

**AN ANALYSIS OF THE IMPACT OF THE ADMISSION OF HEARSAY EVIDENCE  
ON THE ACCUSED'S RIGHT TO A FAIR TRIAL**

by

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To my friends and family, thank you for your inspiration and encouragement.

Student number: 8350779

### DECLARATION

I declare that **AN ANALYSIS OF THE IMPACT OF THE ADMISSION OF HEARSAY EVIDENCE ON THE ACCUSED'S RIGHT TO A FAIR TRIAL** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

*Pete Vusi Mhlanga*

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SIGNATURE

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26 October 2016

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DATE

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## CHAPTER 1 INTRODUCTION

### 1.1 Introduction

Amongst the major achievements of English common law are the trial by jury system and the hearsay rule, a rule which was formed as a tool to handle the admission of evidence and was subsequently called the hearsay rule. At the centre of this rule is the notion that “evidence so labelled should be excluded uncompromisingly if it could not be accommodated within an existing, recognised exceptions, whether statutory or at common law.”<sup>1</sup> Wigmore described the hearsay rule as, “the most characteristic rule of the Anglo-American law of evidence – a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world’s methods of procedure”.<sup>2</sup> Furthermore, Thayer, when describing the influence of the hearsay rule in the English law of evidence, states that the “greatest and most remarkable offshoot of the jury was the body of excluding rules which chiefly constitute the English law of evidence.”<sup>3</sup>

Of equal importance is that Zeffertt and Paizes also note that the hearsay rule applied in South Africa was received from England and was subsequently incorporated into South African law through statutory enactments.<sup>4</sup> On the other hand, this rule has also seen “some reforms in the United Kingdom recently which were considered to be in line with human rights and the right to a fair trial.”<sup>5</sup> Moreover, prior to the legislated definition of hearsay evidence, the South African courts have defined hearsay evidence as “evidence of statements made by persons not called as witnesses which is tendered for the purpose of proving the truth of what is contained in the statement.”<sup>6</sup> When commenting on the fundamental attributes of the hearsay rule and the rationale for excluding hearsay evidence, Paizes argued that this evidence is considered inadmissible because “it contains intrinsic dangers and weaknesses that are not normally present in original testimony.”<sup>7</sup>

Furthermore, owing to criticism levelled against the common law hearsay rule, parliament adopted the Law of Evidence Amendment Act 45 of 1988 in order to prescribe for the circumstances in which hearsay evidence may be admissible. On

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<sup>1</sup> D T Zeffertt and AP Paizes *The South African Law of Evidence* (formerly Hoffmann and Zeffertt) (2009) at 385.

<sup>2</sup> John H. Wigmore *A Treatise on the Anglo-American Systems of Evidence in Trials at Common Law* (1940) at para.1364.

<sup>3</sup> B. Thayer *A Preliminary Treatise on Evidence* (1898) at 180.

<sup>4</sup> *Ibid* at 385.

<sup>5</sup> *Horncastle and others v R*, [2009] UKSC 14 at para. 55.

<sup>6</sup> *Estate De Wet v De Wet* 1924 CPD 341 at 343.

<sup>7</sup> AP Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions*” a thesis submitted in 1983 at the Witwatersrand University, at 20.

the other hand, the 1996 Constitution<sup>8</sup> guarantees an accused's right to a fair trial which includes the right to challenge evidence.

## 1.2 The problem statement

Section 3 of the Law of Evidence Amendment Act 45 of 1988 maintains the primary common law principle that hearsay evidence is inadmissible, but it also adds circumstances in which such evidence may be admissible. The Act provides as follows:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to –
  - (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail; and
  - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings.: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For purposes of this section –

“hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

On the other hand, the Constitution provides that, “Every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence.”<sup>9</sup> In addition, South African courts are not unanimous with regard to the meaning and

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<sup>8</sup> Constitution of the Republic of South Africa, 1996.

<sup>9</sup> Section 35(3)(i) of the Constitution.



intention of the right to challenge evidence and whether it includes the right to cross-examine adverse witnesses.

In 2002, in *S v Ndlovu and others*,<sup>10</sup> the court had to determine whether the “use of hearsay evidence by the state violated the accused’s right to challenge evidence by cross-examination”? It was held that, because the right to challenge evidence does not include the right to cross-examine adverse witnesses, the admission of hearsay evidence did not, therefore, violate the accused’s right to a fair trial. However, in 2009, in *S v Msimango and others*,<sup>11</sup> the court once again considered whether the right to challenge evidence includes the right to cross-examine adverse witnesses even in circumstances where hearsay evidence could be admissible, and it was held that the right to challenge evidence includes the right to cross-examine witnesses.

Furthermore, the decision in *Ndlovu* was also criticised in the 2007 judgement of the Supreme Court of Appeal in *S v Balkwell and another*,<sup>12</sup> where the provisions of section 3 of the 1988 Act and the accused’s right to a fair trial were also at issue. Ponnann JA identified the numerous problems created by the decision in *Ndlovu* and stated that “what is envisaged in *Ndlovu* it seems, in the case of an accused implicated by the extra-curial statement (hearsay statement) of another, is that he should go into legal battle without the sword of cross-examination or the shield of the cautionary rules of evidence. That can hardly conduce to a fair trial.”

In addition, the decision in *Ndlovu* was recently rejected with regard to another aspect by the Constitutional Court in *S v Mhlongo; S v Nkosi*,<sup>13</sup> where the court examined the approach adopted in the admission of hearsay evidence in *Ndlovu* and held that approach to be unconstitutional because “it violates section 9(1) of the Constitution, which provides that everyone is equal before the law and entitled to equal protection and benefit of the law.” While in *Mhlongo*, the constitutionality of the approach in *Ndlovu* was not questioned on the basis of the right to challenge evidence, it was, however, criticised on the use of hearsay statements against an accused where such evidence has not be subjected to cross-examination and its effect on the right to challenge evidence.

Moreover, Wigmore, when commenting on cross-examination as a fundamental common law principle and the right of confrontation, argues that, “if there has been cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation in the American Constitution.”<sup>14</sup>

Furthermore, the issue of whether the admission of hearsay evidence violates the right of the accused to a fair trial is well covered in other jurisdictions. In 1895, the

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<sup>10</sup> 2002 (2) SACR 325 (SCA) at para. 24.

<sup>11</sup> 2010 (1) SACR 544 (GSJ) at paras. 4 and 27.

<sup>12</sup> [2007] 3 All SA 465 (SCA) at para. 35.

<sup>13</sup> 2015 (2) SACR 323 (CC) at paras. 27-33.

<sup>14</sup> Wigmore *supra* 1396 at 127.

United States Supreme Court, in *Mattox v United States*,<sup>15</sup> when examining the admission of hearsay evidence and the accused's right to be confronted with witnesses against him, had stated that:

“the primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”

Cross-examination seems to have been a core feature of the constitutional right to be confronted with adverse witnesses provided by the United States Constitution for centuries.

Moreover, the United States Supreme Court, in *Coy v Iowa*,<sup>16</sup> when considering hearsay evidence and the right of confrontation held that:

“the confrontation clause by its words provides a criminal defendant the right to confront face-to-face the witnesses against him. The core guarantee serves the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the fact-finding process by making it more difficult for witnesses to lie.”

The right to confrontation between an accused and his accuser also safeguards the fairness of the criminal procedure system. In addition, in *Maryland v Craig*,<sup>17</sup> the United States Supreme Court also held that the right to be confronted with adverse witnesses is also discharged and completed by numerous factors, amongst which, cross-examination is the main factor.

The questions for this study are, therefore:

1. Does the right to a fair trial, which includes the right to challenge evidence, include the right to cross-examine a witness?
2. Does the admission of hearsay evidence under section 3 of the Law of Evidence Amendment Act 45 of 1988 violate the right of the accused to a fair trial?

### **1.3 Point of departure, assumptions, and hypothesis**

An accused has a right to a fair trial which includes a right to challenge evidence in terms of section 35(3)(i) of the Constitution. The Constitution is, however, incomprehensible and unclear on whether the right to challenge evidence includes a right to cross-examine adverse witnesses. An analysis of the relevant case law and literature review in South Africa reveals that the case law is not precise about whether the right to challenge evidence includes the right to cross-examine the original maker of a statement. Furthermore, an analysis of other international

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<sup>15</sup> [1895] USSC 34, at 242-243.

<sup>16</sup> [1988] USSC 154, at 1015-1020.

<sup>17</sup> [1990] USSC 130, at 836.

jurisdictions on the admission of hearsay evidence is essential in interpreting the phrase in the Constitution “right to challenge evidence.” Accordingly, the admission of hearsay evidence in South Africa is analysed from a constitutional point of view.

#### **1.4 Research methodology**

Of importance is that the research for this study consists primarily of a literature study that focuses on the Constitution of the Republic of South Africa and the relevant legislation, viz. the Law of Evidence Amendment Act 45 of 1988. In order to answer the primary questions posed in this study, the study will examine both the historical and comparative overview of the hearsay rule. Comparison with common law jurisdictions which currently use the hearsay rule principle in respect of a fair trial will also assist in formulating an informed opinion and views when making recommendations for the reform of existing legislation on hearsay evidence and the right to challenge evidence which is part of the right to a fair trial in South Africa.

#### **1.5 Aims of the study**

The aims of the study are, firstly, to examine the constitutionality of section 3 of the Law of Evidence Amendment Act, and, secondly, to examine and interpret the constitutional provision on the right to a fair trial which includes the right to adduce and challenge evidence. Furthermore, the study also aims to clarify whether the constitutional right to challenge evidence includes the right to cross-examine adverse witnesses, and, in addition, whether the Law of Evidence Amendment Act violates the Constitution in this regard.

#### **1.6 Projected time scale**

The projected time scale of this study is November 2016.

#### **1.7 Outline of the chapters**

##### **Chapter 1 – Introduction**

This chapter explains the problem statement, the point of departure, the aim of the study, the projected time scale, the research methodology, and it also provides an outline of the chapters.

##### **Chapter 2 – The historical development and background of the hearsay rule in England and South Africa**

This chapter discusses the origin and development of the hearsay rule in England and its adoption into South African law of evidence.

### **Chapter 3 – Examining the use of evidence considered admissible under the reforms introduced by the Law of Evidence Amendment Act 45 of 1988**

This chapter probes and examines the admission of hearsay evidence under provisions of this Act with the view to establishing whether this Act is comprehensible and intelligible in providing for the admission of such evidence.

### **Chapter 4 – The right to a fair trial: meaning and intention of the right to challenge evidence in the South African Constitution**

This chapter examines the meaning and intention of the right to challenge evidence in the Constitution with a view to establishing whether this right includes the right to cross-examine witnesses.

### **Chapter 5 – The hearsay rule and the right of confrontation in other common law jurisdictions and in the European Court of Human Rights**

The aims of the study in this chapter is to probe how the hearsay rule and the right of confrontation are understood and applied in other common law jurisdictions and in the European Court of Human Rights. This comparative analysis will also assist in establishing and interpreting the magnitude and extent of the right challenge evidence in South Africa's Constitution in the context of the use of hearsay evidence.

### **Chapter 6 – The constitutional validity of section 3 of the Law of Evidence Amendment Act 45 of 1988**

This chapter examines the effect of the use of hearsay evidence under this Act on the right to a fair trial. The constitutionality of the statutory tests, namely-, the interests of justice and the reliability evidence which form part of section 3, will be probed with a view to establishing whether this Act is compatible with the values protected by the right to a fair trial. In addition, a comparative analysis of these tests will be embarked upon in order to establish international perspectives in jurisdictions where these tests are used in determining the admissibility of hearsay evidence. The aim of the latter exercise will, in addition, be to assess the constitutionality of these tests which form fundamental features of section 3 of the Act.

### **Chapter 7 – Conclusion**

This chapter will draw some conclusions and also attempt to answer the primary questions of this study.

## CHAPTER 2 THE HISTORICAL DEVELOPMENT OF HEARSAY EVIDENCE IN ENGLAND AND SOUTH AFRICA

### 2.1 Introduction

The objective of the study in this chapter is to examine the historical unfolding and advancement of the hearsay rule in England and its influence in the South African law of hearsay evidence. This entails a probing into the origin, rationale and extent of the hearsay rule at its infancy and assessing whether it has been modified as well as studying the nature and extent of its development over centuries. This examination will also assess the various phases of development of the English hearsay rule and its primary features. Furthermore, the latter part of this chapter will assess the historical development and advancement of the English hearsay rule in South Africa after its adoption into South African law with a view to comprehending fully and assessing whether the current South African hearsay law is comprehensible, definite and intelligible.

Paizes, when commenting on English hearsay rule and its influence in South African hearsay law, asked the question, “Is the hearsay rule the product of the adversary system or the child of the jury?”<sup>18</sup>

In an endeavour to answer this question, Paizes argues that it seems more prudent to consider the fact that the rule developed as a result of two aspects, firstly, the blooming of the adversarial trial system with its main component being the presentation of oral evidence and the confrontation between the accused and his accusers, and, secondly, the jury system which has developed and become the driving force behind the adversarial trial procedure.<sup>19</sup>

On the other hand, the hearsay rule seems not to have been the originally accepted principle in asserting the truth, and this is evident from the articulation of the nature and fundamental attributes of the law of the Roman Empire when one Roman Governor, named Felix, was asked to pronounce judgement against Paul, and he outlined the Roman law procedure for truth-finding and litigation and stated that, “it was not the custom of the Romans to deliver any man to destruction before the accused meets the accusers face to face, and has an opportunity to answer for himself concerning the charge against him.”<sup>20</sup> Ancient Roman law was characterised by confrontation between the accused and his accuser.

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<sup>18</sup> Andrew Peter Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions*” a thesis submitted to the Faculty of Law University of the Witwatersrand, Johannesburg (1983) *supra* at 7,12.

<sup>19</sup> *Ibid* at 12.

<sup>20</sup> Acts 25:16, Holy Bible, New King James Version, 1982.

Furthermore, Fedele has, after a detailed examination of Biblical history, expressed the opinion that this view of Roman law articulated by Felix and the arrest and prosecution of Paul took place during the reign of Roman Emperor Nero in A.D. 64.<sup>21</sup>

## **2.2 Early history and development of hearsay evidence in England**

The English law of evidence can be grouped into three diverse, fundamental conservative phases which unfolded during its primitive historical era:<sup>22</sup> the religious (primitive) phase-, with the fundamental belief that was accepted during this era being that a human being was incapable of judging another human's affairs; the formal phase-, where the fundamental feature of the era was the significance placed on receiving evidence under oath and the belief that a false oath or error could lead to death; and, lastly, the rational phase-, where the fundamental belief was that it was no longer required that the trier of fact should simply confirm the procedural correctness of the method of conducting the trial but also had to employ and exercise cogitation and reasoning before giving judgement in the disputes.

### **2.2.1 The religious (primitive) era**

The procedure that was employed during this phase in order to establish guilt and unearthing the truth was called "trial by ordeal".<sup>23</sup> Schwikkard,<sup>24</sup> when writing on the development of English law during this era, states that the "trial by ordeal" was deemed to be an accurate tool for establishing veracity in disputes, and it was a well-known procedure in England. When commenting on the primary attribute of the "trial by ordeal", Stein argues that this procedure was a petition in which God (deity, divine being) was entreated to judge the issues in dispute.<sup>25</sup> In addition, Stein also explains this procedure and adds that, "In an age of faith, when there was a general belief in the direct intervention of divine providence in human affairs, it was not irrational to think that God knows what happened better than a human and He will indicate which party was in the right." Where did this belief originate? The King James Bible seems to give some indication which points to its origin and rationale where it attests that, "My defence is of God, Who saves the upright in heart. God is a just judge, And God is angry with the wicked every day."<sup>26</sup>

It can be argued, therefore, that this Biblical assertion is the origin of the belief that God judges over human disputes and affairs, and is indignant with the guilty party, and he protects the innocent.

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<sup>21</sup> Gene Fedele *Heroes of the Faith* (2003) at 14-15.

<sup>22</sup> A. Esmein (translated by Simpson) *A History of Continental Criminal Procedure with Special Reference to France: Continental Legal History Series* (1968) at 617-9.

<sup>23</sup> P J Schwikkard *et al Principles of Evidence* (2009) at 3.

<sup>24</sup> P J Schwikkard *et al Principles of Evidence supra* at 3.

<sup>25</sup> Peter Stein *Legal Institutions: The Development of Dispute Settlement* (1984) at 25.

<sup>26</sup> Psalm 7:10-11, New King James Version (1982).

