Letters to the Editor

Dear Editor

You're never going to believe this, but my practice (such as it is) depends on my having an infallible filing system: I can usually lay my hand on correspondence years old in an instant, but in this case, I put aside the Autumn Edition of your estimable publication, intending to reply to the letter concerning the waiving of hearsay, and now having worked out my answer, I can't find it!

So, I'll have to do my best from memory. While I am a somewhat recent addition to the NSW Bar (though one of which I am extremely proud), I have had some considerable experience in other parts of the world.

The one redeeming feature of the common law, the one saving grace it has above all other systems of law, above the presumption of innocence and the requirement of the prosecution to prove its case to the degree of sureness (if these are indeed not two ways of looking at the same thing), is the Rule against Hearsay. In particular, that a defendant shall not be convicted of a crime by hearsay.

This is very much a double edged sword, because it appears to be taken as axiomatic that neither shall a defendant have the *benefit* of hearsay, though it is possible to argue that this could be deemed to be contrary to the above maxims. Cases known to every student are those where the statement of a since deceased woman that she had been given an illegal abortion by a person other than the defendant was not allowed to be admitted in his favour; and the case of the young child who stated that his attacker was black, when the defendant was white (*Sparks v R* [1964] A.C. 964]).

This latter case gives rise to the problem also of whether a statement which would be inadmissible because the witness was too young to give (or otherwise incapable of giving) testimony (sworn or otherwise), should be allowed in by the back door. This however is a separate problem.

While it is not for me to seek to defend the English legal system after the recent scandals of which you are no doubt fully aware, and indeed the Peter Wright litigation also, the Rule has however reached its apotheosis in England, where it is regarded as a rule of law. The significance of this is that it cannot be waived, either by the agreement (implied or otherwise) of the parties, nor is it a matter for the discretion of the judge. Thus if it is discovered at any stage throughout the trial that testimony was in fact hearsay, then the judge should direct the jury to ignore it (for all the good it will do, please see below!)

It also follows that Counsel should not knowingly or carelessly allow testimony of his witnesses which he knows or should know are hearsay. This has never been the case in the USA, where it is common for Counsel to ask his witnesses matters of hearsay, subject only to objection by the opponent, and not even so much as a rebuke from the judge. This is done both in the hope of catching the opponent out, and of prejudicing the jury if the inadmissible testimony is in fact put before them, for however short a time.

As pointed out by Lempert & Saltzburg, judges are always willing to find exceptions to the rule against hearsay where they convict defendants, but not where they acquit them (*A Modern Approach to Evidence* 2nd ed [1982] p527). The rule against hearsay is constantly under attack in England, but because it is there regarded as a rule of law, the attacks have to be directed against the substance of the rule. For examples of this I humbly refer the reader to my book *The Law of Fact*, which is shortly to be published in Australia by the World Law Centre. Mention may be made of the arrant casuistry of the Court of Appeal in holding that hearsay assertions of a negative (such that the absence of any entries in a written record of sales of goods means that the goods must still be the property of the alleged owner) are negative assertions, thus are not assertions at all, and thus not hearsay in the first place (*R v Shone* [1983] 76 Cr. App. Rep. 72)!

The difference is not merely semantic, because it may not be immediately apparent that what the 'witness' is testifying to is in fact hearsay at all. In a case in which I appeared the defendant was accused of using a railway ticket which had been materially altered. In the circumstances of the particular case it was necessary (but I should add by no means sufficient) for the prosecution to prove that the defendant had used the ticket on a particular *outward* journey (the alleged offence relating to the return). A ticket inspector was produced who testified that he had been on that outward journey, and had not noticed any alteration to any tickets he had checked.

Bearing in mind that not noticing an alleged alteration in a ticket could hardly be the most memorable incident in a long career as a ticket inspector, and also that the alleged events had taken place some months previously, and that the ticket inspector had been interviewed only shortly before the trial (the prosecution having only then realised the necessity of calling him), the first question I asked in cross-examination was how did the ticket inspector know he'd been on that particular train in any event. The immediate reply was "From the duty roster"!

No such roster was produced to the court, and in any event would be admissible only as a statutory exception to the rule against hearsay. In any event again, since the duty roster related only to events which were at the time in the future, it does not prove that the ticket inspector actually did travel on that train: the difference is identical to that between an appointments' diary, and a diary compiled after the events related in it.

If the rule against hearsay were only one of procedure and not of substance, would I have been taken to have waived my objection to the hearsay by not having objected to the question the moment it was asked? How or why should I have had any grounds for doubting the authenticity of the statement before it was made? Why should the defendant have been prejudiced by the fact that the prosecuting counsel had overlooked the fact that his witness's testimony was hearsay? What would have happened if the hearsay had come to light only after the close of the prosecution's case, or indeed after the end of the trial? Would this removal of evidence be the much vaunted 'new evidence' that could be introduced on appeal, or indeed after any appeal had failed?

