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WEIGHT OF ORAL EVIDENCE IN CRIMINAL PROCEEDINGS

The crucial role that examination of witnesses plays in the determination of the weight of oral evidence in criminal proceedings has traditionally been hampered by excessive application of the hearsay rule and the rule against narrative, both of which to a greater or lesser extent, preclude access by the trier of fact to previous statements of the witness being examined which may shed valuable light on the veracity of his testimony in court. This article defends the law in Singapore permitting more liberal reliance on a witness's previous statements and argues that the liberalisation in the law can be taken further. The relevance of probabilistic reasoning in weight determination is also discussed and the article argues that probabilistic reasoning in weight determination should not be conflated with probabilistic reasoning in the determination of the standard of proof of guilt.

I. INTRODUCTION

TO borrow the words of Bloch, we are the most imperfect recording cameras of unfolding events;[1] not because all memories are feeble (for some are not), nor because all powers of observation are suspect (for some are strong),[2] but chiefly because both observation and memory are encumbered. We see what we wish or expect to see and remember what we wish or expect to remember.[3] Both in observation and in retention and recollection, we are coloured by the accumulated prejudices of our circle within the larger

1 An imperfect metaphor used in *The Historian's Craft* (1992). Crowder *Principles of Learning and Memory* (1976) and Loftus and Loftus *Human Memory: the processing of information* (1976) identify the three stages of acquisition of information, storage and retrieval. Acquisition may be selective, storage may be altered by fresh and subconscious inputs from reflection, and reading about the events in the media, and retrieval may be affected by the nature of the inquiry, in turn, altering the storage.

2 Some studies conclude that we are generally poor observers of duration, speed and distance: see Cattell (1895) "Measurements of Accuracy of Recollection" *Science n s* 2 at 761.

3 See Whipple (1918) "The obtaining of information: psychology of observation and report" *Psychological Bulletin* 15 at 217-248; Allport and Postman *The Psychology of Rumour* (1947); Hastorf and Cantrill (1954) "They saw a game: a case study" *Journal of Abnormal and Social Psychology 97* at 339-401; Siipola (1935) "A group study of some effects of preparatory set" *Psychological Monographs 46* at 27-38.

community; as a result of which we are sometimes able to convince ourselves that events have happened as we now imagine which may be far from their original course.[4] Moreover, the conditions under which we participate, if such is our misfortune, in events with a criminal significance are nearly always uncongenial to accurate retention and recall. We are likely to have been surprised by them and our attention insufficiently focused until afterwards.[5] Not infrequently, we were ourselves participants (innocent, of course) in the events and our observational accuracy and sensitivity were, as a result, impeded by emotional confusion or agitation.[6]

Further, the circumstances in which many become witnesses to events with a criminal significance lend themselves to personal judgment. We have only to relate an account and it will invariably be a mixture of narrative and judgment.[7] As Pascal put it, "We all play God in judging". No narrative is so far from being a perfectly objective account that it is free from a vestige of prejudicial judgment. The impact of judgment on an observation is worse, for when that observation re-appears in narration or testimony, it has doubled in certitude. Which is harder to detect, the error in observation or the error of compounding judgment? Both are as hard to detect.

Then there is the problem of lying, an activity in which men are driven by diverse reasons. Some imagine, from a heightened intellect, that the truth if spoken will incriminate some person to be protected. From good motives, they bend the truth. Others practise sly alterations because they fear their own exposure in a little fiasco; as where a man visiting the deceased shortly before her death and not desiring the revelation of their acquaintanceship lies about the visit. Yet others are pathological liars. The perversion of the truth exercises a fascination on their minds; simplicity is abhorrence to them and they thrive on complexity and convolution. Others nobler such as Hamlet feign an illness to hide a secret misgiving.

4 The accused is not excluded.

5 Especially by violent events: see Clifford and Scott (1978) "Individual and situational factors in eyewitness testimony" *Journal of Applied Psychology 63* at 352-359.

6 Yerkes and Dodson showed that stress and emotional arousal aid in the learning process but after a point, they are detrimental to it. That point depends on the difficulty of the task. See Yerkes and Dodson (1908) "The relation of strength of stimulus to rapidity of habit-formation" *Journal of Comparative and Neurological Psychology 18* at 459-482.

7 Not directly the subject of studies yet. But the influence of pre-existing knowledge is studied and reported in Leippe *et al* (1978) "Crime seriousness as a determinant of accuracy in eyewitness identification" *Journal of Applied Psychology 63* at 345-351. And the impact of judgment is considered in studies on information retrieval. A witness may volunteer more than he can accurately vouch for because he wishes to help solve the crime or because someone must pay for the horrendous crime.

Experience shows, and psychologists confirm, that there is an infinite variety of unreliability in oral testimony, each in turn varying according to the circumstances.[8] Yet in a less enlightened and more confident age, two were by the common law singled out, namely interest and improbity as grounds of incompetence as a witness.[9] These were the formidable portal guardians. One barred the way of all persons with an interest in the dispute; the other hurried to banish moral depravity. Both were slain by the sword of Bentham, which said: "Let all be displayed",[10] after they had driven away perhaps a considerable portion of the evidence that might otherwise have influenced the result in the cases hitherto.

In a more scientific age, we are convinced that in the discovery (or more exactly, reconstruction) of the facts there is no substitute for the multitude of counsel that unrestricted evidence, all throwing light on the specific fact, can furnish; indeed there is much safety. The cross-check and the cross-reference are merely concrete realizations of this counsel of wisdom, for we have come to regard as indispensable the evaluation of evidence in the light of consonance and dissonance, of agreement and contradiction, the evaluation to be undertaken always in the light of the known infirmities of the evidence. If nothing else, we insist on such a cross-check as the inherent probabilities of the case may provide. The task of the judge as trier of fact has therefore become complex since this change in the scene of weight determination with its now permanent features of greater attention to examination-in-chief, cross-examination, to consistency, inconsistency, and inherent probabilities. Against that backdrop, the reticence the common law feels towards the use of prior statements, whether oral or written, in the evaluation of testimony appears strangely conservative and extraordinarily dated. Apparently, the cause is the fear of introducing hearsay. Our Evidence Act[11] has in that last respect made significant inroads. The question to evaluate is whether we have conceded too much and under-estimated the dangers of admitting hearsay.

8 *Cf* Bentham *Rationale of Judicial Evidence* (1995 Reprint) who calls witnesses the 'eyes and ears of justice' and pronounces oral testimony greatly superior to written testimony.

9 See *Wigmore on Evidence II* (Chadbourn rev, 1979) Ch 24.

10 For instance, he says: "Of a man's, of every man's, being subject to the action of any mendacity-restraining motives, you may be always sure; of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure. But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie?" (see b IX, pt III, c III at 393). Again, he says: "Improbity, in whatever shape or degree, is still farther [than interest] from being a proper ground of exclusion." (see b IX, pt III, c III at 406).

11 Cap 97, 1997 Ed.

After we have put the pieces of cross-referenced and cross-checked evidence together, the final step in weight determination, the assessment of probabilities, is probably the hardest exercise. Ultimately, weight is nothing but the enlightened assessment of probabilities in the light of the totality of the cross-checked and cross-referenced evidence. That assessment being entrusted for a long time exclusively to the jury, rigorous analysis was impossible. After the judge became trier of fact in some cases, it would be surprising if the process did not become more explicit, if account did not have to be taken of the advances in research made elsewhere on theories of probabilistic reasoning.[12] Still, however, there appears to be little reference to such learning; and little has changed in the assessment of probabilities of weight, save the rejection of the Bayes theorem, which appears to be a rejection of much learning beyond the trier of fact. This too merits discussion.

II. Interplay of Weight and Admissibility

Surprisingly, the interrelation of admissibility to issue (or in the language of the Evidence Act, relevancy of facts) and weight is a subject of still little academic interest; of so little primary concern is it that major textbooks devote about a page or two out of four or five hundred to it. We certainly do not feel it necessary to teach it at any significant length; our students of law will somehow get it right when they get there to the trial.[13] As a result of neglect, we are sometimes confused by the notion of the weight of evidence and lending to confusion is the way we sometimes express it in terms of the same word, cogency of the evidence. Cogency apparently is the criterion of relevance and in the next breath the measure of weight. Can any one be blamed for thinking that if evidence has been admitted as relevant because cogent, any further assessment of the evidence as possessing little cogency is bewildering? We do well therefore to explain, if we must persist in using the same word for different things, that there

[12] Bentham would only refer us to experience: "Ask what is the foundation or cause of belief, of persuasion? I answer, without difficulty, *experience*. Ask what is the foundation, the cause, of the belief in the truth of human testimony ... I answer again, the experience of the truth in former instances." (see *op cit* at 115). In his note, he rejects Price's theory of probability. Others might no doubt cite common sense as being the key.

[13] But our judges know its importance. Lost without it, they guide themselves by pragmatic considerations, sometimes articulated and sometimes hidden.

is cogency in relation to the facts in issue[14] and cogency in relation to the evidence and that weight is the qualitative summation of the two.[15]

Two other clarifications are advisable, if not indispensable. Rules of examination of witnesses are not only rules of fairness. They are primarily (as well as also) rules about weight, rules which enable or facilitate the determination of weight. Thus, to foster sincerity in testimony, the oath is prescribed.[16] To ensure that the witness is in possession of sufficient cognitive abilities, he must be competent[17] and to ensure that there will be a complete discovery of the full extent of his powers, among other things, of memory and intellect, he must be subject to cross-examination as of right.[18] There is an intersection as might be expected of rules that serve dual purposes. The rule in *Browne* v *Dunn*[19] lately of great interest in the country, for instance, wears these two faces and as the court has contributed to its clarification, there is now little excuse for overlooking the dualism.[20]

Then there is that thing called reasoning. This can take two forms. The first comes under the rubric of relevancy of fact or admissibility to issue and operates as a prohibition on certain types of reasoning in relation to the proceedings. Thus, the general prohibition of similar fact evidence is neither more nor less than a prohibition of reasoning from propensity, of

[14] In truth, some cogency, for any evidence will always have some bearing on the facts in issue. But the courts say either evidence is probative or it is not; they deny that there is a minimum probative value which evidence must attain before it is admissible. See *Morris* v *R* (1983) 36 CR (3d) 1 (SCC).

[15] The weight of oral evidence depends on the witness's sincerity, powers of observation, powers of retention and recollection and powers of narration, some of which powers become less reliable as the facts recede in time, as well as on the risks of corruption or innocent infection. See *PP* v *Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at 75 on the influence of wide press coverage of a case which must be heard over an extended period of time.

[16] S 5(2) Oaths Act (Cap 211, 1985 Ed). Unless the witness is of immature age, in which case the judge shall admit his evidence after administering a caution that the witness shall tell the truth and the whole truth.

[17] S 120 Evidence Act.

[18] Ss 140, 141, 147, 148 Evidence Act.

[19] (1894) 6 R 67; for its application in criminal trials see *R* v *Fenlon* (1980) 71 Cr App R 307.

