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"HEARSAY UNDER THE UNIFORM EVIDENCE ACT (UEA)"

WHAT EVERY CRIMINAL PRACTITIONER SHOULD KNOW

Introduction

The radical reforms to the hearsay rule, introduced by the UEA, were well overdue. Hardly any trial could be heard without argument, and perhaps some confusion at times, as to what was or was not hearsay and what exceptions applied to the exclusionary rule. The plethora of confusing judge made exceptions was capable of excluding probative evidence. [1] As the widely used text, Cross on Evidence, states:

"The rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules against evidence."[2]

If the rationale for the hearsay rule was that out of court statements of a person not called as a witness could not be tested in court, and therefore may be an unreliable form of evidence, what of the situation where the maker of the statement was called? The common law hearsay rule was understood to exclude such evidence. Such a rule does not seem to accord with common sense. After all, our daily news is replete with hearsay statements. Further, such an exclusionary rule gave scant regard to the jury's ability to assign relative weight to such statements. Hearing some gossip on the bus stop was equated with being told something by your general practitioner during a consultation. Apart from some *res gestae* and other exceptions, the arbitrary nature of the hearsay rule imposed unnecessary fetters on the fact finding role of the courts. It certainly prevented reliable evidence being heard.

[1] ALRC Report 102 Dec. 2005 p.189

[2] Cross, Aust. Edition, Butterworths, Ch. 15 Hearsay, para. 31005

Perhaps the high point of the inflexibility of the rule was the case of **Beddingfield**.[3] In that famous case, the victim had exclaimed shortly prior to death and whilst fatally wounded, "See what Harry has done?" Cockburn CJ found the statement inadmissible and not falling within any exception. It was outside the *res gestae* as the event was over when the victim left the room. It was not a dying declaration as the victim was not under a settled hopeless expectation of death. Thus, the statement was inadmissible.

The UEA introduces some sensible reforms by allowing for the admissibility of first hand hearsay (defined in s62) in criminal and civil hearings subject to certain conditions being met. Like other categories of evidence - tendency and credibility – the scheme of the UEA is to specify a rule of exclusion and then to build in exceptions. Additionally, like Tendency and Coincidence evidence in Part 3.6, Notices are required to be served where hearsay is relied upon based on the non-availability of a witness, or, where it is sought to have a witness's evidence given by way of hearsay in civil proceedings, where undue expense or delay might be occasioned. (s.64)

In this paper I will be concentrating on what are the most significant reforms and the "must know"

provisions of the UEA.

In essence they are:

- Codifying into one section many of the common law exceptions to the hearsay rule – s66A
- Providing a mechanism for first hand hearsay to be admitted in criminal and civil cases where the maker of the statement is <u>not available</u> – s63 & s65;
- Allowing for a mechanism where an inconsistent or consistent statement made on another occasion by a witness can be admitted as proof of the assertions contained within it – s60;
- Providing a mechanism for first hand hearsay to be admitted where the maker of the statement <u>is available</u> and called as a witness - 66;

[3] (1879) 14 Cox's Criminal Cases 341

- Liberalising the admissibility of business records without calling the author of the record – s68;
- Allowing for hearsay in civil cases to be admitted where to call a witness would entail undue expense or delay – 64;[4]

A starting point:

Relevance, under s55, Part 3.1, must be the starting point for questions concerning the admissibility of hearsay evidence as well as any other type of evidence under the UEA.

What are the facts in issue? Or, perhaps more helpfully, what is the issue/s to be decided.

How could the evidence rationally affect the facts in issue?

Is the evidence in question a previous representation - i.e. a representation made other than in the proceedings?

What form does it take?

Then, what fact did the maker of the previous representation intend to assert? (Or to be more precise, what fact can it be reasonably supposed the maker intended to assert?)

Is the evidence being led to prove the existence of that fact?

Can the hearsay be admitted under s66A?

Is the witness " not available" under s65?

Is notice required?

Statement of the Hearsay rule under the UEA

[4] Given the nature of this conference, apart from identifying this reform, no discussion concerning judicial interpretation of this provision will take place.

