THE BEST EVIDENCE - ORAL TESTIMONY OR DOCUMENTARY PROOF?

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I. INTRODUCTION

This article examines certain rules and practices that constitute part of the law of evidence as it deals with the form of the evidence. The question as to whether oral or documentary evidence is the best evidence is one that has occurred and reoccurred as a focus of debate. In the author's view, it is a misconceived question. There is not and can not be one absolute answer to it, as the circumstances will dictate what the best evidence is in an individual case. It is nevertheless appropriate at this juncture to pause to reflect on the rules that govern the conditions of admissibility of evidence designed to place a narrative before the court and on any guidance the case law affords as to the weight to be attached to such evidence. This is particularly appropriate at this instant because of the passage of reform legislation, the *Evidence Act* 1995 (Cth) and the *Evidence* Act 1995 (NSW). This legislation ("the reform legislation") embodies choices as to whether it is desirable to restate or change the common law. These choices must be evaluated, both because legal practitioners in New South Wales must strive to appreciate the changes and because any possibility that other States will adopt reform legislation based on this model will depend, in part, on this assessment.

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II. BEST EVIDENCE AS THEORY

At the outset, I wish to refer briefly to the history of the best evidence rule. Two hundred years ago Gilbert's *Law of Evidence*, published in several editions between 1754 and 1801, was the leading text on evidence.[1] Gilbert chose the best evidence rule as a unifying theme for his disquisition on the law of evidence. He expounded it in these words:

> The first therefore, and most signal Rule, in Relation to Evidence is this, that [one] must have the utmost Evidence the Nature of the Fact is capable of: for the Design of the Law is to come to rigid Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of.[2]

On the basis of this theory, Gilbert categorised evidence and arranged the categories in a rigid hierarchy which proceeded downward from public records at the top, through various other types of documents, to reach oral evidence.

Jeremy Bentham attacked this view of the law of evidence with vigour in the course of writing his *Introductory View of the Rationale of Judicial Evidence.*[3] Bentham argued that by making the distinction between written and oral evidence the foundation of the system, Gilbert had been led into a number of errors. These included overlooking real evidence, giving insufficient attention to circumstantial evidence and ignoring important distinctions such as that between verity and the authenticity of documents. Documentary records, in Bentham's view, might be authentic but unreliable. In contrast to Gilbert, Bentham proclaimed that "[w]itnesses are the eyes and ears of justice".[4]

The best evidence rule was also expounded by Sir WD Evans in the context of a discussion of the law of contracts published in 1806. Evans noted that the law of France went much further than the law of England in not allowing oral testimony to be admitted either to vary or explain contracts. Evans cites an unnamed authority to emphasise the flexibility of the best evidence rule:

> There is but one decided rule in relation to evidence, and that is that the law requires the best evidence. But this rule is always relaxed upon two grounds, either from absolute necessity, or as a necessity presumed from the common occurrences... The rule is not so stubborn but that it will bend to the necessities of mankind, and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind.[5]

Twining's survey of the broad sweep of evidence scholarship since the beginning of the twentieth century leads eventually to the conclusion that nearly all changes in the law of evidence have been in the direction that Bentham recommended, that is towards the abandonment of "illogical and indefensible"

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1 W Twining, "The Rationalist Tradition of Evidence Scholarship" in *Rethinking Evidence - Exploratory Essays*, Blackwell (1990) p 35.

2 Sir Jeffrey Gilbert, *The Law of Evidence* (3rd ed, 1769) as cited by Twining *ibid* (capitalisation as in original) p 36.

3 J Bentham, *Introductory View of the Rationale of Judicial Evidence* (1838-53) as cited in J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice*, Butterworths (1995).

4 *Ibid.*

5 Sir WD Evans in *Pothier on Obligations* (1806) p 148, as cited by Twining note 1 *supra* p 44.

technical rules.[6] The fourth and final of the principal attempts to develop an explicit general theory of the law of evidence, which Twining discerns, is the work of Thayer. He concluded that the rules of evidence are a mixed group of exceptions to a principle of freedom of proof.[7] Free proof as a principle impacts on questions of admissibility and use of evidence and contains a value judgment. Twining makes the point that there is more space than matter in the rules of evidence. Thus, importantly, there are almost no rules of evaluation of evidence, which is to say that there is little guidance from the rules as to the weight or cogency of the evidence. The old rules of priority adumbrated by Gilbert have gone by the board. Twining asserts that there is now no principle that written evidence is to be given greater weight than testimonial evidence.[8] This assessment will be borne out by this specific study of the Australian law of evidence as it stands in 1995.

Despite Gilbert's attempt to use the best evidence principle as a central organising theme, it was adopted by the common law courts as a rule in only a very few cases. The number of references to such a rule to be found in the cases since 1980 is extremely limited. In 1980 it was invoked in the course of argument before the High Court about the admissibility of identification evidence, but not relied on by the Court.[9] In 1987, in the context of a decision about the admissibility of a translation of a conversation recorded on audio tape, Dawson J commented:

> The failure to observe the best evidence rule in practice has led textbook writers to conclude that it no longer exists save as a convenient and concise description of the rule relating to the proof of the contents of written documents, and that it is only in that form that it has survived.[10]

The learned judge went on to hold that the rule, otherwise known as the primary evidence rule, should not be seen as applying to documents other than written documents.[11]

III. DEFINITIONS

There are three terms whose definitions are central to this discussion. They are 'oral', 'document' and 'testimony'.

A. 'Document'

Both case law and statute contain definitions of the term 'document'. The essence of these definitions is that a document is a record of information. The High Court decision in *Commissioner for Railways (NSW) v Young*[12] stands as

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6 W Twining, "What is the Law of Evidence?" in *Rethinking Evidence* note 1 *supra* pp 188-9.
7 See JB Thayer, *A Preliminary Treatise on Evidence at Common Law*, Little Brown & Co (1898).
8 Note 6 *supra* p 196.
9 *Alexander v R* (1981) 55 ALJR 355; see discussion in *R v E J Smith* [1984] 1 NSWLR 462.
10 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 194.
11 *Ibid* at 195.
12 (1962) 106 CLR 535.

authority for the proposition that the purpose for which a party intends to introduce writing into court is central to the determination of whether or not the evidence is a document. In the words of Windeyer J, "[w]ritings or other markings that are not relied on for their meaning but only as part of the appearance of a thing" are not to be considered to be a document. In the same judgment it is made clear that the nature of the writing or the material upon which it appears are not central to the definition. Statutory provisions do not make a distinction dependent on the purpose for which the material is being used quite as clearly, but it is argued that it would be maintained in practice. Where there is no exclusionary rule that insists on the production of the original document this distinction is less important. Other problems have, however, arisen with the advance of modern technology. These include the questions of whether audio or video tapes,[13] such marks as barcodes and computer records are documents. These problems are resolved by the Dictionary in the reform legislation which defines the term 'document' as follows:

> document means any record of information, and includes:
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> (a) anything on which there is writing; or
> (b) anything on which there are marks, figures, symbols, or perforations having a meaning for persons qualified to interpret them; or
> (c) anything from which sounds, images, or writings can be reproduced with or without the aid of anything else; or
> (d) a map, plan, drawing, or photograph.

B. 'Oral'

The term 'oral' is not defined by the law of evidence of Australia and, consequently, the ordinary definition of the term must be taken to apply. The first meaning of the term offered by the New Oxford Shorter Dictionary is "[u]ttered or communicated in spoken words, conducted by word of mouth, spoken, verbal". The presumption that evidence given in a common law trial should be offered in oral form is enshrined in the common law.[14] This presumption is acknowledged in rules of court comparable to Part 36 r 2 of the Supreme Court Rules of New South Wales. There do not appear to be any cases which have considered whether this requirement poses any problems where the witness is deaf or mute.[15] It may be that the fact that the witness' testimony would be transmitted to the tribunal of fact through the words of the interpreter is sufficient to meet the requirement for orality. The reform legislation addresses this problem explicitly by providing in s 13(4) that a person is not competent to give evidence about a fact if that person is incapable of understanding or communicating a reply to a question and the incapacity cannot be overcome. The legislation subsequently provides in s 31 that a witness who cannot hear adequately may be questioned in any appropriate way and that a witness who cannot speak adequately may give evidence by any appropriate means.

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13 Note 10 *supra* at 186 per Mason CJ and Brennan and Deane JJ.