[20] See *Liza bte Ismail* v *PP* [1997] 2 SLR 454. See also *Allied Pastoral Holdings Pty Ltd* v *Commissioner of Taxation* [1983] 1 NSWLR 1 at 16. The rules of fairness may operate at the extreme in forbidding evidence to be brought after a course of action or conduct has been pursued rendering it unfair to bring in the desired evidence; the rules of weight, however, are always operative whenever evidence has been let in.

drawing an inference as to guilt from a propensity to commit similar offences.[21] The prohibition of hearsay evidence proves, likewise, to be a prohibition against drawing an inference that a fact exists from the fact that some statement is made asserting that fact.[22] The second and other form of reasoning goes by the name of inferences from proved facts (that is to say, facts proved by admissible evidence).[23] Thus, that inference may be drawn which having regard to the ordinary course of human affairs is reasonable;[24] such as that when material witnesses capable of being produced are withheld or suppressed, the evidence they would have given would have been unfavourable.[25] And there are countless more like it.[26]

III. Hearsay and Witness Examination

The basic notions of admissibility and weight determination through witness examination are intermingled in the first principal subject to be considered (whereas the notions of weight determination through witness examination and reasoning are intermingled in the second principal subject). The scenario for us is a witness who has made a statement prior to giving testimony,

21 One view, favoured by academics (*eg* Carter), is that the prohibition against the use of similar facts to prove the existence of the facts in issue (including identity) is only a general prohibition against reliance on propensity reasoning, *ie* on reasoning based on the habit or propensity to commit crimes or general propensity reasoning. Therefore, in appropriate circumstances, which may well be exceptional circumstances, reliance may be placed on propensity reasoning, taken in conjunction with the other evidence, for the purposes of reaching a conclusion as to guilt; *ie* on specific propensity.

22 The orthodox definition is that hearsay evidence is evidence of a statement tendered to prove the facts asserted in it: see *R* v *Kearley* [1992] 2 AC 228. But the conception of hearsay as a prohibition of a kind of reasoning better explains many cases in which proof of states of mind is offered in the form of contemporaneous statements expressing that state of mind. See *Walton* v *R* (1989) 166 CLR 283; *Pollitt* v *R* (1992) 174 CLR 558.

23 Strictly, there is a third category of inferences which are drawn from the fact-finder's own inspections of real or documentary evidence which can be left out of the present account. By whatever device the inference is drawn, reasoning is without doubt exclusively a judicial role.

24 S 116 of the Evidence Act states the general principle of discretionary presumptions that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

25 The court may presume that any evidence, and not only oral evidence, which could be and is not produced would if produced be unfavourable to the person who withholds it. The exact presumption, the extent to which the evidence is to be presumed unfavourable, depends on the testimony given and the supposed character of the evidence withheld.

26 There are 9 illustrations accompanying s 116, referring *inter alia* to the presumption of knowledge of the nature of stolen goods, the presumption that an accomplice is unworthy of credit, the presumption that judicial and official acts have been regularly performed.

the contents of which may supplement or contradict or modify some aspect or all of the testimony in court.[27] If I wish to refresh the witness's memory, supplement his evidence, or contradict him, I must bear in mind the clear teaching of common law admissibility – that what he previously said is inadmissible, being hearsay evidence, and not helpful even when the maker of the statement is himself a witness. Whether I desire to refresh, contradict or supplement the witness, the spectre of hearsay is supposed to loom large. If I refresh his memory, critics charge me with admitting hearsay by the backdoor. Perhaps because of this fear, courts are admonished to be very strict with document contemporaneity, which is a requirement for refreshment of memory[28] and some go to the length of denying what must be a common place phenomenon of reading one's own document before coming to court.[29] If I supplement my witness's testimony with his previous statement, I am told that I have violated a cardinal principle that evidence from the same witness may only be given once, thus opening the door to fabrication or concoction or adding to the multiplication of self-serving statements.[30] If I contradict his testimony with a prior inconsistent statement, the common law is certain about the witness's loss of credibility but adamant about shutting out the statement as evidence of the facts it asserts. Section 147(3) of the Evidence Act now affords entry to facts asserted in contradiction; and critics are incessant about this illegitimacy.

The explanations that should be given of these three categories of witness examination, refreshment, contradiction and supplementation, need only be the briefest. All are true categories establishing different weights. A refreshment exercise is not to be equiparated with a contradiction exercise and a supplementation exercise not to be confused with both. My witness who is refreshed in memory is in all respects mine. Therefore his inherent

[27] And in criminal proceedings, which material witness has not made a police statement?

[28] See ss 161 and 162 Evidence Act. For a succint account of the common law requirement of contemporaneity, see *Phipson on Evidence* (14 ed, 1990) at 12-43.

[29] See Howard "Refreshment of Memory out of Court" [1972] Crim LR 351 who is especially critical of reading or refreshing out of court.

[30] This question may be expected when an expert witness refers to his report. In *Saw Thean Teik* v *R* [1953] MLJ 124 the matter was dealt with in the following terms at 125: "In the first place the Medical Officer having been called as a witness his report should not have been put in. I think it is quite clear from the wording of section 427 of the Criminal Procedure Code [s 396 in Singapore] that under that section a Medical Officer's report is admissible only if that Officer is not called as a witness. When a Medical Officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. Moreover, if his report is made when his examination took place the report could be put in not as primary evidence of its contents but to corroborate the oral evidence already given". See also *Muhammed bin Hassan* v *PP* [1998] 2 MLJ 273.

contradictions are mine[31] and the diminution in weight is mine to suffer[32] A witness contradicted suffers a diminution in credibility to the detriment of the party calling him. Where he is cross-examined by the party calling him, this diminution in credibility may neutralize his testimony apparently favourable to the opposite side, unless the opposite side is able to restore the impugned testimony in its favour. In laying out our categories, we should not of course be mesmerized by labels. What is the witness doing in substance? That is our question, a question of fact, hard perhaps to answer in a particular case but necessary. A witness who has genuinely forgotten may have his memory refreshed. A witness whose memory is clear as a bell but feigns forgetfulness may be adverse or hostile, in which case, refreshment is futile. There are also situations nearer the middle. A witness who claims to have forgotten and whose memory cannot be refreshed may not have feigned forgetfulness and may merely be in need of supplemental assistance. We cannot decide which category is before us unless and until the entire record is scrutinized. But decide we must, lest we otherwise assign inappropriate weights to the evidence.

IV. Refreshment of Memory and Hearsay

Granted then that we have three clear categories of witness examination, each not to be strait-jacketed, with different weight implications, the question is whether the hearsay dangers said to be present in all three when recourse is to be had to previous statements of the witness are real.[33] To begin with, the apprehension of hearsay when the speaker is also a witness, supposedly entailed in all categories, falls far wide of any hearsay rationale one might

[31] Unless I contradict him under s 156 Evidence Act.

[32] Thus at common law I may not cross-examine my witness in order to establish from him which of two conflicting documents is more accurate: *R* v *Harman* [1985] Crim LR 326. This proposition may be qualified in Singapore on account of s 156 read with s 147(4). As a general rule a party is bound by the evidence of his own witness: *M Ratnavale* v *S Lourdenadin* [1988] 2 MLJ 371; *Haji Abdul Ghani bin Ishak* v *PP* [1981] 2 MLJ 230; *Lim Guan Eng* v *PP* [1998] 3 MLJ 14 at 47-48.

[33] I will not consider in detail the significance of the rule requiring oral evidence to be sworn or affirmed. We have never required it of documentary evidence that it should be made under oath or affirmation although of course if oral evidence is to be led of the circumstances of its creation and provenance, it must be sworn or affirmed evidence. The objection that to permit recourse to prior statements would be a back-door subversion of the sworn or affirmed evidence rule fails satisfactorily to reflect the fact that testimony about the nature of the document and the circumstances of its making will be provided under oath or affirmation. Nor will I consider the extent to which the rule is subverted when an inadmissible document used to refresh the memory or for the purposes of cross-examination becomes admissible in evidence as evidence of the facts stated.

care to adopt. Especially in relation to refreshment of memory, the fear of admitting hearsay under guise has never been wholly rational, although of ancient concern. If the rationale for exclusion of hearsay is the deficiency in verification by cross-examination (the so-called untested declarant rationale), the very maker himself being available for the purpose of cross-examination, the offence to the rule disappears.[34] If the rationale lies in the uncertainty of the circumstances (and therefore context) of the making of the statement, where certainty is essential to a proper understanding of the statement, these may be obtained from the maker who is a witness. If the rationale is the prevention of surprise, the accused may be surprised by the adduction of a 'non-transactional' statement of which he had no prior knowledge or could not have anticipated, but has the ready means to overcome his surprise when the witness and maker is before him. If we look for a possible rationale in the realm of extrinsic policy, we fare little better.[35] Supposing them to be rationales of extrinsic policy, the argument that the prior inconsistent statement (referring to just one category) is easy to fabricate or concoct is very slender while the argument that the prior consistent statement is easy to fabricate or concoct is weak (as will be shown). In any case, where police statements are concerned, the temptation to fabricate and concoct should be and is discouraged by enacting or prescribing rules, which require *inter alia* the appending of a signature, and the reading back of a statement written on behalf of the maker.

On the other hand, critics of the refreshment exercise,[36] who claim that hearsay is admitted under guise when the witness under pretence of refreshment under section 161 of the Evidence Act adopts his previous statement as evidence, under-estimate the reality of refreshment and the efficiency of cross-examination in exposing any pretence at refreshment.[37] They complain about the sleight of hand when the witness repeats what he has written, but claims to be refreshed in memory. What, however, must not be forgotten is that the written document is never quite so full as testimony can be made to be. One writes as one speaks for the occasion. Even a first information report cannot realistically be expected to contain all the details that are relevant.[38] If then, the virtual impossibility of a complete record is conceded,

[34] At least in all cases save where he has genuinely forgotten.

[35] It is tempting to argue that the exclusion of hearsay depends on the protection of the right of cross-examination. But there is authority that evidence of a witness which cannot be tested by cross-examination is admissible although its weight may not be considerable: *Dr Shanmuganathan* v *Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61.

[36] I will assume for the moment that refreshment is a genuine psychological response.

[37] See and *cf* MN Howard "Refreshment of Memory out of Court" [1972] Crim LR 351; Newark and Samuels "Refreshing Memory" [1978] Crim LR 408.

[38] See *PP* v *Pardeep Singh* [1999] 3 SLR 116.

the impossibility of undetectable adoption follows. A witness certainly can purport to adopt the full text of what he has written but cross-examination on peripheral, if not also salient or central details, will soon reveal his pretence of refreshment. If there is a breach of the hearsay rule, if there is in refreshment an unacceptable exposure to the risk of prejudice by hearsay, yet it gives no cause for concern. Cross-examination can soon enough show that our witness has merely adopted his previous statement but so be it, because the same cross-examination can reveal the degree of confidence we ought to have in the statement.