Moreover, Nokes has examined and written on the meaning and scope of the “trial by ordeal” and he concurs with the views expressed by Stein that the “trial by ordeal” was considered an entreaty that the contest be judged by God and that humans were deemed incapable of making judgement over other human’s affairs.<sup>27</sup>

Schwikkard, on the other hand, identifies the existence of numerous types of ordeals that were employed by the Anglo-Saxons during this era.<sup>28</sup> This views also seems to be in accord with those shared by Morgan who was further of the opinion that one of these ordeals was called “ordeal of the accursed morsel” (this ordeal was also called the *corsnaed*) during which it would be mandatory that the persons accused in the contest would be required to gulp a torrid piece of bread and this would go with a prayer to God that if the accused had lied and was guilty he should be throttled by the piece of bread.<sup>29</sup> In one of the trials that was deemed to be the trial of the century where this ordeal was administered in 1053 it was reported that Edward the Confessor had charged Godwin, the Earl of Kent, with murder, and during the trial Godwin had suffocated and died after he tried to gulp his piece of bread. This outcome is believed to have astounded everyone who had attended the trial and the cruel and inhumane effect it presented were witnessed and questioned.<sup>30</sup>

In addition, Damaska<sup>31</sup> and Wigmore,<sup>32</sup> when commenting on the nature and working of this ordeal, are in accord in suggesting that this trial procedure appeared to be unreasonable and ludicrous to the present-day reasoning. Moreover, Damaska clarifies her criticism of this ordeal in the following terms, “By irrational I mean procedural devices such as trial by ordeal, which rests on religious imaginings, especially the belief that the deity can be summoned to intervene in the screenings of the guilty from the innocent.”<sup>33</sup>

Wigmore also detailed his disapproval of the trial by ordeal and argues that:

“Up to the end of the 1200s, the history of the rules of Evidence, in the modern sense, is like the chapter upon ophidians in Iceland; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *‘judicium Dei’*. There is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses; for the tribunal merely verified the observance of due formalities, and did not conceive of these as directly addressed to its own reasoning powers.”<sup>34</sup>

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<sup>27</sup> G. D. Nokes *An Introduction to Evidence* (1967) at 18.

<sup>28</sup> *Ibid* at 3.

<sup>29</sup> William Forsyth *History of Trials by Jury* (1878) at 68.

<sup>30</sup> Van der Merwe “*Die Evolusie van die Mondelinge Karakter en Uitsluitingsreels van die Engelse Gemene Bewysreg*” *Stellenbosch L. Rev.* (1991) at 288. (my translation).

<sup>31</sup> M. R. Damaska “*Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*” *U. Pennsylvania L. Rev.* (1972) at 556.

<sup>32</sup> Wigmore *Treatise* para. 8.

<sup>33</sup> *Ibid* at 556.

<sup>34</sup> *Ibid* at para. 8.

There was no room for human reasoning required to be exercised by the trier of fact.

Paton and Derham, on the other hand, express divergent views on this point and suggest that the “trial by ordeal” (*corsnaed*) was a sensible, judicious and prudent truth-finding procedure, and they argue that there was credible evidence indicating that emotions of blameworthiness and iniquity could bring dread which could cause dehydration on the mouth and which, in turn, could have made it hard to gulp a torrid slice of bread.<sup>35</sup> These views are also advocated by Scolnick<sup>36</sup> who is of the view that, “There are reports of a deception test used by Indians based on the observation that fear may inhibit the secretion of saliva. To test credibility, an accused was given rice to chew. If he could spit it out, he was considered innocent, but if it stuck to his gums he was judged guilty.”<sup>37</sup>

In addition, Schwikkard has examined the working of the *corsnaed* and questioned whether “it would be far-fetched to suggest that the *corsnaed* was perhaps the early source of the modern rule that the demeanour of a witness may be taken into account as a factor affecting credibility.”<sup>38</sup> The origin of the use of demeanour as tool to establish the credibility of a witness seems, therefore, to stem from this “trial by ordeal”.

Furthermore, Holdsworth also examined the development of English law and the working of the ordeals during this era, and he argues that, in 1066, another form of ordeal, called trial by battle, was brought in. The main feature of this ordeal was that a physical fight between the parties to the dispute was believed to be a credible procedure to resolve the contest.<sup>39</sup> The author also argues that summoning the parties to engage in a physical fight was not simply the determining factor as it “was not merely an appeal to physical force because it was accompanied by a belief that providence will give victory to the right. The trial by battle is the *judiciam Dei par excellence*.”<sup>40</sup> As in the “trial by ordeal” the “trial by battle” was also accompanied by prayer or the belief that God would intervene in the affairs of man and judge which adversary was guilty or innocent. While the trial by ordeal called *corsnaed* was characterised by the swallowing of bread accompanied by a prayer to God, the trial by battle involved physical confrontation also accompanied by prayer as a mode of resolving disputes. What both these ordeals have in common was the fact that divine intervention was entreated to reveal the guilty litigant.

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<sup>35</sup>David P. Paton and George W. Derham *A Text-book of Jurisprudence* (1972) at 597.

<sup>36</sup> Jerome H. Scolnick “*Scientific Theory and Scientific Evidence*” *Yale L.J.* (1961) at 696.

<sup>37</sup> *Ibid* at 696.

<sup>38</sup> *Ibid* at 3.

<sup>39</sup> Sir William Holdsworth *A History of English Law* (1956) at 308.

<sup>40</sup> *Ibid*.



Van der Merwe,<sup>41</sup> also embarked on a detailed examination of English law during the 10<sup>th</sup> century and the working of the trial by battle, and he argues that one of the fundamental attributes of the adversarial trial procedure was the fact that it was required of the parties to the dispute not only to confront each other but also to subject each other to cross-examination, and he further reasoned that “physical confrontation (trial by battle) would later develop into verbal confrontation (cross-examination).”<sup>42</sup> Hence the origin of confrontation through cross-examination seems to stem from this ordeal which was called the “trial by battle”.

Schwikkard is in accord with these views expressed by Van der Merwe on the metamorphosis of the trial procedure in that physical confrontation evolved and amounted to oral confrontation which includes cross-examination and the right of confrontation and this also suggests that this right bears an historical link in the development of the hearsay rule.<sup>43</sup> The accused had to abandon and relinquish his right to confrontation through a physical duel and in return he was required to confront his accuser through cross-examination.

### **2.2.2 The formal era**

This era of development of English law experienced some changes, and Van Caenegem argues that, during the twelfth century, there was an upsurge in individual intellect. He points out that, “in the field of evidence ... people were turning their backs on age old irrational methods”.<sup>44</sup> According to this author the various forms of trial by ordeals later came to be considered “old irrational methods” of dispute resolution.

Van der Merwe also examined the development of English law during the 12<sup>th</sup> century and expressed the view that the effectiveness of the “trial by ordeal” was distrusted and there was growing suspicion about its coherence and validity as a trial procedure used for uncovering the truth. The author also cites incidents where a party to a dispute would bribe and ‘win’ a case through a false oath during the ordeals. Moreover, this injustice was also observed in the “trial by battle” as a form of “trial by ordeal” where a party would commission and pay someone else who was originally not party to the contest to fight on his behalf.<sup>45</sup> When an outsider would be paid to be involved in a fray that was originally intended to be fought by the accused and his accuser, the trial by battle was seen to be achieving what was deemed to be an unintended effect which has also raised doubts regarding the

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<sup>41</sup> SE Van der Merwe *Die Evolusie van die Mondelinge Karakter en Uitsluitingsreels van die Engelse Gemene Bewysreg* Stellenbosch L. Rev.(1991 ) at 290 (my translation).

<sup>42</sup> Ibid.

<sup>43</sup> Ibid at 3.

<sup>44</sup> Van Caenegem in Kuttner and Ryan *Proceedings of the Second International Congress of Medieval Canon Law: Boston College 12-16 August 1963: Monumenta Juris Canonici* (1965) at 304.

<sup>45</sup> SE Van der Merwe *supra* at 292. (My translation)

existence of this trial procedure because it was prayed that God would reveal the guilty party even though wrong parties would be involved in the fray.

Thayer argues that during the 12<sup>th</sup> century there was a growing mistrust about the effectiveness and adequacy of the trial by ordeal and points out that these ordeals were overseen by the Roman Catholic priests. It was during this state of scepticism in 1215 that Pope Innocent III prohibited a priest's involvement. The author also suggests that it was this Roman Catholic's proclamation that brought the legitimacy of the whole trial procedure (trial by ordeal) into ruin.<sup>46</sup>

Langbein concurs with the above view articulated by Thayer<sup>47</sup> and argues that "the decisive prohibition of the Fourth Lateran Council in 1215, reinforced by the decretal of Honorius III in 1222, eliminated the ordeals from church practice, and effectively from secular courts as well."<sup>48</sup>

In addition, Langbein has also considered the significance and magnitude of this Catholic's proclamation on the future role and character of the ordeals and argues that the influence of the forbidding of the involvement of priests in the administering of the ordeals in state courts resulted in priests no longer providing God's intervention in settling disputes and this resulted in a jurisdictional dilemma.<sup>49</sup> The author is also of the opinion that, because this was the age where the Catholic Church was deemed to be the only point of contact between human kind and God, and the withdrawal of priests from taking part in administering the ordeals had a monumental effect on the relevance and value of the trial by ordeals.<sup>50</sup>

Langbein seems to agree with the views expressed by Caenegam that the original meaning and essence of the ordeals were gradually being abandoned, and he argues that their character and purpose was eroded and states that "the attempt to make God the fact finder for human disputes was being abandoned. Henceforth, humans were going to replace God in deciding guilt or innocence..."<sup>51</sup>

Forsyth, in addition, has also identified the changing character of the trial system and argues that it was during this period in England that oath-helpers "compurgators" were employed, and they grew famous. The primary role of the oath-helpers was seen mostly in their willingness to take an oath and declare that reliance had to be placed on the oath of one of the parties even though they were not individuals who had observed the incidents in question.<sup>52</sup> The author further explains the working of the oath-helpers and claims that the side which could gather a vast congregation of

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<sup>46</sup> James B. Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898) at 37.

<sup>47</sup> John H. Langbein *Prosecution Crimes in the Renaissance: English, Germany, and France* (1974) at 134.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> John H. Langbein *Torture and Law of Proof* (1977) at 6.

<sup>52</sup> Forsyth (translated by Morgan) *supra* at 63.

oath-helpers was deemed the “winner” of the dispute.<sup>53</sup> Now a dispute was decided by the size of the crowd that was willing to confirm whether an oath by either litigant was credible and not by prayer to God as in the trials by ordeals.

Mannheim, when describing the main attributes of English law which distinguished it from the law which was used in other countries in Europe during this era, states that:

“English law of evidence is mainly concerned with the question of admissibility, Continental law more with the question of value [weight]. English law eliminates a great deal of evidence from the very beginning, because it may mislead the jury. Continental law comparatively seldom prohibits the admission of evidence. That was originally a consequence of trial by jury...French and German judges ‘think there is no danger in their listening to evidence of hearsay, because they [French and German] can trust themselves entirely to disregard the hearsay evidence or to give it any little weight which it may seem to deserve.’ Nevertheless, this method of admitting as much evidence as possible has been retained in the Continental law...”<sup>54</sup>

The English law of evidence focused on the question of whether the evidence at issue was admissible and it identified a danger in judges listening to hearsay evidence and later being able to exclude it and or determine its admissibility.

Schwikkard, on the other hand, when examining the significance of the oath-helpers in the development of English law, also agrees with the views expressed by Forsyth and says that the number of oath-helpers was decisive in the outcome of a case and that it was not required that a case be decided on the quality of the evidence or its merits.<sup>55</sup> As has been shown these views are also in accord with those expressed by Mannheim.

### **2.2.3 The rational era**

White examined the significant input provided by the compurgators and how their role continued to shape English law, and he states that it did not take long to be comprehended that these oath-helpers were capable of providing a more substantial input into dispute settlements than anyone else. It was owing to their understanding of proceedings that their role changed from being required only to confirm which party’s oath was credible to one where they were also obligated to perform a judging role and give judgement against the litigants. White also explains the accomplishments brought by the oath-helpers into the development of English law of evidence, and he argues that as people in the community became more preoccupied with their own affairs as the inhabitants were growing. This resulted in more people not knowing the private affairs of their neighbours and the details of the contests. There was a growing need for witnesses who had observed the events to appear at the hearing and give oral testimony and the peculiarity of the jury trial system and the

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<sup>53</sup> Ibid.

<sup>54</sup> Mannheim H “*Trial by Jury in Modern Continental Criminal Law*” *Law Quarterly Rev.* (1937) at 338,388-389.

<sup>55</sup> Ibid at 4.

hearing of evidence from witnesses who themselves have perceived the events soon became the fundamental attribute of English law.<sup>56</sup>

This significant shift in the role of the compurgators resulted in the fact that their opinion in the accuracy of a litigant's oath was no longer a prerequisite for taking part in the trial but rather that people who had observed the incidents were summoned to give evidence. The origin of eye-witnesses evidence and its value in uncovering the truth seems to be found in this era of the development of English law. In addition, it became necessary that the compurgators should be unaware and uninformed about the facts in dispute prior to the hearing and that their judgements should be based on the evidence presented during the trial.<sup>57</sup>

On the other hand, it seems that this procedure was not strictly followed because at some stage the jury, which also developed during this era in England, was selected from neighbours who were more likely to be witnesses to the dispute. This aspect Langbein has called "self-informing".<sup>58</sup>

Moreover, Wigmore wrote about this role of out-of-court-witness during this era and states that, "By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here entered, very directly, the possibilities of our modern system."<sup>59</sup> This latter view seems to be in accord with those expressed by White above on the origin of witnesses who would give oral evidence in the English law of evidence.

Forkosch, seems to concur with the views expressed by White on the role of witnesses and also note the growing contrasting roles which witnesses and jurors were performing during this era. He argues that, "jurors now were assumed to enter the box with a cognitive *tabula rasa* so that facts could be writ upon their minds through, for example, the medium of witnesses giving oral testimony..."<sup>60</sup>

Furthermore, Schwikkard also argues that the principle of orality was developed by the widespread admission of verbal evidence during this era because oral testimony was becoming the main source of evidence that could resolve disputes. On the growing role of oral testimony during this era, Van der Merwe also concurs with these views expressed by Schwikkard and is of the opinion that the working of the principle of orality during the medieval era can be rooted in the "trial by battle" which afforded litigants the right to confront each other physically and, from this right, he further argued "flowed cross-examination" as the physical confrontation turned into verbal confrontation.<sup>61</sup> The admission of oral evidence is, therefore, according to Van

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<sup>56</sup> R. White "Origin and Development of Trial by Jury" *Tennessee L. Rev.* (1961) at 15.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> John H. Wigmore *A General Survey of the History of the Rules of Evidence*, in *2 Select Essays in Anglo-American Legal History* (1908) at 692.

<sup>60</sup> M.D. Forkosch "The Nature of Legal Evidence" *California L. Rev.*(1971) at 1373.

<sup>61</sup> SE Van der Merwe *supra* at 306.

der Merwe an input made by the oath-helpers (compurgators) into the common law system as “the spoken word was employed in taking the oath.”<sup>62</sup>

Moreover, Turner, when commenting on the growing need for oral evidence which was witnessed during this era, has stated that it was during the twelfth century in England that the “need to exclude hearsay was first recognised. Though the dangers of hearsay evidence were first recognised in the thirteenth century...”<sup>63</sup>

In summary, this stage of the development of the English law of evidence witnessed the beginning of the system where witnesses would give oral evidence and be required to recount the events in question and a well-thought-out judgement began to be given by the trier of fact. This oral character of these proceedings gave rise to what became the principle of orality. Furthermore, according to Schwikkard, the recognition of the principle of orality led to certain evidence, amongst others, hearsay evidence, to be considered inadmissible in certain circumstances.<sup>64</sup> This notion of excluding hearsay evidence can also be seen as the origin of the rule against hearsay.

### **2.3 Further development of hearsay evidence in England**

In the aftermath of the developments witnessed during the 12<sup>th</sup> and 13<sup>th</sup> centuries, the nature and scope of the English hearsay rule continued to develop, and the general scepticism regarding the admission of hearsay evidence remained at the core of its unfolding character.

Blackstone, when outlining the character and development of English common law and the law of evidence in 1768, argued that that its main characteristic has for a number of years been seen in the method of giving evidence in a criminal trial by witnesses. It embodied what he termed “common-law tradition” whereby common law and the adversarial trial system required that witnesses give live testimony, the inquisitorial system, on the other hand, had allowed examinations which took place in private.<sup>65</sup> As in the preceding centuries this principle of orality was not always upheld and this is evident in the 1670 decision where the court in *Lutterell v Reynell*, after one of the witnesses could not attend the trial, held that sworn statements should be admissible where it was proved that the witness became sick on his way to trial and could not be present.<sup>66</sup>

In another case that was also decided during the same period, in *Green v Gatewick*, the court also accepted that there were circumstances in which hearsay evidence could be received, and it held that evidence given by a deponent in pre-trial examinations could be utilised and also that an accused forfeited the right to

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<sup>62</sup> Ibid.