S59 (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation. [5]

(2) Such a fact is in this Part referred to as an asserted fact.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

It is to be noted that conduct is included. [6]

The common law statement of the rule is as follows:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay when it is led to establish not the truth of the assertion in the statement but the fact that it was made.[7]

Another statement of the rule, and perhaps a less complex working definition is:

"Witnesses, whether for the prosecution or defence, are required to testify as to what they saw, heard smelt or felt and not to what they know because of what they have been told. [8]

The common law statement of the rule is similar to the UEA definition in that a general statement of the rule is adopted and then exceptions apply. However, the scope of the UEA rule differs from the common law as do the exceptions.[9] It is important to observe that so called implied assertions are not caught by the hearsay rule.

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[5] "Representation is defined in the Diction of the UEA as including –

(a) an express or implied representation (whether oral or in writing); or

(b) a representation to be inferred from conduct; or

(c) a representation not intended by its maker to be communicated to or seen by another person; or

(d) a representation that for any reason is not communicated;"

[6] *R v Rose* [2002] NSWCCA 455

[7] Cross op. cit. para 31010

[8] *R v Hennessey* (1978) 68 Cr App R 419 at 425

[9] ALRC Report 102, Dec 2005 at 189. The common law developed may exceptions which are summarised in the Report. The ALRC noted that common law hearsay was " …complex , technical, artificial and replete with anomalies."

A simple example of the operation of the common law rule will suffice:

Example 1

Assume that A is charged with murdering his wife B. There is no body found. There is evidence of a history of conflict. B tells her best friend she is fearful that A will kill her if she tries to leave him and as a result she would never leave her home. B's defence is that the wife has simply left him and moved interstate with no notice left of her whereabouts.

The statement by B to her friend, is admissible under common law not to prove that A would kill her, or had that intent, but to prove her state of mind namely that B would not be likely to have left of her own accord and to rebut the defence that she has simply moved out. [10]

This is sometimes referred to as the hearsay exception relating to statements about a person's future intention.

If however B told her friend that her husband had recently purchased an illegal gun, just before her disappearance would such evidence be admissible under the common law hearsay rule? The answer is no. The evidence would be led to prove the truth of the assertion – the accused bought an illegal gun. The inferences arising from such evidence would be:

- The cause of death - B was likely to have been murdered by gunshot; and/or
- A shot her as he had the means to carry it out. [11]

<u>Section 66 A</u>

Traditional common law hearsay exceptions are found under s66A which states that the hearsay rule does not apply to contemporaneous representations about the person's health, feelings, sensations, intention, knowledge or state of mind. [12]

[10] See *Hoare v Allen* (1801) 3 Esp 276; 170 ER 614; Mason CJ in *Walton v R* (1989) 166 CLR 283 at 288-9.

[11] A good example of this type of hearsay is found in the case of *Baker v R* [1989] 1 NZLR 739

[12] See the list of exceptions in Appendix A

The potential width of this section is obvious. One limitation is that it must be a contemporaneous representation and not a historical one.

Thus, in the example above where B tells her best friend about her fears concerning A if she tries to leave him, so long as such representations are contemporary, they are admissible as going to her state of mind or belief.

What is likely to be routinely admitted are statements about a person future intention; 'I going to catch the train to the city', or 'I'm not feeling well.' Again in the example above, if B were to say to her best friend that she was leaving A, and moving interstate, such evidence would be admissible.[13]

Many of you would be familiar with the relaxation of the hearsay rule where a patient relates a history to a doctor. [14] Section 66A covers this, but the usual warning to juries that they could not rely on the truth of the patient's statements in the history, no longer applies due to s60 – discussed below.

The import of this is far reaching. It may not be always necessary for the defence to call one's client where psychiatric defences are sought to be established in order to get before the jury primary facts on which a medical practitioner's opinion is based. [15]

In ***R v Welsh*** [16] , a case heard soon after the UEA came into force in NSW, the trial judge on appeal was found to have erred in not directing the jury that evidence of the history taken by psychiatrist in a murder trial, where diminished responsibility was raised, could be relied upon for the truth of the assertions within it. Once admitted under s60, it was relevant not only for the fact it had been made but for what it contained.