Section 162 of the Evidence Act goes even further.[39] It plainly conveys the statements as evidence of the facts they assert if the witness can testify to the accuracy of his writing though he forgets the details in the contents.[40] The untested declarant rationale is more than satisfied, for the witness and maker may be cross-examined on his avowal of the accuracy of the making of the document. The fact that there is no independent recollection of the facts stated in his statement merely goes to weight.[41]

What if the witness has genuinely refreshed his memory as to part but adopted the statement as to others, without telling us that he can vouch for the accuracy of the conveyance? Even then, the basic argument that there is no real hearsay concern is not altered. Provided that we have the means to ascertain which part is unaided and which is a supplementation, though the witness has been less than frank with us, we can assign appropriate weights to both. We can isolate the adopted testimony and say that aided testimony generally should receive greater weight when comparing the aided and the adopted.

That this basic thrust is right (and that the fear of the introduction of hearsay is groundless) is proved by two further arguments. First, oral evidence

[39] The English rule of practice also goes this far. See *R* v *Bryant & Dickinson* (1931) Cr App R 146 at 150; *Topham* v *McGregor* (1844) 1 C & K 320.

[40] "In [this] second instance what the witness says amounts to this: that he has no recollection whatsoever of the facts and that all he can say is that certain entries had been made at the time and that such entries would be true and accurate: then it is necessary to introduce the document in evidence.": *V Daniel* v *PP* [1956] MLJ 186 at 190. In England, the rule as to refreshment of memory is only a rule of practice: see *R* v *Governor of Gloucester Prison, ex p Miller* [1979] 2 All ER 1103. Under s 162, the document is evidence of the facts it asserts: see *V Daniel* v *PP* [1956] MLJ 186.

[41] So we should continue to distinguish between the two situations covered by ss 161 and 162 respectively; not for reasons of hearsay, but for reasons of proper weight appreciation. If we find out by cross-examination that the purported section 161 refreshment really should be a section 162 refreshment, we can test the accuracy of conveyance and give the evidence its commensurate weight. If the case truly falls within section 161, the testimony should receive a greater weight.

ought to be weighted in accordance with the degree of accuracy of recall but its efficacy as a means of proof must suffer if it becomes a matter of whether a witness has or has not a better memory. Second, no witness can realistically be prevented from refreshing his memory from his own document in private before he takes the stand; it would be little to the purpose to stop him refreshing his memory from his own document in public.

Of course, refreshment, as we now know it, must proceed from a contemporaneous document of the witness,[42] after the court has exercised its discretion to permit it.[43] Questioning the need for contemporaneity, which restricts the class of refreshment documents which may be used, one might make so bold as to suggest that if the witness believes that a prior, though not contemporaneous, statement which he has made is accurate and is willing to adopt its contents entirely, no one could reasonably suggest that that would be grotesquely wrong. To adapt the Benthamite argument to a different context, we do better to make the process of displaying the weight of evidence transparent than to shut out the previous statement. It may be objected that these are arguments for complete liberalization, that if the arguments are right, we should have to go the whole distance and admit all previous documents of the witness, whether contemporaneous or not, as evidence of the facts they state.[44] But suppose that the law be that a witness may say that everything he wishes to say is in that document. Provided that no secondhand hearsay evidence is in effect adduced, yet there does not seem to be in that proposal anything seriously wrong. In civil proceedings, we do not see that there is anything wrong in admitting affidavit evidence in lieu of examination-in-chief. The orthodox reason for insisting on examination-in-chief in criminal proceedings is two-fold; first, that the witness should generally give his testimony unaided so that his mind may be focused on the trial at hand, whereas his previous statements may have been influenced by their surrounding contexts and may not have been made under comparable

[42] S 161 speaks of a statement made when the facts were fresh in the memory. This expression has caused some difficulty but there is unlikely to be any difference between its demands and the requirement of contemporaneity. In the context of s 66(2) of the Evidence Act 1995 of New South Wales, which follows the Commonwealth Evidence Act 1995, it has been held that "fresh in the memory" means "recent" or "immediate": *Graham* v *The Queen* (1998) 195 CLR 606.

[43] There must be a demonstrated need for the exercise of the discretion: *Yuen Chun Yii* v *PP* [1997] 3 SLR 57 at 63. That need is based on infirmity of memory; so there should, for instance, have been a long interval of time between the time when the document was made and the trial.

[44] Presently, under section 161, documents used to refresh the memory are not in evidence unless an issue of concotion or fabrication of the contemporaneous document arises: (1953) 37 Cr App R 51; *R* v *Callum* [1976] Crim LR 257; *R* v *Sekhon* (1987) 85 Cr App R 19.

conditions of solemnity; and second, that to permit the witness to refer liberally to his previous statement is to enhance its impact and hence perpetuate its errors. But neither argument adequately meets the case of affidavit evidence in which the desired concentration of mind will be found in the known purpose for which the evidence is prepared under penalty of perjury. Similarly, neither adequately meets the case where the witness is prepared to swear that his previous statement though not made under comparable conditions of solemnity is nevertheless true. The true reason for insisting on examination-in-chief in criminal proceedings must lie elsewhere. Historically, the rule that the accusers must accuse the accused to his face was designed to avoid an odious trial by secret letters, their writers not being available for cross-examination. Today, we could say that the rule merely serves to give the trier of fact the advantage of observing the demeanour of the witness when giving his testimony, which though of little significance in a civil trial, may be significant in a criminal trial in which word is cast against word. In other words, the insistence on examination-in-chief is based on the desirability or greater significance of demeanour evidence in criminal trials but if so, why should it be thought objectionable to permit a witness to swear on the stand that some previous, though not contemporaneous, statement of his contains the true facts? Any diminution in the demeanour evidence would merely be in degree, not kind.

In its strongest sense, the objection to removal of the contemporaneity requirement is saying that there is something wrong about allowing a witness to bring in his statement even though no case for refreshment arises, it being supposed that a true case of refreshment is impossible with non-contemporaneous documents. The research, however, does not suggest that refreshment is only attainable with contemporaneous documents.[45] In its weakest sense, the objection is an objection to consistency evidence, regarded with suspicion as self-serving evidence.[46] In fact, as will be shown, there should be nothing wrong with proving a consistent pattern of statements when such statements are not self-serving (and because not all such statements are necessarily self-serving).[47]

[45] See Loftus *Eyewitness Testimony* (1996).

[46] One should not forget that evidence is self-serving only if manufactured for a consistency effect.

[47] Moreover, whenever previous statements are provable, we must still distinguish between refreshment of the memory and proving consistency. The reason is that in the case of refreshed testimony as compared to unaided testimony, the impact of the statement in the refreshment must be considered for its weight. But provided that there has been genuine refreshment, as may be established otherwise by cross-examination, there is no reason why there cannot be a further consistency effect.

We must also meet the objection that to drop the contemporaneity requirement would be unfair to the cross-examiner as it would pre-empt cross-examination and impede the course of reconstruction of the facts.[48] Such fears are inflated, being based on a misappreciation of the efficiency of cross-examination. Take away the requirement of contemporaneity, the witness may be tempted to prepare a very full statement to which to adhere in the trial. But one can investigate his reasons for preparing such a statement and the objective need, if any, of doing so and thereby ascertain his true motive. Then also, there is the argument that statements made long after the event are likely to contain corrupt post-event information and that there is much futility in trying to refresh the memory from a source which is already corrupt. But the premises of the argument are inconclusive. The argument depends on the premises that post-event information invariably alters the retention process, that non-existent events become lodged in the memory as real occurrences. But psychological studies show that post-event information can alter *or enhance* the retention process.[49] There is no pre-disposition in effect, which suggests that the problem has to be addressed as a matter of weight. A similar sort of argument is that post-event information derived from discussion or from the media can generate consistency among several witnesses as discussants or media consumers.[50] But if we deny admissibility to non-contemporaneous statements on account of post-event corruption, we might as well deny all testimony, for all testimony will be affected, in some degree, by post-event information.

In fact, one might make so bold as to suggest not only allowing refreshment of memory from non-contemporaneous documents but allowing it not only from the witness's own statements but from other statements.[51] Although the law may refuse to countenance this, it has little psychological basis for doing so since psychological studies show that consistent information, of whatever kind whether self-generated or otherwise, enhances memory and recall while misleading information, of whatever kind whether self-generated or otherwise, impedes.[52] We may compare the way risks of infection of testimony are tolerated when one witness is permitted to hear the testimony

[48] Newark and Samuels argue that the contemporaneity requirement shifts the balance of advantage significantly to the prosecution as it has far greater access to contemporaneous documents. See Newark and Samuels "Refreshing Memory" [1978] Crim LR 408.

[49] See Loftus *op cit* (1996).

[50] Loftus (1975) "Leading questions and the eyewitness report" *Cognitive Psychology 7* at 560-572.

[51] Which the witness had not recognized as being accurate at the time when they were made at his direction or under his supervision.

[52] See Loftus *op cit* (1978).

of another instead of being excluded from the court-room until his turn arrives to give his testimony. In these circumstances, the law does not feel it necessary to exclude the testimony altogether but urges the trier of fact to be careful about assigning the evidence considerable weight.[53] Why should a different disposition apply with respect to out of court statements?

Therefore, while the assessment of the weight of witness testimony cannot properly be undertaken without recourse to the help which any prior statements can give when this help is desired on account of infirmity of memory, it has also been urged that the refreshment law can and should be taken much further, because many of the fears that underlie the contemporaneity requirement prove to be feeble. In so far as the contemporaneity requirement has hearsay overtones, it misses the point. In so far as it assumes that infirmity of memory can only be jogged by a contemporaneous document, it is a fallacy. In so far as the requirement of contemporaneity is one of weight, it should be dropped as a condition of admissibility.

Indeed, the way we accommodate reading out of or in court a non-contemporaneous document these days reflects a persuasion consistent with liberalization of the refreshment law. We sometimes still encounter the argument that reading out of court a non-contemporaneous document is *per se* objectionable, whether for reasons of hearsay or otherwise.[54] If there is such a rule, with such strictures, it must be one more manifest in breach than in observance. It would be puerile to pretend that reading of documents never takes place. What is more natural than to consult a document one has written in order that one's recollection should not be upset by the effluxion of time? If this is objectionable, how should it be policed? If there was such a rule, it would be unrealistic generally and efficacious only in respect of police statements kept in the custody not of the witness but of the police; so that if there is to be any reading, the statement would have first to be provided by the police. But there seems to be something arbitrary, if not wrong, about in effect prohibiting the reading of police statements by the witness who made them. Any temptation to fabricate on the part of the

[53] The trial judge has a duty to ensure that a witness other than an expert witness is excluded from the court-room when another witness is giving evidence. See *Yomeishu Seizo Co Ltd* v *Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334 at 348. In England, this duty is imposed only in criminal proceedings. Even so, if the witness has contrary to the judge's order heard the evidence, there is no rule of law that precludes him from giving evidence. See *Moore* v *Registrar of Lambeth County Court* [1969] 1 WLR 141 at 142. As a matter of practice, in civil proceedings, witnesses are permitted to sit in the court-room before they are called to give evidence. See also *R* v *Kingston* [1980] RTR 51.