14 See A Ligertwood, *Australian Evidence*, Butterworths (2nd ed, 1993) p 344.

15 The question did not arise in *Gradidge v Grace Bros* (1988) 93 FLR 414 at 414.

C. 'Testimony'

The term 'testimony' is not generally defined in either legislation or major texts in Australia. A definition of the term has been offered recently by an Australian philosopher. Coady summarises the distinguishing features of testimony in six propositions. The sixth can be collapsed into the first proposition and this has been done by this author. With this amendment the propositions are as follows:

(a) It is a form of evidence. This implies that the testimony is relevant to a disputed or unresolved question and is directed to those who are in need of evidence on the matter.

(b) It is constituted by person A offering their remarks as evidence so that we are invited to accept P because A says that P is so.

(c) The person offering the remarks is in a position to do so; that is, the person possesses relevant authority, competence or credentials.

(d) The testifier has been given a certain status in the inquiry by being formally acknowledged as a witness and by presenting evidence with due ceremony.

(e) As a specification of (c) within Australian law, testimony is normally required to be first hand rather than hearsay.[16]

An important feature of the definition of testimony is found in proposition (b). From this proposition it follows that testimony offers the tribunal of fact indirect access to knowledge. The tribunal of fact is invited to accept P because A says that P is so. Testimonial evidence thus contrasts with 'real evidence' which is experienced directly by the tribunal.[17] This contrast between evidence experienced directly and that experienced indirectly presents a binary framework for categorising evidence.

The binary structure applies to the classification of oral and real evidence. Oral evidence will invariably be presented as indirect proof of a fact or facts. This is so even where the fact can only possibly be answered in this fashion, such as when the question relates to an individual's state of knowledge or intention. Even if testimony is offered by the individual in question, the court must decide whether to accept the individual's testimony. Real evidence is always offered as evidence that will speak directly to the tribunal of fact.

Documentary evidence does not fit easily within the binary framework. A document which, in and of itself, is relevant to the questions before the court is evidence which the tribunal will assess directly. An example of such a document would be a written contract offered as evidence when the issue is the terms of the contract. Such documents were admissible at common law. A document which contains a narrative account of an incident offers indirect proof of a fact if accepted in evidence. An example would be a diary note or memo containing an account of a meeting where the issue is what was said at the meeting. If this narrative is accepted as evidence at all, it is on the basis that the writer of the document was in a position to know that the facts were as recorded. Proposition

16 CAJ Coady, *Testimony - A Philosophical Study*, Clarendon Press (1992) pp 32-3.

17 Note 14 *supra* p 344.

(c), as set out above, therefore applies. There is a question as to whether the writer of the statement can be accorded the status referred to in proposition (d) merely on the basis of the fact that the observations have been recorded in writing.

IV. CONDITIONS OF ADMISSIBILITY

The law of evidence of Australia imposes conditions of admissibility on both oral and documentary proof in various forms. In the following discussion the older rules, common law and statutory, will be considered before the new provisions to be found in the reform legislation are expounded.

A. Oral Evidence

Oral evidence is offered to the court by witnesses. The rules governing the admissibility of this evidence are those rules which determine which witnesses are able to testify. These must be linked to rules which determine which witnesses can be forced to testify. Also to be considered are the rules which require that each witness provide some formal assurance of an intention to tell the truth and which specify how the testimony is to be communicated to the court.

The general rule in force in all Australian jurisdictions prior to the reform legislation was that any person who is competent to testify may and indeed must do so if summoned. At common law, competence depended primarily on mental ability to observe, remember and report. In the case of an adult witness there was authority for the proposition that such competency should be presumed.[18] There were, however, a number of legal requirements which acted as additional disqualifications.[19] These legal disqualifications were removed by statute at the turn of the century. Typical of the provisions removing these disqualifications are s 5 of the *Evidence Act* 1898 (NSW) and s 407 of the *Crimes Act* 1900 (NSW). When read together the effect of those provisions was that in both civil and criminal cases, parties and their husbands or wives, those who otherwise had a pecuniary interest in the case and persons who had been convicted on criminal charges were all competent to testify. The question of whether a competent witness could be forced to testify was governed by s 6 of the *Evidence Act* read subject to ss 407 and 407AA of the *Crimes Act*. The effect of these provisions was that the general rule that all competent witnesses were compellable applied in civil cases and in criminal cases to all witnesses other than the accused and the accused's spouse. The accused was not competent to testify for the prosecution and the accused's husband or wife could only be compelled to do so in the context of domestic violence offences. Such cases were governed by s 407AA and the witness could apply to the court for leave to be excused.

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18 *Toohey v Metropolitan Police Commissioner* [1965] AC 595.

19 The common law set out "to safeguard tribunals from error by restricting them from taking the evidence of certain classes of witnesses who were supposed by reason of their antecedents, or their relation to the matters at issue, to be more likely to mislead than to aid the tribunal in its search for the truth": *R v White* (1899) 20 LR (L) (NSW) 12 at 22-3 per O'Connor J.

Children as witnesses were not governed by the same rules. The common law stipulated that the judge must determine whether the child "understood the nature of the oath",[20] by which quaint phrase a double test was imported. The child had to satisfy the judge that they understood and could distinguish between truth and fantasy and that they believed in God. This position had been changed by statute in the relatively recent past. The changes were responsive to criticism of the requirement that the child understand the moral and religious duty to tell the truth before being permitted to testify. The facility to testify after making a simple promise to tell the truth was thus extended to children. In New South Wales the provisions in s 33 of the *Oaths Act* 1900 applied to children under the age of 12. A child was assumed to be capable until the presumption was challenged. Thereafter, the judge decided whether the child understood the duty of telling the truth. Provisions enacted in Victoria, South Australia and Tasmania were similar. In Queensland and Western Australia the requirement for the child to understand the moral duty to testify truthfully was abolished and replaced by a simple direction that the judge should determine whether the child is sufficiently intelligent to give reliable evidence.[21]

The provisions for competence and compellability adopted by the reform legislation are contained in ss 12 to 20. The general rule as laid down in s 12 is that, unless otherwise provided in the legislation, every person is competent[22] and compellable[23] to give evidence. There are provisions dealing with the situation where witnesses either lack or have a reduced capacity to give evidence. A Sovereign (Australian or foreign) or the representative of a Sovereign is not compellable to testify.[24] Judges and jurors are not competent to give evidence in the proceeding in which they officiate, although a juror can give evidence about matters affecting the conduct of the proceeding.[25] Finally, there are provisions about the competence and compellability of defendants and of close relatives of the defendant in criminal proceedings.

It is notable that there is no provision placing children in a separate category as witnesses. The reform legislation deals in s 13 with three separate reasons why a person might lack the capacity to testify. The provisions defining these grounds of incapacity and the method of dealing with them are subject generally to a provision which specifies that it is presumed, unless the contrary is proved, that a person is not incompetent to testify "because of this section".[26] It is to be hoped that this will be interpreted to mean 'for the reasons dealt with in this section'. Also of general application is the provision which specifies that, for the purpose of determining a question arising under this section, the court may inform itself as it thinks fit.[27]

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20 See *R v Brown* [1977] Qd R 220.
21 *Evidence Act* 1977 (Qld) s 9(1); *Evidence Act* 1906 (WA) s 106D.
22 Section 12(a).
23 Section 12(b).
24 Section 15.
25 Section 16(1).
26 Section 13(5).
27 Section 13(7).

Section 13(1) provides that a person who is incapable of understanding that there is an obligation to give truthful evidence when giving evidence in court is not competent to give sworn evidence. Such a person is competent to give unsworn evidence if three conditions are satisfied. The court is required by s 13(2)(a) to be satisfied that the person understands the difference between the truth and a lie. The court is required by s 13(2)(b) to tell the person that it is important to tell the truth and the person must indicate that they will not tell lies in the proceeding.

There is something slightly strange about the enabling provision. The provision only applies where the person does not understand that there is an obligation to give truthful evidence. The person must, however, be able to distinguish between the truth and a lie and must promise not to lie. In promising not to lie the person undertakes an obligation to tell the truth. It appears that the distinction is between the concept of a social and perhaps religious obligation to tell the truth and the concept of a purely personal obligation to tell the truth. These provisions are comparable to the pre-existing provisions for receiving a child's testimony, although clearly capable of wider application.[28]

The second basis upon which a person will lack the capacity to give evidence is that the person is incapable of giving a rational reply to a question about a fact. Section 13(3) provides that such a person must not testify as to that fact but can testify as to other facts. This provision will apply where a witness suffers from delusions which affect some but not all of the evidence which the person might be able to offer relevant to the issues in the trial. The clear acknowledgment that delusions need not totally destroy a person's ability to testify is welcomed. It is also considered appropriate to prevent a witness from presenting testimony known to be affected by delusions to the court despite the fact that this creates an exception to the principle of free proof espoused by Thayer.