It must also be noted that although the facts taken down as part of the history can go to the truth of such statements it does not mean they must or that a jury is obliged to accept them as such. (See s 76)

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[13] This is because a person's state of mind often leads to an inference about how they might have behaved at some later point of time; i.e. she intended to leave her husband which makes it more likely that she did on the basis of our experience that people often act in accordance with their intentions.

[14] *Ramsay v Watson* 919610 108 CLR 642

[15] See Stantton J S.C. "The rule Against Hearsay" http://www.publicdefenders.lawlink.nsw.gov.au

[16] (1996) 90 A Crim R 364

S60 dual relevance

The effect of this section is that evidence of a previous representation that is admitted for some purpose other than proof of an asserted fact becomes relevant - as proof - for all purposes.

Example 2

Consider: Witness A for the prosecution says in a statement he saw D leaving the shop with a gun. In evidence in chief he denies this. The prosecutor is able to cross-examine him, with leave, under s38. In the cross-examination he admits he made the statement to police.

The common law states that the inconsistent statements were relevant to credit only. Juries were confusingly directed that way. Now, the statement can be adduced for its truth i.e. that he saw D leave the shop with a gun.

A consideration of the traditional hearsay exception, the complaint in sexual cases, demonstrates this. Under the common law such evidence went to credibility only. It demonstrated consistency. Not so under s60 where it is admissible as establishing the truth of what was said. [17]

Admissions

Admissions do not receive this dual treatment unless they are first hand hearsay.

To understand this rather complex treatment one needs to go to s60 (3) which states that:

"…this section does not apply in a criminal proceeding to evidence of an admission."

Two cases however should be considered under this topic. ***Lee v R*** [18]and ***R v Klein*** [19]

In ***Lee's*** case the accused was charged with committing an armed robbery in which he fired a gun. He was seen in a sweaty state in the street on the day of the armed robbery by witness C. C accosted the accused over a debt. The accused replied *"Don't bother me; I have just done a job. I fired two shots.*" C made a statement to this effect but resiled from it

[17] *R v Welsh* (1996) 90 A Crim R 364 at 368

[18] (1998) 195 CLR 594

[19] [2007] NSWCCA 206

in evidence. He was cross-examined but said the statements were not his. A police witness said they were. The trial judge directed the jury that pursuant to s60 the jury could rely on the truth of the statements. The NSW CCA found nothing wrong with this approach.

The High Court disagreed allowing the appeal on the basis *inter alia* that it was second hand hearsay – the police relating what witness C had said about what the accused had admitted to him. The court was of the opinion that the evidence of the admission made by the accused to C could not be led as to its truth, it was only relevant as to the credit of the witness.

The case was followed in the NSW case of ***R v Klein*** (above). This case concerned a shooting murder in a mobile phone retail outlet in Gladsville. The accused was said to have confessed to the murder to an associate J who had made an induced statement about it to the NSW Crime Commission. At trial, J said the evidence about the admission was a lie. The accused was convicted.

On appeal, the sole ground was that the trial judge had misdirected the jury concerning the use to be made of the alleged confession. The trial judge had directed the jury that if they found that witness J's account of the confession made by the accused was honest and accurate they had a duty to convict the accused. There appears to be at least some confusion as to whether the alleged statements made by the accused to J, as deposed to in his various statements and denied at trial, were relevant just to credit alone. A least the NSW CCA were not satisfied that this limitation was perfectly clear in the directions to the jury. The court overturned the conviction affirming the view that admissions could not benefit from s60.

In my view, the approach introduced by ***Lee's*** case has added a degree of complexity to this provision namely, that admissions are treated differently from other hearsay statements. Apart from the policy reason of introducing a filter against potentially damning evidence against an accused, such an approach does not seem logical and harks back to the plethora of complex exceptions that had evolved under the common law.