<sup>63</sup> J. W. Cecil Turner *Kenny's Outlines of Criminal Law* (1966) at 498.

<sup>64</sup> Ibid at 5.

<sup>65</sup> W. Blackstone *Commentaries on the Laws of England* (1768) at 373-374.

<sup>66</sup> *Lutterell v Reynell* (1670) 86 Eng. Rep.(K.B.) at 887-888.

question that witness if the witness's absence was caused by wrongdoing on the part of the accused.<sup>67</sup>

Stephen, on the other hand, argues that, while English common law was developing firmly on the principle of oral evidence, there were also times where it embraced components of the civil-law mode of criminal procedure. Witnesses were examined by Justices of the Peace and statements taken prior to the hearing. The court would allow these examinations to be read instead of receiving live testimony. This procedure would lead the accused to demand that the deponents appear and give live testimony, and these requests were at times turned down.<sup>68</sup>

Furthermore, Langbein describes the procedure used in taking the examinations by the Justices of the Peace (JPs) and points out that:

“the JPs would bind over the accuser to prosecute. On pain of forfeiting his bond, the accuser would be obliged to appear at gaol delivery to give evidence before the assize<sup>69</sup> judges and the two juries. The witness who lost his taste for revenge between the crime and the trial, or who was intimidated, or who was loath to make a long journey to the county town for assizes – he would now be bound to attend and give evidence.”<sup>70</sup>

The notion that verbal confrontation would take place between the adversaries as a tool to resolve disputes was gradually becoming a fundamental attribute of English common law, and, in turn, the complainant was relinquishing his claim and prerogative to seek vengeance against the accused.

This state of affairs in the common law hearsay rule was also influenced by the legislative developments which were enacted during the 16<sup>th</sup> century when Queen Mary passed a statute<sup>71</sup> which introduced new changes in the rules of evidence. Section 11 of the relevant legislation provides that “all witnesses against the defendant were to attend court to give evidence against him in person if living and within the realm.”<sup>72</sup>

Friedman examined the effect of this statutes and the English common law during 16<sup>th</sup> century and gave the opinion that:

“one of the great prides of the English was that in their system, as in those of the ancient Hebrews and Romans, witnesses against an accused gave their testimony openly, “face-to-face” with the accused. As the system developed further, it also became clear that the accused had a right to subject witnesses against him to cross-examination.”<sup>73</sup>

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<sup>67</sup> *Green v Gatewick* (1672) (K.B.), in Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1772) at 239.

<sup>68</sup> J. Stephen *History of the Criminal Law of England* (1883) at 326.

<sup>69</sup> Assizes defined ‘formerly in England and Wales the sessions of the principal court in each county [Latin *assidere* to sit aside]’ Collins English Dictionary 2015.

<sup>70</sup> John H. Langbein “*The Origin of Public Prosecutions at Common Law*” a paper presented at the 1972 meeting of the American Society for Legal History, Williamson at 322.

<sup>71</sup> Treason Act 1554, Act of the Parliament of England.

<sup>72</sup> [http://en.wikipedia.org/wiki/Treason\\_Act\\_1554](http://en.wikipedia.org/wiki/Treason_Act_1554) - last seen 6 November 2015.

<sup>73</sup> Richard D. Friedman “*The Mold That Shapes Hearsay Law*” *Fla. L. Rev.* (2014) at 436.

Hence English common law is thought to have provided not only the notion of giving live evidence in the presence of both adversaries but also cross-examination as its fundamental attribute through this legislation.

Civil-law depositions, on the other hand, could still be witnessed in some cases during this era, as this was evident in the 1603 treason trial of Sir Walter Raleigh. One Lord Cobham, and Raleigh's co-accused, had written a letter which was read into evidence during the trial and which implicated Raleigh in a plot to overthrow the English monarch. The jury allowed this letter to be read into evidence instead of oral testimony. Raleigh objected and questioned this procedure and stated that "Cobham had lied to save himself, Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour."<sup>74</sup> Raleigh also demanded that Cobham appear and give evidence in his presence. He thought this could lead to Cobham's withdrawal of the letter and argued "the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ..."<sup>75</sup> His request, however, fell on deaf ears and the judges admitted the hearsay statement, and convicted him, and he was sentenced to death.<sup>76</sup> Furthermore, this uncertainty and the unpredictability of the procedure involved in receiving hearsay evidence was also evident in the Chief Justice's remarks that the accused's right to have the witnesses against him to attend the trial and give evidence against him was not absolute.<sup>77</sup> It was, however, not clear from the Treason Act of 1554, which was the legislation regulating the admission of evidence at the time, whether this view was the original intention of the legislature. These views expressed by the Chief Justice were also questioned and doubted when one of the judges who presided over Raleigh's trial was subsequently reported to have regretted the procedure applied in admitting hearsay evidence and convicting Raleigh where he stated that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."<sup>78</sup>

Langbein, on the other hand, after he had extensively examined English common law during the time *Raleigh's State Trial* was decided, questions the rationale in admitting hearsay evidence and also thought that the admission of hearsay evidence in this case created a deceptive and fallacious authority, and he identifies other reasons for such evidence's admission where he points out that:

'*Raleigh's Case* and the other State Trials of these years can, however, be misleading precedents when the concern is to understand the criminal procedure which was ordinarily used in cases of serious crime. The State Trials were extraordinary case, touching the interests of the political authorities. They were in several respects the subject of special procedures not followed in cases of ordinary felony. ... But within common law criminal procedure, there were often significant differences between the State Trials and ordinary criminal cases. For the State Trials the judges were

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<sup>74</sup> *Trial of Sir Walter Raleigh*, (1603) reprinted in David Jardine, *Criminal Trials* (1832) at 400,420.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

handpicked. They sat under special commissions of oyer and terminer – in London, under the eyes of the political authorities. By contrast, ordinary felony was tried locally, usually before royal judges on their regular assize circuits. In most State Trials the juries were also handpicked for the particular case, and they heard only that case.<sup>79</sup>

Hence, the exact nature of the English hearsay rule during this period seems incomprehensible and imprecise.

Furthermore, Bowen also examines the admission of hearsay evidence in *Raleigh's* case and its effect on the development of English common law and concludes that this was the “shameful, unworthy, never to be forgotten treason trial.”<sup>80</sup>

As a result of Raleigh trial's hearsay evidence admission, however, courts established comparatively firm principles of unavailability of witnesses against the accused for the first time. If, however, it was shown that a witness could not attend the trial, the court would still receive evidence taken during examinations.<sup>81</sup>

In the 1666 state murder trial of Lord Thomas Morley,<sup>82</sup> the prosecution intended to read an examination taken by the coroner witnesses who were absent because they had died prior to the commencement of the trial. The judges were asked to receive hearsay evidence contained in the coroner's depositions, and, after considering English common law, the judges described the rules regarding the admission of hearsay and stated: *firstly*, that hearsay evidence in the form of examinations by the coroner would be admissible if taken under oath and the witness had since died or not been able to attend the trial; *secondly*, if the witness who had made the deposition which was taken under oath was unable to attend the trial and the judge had after considering all the facts in the matter decided that such hearsay evidence be received in evidence; and, *thirdly*, if a witness who had been questioned under oath by the coroner could not be located after a diligent search; such hearsay could be read into evidence.<sup>83</sup>

Moreover, Donaldson examines the extent and rationale of the judges' decision in *Lord Morley's Case* in outlining the admission of hearsay evidence during the 1600s and argues that the prevailing views on this point seem not to be unanimous because “there appears to have been some initial resistance to the rulings by the judiciary in *Lord Morley's Case*.”<sup>84</sup> Donaldson also suggests that the extent of these

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<sup>79</sup> John H. Langbein “*The Origins of Prosecution at Common Law*” *The American Journal of Legal History supra* at 315-316.

<sup>80</sup> Catherine D. Bowen *The Lion and the Throne: The Life and Times of Sir Edward Coke (1552-1634)* (1957) at 195-96.

<sup>81</sup> M. Hale *Pleas of the Crown* (1736) at 284.

<sup>82</sup> *Lord Morley's Case*, (1666) (House of Lords), reprinted in 6 T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the Earliest period to the Year 1783*, (1816) at 783-85.

<sup>83</sup> *Ibid* at 770-771, 776. Collins English Dictionary defines a coroner as ‘public official responsible for the investigation of violent, sudden, or suspicious deaths.’

<sup>84</sup> Tim Donaldson “*The Gradually Exploded: Confrontation vs. The Former Testimony Rule*” *St Mary's Law Journal* (2015) at 157.



disagreements amongst the judges in admitting hearsay evidence was based on the principle that hearsay evidence at times was not considered as forming part of English common law and, in other words, the admission of hearsay evidence instead of oral evidence still remained an unsettled legal principle in England's courts.<sup>85</sup>

In addition, Donaldson also noted that the court's ruling in *Lord Morley's* case "made clear that depositions were only admissible in a criminal case if a deponent was unavailable at the time of trial for some adequate reason and not merely absent."<sup>86</sup> In other words, more compelling reasons had to be shown by the prosecution before hearsay evidence could be deemed admissible.

Furthermore, as the hearsay rule developed during this period it also became an established principle that a confession made by one person could not be allowed in evidence against others, but only against him.<sup>87</sup> In *King v Westbeer*,<sup>88</sup> however, the court took a different stance. One Curteis Lulham, an accomplice in Thomas Westbeer's trial had produced a confession in writing implicating Westbeer before Lord Chief Justice Lee. The prosecutor proved that the circumstances of the death of Lulham were not related to any wrongdoing on the part of the accused and demanded to read Lulham's written deposition as testimony against the accused.<sup>89</sup> The counsel appearing on behalf of the accused opposed the reading of the deposition and made submission that such procedure was against English common law. He pointed out that:

"as the act of God which the Law says shall not work an injury to any man, had, by Lulham's death, deprived the Crown of the opportunity of producing him *viva voce*, the admitting of his deposition to be read in evidence would injure the prisoner, inasmuch as he would lose the benefit which might otherwise have arisen from cross-examination."<sup>90</sup>

The submission made on behalf of the accused was that the accused could not relinquish his prerogative to cross-examine the deceased witness because the witness's death was not caused by any wrongdoing on the part of the accused and, further, that the denial of this right could prejudice the accused.

In 1692, Henry Harrison was charged and appeared in the Old Bailey criminal courts for the murder of Dr. Andrew Clenche.<sup>91</sup> When giving evidence during the pre-trial examinations the witness said that he had witnessed two individuals running away from the scene of the crime.<sup>92</sup> These witnesses had subsequently identified Harrison

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<sup>85</sup> Ibid at 157-158.

<sup>86</sup> Ibid at 157.

<sup>87</sup> W. Hawkins *Pleas of the Crown* (1787) at 603-604.

<sup>88</sup> (1739) Eng. R.8 at 12-15.

<sup>89</sup> Ibid at para. 3.

<sup>90</sup> Ibid at para. 4.

<sup>91</sup> *Henry Harrison's Case*, (1692) Old Bailey Crim. Ct.), reprinted in 12 T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the Earliest Period to the Year 1783* (1816) at 834.

<sup>92</sup> Ibid at 852-53.

as one of the individuals they had seen at the crime scene.<sup>93</sup> When the trial started these witnesses were nowhere to be found and Harrison was suspected of wrongdoing in their disappearance because one of his friends incriminated him. Harrison, on the other hand, recanted this accusation.<sup>94</sup> Nevertheless, the judge, after considering the English hearsay rule on the unavailability of prosecution's witnesses owing to fault on the part of the accused, stated that: "That is a very ill thing, and if it be proved, it will no way conduce to Mr. Harrison's advantage."<sup>95</sup> In addition, the judge also held that the Crown prosecutor could make use of written examinations of the witness who had made an adverse statement against Harrison if the prosecution could "prove upon him that he made him keep away."<sup>96</sup>

Moreover, Wigmore, when commenting on the admission of hearsay evidence during this period, is of the opinion that, while hearsay evidence was received through depositions during the 1500s to the 1600s, there was a growing dissatisfaction regarding its effects on an accused's inability to question the deponent.<sup>97</sup>

Justice Scalia, on the other hand, when summing up the state of affairs of the development of the hearsay rule and the admission of examinations in English law during this period, notes that "one recurring question was whether the admissibility of an unavailable witness's pre-trial examination depended on whether the defendant had had an opportunity to cross-examine him."<sup>98</sup> This question is also said to have been considered and have been answered favourably in the 1695 decision in the *State Trial of The King v Paine*,<sup>99</sup> where the defendant was tried in a misdemeanour of libel. During the trial the prosecutor intended to utilise depositions that had been obtained by the Mayor of Bristol in the absence of Paine.<sup>100</sup> Paine's solicitor insisted that the depositions should not be utilised, since admitting the deposition as evidence would result in Paine forfeiting every occasion of cross-examination. In his view such depositions were not taken in accordance with English law.<sup>101</sup>

Moreover, within a short period after *Paine* trial, Sir John Fenwick was indicted for treason in Parliament (State Trial).<sup>102</sup> Meanwhile there were statutory reforms regarding the admission of hearsay evidence which also came into effect during this period and were contained in the Act for Regulateing of Tryals in Cases of Treason

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<sup>93</sup> Ibid at 853.

<sup>94</sup> Ibid at 835-36.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid at 851.

<sup>97</sup> John H. Wigmore "The History of the Hearsay Rule" *Harvard. L. Rev.* (1904) at 444.

<sup>98</sup> *Crawford v Washington* [2004] USSC 59; 541 U.S.36 at 42-56.

<sup>99</sup> *The King v Paine* (1695) 87 Eng. Rep. 584 (K.B.) 584; Mod.163, at 163-64.

<sup>100</sup> Ibid at 584-85.

<sup>101</sup> Ibid at 585.

<sup>102</sup> *Fenwick's Case*, (1696)(H.C.) ("Mr Speaker, I [Sir John Fenwick] suppose the House is not ignorant of my circumstances. I am indicted of high-treason, and have been arraigned..."), reprinted in, T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours From the Earliest Period to the Year 1783* (1816) at 538-539.

and Misprision of Treason.<sup>103</sup> This legislation made it a requirement that there should be two witnesses testifying against an accused in treason trials.<sup>104</sup> The prosecution asked that hearsay evidence which was contained in examinations taken prior to the trials be received as evidence against Fenwick.<sup>105</sup> The solicitor for Fenwick, Bartholomew Shower opposed the admission of this hearsay statement and also argued that it was one of the primary features of English law that both parties to the dispute would be present, give oral testimony and be subjected to cross-examination and that the purpose of cross-examination was the uncovering of the truth.<sup>106</sup>

In addition, in *Fenwick*, Shower also described English common law and argued that “No depositions of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him... Our constitution is that the person shall see his accuser.”<sup>107</sup> Hence the *Fenwick* case seems to have validated the standpoint that English common law required that, when examinations were taken and the accused had no opportunity to question the deponent, such examinations could not be admitted as evidence against the accused at trial.

It was as result of this decision and the law that was outlined in *Fenwick*, that Lord Chief Justice Kenyon in 1790 in *King v Eriswell*,<sup>108</sup> noted the injustice faced by an accused when hearsay evidence was received because its reliability could not be challenged or disputed, and he pointed out that:

‘Examinations upon oath ... are of no avail unless they are made in a cause or proceeding depending upon the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is *res inter alios acta*, and not to be received.’<sup>109</sup>

Wigmore, seems to concur with the views and the scope of the English hearsay rule which were expressed by legal the representative in *Ferwick’s* case in that an accused could not be convicted on the strength of hearsay evidence and was also of the opinion that such a conviction “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination.”<sup>110</sup>

Furthermore, in 1816, in the most popular statement made by Chief Justice Mansfield in the *Berkeley Peerage Case*, the Chief Justice reminded us of some fundamental attributes of the English hearsay rule when he stated that “in England,

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<sup>103</sup> Act of 1695-1696.

<sup>104</sup> Tim Donaldson *supra* at 163.

<sup>105</sup> *Ibid* at 580-624.

<sup>106</sup> *Ibid* at 592.

<sup>107</sup> *Ibid* at 592.

<sup>108</sup> [1790] Eng. R.1934 at 70.

<sup>109</sup> *Ibid*.