The third basis of incompetence is the inability to hear, understand, or communicate a question about a fact. If this incapacity cannot be overcome the witness is rendered incompetent.

The legislation preserves a provision to the effect that a defendant in a criminal proceeding is not competent to give evidence for the prosecution. This is contained in s 17(2). Further, s 17(3) provides that an associated defendant is not compellable to give evidence for or against a defendant in criminal proceedings unless the associated defendant is being tried separately. Section 17(4) imposes an obligation upon the judge to ensure that the witness is aware of the fact that they cannot be so compelled. The term 'associated defendant' is defined in the dictionary to mean a person against whom a prosecution has been instituted, but not yet completed or terminated, for an offence arising out of the same events or connected with the offence for which the defendant is prosecuted. It is unclear what the effect of this provision will be where the associated defendant chooses to testify in order to assert their own innocence and is asked a question about the guilt of another defendant in the same trial. It appears that the common law

28 See discussion above.

position was that, once an accused chose to testify, they could be asked any question relevant to the facts in issue.[29]

The provision dealing with the compellability of members of the family of the accused is modelled on the more generous Victorian[30] and South Australian[31] provisions rather than on the provisions previously in force in New South Wales. Section 18(2) provides that a person who, when required to give evidence, is the spouse, defacto spouse, parent or child of the defendant to criminal proceedings may object to being required to give evidence. The court has an obligation under s 18(4) to ensure that any person who might be entitled to object under this provision is informed of their right and is also required by s 18(5) to ensure that any objection is determined in the absence of the jury. There is no provision specifying that the court must hear and determine the objection but this is clearly implied, not only from the provision about the absence of the jury, but also from the provisions stipulating which matters the court must take into account. Section 18(6) provides that the objection must be upheld if the court finds that there is a likelihood that harm might be caused to the relationship which would outweigh the desirability of having the evidence. In other cases the court is required by s 18(7) to take into account the nature and gravity of the offence, the substance and importance of the evidence, the availability of other evidence, the nature of the relationship between the defendant and the person called as a witness and whether or not the information was received in confidence. In the case of domestic violence offences where the witness is the victim or the victim is a child, the provisions for lodging and dealing with objections to giving evidence do not apply.[32]

At common law all testimony had to be preceded by an oath. The taking of a religious oath was considered crucial both for the assurance it offered to a Christian society that the witness would make every effort to tell the truth for fear of eternal punishment and for the fact that it was a necessary precondition before charges of perjury could be laid. Statutory provisions in force in most Australian jurisdictions throughout the twentieth century give witnesses the choice between an oath, an affirmation and a declaration.[33] Section 21(1) of the reform legislation continues to require that a witness must either take an oath or make an affirmation before giving evidence. The fact that the same provision offers both alternatives means that there will no longer be a presumption that the witness will take an oath. Section 21(4) provides that an affirmation has the same effect for all purposes as an oath. Section 23(2) requires the court to inform the person that they have the choice between an oath and an affirmation. The court has the power under s 23(3) to require an affirmation to be made if the person refuses to choose or if it is not reasonably practicable for the person to take an appropriate oath. Finally, s 24 provides that it is not necessary that a religious text be used in taking an oath and

29 See *Crimes Act* 1958 (Vic) s 399(4); *Evidence Act* 1929 (SA) s 18(v); see also *Attwood v R* (1960) 102 CLR 353; *Sherrin v R* (unreported, Tasmanian Court of Criminal Appeal, 12 January 1991).

30 *Crimes Act* 1958 (Vic) s 400.

31 *Evidence Act* 1929 (SA) s 21.

32 Section 19.

33 See *Laws of Australia*, vol 16 "Evidence" ch 16.4 at [4].

that an oath is not to be considered ineffective if it is discovered that the person did not have a religious belief or a religious belief of a particular kind or did not understand the nature and consequences of an oath. Although it is acknowledged that the common law rules were worse than insensitive to the growing agnosticism and atheism of secular society in the twentieth century, it is important that the newer rules allow the belief systems of all witnesses to be invoked in aid of the trial process where this is consonant with those belief systems. It will therefore be necessary to watch that the power given to the court under s 23(3) should not be used too broadly.

Generally speaking, the present law dealing with competence and compellability is designed to assist the parties to a case to get the evidence into court rather than to filter the evidence so that only the best evidence that the nature of the case would admit is admissible. It might have been arguable that the legal disqualifications which the common law imposed were designed to achieve such filtration; the current law has set these aside. The three grounds of incompetence dealt with in s 13 of the reform legislation are such as would affect the quality of the evidence, but again the emphasis is on overcoming these if at all possible. The exceptions to the rule that all competent witnesses are compellable are not related to a concern about the quality of the evidence but rather to concerns about the relationship between the witness and the court or the accused. The rules requiring some formality can be seen as relating to the quality of the evidence, but the effect of the current reforms is to give effect to the modern perception that there is no ground for distinguishing between the testimony of persons who do or do not believe in God. It therefore appears that the emphasis is on furthering freedom of proof rather than on implementing the best evidence principle.

B. Documents

There are four discrete bodies of rules governing the admissibility of documentary evidence in court. The common law rules only applied to allow into court documents which would be directly relevant to the issues in the trial. In the twentieth century they had been supplemented by two bodies of statutory rules, each subject to a separate set of conditions, which would allow into evidence documents which would not clearly have been admissible at common law. The set of rules for documentary evidence which is contained in the reform legislation ignores these old distinctions.

(i) Common Law Rules

The common law rules applicable to documentary evidence imposed two conditions which had to be satisfied before documents could be admitted and made the admissibility of the document subject to the exclusionary rules of evidence. The two conditions were that the document could be authenticated and that the original document was produced. To authenticate the document, the party adducing it would have to prove that it had been written, signed, executed or adopted by a relevant person. In interpreting this requirement in the context of decisions on unsigned records of police interview, the High Court distinguished

between evidence which would prove that the relevant person had read and adopted the document[34] and evidence which suggested that the person had adopted the contents of the document.[35] The requirement that the original document should be produced has been tied very closely to the principle that the best evidence should be produced, as has been made clear above. This particular requirement was subject to a number of exceptions, but it made sense in a time when copying meant introducing the possibility of human error.[36]

(ii) Written Testimony

The trend in civil litigation in Australia in the second half of the twentieth century has been to rely increasingly on documents to provide testimonial assertion to the tribunal of fact. Three factors have contributed to these developments. The first of these factors, in chronological order, was the adoption of statutory provisions to allow the introduction of statements in a document in civil trials where a witness would be allowed to testify orally about the fact. Each State has such provisions,[37] modelled more or less closely on provisions adopted in Britain in 1938.[38] In New South Wales the relevant provisions were found in Part IIA of the *Evidence Act* of 1898.

In this article the older New South Wales provisions are examined in some detail because, rather than despite the fact that, these are the provisions which have been replaced by the enactment of the reform legislation.

The central stipulation in Part IIA of the *Evidence Act* 1898 (NSW), s 14B(1), specified that "in any civil proceedings where direct oral evidence of a fact would be admissible" then a statement made by a person in a document was admissible as evidence of that fact if the original was produced and if two other conditions were met. Even before turning to examine those conditions, it should be noted that three conditions were spelled out in the head clause. The first was a condition as to the nature of the proceedings. The second condition, which was that oral evidence was admissible, preserved the distinction drawn by the common law on documentary evidence. This was the distinction between evidence that was directly relevant and evidence which was only indirectly relevant. This provision applied to augment rather than to replace the common law. It allowed into court evidence that the common law would not have held admissible, and left the common law to govern the admissibility of documents that were directly relevant to the facts in issue. The third condition, that the original document be produced, adopted a distinction that was important to the common law.

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34 *Driscoll v R* (1977) 137 CLR 517.

35 *R v Harris* (1970) 91 WN (NSW) 720 at 725-8; see also *R v Kerr* (No 1) (1951) VLR 211; *R v Lapuse* (1964) VR 43 at 45; *R v Oliver* (1968) VR 243 at 245; *R v Ragen* (1964) 81 WN (NSW) (Pt 1) 572; *Reg v Vandine* [1968] 1 NSWR 417; *R v Daren* (1971) 2 NSWLR 423 at 434; *R v West* [1973] Qd R 338.

