THE ADMISSIBILITY OF HEARSAY STATEMENTS UNDER PART VI OF THE EVIDENCE ACT 1977-80 (QLD)*

By

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1.0 Introduction

The classic judicial formulation of the hearsay rule is found in *Subramaniam* v *Public Prosecutor*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness 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.

Thus it is the purpose for which evidence is tendered, rather than the fact that it comprises a statement by a person other than the witness testifying, which is the foundation of the rule. If any relevance can attach to the making of a statement *per se*, that is to the fact that it was spoken or written, then it will be admissible without reference to the question of whether any assertions it contains are true. A recent example of this principle can be found in *Walton* v *The Queen*[2]. A woman who was later murdered had told friends that she was going to meet the accused at a certain time and place. The High Court held that the testimony of the friends as to the victim's statements was admissible. It did contain a hearsay element if viewed as proof in itself that there was an arrangement for a meeting and that this meeting did take place, since this inference relies on the truth of the statements. However, the testimony was held to be admissible as original evidence because it indicated what the deceased's intention was and this in turn could lead to a circumstantial inference in the light of other evidence that she carried out that intention. Thus, the state of mind of the deceased was a fact relevant to a fact in issue and the friends' testimony did not infringe the hearsay rule because it was direct evidence of the relevant fact as perceived by them from the deceased's conduct.

Part VI of the Evidence Act contains five sections which operate as exceptions to the rule against hearsay, thus making the statement of a person other than the witness testifying admissible notwithstanding that the statement has no relevance only as original evidence. These sections are:

1. Section 92, which subject to numerous preconditions makes admissible in civil proceedings a hearsay statement contained in a document.
2. Section 93, which to a more limited extent achieves in criminal proceedings what s.92 achieves in civil proceedings.
3. Section 93A, which makes admissible in both civil and criminal proceedings subject to certain preconditions a hearsay statement contained in a document and made by a child under the age of 12. This new addition to the Act also creates the extraordinary situation that any statement by a third person referred to in the child's statement which has led

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1. [1956] 1 WLR 965 at 969-70.
2. (1989) 63 ALJR 226.

to a response by the child is itself rendered admissible, thus legitimising hearsay upon hearsay.

4. Section 95, which makes admissible in both civil and criminal proceedings and subject to certain preconditions any statement in a document produced by a computer. This provision facilitates the admission of hearsay, since computers often reproduce only what they have been told. It also facilitates the admission of hearsay upon hearsay many times over, since computers do not always reproduce information received at first hand.
5. Section 101, which makes admissible through the testimony of other witnesses or through documents the previous statements of a witness proved either as:
   (i) inconsistent or contradictory statements in terms of sections 17, 18 or 19
   (ii) consistent statements in terms of the rule allowing rebuttal of the suggestion of recent invention or fabrication.

   This section facilitates the admission of hearsay because the previous statement is admitted not just on the basis that the fact it was made diminishes or enhances credit but on the basis that it is evidence of the truth of the assertions it contains.

It is my intention to defer until another time consideration of sections 92 and 93, which have been the subject of comment by me on another occasion,[3] and also to defer consideration of sections 93A and 95. This I hope will enable a detailed consideration of the effects of section 101 and I now turn to that task.

2.0 Previous Contradictory Statements by Adverse Witnesses

I wish firstly to examine the effect of section 101 in the context of the extent to which a party is entitled to discredit his own witness. This matter is governed by section 17 of the Evidence Act, which provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but may contradict him by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of the court prove that he has made at other times a statement inconsistent with his present testimony. Provided that, before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement.

2.1 History of Section 17

The position at common law was that a party could not impeach the credit of his own witness by general evidence of bad character. If a witness did not come up to his proof of evidence then other witnesses could be called to give a different account of the issues. A hostile witness could be questioned as to previous inconsistent statements. Other witnesses could not be called for the purpose of contradicting answers to such questions i.e. to prove that the witness had earlier made statements different from his sworn testimony. In *Melhuish* v *Collier*[4] Erle J explained:

> But the evil to be provided for here is that of a treacherous witness. It is quite within the experience of any person accustomed to courts of justice, that a witness will make statements such as to induce one of the parties to a cause to call him as a witness, and afterwards upon his examination will give his evidence in favour of the opposite party; and in such a case I think the law allows the party calling the witness to examine

3. (1985) 1 QITLJ 111.
4. 19 LJQB 493, at 496-7.

him as to other statements made before the trial, and that is all that has been done on the present occasion; and I see no evil likely to arise from that course, if the evidence is properly explained to the jury as here. It is not necessary here to decide the point, whether the attorney could be called to contradict. The majority of the judges are of opinion that such a course ought not to be allowed; but some judges have continued until the end of their career to think that justice required that such evidence should be admitted.

