *Gain v Gain* [1961] 1 WLR 1469. A further distinctive feature of this "privilege" is that, if it is not asserted by the Crown or by either party, it must be asserted by the judge.

75 *Marks v Beyfus* (1980) 25 QBD 494; *R v Watson*, (1817) 2 Stark 115, 135-136, 171 ER 591, 600; *Phipson*, supra n 1, 278-279; *R v Hardy* (1794) 24 St Tr 199; *A G v Briant* (1846) 15 M and W 169, 153 ER 808. This category extends to the names of persons who set in motion State machinery for the care, custody or protection of children: *D v NSPCC* [1978] AC 171. It has been suggested that the public interest puts this rule in abeyance where disclosure of the informer's name is necessary to making out a defence in a criminal case: *Marks v Beyfus*, supra 498; *Rogers*, supra n 74, 407; see, too, *Hennessey* (1979) 68 Cr App R 419, 425-426. The rule also protects the names of persons to whom information pertinent to crime was given, the nature of the information, the channel of communication of the information, and official action on the basis of the information: *R v Carpenter* (1911) 156 Sess Pap CCC 298; *Auten v Rayner* [1958] 3 All ER 566; *R v Herlihy* (1898) 321 LT 38. Again, like the Crown Privilege head, this rule of protection must be enforced by the judge if not asserted by either party.

76 *McTaggart v McTaggart* [1949] P 94; *Mole v Mole* [1951] P 21; *Bell v Bell* [1970] SASR 310; *Theodoropoulos v Theodoropoulos* [1964] P 311; see also Family Law Act 1975 (Cth) s 18(2); *Phipson*, ante n 1, 375; Cross, ante n 1, 301; *Henley v Henley* [1955] P 202; *Constable v Constable* [1964] 5 FLR 278. Evidence of communications otherwise protected by this head can be adduced with the consent of both parties to the marriage: *McTaggart v McTaggart*.

77 There are perhaps two additional categories of public policy privilege which are usually formally characterised as rules regulating the competence of witnesses. These are the rules: first, that a judge may not be compelled to give evidence as to matters arising during a trial over which he presided: *R v Gazard* (1838) 8 C & P 595; *Hennessey v Broken Hill Pty Ltd* (1926) 38 CLR 329, 342; and secondly, that a juror may not give evidence as to the deliberations of a jury in the jury room: *McKay v Elias* (1928) 28 SR (NSW) 340; see too NSW Law Reform Commission, *Competence and Compellability*, (Discussion Paper) 74, where it is suggested that the relevant rule is properly characterised as a privilege. Edwards, *Cases on Evidence in Australia* (3rd ed 1981) 248-250; Aronson, Reaburn and Weinberg, supra n 23, 460; Cross, supra n 1, 317 treat these as rules of competence and compellability. *Phipson*, supra n 1, 279 and *Archibald*, supra n 27, 12-15 aggregate the categories under the heading "Judicial Disclosures". These rules permit secondary evidence of the information to which they apply, and accordingly (even though they may arise from a perceived public interest) they are rightly characterised as rules restricting the competence and compellability of witnesses.

The rule excluding information within each of these categories is fundamentally different in effect from the rules discussed in the preceding section. The rules which fall within the rubric of the genuine exclusionary principle have five characteristics which distinguish them from the other so-called exclusionary rules of evidence: first, they operate to prevent the proof of certain evidentiary facts irrespective of the purpose underlying the attempt to tender the evidence;⁷⁸ secondly, they prevent the tender of what is known as "secondary evidence" of the protected facts.⁷⁹ Thirdly, they have no connection with any principle of substantive law; fourthly, their application in a particular case depends on the judge's balancing of competing public interests, not on any hard and fast rule; and, finally they are not dictated by the adoption of either an adversarial or a rational system of dispute-resolution.

The fourth category of communication protected by the public interest, that is, without prejudice communications, has some of the features of a rule merely restricting the use to which evidence can be put. This category protects admissions made for the purpose of enabling a dispute to be resolved or litigation to be settled by agreement before trial or before judgment. Admissions actuated by that purpose cannot be used (in the litigation which generated it) as a means of proof of the admitted fact without the consent of the parties to that litigation.⁸⁰ It matters not whether the communication was made orally or in writing or whether it was expressly declared to have been made "without prejudice".⁸¹ In other words, evidence cannot be given of a communication (by which a fact was conceded or admitted with the objective of facilitating the settlement of litigation) for the purpose of proving the conceded fact, unless the parties to the communication consent to that use of the communication.⁸² It is contrary to public policy to permit such a use of the concession. Public policy favours the negotiated settlement of disputes. But the fact conceded by protected communications continues to be provable, as a matter of substance, by proper means, if it is material. Equally the otherwise protected communication can be used for any other material purpose compatible with the public interest.⁸³

These four heads of exclusion protective of information or communications are often referred to as "privileges". The use of this

78 Eg *R v Watson* supra n 75, 148; 171 ER 604. This proposition is subject to a qualification in the case of "without prejudice" communications.