In the event the judge directed (or at least should have!) the jury to ignore the testimony. He should indeed have directed the jury that there was no case to answer, but that's another story! I note from your article that the US idea, that the rule against hearsay is one merely of procedure, and can thus be waived, is getting a foothold in NSW. I urge all those reading this article to try by all means to stop this, for the above reasons.

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Postscript

I recently sent you an article for your consideration on the matter of the present correspondence relating to the waiving of hearsay. Having done so, I have now come across the original item which started it, so I wonder if I might be allowed to submit the following by way of addendum? To remind the reader, this was an item in the Summer 1990 edition of this estimable publication under the title "One Question Too Many?", where views were invited on whether Counsel cross-examining to establish that testimony was hearsay, had inadvertently waived the hearsay (which the testimony unarguably was), by asking in effect "Was that just what someone had told you?"

I remember when as a schoolboy I first realised that there was a difference between 'hearsay' and 'heresy'! If the pun may be excused, I wonder if there may have arisen a heresy in the Rule against Hearsay, which I shall endeavour to elucidate as below:

A photograph may or may not be hearsay. I go to some lengths in my previously mentioned book to show that it is, at least generally, not hearsay (and thus indeed even that photo-copying does not generally import an element of hearsay!), but that point does not concern us here. I go on to conclude that a photograph may even be testimony: if the testifier (i.e. the person testifying whom, for the reason that I state in my book, I am forced by logic to call a 'testifier'; he may or may not be a witness: that is for the jury to decide) is asked, not "Is this a photograph of the shop on the occasion in question?", but "Did the shop look like that then?", then the origin of the photograph is totally irrelevant: the photograph is merely one way that the testifier can deliver his testimony.

This does not beg the question of whether the testimony is in fact based on what the testifier has been told (or otherwise communicated to) by somebody else, and thus is hearsay because the testimony is in either event really that of some third person, merely being related to the jury (or other tribunal of fact). This is a completely separate matter.

It is for the party who needs to prove a point to call testimony (or other means of proof) for the purpose, not for the other side to disprove it. That is what is meant by saying that it is up to a party to prove its case. It may transpire by skilful cross-examination that the testimony which has been adduced is in fact untrue, or hearsay. In the latter case it is then open to counsel in chief to establish that it comes under one of the statutory or common law exceptions to the rule against hearsay.

Suppose that counsel in chief says "Look at this photo-graph; did someone tell you that this is a photograph of the shop then?" or equally "Did someone tell you that the shop looked like that then?", opposing Counsel should immediately object to the question, not on the ground that the question itself is hearsay, which is impossible, since questions can hardly be hearsay, but on the ground that the answer sough (in this case 'yes') would be hearsay. This is a wholly different situation from that where, counsel in chief having elicited from the testifier that the photograph was one of the shop then, or that the shop looked like that, he then asks "Is that just what someone told you?"

This does not seek to introduce hearsay, but seeks to discover (what counsel in chief should already have known) whether the testimony already given is hearsay or not. This applies whether the hearsay is admissible or not, because the jury is entitled to take into consideration that the testimony is only hearsay even if it is admissible. Even if opposing counsel were so misguided as to want to object to the question, he could not do so because the answer sought is not hearsay. Nor is it objectionable even as a leading question, because it seeks to lead the testifier away from the point that counsel calling him seeks to provie, i.e. that the testimony is that of the testifier's own unaided senses.

Exactly the same situation arises if the question is put in cross-examination: the question does not seek to introduce hearsay, but to discredit hearsay which has already been given. This is surely the fallacy in the argument of those who assert that the 'hearsay has been waived': since the question is not even objectionable, the objection can hardly have been waived by non-use, can it?

Cross-examination may elicit that testimony is untrue, e.g. that the testifier was mistaken, perhaps he got the date wrong, or the wrong location, or indeed that he is deliberately lying, though this does not absolve counsel calling a person to testify from satisfying himself beforehand that that person is both honest and reliable: this will be personally in the case of his client or an expert witness, or through his instructing solicitor otherwise. This also includes satisfying himself that the testimony is admissible.

While there is no reason to think that this was the situation in the instant case, what then of the counsel who deliberately produces a testifier before the court knowing that he has only dishonest testimony to offer, but hoping that the other party will not discover the fact? Is he a really clever lawyer, or is not such counsel guilty of deceiving the court?

What then of the counsel who produces to the court a testifier who has only hearsay to offer: is the situation any different? Likewise, on the basis that ignorentia legis haud excusat, the testifier as presumably a layman is deemed to know the law, if he keeps quiet even to the counsel calling him about the fact that all he has to offer is hearsay (since he is deemed to know the law, he is deemed to know what hearsay is, while we lawyers are entitled to claim ignorance of it!) is he not guilty likewise of deception?

Is this not then the reductio ad absurdum of the argument that hearsay is merely a procedural rule, i.e. one that can be waived? Does it not otherwise put counsel in an impossible position, faced with a choice on the one hand of being in breach of his professional duty by hoping to deceive the court by adducing testimony which he knows is hearsay in the hope that that fact will not be discovered, and on the other hand to be in breach of his duty to his client by not adducing the testimony at all?