In 1854 s.22 of the Common Law Procedure Act (Eng.) was passed and this was re-enacted as s.3 of the Criminal Procedure Act 1865 (Eng.). These sections were adopted in Queensland as s.16 of the Evidence and Discovery Act 1867. They provided that:

(i) a party could not impeach the credit of his own witness by general evidence of bad character. The common law on the point was therefore preserved.

(ii) a party may contradict his own witness by other evidence on the issues, but *only* if the witness was *hostile*. It will be seen that this aspect of the section is much narrower than the preceding common law.

(iii) a party may prove a prior inconsistent statement by his own witness who was hostile, subject to the usual proviso and subject to leave. However, such a statement was relevant to credit only and did not go to the issues unless the witness admitted both that he had made the statement and that it was true. The common law was therefore extended on this point.

Section 16 of the Evidence and Discovery Act 1867 was altered to the format that now appears as s.17 of the Evidence Act 1977-89. This has removed the necessity for a witness to be hostile before he may be contradicted by other evidence on the issues, thus reverting to the common law position on this point prior to the passing of the 19th century statutes.

2.2 The Relationship Between Section 17 and Section 101

A witness may prove merely unfavourable in the sense that he attempts to give full and honest evidence but does not prove what he was called to prove, or indeed proves the contrary. In such a case, counsel for the party on whose behalf the witness was called may not seek to impeach credit by any means other than the indirect means of calling further evidence on the issues which is contradictory and which might lead the tribunal of fact to conclude that the unfavourable witness is in error. On the other hand a witness may prove hostile in the sense that he may withhold evidence or may not wish to tell the truth or the whole truth at the instance of the party who has called him.[5] The reference to an adverse witness in section 17 is a reference to a hostile witness.[6] In such a case counsel may of course impeach credit indirectly by calling other contradictory evidence on the issues, but in addition may by leave of the court and subject to the proviso do so directly by proving that the hostile witness has made a previous inconsistent statement. It is not necessary that this be a statement on oath, nor of course does it have to be in writing. Section 101 then makes the prior statement, if it was proved by virtue of s.17, evidence of the truth of the matters it asserts so far as they are relevant to the issues.

The proviso is in effect a statement of the rule in *Browne* v *Dunn*[7] whereby if the court is to be invited to reject the evidence of a witness the latter must be told of the challenge to his testimony and given the opportunity of dealing with any alleged contradiction. It is possible that the witness will agree not only that he made the previous statement but that it is true. In such a case the previous statement is subsumed into the testimony of the

5. *McLellan* v *Bowyer* (1961) 106 CLR 95.
6. *Greenough* v *Eccles* (1859) 141 ER 315.
7. (1894) 6 R 67.

witness and goes not only to his credit but also to the issues in so far as it is relevant.[8] There has been no need to prove the statement since it has been fully admitted, and therefore there is no need to rely upon section 101.[9]

On the other hand, it is more likely that the witness will deny making the previous statement and it will be necessary to seek leave to prove it by virtue of s.17 through the testimony of another witness or the tendering of a document. This may not be the formal process which the section suggests. In *R* v *Lawrie*[10] counsel had successfully sought a declaration of hostility (which is of course a threshold requirement to the ability to raise prior contradictory statements under this section) and had been given leave to cross-examine his own witness. He did not formally apply for leave to raise prior statements. Connolly J held that the process adopted ". . . convey [ed] the authority provided for by the section". Williams J agreed, saying that the declaration of hostility and the grant of permission to cross-examine impliedly included a grant of leave to raise prior statements. His Honour noted a tendency to blur the distinction between the declaration of hostility and the granting of leave to prove prior statements and went on to say that it would be preferable for a specific grant of leave to be given. His Honour also noted that whilst it is clear that a judge may properly refuse leave to prove a prior statement under this section the point had not been the subject of any reported comment since 1859.[11] That situation has now altered and I shall return to the point later.