<sup>110</sup> John H. Wigmore *Treatise supra* at 22.

where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effects it might have upon their minds.”<sup>111</sup>

These views, expressed by the Chief Justice, about the essence of the English law of evidence at that time are also in accord with the submission made by Shower when describing English law in the *Fenwick* case where he said, “our law requires people to appear and give their testimony *viva voce* ... and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them...”<sup>112</sup>

This latter feature and scope of English common law was also evident where Bentham questioned and distrusted the hearsay rule and gave the rationale for his views in that hearsay evidence was not given under the approbation of an oath and, therefore, it was not the “best evidence” and its sincerity and trustworthiness could not be determined because it was not probed by cross-examination.<sup>113</sup>

## **2.4 Historical development of hearsay evidence in South Africa**

In 1806, the British army invaded the Cape, and the laws that were in operation were unaltered. While these laws were applied for two decades, there was growing disapproval of the system of justice including the Dutch laws that were utilised. The British government sent Commissions from England to review, improve and report on the state of affairs of the justice system. In addition, these reviews of the legal system resulted in the first Charter of Justice in 1827, which brought in a new legal framework, repealed the whole procedure used by the courts, and formed a new Supreme Court and lower courts.<sup>114</sup>

Zeffertt and Paizes examined the influence the English Commissioners’ reviews had on the South African law of evidence, and summed it up as follows:

‘In 1828 four new judges took up appointments to the Supreme Court established by the Charter. Besides their judicial duties the judges were also required to assist in the drafting of legislation and in due course they submitted to the Governor a draft Ordinance to declare and amend the law of evidence. This measure was promulgated as Ordinance 72 of 1830. Although now repealed, the Cape Evidence Ordinance is important for two reasons. First, because it was still largely in force for civil proceedings in the Cape Province on 30 May 1961. Consequently, when section 42 of the Civil Proceedings Evidence Act 25 of 1965 says that a court shall apply the law in force on that date; this meant, for the former Cape Province, the Ordinance of 1830. Second, the Cape Ordinance formed the model on which virtually all subsequent South African legislation on the subject has been moulded. Most of its sections were reproduced in the Evidence Proclamations issued for the Transvaal and Orange River Colony after the annexation in 1902. The provisions applicable to criminal proceedings were taken over more or less intact by the Criminal Procedure and Evidence Act 31 of 1917 and its successors, the Criminal Procedure Act 56 of 1955 and the Criminal Procedure Act

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<sup>111</sup> 4 Camp. 401,415,171 Eng. Rep.(H.L.1811) at128,135.

<sup>112</sup> Ibid at 592.

<sup>113</sup> Jeremy Bentham *The Works of Jeremy Bentham* (1843) at 500.

<sup>114</sup> DT Zeffertt and AP Paizes *The South African Law of Evidence* (formerly Hoffmann and Zeffertt) *supra* at 5.

51 of 1977. A number of the sections applicable to civil proceedings are reproduced in the Civil Proceedings Evidence Act 25 of 1965. It follows that a good deal of fairly recent legislation can be understood only if it is remembered that it contains provisions that were originally intended to reflect the law of England 150 years ago.<sup>115</sup>

These unfolding events seem to attest to a process in which the English law of evidence was enacted into the South African legal system. This fact is also evident in section 44 of the Cape Evidence Ordinance of 1830 which read that “No evidence which is in the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in any of His Majesty’s Courts of Record at Westminster.” In other words, the admissibility of all hearsay evidence was to be tested on the framework and scope of English hearsay law.

Zeffertt and Paizes, when commenting on the influence of English common law on the hearsay rule in South African law during this period, also expressed the opinion that the scope of the hearsay exceptions were a fundamental factor of this rule since the courts could no longer create new exceptions.<sup>116</sup> In addition, Zeffertt and Paizes commented on the numerous definitions of hearsay evidence that were in force under English common law and the exclusionary rule, and they noted that the rule for keeping out hearsay was not adaptable, and this led to a host of hearsay definitions. There were, however, identified parameters of hearsay exceptions and hearsay found not to be within that scope could not be received.<sup>117</sup> Hence, it seems that these dissimilar, and at times contrasting, definitions of English hearsay evidence have also added to what was already a legal dilemma in the reception and adaptability of English hearsay evidence into South African law.

Maguire, when commenting on the numerous common law definitions which existed under English common law and which at times were infinite and inconsistent, concludes that the hearsay law was in a state of what he termed an “unintelligible thicket”.<sup>118</sup>

Paizes, when commenting on the influence and importance of the plethora of these contrasting common law hearsay definitions, said that these definitions had not done much to resolve the bewilderment besieging the meaning of hearsay.<sup>119</sup>

Furthermore, these diverse, and at times inconsistent, common law definitions of hearsay evidence also turned out to be incapable of determining whether evidence obtained through market-research surveys was hearsay or not. The Witwatersrand Local Division in 1975 held that evidence in the form of market-research surveys was

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<sup>115</sup> Ibid at 6

<sup>116</sup> Ibid at 386.

<sup>117</sup> Ibid.

<sup>118</sup> John M Maguire “*The Hearsay System: Around and Through the Thicket*” *Vanderbilt L. Rev.* (1961) at 741.

<sup>119</sup> AP Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Assertions*” *supra* at 95.

not hearsay and was admissible.<sup>120</sup> In reaching this decision, Coetzee J reasoned that he was indisposed to exclude scientific, vital and useful evidence that provided a solution to a tantalizing real dispute. Coetzee J concluded that, after cautious consideration of all the circumstances surrounding the process used to obtain the evidence through interviewers who completed “structured questionnaires”, the evidence did not fall within the field of reference of the hearsay rule.<sup>121</sup>

On the other hand, in 1980, in *Die Bergkelder v Delheim Wines (Pty) Ltd*,<sup>122</sup> the Cape Provincial Division held that such evidence was hearsay and was not admissible.

Commenting on the conflicting reasoning of the judges in identifying hearsay evidence in these two decisions, Paizes argued that, in *Rusmarc* Coetzee J made reliance upon the truth in the contents of the surveys and made use of the assertion-oriented definition, and Van Heerden J in *Die Bergkelder*, on the other hand, identified the nature of the evidence embodied in the surveys and held that it enclosed fundamental attributes of hearsay because it could not be tested through the cross-examination of the original declarant and so concluded that the market-survey polls evidence was hearsay.<sup>123</sup>

Moreover, these two classes of hearsay definitions, described by Paizes in latter cases, seem to be in accord with Park’s views of hearsay definitions and the hearsay rule. In addition, Park, when probing these classes of hearsay definitions, terms it the “declarant-oriented definitions” which requires trust be placed on the use of the spoken words or deeds in establishing the absent actors’ reliability. The second type of hearsay definition Parks calls the “assertion-oriented definitions” which requires dependency to be placed on whether statement made by the absent actor was utilised to establish the truth of its contents.<sup>124</sup> Hence, the differences between these two definitions of hearsay is that the “declarant-oriented definitions” classify as hearsay any conduct or spoken words if such conduct or spoken words would be used and depended upon in establishing the absent declarant’s reliability. While the “assertion-oriented definitions” are aimed at looking at what purpose the statement made by the absent declarant was given to establish.

Zeffertt and Paizes identify the fundamental attributes of these hearsay definitions and describe what could be the shortcomings and weaknesses embodied in these definitions. They argue that the declarant-oriented definition was abstractly preferred to its assertion-oriented equivalent, and they state that “it [declarant-oriented definition] brands as hearsay all evidence that is latently unreliable and susceptible to the so-called “hearsay dangers” of insincerity and defective memory, perceptive

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<sup>120</sup> *Rusmarc (SA) (Pty) Ltd v Hemdon Enterprises (Pty) Ltd* 1975 (4) SA 626 (W).

<sup>121</sup> *Ibid* at 630-631.

<sup>122</sup> 1980 (3) SA 1171 (C) at 1182.

<sup>123</sup> AP Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Assertions*” *supra* at 86.

<sup>124</sup> Roger C. Park “*McCormick on Evidence and the Concept of Hearsay: A Critical Analyses Followed by Suggestions to Law Teachers*” *Minnesota L. Rev.* (1981) at 423.

powers and narrative capacity.”<sup>125</sup> The declarant-oriented definition utilises the reliability test in identifying hearsay evidence.

The decision in *Vulcan Rubber Works (Pty) Ltd v SAR & H*, has exhibited the latent defects and infirmities embodied in the hearsay rule and in the exercise of its exceptions as the court found certain evidence to have fallen under the definition of hearsay but it was not covered by the well-known hearsay exceptions and, therefore, had to be excluded. Furthermore, the court’s task was to determine whether it should continue to extend and develop the hearsay rule to include matters that were not originally defined and provided for in the hearsay rule and its exceptions when it was received from England. The court decided that it was not its task to create new exceptions to the hearsay rule but that the legislature should be tasked with such a function.<sup>126</sup>

Furthermore, in *Vulcan Rubber Works*<sup>127</sup> the court, when developing South African hearsay law, has further validated the assertion-oriented definition of hearsay evidence as part of South African law. These latter views, expressed by the court in *Vulcan Rubber Works*, were also aligned with the 1924 court’s decision in *Estate De Wet v De Wet*<sup>128</sup> where hearsay was defined as “evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement.”

The South African court in 1939 had once again an opportunity to define and develop hearsay evidence in *R v Miller and another*,<sup>129</sup> and Watermeyer JA elaborated and detailed what he had earlier stated in defining hearsay evidence in *Estate De Wet* in 1924. He relied on the assertion-oriented definition of hearsay in developing our hearsay evidence and defined hearsay as evidence given by a person who was called to testify in court which was not given by the declarant during the court’s proceedings and the objective of which must be to establish the accuracy of what is stated. The court also held that, if such out-of-court statement is given to establish not the accuracy of what it states but is of contingent and inferential value, then it is not hearsay and is admissible.<sup>130</sup>

Moreover, this definition of hearsay was also applied by the court in *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd*, where it was held that the “rumours” that were spread were admissible testimony because “the truth of the rumours” was not at issue but the fact that these “rumours” were spread.<sup>131</sup>

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<sup>125</sup> Ibid at 387.

<sup>126</sup> 1958 (2) SA 285 (A) at 296.

<sup>127</sup> Ibid.

<sup>128</sup> 1924 CPD 341 at 343.

<sup>129</sup> 1939 AD 106 at 119.

<sup>130</sup> Ibid.

<sup>131</sup> 1953 (3) SA 343 (W) at 345.

In addition, Zeffertt and Paizes examined the influence of the adoption of the assertion-oriented definition into our law and state that our law was disentangled from the hearsay rule's complex definitions of hearsay and soon a "tension arose between the meaning of hearsay and the rationale underlying its exclusion."<sup>132</sup> According to the authors, the assertion-oriented definition of hearsay formulated by our courts came at a price that would disqualify certain evidence that would have been admitted under the old hearsay rule.

On the other hand, the significance of the 1964 decision of *S v Van Niekerk*,<sup>133</sup> in developing our hearsay rule lies in the fact that the court's standpoint on the definition of hearsay shifted and it held that implied assertions were also part of South Africa's hearsay rule. This latter decision by the court has also created some scepticism and perplexity on the essence and efficiency of English common law which was gradually becoming unintelligible, illogical and incoherent even after its adoption into South African law.

Furthermore, Zeffertt and Paizes<sup>134</sup> also identified another rationale why the 1837 English decision in *Wright v Doe d Tatham*, which had applied the implied assertion definition of hearsay, was still binding in South African courts prior to 30 May 1961. They added that it was because, up to this date, South Africa was a British territory and England's laws were considered to be the laws governing such foreign territories.<sup>135</sup> Schmidt<sup>136</sup> seems to concur with the views expressed by Zeffertt and Paizes on the status of England's common law in South African law during the period leading to 1961, and he adds that the prohibition of implied assertions was not part of South African law and was not well-founded on reasons of rules. In addition, in *Kroon v J L Clarke Cotton Co (Pty) Ltd*,<sup>137</sup> Smalberger J analysed the use of implied assertions and acknowledged that implied assertions did form part of our hearsay rule.

Moreover, Smalberger J also made reference to *Estate De Wet* when outlining the differences between implied assertions and the assertion-oriented definition of hearsay. In terms of the judgement of Smalberger J in *Kroon*, however, hearsay

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<sup>132</sup> Ibid at 387.

<sup>133</sup> 1964 (1) SA 729 (C) at 734.

<sup>134</sup> Ibid at 388.

<sup>135</sup> Ibid. See also article: "Union of South Africa ceases to exist, 30 May 1961, in March 1961, at a Conference of Commonwealth Prime Ministers held in London, the South African Prime Minister, H.F. Verwoerd formally announced that South Africa was changing from a Constitutional Monarchy to a republic. Subsequently, the Union of South Africa, which was established in 1910 by the British government under the premiership of Louis Botha, ceased to exist at midnight on 30 May 1961. The Union left the British Commonwealth to become the Republic of South Africa under the leadership of Verwoerd. The country criticised for its apartheid policies by members of the Commonwealth." – <http://www.sahistory.org.za/dated-event/union-south-africa-officially-ceases-exist> - seen on 16 July 2015.

<sup>136</sup> CHW Schmidt *Bewysreg* (1982) at 453-5.

<sup>137</sup> 1983 (2) SA 197 (E) at 206d-h.



evidence was not defined as “evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement”<sup>138</sup> as was the case in *Estate De Wet*, but in the *Kroon* case the court had to infer from certain unexpressed conducts of the representative of Teflan’s manufacturer, Bennie, which in the court’s view amounted to the “implied assertion that Teflan did not work.”<sup>139</sup>

A closer look at the 1837 decision of *Wright v d Tatham*,<sup>140</sup> might be warranted because it still remained part of South African law during the period leading to 1961. In this case the court had to determine whether one, Marsden, the testator, had the necessary testamentary ability when drafting his will. Three letters written on different occasions by three individuals who had known the testator were handed in as evidence with the objective of proving that Marsden had the necessary testamentary capacity as the language used by these individuals in communicating with him showed that he was of sound mind. It was inferred by the court that the writers of these letters had communicated with Marsden in a language they would have used with someone who had reasonable testamentary capacity and in this reasoning the implied-assertion hearsay definition was used. Hoffmann, on the other hand, has examined the court’s reasoning in *Wright’s* case and has argued that what was common between this case and *Van Niekerk’s* case above was that “they all involve implied assertions about what the maker of the statement himself has done or not done.”<sup>141</sup> Hence the hearsay statement in question was not expressly stated but some non-verbal conduct was held to be amounting to hearsay statements.

Paizes has examined these letters in the *Wright* case, and he seems to concur with the views expressed by the court in these letters which were interconnected to the issue and written in speech suitable for correspondence with a person having a sensible intellect and judgement. He adds that these letters were presented, not to establish the truth of any part of their stated subject matter, but to prove reliance on the part of the author that Marsden had satisfactory intelligence, and consequently that he did as a matter of fact possess such intelligence.<sup>142</sup> This definition of hearsay was also different from those cited earlier in that in this instance the hearsay at issue was unspoken but inferred from certain circumstances.

Furthermore, Morgan has also analysed the court’s decision of *Wright* and expressed a divergent view as to whether the evidence in question was hearsay or not, and he argues that the case entailed opinion evidence and not merely hearsay. He also adds that the testator’s attestation was implied from the three letters

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<sup>138</sup> Ibid at 343.

<sup>139</sup> Ibid.

<sup>140</sup> (1837) 7 Ad & El 313.

<sup>141</sup> L.C. Hoffmann “*Implied Assertions as Hearsay*” SALJ 144 (1964) at 152.

<sup>142</sup> Ibid at 203-204.

addressed to Marsden in which all three writers entertained the opinion that Marsden was of sound mind which could have been indicative of his mental capability.<sup>143</sup>

Hoffmann, on the other hand, also examined the effect of the *Van Niekerk* decision in South African law and argues that “the Court found itself exploring that twilight zone of the rule against hearsay in which a statement is tendered to prove a fact which the maker did not expressly assert, but which may be inferred from what he said.”<sup>144</sup>

In 1982, Lansdowne and Campbell,<sup>145</sup> when commenting on the dilemma and quandary facing South African hearsay rule which had become contradictory, inconsistent and unclear, argued that, “As the authorities now stand, ... it cannot be stated with any confidence whether the rule against hearsay does not apply to conduct not intended to be assertive, or whether it does apply and is received in certain cases, such as to show relationship, under an exception to the rule.”

## 2.5 Conclusion

English common law has recognised a notion where an aggrieved party has a right to seek vengeance. During one of the trials by ordeals which were established to settle disputes, the litigants would engage in physical force to settle their disputes. In addition, over time, the wronged party has relinquished his right to seek vengeance and has entrusted the governing authority to punish the infraction he has suffered. Moreover, it was also during this period that the accused was given a right to verbal confrontation with his accuser, and this right, has developed into what later became the right to cross-examination. The hearsay rule also developed alongside this common law right of cross-examination and one of the fundamental attributes of English common law was that it gave preference to oral testimony during the proceedings where both parties would give their testimony and be subjected to cross-examination by the adversary in the presence of the trier of fact.