The notes to section 60 say that an admission may still be admissible under s81 as an exception to the hearsay rule if it is 'first-hand' hearsay – see s82.

Hearsay and Admissions – Part 3.4

S81 excludes the hearsay rule and opinion rule from evidence of an admission. This mirrors the common law where, although hearsay, admissions (statements against interest) were always an exception to the hearsay rule.

S82 reintroduces the hearsay rule to admissions that are not first hand. So, therefore, the hearsay rule applies to second hand admissions but not first-hand admissions.

Thus, in our example above (**Example 2**) if the witness A also gives evidence that not only did he see D leaving the shop but that, later, he overheard him say he held up the store; such a statement is clearly admissible under s81.

What if A resiles from this in evidence but admits that he made such a statement to police– unlike the position in ***Lee's*** case where he denied making the statement?

Ought it to be received as truth of its contents, and not just relevant to credit, if A should try to retract or depart from the statement? The situation is not on all fours with ***Lee's*** case (discussed below) but on the authority of ***Klein's*** case the admission cannot be used as to the truth of its contents.

S65 - Hearsay witness unavailable

- **Notices under s67 of an intention to lead hearsay evidence – relevant to the exceptions ss 63(2), 64(2), 65(2) & 65(8)**

Although I have seen s67 (Notices) referred to in one paper as a matter the defence ought to be wary of when the prosecution seek to use this provision, it is, like tendency and coincidence evidence, equally applicable to the defence. Thus, I would advise scanning any brief to identify any hearsay which the Crown might use to advance its case, or, that the defence might see as helpful, and, then, serve the notice.

The regulations made pursuant to the UEA will prescribe the form of such Notices. I have seen few technical objections made so long as the service was within a reasonable time and the nature of the evidence and the basis for its admission under s65 is specified.

Witness unavailability – the precondition for admissibility under s65

Definition in Dictionary

A person is taken to be unavailable to give evidence where:

(a) the person is dead, or

(b) the person is, for any reason other than the application of s16 (competence and compellability), not competent to give evidence about a fact, or

(c) it would be unlawful for a person to give evidence about fact, or

(d) a provision of this Act prohibits the evidence being given, or

(e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give evidence, but without success.

Cases arising under s65 have generally concerned both the question of non-availability and whether the first hand hearsay falls within the pre-conditions under s65 (2) (a) – (d).

Witness unavailability has been given a wide definition.

The following examples well illustrate the point:

In ***Suteski*** [20], at first instance, Kirby J allowed the Crown to tender an interview with a witness who was said to have been part of a plan to arrange the murder of the deceased arranged by the accused. The statement was said to be against interest. The witness refused point blank to testify. Kirby J found the witness was unavailable and allowed the Crown to tender the interview. This was despite the witness not having been cross-examined and an accomplice. On appeal, [21]the ruling was upheld. Wood CJ at CL refused to read down the Act in such a way that it was a requirement for the witness to have been cross-examined at some earlier point in time. The case is also useful as to how the court approached the prejudice provisions (or discretionary exclusions) under ss137 and 138.

In Victoria**,** ***Suteski*** was followed in ***Darmody.***[22] There a similar situation arose. The witness said to be unavailable was called in relation to a serious assault. He was in prison and refused to give evidence whilst in custody but said he would if released on parole. The trial

[20] (2002) 128 A crim R 275

[21] (2002) 137 A Crim R 371

[22] [2010] VSCA 41

judge refused the Crown application to adjourn the trial but allowed the prosecution to tender the witness's statement and committal evidence on the basis he was not available.

In ***Nichols*** [23], another assault case, the witness applied and was granted an exemption from giving evidence under s18 of the Act. She was in a de facto relationship with the accused. The magistrate refused to allow the tender of her statement on the ground she was not available and ultimately dismissed the case. The Crown appealed. Beach J held the magistrate was in error. He held that there was no difference under s65 between refusing to give evidence without legal foundation i.e. an act of will, and refusing to give evidence based on an order of the court.