79 *Williams v Star Newspaper Co Ltd* (1908) 24 TLR 297; *Anthony v Anthony* (1919) 35 TLR 559.

80 *Walker v Wilshen* (1889) 23 QBD 335; *Rogers v Rogers* (1964) 114 CLR 608; *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285; *Davies v Nyland* (1974) 10 SASR 76; *Re Turf Enterprises Pty Ltd* [1975] QD R 266.

81 See the authorities cited in n 80 and *Bentley v Nelson* [1963] WAR 89.

82 *Re Turf Enterprises Pty Ltd* [1975] Qd R 266; *Blow v Norfolk C C* [1967] 1 WLR 1280; *Walker v Wilsher* (1889) 23 QBD 335.

83 Eg, on the question of costs, after judgement (where the offer is "without prejudice" except as to costs): see *Computer Machinery v Drescher* [1983] 3 A11 ER 156; *McDonnell v McDonnell* [1977] 1 A11 ER 766; *Cutts v Head* [1984] 2 WLR 349 or to prove a compromise of the action *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378. There is a basis for characterising this rule as one aspect of the rules regulating the proof of informal admissions. This is the approach in *Phipson*, supra n 1, 19-10, 19-11. The true status and effect of this head of immunity is left outstanding by the decided cases: see the discussion in Australian Law Reform Commission, *Privilege*, (Evidence Reference, Research Paper no 16) 246, 247 and the decisions discussed in *Phipson*, supra n 1, 322-328, 374.

terminology is confusing.⁸⁴ It is of the very essence of a privilege that it can be waived and that it confers only defensive rights on persons. The common law of evidence acknowledges only two genuine privileges which may be invoked in the course of a trial itself, namely legal professional privilege and the privilege against self-incrimination. Each of these privileges confers advantages on specific persons: in the one case, on the citizen who has retained a lawyer; in the second case, on witnesses generally. Each of these privileges can be waived, expressly or by conduct. They each confer purely defensive rights and, in particular, the right to prevent the eliciting of relevant evidence from a particular source. Legal professional privilege involves the right in each litigant not to be compelled, while giving evidence at the trial, to disclose communications made to their legal adviser for advice or for use in litigation, and the right to object to attempts, by the opponent, to elicit evidence from the legal adviser (and the adviser's agents) as to communications made professionally by or to the legal adviser incidental to giving advice or conducting litigation for the litigant concerned.⁸⁵ The privilege against self-incrimination has two forensic aspects: it entitles the defendant at a criminal trial to insist that the tribunal of fact be directed to draw no inference adverse to the defendant from the fact that, when questioned by persons in authority before the trial, the defendant maintained silence;⁸⁶ and secondly it entitles witnesses generally to withhold information (and litigants to withhold documents) whose publication might result in their exposure to a charge, penalty or forfeiture.⁸⁷ Where a genuine privilege is concerned, secondary evidence of the privileged information or communication is admissible.⁸⁸ By contrast, the public policy exclusion rule attaches to information and not merely to communications, and secondary evidence of the information is in general inadmissible.⁸⁹

5. Conclusion

Confronted with an item of information which may be of potential use at a trial, the first question which many practitioners and, indeed, some judges, ask of themselves is: does the information come within any of the exceptions to the exclusionary rules of evidence, with the result that it is admissible. This reaction to evidence is one result of labouring

84 Tapper, "Privilege and Policy" (1974) 37 Mod L Rev 92.

85 *Wilson v Rastall* (1972) 4 TR 753; *Bursill v Tanner* (1885) 16 QBD 1. The propositions in the text on the status of legal professional provision will be incorrect in Australia if the High Court adopts the views of Brennan J in *Baker v Campbell*, supra n 10, 773. There, indicating disapproval of *Calcraft v Guest* [1898] 1 QB 759 and *Lloyd v Mostyn* (1842) 10 M and W 478, 481-482, 152 ER 558, 560, his Honour held that secondary evidence of certain privileged communications is not admissible. If this view prevails, legal professional privilege has ceased to be a genuine privilege and is properly characterised as an aspect of public interest immunity.

86 *Gilbert v The Queen* (1977) 66 CR App R 237; *Sadaraka* [1981] 2 NSWLR 459.