A third possibility which emerges when a witness is confronted with a prior inconsistent statement under the proviso to s.17 is that he will admit making it yet not admit the truth of its content. This is precisely what happened in *Lawrie*. With respect, it is submitted that of the three judges in that case only Connolly J appears to have appreciated the distinction between this situation and the one where not only the making of the statement but also its truth are conceded by the witness. Connolly J referred to the case of *R* v *Mursic*[12], which was decided in the context of s.18 of the Act and which was a case in which His Honour had also been involved. A defence witness under cross-examination by the Crown had admitted having made a statement to the police but said that at the time of making it she was ill and that in hindsight she did not fully believe what she told the police to be true. Connolly J who was in the majority held that the witness had not "distinctly admitted" the prior statement as required by s.18 and thus it had been correctly proved by virtue of that provision with the attendant consequences of s.101. In *Lawrie* His Honour applied the same principle to s.17 in similar circumstances. On the other hand, Ambrose J said[13]:

> If a witness upon being asked . . . admits that he has made that statement then clearly the person cross-examining him by leave as an adverse witness had discredited him. It is quite unnecessary in such a case for the cross-examiner to call other evidence to prove the making of the inconsistent statement and therefore it is both unnecessary and in my view impermissible to prove such inconsistent statement "by virtue of" s.17. It has already been proved "by virtue of" the common law rules of evidence. In my view an attempt made to prove such a statement "by virtue of" s.17 . . . merely to achieve the evidentiary effect of s.101 ought not generally succeed. If a witness under cross-examination admits that he has made a statement on a former occasion

8. *Morris* v *The Queen* (1987) 61 ALJR 588.
9. *Supra* n.8 per Deane, Toohey and Gaudron JJ at 594, per Dawson J at 599.
10. [1986] 2 Qd R 502.
11. *Greenough* v *Eccles* supra n.6.
12. [1980] QD R 481.
13. *Supra* n.10 at 515.

> inconsistent with the testimony he has given in Court that admission simply goes to his credit . . .

With respect, it is submitted that this passage points to the error in His Honour's reasoning. His Honour makes no distinction between admitting both the making of the statement and its truth on the one hand and on the other admitting the former but not the latter. In the second situation the truth of the statement has *not* been "proved by virtue of the common law rules of evidence", since it has not been admitted. There is thus a clear necessity for counsel to seek to prove it in reliance upon s.17 so as to attract s.101, and it is submitted that the approach of Connolly J is to be preferred for allowing that course.

The third judge involved in *Lawrie* was Williams J. His Honour said:

> . . . prior to the enactment of such a provision as is now found in s.17, another witness could not be called to prove the prior inconsistent statement if the witness denied making that statement. Clearly then any statement proved through the calling of another witness is a statement "proved by virtue of s.17". But what of the situation where the witness, under cross-examination after being declared adverse, admits to having made the previous inconsistent statement? *Melhuish* v *Collier* (*supra*) confirms that prior to 1854 such cross-examination was permissible, and such answer could be used as the basis of an attack on the witness' credit. What the original section did (and what the current section still does), in my view, is to restate the existing law prior to 1854, *and* confer the right to prove the inconsistent statement through another witness; the two methods of proving the prior inconsistent statement are subsumed into the one statutory provision.

It is clear that at common law cross-examination as to prior contradictory statements was permissible after a declaration of hostility.[14] There is unassailable High Court authority that where on such cross-examination both the making of the statement and its truth are admitted it has been proved by virtue of the common law and goes to the issues as well as to credit[15]. Thus, in such a situation no reliance on either s.17 or s.101 is necessary.

On the other hand, the common law prohibited pursuing the matter of a prior statement the making of which had been denied in the witness box[16], thus necessitating resort to s.17 and s.101. In the end the same result is achieved i.e. the tribunal of fact may consider the prior statement as evidence of the truth of the assertions it contains. In *Lawrie*, Williams J concludes:

> It follows, in my view, that whether the statement is proved by securing an admission from the witness that the prior inconsistent statement was made, or is proved by calling another witness, the statement is "proved by virtue of s.17" for purposes [sic] of s. 101; the consequences specified in s. 101 therefore apply in either case.