Over time English common law was received in South Africa, and its main sources were English court’s decisions and textbooks written by various authors. These court’s cases and views of writers were divergent both on the scope and substance of the hearsay rule and in defining hearsay evidence. In addition, these divergent views have also caused confusion, mystification and uncertainty, which, at the same time, have contributed to making South Africa’s hearsay rule to be incompressible and incoherent. It was not long before that the South African courts and academics, when interpreting and making use of this bewildering state of English law, found themselves also developing an incomprehensible and incoherent South African jurisprudence in the area of hearsay rule.

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<sup>143</sup> Edmund Morgan “*Hearsay Dangers and the Application of the Hearsay Concept*” *Harvard L. Rev.* (1948) at 207-212.

<sup>144</sup> *Ibid* at 151.

<sup>145</sup> Alfred V. Lansdowne and Jean Campbell *South African Criminal Law and Procedure* (1982) at 817.

Consequently, it became inevitable that the South African legislature would resolutely undertake some statutory reforms which would codify and improve the hearsay rule. The Law of Evidence Amendment Act 45 of 1988 was the result of these statutory reforms of the hearsay rule. Hence, in the succeeding chapter, these statutory reforms on the law of evidence will be examined.

## CHAPTER 3 – EXAMINING THE ADMISSIBILITY OF HEARSAY EVIDENCE UNDER THE REFORMS INTRODUCED BY THE LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988

### 3.1 Introduction

The objective of the study in this chapter is to examine whether the reforms introduced by Section 3 of the Law of Evidence Amendment Act 45 of 1988 have succeeded in making the hearsay rule more comprehensible, coherent and intelligible. This necessitates an investigation into the definition of hearsay evidence, the purpose of the Act, and whether section 3 of the Act formed a discretion or not. In addition, the various factors provided in the Act which should be considered when determining whether hearsay evidence should be admissible will also be examined.

In 1983, Paizes<sup>146</sup> embarked on a comprehensive survey of South African hearsay law and was moved to state that for a long period, there had been a growing need to reform the common law hearsay rule by legislation. He argued that the debate advocating reforms went back to 1898 when Thayer also identified the need for these reforms and argued that it would “restate the law so as to make what we call hearsay rule the exception, and make our main rule this, namely, that whatever is relevant is admissible”.<sup>147</sup> Paizes was also of the opinion that this assertions made by Thayer in 1898 were prophetic and of a prognostic nature and that the need for reform had reached a turning point.<sup>148</sup> As was discussed in the preceding chapter, the justification for legislative reforms in South Africa’s hearsay evidence was founded on the fact that this law had become incoherent and incomprehensible after it had been received from England and subsequent to its adoption into South African law.

In 1986 the South African Law Reform Commission launched an investigation into the circumstances surrounding hearsay evidence with the objective of reforming, developing, improving our hearsay evidence law through a Project 6 Review of the Law of Evidence. The closing date for submissions in the consultation paper was 30 May 1986.<sup>149</sup>

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<sup>146</sup> AP Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions*” *supra* at 447.

<sup>147</sup> James Bradley Thayer *Preliminary Treatise on Evidence at the Common Law* (1898) at 522.

<sup>148</sup> *Ibid.*

<sup>149</sup> South African Law Commission *Report on the Review of the Law of Evidence, Project 6* (1986) at page (ii).

In addition, Paizes, when outlining the required hearsay evidence legislative reforms, formed a view which was also endorsed by the Law Commission in its review, in detailing the approach which should be used to establish the admissibility of hearsay in the following terms:

“DRAFT PROPOSAL FOR HEARSAY REFORMS

Section 2 – Admissibility

- (a) Subject to the provisions contained in this or any other law, hearsay evidence is inadmissible unless:
  - (i) Its probative value exceeds the disadvantages caused by its reception;
  - (ii) Its reception is in the interests of justice; and
  - (iii) The maker is unavailable to be called as a witness.”<sup>150</sup>

Moreover, the South African Law Commission, after careful analysis of this draft proposal, approved and incorporated it into its recommendations for reforms and reported that:

“3(1) Hearsay evidence should not be admissible unless-

- (a) the accused or party against whom that evidence was to be adduced agreed to its admission;
- (b) the person upon whose credibility the probative value of that evidence depended himself testifies at the proceedings;
- (c) the court when considering certain factors is of the opinion that such evidence be admitted in the interests of justice.”<sup>151</sup>

The impact of Paizes’ recommendations detailing the reforms to hearsay evidence was very evident in the Law Commission’s recommendations to the legislature which was proposing reforms to the hearsay rule. Furthermore, it was thought that these recommendations were also very comprehensible, regarding the tests to be used for the admissibility of hearsay, viz. the party against whom this evidence was adduced could give consent, or the person who bore the reliability of this evidence could testify. For the first time judicial discretion was statutorily legislated with specific enumerated factors.<sup>152</sup>

It was as a result of the Law Commission’s recommendations that the Law of Evidence Amendment Act 45 of 1988 was adopted by the South African legislature. It came into effect on 3 October 1988. A closer look at section 3 of the Act attests to the influence of these recommendations. It reads:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
  - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

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<sup>150</sup> Ibid at 470-471.

<sup>151</sup> Ibid at 48.

<sup>152</sup> Ibid.

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to –
  - (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail; and
  - (vii) any other factor which should in the opinion of the court be taken into account-

is of the opinion that such evidence should be admitted in the interests of justice.

- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection(1) or is admitted by the court in terms of paragraph (c) of that subsection.
- (4) For the purposes of this section – “hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; “party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

What will now follow is a probe into the various facets which have relevance in this Act and its implementation.

### **3.2 The purpose of section 3 of the 1988 Act**

When commenting on the purpose of the Act, Schwikkard gave the opinion that section 3 of the Act was intended to develop, enhance and reform the inflexibility and inelasticity of the common law hearsay rule because “no matter how relevant, hearsay evidence at common law could only be admitted if it fell within closed list of exceptions.”<sup>153</sup>

Paizes, seems to concur with Schwikkard and also argued that section 3 of the Act has reconstructed hearsay evidence and the unreasonableness of the hearsay rule and its exception. He also argued that the rule created by this Act amounts to the intelligibility and comprehensibility of South African hearsay evidence.<sup>154</sup>

Furthermore, the court in *Makhathini v Road Accident Fund*,<sup>155</sup> when construing the provisions of the Act stated that, “the purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception.”

<sup>153</sup> PJ Schwikkard “*The Challenge of Hearsay*” SALJ (2003) at 63.

<sup>154</sup> AP Paizes in Du Toit *et al The Commentary to the Criminal Procedure Act*, [2012] at ch24-p45.

<sup>155</sup> 2002 (1) SA 511 (SCA) at para. 27.

The court in *Metedad v National Employers' General Insurance Co Ltd*,<sup>156</sup> also described the purpose of the Act and stated that it allows the admission of hearsay evidence in conditions where strict common law hearsay rule would not have allowed and that it also provides for the admission of reliable hearsay statements.

The Supreme Court of Appeal, in *S v Ndlovu*,<sup>157</sup> also echoed the same sentiments as in *Metedad*, where Cameron JA stated that the Act formed a structure which replaced the strict, unpliant and unadaptable common hearsay rule.

In addition, Schwikkard and Van der Merwe claimed that the Act, as part of its objective, has removed and weakened the inflexibility and inevitability of the common law.<sup>158</sup> In other words, the above views of the courts and some academics seem to be that the Act has improved the framework governing the admission of hearsay evidence.

Rall, on the other hand, questions and disputes these above endorsements of section 3 and concludes that this is a statute which provides an “unintelligible objective”. He adds that:

“The intention of the Legislature in enacting the above two sections [sections 3 and 9 of the Law of Evidence Amendment Act 45 of 1988] appears to be clear. However, a careful examination shows that it is by no means clear that the sections achieve their objective”<sup>159</sup>

In other words, Rall's views are that the Act is incomprehensible, incoherent and meaningless and, therefore, incapable of developing and reconstructing our hearsay rule. By implication, Rall's views suggest that the standpoints endorsed by Paizes, Schwikkard and Van der Merwe on the objectives of the Act which were expressed above are ill-advised, ill-considered and misguided.

### **3.2.1 Definition of hearsay evidence**

Paizes, in his thesis, also surveyed different common law hearsay definitions which have been advanced by academics, and he commented on the attributes of a definition that would be suitable for South African hearsay evidence taking into account its common law heritage. He stated that the definition of the envisaged hearsay reform should provide a practical model that would empower courts in applying its discretion.<sup>160</sup> In other words, he envisioned a new definition which would include and empower a notion of judicial discretion to admit hearsay evidence.

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<sup>156</sup> 1992 (1) SA 494 (W) at 498i-499g.

<sup>157</sup> 2002 (2) SACR 325 (SCA) at para.15.

<sup>158</sup> PJ Schwikkard and SE Van der Merwe *et al Principles of Evidence* (2009) at 284.

<sup>159</sup> Adrian Rall “*The New Hearsay Rules*” (1990) *Consultus* 53 at 53.

<sup>160</sup> *Ibid* at 135.

In addition, Paizes also elaborated on the envisaged proposed definition of hearsay and stated that:

“hearsay evidence means any evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests in part or in whole on the veracity and competence of some other person, hereinafter referred to as the ‘maker’”.<sup>161</sup>

The new definition of hearsay evidence as it later appeared in section 3(4) of the Act seems, however, not to contain a similar text containing the elements which formed part of Paizes’ reform proposals because it states that “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.”

Moreover, Van der Merwe and De Vos<sup>162</sup> examined this definition and wrote that the determining question which forms the fundamental attribute of this definition is now whether the probative value of such evidence depends upon that person’s credibility. In addition, the authors also noted that the assertion-oriented approach which focused on whether the statements depended “upon the purpose for which they are tendered as evidence”<sup>163</sup> has been abandoned and replaced with the declarant-oriented approach which “focuses on whether the use of the act or utterance requires reliance to be placed on the credibility of the out-of-court declarant”.<sup>164</sup> In other words, the assertion-oriented definition has been abandoned, and, in its place, the implied oriented definition was adopted. Schwikkard and Van der Merwe, when commenting elsewhere seem to concur with these views expressed by Van der Merwe and De Vos and also state that the initial phase when making use of this definition is to establish “what the probative value of the evidence is”.<sup>165</sup>

Zeffertt, has described this definition as being distinguished from the common law definition, and he also seem to concur with these views expressed by Van der Merwe, Schwikkard and De Vos. He also argues that the new definition does not require that, in order for a hearsay statement to be received as evidence, it should be given with the aim of establishing the accuracy or truthfulness of what it contained. The Act now focuses on the probative value of the hearsay statement in order to establish whether such statement is hearsay.<sup>166</sup>

The court in *Mdani v Allianz Insurance Ltd*, however, did not approve of Zeffertt’s interpretation and application of the definition when establishing whether a certain statement was hearsay or not. Van Heerden JA reasoned as follows when he

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<sup>161</sup> Ibid at 471.

<sup>162</sup> SE Van der Merwe and W le R de Vos “*Hoorse: Verlede, Hede en ‘n Handves*” *Stell L. Rev.* (1993) at 11. (my translation).

<sup>163</sup> *R v Miller* 1939 AD 106 at 119.

<sup>164</sup> Zeffertt and Paizes *The South African Law of Evidence supra* at 387.

<sup>165</sup> PJ Schwikkard and Van der Merwe *et al Principles of Evidence supra* at 275.

<sup>166</sup> L H Hoffmann and D T Zeffertt *The South African Law of Evidence* (1988) at 127.



concluded that, relying on Zeffertt's views regarding the hearsay definition and its test in determining whether a statement was hearsay, could be flawed:

'There the authors deal with the effect of section 3(4) of the Act. That subsection defines 'hearsay evidence' as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving evidence'. According to the authors the words 'depend upon' should be given the meaning of 'to rest primarily upon' or 'to be governed by'. ... the authors appear to be of the view that the probative value of hearsay evidence given by a witness depends primarily upon the credibility of that witness, and that, having regard to the definition of 'hearsay evidence' in section 3(4), evidence given by a witness as to extra-judicial admissions by another person therefore cannot be admitted under section 3(1). Apart from the fact that on this view section 3(1)(c) would have little, if any, practical significance, there is a basic flaw in the authors' reasoning. I say so because in my view the passage confuses two different questions, i.e. whether an extra-curial admission was made and whether its content is true.'<sup>167</sup>

Of equal concern, is that the above reasoning by Van Heerden JA in *Mdani* was criticised by Schwikkard where she argued that the court's reasoning in *Mdani* was incorrect and deceptive because it considered certain phrases or words not in the context of the whole Act and could not be supported by a wording of the Act and especially the words "its probative value would depends upon".<sup>168</sup> In other words, Schwikkard's approves of Zeffertt's application of the hearsay definition.

Rall, on the other hand, also examined the definition of hearsay in section 3(4) of the Act and questions the views which suggest that it was coherent and comprehensible, and he argues that it was inconsistent and contradictory and incapable of enhancing, ameliorating and developing South African hearsay law. He also explained the premise for his conclusion in the following terms:

'The new definition is meaningless. In order to analyse the definition, the use of traditional hearsay statements is helpful. A witness (W) states 'D (a non-witness declarant) said: "I saw the accused shooting the deceased".' The evidence in question is the evidence of W, i.e. what is said in court, and not the statement by D. To this extent the new definition is similar to the old one which was 'evidence of statements made by [an out-of-court declarant]'. Under the old rule, if W's evidence was tendered to prove:

- (a) that the accused shot the deceased it was inadmissible (true hearsay evidence); but if tendered to prove:
- (b) that D uttered the words in question, it was admissible (not being hearsay at all).'<sup>169</sup>

Rall went further by putting forward what he considered to be an uncomplicated, coherent and unambiguous definition of hearsay evidence because, he argued, the Act has already given wide discretion in section 3(1)(c) to admit hearsay and the definition should include components of both types of definitions, viz. declarant and assertion-oriented. In addition, according to Rall, the much-needed hearsay definition which was required during this legislative reform process had to affirm these types of definitions and, therefore, it should states that, "Any evidence of any

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<sup>167</sup> 1991 (1) SA 184 (A) at 189e-i.

<sup>168</sup> P J Schwikkard "Extra-Curial Statements and the Definition of Hearsay" SALJ (1991) at 412.

<sup>169</sup> Ibid at 54.

statement, including statements by conduct made outside the proceedings in question by someone other than a witness or party in the proceedings.”<sup>170</sup> This definition would also be coherent and intelligible, Rall argued, correctly, it is submitted, because it would take into account not only oral or written statements but would also merge this type of hearsay with implied assertions.<sup>171</sup>

Schmidt, on the other hand, has compared the common law definition contained in *Estate De Wet v De Wet*<sup>172</sup> with the new definition provided by section 3(4) of the Act and argues that the new definition “is a very wide definition – so wide that it would have been unacceptable if the inflexible common law admissibility rules had still applied.”<sup>173</sup> In other words, Schmidt’s views are that common law would not have permitted such a broad and open definition.

Recently, in 2015, the definition of hearsay evidence provided by the Act also came under the spotlight in the Supreme Court of Appeal when a submission was made on behalf of the applicants that a certain report compiled by the Public Protector was hearsay and should not be admissible because it was used to prove the truth of the subject matter in the respondent’s application.<sup>174</sup> In dismissing this argument the Supreme Court of Appeal stated that:

‘The Public Protector’s Report is not hearsay. The Public Protector has confirmed the content of the Report under oath. If it was ever hearsay, it no longer is. That does not mean that a court must accept the truth of the Public Protector’s finding.’<sup>175</sup>

Hence the court’s view was that the report was no longer a hearsay statement after the truthfulness of what it stated had been verified under oath in writing. The question can still be asked: Is this definition of hearsay evidence in the Act clear, comprehensible and precise? If the answer is in affirmative, why then does this “confusion” amongst lawyers when interpreting this definition in 2015 still exist? This state of affairs seems to be indicative of the quandary in the interpretation and application of this definition which was already identified by Rall in 1990. It is submitted that the above state of disenchantment and uncertainty might also be indicative of the fact that the 1988 Act did not resolve and satisfactorily improve some difficulties and rigidity contained in the common law hearsay rule and its exceptions which had also been experienced before this statutory reforms.

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> 1924 CPD 341 at 343: “evidence of statements made by persons not called as witnesses which are tendered to prove the truth of what is contained in the statement.”

<sup>173</sup> CHW Schmidt and H Rademeyer *Law of Evidence* (2003) at 18-6.

<sup>174</sup> *The South African Broadcasting Corporation and others v Democratic Alliance and others* (393/2015) [2015] ZASCA 156 (8 October 2015) at para. 66.

<sup>175</sup> Ibid at para. 66.2.