87 *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253. The second limb of the privilege does not prevent the cross-examination of an accused who gives evidence in his or her own defence, as to facts relevant to the accused's guilt of the offence charged: this is the effect of Criminal Evidence Act 1898 (UK) s 1(e) and its equivalents in Australia.

88 As far as concerns the privilege against self-incrimination, see *Tomkins* (1978) 67 Cr App R 181. As far as concerns legal professional privilege, see *Coates v Birch* (1841) 2 QB 252 and the authorities cited in n 85 and in Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 Mod L Rev 601, nn 3-7.

89 See the authorities referred to in n 79, and *Foran v Derrick* (1892) 18 VLR 408; *King v Bryant* (No 2) [1956] QSR 570; *Honeychurch v Honeychurch* [1943] SASR 31.

under the misconception that the common law of evidence is dominated by rules of exclusion. This is the very reverse of the truth. The first question to be asked of any item of information of potential use at a trial is, is it relevant? That question logically leads the mind to ask the related question, what is the intended use of the evidence? In other words, how is the information relevant? If the information is relevant and its intended use is rational then *prima facie* it is both admissible and required to be admitted and if it is elicited in proper form from a competent witness, in practice its rejection would be quite exceptional.

The common law has developed certain rules as to the form of evidence particularly in relation to documents. Legislation and the common law regulate the competence and compellability of witnesses. But these are not substantive rules as to what information may or may not be received by the judge. The common law also clearly lays down one general rule restricting the use to which relevant information may be put, once admitted: evidence of out-of-court assertions cannot in general be used as evidence of the facts thereby asserted. In addition to this rule (the hearsay rule), there are three other canons, namely the prior consistent statement rule, the opinion evidence rule and the rule laid down in *Makin v Attorney-General*⁹⁰ (widely accepted as rules of exclusion) which in their real operation merely restrict the use to which admitted evidence may be put. It has been sought to demonstrate that not only are these three rules not rules of exclusion of evidence, but that, properly analysed, they are but illustrations of the practical operation of aspects of the cardinal rule of evidence, namely that evidence is admissible if and only if it is needed to assist, and capable of assisting, a rational and properly instructed tribunal of fact to determine the issues between the parties. Strictly speaking, at common law, the exclusion of evidence from a competent witness in proper form is always worked either by the negative aspect of the cardinal rule or by one facet of public policy. Substantively speaking, there is only one common law rule of exclusion of evidence, namely that information is required to be rejected by the trial judge if its reception would be contrary to the public interest.

The conceptual structure advanced in this article has a number of advantages. First, it will tend to eliminate the unthinking use of jargon, labels, stereotypes and precedents. Secondly, it better serves the policy of the law encapsulated in the hearsay rule (and the other "canons of exclusion") by attracting attention to the two crucial stages in the impact of evidence in the courtroom: its reception by the tribunal of law and its use by the tribunal of fact. The characterisation of these canons as "use" rules rather than "exclusion" rules has this latter advantage because it emphasises that these rules are not a spent force once relevant information which is subject to them is admitted by the judge. The use of that information by the tribunal of fact continues to be controllable by the parties. Where there is a jury, the jury should be instructed as to the proper use of relevant information admitted by the judge.⁹¹ The

90 Supra n 2.

91 The United States Federal Rules of Evidence provide:

105. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the

third advantage pertains to the effect of the undoubted exceptions to the prior consistent statement rule and to the hearsay rule. If these rules are characterised as rules of exclusion, it would follow that evidence falling within an exception to them is, once admitted, "at large" and uncontrolled by legal rule. However, if these rules are viewed as rules of use, the exceptions merely predicate that the relevant information which is subject to the exception can, contrary to the general run of things, be used for the purpose normally proscribed by the rule. But that information continues to be governed, as far as concerns its application by the tribunal of fact, by such other of the use rules as may apply to it.

The distinction between controlling admission of relevant evidence and controlling its use is one well known to common lawyers. It permeates the law of evidence in contexts beyond those of the "canons of exclusion" treated in this article. It often happens, for example, that information relevant only to the credibility of a witness is adduced at a trial; such information can be used by the tribunal of fact only in assessing the credibility of the witness concerned. Its use for any other purpose would be wrongful. Equally, in trials involving more than one defendant, evidence is often adduced which can lawfully be used only against one defendant. In the interests of clarity of thinking and proper application of the policy underlying the "canons of exclusion", the distinction is one which should be explicitly applied to the four "great canons". It is of the highest importance that lawyers' use of terminology corresponds with lawyers' perception of the practical operation of legal rules.

Continued

Court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

But contrast the dissenting judgment of Spence and Laskin JJ in *Perras v The Queen* (1973) 11 CCC (2d) 449, 460.