With respect, it is submitted that His Honour reached the correct result for the wrong reasons, again due to lack of recognition of the distinction already referred to. His Honour appears to reach his conclusion without reference to the distinction, nonetheless his conclusion accords with that arrived at by Connolly J in the case of an admitted prior statement the truth of which is not conceded, though for a different reason.

The upshot of *R* v *Lawrie*[17] is that a majority may be found for the following propositions:

(a) a prior inconsistent statement which a hostile witness admits he made and admits is true is evidence of the matters it asserts (this is implicit in the reasoning of Connolly J.)

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14. *Melhuish* v *Collier supra* n.4.
15. *Supra* n.7.
16. *Supra* n.13.
17. *Supra* n.10.

(b) a prior inconsistent statement which a hostile witness denies making may be proved by virtue of s.17 and is then by virtue of s.101 evidence of the matters it asserts
(c) a prior inconsistent statement which a hostile witness admits making but the truth of which he denies may be proved by virtue of s.17 and is then by virtue of s.101 evidence of the matters it asserts.

3.0 Previous Contradictory Statements by Witnesses Under Cross Examination

I turn now to the effect of s.101 in the context of prior inconsistent statements made by a witness under cross examination. This matter is governed by s.18, which provides:

> If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the proceeding and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it:
> Provided that, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement.

It will be seen that the provision is similar but not identical in its terms to s.17. The ability to prove previous inconsistent statements is provided for subject to the same proviso relating to the rule in *Browne* v. *Dunn*[18] as appears in s.17. There is no requirement that the previous statement be either on oath or in writing. There are however three features of s.18 that require comment.

Firstly, only those prior statements which are "relative to the subject matter of the proceeding" may be proved by virtue of s.18. This is a requirement of relevance of the content of the statement to the issues in the case, though it is not necessary that the statement make explicit reference to those issues. The requirement of relevance to the issues may be contrasted with s.17, which since it lacks this condition may be thought to countenance prior statements which could be relevant only to matters of credit. In *R* v *Cox*[19] the C.C.A. was unanimously of the view, albeit in *obiter dicta*, that this is not the case, the prior statement must be relevant to the issues to come within the ambit of s.17 even though without s.101 it would affect credit only.

Secondly, s.18 enables a prior statement to be proved unless the witness "distinctly admits" having made it. As previously noted, in *R* v *Mursic*[20] this was interpreted as requiring not only an admission that the statement was made but that its content is true.

Thirdly, s.18 makes no reference to leave of the court: it states that unless there is distinct admission proof may be given. This would prima facie appear to provide a choice to the cross-examiner rather than require a decision by the court to allow such proof. Nonetheless it was held in *R* v *Neville*[21] by Williams J, with whom Campbell C J and Ryan J agreed, that s.18 does not give any statutory right to prove a prior statement, it provides no more than that such evidence is admissible subject to a judicial discretion exercised in the light of particular circumstances.[22] This is because in the case of a defence witness against whom the Crown or plaintiff wishes to prove a prior statement it will be necessary for that evidence to be given by way of rebuttal after the closing of the principal case.

It is beyond the scope of this paper to fully canvass the principles of rebuttal evidence.

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18. *Supra* n.7.
19. [1972] Qd R 366.
20. *Supra* n.12.
21. [1985] 2 Qd R 398.
22. See also *R* v *Ghion* [1982] Qd R 781.

Ordinarily it is not allowed unless the point is serious and material, the rebuttal evidence is strongly probative of it and the Crown or plaintiff could not have foreseen it or raised it in their principal case.[23] In *R* v *Ghion*[24] it was said that in the context of s.18 rebuttal evidence should only be allowed where it was inadmissible in the Crown case. In *Neville* it was said that there must be consideration of the nature and relevance of the evidence given by the witness under attack, the circumstances in which the prior statement was made including factors relevant to its reliability and the fairness of allowing the jury to have recourse to such a statement so late in the trial.

3.1 The Relationship Between Section 18 and Section 101

In the context of s.18 the three possible responses by a witness confronted with a prior statement pursuant to the proviso are the same as in the context of s.17 i.e.

(i) he may admit both the making of the statement and the truth of its content. In this case s.18 and s.101 have no operation. The common law right to cross-examine about such a matter has been exercised and the admissions cause the prior statement to be subsumed into the testimony of the witness.[25] It is then evidence of the truth of its content so far as that is relevant to the issues, as well as bearing upon credit.