Illness and death of course also fit into the definition of being not available. In ***Easwaralingam*** [24] another appeal from the magistrates' court, the magistrate refused to adjourn a proceeding due to the illness of the complainant. The magistrate refused an application under s65 to admit her statement finding it was an abuse of process. Such a misunderstanding of the law was quickly quashed by the Victorian Court of Appeal which found that the magistrate failed to consider the statutory definition of "not available". [25]

Section 65(2) (b) & (c) – "fabrication" and "reliability"

Paragraph (b) is not concerned with honest mistake but concoction. Hence the word 'fabrication'.

In ***Hegarty v DPP*** [26]an 89 year old man was brutally assaulted by punches and kicks in a street on his way home from the dry-cleaners. He died not long after the assault having sustained a broken neck. There was an eye-witness, but the Crown, to corroborate him, led hearsay evidence of what the deceased had said shortly after the assault to an ambulance officer. The words were paraphrased in a note the witness read as he had no re-call of the words. He noted:

[23] [2010] VSC 397

[24] [2010] VSCA 353

[25] Dictionary cl 4 (1) (g) "…mentally or physically unable to give evidence".

[26] [2012] VSCA 252

"Walter… had a full recollection of the incident, recalled being punched, falling to the ground, landing on the ground and being hit in the back of the head."

During the trial the defence objected to the evidence on the basis that the statements of the deceased were made at a time when he had, on the Crown case, been severely assaulted. Thus, it could not be said to be highly probable that the representations were reliable. The representations were however made shortly after the asserted fact occurred and in circumstances that made it unlikely that they were fabricated.

On appeal, the court noted the limitations of the hearsay evidence were mentioned to the jury by the trial judge[27]. The court was not satisfied the judge ought to have ruled the statement out under the prejudice versus probative test under s137 of the Act. The conviction for murder stood.

A similar statement was admitted in ***R v Polkinghorne*** [28] where the deceased had said to her mother, "Mum, Vin stabbed me." The issue in that case was not the question of unavailability but reliability under s65 (2)(b) and (c). What affected the statement made to the mother was that two later statements to an ambulance officer did not confirm what was said to the mother. When asked what had happened later the deceased had said "I don't know". Levine J held the statement was admissible commenting that both the mother and the ambulance officers were available for cross-examination. Levine J further declined to rule the evidence out under s137.

In ***R v Morton*** [29] a French national who was residing in Sydney was the victim of a robbery. Shortly after the victim was taken to the police station and asked to make a statement. Aided by a friend, who spoke some French and English, the witness made a statement which was signed. Prior to the trial he returned to France. The Crown served notices under s67. The question was whether the witness was available as well as the issue of the reliability of the hearsay statements. There was evidence relating to failed contact with the witness plus evidence that he had started a new job and the demands of the job meant that he would not be returning.

The Court of Criminal Appeal found that the trial judge erred in relation to certain fact finding obligations in refusing to admit the statement under s65. Importantly, his Honour had

[27] Note s165(1) of the Act and warnings that apply to that 'kind' of evidence.

[28] [1999] NSWSC 704

[29] [2008] NSWCCA 196

misstated the test under s65 (2)(b) i.e. the risk of fabrication. Section 65 does not require the court to find "no risk of either fabrication or unreliability" in the production of a statement.

A wide approach considering all the circumstances that bear upon the making of a statement under s65 was adopted by Forrest J in ***R v Bond.*** [30] This was a cold case where it was alleged that in 1994 Elizabeth Membrey, a barmaid, was murdered by the accused. The deceased spoke to friend in a public bar where she worked about the accused in which she said the accused had asked her out, that she rejected his invitation and that he had persisted in the face of that rejection. In ruling the evidence admissible Forrest J said, noting that the test under s65 (2)(c) (reliability) was a different and higher threshold of admissibility than under s65 (2)(b) said:

"I am entitled to have regard to all the circumstances revealed by the totality of the evidence in the case that bear upon the reliability of the representation. This includes evidence of prior and later statements and the conduct of the maker of the statement. "

Included in Forrest J's considerations were that Ms Membrey was working at the time behind the bar when the conversation occurred and that she was an intelligent and diligent women.