36 D Byrne and JD Heydon, *Cross on Evidence*, Butterworths (3rd Aust ed, 1986).

37 *Evidence Act* 1971 (ACT) Pt VI; *Evidence Act* 1898 (NSW) ss 14A-14C; *Evidence Act* 1939 (NT) ss 26D, 26F; *Evidence Act* 1977 (Qld) ss 92, 94, 96-103; *Evidence Act* 1928 (SA) ss 34c, 34d, 34g; *Evidence Act* 1910 (Tas) Pt III Div 7; *Evidence Act* 1958 (Vic) ss 55, 55A, 55C, 55D, 56; *Evidence Act* 1906 (WA) ss 79B, 79C, 79D, 79H.

38 Note 14 *supra* pp 518-24.

The additional conditions went to the source of the information recorded in the document and the availability of the maker of the document as a witness. It was provided that the maker of the statement should either have personal knowledge of the matters dealt with by the statement or a duty to record information supplied by a person who could be presumed to have personal knowledge in a continuous record.[39] The condition that the maker should be called as a witness was imposed, but was subject to a proviso that the maker need not be called if unavailable for certain specified reasons. Note that it was necessary to identify the maker in order to establish that these exceptions applied. The written statement was not admissible in evidence if it was made at a time when proceedings were pending or anticipated by a person who was interested, in a monetary sense, in the proceedings.[40] Finally, the maker of the statement was required to have produced the statement in the document by his or her own hand or to have signed or initialled it or otherwise to have acknowledged in writing responsibility for its accuracy.[41]

The second factor in the increasing importance of written testimony has been the move away from the use of juries in civil trials. The extent to which such a move has been made varies from jurisdiction to jurisdiction. In New South Wales the general rule expressed in s 85 of the *Supreme Court Act* of 1970 is that proceedings shall be tried without a jury, unless the court otherwise orders. There are three specific sections dealing with the use of juries in relation to common law claims. In proceedings on a common law claim in which there are issues of fact on an allegation of fraud, or on a claim in defamation or for specific offences of trespass to the person, s 88 provides that a jury will be used. In a running down case, s 87 provides that the court may, on the application of any party, and shall, on the application of all parties, try the matter with a jury. In other common law claims s 86 requires a jury to be used if any party files a requisition and pays the stipulated fee. These specific provisions are subject, however, to s 89, which allows the court to decide that the trial will proceed without a jury despite the fact that the provisions apply. The popular press reported recently that juries had been requested in only 15 per cent of cases pending in the New South Wales Supreme Court, while in the District Court they were used in less than 10 per cent of civil cases.[42] Moves to change the statutory provisions to limit the use of juries more severely were introduced in the New South Wales legislature in 1994 but not passed.

The third and final factor in putting emphasis on what has here been called 'written testimony' has been the adoption of rules of court allowing exceptions to the rule that the evidence must be given in oral form. In New South Wales, this rule - Part 36, r 2 SCR (NSW) - is expressed to be subject to the *Supreme Court Act,* the rules of court, any direction of the court and any agreement between the parties. More specifically, Part 36 r 3 provides that, subject to the rule requiring evidence to be in oral form, evidence may be given by affidavit. Rule 4 provides

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39 *Evidence Act* 1898 (NSW) s 14 B(1)(i)(a) and (b).

40 *Ibid* s 14B(3)

41 *Ibid* s 14B(4).

42 J Hole, "Lawyers Oppose Loss of Juries", *Sydney Morning Herald,* Friday May 13 1994, p 5.

that where undue delay or hardship would be caused, evidence is not to be excluded on the grounds that it is hearsay or that the document is not the original. This last rule, however, does not apply to evidence on an issue at the trial.[43] Finally, Rule 4A provides that the court may give directions to have witness statements served on each other party to the case and, where this is done and the witness is called at the trial, the court may direct that the witness statement shall stand as the evidence or part of the evidence in chief of the witness.

The result of these developments is that, where the court is composed of a judge alone, testimony will now frequently be presented in the form of documentary witness statements and the witness will be called merely for the purposes of cross-examination. Where the court consists of a judge sitting with a jury, however, the testimony will almost always be presented orally.

(iii) Business Documents

In the last third of the twentieth century, statutory provisions designed to allow business documents to be introduced into evidence have been adopted in all Australian and many other common law jurisdictions.[44] Justice Hope offered an explanation of the rationale behind these provisions in the course of his judgment in *Albrighton v Royal Prince Alfred Hospital*:

> Any significant organisation in our society must depend for its efficient carrying on upon proper records made by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned. In the every-day carrying on of the activities of the business people would look to, and depend upon, those records and use them on the basis that they are most probably accurate. ... The purpose of Part IIC is to bring into the courtroom a method of establishing the truth which is relied upon by our society outside the courtroom - to bring into the rules of evidence a reality which they otherwise lacked.[45]

The provisions of Part IIC of the *Evidence* Act 1898 (NSW) which applied both in civil and criminal proceedings were the most elaborate of these provisions. Again, they provide the focus because they have been replaced. Statements of fact in documents were made admissible by Part IIC if three conditions were satisfied, regardless of specified rules of evidence, including the hearsay rule. The conditions were, first, that the statement must be in a document which formed "part of a record of a business".[46] Secondly, the statement must have been made "in the course of and for the purposes of the business". The final condition went to the source of the information. The statement either had to have been made by a qualified person or to derive from information of statements each made by a qualified person or information from devices which record information independent of human action.

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43 See discussion in The Hon Justice PW Young, "Dispensing with the Rules of Evidence" (1992) 66 *Australian Law Journal* 37.

44 *Evidence Act* 1905 (Cth) Pt IIIA; *Evidence Act* 1971 (ACT) s 29(2)(b); *Evidence Act* 1898 (NSW) Pt IIC; *Evidence (Business Records) Interim Arrangements Act* 1984 (NT); *Evidence Act* 1977 (Qld) ss 92, 93; *Evidence Act* 1929 (SA) s 45a; *Evidence Act* 1910 (Tas) Pt III Divn 2B; *Evidence Act* 1958 (Vic) s 55; *Evidence Act* 1906 (WA) ss 79B-79G.

45 1980] 2 NSWLR 542 at 548-9.

46 *Evidence Act* 1898 (NSW) s 14CE(4).

The term 'business' was clearly important to the application of these provisions. The normal definition of the term applied but was expanded by s 14CD to include any business, profession, occupation, calling, trade or undertaking, wherever carried on and whoever carried it on and whether carried on for profit or not. It has also been made clear by judicial interpretation that, although it did not matter whether the business was carried on by a party or not, once the relevant business had been identified for the purpose of one condition, the other conditions had to relate to the same business.[47] Thus, when the statement was produced from the filing cabinets of one business as a part of the record of that business, it must have been made for the purposes of that business by a qualified person. The definition of 'qualified person' found in s 14CD had two limbs. The first limb defined a relationship between the person and the business. The second limb required the information relied on to be either personal knowledge or opinion based on expertise. It has been held that the provisions did not apply "merely because a document is on the file of a business and has been looked at by a qualified person somewhere along the way".[48] It is notable, however, that the New South Wales courts appear to have taken a more liberal approach to these provisions than is common elsewhere.[49] The term 'record of a business' was interpreted in New South Wales so as to require entries to be "made progressively and reasonably contemporaneously to the matters which they record in a document or series of documents comprising part of a system for the recording of information".[50] New South Wales courts did not, however, follow decisions[51] which restrict the meaning of 'record' to primary entries.[52] As an example, the case of *Ritz Hotel Ltd v Charles of the Ritz Ltd*[53] saw the business document provisions invoked to allow into court the minutes of a company meeting which included a lengthy history of a claim. It is clear that the distinction between evidence that is directly and indirectly relevant to the facts in issue in court was overridden by the provisions.

(iv) Evidence Acts 1995

Part 2.2 of the reform legislation appears under the heading "Documents". The main operative section in this Part is s 48 which provides that "[a] party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods". The term 'document in question' is defined in s 47 to mean a document "as to the contents of which it is sought to adduce evidence". The distinction drawn in *Commissioner*

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47 *Atra v Farmers and Graziers Co-op Co Ltd* (1986) 5 NSWLR 281 at 286.

48 *Ross McConnel Kitchen and Co Pty Ltd (in liq) v Ross* (1985) 1 NSWLR 233 at 235.

49 *Ibid*, attributing the liberal attitude to the decision in *Albrighton v Royal Prince Alfred* note 45 *supra*.