(ii) he may admit making the statement but not the truth of its content. In this case there has been no distinct admission, s.18 operates to allow proof of the statement by other means and s.101 operates to render it evidence of the truth of its content so far as that is relevant to the issues.[26]

(iii) he may deny making the statement. In this case the result will be the same as if he had failed to distinctly admit the truth of its content i.e. the statutory provisions will operate.

3.2 The Relationship Between Section 17 and Section 18

In *R* v *Lawrie*[27] Ambrose J says:

> Section 18 of the Evidence Act deals with witnesses under cross-examination generally and not with only those witnesses whose credit is not sought to be impeached upon cross-examination by the party calling them.
>
> In my view, s.17 of the Act purports to deal with the rights of a party to discredit witnesses called by that party while s.18 on the other hand deals with the rights of persons generally who have cross-examined a witness (whether declared hostile or not) as to the making of a former inconsistent statement relative to the issue to prove that statement if that witness "does not distinctly admit that he has made such statement." . . .
>
> Sections 17 and 18 can be read together so that s.17 permits leave to be given to prove against an adverse witness a prior statement inconsistent with his present testimony where that statement goes only to credit and does not relate to the subject matter of the proceedings while s.18 gives a right to prove a prior statement inconsistent with his present testimony where that statement does go to the issue and the witness does not distinctly admit that he made it.

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23. *Killick* v *The Queen* (1981) 56 ALJR 35.
24. *Supra* n. 21.
25. *Morris* v *The Queen supra* n.8.
26. *R* v *Mursic* supra n.12.
27. *Supra* n.10.

It is thus suggested by His Honour that in fact it is s.18 which governs proof against a hostile witness of a prior inconsistent statement, rather than s.17.

With respect it is submitted that His Honour's conclusion is contrary to the unanimous view expressed by the C.C.A. in *Cox* if it suggests that pursuant to s.17 a prior inconsistent statement not relevant to any issue but relevant only to credit may be proved. It may otherwise be said that whether it is s.17 or s.18 which facilitates proof of a prior statement by a hostile witness the end result will be the same and the question is therefore of academic interest only. Nonetheless it is submitted that the conclusion reached by Ambrose J in this respect is inaccurate, and that the error into which His Honour falls is lack of recognition of the distinction between a prior statement admitted as to its making only and a prior statement admitted both as to its making and its truth. His Honour cites the joint judgement of the Court of Criminal Appeal in *R* v *Andrews*[28] as authority for his conclusion. Reference to this case discloses a prior statement by a hostile witness named McConnell having been admitted, according to the court, via s.18.[29] It is not clear from the report however that this was a point considered in any detail and thus it is difficult to discern from the case any clear authority for the proposition stated by Ambrose J in *Lawrie*. It is submitted that the language of sections 17 and 18 suggests that they are *both* concerned with prior statements which may be rendered admissible in terms of the truth of their content by section 101.

3.3 Previous Contradictory Statements in Writing Put In Evidence By The Court: Section 19 and Section 101

Section 19 of the Act permits a witness to be cross-examined about a prior statement made by him in writing without actually being shown the document concerned. This is subject to a requirement that the statement be relevant to the issues and a proviso that if it is intended to contradict the witness by use of the document he must first be directed to the relevant portions, though he need not be given an opportunity to explain the contradiction even if the document is to be tendered.[30] The section also vests in the court a discretion to require the statement to be tendered, which may be exercised for the reasons described in *R* v *Ford*.[31]

> If the deposition is not put in evidence it is impossible to tell whether it contains the same or a different statement from [the one] which the witness makes in court . . . The two statements may be precisely the same; yet this line of cross-examination would naturally leave the jury to suppose that they were different.

When the discretion is exercised s.101 renders the statement admissible as evidence of the truth of the assertions it contains so far as they are relevant to the issues. There is of course also an effect on the credit of the witness.