Such an approach is consistent with other authority. [31]

S65 (2)(b) - "shortly after"

It is apparent that both s65 (b) and (c) reproduce the kind of circumstances the common law termed *res gestae* although authority establishes it is less restrictive. It has been noted that the phrase imports a degree of flexibility.[32]

The temporal limitation is also important to bear in mind in any application to admit this kind of evidence and is to be contrasted with the more liberal test used in s66, namely "fresh in the memory". Thus, there would need to be some evidence of what time has elapsed to determine whether the event about which the unavailable witness is speaking is "shortly after".

[30] Ruling no. 4 [2011] VSC 536

[31] See *R v Williams* (2000) 119 A Crim R 490; *R v Ambrosoli* (2002) 55 NSWLR 603

[32] *R v Mankotia* [1998] NSWSC 295

Time pressure, or even urgency of the event, about which the evidence is concerned, seems to be a requirement. [33] However, in ***R v Harris*** it was open to the trial judge to find that a written statement made 24 hours after the incident was made "shortly after". [34]

It is important to bear in mind also that the phrase 'shortly after' is informed by the context in which it appears, namely, the subsection is designed to exclude evidence that may be concocted. [35] In ***Williams*** however, the Crown witness, who had become deceased, made statements in an interview with police five days after the armed robbery with which the accused was charged. The lapse of time was said to be outside the "temporal realm of statements that may be considered to be reliable" [36] even though the witness may have retained a good recollection of events.

S63 – Civil proceedings witness unavailability

Like section 65 (criminal proceedings maker unavailability) this section allows for the unavailable witness's evidence to be adduced (orally or in document form) under notice to the other party. It is notable that it is less restrictive than the criminal provision and should be read and understood along with section 64. (The latter section excuses a party from calling an available witness in civil proceedings where to do so would occasion undue expense or delay.)

Section 63 **does not impose** the type of restrictions contained under s65(2), such as a requirement the maker of the statement made it under a duty, it was made shortly after an event and is unlikely to be a fabrication or it is highly probable it is reliable. To that extent the UEA allows for ample flexibility in its application to civil litigation.

S66 – Criminal proceedings if maker available.

[33] *Williams v R* (2000) 119 A Crim R 490

[34] (2005) 158 A Crim R 454

[35] Williams ibid at p.502.

[36] Ibid.

This section does take some care in applying as at first blush it suggests that, subject to events being fresh in the memory of a witness called, anything said by that witness relevant to the issues can be repeated by another witness called.

Broken down the requirements of the section are:

- the maker of the statement V is available to give evidence;
- the person to whom V made the representation is available (the evidence is first hand);
- when the previous representation the matter was "fresh in the memory" of the witness V.

The important thing to first note with this section is that it applies not only to complaints in sexual cases but any relevant matter about which a witness is to testify.

S66(2) - "Fresh in the memory"

The phrase has sparked a considerable amount of litigation. Section 66(2A) mandates the matters that the court is to consider in considering whether the representation passes the test. The matters are:

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Subsection (2A) was inserted into the UEA in response to the decision of **Graham v R** [37]

In that case, at first instance, a complaint some six years after incidents of sexual abuse occurring, when the complainant was 9 or 10 years old, was admitted. The appeal, by the accused, was allowed on the basis that the complaint evidence was wrongly admitted in that it failed the "freshness" test.

[37] (1998) 195 CLR 606

The court found that fresh in this context meant recent or immediate.

Cases since Graham have tended to adopt a more liberal approach. In **R v XY** [38] the accused was charged with four counts of sexual penetration with a child between June 2003 and September 2005. Whealy J, with whom the rest of the court agreed, said the complaints made to a friend in late 2007 and to the complainant's parents in June 2009 satisfied the freshness test.

"The expression "fresh in the memory" is now to be interpreted having regard to the considerations specified in s66 (2A) and such other matters as the court considers relevant. In particular, the "nature of the event " loom large in the matters now to be considered. The issue here is how extraordinary, impressionable or memorable would the event have been on the mind of the complainant.