50 Note 47 *supra* at 285.

51 See *H v Schering Chemicals Ltd* [1983] 1 All ER 849; *Savings and Investment Bank Ltd v Gasco Investments (Netherlands)* Bv [1984] 1 All ER 296; *Watkins Products Inc v Thomas* (1965) 54 DLR (2d) 252.

52 *Compafina Bank v Australian and New Zealand Banking Group Ltd* [1982] 1 NSWLR 409; *Ashby v Car Owners' Mutual Insurance Co Ltd* (1977) 4 Petty Sessions Review 1718; *Utting v Luhtala* (1983) 6 Petty Sessions Review 2857; *Manton v Commonwealth* (1981) 34 ALR 342.

53 (1988) 15 NSWLR 158.

for Railways (NSW) v Young[54] and discussed above thus appears to be preserved. The methods which can be used to adduce the evidence will be discussed in the next section of this article. It is relevant to note two things here. Section 48(2) stipulates that it is not a condition of admissibility that the document is or is not available to the party. If the document is not available to the party s 48(4) provides two additional methods to adduce evidence of its contents. If the document is in a foreign country, s 49 requires the party who intends to adduce the contents of the document to either serve a copy of the document on each other party not less than 28 days before the day on which the evidence is to be adduced or persuade the court to make directions as to how to achieve the aim. It is specifically provided in s 51 that the principles and rules of the common law that relate to the means of proving the contents of documents are abolished. Thus, it is no longer a condition of admissibility that the document must be the original or that the document be authenticated.

Other provisions in the legislation dealing with documentary evidence are found in ss 69, 70 and 71. Section 69 deals with business documents and applies to a document if two conditions are fulfilled. Firstly, the document must be or have been part of the records of a business. Secondly, it must contain a previous representation made or recorded in the document in the course of and for the purposes of the business. Section 69(2) provides that the hearsay rule will not apply to the document if the representation was made by a person who had or might reasonably have had personal knowledge of the fact or on the basis of information directly or indirectly supplied by a person who had the personal knowledge of the fact. Section 69(3) provides that business documents will not be admissible under s 69 where the representation was prepared or obtained for the purpose of conducting a 'proceeding' or "in connection with an investigation relating or leading to a criminal proceeding". Section 70 deals with "tags or labels or writing" on objects if the document may reasonably be supposed to have been placed on the object in the course of business for certain specified purposes. Section 71 states that the hearsay rule does not apply to a representation contained in a document recording a message transmitted by electronic mail or fax, telegram, lettergram, or telex. This exception is limited to statements in such a document identifying the person who sent the message, the date on which the message was sent, and the destination of the message. Section 71 does not specifically make other contents of the message admissible, unless the mere fact that a communication passed between two persons is relevant. This appears to be a curious omission. If the assumption is that the contents of such a message will be admissible under Part 2.2, the question arises as to why the parts of the transmission admissible under s 71 would not be covered by Part 2.2.

Documents may be admitted into evidence under provisions in the reform legislation which create an exception to the hearsay rule for first hand representations.[55] These provisions replace those in Part IIA of the *Evidence Act* 1898 (NSW). It is of interest here that these provisions abolish the distinction

54 (1962) 106 CLR 535.
55 Sections 62-68.

between the form of prior representations. Under the older provisions, oral representations were not allowed into evidence but written representations could be. A justification for this distinction could be found in the imperishable nature of a written representation. To allow oral representations into court on the same basis is to introduce possible problems with the powers of observation and memory of the person who bears witness to the representation. These problems have not been minimised. Rather, the approach that has been taken is that they should go to weight rather than admissibility. In introducing the proposal in 1985 the Australian Law Reform Commission commented that it should assist the court and the parties by enabling the best evidence that the parties have available to them to be led.[56]

Any document whose contents are directly relevant to the question before the court is clearly admissible under Part 2.2. The better view is that, whenever a document is in question, the provisions in Part 2.2 apply. There is, however, no clear indication in Part 2.2 that the distinction drawn by the common law between documents that are directly relevant to the issues in the case and documents which are testimonial in nature has been abolished. This is not addressed by s 51, which in terms only abolishes "principles and rules" that "relate to means of proving", not those which relate to the question of the admissibility of the contents of a document. Clearly, if a document contains a representation which is admissible under these provisions,[57] the party will be seeking to adduce the contents of the document in evidence in the terms of s 47(1).

V. METHOD OF PROOF

There are some rules of adjectival law which apply to govern the method of presenting various forms of evidence. These rules are, admittedly, largely procedural in character but, given their application, must be considered as rules of evidence. Two principles and one practical reality are common themes uniting this body of rules. The two principles are party presentation and open justice. The practical reality is that the trial judge is in control in the courtroom and must, even when not the ultimate decision maker there, be treated with due deference. The principle of party presentation, eloquently enunciated by Ligertwood, is inherent in the nature of the adversarial system.[58] It dictates that certain choices, such as the choice of which witnesses to call, or which documents and items of real evidence to introduce, and in which order, are decisions for the party not decisions for the judge. The principle of open justice was recently articulated by Kirby P in *Gradidge v Grace Bros Pty Ltd.*[59] It means that the public should know what evidence is being presented in court. In particular, each party should know and be able to assess the evidence presented by the adversary. These common themes

56 Australian Law Reform Commission, Interim Report 26, *Evidence* (1985) p 344.

57 See Sections 63(2)(b), 64(2)(b), 65(8)(b), 66(2)(b).

58 Note 14 *supra* pp 33, 300-301.

59 Note 15 *supra* at 414 citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141 and *Raybos Australia Pty ltd v Jones* (1985) 2 NSWLR 47.

have had or will have an impact on the presentation of both oral and documentary evidence.

A. Oral Evidence

In the matter of the method of introducing oral evidence, procedure in common law courts was governed largely by practice rather than by explicit decision. To some extent these practices have been articulated by the reform legislation. In this section, accordingly, the discussion of common law and of the new provisions will be integrated.

The principle of party presentation, as indicated above, has its clearest application in decisions as to which evidence to call in what order. There is common law authority for the proposition that even the prosecution in a criminal case was free to decide which witnesses to call "save in the most exceptional cases".[60] There was also case authority for the proposition that both in civil[61] and in criminal cases[62] the parties were free to decide in which order to call the witnesses. These propositions are not contained in the reform legislation and there is cause for some concern as to whether they will continue to apply. This concern arises from ss 26 and 28. Section 26 relevantly provides in subparagraphs (a) and (c) respectively that the court may make such orders as it considers just in relation to the way in which witnesses are to be questioned and the order in which parties may question a witness. On its face, it would appear that the provision as to the order of questioning was concerned only with the question of precedence as between counsel who will question a witness once that witness has been called. However, s 28 deals with this matter in so far as precedence between examination in chief, cross-examination and re-examination is concerned. It is conceivable, given the absence of provisions specifying that the parties control the order in which witnesses are questioned, that the courts might interpret s 26(c) as allowing the judge to control this matter. It is suggested that the better view will be that s 26(c) applies where there are more than two parties to allow the judge to control the order in which the parties get to cross-examine the witness and that the common law principles continue to apply.

The language of courts in Australia is English. This can be seen as being part and parcel of the open justice principle. Witnesses who did not speak English were permitted by common law principles to apply to the judge for permission to use an interpreter. Such witnesses did not, it was held, have a right to use an interpreter.[63] It appears that the courts were concerned that some witnesses who did have a full command of English might take unfair advantage by asking for an interpreter so as to gain time to answer the questions, and perhaps also to gain the

60 *R v Apostilides* (1984) 154 CLR 563.
61 *Briscoe v Briscoe* [1968] P 501.
62 *R v Lister* [1981] 1 NSWLR 110.
63 *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75.

assistance of a more eloquent speaker.[64] As Kirby P has repeatedly suggested, the nurturing of this fear is inconsistent with the view of Australia as multi-cultural which is now current.[65] Section 30 of the reform legislation provides that:

> A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

The commentary to this provision produced by Bellamy and Meibusch points out that this section will allow the judge to permit the witness' occasional assistance.[66] The reference to questions about the fact has this effect. More generally however, this provision changes the presumption but may not change the actuality. It will be assumed that the witness may give testimony through an interpreter, but it is the judge who will decide whether the witness can understand and speak English. The reform legislation indicates that the only consideration for the judge is the language ability of the witness. The older cases indicate that the judge could also consider factors such as time, cost and convenience.[67] Questions will arise as to the meaning of the terms 'sufficiently' and 'adequate'. I suggest that it would have been appropriate and far preferable to leave these decisions with the witness who is using the interpreter. The possibility that this freedom might occasionally be abused is far outweighed by the frustration and alienation that witnesses who do not feel that they are communicating their meaning adequately will suffer when the court intervenes to remove the assistance of an interpreter.