### 3.2.2 Does section 3 create a rule or discretion?

In 1983, Paizes, in his thesis<sup>176</sup> when making recommendations about the nature and scope of the required legislative reforms into South African hearsay evidence's dilemma, argued that the reforms should "liberate hearsay from its traditional maze of exceptions" and added that a "judicial discretion" would be an answer. When elaborating on the scope of such discretion, Paizes added that "a court should have the discretion to admit or exclude hearsay, depending on the extent to which the values of the adversary trial procedure are prejudiced by its reception."<sup>177</sup>

The 1986 South African Law Reform Commission report, as has been shown above, has incorporated these latter views in its recommendations for reforms.<sup>178</sup>

The legislature, on the other hand, when enacting this Act and adopting these recommended hearsay reforms, fell short of openly and distinctly specifying whether this Act provides a judicial discretion and indicating that the determination of the factors provided for establishing the admissibility of hearsay includes a discretion. As a result this facet of section 3 of the Act has caused intense debates involving contrasting standpoints amongst academics and the courts on the existence of discretion in this Act.

Spindle, has examined the application and scope of a discretion in common law courts over the centuries and argues that:

"Judicial discretion is not to be exercised at the arbitrary will of the judge; not invoked maliciously, wantonly or arbitrarily or against logic and the effects of facts; not applied against reasonable, probable and actual deductions; not employed to defeat the ends of justice."<sup>179</sup>

The 1839 edition of the Bouvier's Law Dictionary throws some light on the application of a common law judicial discretion and states that:-

"The discretion of a judge is said to be the law of tyrants, it is always unknown, it is different in different men, it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice, in the worst, it is very vice, folly and passion, to which human nature is liable."<sup>180</sup>

In addition, the 1891 English decision in *Sharp v Wakefield*, described common law discretion as "when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason or justice, not according to private opinion, according to the law and not humour."<sup>181</sup> One of the

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<sup>176</sup> AP Paizes "The Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions" *supra* at 463.

<sup>177</sup> AP Paizes thesis *supra* at 114-115.

<sup>178</sup> See South African Law Reform Commission *supra* at 41-45.

<sup>179</sup> Richard B. Spindle "Judicial Discretion in Common Law Courts" *Washington & Lee Law Rev.* (2012) at 144.

<sup>180</sup> Bouvier's Law Dictionary (1839).

<sup>181</sup> *Sharp v Wakefield* (1891), 64 L.T. Rep.180, Ap.Ca.173.

primary attributes of English common law judicial discretion seems to be that it cannot include private beliefs or convictions of the judge but should be based solely on legal principles. Hence, this common law feature of a discretion stands in sharp contrasts to the wording of section 3(1)(c) in paragraph (vii) which provides that:

“hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – the court, having regard to any other factor which should in opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

The court is permitted to take into account its own private opinions when applying this provision which amounts to rewriting and redefining the scope of the hearsay law when establishing whether it could in the interests of justice to admit the evidence. Moreover, what can be noted from the above English common law decision is that the common law notion of discretion excluded the use of private opinions in its application.

How do South African courts construe these provisions? Does this Act provide a rule or discretion? Since this Act’s commencement there have been divergent views given by our courts on whether section 3 contained a discretion to admit hearsay evidence or not. The following cases present a random sample where these views are evident:

The Transvaal Provincial Division in *Hewan v Kourie NO and another*<sup>182</sup> examined the intention of the legislature in enacting section 3 of the Act and held that the Act has created a discretion to admit hearsay evidence. During the same year, 1993, the Appellate Division, in *S v Ndlovu*,<sup>183</sup> also concluded that section 3 of the Act has created a discretion to admit hearsay evidence. These views by the Appellate Division were also reached in its 1991 decision in *Mdani v Allianz Insurance Ltd.*<sup>184</sup>

These were also the views shared by the Eastern Cape Division in *S v Cekiso and another*,<sup>185</sup> where it was held that the Act has created a discretion. Furthermore, in *Hlongwane and others v Rector, St Francis College and others*,<sup>186</sup> the Durban and Coastal Division also examined section 3 of the Act and its purpose and held that it has given a court a discretion to be exercised when admitting hearsay evidence after weighing the enumerated factors.

In addition, the Cape Provincial Division in *Mnyama v Gxalaba and another*,<sup>187</sup> when commenting on the nature and the scope of section 3 of the Act, also held that the Act created what it found to be an “immense discretion” to be exercised when admitting hearsay statements.<sup>188</sup> Furthermore, in its decision in *Metedad v National*

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<sup>182</sup> 1993 (3) SA 233 (T) at 237g-h.

<sup>183</sup> 1993 (2) SACR 69 (A) at 73a-b.

<sup>184</sup> 1991 (1) SA 184 (A) at 190d-e.

<sup>185</sup> 1990 (4) SA 20 (E) at 21e.

<sup>186</sup> 1989 (3) SA 318 (D) at 327b.

<sup>187</sup> 1990 (1) SA 650 (C) at 653b.

<sup>188</sup> *Ibid.*

*Employers' General Insurance Co Ltd*,<sup>189</sup> the Witwatersrand Local Division also held that the Act created a discretion.

In *McDonalds's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another*,<sup>190</sup> however, the Appellate Division questioned and rejected the rationale in the notion that, when applying section 3 or admitting hearsay evidence under its provisions, a court would be exercising a discretion, and Grosskopf JA pointed out that:

“A decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong. There is in my view nothing in section 3 of the Act which changes this situation.”<sup>191</sup>

Moreover, in 2002, in *Makhathini v Road Accident Fund*,<sup>192</sup> the Supreme Court of Appeal court also cited with approval its 1997 decision in *McDonald's Corporation* where it stated that the admissibility of evidence is not a discretion but “one of law” and it rejected the notion that the provisions of section 3 of the Act contained a discretion. When deciding that this Act did not create a discretion in *McDonalds* and *Makhathini* the Supreme Court of Appeal was, however, also rejecting its earlier decisions in *S v Ndlovu* and *Mdani v Allianz Insurance Ltd* where it stated that the Act has created a discretion.

Furthermore, in 2007, in *S v Shaik and others*,<sup>193</sup> the Supreme Court of Appeal has confirmed its views in the *McDonalds* and *Makhathini* cases that section 3 does not create a discretion. This court, however, again altered its standpoint on the nature and scope of section 3 of the Act recently in its 2011 decision-, in *Giesecke & Devrient Southern Africa (Pty) Ltd v The Minister of Safety and Security*,<sup>194a</sup> judgement by Brand JA where Lewis, Cachalia, Mhlanta and Shongwe JJA concurred, where it was held that this provision created a discretion to admit hearsay evidence.<sup>195</sup>

In summary, the courts' views remain conflicting on the nature and the scope of section 3 of the Act and whether these provisions have created a discretion to admit hearsay evidence or not.

Furthermore, the views of academics also seem to be divergent on whether the Act created a judicial discretion or not, and they are as follows: -

As was shown above, Paizes, in his 1983 thesis, proposed legislative reform into the hearsay rule which should include a discretion to admit hearsay evidence when

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<sup>189</sup> 1992 (1) SA 494 (W) at 498h-i.

<sup>190</sup> 1997 (1) SA 1 (A) at 27d-e.

<sup>191</sup> Ibid.

<sup>192</sup> 2002 (1) SA 511 (SCA) at para. 26.

<sup>193</sup> 2007 (1) SACR 247 (SCA) at para.170.

<sup>194</sup> (749/10) [2011] ZASCA 220 (30 November 2011) at para. 31.

<sup>195</sup> Ibid.

certain circumstances were met.<sup>196</sup> The authors of the *Commentary on the Criminal Procedure Act*, on the other hand, when commenting on the nature and scope of the text of section 3(1) of the Act, disputed the existence of a discretion in section 3 and have advanced the opinion that these provisions contained a “legal rule.”<sup>197</sup> They further added that they had reached this conclusion because the nature of the determination on the admissibility of evidence in terms of these provisions remained “one of law and not discretion.”<sup>198</sup> These latter views are also in accord with those expressed earlier by the Supreme Court of Appeal in *McDonalds* and *Makhathini* which it has since questioned and rejected in its 2011 decision in *Giesecke & Devrient* above.

De Vos and Van der Merwe, on the other hand, when commenting on the nature of the court’s determination in admitting evidence under this Act, have expressed the view that, while the courts do not seem to have been given some form of authority which they did not have in the past, section 3 of the Act did create a discretion.<sup>199</sup> In addition, Schwikkard and Van der Merwe are also in accord with these latter views and conclude that section 3(1) of the Act created a “judicial discretion”.<sup>200</sup>

Schmidt is also in accord with these views on the nature and scope of section 3 of the Act and suggests that it does contain a discretion.<sup>201</sup> Moreover, Naude is also in accord with these views and has argued that the Act has created what he termed “discretion to admit hearsay”.<sup>202</sup> In summary, when considering the proposal for reforms by Paizes, the South African Law Commission report, the divergent views by the courts and what seems to be the overwhelming views of academics, as well as taking into account that the fact that the Act does not comprehensibly and coherently state whether it provides a discretion, there seems to be sufficient unanimity in the standpoint that the fact that the Act provides, and was in actual fact intended to provide a discretion. On the other hand, without section 3 of the Act stating distinctly and comprehensibly that it gives courts a discretion to admit hearsay evidence these above views which are based on the interpretation of section 3 might not resolve the defects or infirmities embedded in this Act.

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<sup>196</sup> Ibid at 467.

<sup>197</sup> Du Toit *et al Commentary of the Criminal Procedure Act supra*, (2013) at ch24-p48.

<sup>198</sup> Ibid.

<sup>199</sup> De Vos and Van der Merwe “*Hoorse: Verlede, Hede en ‘n Handves*” *Stellenbosch Law Rev.*(1993) at 13.

<sup>200</sup> *Principles of Evidence supra* at 277.

<sup>201</sup> *Law of Evidence supra* at 18-9.

<sup>202</sup> BC Naude “*‘Testimonial’ Hearsay and the Right to Challenge Evidence*” SACJ (2006) at 320.

### 3.2.3 Admissible by agreement – section 3(1)(a)

In terms of section 3(1)(c)(i) hearsay evidence can be admissible if a party affected by its admission consents that it be admitted.<sup>203</sup>

Van der Merwe, when commenting on the nature of the required consent, argues that what form such consent should be given remains not plainly articulated from the Act.<sup>204</sup>

Paizes and Zeffertt, on the other hand, after taking into account the nature of the required consent under common law have argued that such consent would preferably be expressed than “tacit consent”.<sup>205</sup> The court in *S v Aspeling*,<sup>206</sup> however, also considered the nature of consent that might be appropriate in criminal cases and held that the accused’s counsel signalling that he was ‘happy’ with that information which amounted to hearsay evidence, was a sufficient form of consent that the hearsay evidence be admissible. The correctness of this judgment can be questioned because the meaning of the words ‘happy’ might be doubted as such consent does not seem to be assertive and firm.

In addition, De Vos and Vander Merwe seem to agree with these views expressed by Paizes and Zeffertt and state that the consent which would meet the provision of section 3(1) of the Act “should be expressly made and it must be clear that the accused gave it freely and was in his full senses.”<sup>207</sup>

### 3.2.4 Admissible where the declarant testifies – section 3(1)(b)

The reason for the admissibility of hearsay evidence under this subsection is that, because the person who made the statement is present and would later give his testimony and be subjected to cross-examination, his testimony would be reliable and thus the hearsay evidence it contains would be admissible.<sup>208</sup>

In 2000, the court in *S v Ndlovu and others*,<sup>209</sup> examined whether this section was applicable only if the declarant would retell what he said out-of-court during the proceedings and whether such a statement made by a co-accused was also permissible against one accused. Goldstein J concluded that section 3(1)(b) did not require that a witness should retell what he had said out-of-court and that such

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<sup>203</sup> Section 3(1)(a) of the Act.

<sup>204</sup> De Vos and Van der Merwe “*Hoorse: Verlede, Hede en ‘n Handves*” *supra* at 21.

<sup>205</sup> Zeffertt and Paizes *The South Africa Law of Evidence supra* at 394.

<sup>206</sup> 1998 (1) SACR 561 (C) at 568.

<sup>207</sup> De Vos and Van der Merwe *supra* at 22.

<sup>208</sup> Paizes in Zeffertt and Paizes *The South African Law of Evidence supra* at 370.

<sup>209</sup> 2001 (1) SACR 85 (W).

statement made by a co-accused was also permissible against one accused.<sup>210</sup>  
When reaching this conclusion Goldstein J motivated as follows:

“subsection 3(1)(b) would have no or little purpose since an extra-curial statement, which is repeated under oath, need not be referred to at all, and is indeed of doubtful admissibility, constituting as it does a previous consistent statement”.

These views were questioned and rejected by the Supreme Court of Appeal when this case later appeared before this court in its 2002 decision where Cameron JA stated that this subsection permits the admission of hearsay statements made by a co-accused against one accused if both of the accused testify during the proceedings.<sup>211</sup> After establishing the justification for this subsection Cameron JA stated as follows:

“Before the Act, a witness whose narrative was conjoined with that of a later witness could not refer at all to the latter’s hearsay statements. This could render the delivery of evidence fragmentary and even incoherent. Any allusion to hearsay would be met with justified objection, and the court would have to wait for the later witness to be called for coherence to emerge. In these circumstances the provision permits the first witness to testify fully and without objection, provided the court is informed that the declarant will in due course be called. If the declarant is not called the hearsay is ‘left out of account’ unless the opposing party agrees to its admission or the interests of justice require its admission under section 3(1)(c).”<sup>212</sup>

Schwikkard, on the other hand, examined both *Ndlovu* decisions and gave the opinion that Goldstein J in *Ndlovu* did not consider the role of cross-examination by a co-accused against whom such hearsay statement might be deemed admissible.<sup>213</sup> On the other hand, the author has raised no similar concerns on the correctness of Cameron JA’s reasoning in *Ndlovu* which might be deemed to be her implied approval of this decision. Furthermore, Cameron JA’s decision in *Ndlovu* was later criticised and rejected by the Supreme Court of Appeal in its 2007 decision in *S v Balkwell and another*<sup>214</sup> where Ponnann JA said that “*Ndlovu* offers no guidance as to how the receipt of the extra-curial admissions which it allows under section 3, should be approached given the rationale at common law for their exclusion or what role, if any, the various common law safeguards should play.”

The Act also provides that paragraph (b) of section 3(1) should be read together with subsection 3(3), which requires that the court might be informed at the time the hearsay evidence is presented that the declarant will later testify so that the hearsay can be received provisionally. De Vos and Van der Merwe, when commenting on the provisional receiving of hearsay, conclude that the Act did not introduce any new principle because under common-law hearsay evidence was also provisionally admissible if the original declarant would later testify during the proceedings.<sup>215</sup> In

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<sup>210</sup> Ibid at para. 50.

<sup>211</sup> Ibid at para. 28.

<sup>212</sup> Ibid.

<sup>213</sup> PJ Schwikkard *et al*, *Principles of Evidence supra* at 276-277.

<sup>214</sup> [2007] 3 All SA 465 (SCA) at para. 34.

<sup>215</sup> De Vos and Van der Merwe “*Hoorse: Verlede, Hede en ‘n Handves*” *supra* at 20.



addition, subsection 3(3) also states that, if the declarant does not testify at the trial, the hearsay evidence must be left out of account unless it is admitted under paragraph (a) of subsection (1) or it is admitted under paragraph (c).<sup>216</sup>

Dlodlo J, in *S v Carstens*,<sup>217</sup> held that, that where the prosecutor knew that a certain witness would not be called to testify and failed to inform the court that the original declarant of that out-of-court statement would not testify, such conduct has caused grave prejudice to the accused.

The Constitutional Court, in *S v Mhlongo; S v Nkosi*,<sup>218</sup> also rejected the Supreme Court of Appeal's decision in *Ndlovu*, and Theron AJ reasoned that the decision in *Ndlovu* was flawed because:

'First, it did not deal with the common-law rule against allowing admissions to be tendered against a co-accused. Second, the court in *Ndlovu* did not deal with the provisions of section 3(2) of the Law of Evidence Amendment Act 45 of 1988. Third, *Ndlovu* did not seem to have regard to the provisions of section 219A of the Criminal Procedure Act 51 of 1977 – which expressly allows an admission to be admitted only against its maker and is silent regarding other persons. Fourth, the court in *Ndlovu* seemed not to have had regard to whether the Evidence Amendment Act altered the common law.'

### **3.3 Admissible in the interests of justice – section 3(1)(c)**

In terms of section 3(1)(c), a court may, when considering the various enumerated factors in (i) to (vii) of that subsection, if it is “of the opinion that such evidence should be admitted in the interests of justice” receive the hearsay evidence against any of the parties to the proceedings.