Such an approach represents a very significant change given to the phrase 'fresh in the memory' determined by the High Court in **Graham's** case.

A similar approach was taken in the Victorian case of **LMD v R** [39]. In that case the complaint was 10 years after the event.

An interesting side issue in interpreting the provision is whether the witness V, who makes the complaint, is able to testify that he/she told another witness about the matter. The answer is that it is not a requirement.

In **Singh v R,** [40] the Court of Appeal held that the trial judge's ruling that V's complaints to police officers and her son of rape the morning after the alleged incident, were admissible. At the time of the incident, V was drunk. In evidence at trial, she could not remember the incident or what she said to witnesses.

The fact that V was available to give evidence about an asserted fact satisfied the test under s66 (1). The section did not require the person who made the representation to remember having done so.

S 66 and the Credibility rule

[38] [2010] NSWCCA 181

[39] [2012] VSCA 164. See also *ISJ v R* [2012] VSCA 321

[40] *Singh v R* [2011] VSCA 263

The interplay between s66 and the credibility rule under s102 requires some care.

If the prosecution are seeking to adduce a prior consistent statement made by a witness under s66 the forensic purpose may simply be one of bolstering the credibility of the witness.

Under s102 such evidence is not admissible unless it is a sexual case involving a child (where a specific provision allows for the reception of this type of evidence) or there is an attack on the witness such that the party calling the witness is able to re-establish credit under s108.

Dealing with the child who makes a complaint alleging sexual abuse, s377 Criminal Procedure Act 2009 (Vic) allows for the reception of this type of evidence going to credibility. The restriction that the matters complained must be fresh in the memory to be admissible is not a requirement unlike prior representations under s66. The evidence must also be sufficiently probative.[41]

Apart from the child sexual case, the grounds under s108 for adducing prior statements are that:

(a) evidence of a prior inconsistent statement has been admitted; or

(b) it is or will be suggested either expressly or by implication that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of suggestion -

and the court gives leave.

It is notable that s108 is less restrictive than the common law which required recent invention to be put to the witness. [42]

[41] See *Stark v R* [2013] VSCA 34 where there is a useful discussion of the interplay between s66 and s377 CPA.

[42] See *Niaros v R* [2013] VSCA 249

If relying on s108(3)(a) – adducing a consistent statement made by the witness to answer an attack made that the witness made an inconsistent one - it would be important, in obtaining leave, that evidence of the prior consistent statement might answer the attack made or at least throw light on the making of the prior inconsistent statement.[43]

As to leading a prior consistent statement to answer an allegation that the evidence is fabricated, it has been said here that, "…there is no warrant for reading into the provision a requirement that fabrication be explicitly raised or strongly inferred before the credibility rule is waived."[44]

Perhaps to come back to the beginning of this talk it is worth noting that if admitted it is relevant not only for credibility but for the assertions contained within it – s60.

Business Records under s69

Unlike some of the earlier provisions discussed, the business records exception to the hearsay rule seems refreshingly simply.

Business record is defined in the Dictionary – Part 2 Other Expressions.

It includes a profession, calling, occupation, trade, undertaking or activity carried on by the Crown in any of its capacities, or an activity carried on by a person or body holding office.

To be admissible the evidence must be in the form of a document (defined) which contains a representation made or recorded in the document in the course of carrying out or for the purpose of the business.

The representation must be made by the person who might reasonably be supposed to have had personal knowledge of the asserted fact or the information was based on someone else reasonably supposed to have had personal.

It is clear, then, the provision, so far as documents are concerned, allows for second hand hearsay.

Example 1 (above) under the UEA

[43] See *KNP v R* (2006) 67 NSWLR 227; R v Ali [2000] NSWCCA 177

[44] *Pavitt v R* [2007] 169 A Crim R 452. There the attack on the credibility of the complainant arose in the opening by the defence thus allowing the prosecution to, with leave, lead in evidence in chief from the complainant evidence of complaint.

Would such a statement of the deceased B telling her friend, just prior to her disappearance, that her husband had bought an illegal gun, be admissible under the UEA?