The procedure used in common law trials dictated an approach to the testimony of each witness that included four steps. These steps formed a loop which was repeated whenever a new witness was called. The witness would first give a formal assurance of an intention to tell the truth in the form of an oath or declaration.[68] The party that had called the witness would next conduct the examination in chief. The third step was cross-examination, when the other party or parties to the case would have an opportunity to question the witness. The fourth part of this loop, re-examination, which allowed the party that had called the witness to put additional questions after the cross-examination, did not automatically occur. On the basis that the party calling the witness was supposed to elicit all the relevant information before cross-examination occurred, the rule was that re-examination could only occur when an ambiguity in the witness' testimony remained after cross-examination. The ambiguity could be either patent or latent, obvious on the face of the testimony or hidden. The general rule was that the court should accept counsel's application to re-examine unless it has been shown that counsel was prone to abuse the privilege.[69] The reform legislation

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64 See discussion of *Dairy Farmers Co-operative Milk Co Ltd v Acquilina ibid* by Samuels JA in *Gradidge v Grace Bros Pty Ltd* note 15 *supra*. Justice Samuels explains that he was counsel in the former case and presents an insight into the matters that concerned the court.

65 See *Gradidge v Grace Bros Pty Ltd ibid* at 420-22 and *Adamopoulos v Olympic Airways SA* note 63 *supra* at 77.

66 G Bellamy and P Meibusch, *Commonwealth Evidence Law with Commentary*, AGPS Press (1995) p 35.

67 Note 63 *supra*.

68 See discussion above.

69 See *Wojcic v Incorporated Nominal Defendant* [1969] VR 323.

refers to the order of the three phases of examination in chief, cross-examination and re-examination in s 28. Although the terms are not defined, it is clear there is no intention to change their common law significance. Limitations on the right to re-examine are spelt out in s 39 and these are in line with the common law limitations.

The general approach to all three phases of witness testimony was that the evidence was given in the form of questions and answers. When the party that had called the witness was questioning the witness, either at the outset or in re-examination, the prohibition on leading questions normally applied. Although there are cases discussing the leading question rule,[70] the restatement in the reform legislation is welcome given some common misapprehensions about the rule. The Dictionary to the legislation defines the term 'leading question' as a question which either suggests a particular answer or assumes the existence of a disputed fact of which the witness has not previously given evidence. The prohibition on leading questions as put to a witness called by the party is contained in s 37. The prohibition is subject to six exceptions as spelt out in subparagraphs (a) to (e) and in subsection (2). The leading question rule does not normally apply to cross-examination. Again, this is spelt out in s 42(1). The court is here, however, given explicit power to intervene to prevent the use of leading questions in cross-examination. In exercising this power, the court is to take account of the extent to which the witness has an interest consistent with that of the cross-examiner, or is sympathetic to that party and the extent to which the evidence that has been given in examination in chief is unfavourable to the party that called the witness. The court may also take into account the witness' age and any mental physical or intellectual disability.[71]

One criticism of common law trial procedure focuses on the power of the cross-examiner. It is said that cross-examination is frequently used to confuse witnesses, to get them to contradict themselves, and to humiliate them.[72] There were, however, provisions in the older legislation that gave judges the power to control questions designed to insult or annoy the witness, or that were indecent or scandalous, or which did not materially affect the credit of the witness.[73] This judicial power to control the cross-examination is contained but not expanded by s 41 of the reform legislation.

The Australian rules governing cross-examination allow questions to be asked going to any aspect of the issues before the court and also allow questions that go only to credit. If the opponent intends to challenge the testimony of any witness there is a rule of practice which imposes a duty to cross-examine the witness on the relevant point. The rule applies regardless of the way in which the challenge will be put. The challenge may be by suggesting in argument that the testimony

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70 See *Maves v Grand Trunk Pacific Railway Co* (1913) 14 DLR 70.

71 See generally discussion in NSWLRC Discussion Paper No 35, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (1994) pp 178-86.

72 J McEwan, *Evidence and the Adversarial Process: The Modern Law*, Blackwells (1992) pp 15-19; see also ALRC Discussion Paper No 54, *Equality before the Law* (July 1993) at [11.17].

73 *Evidence Act* 1898 (NSW) ss 56-58.

should be rejected or by presenting conflicting evidence.[74] There are some grounds for suggesting that the rule only applies where the failure to cross-examine is unexplained.[75] The author has suggested elsewhere that a better view, even at common law, is that the trial judge has a discretion once the rule has been breached, as to whether a remedy should be provided for the breach of the rule and, if so, as to which remedy is appropriate.[76] The rule imposing a duty to cross-examine is reflected in s 46 of the reform legislation, which provides that the court may give leave to recall a witness if that witness was not cross-examined and evidence has been given which contradicts evidence given by the witness or about a matter about which the witness could have given evidence. The provision also applies if the opposing party intends to draw an inference from evidence admitted in the case and that inference has not previously been drawn to the witness' attention. There is no reference to any other remedy for the failure to cross-examine and the question will arise as to whether the section is intended to exclude other remedies[77] or whether judicial power remains unabridged.

The reform legislation contains provisions for two exceptional situations that may arise in examination in chief. The first such provision is found in s 29(2). It is supplemental to a provision which in fact reflects the principle of party presentation reflected in s 29(1), which states that a party may question a witness in any way the party thinks fit. Section 29(2) allows a witness to give their evidence in chief in narrative form once the court's permission has been obtained. The Australian Law Reform Commission report, on which the legislation is ultimately based, noted[78] that there was a reluctance in practice to permit witnesses to tell their story freely and commented that this was unfortunate, as psychological research suggests that a free report gives a significantly more accurate version of the events in dispute.[79] Although the innovation is welcomed, it should be noted here that the psychological research is more balanced than this report would suggest. Although free accounts are more accurate, there are grounds for suggesting that they are less complete and that the loss in accuracy that occurs where question and answer format is substituted for narrative is more than made up for by the gain in completeness.[80]

The second provision is not new in substance, although some changes of emphasis have occurred. Section 38 operates to allow the party, with the leave of the court, to question a witness they have called as though they were cross-

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74 See *Bulstrode v Trimble* [1970] VR 840; *Haughian v Paine* (1986) 46 SASR 186; *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551; *Ghazal v GIO of NSW* (1992), 29 NSWLR 336. See ES Magner, *Replay or Remembrance: Dealing with the Selectivity of Witness Memory*, thesis submitted for degree of Doctor of Juridical Science in the Department of Law, School of Graduate Studies, University of Toronto.

75 *R v Birks* (1990) 19 NSWLR 677.

76 ES Magner note 74 *supra.*

77 See for example, *Payless Superbarn Pty Ltd v O'Gara* note 3 *supra.*

78 Note 56 *supra* p 144.

79 Citations include KH Marquis, J Marshall, and S Oskamp "Testimonial Validity as a Function of Question Form, Atmosphere and Item Difficulty" (1972) 2 *Journal of Applied Social Psychology* 167.

80 *Ibid*; see also ES Magner, R Markham, and C Barnett "Reviewing Eyewitness Reports" Conference Paper delivered at the Conference of Australian and New Zealand Association of Psychiatry, Psychology and Law, Perth, April 1994.

examining the witness. The procedure to be followed when seeking the court's leave is not specified, although subsection (6) provides that the court may take into account in determining whether to give such leave whether the party gave notice at the earliest opportunity of the intention to seek leave and the matters on which and the extent to which the witness is likely to be questioned by another party. The matters about which the party may cross-examine their own witness once leave has been obtained are specified in subsection (1). They include evidence given by the witness that is unfavourable to the party, matters about which the witness may reasonably be supposed to have knowledge and about which they do not appear to be making a genuine attempt to give evidence and prior inconsistent statements. Subsection (3) also specifies other matters going only to the witness' credit. The procedures here are similar to those which applied earlier to 'hostile witnesses'. These procedures were spelt out by common law[81] and statutory provision[82] read together. Some major problems with those statutory provisions required the courts very early to take a liberal approach to their construction.[83]

B. Documents

By contrast with the provisions that apply to the method of introducing oral testimony, there are very few rules for the introduction of documentary testimony. Although this observation applies generally, it may be illustrated by reference to the fact that, while there are twenty-one sections in the reform legislation dealing with the latter topic, only five provisions appear under the heading documentary evidence and some of these provisions deal with questions of admissibility.