Is the only escape for counsel to plead ignorance, i.e. to claim that he was so inept that he did not realise that the testimony was hearsay, and is he not then in breach of his duty of competence?

Does this not prove that hearsay must be a substantive rule, which I repeat is one that cannot be waived, and must indeed be taken by the judge if opposing counsel does not spot it? Could it possibly be that regarding hearsay as a mere procedural rule is a device developed by appellate courts as a way of avoiding being forced to allow appeals, on the basis that the admission of the hearsay was the appellant's own fault, by his counsel's failing to spot the hearsay?

If an understanding of hearsay is a requirement of professional competence in a barrister (or indeed even a judge!), there would soon be very few judges or barristers left in practice (at least in England!). The same result is achieved in England by the general rule that points of law (which a substantive rule against hearsay is) cannot usually be taken on appeal if they have not been taken below, but this does at least leave open the possibility that the damage that is caused by putting inadmissible hearsay before the jury even if only for a short time, can be reduced by a direction to them to ignore the hearsay, and indeed by his not being able to rely on it in his summing up.

Since as asserted above, hearsay is almost always used against defendants rather than in their favour, is not the regarding of hearsay as a mere procedural rule thus just another example of the penchant for judges to allow hearsay against defendants rather than in their favour?

Is thus the competent counsel who elicits that what has been put before the court, by the more or less culpable fault of the other counsel, as testimony is really untrue, to be told in the very next breath that, even though he has done so, by the very fact of doing so he is deemed to have consented to the waiving of the untruth and has thus allowed in the very untruth to which he wishes to object? Is this not in the first place contrary to the very notion of waiver, which is that it is informed consent, even if only by implication? Could anything be more ridiculous, to put this again in the terms of the formal logic (to which we lawyers can surely all aspire if none of us can emulate) another example of reductio ad absurdum?

Why then as in the instant case should the situation be any different in hearsay? If the counsel who by his lack of ability fails to discover that his testifier's testimony is in fact inadmissible, and thus calls him, to be in a better position than one who does, and thus does not call him? What then of the position of the counsel who knowingly calls a testifier whose testimony is hearsay, in the hope that the other side will not discover the fact: is he to be in a better position than the other, who honestly does not call him?

The questions asked by the counsel in cross examination in the instant case are exactly those which should have been asked in chief, on pain that if they weren't, that party would be found not to have proved the fact that he wished to establish, i.e. what the premises looked like on the occasion in question. This should have been introduced by such preliminary questions as "How well (if at all) do you know the premises?"

Or is what is being asserted merely a semantic argument: is it accepted that it would be perfectly permissible for the counsel in cross-examination, instead of "That was just what someone had told you?" to have asked, "You hadn't discovered that by your own unaided senses, had you?", then I challenge it on that basis: it is a purely semantic argument. An example of a semantic argument is asking someone to define a vacuum: it is just the absence of everything else.

While I am unaware of the situation in NSW, in England at least hearsay is perfectly permissible in any event in an affidavit, so long as the source is stated, and the deponent states the fact that he believes the hearsay. If the situation is indeed the same in NSW, since the testifier states that indeed the fact asserted had been told him by another person, it seems quite likely that he knew who that person was. It was thus just a matter of the failure of the counsel in chief to have drafted his affidavit properly which would have been the reason why the hearsay should not have been admitted, rather than the brilliance of the counsel in cross-examination in asking (as it is alleged) one question too many.

I am delighted to have been able to be of service to my colleagues at the NSW Bar by what I trust is the putting-down of a heresy, just as the famous case of *Subramaniam v R* ([1956] 1 W L R 965) laid another heresy. I hope shortly to be able to commence practice in NSW, and should be delighted to receive any further correspondence on this or indeed any other points arising from The Law of Fact.

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Dear Editor

Lawyers, like most Australians, have ambivalent attitudes to American influences, as your note on the Stars and Stripes Invasion attests.

But why does a witness have to take an oath with the Bible in the right hand? Here in the ACT, a witness who takes an oath is told, "Take the Bible in your hand". Which hand the witness chooses is of no consequence.

What is wrong with the witness holding up the unoccupied hand? The practice is not peculiarly American. It is what they do in Scotland. Even the English courts allow Scottish oaths - and without the witness having to prove that she is a Scot (Archbold, 43rd ed, 403).

And if you are worried about people "taking the stand" instead of "entering the witness box", forget it. That dreary battle was lost long ago.

I do agree though that showing judges using gavels is a bit much. In Canberra we do not even have staves to be tipped.

The Honourable Mr Justice Jeffrey Miles
Chief Justice of the Australian Capital Territory

Dear Editor,

Recently I was passed a brief to appear for the plaintiff in an industrial accident case. I was amused by the judicious placement of the comma in the following reply to the defendant's request for further and better particulars:

> "Selected light duties not involving heavy lifting, repeated bending, climbing or strenuous work. Without in any way limiting his case in an effort to assist the Defendant, the Plaintiff instructs us that a non working supervisor's leading hands position may be appropriate."

I thought other members might find the passage entertaining if not educational.

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