3.4 Previous Consistent Statements and Section 101

It is a well known rule that the previous consistent statement of a witness is not generally admissible at the instance of the party who called him. This is subject to a number of exceptions, including previous consistent statements being admissible to rebut a suggestion of fabrication. The court has a discretion which will normally be exercised when the suggestion is clear either directly or indirectly and there is a prior statement which serves to rebut it.[32] The underlying purpose of this procedure is to enable a witness to defend himself

28. [1987] 1 Qd R 21.
29. *Supra* n.28 at 35.
30. *Savanoff* v *Re-Car Pty Ltd* [1983] 2 Qd R 219.
31. (1851) 5 Cox C.C. 184.
32. *Nominal Defendant* v *Clements* (1960) 104 CLR 476.

against an attack on his credit of this nature. Section 101 also makes the prior statement evidence of the truth of the assertions it contains so far as they are relevant to the issues, a factor which must be borne in mind by any counsel contemplating an allegation of fabrication.

3.5 The Rule in Walker v. Walker[33] and Section 101

Before leaving section 101 it is worthwhile noting its reference in paragraph three to refreshment of memory. This refers to the practice of a witness consulting a document to refresh his memory in the witness box. Such a document (which must be made by or supervised by the witness) is usually of course a prior consistent statement and thus normally inadmissible in the case of the party who called the witness. It must however be produced for inspection on demand by the opponent, who may use it for the purpose of cross-examination. A party following this procedure is not deemed to have called for the document and thereby avoids the obligation stated in *Walker* v *Walker*[34] that a document called for must be tendered on demand by the party producing it. The exception to this, which enlivens the rule in *Walker* v *Walker*, is where the cross-examiner who has called for the document uses it to open new material in the document which the witness did not refer to in his evidence in chief.[35]

In referring to the above practice s.101 confirms the rules of common law and declares documents which become evidence under the rule in *R* v *McGregor*[36] to be evidence of the truth of the assertions they contain so far as these are relevant to the issues, but only to the extent that such assertions could have been made testimonially by the witness who consulted the document to refresh his memory.

4.0 Weight of Previous Statements

It is of course for the tribunal of fact to decide the weight which should be accorded to a prior statement, and in the case of an inconsistent statement to decide whether the sworn evidence or the content of the statement should be accepted.[37] This of course assumes that the statement has been found to have sufficient weight to be considered by the tribunal of fact and has not been excluded through the exercise of judicial discretion. It must usually be remembered that the prior statement will have been made out of court and not under oath, both factors which will bear upon its probative value.

Section 102 of the Act sets out two specific matters which are to be taken into account in assessing the weight of a prior statement, in addition to all other circumstances which might be relevant to that question.

The section provides:

> In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including:
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and

33. (1937) 57 CLR 630.
34. *Supra* n.33.
35. *R* v *McGregor* [1984] 1 Qd R 256.
36. *Supra* n.35.
37. *R* v *Morris* [1987] 1 Qd R 370.

(b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

Previous consistent statements and statements admitted under the rule described in *R* v *McGregor*[38] seem to have provided little difficulty, although clearly the possibility that their maker may have had some motive to misrepresent the facts must be given no less than full attention. Previous inconsistent statements by hostile witnesses have provided more difficulty. This has been especially true where the prior statement has been more damaging to the accused than the witness' testimony. This point has been the subject of several recent decisions, and it is to these that I now turn.

4.1 Weight of Previous Inconsistent Statements By Hostile Witnesses

In *Morris* v *The Queen*[39] Deane Toohey and Gaudron JJ in their joint judgement say:

> The receipt into evidence of a prior inconsistent statement as evidence of the facts therein contained poses particular problems in a criminal trial, especially where the prior inconsistent statement is more damaging to an accused person than is the testimony of the witness. Where the prosecution seeks to adduce such evidence from a prosecution witness, an issue may well arise as to whether the prejudicial nature of the statement does not outweigh is probative value, such that as a matter of judicial discretion it should be excluded: see *Harris* v *Director of Public Prosecutions* [1952] A.C. 694 at 707; *Kuruma* v *The Queen* [1955] A.C. 197 at 204; *Driscoll* v *The Queen* (1977) 137 C.L.R. 517 at 541 and *Cleland* v *The Queen* (1982) 151 C.L.R. 1. If however, such a statement is admitted, it will usually be necessary for the trial judge to give very careful and very precise instructions to a jury as to the weight the evidence should be given. The nature of the instructions will necessarily depend on the particular case. It is difficult to conceive that in a case where the prior inconsistent statement is more damaging to the accused person than the evidence given by the witness, a mere invitation to the jury to consider the matters referred to in s.102 of the Evidence Act would be a sufficient instruction. In many cases such an invitation may be to the disadvantage of the defence case.