(i) Common Law Rules

The original of more conventional documents generally had to be produced to the court, although there were exceptions to this rule.[84] There was authority that if such an exception to the original document rule applied, the party was free to choose what sort of secondary evidence to produce. The courts held that there were no degrees of secondary evidence.[85]

Once admitted into court under the common law rules, the document was assessed directly by the tribunal of fact. An exception to this rule existed in the case of tape recordings. The High Court, in *Butera v Director of Public Prosecutions* held that there were circumstances in which the contents of a tape recording could be presented to the court in the form of a transcript.[86] If the recording was of good quality and understandable by the court, however, the tape should normally be played. Tape recordings do not fit easily into the old tripartite categorisation of forms of evidence but, in so far as tape recordings are relied upon as a record of information relevant for its meaning, they may be considered as

81 See *McLellan v Bowyer* (1961) 106 CLR 95; *Wentworth v Rogers* [1987] 8 NSWLR 398; *Price v Bevan* (1974) 8 SASR 81; *R v Thynne* [1977] VR 98; *R v Hadlow* (1991) 56 A Crim R 11.

82 *Evidence Act* 1898 (NSW) s 53.

83 See *Greenough v Eccles* (1859) 141 ER 315.

84 See *Laws of Australia*, vol 16, "Evidence" , Law Book Company ch 16.5 at [26]-[37].

85 *Ewart v Royds* (1954) 72 WN (NSW) 58.

86 Note 10 *supra*.

fitting within this category. In the same case the High Court indicated that whenever a tape recording is relied upon, the party offering the evidence would have to provide an explanation as to how the tape was made and its history or provenance from the time it was made until it was played in court. A purely mechanical copying process could be utilised.

Generally, documents, once admitted, would be taken into the jury room and would be freely available for consultation during the jury's deliberations. On the basis that this might give a document undue weight, the High Court in *Driscoll v R*[87] suggested that, although the document was strictly admissible in evidence, the judge should exercise a discretion to exclude this form of the evidence. The document in question was an unsigned record of interview, and it is important to note that the High Court did not suggest excluding the confession. Instead, the suggestion was that the police officer could testify to the fact of the confession. The document could be used, if necessary, to refresh the police witness' memory. This procedure would leave the police evidence that there was a confession on an equal footing with the defence evidence that there was no confession. A similar suggestion was made by Gaudron J in her judgment in *Butera v Director of Public Prosecutions*,[88] although it was not considered by the majority.

(ii) Statutory Provisions: Evidence Act 1898 (NSW)

The statutory provisions which allowed statements in documents into evidence in civil proceedings contained the requirement that the original document should be produced and that the maker of the statement should be called as a witness.[89] There were circumstances in which the second requirement did not apply[90] and the court was given power to dispense with both requirements.[91] The power to dispense with both conditions was made dependent on the court's satisfaction that undue delay or expense would otherwise be caused. In deciding whether a statement was admissible under s 14B, the court was specifically empowered to draw any reasonable inference from the form or contents of the document in which the statement was contained or from any other circumstances.[92]

The provisions in Part II C which allowed business documents into evidence did not require the original document to be produced. Neither was it generally a requirement that the maker of the statement be called. The method in which the evidence could be introduced was specified in s 14CN(1). If the statement was in a document it could be proved by production of a copy of the document or the material part of the document. If the statement was "in a document which is designed to reproduce the statement in the form of a visible display or of sound" then the statement could be proved by reproducing the statement in that form in the presence of the court. If the statement was in a record of information made by use of a computer, it might be proved by production of a document produced by the

87 (1977) 137 CLR 517.
88 Note 10 *supra*.
89 *Evidence Act* 1898 (NSW) s 14B(1).
90 *Ibid*.
91 *Ibid* s 14B(2).
92 *Ibid* s 14B(5).

use of a computer containing the statement in a form which could be understood by sight. Where a person proposed to prove the statement otherwise than by producing the document, the court was given power under s 14CN(3) to require production of the document to the court or the parties for examination or testing and to reject the proffered evidence if this was not done. Where the statement was proved by a visible display or sound the court might require a record of the statement to be produced pursuant to s 14CN(4).

Section 14CO gave the court power to prescribe the manner in which the document was to be authenticated. For the purposes of establishing the conditions for the admissibility of a business document, s 14CM(1) provided that evidence might be given by a person who had a responsible position in relation to making or keeping the records concerned, either at the time the statement was made or subsequently. The section also provided that such evidence might be given by an authorised person. This term was defined in subsection (3) to mean a police officer of the rank of sergeant or above, a person authorised by the Attorney-General, or a person authorised under the *Oaths Act* 1900 (NSW) to administer an oath. It must be presumed that such a person would only be giving evidence about government documents. Whether a responsible person or an authorised person testified, the evidence could be given on information and belief, which meant that this person could state what the system was even in the absence of specific knowledge that the system was followed in the particular case.

There were special provisions for criminal proceedings allowing an opponent to require the tendering party to call as a witness any person who made or was concerned in the making of the statement.[93] However, the court could excuse the tendering party from complying with the requirement if the individual was unavailable for reasons that compare with the reasons specified in s 14B, or for a number of other reasons. Included among those other reasons were the inability to identify the maker of the statement or to find that person. The court might also dispense with the necessity to call the maker if it appeared that, having regard to the time and other circumstances, the maker of the statement could not reasonably be expected to have any recollection of the statement or that, having regard to the circumstances of the case, undue expense or delay would be incurred by calling the witness.

Finally, as relevant to admissibility, there was provision in s 14CU allowing regulations to be made for any matter which was required, necessary or convenient for carrying out or giving effect to those provisions for business documents. Specifically mentioned was the possibility that rules might be enacted requiring the giving of notice of an intention to tender evidence under this section, and of an intention to object or dispute the statement or evidence. Also envisaged was the possibility of regulations requiring the party who proposed to tender such documents to make these documents or any related documents available for inspection. Where a court had power to make rules regulating procedure, this power was extended by s 14CV to the making of rules for any matter that arose under the Part.

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93 *Ibid* s 14CG(2)(a).

Both sets of statutory provisions governing the admission of documents conferred discretionary powers on the judge for exercise in cases with a jury. The court was empowered to reject a statement on the basis that its weight was too slight to justify admission of the statement or that its utility or probative value was outweighed by the probability that its admission would be unfair or mislead the jury.[94] Separate discretionary power was conferred if it appeared that the jury might give the statement undue weight if it was available in the jury room. In such circumstances the document might be admitted into evidence but withheld during the deliberations.[95]

(iii) Evidence Acts 1995

The contents of a document can be put in evidence under the provisions of the reform legislation by tendering the document or by other means specified in six subparagraphs of s 48(1). These other means, which include, tendering a document which "is or purports to be a copy", can be used whether or not the document in question is available to the party. If the document is not available to the party or the existence or contents of the document are not in question, the party may adduce evidence of its contents by tendering a copy, extract from, or summary of it or by adducing oral evidence of its contents. These provisions impliedly abolish the original document rule, but s 51 expressly stipulates that that rule is abolished. Adversarial rights are protected in the context of these provisions by the provisions in Division 1 of Part 4.6 of the Act. These provisions allow a party to make certain requests of their opponent. Such requests must be reasonable and must be directed to determining a question that relates to a previous representation under ss 63 to 66 or to a document. Section 166 defines 'request' in terms of seven specific things that may be done. These include producing the document in whole or in part, allowing the requesting party to examine, test or copy the document or calling a particular witness. Such requests must be made within 21 days after the requesting party is served with a copy of a document intended to be introduced into evidence or notice of the intentions of the other party to rely on a particular type of evidence. If the request is to be made after this period, s 168 requires that leave be obtained from the court. If the party expected to respond to the request fails to do so without reasonable cause, an application may be made to the court and the court may order compliance, or order that the evidence in respect to which the request was made is not to be adduced. In making such an order the court may take into account the importance of the evidence, the likelihood that there will be a dispute about the matters to which the evidence relates, the existence of reasonable doubt as to the authenticity or accuracy of the evidence, whether compliance with the request would involve undue expense or delay and the nature of the proceeding.