Where is the origin of the “interests of justice” exception? Paizes, when commenting on the legislative reforms which were required prior to the enactment of this Act, argued that the interests of justice test which formed part of the United States Federal Rules of Evidence and which was applied to determine the admissibility of hearsay evidence should be incorporated into South African hearsay evidence because, he added, “this principle [the interests of justice residual exception] may beneficially be utilized in the formulation of the proposed discretion.”<sup>219</sup>

Meanwhile there was already some scepticism surrounding the effect of the interests of justice test on the trial proceedings long before it was incorporated into South African law, and this is evident in the submission made by Zwick when commenting on its nature and scope where it was noted that “inasmuch as the residual exceptions are formulated so inexplicitly, courts will have to be especially

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<sup>216</sup> Sections 3(1)(b) and 3(3) of the Act.

<sup>217</sup> 2012 (1) SACR 485 (WCC) at paras. 10-11.

<sup>218</sup> 2015 (2) SACR 323 (CC) at paras. 26-31.

<sup>219</sup> AP Paizes thesis *supra* at 467-468.

circumspect when applying them in criminal cases to avoid possible infringement of the defendant's right of confrontation."<sup>220</sup>

Wigmore, on the other hand, recognised the necessity and trustworthiness of the evidence as important factors under the common law hearsay exceptions, and Paizes argued that Wigmore's views should not be abandoned but be made part of a judicial discretion which would take into account the interests of justice when admitting hearsay evidence.<sup>221</sup> It is not the intention or purpose of this study to embark on a survey of the United States hearsay evidence in this chapter as it will be discussed in chapter five. A brief probe into the interests of justice application in that jurisdiction might, however, be necessary in order to appreciate its application. The United States Federal Rules of Evidence was adopted in 1975 and has created the residual exception called "interests of justice" which should be considered by the courts when admitting hearsay evidence.<sup>222</sup> The relevant Federal Rules of Evidence provides as follows:

'Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statements and the particulars of it, including the name and address of the declarant.'<sup>223</sup>

Furthermore, Paizes, when commenting on the constructive outcome the interests of justice test would bring into South African hearsay law, argued that it would take into account the application of the right to confrontation while it contains a judicial discretion to admit hearsay, and he added that:

'The interests of justice: The residual exceptions require that "the interests of justice must best be served by admission of the statement into evidence"<sup>224</sup>, a requirement which the United States courts seem to have conflated with the constitutional confrontation rule of the Sixth Amendment. This concept of protecting the interests of the accused also finds an echo in the Australian proposal, which distinguishes between the reception of hearsay in civil and criminal trials on the ground that "the criminal trial is premised on the view that we should minimize the risk of convicting the innocent even though this may result in the acquittal from time to time of the guilty".<sup>225</sup> It is submitted that this principle may beneficially be utilised in the formulation of the proposed discretion, thereby making

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<sup>220</sup> Shelly Crittendon Zwick "Hearsay Evidence and the Federal Rules: Article VIII-II. Exceptions to the Hearsay Rule: Expanding the Limits of Admissibly" *La. L. Rev.* (1975) at 162.

<sup>221</sup> *Ibid* at 466.

<sup>222</sup> Federal Rules of Evidence of the United States Courts and Magistrates' Courts, Pub. L. No.93-595, (1975) U. S. Code Congress & Ad. News (88 Stat.) at 2215.

<sup>223</sup> Federal Rules of Evidence 803(24) and 804(b)(5).

<sup>224</sup> See Clause (C) of Rules 803(24) and 804(b)(5) *supra*.

<sup>225</sup> Australian Law Reforms Commission RP 3 *Hearsay Evidence Proposal* (1981) at 121.

allowance for the right of confrontation which has become inextricably fused with the hearsay rule in the United States.<sup>226</sup>

Zwick, on the other hand, has also surveyed the common law hearsay rule in the United States and the rationale for the legislative reforms which include the residual hearsay exception “interests of justice”, and she argues that originally, when debated in the United States Congress, the thought was that such a statutory test should be applied “very rarely and in exceptional circumstances” because of the effect it would have on the right to confrontation and the fact that it would lead to unpredictability in the evidence presented to prove guilt or innocence.<sup>227</sup>

Of equal concerns is the fact that the apprehension expressed by Zwick on the application of the interests of justice on an accused’s right of confrontation had never crossed the mind of the South African Law Reform Commission when it recommended that the interests of justice should form part of South African hearsay legislative reforms. There could have been various justifications behind the lack of consideration of this aspect, but one that comes strongly to mind is that, in 1986, as will be discussed in chapter four, our legislature and the South African Law Reform Commission did not have to consider the accused’s right to confrontation when reforming and enacting legislation. Hence the interests of justice exception was included in South Africa’s hearsay law without due consideration of its effect on the accused’s right to be confronted with witnesses. It is respectfully submitted that one can safely come to this conclusion because there is nothing in the South African Law Reform Commission’s recommendations and the Act that suggests otherwise.

Moreover, Paizes, when commenting on this residual exception “interests of justice” and the hearsay rule, stated that the United States courts “seem to have conflated it with the constitutional confrontation rule of the Sixth Amendment”. The extent and substance of these views were, however, left unexplained by Paizes. Baker, on the other hand, advocates a divergent view where he states that, “the parameters of the hearsay rule and the right of confrontation are not coextensive.”<sup>228</sup>

Yasser has also examined the intention of the United States Congress in enacting the interests of justice statutory test and concurs with Zwick that it was intended to be used rarely and that the major concern was the very broad extent a judge would have to consider the admissibility of hearsay, which still remains untested evidence. He argues further that “the Committee indicated that it intended that the residual

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<sup>226</sup> AP Paizes thesis *supra* at 467-468.

<sup>227</sup> Shelly Crittendon Zwick “*Hearsay Evidence and the Federal Rules: Article VIII-II. Exceptions to the Hearsay Rule: Expanding the Limits of Admissibility*,” *La. L. Rev.* (1975) *supra* at 161-162.

<sup>228</sup> Baker, “*The Right of Confrontation, The Hearsay Rules, and the Due Process – A Proposal for Determining When Hearsay May be Used in Criminal Trial*” *Conn. L. Rev.*(1974) at 541.

hearsay exceptions will be used very rarely, and only in exceptional circumstances and that no broad license for trial judges was granted.”<sup>229</sup>

Furthermore, Zeffertt and Paize also agree with these views that the hearsay exceptions which allows for the admission of hearsay evidence in the interests of justice after considering the factors listed in section 3(1)(c) are broad and exceptionally excessive.<sup>230</sup> As it will be shown later, in its 2009 report the Hong Kong Law Reform Commission had rejected statutory reforms to its hearsay rule which would include this test because it “was concerned about the open-endedness of the discretion.”<sup>231</sup>

The other dimension which led to this Act being incomprehensible with regard to this aspect seems to be the lack of intelligibility in Paizes’ proposals for reforms and in the South African Law Commission’s recommendations in articulating the fact of whether the envisaged interests of justice statutory reforms should be applied sparingly or not. What will follow is an evaluation of court decisions where these provisions of the Act have been interpreted with the view to determining whether it should be applied sparingly or not.

In 1990, the Eastern Cape Local Division in *S v Cekiso and another*, when considering the provisions of the Act and the effect the interests of justice test would have on an accused, Zietsman J held that “section 3(1)(c) of the Act should not be lightly applied.”<sup>232</sup>

On the other hand, in 1992 the Witwatersrand Local Division in *Metedad v National Employers’ General Insurance Co Ltd*, Van Schalkwyk J questioned and rejected Zietsman J’s views in *Cekiso* and stated that the interests of justice test should be applied whenever the court deems it fit and that there was nothing in the Act providing otherwise or limiting its application under certain circumstances.<sup>233</sup>

This state of confusion did not end there because, during the same year, in 1992, the Witwatersrand Local Division in *Aetilogy Today CC t/a Somerset Schools v Van Aswegen & another*, also questioned and rejected its earlier decision in *Metedad* and held that Zietsman J’s views in *Cekiso* were correct in concluding that this test should be applied sparingly.<sup>234</sup> In addition, in 1993, the Transvaal Provincial Division in *Hewan v Kourie NO and another*, also considered whether section 3(1)(c) should be applied sparingly or not and Du Plessis J, after a comprehensive analysis of the common law hearsay rule and the provisions of the Act and what he considered to be the intention of the legislature in the enactment of this Act, rejected Zietsman J’s

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<sup>229</sup> Ray Yasser “*Strangling Hearsay: The Residual Exceptions to the Hearsay Rule*” *Tex. L. Rev.* (1980) at 593.

<sup>230</sup> Zeffertt and Paizes *The South Africa Law of Evidence supra* at 398.

<sup>231</sup> The Law Reform Commission of Hong Kong *Report Hearsay in Criminal Proceedings*, November 2009 at para. 8.20

<sup>232</sup> 1990 (4) SA 20 (E) at 21e.

<sup>233</sup> 1992 (1) SA 494 (W) at 499f-g.

<sup>234</sup> 1992 (1) SA 807 (W) at 822.

views in *Cekiso* and also held that the decision in *Aetiology Today (supra)* was not sound and could not be supported by the text of section 3(1)(c) of the Act. Hence it was held that there was nothing in the Act limiting its application.<sup>235</sup>

In 2002, in *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting*,<sup>236</sup> the Transvaal Provincial Division once again had to decide on this aspect of the Act, and, after considering what it found to be the intention of the legislature, it approved the views in the *Hewan* and *Metedad* cases to be sound where it was stated that the Act contained no provision that this test should be applied sparingly.

The courts, when interpreting these provisions of the Act, have given divergent standpoints on whether the interests of justice test should be applied sparingly or not. This dilemma seems to be caused by the fact that this legislation is incomprehensible about whether the interests of justice test should be applied rarely or not, and this fundamental component of this Act has been overlooked by the legislature with the result that the courts find themselves having to come up with what could be deemed the proper and true meaning of the Act.

### **3.3.1 The nature of the proceedings –section 3(1)(c)(i)**

When a court determines whether to admit hearsay evidence in the interests of justice, the nature of the proceedings remains an important factor which should be taken into account. According to Paizes, there is a rationale behind this factor, and he argues that this is because our criminal law has placed a certain benchmark which evidence has to meet before it can be considered to have discharged a certain burden resting on the prosecution, a notion which he suggests is founded on idea that “it is better that ten guilty men go free than one innocent man be convicted.” Hence the interests of justice test in criminal proceedings will, in his view, take this burden of proof into account.<sup>237</sup> Paizes does not, however, elaborate on how the interest of justice test has given an advantage to the burden of proof in criminal proceedings. As will be shown in chapter five, these favourable views regarding the interests of justice are questioned and disputed by Brodin who argues that “it is a product of the perception that criminals were escaping conviction because of legal technicalities”.<sup>238</sup>

Furthermore, Van Schalkwyk J, in the *Metedad* case, concurs with these views expressed by Paizes, and, when commenting on the provisions of the Act and the admission of evidence in the interests of justice, he added that, because of the

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<sup>235</sup> 1993 (3) SA 233 (T) at 239h-i.

<sup>236</sup> 2002 (3) SA 765 (T) at 802b.

<sup>237</sup> Paizes in Du Toit *et al Commentary of the Criminal Procedure Act supra*,(2013) ch24-p50C.

<sup>238</sup> Mark S. Brodin “*The British Experience with Hearsay Reform: A Cautionary Tale*” *Fordham Law Rev.* (2016) at 1421.

presumption of innocence principle applied in criminal law cases, courts have been hesitant in relying on hearsay evidence to convict an accused.<sup>239</sup>

The court in *Hewan v Kourie NO and another* also examined the provisions of section 3(1)(c)(i) and nature of criminal and civil proceedings, and Du Plessis J stated that:

‘Thus the Court having regard to the nature of the proceedings ...might be inclined to admit evidence which is by its nature less reliable where the evidence is tendered in motion proceedings, but, in order to prove a central issue in a criminal case, the Court would in turn probably require a high degree of reliability or a substantial probative value before exercising its discretion in favour of admitting evidence.’<sup>240</sup>

In addition, Schutz JA in *Ramavhale*<sup>241</sup> cited with approval the views of Van Schalkwyk J in *Metedad* and Du Plessis J in *Hewan* and also seems to have concurred with these views on the application of the Act. He added that, in criminal cases, a court has to remain alert to the fact that the evidence has to prove the accused’s guilt beyond reasonable doubt.<sup>242</sup>

### **3.3.2 The nature of the evidence – section 3(1)(c)(ii)**

According to Schwikkard, the decision of the courts have provided no direction with regard to what the criteria for the admission of evidence in terms of section 3(1)(c)(ii) could be. She added that the decision by the court in *Hewan v Kourie NO*<sup>243</sup> might be indicative of the fact that the “reliability of the evidence when it comes to its nature” would be considered.<sup>244</sup>

Du Plessis J, in *Hewan v Kourie NO*, examined the common law hearsay rule and the provisions of section 3(1)(c)(ii) of the Act in order to determine the application of these provisions of the Act, and he stated that:

‘The reason for the exclusion of hearsay evidence at common law is, essentially, that it is unreliable because it cannot be tested in cross-examination. When regard is had to the common-law exceptions to the hearsay rule, the rationale is that there is otherwise reason to accept that such evidence would be reliable. Hence, the Court should only exercise its discretion to admit hearsay evidence in terms of section 3(1)(c) if there is something to suggest that, despite the absence of cross-examination, the evidence is reliable. ... It would follow in logic that hearsay evidence should only be admitted if the Court is satisfied that such evidence is inherently reliable.’<sup>245</sup>

In other words, the reliability of hearsay evidence is also found to be the primary justification for its admission in terms of these provisions.

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<sup>239</sup> *Metedad supra* at 499g-h.

<sup>240</sup> 1993 (3) SA 233 (T) at 499e-f.

<sup>241</sup> *S v Ramavhale* 1996 (1) SACR 639 (A) at 647i-j.

<sup>242</sup> *Ibid* at 647i-648a.

<sup>243</sup> 1993 (3) SA 233 (T) at 240d.

<sup>244</sup> PJ Schwikkard and SE Van der Merwe *et al The Principles of Evidence supra* at 279.

<sup>245</sup> *Ibid* at 237f-g and 238a-b.

Zeffertt and Paizes, on the other hand, when commenting on these provisions of the Act stated that it has its basis on the nature of hearsay evidence, in that hearsay contains inherent dangers because it is untested, and they pointed out that it requires the court to be mindful of the following factors:

- “(a) insincerity on the part of the absent declarant or actor;
- (b) erroneous memory;
- (c) defective perception; and
- (d) inadequate narrative capacity.”<sup>246</sup>

The memory of witnesses in regard to certain events was also questioned in *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting*,<sup>247</sup> and the court, in making reliance on the witness’s written statements to establish their memory, stated that, “the statements were taken from the witnesses on 27 July 1998, 28 July 1998 and 12 August 1998 when the facts were probably still fresh in their memories.”<sup>248</sup>

Furthermore, the court in *S v Ndlovu and others*<sup>249</sup> considered the perception aspect in a witness’s testimony, and Goldstein J found it to be a helpful tool in determining the admissibility of the hearsay statement. He explained that:

‘... such relates to the information conveyed in the case of accused No 3 voluntarily and spontaneously, and before he had any opportunity to fabricate. The information related to a very recent event of which he must have had a clear memory and in respect of which he had an adequate opportunity for observation. He had personal knowledge of the facts. There is no reason to doubt his ability to observe and perceive properly what occurred.’<sup>250</sup>

In addition, the time the events were recorded by the witnesses seemed to have given some indications as to whether the court should rely on the perception of these witnesses relating to the events.

Goldstein J, in *Ndlovu*, also considered the narrative capacity of the witness in establishing whether these provisions of section 3(1)(c) were applicable, and he held that the witness’s evidence was clear and understandable and was given immediately after the incident. Hence these provisions of the Act were found to be applicable to admitting the hearsay statements.<sup>251</sup>

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<sup>246</sup> Zeffertt and Paizes *The South African Law of Evidence supra* at 401.

<sup>247</sup> 2002 (3) SA 765 at 803j-804a.

<sup>248</sup> *Ibid.*

<sup>249</sup> 2001 (1) SACR 85 (W) at 100d-f.

<sup>250</sup> *Ibid.*

<sup>251</sup> *S v Ndlovu and others supra* at 100e-f.