[54] Notably in *Moomin bin Seman* v *PP* [1993] 3 MLJ 282. The arguments advanced in [1972] Crim LR 351 are: that it subverts the contemporaneity requirement; that it subverts the rule against hearsay; it contradicts the rule against self-corroboration.

police ought to be and is removed by procedural safeguards requiring *inter alia* reduction of the statement of a potential witness in writing, the written statement to be read back to its maker and the appending of the maker's signature. A more palpable danger is the introduction of external information in the process of inquiry or interrogation which infects the statement of the witness; but this should be redressed by laying down a suitable code of practice for interrogators to the extent that the indoctrination cannot be exposed in cross-examination and hence be dealt with by an appropriate reduction in weight.

A careful delineation of the details, though not effected contemporaneously, but effected to crystallize the events in concreteness, does wonderfully ensure that the trial does not become a trial of memory. This is as much a reason for permitting refreshment as for reading a non-contemporaneous document.[55] The most tenacious policeman will not be able to keep repetitive events in his head and is not spared from the conflation of details that is a job hazard of specialization in crime detection.[56] The weight of evidence critically dependent on detail cannot properly be assessed if there is raised a barrier against reading a non-contemporaneous document.

But then, some may propose that the propounder should disclose and bring to light the fact of reading as part of the process of eliciting the testimony. This proposal is an attempt to improve, not to discourage, the reading out of court of a non-contemporaneous document. It would be a sensible, if not advisable, proposal if reading one's document were not common experience and in the first place innocuous. But it does not really improve the situation with which we are concerned to propose that nevertheless the non-contemporaneous police statement must be suspicious and that we start the other way when such a statement has been requested for and read before the trial. Essentially, reading out of court is insidious to those who under-estimate the efficiency of cross-examination in revealing tailored testimony. There is no evidence of the supposed inefficiency, for witnesses may simply be asked whether they have read anything before the trial; but if the question is seldom asked, it is because reading one's document is common experience and the question would ordinarily be pointless. Coaching is, of course, reprehensible and the question of reading

[55] See *Lau Pak Ngam* v *R* [1966] Crim LR 443: 'There is no rule that it is preferable for witnesses to refresh their memories in court rather than by looking at such documents before going into the witness box.'

[56] In *Lim Hong Yap* v *PP* [1978] 1 MLJ 154 at 158 the court said: 'Indeed one can imagine many cases, particularly those where the material witnesses are persons such as police officers or narcotics officers whose daily duties consist of investigating activities of a criminal nature, where such a rule would militate greatly against the interests of justice.'

will be asked if there is some reason to think that the witness has been coached. But we should not need to deal with it unless there is some evidence of a tailoring of testimony. Even then, it should be left to the cross-examiner to establish the circumstances in which the reading of prior documents was carried out and the need for enforced disclosure by the party of the circumstances ruling out coaching of a witness he calls is doubtful.

The advice given by the English Court of Appeal in *R* v *Da Silva*[57] permitting reading in court in prescribed circumstances[58] a non-contemporaneous document[59] therefore makes perfect sense. It may finally be objected that permitting reading whether in court or out of court of a non-contemporaneous document undermines the rule regarding refreshment of memory.[60] This objection is based on a misunderstanding of the purposes of refreshment. The vital difference still remains intact. The cross-examining counsel is entitled to a refreshment document but not to a non-contemporaneous document and has an option to make those parts not used to refresh evidence, which is the next point.

V. Cross-Examination and Hearsay

The refreshment of memory by recourse to a contemporaneous document of the witness entails the document's availability to the opposite side[61] and the opposite side may wish to cross-examine the witness on that document. In England, the applicable rule has thus been stated:

> When a document is used to refresh a witness's memory, cross-examining counsel may inspect the document in order to check it, without making

[57] [1990] 1 All ER 29.

[58] The judge should be satisfied "(1) that the witness indicates that he cannot now recall details of events because of the lapse of time since they took place, (2) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it, (3) that he had not read the statement before coming into the witness box and (4) that he wished to have the opportunity to read the statement before be continued to give evidence."

[59] By which is meant a document made near to the time of the events in question, even though it cannot be said to be a contemporaneous document. Query whether there is a real justification for restricting the non-contemporaneous document to one made near to the time of the events in question.

[60] See *Moomin bin Seman* v *PP* [1993] 3 MLJ 282. *Cf PP* v *Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at 69.

[61] See *Howard* v *Canfield* (1836) 5 Dowl 417; *Beech* v *Jones* (1848) 5 CB 696. The opposite side is entitled to inspect the document, as well when a contemporaneous document is read out of court: see *Owen* v *Edwards* (1984) 77 Cr App R 191.

> it evidence. Moreover, he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness ...[62]

But where he goes further and cross-examines on independent parts, those parts are evidence against him, which will be very telling for him if the cross-examination fails.[63]

Let us suppose that the document contains stronger statements which the witness testifying does not adopt but that his memory purportedly refreshed he adopts a weaker stance. The common law rule tells us that cross-examining counsel may cross-examine on the apparent inconsistency without making the stronger statements evidence. He may thereby force the witness to provide an explanation for the discrepancy; or else an explanation failing, he may suggest the discard of the testimony given. The rule above-stated that the statement does not become evidence of the facts stated does little harm to the adverse party who will be content with the discard of the refreshed testimony when the statements are stronger. But when the refreshed testimony is weaker, the party calling the witness may wish to cross-examine him and to have the stronger statements as evidence, if the witness can furnish no explanation for the discrepancy.[64] The rule above-stated foils his purpose. On the other hand, the document may contain weaker statements and the testimony stronger. Where the witness has under guise of refreshment enhanced his evidence, without cause, it seems entirely illogical that cross-examining counsel may not have the weaker statements preferred as evidence, upon showing that there is no cause to depart from them. It makes little sense that the refreshed testimony is merely discarded.

As if hinting at its own inherent illogicality, the common law rule clearly signifies that where cross-examination is conducted on parts not used to refresh, there is no objection to admissibility of the previous contemporaneous statement against the cross-examiner. The cross-examiner's motivation to cross-examine on parts not used to refresh will be great when having checked the document, he finds a contradiction between the unaided testimony and those other parts. If his cross-examination succeeds, the unaided testimony is gone (which is but the existing common law rule as to the effect of successful cross-examination). But the statement is not in evidence for him. However, if his cross-examination fails, the statements

62 *Senat* v *Senat* [1965] P 172 at 177.
63 *R* v *Britton* (1987) 85 Cr App R 14.
64 This cross-examination appears to be permitted by s 156.

are evidence against him. Search as we may for a reason for punishing the cross-examiner, we can find none that makes any sense. The common law is apparently prepared to discourage such cross-examination, whatever may be the reason for the inconsistency. It may be supposed that as the document had come from the witness, the cross-examiner should not be favoured with the liberty to roam at large over it. If the cross-examiner had known of the document's existence before an application was made to refresh the memory, it could not be urged that the effects of successful cross-examination should be so circumscribed. It makes no sense that a rule should depend on whether the cross-examiner had prior knowledge of the document or only acquired the knowledge upon refreshment of the memory by the opposite side.

Our own rule is contained in section 147(4).[65] It may be preferred for it at least contains the potential to avoid this illogicality. Without doubt, the court is given discretion to receive the refreshment document as evidence of the facts asserted. That discretion, in the present view, should be exercised in a manner untrammeled by the common law.[66]

What has been touched on in relation to cross-examination on refreshment documents is in fact a subset of a larger class of cross-examination on prior inconsistent statements. Mindful of the dangers of introducing hearsay evidence, the common law courts have always emphasised that the effect of a previous inconsistent statement is to contradict, not to replace, to weaken testimony, not to substitute for it its negation. Substitution or replacement would be tantamount to admitting hearsay on the condition that the witness

[65] The section is as follows: "When a person called as a witness in any proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings; and where a document or any part of a document is received in evidence by virtue of this subsection, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

[66] *Cf* s 3(2) Civil Evidence Act 1968 which is as follows: "Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any civil proceeding is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings: and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

is saying a different thing in court when he is unable to explain why he should so do. Section 147(3)[67] is our response, of which it is suggested that section 147(4) is a subset: the prior inconsistent statement may be admitted as evidence of the facts it states of which direct oral evidence by the witness would be admissible.

Of all objections to section 147(3), the least significant is that it results in the substitution of inferior for superior evidence, namely, that of testimony not on oath for testimony on oath. That is a weight, not an admissibility objection. In any case, it will not convincingly distinguish the police statement the weight of which may be just as great as testimony on oath; for although it would not have been made on oath it might have been made under a sanction and a penalty as powerful.[68] Moreover, the recollection at an earlier moment nearer in time to the events in question may be superior to a later recollection, though the mind may not have been concentrated in recollection by the implications and solemnity of a formal oath. This is not to overlook the impact of interrogation by the police and the possibility of external information being imparted and incorporated into the witness's recollection of the events. But the risk of indoctrination must not be exaggerated, for any witness who has been interrogated will bear, even at the trial, the effects, if any, of the interrogation when it is used as a device of indoctrination (admittedly the impact of any indoctrination is less than when he made his statement).

There may be supposed also the reproach of the wider embrace of the cross-examination rules under the Evidence Act which allow a party's own witness to be cross-examined without the witness being found to have turned hostile or adverse.[69] The argument goes on to raise the prospect of a party

[67] The section is as follows: "Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible." Query whether the references to proof by virtue of this section affect the applicability of the section when evidence is adduced under s 160 to impeach the counter-factual credibility of the maker of a statement admitted under s 32 of the Act.

[68] Under s 121(1) a person is bound to state truly the facts and circumstances with which he is acquainted concerning the case except only that he may decline to make with regard to any fact or circumstance a statement which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Violation of this duty amounts to an offence of giving false information: see *Kee Chin Thuan* v *R* [1951] MLJ 138.

[69] Under s 156 Evidence Act. See *Re Wee Swee Hoon* [1953] MLJ 123. This has been one of the striking points of departure in the Evidence Act from the common law and its insistence of hostility. But as the 11th Committee report frankly admits, the insistence on hostility was "a great blunder": Criminal Law Revision Committee, *Eleventh Report – Evidence (General)* Cmnd 4991 at 45.

cutting up his own witness when he is dissatisfied thus far with his performance and pre-empting more searching cross-examination by the opposite side. Such dangers certainly may arise.[70] But that is precisely why the judicial discretion is given and where it may be exercised. Worse, the argument goes, a party may thus bring in the prior statements that have led him to suppose his witness would speak in his favour and if this is going to happen on a regular basis, the attention shifts from the trial to the evidence gathering process. There may be an unarticulated fear of statement extraction or of fabrication or concoction by the investigators, tempted to get a good statement in case the witness should prove inconsistent, coupled with scepticism that the exercise of judicial discretion can moderate or effect an appropriate restraint.