In *Morris* a chronic alcoholic called by the Crown had been declared a hostile witness on the basis of his demeanour in the witness box, a prior inconsistent statement he had made to the police and contrary evidence he had given at earlier committal proceedings. Under cross examination by the Crown he admitted the truth of his prior statements to the police and at the committal, although under cross-examination by the defence he then denied their truth. As was pointed out by their Honours in the joint judgement, the issue s.102 referred to in the passage just quoted did not arise on the facts of the case, since due to the testimonial admission by the witness of the truth of the previous statements they had not been received pursuant to s.101 of the Evidence Act. Nonetheless it was held that the jury should be carefully instructed on general principles.

Another decision of the High Court relevant to the issue of the weight to be given in circumstances of prior inconsistent statements is *Driscoll* v *The Queen*.[40] This case addresses the reliability of the evidence of a witness who has made a previous inconsistent statement, as opposed to the reliability of that statement. Gibbs J, speaking for the whole court on the point of appropriate directions to be given to a jury, said:

> In some cases the circumstances might be such that it would be highly desirable, if

38. *Supra* n.35.
39. *Supra* n.8 at 594.
40. (1977) 137 CLR 517 at 536.

> not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony.

His Honour went on to reject a submission that there was an inflexible rule of law or practice that a direction be given that the testimony of the witness be regarded as unreliable.

There are also two relatively recent decisions of the Queensland Court of Criminal Appeal which directly relate to this issue.

In *R* v *Siedofsky*[41] the accused was charged with indecent dealing and carnal knowledge in relation to his step-daughter, aged 12 at the time of the trial. At the urging of her mother the child had made a complaint to the police but at the trial denied that "anything untoward" had happened between her and her step-father. The child was declared a hostile witness and her original statement placed in evidence pursuant to s.17 after she had denied its truth. Thomas J, with whom Andrews C J and Connolly J agreed, held that the potential probative value of the statement was more than slight so as to exclude the possibility that it should be excluded through use of the judicial discretion of fairness referred to in *Morris* and most recently explained in Queensland in *R* v *Hasler*.[42] It is submitted that this will usually be found to be the case. His Honour then dealt with a submission that the result of allowing evidence of the prior statement to go to the jury would be that wherever a witness tells a false story to the police and retracts it at the trial, the accused must be convicted on the written statement if the jury is left in doubt as to the explanation for telling the false story in the first place. His Honour pointed out that the tribunal of fact has every right to reject the written statement but that on the other hand there may be reasons suggesting it is more reliable than the testimony of the witness, in this case a young girl wanting to call a halt to a prosecution she has started with a truthful statement when there is an ongoing relationship between her mother and the accused.

His Honour then referred to the direction given to the jury by the learned trial judge, saying:

> It should also be noted that the learned trial judge certainly did not confine his directions to the jury to a statement of s.102. In addition to an ample explanation of that section he drew attention to the fact that the statement was not in the same category as sworn evidence, that the jury obviously did not have the opportunity of seeing her demeanour as they would have done had she given sworn evidence and referred to the "disadvantage in considering the statement as distinct from oral evidence (namely) that you do not have an opportunity of seeing the demeanour of the witness and the circumstances in which it was made". The defence explanations for the change of heart were mentioned at length, as were those of the prosecution.

His Honour adverted to the dangers referred to by the High Court in *Morris* but held that the direction was sufficient and that in the circumstances it was safe to leave the matter with the jury.

It will be observed that in *Siedofsky* there was no suggestion that the Crown had called

41. [1989] 1 Qd. R. 655.
42. [1987] 1 Qd. R. 239.

the girl knowing her to be hostile and with the sole view of employing s.17 to render admissible her original statement. This suggestion was made in the case of *Blewett* v *The Queen.*[43] It was rejected on the facts, although the High Court in a unanimous joint judgement held that such a course of action would be improper and might well give rise to a miscarriage of justice. Whilst it is possible that the Crown will know a witness to be hostile before calling him, it was pointed out in *R* v *Andrews*[44] that what is more likely is that the Crown will know only that the witness might not come up to proof or might turn hostile: here there can be no objection to the witness being called.