Voluminous or complex documents may be proved by the introduction of a summary where the court so directs. If a party seeks such an order they must apply to the court before the hearing commences and satisfy the court that it would not

94 *Ibid* ss14B(6) and14CP.
95 *Ibid* ss14B (7) and 14CQ.

be possible conveniently to examine the evidence in another form. Further, the party seeking the order must serve a copy of the summary on each other party together with information about the person who prepared the summary and give those other parties an opportunity to examine or copy the documents in question.

There is no need for specific provision in the reform legislation for a discretion to exclude documentary evidence such as exists under Parts IIA and IIC. This is because the general provisions for such discretions found in ss 135 to 138 apply.

It was suggested above that the principles of open justice and party presentation together with the reality of judicial control of court proceedings should be seen as governing the adduction of documentary proof as well as oral testimony. It is submitted that what has been written above clearly demonstrates that party presentation and judicial control do apply to documentary evidence. It is less clear that the principle of open justice applies here. This fact was remarked upon in the joint judgment in *Butera v Director Of Public Prosecutions*: "[o]ral evidence is public; written evidence need not be."[96] There are logistical and financial difficulties that militate against the provision of copies of documents to any person who is interested. Accordingly, documentary evidence becomes public if it is read out in court or if discussion of the contents of the document are particularly detailed and not otherwise. It may be that the growth of computer technology will soon allow this problem to be overcome. It is conceivable that documents could be made available through CDROM at no additional expense per copy to the parties. Until that stage is reached, the openness of oral testimony will continue to be a reason for preferring it that runs concurrently with the argument that the credibility of oral evidence is more easily assessed.[97]

VI. THE WEIGHT OF THE EVIDENCE

Although it is frequently observed that the weight of the evidence is not a matter governed by the law, an important feature of the common law of evidence were the rules which controlled the admissibility of evidence going to credit. Credit evidence is evidence which is relevant to the weight which should be given to oral testimony. Underlying the approach to the admissibility of credit evidence is the dichotomy between evidence that can be used to support a witness' credit and evidence that can be used to attack a witness' credit. The former is not normally admissible. The latter is almost always admissible.[98] There were statutory provisions designed to express the trial judge's power to protect the witness against questions designed to insult, annoy or embarrass the witness.[99] Generally, however, judges are reluctant to limit the ambit of cross-examination going to credit. A different attitude is taken to the question of whether the opponent can introduce independent evidence relevant to the credit of a particular witness. This attitude is expressed in the so-called collateral matters rule. The name of this rule

96 Note 10 *supra* at 189.

97 *Ibid*; see also *Prestage and Shearing v R* [1976] Tas SR 16; *Hetherington v Brooks* [1963] SASR 321.

98 Note 14 *supra* pp 524-6; note 36 *supra* pp 414-17.

99 *Evidence Act* 1898 (NSW) ss 56-59.

derives from the fact that an item of information relevant only to the credit of a witness is only collaterally relevant to the trial. The collateral matters rule prevents a party from introducing independent evidence as to a collateral matter and stipulates that the answers of the impugned witness to a collateral question shall end the matter.[100] There are a number of well-recognised exceptions to the rule. These permit the opponent to introduce independent evidence of the bias, convictions, general reputation, physical or mental incapacity and previous inconsistent statements of the impugned witness.[101] Indeed, there are some commentators[102] and courts[103] which suggest that the exceptions to the collateral matters rule are so broad that the whole question is better viewed in terms of relevance alone without the baggage of a rule expressing an initial prohibition. Section 102 of the reform legislation establishes a credibility rule to the effect that evidence that is relevant only to a witness' credibility is not admissible. There are exceptions to this rule in ss 103 and 108 respectively which apply to allow such evidence to be adduced in cross-examination if it has substantial probative value or to evidence directed to re-establishing credibility once it has been attacked.

So far, no equivalent body of rules has been developed to govern testimony that is relevant to the weight of documentary evidence. There were, however, some applicable provisions in Parts IIA and IIC of the *Evidence Act* 1898 (NSW). These provisions were to the effect that regard was to be had to all the circumstances from which any inference could be reasonably drawn as to the accuracy of the statement.[104] In particular, under s 14C, regard was to be had to the contemporaneity of the statement with the occurrence of the fact and to the question whether the maker of the statement had any incentive to conceal or misrepresent facts. Where the statement admitted under Part IIC was made by a person, factors which might be relevant included the recency at the time when the statement was made of any relevant matter dealt with in the statement and the presence or absence of any motive for the maker of the statement to conceal or misrepresent any relevant matter in the statement. If the statement derived from information recorded by a device, the reliability of the device was relevant, and if the statement reproduced information the reliability of the means of reproduction or of derivation were relevant. These relevant factors were specified in s 14CI. Further, where the statement, introduced under the business document provisions, reproduced information provided by a person not called as a witness, s 14CK(2) provided that evidence which would be admissible to support or destroy that person's credit as a witness was admissible. In particular, evidence of inconsistent statements made by the person was admissible under s 14CK(3).

In the context of documents admitted in civil proceedings, it was not necessary to provide specifically that evidence as to the credit of the maker should be admissible as, once the maker was called as a witness, the ordinary common law

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100 *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533; *Kurgeil and Kurgeil v Mitsubishi Motors Australia Ltd* (1990) 54 SASR 125 at 130.

101 See *Aldridge* (1990) 51 A Crim R 281.

102 Note 14 *supra* pp 417-24.

103 *Natta v Canham* (1991) 32 FCR 282.

104 *Evidence Act* 1898 (NSW) ss 14C, 14CI.

rules would apply to make such evidence admissible. It was stipulated, however, that a statement admitted under the Part would not be treated as corroboration of evidence given by the maker of the statement. However, the Part applied only to civil proceedings in which corroboration is rarely a requirement.

There is generally no reference in the reform legislation to the weight of any document. However, where a previous representation, either oral or documentary, is relied upon the credibility rule does not apply to evidence about matters as to which the maker of the representation could have been cross-examined if they gave evidence. It is predicted, however, that it will soon be the experience that, in the cases in which these provisions apply, attention does focus on the weight of the evidence. Where the tribunal is composed of a judge sitting alone it should be expected that the judge will have comments to make on the value of any form of evidence presented, particularly where the party chooses an alternative other than the original document. Where a jury is used, judicial directions may well make reference to such choices as well. This would only be to continue the trend that has been established in the last ten years of requiring specific warnings to be given to the jury about the dangers of particular types of evidence.[105]

VII. CONCLUSION THE AVAILABLE EVIDENCE

This article referred at the outset to the fact that, two hundred years ago, the best evidence rule governed the adduction of documentary evidence, even if it was not the governing principle of the whole of the law of evidence. This principle no longer governs even documentary evidence. Instead, the principle which appears to have been established by the reform legislation is that the party is free, within the limits of relevance, to present any available evidence. The court will then assess the evidence and attach the weight that appears appropriate to it. Where the party has a choice between oral and documentary evidence, the choice is only minimally constrained. Where the party, has a choice between forms of documentary evidence, this choice is effectively left to the party. Although, considered over that span of years, the change in principle is marked, a comparison of the provisions of the reform legislation with the law as it existed in jurisdictions in which the legislation takes effect just prior to the reform and with the law as it exists still in other Australian jurisdictions shows that the change is not quite as radical. The effect of the changes upon the law governing the conditions of admissibility is quite marked, but the effect upon the law governing the manner of adducing evidence is much less. There is small reference in the reform legislation to the weight of the evidence which is produced, but the author anticipates that the focus of development in the case law over the next twenty years will see the emphasis being placed on the relative weight of various types of evidence.

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105 See for example *Bromley v R* (1986) 67 ALR 12; *Longman v R* (1989) 168 CLR 79; *Domican v R* (1992) 173 CLR 555.

Although the title of this article raised the question of whether it was possible to make a choice between oral testimony or documentary proof, the conclusion must be that such a choice is illusory. Some forms of documentary evidence will, together with real evidence, provide material from which the tribunal of fact can draw conclusions directly without relying on the intermediation of other human observers. This might indicate a basis for preferring that sort of documentary evidence, but this distinction is not one on which the Australian law of evidence now focuses. Oral evidence presented by a witness in open court is accessible not only to the parties and the tribunal but also to the public in a way that documentary evidence is not. This might indicate a basis for preferring oral evidence, as it preserves our ideal of open justice. Again, this is not a point which has been relied upon by our courts or legislatures. It therefore appears that the nature of the case and the principle of party presentation will alone determine which evidence will be presented to an Australian court. In the end, the evidence that is presented is likely to be the best evidence that is available.