It seems first that the argument exaggerates the temptation to fabricate or concoct by the police[71] and second that we can learn something useful from Honoré's comparative treatment of the primacy of oral evidence. After a convincing demonstration that documentary evidence is in no way superior or inferior to oral evidence, he concludes rightly that:

> oral testimony, if it is convincing, possesses a tactical hold over the other forms of evidence. Whereas a witness can, in a favourable case, explain away documents and real evidence, for instance by filling in the background to them and presenting them in an unexpected light, its rivals are confined to repeating endlessly what has already been said. A witness is a self-authenticating and self-defending document. But this gives oral testimony a tactical advantage rather than one of merit.[72]

That reference to tactical advantage is important. We are dealing with the ordinary case. Where, however, the oral evidence is not convincing, where the witness shows that he is far from being a self-authenticating and self-defending document, it is surely right to put all his previous speeches on the matter to scrutiny, that we may know where the facts lie. To do this in the ordinary case is a waste of time and breeds inefficiency. Not to do this where there is this demonstrated need is negligence. On principle, this is an invariant proposition. It does not alter merely because cross-examination

[70] But is minimised by the rule that a witness thus cross-examined is not thereby removed from the field but remains open to cross-examination by the opposite side: see *Paramasivam* v *PP* [1970] 2 MLJ 106; *Dato Mokhtar Hashim* v *PP* [1983] 2 MLJ 232.

[71] In any case, the temptation is best removed by rules of procedure.

[72] "The Primacy of Oral Evidence" in Tapper (ed), *Crime, Proof and Punishment – Essays in Memory of Sir Rupert Cross* (1981) at 191-192.

is conducted of one's own witness, provided that the witness is not as a result removed out of the way and that witnesses thus cross-examined remain in every other respect, save in relation to the contradictions, witnesses for the party calling them.

For some minds, the self-authentication argument for recourse to the witness's previous statements is not enough because they object to the quantum leap from inconsistency to proof by a prior statement. They are right to mean that these 'speech' tracks are not unwitting trails but conscious articulations (open to concoction) but wrong to assume that admissibility is proof. Admissibility is not proof but merely removes the barrier to consideration by the trier of fact. Mere inconsistency may be the result of a faulty positioning; if so an explanation will preclude admissibility. But if no explanation is forthcoming, the courts should be permitted to reason, not invariably but when there is a real ground for it, that the change in line and story is the result of a change of heart, or a favour, intended to obscure the correctness of the prior statement. In saying this, one is far from depending upon some alleged superiority of circumstantial evidence constituted by the prior statements. That direct evidence of an observable is neither better nor worse than circumstantial evidence of the same quality was demonstrated a long time ago and needs no further demonstraton but only to be stated.[73] But when the inference from his conduct in the trial is that the witness has deliberately lied, it may further be inferred that the contradictory account in the prior statements is correct. If this is a hearsay inroad, yet we need have no disquiet that hearsay is admitted by the backdoor.

In *Rajendran s/o Kurusamy* v *PP*[74] the court held, after a thorough examination of what is meant by cross-examination, that section 147(3) applied equally to a witness cross-examined by the party by whom he was called. For the reasons mentioned above, we need not fear that applying

[73] See Wills, *An Essay on the Principles of Circumstantial Evidence: Illustrated by Means of Numerous Cases* (6 ed, 1912) at 45.

[74] [1998] 3 SLR 225 at 246. See also *Chai Chien Wei Kelvin* v *PP* [1999] 1 SLR 25.

[75] Following the 11th Committee's recommendation. The report is surprisingly brief on the matter, saying: "In a case where the witness has made a statement inconsistent with his evidence, it seems more likely to conduce to the discovery of the truth if the fact that the witness made the statement is before the court, because the previous statement may be the nearer to the truth and in any event is likely to affect the value of the evidence given in court; and it seems artificial to base the admission of the previous statement (as the law does in effect since *Fraser and Warren*) on the idea that the fact that the witness made it shows that he is now hostile. At present the previous statement, when admissible, is not evidence of the truth of the facts stated in it, but is admissible only in order to destroy the effect of the evidence given in court; but we shall be proposing below that it shall be admissible as evidence of the facts stated in it." (footnotes omitted): see Criminal Law

section 147(3)[75] to all cross-examinations, whether or not by the opposite side, will result in the unwarranted admission of hearsay. If a qualification is desirable, it is that we inquire a little more about the motivations behind making the previous inconsistent statement. We, of course, pay attention, and rightly, to guiding factors and are told that in estimating the weight to be attached to a statement which becomes evidence of the facts it asserts, regard must be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy of the statement.[76] Two factors especially to be noticed and considered are the proximity in time between the making of the statement and the occurrence of the facts it asserts[77] and the existence of any incentive to conceal or misrepresent the facts.[78] Regard should also be had to the plausibility of any explanation that is offered for the discrepancies between the previous statement and the testimony in court,[79] the total context of the statement, and the cogency and coherence

Revision Committee, *Eleventh Report – Evidence (General)* Cmnd 4991 at 102. Then at 149: "Clause 33, which is similar to s 3 of the Civil Evidence Act 1968, secures that a previous statement made by a witness will be admissible not only to support or impugn his credibility as a witness (as at present) but as evidence of the facts stated in it. The purpose of the clause is to do away with the situation in which a statement may be proved for one purpose, for example, to show that a witness had contradicted himself, but is inadmissible as evidence of the facts stated. As previously mentioned, this is over-subtle, and it seems to us right that, as under the Civil Evidence Act, contradictory statements by the same person should contradict one another on the same evidential footing." (footnotes omitted) Note the difference in phraseology in ss 59 and 60 Evidence Act 1995 (NSW). Suppose the prior statement refers to a confession made by the accused to the witness, the phraseology of s 59 suggests that the confession not being an asserted fact does not become evidence of the facts of a confession: see *Lee* v *The Queen* (1988) 195 CLR 594. Our s 147(3) is apparently wider.

76 S 147(5) Evidence Act.

77 *PP* v *Tan Kin Seng Construction Pte Ltd* [1997] 3 SLR 158 at 167-168; but "the degree of contemporaneity required will vary with the facts in question. The recollection of the details of particular events, particularly where these occur quickly, is easily susceptible to error with time but the recollection of the existence of a relationship is not so malleable."

78 *Ibid*. The involuntariness of the statement is relevant; a witness forced to make a statement will have a motive to misrepresent: see *Chai Chien Wei Kelvin* v *PP* [1999] 1 SLR 25 at 59. It should be noted that according to s 147(6) "Notwithstanding any other written law or rule of practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of this section shall not be capable of corroborating evidence given by the maker of the statement." The provisions are extremely odd because s 159 defines a previous statement as being corroboration but the subsection prohibits a more important statement from being corroboration.

79 One would have thought this was relevant only in the confirmation of contradiction.

80 *PP* v *Tan King Seng Construction Pte Ltd* [1997] 3 SLR 158 at 167-168.

of the facts to be relied upon.[80] It would be useful to state that we should in addition pay attention to the possibilities of indoctrination introduced by police interrogation.

VI. Examination and Prior Consistent Statements

In relation to prior consistent statements, our discussion is complicated by the intromission of another rule, the rule against self-serving statements (more exactly, the rule against narrative).[81] The rule is expressed with acute force from the point of view of the accused. To permit previous consistent statements is to create an incentive to multiply such statements on behalf of the defence to the confusion of the court. *Ex hypothesi*, before the question of prior consistent statement arises, the accused must take the stand. Therefore, the rule's misgiving is that we are helpless to determine through cross-examination the context of each of his several statements and hence determine whether he has multiplied them for self-serving reasons. This does not seem to be a formidable misgiving at all,[82] even when allowance is made for the fact that cross-examination of an accused on credit is extremely limited unless his shield is lowered.[83] Let us suppose a weaker fear, a psychological one, that there is no point in repetition because it only repeats errors. But generally, the more information we have, the greater the security of result. The repetition may seem superfluous but the assistance afforded is not futile if on occasions when the maker of the statement must speak, he does demonstrate an uncanny and unfeigned consistency. Paul testifies thrice, each time in slightly different terms as to the means of his conversion, because he responds to the context. Is this not of greater assistance to weight determination when we see such discrepancies as are produced by context amidst substantial consistency in salient points? If when we should expect greater accuracy, carefulness and circumspection in a police statement, we see it, few would not accept this as valuable information in weight assessment. Infiltration of post-event information may be inevitable but that infiltration

[81] Described as one of the four exclusionary rules of the common law of evidence.

[82] Because we can easily discern a statement, carefully crafted, too perfect in its details, made for the purposes of anticipated proceedings.

[83] In terms of section 122(4), the accused shall not in cross-examination be asked and if asked shall not be required to answer any question tending to reveal his bad disposition or his criminal record. The prohibition does not apply if the accused's bad disposition or criminal record has already been revealed at the time when the question is asked. Nor does it apply where the accused has taken certain steps in the course of the trial which taken in the round amount to attacking the credibility of the prosecution witnesses or putting his good character in issue or where the accused gives evidence against a co-accused.

is also best detected by laying out the prior statements of the witness in their respective contexts for comparison and contrast with the testimony in court. On the other hand, the fact that the witness has multiplied his statements as a parrot is also valuable information, no less, of absence of credibility, or bias or interest or grudge. In reality, one generally relates criminal events one has witnessed and our suspicions should be aroused when the witness, although gregarious and sociable, apparently has never spoken of the events he witnessed and purports to have hidden them all in his breast until now. Provided the context is made plain, the independent value of consistency is demonstrable, when it converges from many like statements made in differing contexts.

A very strong impression is created that we have impoverished the determination of the weight of evidence by fears of self-serving statements, which turn out on closer examination to be (again) merely fears of fabrication and concoction. A witness, including the accused, will concoct consistent lies, what with the opportunities he will have for crafting perfect answers. But if a man will lie, he will lie in word and in deed; and there does not seem to be a higher order of difficulty whether the lie is in word or in the laying of a false trail of real evidence or in the destruction of incriminating non-hearsay evidence.

The common law barrier to admissibility of prior consistent statements, apparently hard to understand, can perhaps partly be attributed to the rule against shoring up testimony by evidence of the good character of the witness[84] and partly to the rule against allowing two sets of evidence from the same witness.[85] There is an easily understandable objection to credibility confirmation by evidence of good character; the additional information as to good character cannot add much that is distinctively of value to the weight determination. But confirmation between prior statements and the testimony in court is both direct, whereas good character buttresses are indirect, and the analogy is therefore inappropriate. As for allowing two bites to the cherry to the same witness, we are far from doing that when we rely on such additional information as true consistency discloses.

To be sure, one might also suggest that previous consistent statements made when the events were fresh in the memory should in any case be admissible if refreshment from contemporaneous documents is permitted,

[84] This would be contrary to the rule against oath-helping which forbids questions about the truthfulness of the witness. A witness cannot be asked whether he has spoken the truth. This is also why the Act provides for impeachment but does not make any provisions for the converse. Indeed, expert evidence of witness veracity has been rejected on the same ground that the law does not accept witness bolstering.