The second recent Queensland case to deal with the weight of prior inconsistent statements is *R* v *Nguyen*[45], although what is there said is *obiter dicta* because the relevant grounds of appeal were ultimately abandoned. The accused had been charged with attempted murder, unlawful wounding and wilful damage arising from a rifle shot which missed its intended target but struck a window and caused injury to a bystander. Again, a hostile witness denied in testimony the truth of a statement she had made to the police, her reason for making it she said having been a desire to "take it out" on the accused. Matthews J, with whom Kelly SPJ agreed, expressed doubt that the probative value of an unsworn out of court statement made admissible through s.17 and s.101 could ever outweigh its prejudicial effect arising from its unreliability. It is interesting to note here that his Honour appears to suggest an exercise of the judicial fairness discretion to exclude such statements but appears to adopt the traditional interpretation of when this direction should be exercised rather than the stricter view expressed in *Hasler.* His Honour also suggested that the operation of s.101 be confined to civil cases by legislative amendment. In any event, in criminal cases his Honour took the view that there should be a direction to the jury that such statements should be acted upon only if the jury were satisfied beyond reasonable doubt that they were made and that they were true, in other words the direction referred to by the High Court in *Chamberlain* v *The Queen No. 2.*[46] Williams J with whom Kelly SPJ also agreed in *Nguyen* referred to *Siedofsky* and noted that a jury may convict even where the substantial evidence against the accused consists only of a prior statement admitted pursuant to s.17 and s.101. His Honour referred to the direction in *Nguyen* wherein the learned trial judge had invited the jury to consider the circumstances in which the statement came into existence, any motive which may have existed for the maker to conceal or misrepresent facts, the fact that the statement was not on oath and the reasons given by the witness as to why lies had been told by the police. In all this Williams J found no cause for complaint yet his Honour asked whether the trial judge had gone far enough. He said:

> In many cases where the statement admitted into evidence is more damaging to an accused person than the oral sworn evidence of the witness it will be desirable, if not necessary, for the trial Judge in his summing-up to warn the jury as to the dangers involved in accepting and acting upon the out of court statement. The precise formulation of a warning would, of course, be dependent upon the circumstances of each particular case. In my view it would have been preferable for the learned trial Judge in his summing up in this case to have warned the jury of the dangers of convicting given the state of the evidence, but it is not necessary to decide the case on that point.

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43. (1988) 62 ALJR 503.
44. *Supra* n.28.
45. [1989] 2 Qd. R. 72.
46. (1984) 58 ALJR 133.

4.2 **Weight of Previous Inconsistent Statements By Witnesses Under Cross Examination**

Much of what has just been said in the context of hostile witnesses is relevant also in considering the weight to be given to a prior statement made by a witness under cross-examination, and in considering the weight to be given to the testimony of that witness. In addition I mention the case of *R* v *Perera*.[47] The trial judge had described to the jury the weight of the prior statement by telling them it was "some evidence", "simply a statement", "not irrefutable evidence" and " . . . not . . . clear evidence". A point taken on appeal was that the trial judge was wrong in that by using these words he had suggested that evidence in the form of an inconsistent statement was of lesser or dubious value. Williams J, with whom Connolly and Moynihan JJ agreed, said[48]:

> It is correct that evidence made admissible by s.101 is not conclusive or irrefutable, and it is probably desirable to make that clear to the jury. Finally on this topic it should be noted that s.102 itself implies that in many (perhaps even most) situations evidence of the type in question may be regarded as having lesser weight or significance than other evidence. Provided the jury are directed as to the appropriate factors to be considered in determining weight, there is no harm in my view in telling them that they may conclude that a statement admitted pursuant to s.101 has less significance than other evidence relevant to the fact in issue.

5.0 **Conclusions**

From the above it will be seen that a number of considerations are involved in the reception of prior inconsistent statements into evidence. These are:

1. Under s.17, is the witness properly to be regarded as hostile?
2. Should leave be given to prove a prior inconsistent statement having regard to its probative value and, under s.18, having regard to factors relevant to rebuttal evidence?
3. If there is no jury, what weight should be accorded to the statement, having regard to s.102 where necessary and generally to other factors?
4. If there is a jury, what direction should be given?

I hope that this paper has served in some small measure to address those issues. The questions in each individual case must of course be decided according to the particular facts.

47. [1986] 2 Qd R 431.
48. *Supra* n.47 at 437.