[85] Alluded to in *PP* v *Lam Peng Hoa* [1996] 5 MLJ 405.

as is true. Any other result would be excessively logical. Admit the case of critics that refreshment is a fiction because it does make the document evidence of the facts stated. Then there is no difference between that case and the instant, especially from the gap-filling angle. The only difference is whether we should go on to add the value of corroboration to the additional evidence in the instant case.

Therefore, the drafter of section 8 of the Evidence Act who, from its inception, refused to see any hearsay difficulty in the admissibility of evidence of statements influenced by facts in issue is proven correct. Section 8 is confirmed as not some antiquated misconception but a presage of what other jurisdictions have more recently done by way of reform of the common law. Section 66(2) of the Evidence Act 1995 (NSW) may now be likened to it: 'evidence of a previous representation is not inadmissible hearsay if, when the representation was made, the facts represented were fresh in the memory of the representor.[86]

VII. Forgetfulness and Supplementation

The final scenario is that which arose in a recent case, the yet unreported case of *PP* v *Heah Lian Khin*.[87] Let us suppose that a witness claims repeatedly in examination-in-chief to have forgotten the facts or to be unable to recall them. (The discussion is not materially altered if the claims are made under cross-examination). On the supposition as outlined, we actually do not have a third category. Without further investigation, we may simply have one or the other already discussed. The witness's claims may be false. We may attempt to refresh his memory but he will not and adamantly refuses to be refreshed. He has in fact turned hostile, which may also be proved by the fact that his document is of such a nature he could not possibly have forgotten the facts in the manner that he claims. We could well argue that where he has turned hostile, he should be taken to have in effect given evidence against the party calling him, because of the inference that the person calling him has no evidence. We should then permit the party calling him to put his previous statement to him in cross-examination, not to show any inconsistency, but to show that he has turned against the party, so that his apparent forgetfulness should not weigh against that party. There may be cases where we may be quite happy merely to have his credibility impugned by his apparent inability to remember the simplest facts, occurring

[86] Reminiscent of the wording used in our s 161(1). There are important differences, of course. Section 8 elevates the complaint and read with section 159 includes a contemporaneous statement.

[87] MA No 354 of 1999.

in the not too distant past, or we may be quite content with the inference that the witness did have something favourable to say on the party's behalf before he turned hostile. But that course of action, where he is our principal witness, should leave us without positive evidence of the facts. Suppose that there is evidence that he has been intimidated into keeping silence. Could it then be suggested that his previous statement should nevertheless not be admitted as evidence of the facts it asserts? The question should be whether there is sufficient evidence such that taken in conjunction with what he has previously said, there is reason to think that but for this intimidation, he would have adhered to his statement.

On the other hand, his claims of forgetfulness may be genuine and all that is needed is to refresh his memory, if his memory can be refreshed. Both the refreshment of memory and the cross-examination of a hostile witness are known categories. A new question arises only if the witness's claim is genuine and one of complete forgetfulness so that his memory is past refreshment; admittedly, there comes a point where the witness ceases to be a witness on account of genuine forgetfulness in the complete sense that he cannot even remember making a statement, let alone that he conveyed the contents accurately. When that point is reached, it does not require much imagination to suggest that to confront him with what he has previously stated to be the facts and afford him fresh opportunity to reconsider and explain would be futile. A claim of partial forgetfulness must be distinguished, for while we may not be able to cross-examine the witness on what has been erased from his memory, he is still cross-examinable on the accuracy of his partial recollection. We would not be constrained to draw any inferences purely from the contents of the previous statement, for we would have the additional information that cross-examination on the partial recollection can yield. If the partial recollection proves to be accurate, we may infer that if the witness could recall what has been forgotten, it would not be different from the account in his previous statement. There is no reason to think that this is offensive to considerations of hearsay.

Only where the witness's claim amounts to total forgetfulness on salient points (and absent an underlying medical cause, such claim seems dubious), could it seriously be argued that to admit his previous statement as evidence of the facts asserted is to admit hearsay evidence. True, no further information can be obtained from such witness either as to the accuracy of the contents or the accuracy of any partial recollection when cross-checked against his statement. However, even in such cases, the witness can be cross-examined on credit and credibility; we are in a position to obtain from him information on his credit-worthiness and as to his present powers of observation. The question reduces to this: is the fact that such a witness can provide us with information on his credit-worthiness and present powers of observation sufficient to remove the hearsay objection to the admissibility of his previous

statement? The answer is a close one on which reasonable minds may differ. But, in the present view, the matter is still better regarded as being primarily an exercise in weight determination since we would not be acting solely on the basis of the information provided by his prior statement but would be acting on it only if we could find the information reliable from the present information we have elicited as to the maker's credit and credibility.

VIII. Section 380 Criminal Procedure Code

Thus far, the adduction of prior statements has been looked at primarily from the witness examination angle, in which the value of classifying the problem as a hearsay problem was denied. Only one possibly true hearsay category (when there is genuine total forgetfulness) was found and we must now inquire about the hearsay provisions of the Criminal Procedure Code,[88] notably those of sections 380 and 378, for these provisions have an important bearing on the matter.

Sections 380 and 378 are a cut of the same cloth. They bear the marks of their age. Conceived of at a time when hearsay was viewed as a reliability issue, the essential difference between them lies in an assumption which some would today question, namely the intrinsic reliability of a documentary record. Be that as it may, section 378 admits hearsay, oral or written; so the key is not the intrinsic reliability of writing over the spoken word. This admissibility relies on satisfaction of three conditions. First, the maker as potential witness must be unavailable in the prescribed sense.[89] Second, notice of intention to tender the hearsay must be given within a stipulated

[88] Cap 68, 1985 Ed.

[89] The prescribed circumstances are that being compellable to give evidence on behalf of the party desiring to give the statement in evidence, the maker of the statement attends or is brought before the court but refuses to be sworn or affirmed, that the maker is dead or is unfit by reason of his bodily or mental condition to attend as a witness, or that the maker is beyond the seas and that it is not reasonably practicable to secure his attendance.

[90] A party who seeks to rely on admissibility of a statement under the section must give notice of his intention to do so and serve it on each of the party to the proceedings. Where the trial is before the High Court, notice must be given before the expiry of 7 days from the end of the preliminary inquiry. Where the trial is before a subordinate court, notice must be given not less than 14 days before the date set down for trial. The purposes of the notice are to enable the party against whom the statement is to be admitted in evidence to test the condition of admissibility, if he wishes, prepare to answer the statement as well as to secure, if he wishes, evidence which may affect the weight of the evidence. This notice must therefore state the ground or grounds on which admissibility is claimed. It must also, where the statement is oral or verbal, contain particulars as to the time, place or circumstances at or in which the statement was made, as to the identity and address (if known and unless

time frame or leave of court would be necessary.[90] Third, evidence of the maker's credibility shall be admissible.[91] On the assumption that documentary hearsay in a record is more reliable, admissibility under section 380 dispenses with the safeguard of notification. At the same time, second-hand hearsay is permitted, since the definition of documentary record is satisfied as long as the record is based on information supplied by a person with personal knowledge to any number of persons under duty to transmit the information before recordation by a person under duty to make the record.

For our purposes, the conditions of witness unavailability are critical. For section 378 admissibility, these are such circumstances as we may expect and are already familiar with in relation to section 32 of the Evidence Act.[92] Section 380's conditions of witness unavailability, however, are wider. In particular, the section contains the following condition: 'that the person in question has been or is to be called as a witness in the proceedings.' Suppose a person has been called as a witness or is to be called as a witness. Then, referring back to subsection (1), the court in criminal proceedings may admit a record containing information which that person supplied to the maker of the record if the recording was made under duty and the person supplying the information had personal knowledge of it. There is no similar condition of admissibility in relation to section 378 with the important difference and consequence, that the admissibility of a statement, which is not a record, when the maker has been called as a witness or is to be called as a witness, is impossible.

It would be ingenious to suggest that this difference in section 378 is warranted because under section 380 the maker is also a witness. Far from

he is dead) of the maker of the statement and the identity and address of the addressee or person who heard the statement and as to the substance of the statement or the relevant words spoken or written, if the actual words used in making it are material. The notice requirements create an entitlement to automatic admissibility provided that all the prerequisites relating to witness unavailability are met. But the court may grant leave to admit a statement in evidence under the section despite the failure of notice. Although the section gives no further guidance as to the exercise of the discretion, the court may be expected to have regard to any injustice, material prejudice or embarrassment to the accused.

[91] The court is expressly directed to receive evidence of the credibility of the maker of the statement, namely evidence, which if the maker had been called to give the evidence, would have been relevant to his credibility as a witness. Thus, any evidence that, if that person had been called as a maker, would be admissible for the purpose of destroying or supporting his credibility is admissible. Evidence may be given of other inconsistent statements for the purpose of showing that the maker has contradicted himself and such statements may have been made before or after the proposed section 378 statement.

[92] These are that the maker must be dead or cannot be found or must have become incapable of giving evidence or that his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.

it, where the witness is also the maker of the statement, the need for cross-examination on a written statement, which is not a record, is as urgent as where the statement is part of a record. If we recall that the record is a statement recorded under duty from the maker who must have personal knowledge of the information supplied and recorded, then we may suppose that the greater reliability of a record is the reason why the witness's testimony can be supplemented or modified by the contents of the record but not by a mere statement. But if that is right, the contemporaneous statement cannot be inferior and yet is left out, not being a record.

The condition specified by section 380 that the supplier of information has been or is to be called as a witness is the widest imaginable. There is no restrictive requirement that the person who has been called or is to be called as a witness should turn hostile or that it is anticipated that he would turn hostile. If anything, the reference to 'to be called as a witness' signifies the widest amplitude and more than hints at the supplemental role envisaged by the condition. Therefore, if the witness has forgotten the events in question, in whole or in part, we may admit a previous recorded statement recording those events; likewise, where the witness has not forgotten them but out of intimidation refuses to divulge them in court. The only qualification appears in the form of a judicial discretion to admit or refuse to admit a document setting out the evidence which a person could be expected to give as a witness which has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal.[93] Such document shall not be admitted without leave of the court. The idea itself is not difficult to appreciate. A document so prepared is thought to stand on a different footing. It is preloaded. It is not the natural effusion of the speaker. Therefore, it is not to be admitted as of right, although the witness who has been called refuses to speak. The court must form an opinion that in the particular circumstances 'it is in the interests of justice for the witness's oral evidence to be supplemented by the reception of that statement or for the statement to be received as evidence of any matter about which he is unable or unwilling to give oral evidence.'

What about the fact that the statement is a police statement? First, as has been said, being a statement made after the commencement of criminal proceedings, in the widest sense, leave of the court to admit it is necessary. Second, there are express provisions that a statement under section 380 shall not be admissible if the person who supplied the information did so after the commencement of investigations into the offence and if the person

[93] S 380(4) Criminal Procedure Code.

doing so being compellable, refuses to give evidence or is beyond the seas and it is not reasonably practicable to secure his attendance in court or being competent but not compellable he refuses to give evidence on behalf of the party for whom he is competent.[94] However, the statement though made after the commencement of investigations by a person since deceased or who has become mentally incapable or who has been or is to be called as a witness or who cannot be expected to have any recollection of the facts recorded is admissible under the section, notwithstanding the general prohibition under section 122(1) of the Criminal Procedure Code. Third, the fact that a police statement is not contemporaneous with the events recorded is immaterial since there is no requirement that the record must be compiled in the course of business, which in England has been construed to impose a contemporaneity requirement.[95]

Reverting to section 147(3) and 147(4), these sections state a limitation, that evidence may be given of facts stated in a prior document if oral evidence of those facts by the maker would be admissible. The same limitation appears in section 380. Under both sets of provisions then, no one can doubt that oral evidence of an admission or confession stated in a document would be admissible.[96] Suppose then a witness who denies that such confession was made is to be contradicted by his prior statement made to the police that such confession was made or suppose that he denies completely any recollection that such confession was made and is to be 'contradicted' by the document. There could have been no objection to the witness giving evidence of the admission or confession and therefore, the statement (being his statement) of the admission or confession is admissible in evidence under section 147(3). Again, if the witness refreshes his memory but on cross-examination cannot satisfactorily explain why there remains a discrepancy between the refreshed testimony and the statement, the court may admit the statement (being his statement) as evidence of a confession under section 147(4). These are also exactly the results obtained under section 380. Provided that the supplier of information has personal knowledge of the confession, and the police officer recording the information supplied is under duty to do so, the record is evidence of such facts of which oral evidence by the supplier of information would be admissible.

The overlap between the examination provisions in the Evidence Act

94 S 380(3) Criminal Procedure Code.

95 Witnesses's statements, as *R* v *Martin* [1988] 3 All ER 440 shows, would not in England qualify as a record made in the ordinary course of business, because the requirement of contemporaneity would be missing.

96 See *The Ymnos* [1981] 1 Lloyd's Rep 550. There appears to be no requirement that a recorded confession must have been made voluntarily: *cf* s 378(1) Criminal Procedure Code.

and the hearsay provisions contained in section 380 is striking. If the witness is contradicted, under section 147(3) or 147(4) his statement becomes evidence of the confession. Under section 380, the court may give leave to admit the statement as evidence of the confession and if the statement is not a statement made whilst proceedings are pending, it is automatically admissible. It has been argued that if the witness refuses to speak in court not because he cannot remember anything but because he will not speak, he should be treated as hostile and his statement admitted as evidence of a confession. In this case also, under section 380 leave may be given and if the statement is not one made while proceedings are pending, it is automatically admissible. If the witness has genuinely and completely forgotten the facts, the admissibility of his previous statement under section 147(3) is arguable but is certain under section 380 (if leave is necessary) or automatic if the statement is not one made while the proceedings are pending. In any case, upon probing as to the cause of the debility, if the cause is shown to be insanity, the provisions laying down other conditions of admissibility may be invoked, making leave of the court irrelevant.[97] That leaves the section under examination to deal with cases where the cause cannot be proven, although the effect of forgetfulness or lapse of memory is manifest. It follows, therefore, that the result in *PP* v *Heah Lian Khin* is defensible, perhaps not in terms of section 147(3) but without doubt in terms of section 380. The police statement in question was undoubtedly a record and leave would undoubtedly have been given under the section.

The fact is that Parliament has enacted both the provisions of section 147(3) and (4) on the one hand and section 380 on the other and the courts' task must be to give effect to both in a sensible and harmonious fashion. The hearsay perspective is all there in section 380 but admittedly, its possibilities have hitherto been unsuspected or underestimated.

IX. First Conclusion

It has been a while ago since the question was asked about the inter-relation of hearsay and witness examination and the length of that inquiry is a good reason for proffering a minor conclusion by way of gathering together the main threads. The argument endeavoured has been that there is no essential difference between the admissibility of a prior statement as evidence of the facts it asserts in examination-in-chief and in cross-examination. In both cases, admissibility is justified when the witness has so conducted himself in giving evidence that his testimony can only satisfactorily be clarified

[97] S 380(4) Criminal Procedure Code.

by a judicious scrutiny of his past pattern of speech about the matter. If that exercise enables us to conclude that the accurate account of events in question is contained in his prior statement, so be it. One might truly say that recourse to prior statements in these circumstances should not be seen as engaging any hearsay issue, since all that is happening is that we are drawing an inference from the scrutiny of what the witness has said out of court and in court as to which version is correct. We do not draw that inference *purely* from the contents of what he has said in his prior statement.

If, however, there is a question of hearsay, then hearsay has spread too widely. Its tenacity has been taken where it should not have been and the enactment of sections 147(3) and 147(4) rightly curbs its excessive reach. The enactment of section 380 helpfully overcomes all debate whether his previous statement may be used to fill in the gaps when the witness has genuinely and totally forgotten the facts which he saw or heard. But section 380's insistence on a record could be criticised as coming in too small a dosage in leaving out the prior statement, written or oral, of a person who is called or is to be called as a witness.

X. Probabilities and Weight

The second principal subject next considered traverses what appears to be very different terrain; but if apology is necessary for its inclusion, this terrain is marked by features, which continue from, or are an extension of, the earlier, as part of an interactive system.

There are some things mystifying about probabilities, which ought first to be dispelled. Evidence is essentially and structurally a theory of reconstruction of the past; although it may be approached from an epistemological angle.[98] Probabilities, however, are a predictive device, a forecast of the future. The past event was or was not. If it did occur, it was in existence, and the time for chances has gone. When therefore we say that the past event probably occurred, we are applying a model, a reconstruction. We are projecting backwards, then forwards, assuming a predictive attitude in relation to the future from a defined (but unfortunately, not definitive) reference point. We are operating much like an historian who, with "a bold exercise of his mind", endeavours to "gauge the chances" of an event "upon

[98] I am fully aware that evidence may be used in the true predictive sense as where a doctor looks at the evidence of his patient's vital signs and from it makes a prediction as to some other fact about his medical condition.

[99] Bloch *op cit* at 100.

the eve of its realization".[99] Up to a point that is a correct analogy. But at what point in the past does the trier of fact project his hypotheses about the future, where is the eve of realization? That depends partly on the strength of counsel's perseverance, for if he goes back far enough he may be able to find connections unnoticed by one less diligent. Counsel is, as it were, tracing the genealogy; if he goes back far enough he may find a common ancestor between persons hitherto least suspected to be related, as fresh hints and cross-links dawn upon him. In the same manner, the evidence to be assigned a probability is not without its internal and external clues. Ultimately, however, the fixing of the reference point from which the predictive evaluation is launched is intuitive or instinctive and a complex function of experience and affordability.

If the problem of fixing upon "the eve of realization" is daunting, the task of satisfying the essential condition of impartiality without which Pascalian probabilities[100] make little sense is formidable. For Pascalian probabilities to be assignable, the events decomposed must themselves be independent.[101] In a throw of a die, where there is an even a chance of any one of six numbers showing up, this condition is satisfied. But, if the die is loaded, the even chances of any number turning up in a throw are falsified or unattainable. Unfortunately, in criminal cases, we should rather expect the die to be loaded because we encounter events that are determined in counsel and execution. The quality of independence is somewhat lacking, as much where there is no attempt to manufacture evidence as where there is.

There is another fundamental difficulty. In the academic literature, a debate continues whether evidentiary probabilities should be objective or subjective and the notion of weight, to reflect this debate, might be denominated the "degree of support" or "the degree of belief", which the evidence has in relation to the fact to be proved, according to one or the other view. When the jury undertook the assessment of weight, the difficulty could remain invisible. Now that the judge is responsible for the assessment of weight, we are compelled to grapple with it in order to make it perspicuous. The debate should accordingly continue until agreement is reached or a clear demonstration of correctness emerges. Nevertheless, it may be that none is possible, if the experience in a different quarter is any hint. The same debate, not entirely unknown in legal circles, is conducted at the level, not of weight, but of standard of proof. There, we have the more subjective formulation of the civil standard proof in *Briginshaw* v *Briginshaw* where

[100] *Ie* probabilities that add up or normalize to one over an exhaustive class of mutually exclusive hypothetical occurrences.

[101] One of the axioms identified by Kolmogorov in his seminal work, *Foundations of the Theory of Probability* (2d English ed, 1956).

Dixon J said: "The truth is that, when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality".[102] On the other hand, more than a score of cases apply nothing more than an objective assessment;[103] and our section 3 arguably falls on both sides of the controversy.[104] Which is correct?

The foregoing reference to standard of proof in a discussion about weight is not intended to conflate weight and standard of proof, but to compare and contrast. The weight is an evaluation we apply to an item of evidence or a body of evidence properly regarded as a composite item of evidence. The standard of proof is that evaluation which we apply to the entirety of the evidence in relation to the issue. Thus, assuming that the same probabilistic methodology is the vehicle of evaluation, yet the corpus is different. The corpus is nothing short of guilt in a criminal proceeding;[105] to that end an assessment of the standard of proof is undertaken. But further, the difference between an assessment of weight and an assessment of standard of proof is also in the reasoning. The standard of proof is the formulation of that method of inductive proof by which ultimately the combination of essential facts may be taken as proved to a moral certainty.[106] It is primarily Baconian in approach, relying on eliminative reasoning. In the terminology of Cohen,[107] the provability of a hypothesis of guilt is raised or built up from the degree to which reasonably probable alternatives to the contrary are eliminated. Once evidence is found to attain to some threshold of weight which makes it worthy of consideration in the determination of the standard of proof, the task that remains is to see if its weight judged sufficient for

[102] (1938) 60 CLR 336 at 361-362.

[103] See Sir Richard Egglestone *Evidence, Proof and Probability* (2nd ed, 1983) at 132.

[104] S 3(3) Evidence Act states that: "A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." The first limb expresses a more subjective test, the degree of belief test while the second limb the more objective or degree of support test. See also the definition of "disproved" in s 3(4).

[105] S 103 Evidence Act states that "Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist." Illustration (a) states: "A desires a court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."

[106] The term is used by Wills *op cit*.

[107] *The Probable and the Provable* (1977).

this further analysis increases as reasonably probable alternatives to the contrary of the ultimate hypothesis are eliminated.[108] The rise in weight following elimination of reasonably alternative hypotheses is not necessarily numerative though it is always at least ordinal. But if it rises sufficiently, the standard of proof is attained. In contrast, the weight of any item of evidence calls for an assessment of the probabilities in relation to the proof of a relevant fact (the corpus difference). More importantly, the accumulation in weight may be Pascalian in nature; and may follow the Bayes theorem, a theorem about Pascalian probabilities, which tells us how to revise a prior probability of an event in the light of other known probabilities of events linked to that event. But the accumulation in weight may also be Baconian in nature, reflecting the application of eliminative reasoning not to the ultimate hypothesis but the particular relevant fact (if so, the only difference is in the corpus, not the reasoning).[109] It is often a combination of both (especially in the determination of the weight of circumstantial evidence).

The point of departure may be elaborated with the help of an idea vented by Wigmore (although his attempts to popularise it failed), namely that evidential reasoning is catenated reasoning, reasoning that occurs in a cascade or catena. To Wigmore, 'virtually all inferences we encounter are cascaded or catenated' or inferences from inferences.[110] Once evidence clears the threshold set by relevance, its weight is to be determined by the support or rebuttal, as the case may be, from inferences derived directly or indirectly from the other evidence (which is Pascalian) and the elimination of such inferences the evidence to be weighted may suggest by opposing the most dissonant or contradictory hypothesis (which is Baconian).

Approaching closer to the case to be discussed and its rejection of application of the Bayes theorem in weight determination, it remains only

[108] Hence, the appeal to inherent probabilities in which we judge of the coincidence or accordance with the relative frequencies in our ordinary experience. Not that the proof is rejected in case of discordance but that then the case for an exceptional occurrence must be made.

[109] An example is that of Lord Brougham: "The degree of excellence and of strength to which testimony may rise seems almost indefinite. There is hardly any cogency which it is not capable by possible supposition of attaining. The endless multiplication of witnesses – the unbounded variety of their habits of thinking, their prejudices, their interests – afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us." (see *Works of Lord Brougham* vol vi, Discourse on Natural Theology, Note V).

[110] *Science of Judicial Proof* (1937). See also *Wigmore on Evidence* vol 1A (Tillers rev, 1983) at 1106-1138.

to highlight the vital difference between reasoning from credibility and reasoning from non-credibility evidence.[111] To illustrate by reference to circumstantial evidence in which probabilistic reasoning is inevitable, we may ask: In what does its weight consists? The answer is: in the cancellation of cross-inferences and the reinforcement of a thesis or hypothesis to the refutation or elimination of another otherwise equally plausible alternative. Where these elements of consonance are independent in occurrence of each other, we may suppose that the probability of one occurrence increases in Bayesian fashion as the other is demonstrated to be probable.

Reasoning with direct evidence is different. One has to form a view of the impact of credibility on the evidence. Of course, in every case of credible direct evidence, the fact implicit is established *ipso facto*. But in order to arrive at that syllogism, we need to translate credibility evidence into proof, we need to make precise the proper reasoning of that translation. Clearly, there may be cases such as those we considered earlier in which probabilistic inferences from collateral facts may assist us to evaluate the testimony as to credibility.[112] First, there is truthfulness or sincerity and then there is accuracy. So far this corresponds to the epistemology that sees knowledge as a function of belief in the occurrence and the possession of justification for that belief. The law seeks to control or regulate it all by requiring an oath or affirmation. Of course, notwithstanding the witness has sworn or affirmed that he will tell the truth, he may still lie if not on all points, at least on some. Again, his objectivity is important, but we hope to rule out secret prejudices by the direct evidence rule.[113] Despite the rule, the witness may mix fact and imagination, undeterred by the prospect of discovery. But at least subjective recollection and narration will not be the common course. Only after these preliminary hurdles are cleared, are we directed to the task of measuring the proper reasoning whereby credibility is translated into proof.

And then, in that connection, it has convincingly been demonstrated that the reasoning with direct evidence is different and that credibility is a function not of Pascalian but of non-Pascalian probability. Suppose a witness tells us that the assailant was the accused. If we say that he is very credible, there is a strong likelihood that the assailant was the accused. However,

[111] Strictly, so-called non-credibility evidence does not exist since nearly, if not, all evidence in the end rests upon some person proving if nothing more, the provenance of the evidence.

[112] As Hume puts it: "Suppose, for instance, that the fact, which the testimony endeavours to establish, partakes of the extraordinary and marvellous; in that case, the evidence resulting from the testimony, admits of a diminution, greater or less, as the fact is more unusual." (see *Enquiries Concerning Human Understanding* (1777) at 113).

[113] See s 62(1) Evidence Act.

if he is not credible, it does not follow that the assailant was not the accused. The likelihood that in spite of his incredibility, the assailant was the accused exists. Pascalian probabilities of existence and non-existence sum to one over the class of mutually exclusive hypotheses; non-Pascalian may not.[114]

Thus equipped, let us suppose the facts of the *Adams Case,* in which the English Court of Appeal (on a second appeal from the re-trial) rejected the applicability of the Bayes theorem.[115] On the evening of April 6 1991, Miss M was raped, and in September 1991 the appellant was tried and convicted primarily on the strength of DNA evidence. The evidence of the prosecution expert was that the DNA profile based on a vaginal swab taken from Miss M matched the profile of the accused's undisputed DNA. On the basis of the first four probes, the prosecution expert undertook a comparison with a DNA database based on the white European population and estimated that the chances of another man than the accused having the same profile were one in 2 million. These are of course staggering odds. On the basis of an additional fifth probe, the odds rose phenomenally to one in 200 million. The defence expert, as might be expected, raised questions about the sample size, about the fact that a faded band had been re-drawn with pen when re-examined, about making proper allowance for sampling errors. The defence, however, also did what was admitted to be a first in the history of the English law of evidence. It invited the jury to apply the Bayes theorem; its purpose was to show how greatly the odds plunged with that wonderful aid. There was no doubt that the DNA evidence was powerfully criminatory. On the other hand, the identification evidence of the complainant who had about a few seconds' sight of her assailant left much to be desired since it described a 20 to 25 year old when the accused was 37. Moreover, the complainant plainly said that the accused did not look like the man who had attacked her and, even more tellingly, the accused proffered an alibi, supported by his girlfriend. The Bayes theorem was presented with a view to showing how considerably the odds derived from the DNA evidence could be reduced by recourse to these other non-DNA evidence.

As the prosecution did not object in principle to application of the Bayes theorem, the trial judge felt obliged to put the Bayesian "evidence" (it is more reasoning than evidence) to the jury. The jury convicted the accused and hence the appeal. One of the grounds was that the trial judge had left the jury unguided as to the application of the Bayes theorem. So far from

[114] This allows for the fact that truth may be stranger than fiction. See G Shafer *A Mathematical Theory of Evidence* (1976); D Schum *Evidentiary Foundations of Probabilistic Reasoning* (1994).

[115] [1996] 2 Cr App R 467. *R* v *Denis Adams* (No 2) is reported in [1998] 1 Cr App R 377.

agreeing, the appellate court considered that the trial judge, being mesmerized by his desire adequately to direct the jury on the theorem, had failed to guide them on the more orthodox way of applying common sense. A retrial was therefore ordered.

The important passage in the appellate court's judgment is where, without expressing a concluded view, and despite the lack of argumentation (since both sides agreed on the applicability of the theorem), the appellate court expressed very strong doubts about the admissibility of the evidence of the Bayes theorem in these terms:

> But we have very grave doubt as to whether that evidence was properly admissible, because it trespasses on an area peculiarly and exclusively within the province of the jury, namely the way in which they evaluate the relationship between one piece of evidence and another. The Bayes Theorem may be an appropriate and useful tool for statisticians and other experts seeking to establish a mathematical assessment of probability. Even then, however, ... the theorem can only operate by giving to each separate piece of evidence a numerical percentage representing the ratio between probability of circumstance A and the probability of circumstance B granted the existence of that evidence. The percentages chosen are matters of judgment; that is inevitable. But the apparently objective numerical figures used in the theorem may conceal the element of judgment on which it entirely depends. More importantly for present purposes, however, whatever the merits of demerits of the Bayes Theorem in mathematical or statistical assessments of probability, it seems to us that it is not appropriate for use in jury trials, or as a means to assist the jury in their task. In the first place, the theorem's methodology requires, as we have described, that items of evidence be assessed separately according to their bearing on the accused's guilt, before being combined in the overall formula. That in our view is far too rigid an approach to evidence of the type that a jury characteristically has to assess, where the cogency of (for instance) identification evidence may have to be assessed, at least in part, in the light of the strength of the chain of evidence in which it forms part. More fundamentally, however, the attempt to determine guilt or innocence on the basis of a mathematical formula, applied to each separate piece of evidence, is simply inappropriate to the jury's task. Jurors evaluate evidence and reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before

[116] *Denis Adams* [1996] 2 Cr App R 467 at 481.

them.[116]

At the re-trial, and on the question of applicability of the Bayes theorem, which was again raised by the defence without objection by the prosecution, the second trial judge left the matter entirely to the jury. "Do it if you please; do not do it if you do not please." A direction that amounts to sitting on the fence never satisfies any side, in this case, the defence. There was a second appeal. The defence complained first that the judge had drawn too sharp a distinction between the statistical approach and the common sense approach. Second, it complained about the way he had slighted the utility of the Bayes theorem when he said: "If you feel able to use the questionnaire to operate Bayes Theorem and you find it almost as easy to kiss your hand to give the answers, then you have the opportunity to do it ..." We may not be too surprised, after what the appellate court had observed in the first appeal, that the appellate court in the second appeal should dismiss both complaints, offering these last words: "reliance on evidence of this kind in such cases is a recipe for confusion, misunderstanding and misjudgment, possibly even among counsel, but very probably among judges and, as we conclude, almost certainly among jurors."

The *Adams Case* has been cited in some detail because it appears to exhibit a typically uninformed response to advances in the extra-legal learning. Its responses are sweeping and intuitive. We do not care to know how the Bayes theorem works because we know it works to confusion. The appeal to common sense is particularly specious. What is common sense? We are not so far from the great changes in scientific thinking about relativity to have forgotten that common sense may be wholly wrong and false. Continuity is common sense but we now well know that energy, contrary to common sense, is discrete.

In the rejection of the applicability of the Bayes theorem, the objection to the assignment of numerical values to probabilities seems to have been uppermost in the minds of the appellate judges. One court declares such assignment as "simply inappropriate to the jury's task"; another warns that "it is a recipe for confusion." But neither court gets to the heart of the difficulty. In the correct analysis, the true issue was one of weight of the evidence of identification and not one of guilt or innocence in relation to the offence charged. Asking the jury to assign numerical values in the guilt or innocence sense was wrong even assuming the application of the Bayes theorem was right. Both weight and standard of proof stages in the reasoning are run together, elliptically, so that we are never quite sure whether weight or standard of proof is in view. Secondly, the fact that the theorem was inappropriate for a different reason was overlooked. The application of Bayesian probabilities to the DNA evidence was not wrong. The extension of it to all the evidence, especially the non-DNA evidence (the identification

evidence) dependent, as it was, on credibility was. As has been seen, evidence, not essentially dependent on credibility, is susceptible of Pascalian (and hence Bayesian) reasoning. However, evidence dependent on credibility calls for non-Pascalian treatment and is inappropriately handled by Bayesian analysis, essentially a Pascalian principle. The assimilation or melange of two very different reasoning processes is the true objection to application of the Bayes theorem in the case, not the fact that numerical assessments are deceptive. The weight of the identification evidence (both the DNA and non-DNA evidence) had to be resolved by the eliminative (Baconian) method because the principle of independence did not hold. In conclusion, it would be regrettable to take the case as marking the end of recourse to probabilistic theories whenever these are appropriate or help to make common sense more exact.

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