### 3.3.3 The purpose for which the evidence is tendered – section 3(1)(c)(iii)

The old common law assertion-oriented definition of hearsay evidence placed reliance on the purpose for which the evidence was given when establishing whether it was hearsay evidence. Paizes examined the assertion-oriented definition of hearsay evidence and the provisions of section 3(1)(c)(iii) which takes into account the purpose for which the hearsay evidence was given when establishing whether the interests of justice require that it should be admissible. He explained that:

'Hearsay is no longer defined according to the purpose for which it is tendered but rather according to the extent to which one is asked to rely on the credibility of an out-of-court actor or declarant. This is not to say that the first inquiry no longer has any utility: it is, invariably, the first step in determining the degree of reliance that will have to be placed on the credibility of the absent declarant and, accordingly, the extent of the dangers that will have to be addressed by the court under (ii) above in resolving the question of admissibility.'<sup>252</sup>

In other words, the purpose for which the hearsay statement is given still remains a factor when examining whether hearsay statements should be admissible or not.

While hearsay evidence is admissible under this paragraph of section 3(1)(c) of the Act, the Supreme Court of Appeal, in *Mamushe v S*,<sup>253</sup> gave a *caveat* against the admission of hearsay evidence in terms of this part of the Act in criminal trials where such evidence relates to fundamental issues that needed to be proved against an accused.

In *Hlongwane and others v Rector, St Francis College and others*<sup>254</sup> the court also examined the purpose for which the hearsay statement was given and the fact that it was argued by respondents that it should be admissible because "two prefects have since left the school ... and are in hiding for fearing of their lives" when finding that the hearsay was admissible. As in the *Mamushe* case, the court also rejected the admission of hearsay evidence under these provisions of the Act if it was tendered for the purpose of determining "fundamental issues" against any party in the absence of cross-examination.<sup>255</sup>

Moreover, the court in *Hewan v Kourie*<sup>256</sup> also agreed with the approach in *Hlongwane* where Du Plessis J held that untested evidence that would prove a main issue in the proceedings should not be admissible.<sup>257</sup>

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<sup>252</sup> Du Toit *et al Commentary of the Criminal Procedure Act supra*, (2013) at ch24-p50D-3.

<sup>253</sup> [2007] 4 All SA 972 (SCA) at para.18.

<sup>254</sup> 1989 (3) SA 318 (D) at 321f-g.

<sup>255</sup> *Ibid.*

<sup>256</sup> 1993 (3) SA 233 (T).

<sup>257</sup> *Ibid* at 241d.



Furthermore, the Supreme Court of Appeal, in *S v Ramavhale*,<sup>258</sup> also cautioned against the reliance on hearsay evidence under this paragraph of section 3(1) of the Act if it would be decisive in the case for the prosecution, and Schutz JA stated that:

'I would agree with remarks in *Metedad supra* at 499e-f, the effect of which is that a Judge should hesitate long in admitting hearsay evidence which plays a decisive or even a significant part in convicting an accused, unless there are compelling justifications for doing so.'<sup>259</sup>

The court, on the other hand, when commenting on the purpose for which the hearsay statement was tendered in *Metedad*, stated that:

'The fact that the Court is required to have regard, *inter alia*, to the purpose for which the evidence is tendered in deciding whether or not to exercise its discretion to allow hearsay evidence under section 3(1)(c)(iii) of the Act ... means only that evidence tendered for a compelling reason would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose.'<sup>260</sup>

De Vos and Van der Merwe seem to concur with these views expressed by the courts, and they also argue that the reliability of the hearsay statement is a factor to be considered when a court has to establish the admissibility of hearsay under these provisions of the Act.<sup>261</sup>

### **3.3.4 The probative value of the evidence – section 3(1)(c)(iv)**

Schwikkard, when commenting on the application of the probative value of the hearsay statement in the *Ndlovu* case, argued that this subparagraph of section 3(1)(c) requires that a court answers two issues when determining the admissibility of the hearsay: "Firstly, it must be established what the hearsay evidence will prove if admitted and, secondly, whether this would constitute reliable proof."<sup>262</sup> Hence the reliability of the hearsay framework has also become a fundamental component of this Act.

In the *Ndlovu* case Cameron JA seems to agree with these views expressed by Schwikkard when examining the probative value of the hearsay in question, and he found that this subparagraph provides a test which requires the reliability of a hearsay statement to be established. He also stated that the "probative value" means value for purposes of proof. This means not only-, 'what will the hearsay evidence prove if admitted?', but also 'will it do so reliably?' In the present case, the guarantees of reliability are high."<sup>263</sup>

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<sup>258</sup> 1996 (1) SACR 639 (A).

<sup>259</sup> Ibid at 649c-d.

<sup>260</sup> Ibid at 498d-e.

<sup>261</sup> De Vos and Van der Merwe "*Hoorse: Verlede, Hede*" *supra* at 27-28.

<sup>262</sup> PJ Schwikkard "*The Challenge of Hearsay*" *supra* at 66.

<sup>263</sup> Ibid at para. 45.

Furthermore, the court, in *Makhathini v Road Accident Fund*,<sup>264</sup> examined the probative value of the hearsay evidence requirement contained in the Act, and Navsa JA held that the “relevance and reliability” of the hearsay evidence form a significant feature in determining its probative value.

Moreover, Zeffertt and Paizes argue that the admission of hearsay evidence in the interests of justice based on its probative value and on the fact of whether the hearsay statement would prejudice one party is indicative of “a realistic acknowledgement of the fact that, although the rules relating to relevance and hearsay may be kept apart for the purpose of analysis, they are, in effect, co-determinants of the same practical inquiry – that of admissibility”.<sup>265</sup> The probative value of the hearsay evidence and the issue of whether the hearsay evidence would prejudice one of the parties both rely on the relevance of the evidence. In other words, these provisions also empower the court to consider not only the reliability of the hearsay statement but also its relevance.

During 2008, the South African Law Commission investigated the link between hearsay evidence and relevance of evidence under this subparagraph of section 3(1)(c) and in subparagraph (vi), and it reported that:

‘Logically relevant evidence does not guarantee admission. ... Legal relevance requires that the probative value of the evidence outweigh any prejudice that may accrue as a result of its admission. Prejudice in this context does not refer to the possibility of a finding of fact being made against a particular party, it refers to unfair prejudice which at common law includes not only procedural prejudice but also prejudice that arises out of the possibility of the fact finder being misled or unduly swayed by a particular item of evidence.’<sup>266</sup>

Hence, in determining the relevance of evidence, a court has to consider whether its prejudicial outcome is diminished and weakened by the admission of the hearsay evidence when considering its probative value.

### **3.3.5 The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends – section 3(1)(c)(v)**

Wigmore, when commenting on the admissibility of hearsay evidence, in common law and the need to test the credibility of the original declarant, argued that the admission of hearsay statements hinged on two justifications, viz. trustworthiness and necessity.<sup>267</sup> In addition, he also added that all common-law exceptions to the rule against hearsay evidence were considered through these justifications.<sup>268</sup>

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<sup>264</sup> 2002 (1) SA 511 (SCA) at para. 32.

<sup>265</sup> Ibid at 408.

<sup>266</sup> South African Law Reform Commission *Discussion Paper 113 Project 126, Review of the Law of Evidence (Hearsay and Relevance)* 30 June 2008 at para. 3.11.

<sup>267</sup> Wigmore *On Evidence supra* at 1420.

<sup>268</sup> Ibid.

Paizes, on the other hand, examined these views expressed by Wigmore on trustworthiness and necessity of hearsay evidence as grounds for its admissibility and gave the opinion that the legislature, in enacting section 3, refined these grounds of admissibility from what he termed “the cloudy and unscientific mix into which the common law had degenerated”.<sup>269</sup> He also added that “trustworthiness” is provided in the provisions of subparas (ii) and (iv) and “necessity” is located in the provisions of subparas (iv) and (v).<sup>270</sup> Therefore, subpara (ii) requires the court to consider “the nature of the evidence” and subpara(iv) “the probative value of the evidence”. On the other hand, subpara (v) requires the court to consider “the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends”.

The following illustrates a random examination of how our courts have considered the witness’s justification for not testifying by making reliance on this subparagraph of section 3(1)(c) of the Act -:

- In *Hlongwane’s* case the reason for not testifying was that the witnesses feared for their lives and “two prefects were assaulted”, and the hearsay statement was deemed to be admissible-.<sup>271</sup>
- In *S v Ndlovu and others*<sup>272</sup>the court examined the reason for the witnesses not testifying, viz. they disavowed their statement which they had given to police prior to the trial, and the court concluded that the hearsay evidence contained in these statements should be admissible in the interests of justice because it was deemed to be reliable and given immediately after the incident-.
- In *S v Ramavhale*, Schutz JA noted that the hearsay evidence could not be given by the person who was considered the maker of such statement because he was dead, and, after considering all the evidence presented by prosecution the court held that the accused’s guilt was not proved by the hearsay evidence-.<sup>273</sup>
- In *Giesecke & Devrient Southern Africa v The Minister of Safety and Security*,<sup>274</sup> the witnesses had disappeared from their criminal case when they had to testify, and they could not be located when this case appeared for hearing.-, Brand JA held that the witnesses could not give their testimony because they could not be located and stated that it was in the interests of justice to admit the hearsay statements.
- In *S v Shaik and others*<sup>275</sup> the witness who did not testify was Thetard, and the reason was that he refused to come to South Africa and there was, in the view of the court, sufficient evidence incriminating this witness to the crimes against the

<sup>269</sup> Paizes in *Du Toit et al Commentary of the Criminal Procedure Act supra*, RS 51,(2013) ch24-p50F.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid at 325i-j.

<sup>272</sup> 2002 (2) SACR 325 (SCA) at para. 48.

<sup>273</sup> 1996 (1) SACR 639 (A) at 650h.

<sup>274</sup> (749/10) [2011] ZASCA 220 (30 November 2011) at para. 29.

<sup>275</sup> 2007 (1) SACR 247 (SCA) at para.176.

accused. The court also found this reasons to be sufficient to admit the hearsay evidence in the interests of justice.

### **3.3.6 Any prejudice to a party which the admission of such evidence might entail – section 3(1)(c)(vi)**

Paizes, when commenting on these provisions of this Act under this subparagraph which admits hearsay evidence in the interests of justice and taking into account the prejudice which might be incurred through the admission of such evidence, argued that, because the hearsay rule is believed to be an invention of the adversarial trial procedure system, this is an important aspect. He also added that this is because any witness may give false evidence or make a mistake and, therefore, all evidence is probably risky. The adversarial trial system has formed specific procedures for uncovering and discovering trustworthy and untrustworthy mistakes. Hearsay is differentiated from other evidence not by the magnitude of its intrinsic dangers but because the dangers it contains cannot be uncovered and appraised. The adversarial trial mode which was developed for the objective of uncovering the trustworthiness of testimony can exclusively be correctly used when they are aimed at confronting the “person upon whose credibility the probative value of the evidence depends”.<sup>276</sup>

Cross, on the other hand, argued that the prejudice caused by the admission of hearsay evidence at common-law was in the form of the deprivation of an adequate opportunity to cross-examine the person who made the statement.<sup>277</sup> Morgan concurs with the views expressed by Cross on the primary attribute of prejudice caused by the admission of hearsay evidence when he argued that the main justification for excluding hearsay was the absence of an occasion to cross-examine the adversary.<sup>278</sup>

The court in *Hlongwane*'s case considered the prejudice which might be caused when admitting hearsay evidence against the applicants, and it stated that this subparagraph highlights the injustice which an accused might have to face when hearsay evidence is admitted. It added that the peculiar factors of each case should be considered when a court determines whether to receive hearsay evidence in the interests of justice under this subparagraph.<sup>279</sup>

The court, in *Hlongwane*, also weighed the extent of the inconvenience and harm the admission of the hearsay would cause the applicants against the harm and risk it would cause the respondent if such evidence was not considered inadmissible. The court also noted that the fact that the respondent, the school, was prepared to allow the applicants to write their final examinations even if this application was granted through the use of hearsay evidence, and this factor, the court considered to be

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<sup>276</sup> Paizes in *Du Toit et al Commentary of the Criminal Procedure Act supra* RS 51,(2013) ch24-p50H.

<sup>277</sup> Sir Rupert Cross *Evidence supra* at 479.

<sup>278</sup> Edmund M Morgan “*The Hearsay Rule*” *Washington L. Rev.* (1937) at 3-4.

<sup>279</sup> *Ibid* at 326a-d.

mitigating the extent of the prejudice the applicants could suffer if the hearsay evidence was received.<sup>280</sup>

The trial court in *Ndlovu's* case also examined the scope of the prejudice which the admission of hearsay might cause to an accused, and it noted that such evidence should be admissible in the interests of justice because:

'as to (vi), any prejudice which the evidence may entail, of course its admission strengthens the State case against each of the remaining accused in some cases substantially so. This is, however, so it seems to me, not the kind of prejudice the Legislature can have intended to provide for since an accused who is justly convicted can surely not be said to be prejudiced.'<sup>281</sup>

Hence Goldstein J's view is that a conviction based on hearsay evidence, which he termed "justly", cannot constitute prejudice to an accused.

Furthermore, the appeal court in *Ndlovu's* case, on the other hand, when commenting on the prejudice which might be caused through the admission of hearsay evidence, explained that:

'Prejudice' in section 3 clearly means procedural prejudice to the party against whom the hearsay is tendered. It envisages the fact that the party against whom the hearsay is tendered cannot cross-examine the original declarant. The prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission.'<sup>282</sup>

In addition, Cameron JA also said that, "prejudice has to be weighed against the reliability of the hearsay evidence."<sup>283</sup> The prejudice should be looked at not in isolation, but a court should never lose sight of the trustworthiness of the evidence. The reliability of the evidence is a factor which plays a role in determining the admissibility of hearsay under this subparagraph.

Moreover, the court, in *Ramavhale's* case, considered the fact that the hearsay evidence was received by the trial court in convicting the accused and its admissibility was decided only during judgement. It held that this procedure had prejudiced the accused and rendered the hearsay inadmissible.<sup>284</sup>

A ruling on the admissibility of hearsay evidence was, in the court's view, required to be made after the State had closed its case because of the prejudice the admission of such evidence might cause to the accused and this would also have enabled the accused to prepare his defence accordingly.<sup>285</sup> A timeous ruling on the admissibility of hearsay statement would, in the court's view, mitigate the prejudice which is inherently embodied in the admission of a hearsay statement.

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<sup>280</sup> Ibid.

<sup>281</sup> Ibid at para. 57.

<sup>282</sup> Ibid at para. 49.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid at 651g.

<sup>285</sup> Ibid.

Schwikkard, when commenting on the provisions of this Act and the nature and extent of the prejudice it might entail, argued that “given the definition of hearsay it is submitted that the prejudice envisaged by the 1988 Act is the inability to cross-examine the person upon whom the probative value of the evidence depends.”<sup>286</sup>

In addition, Schwikkard also seems to agree with the views expressed by Cameron JA in *Ndlovu* in identifying the nature of the prejudice caused by the admission of hearsay evidence, in that she argued that it is “procedural prejudice”.<sup>287</sup>

### **3.3.7 Any other factor which should, in the opinion of the court be taken into account – section 3(1)(c)(vii)**

This subparagraph permits a Judge to use his private or personal opinions in determining whether hearsay evidence should be admissible in the interests of justice.

Van der Merwe and De Vos, when commenting on this provision of the Act, claimed that this subparagraph has its sight set on ensuring that the court’s discretion should not lie only on the factors enumerated in section 3(1)(c).<sup>288</sup> In other words, the court is empowered to look outside the provisions of this Act and redefine what other factors could be relevant under this subparagraph. Hence this subparagraph might also be seen as empowering the court to redefine the scope and content of the interests of justice statutory test.

As was discussed above, the courts’ views relating to whether section 3(1)(c) has created a discretion remains divided and contradictory. Consequently, if it were to be accepted that the provisions created a discretion, the use of private opinion in exercising that discretion seems to form a curious contradiction of its own because, in common law, a discretion did not include the use of private opinions, and this is evident in the 1891 English decision where Lord Chief Justice Halsbury said:

“Discretion” means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office, ought to confine himself.<sup>289</sup>

What still remains incomprehensible relating to these provisions of the Act-, is whether this Act is coherent and intelligible?

The provisions of section 3(1)(c) seem to create another difficulty-, in that they seem to be in violation of another fundamental common law principle, viz. the principle of legality or legal certainty which forms an integral part of the rule of law. The problem

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<sup>286</sup> PJ Schwikkard “*The Challenge of Hearsay*” *supra* at 66.

<sup>287</sup> *Ibid* at 66.

<sup>288</sup> De Vos and Van der Merwe “*Hoorse: Verlede, Hede en ‘n Handves*” *supra* at 24.

<sup>289</sup> *Sharp v Wakefield supra* at 173.

is evident in the uncertainty which is created by this subparagraph of the Act. Snyman, when commenting on the common law principle of legality, argued that this notion does not allow judges to make use of their own personal opinions when exercising their official duties and explained that:

‘The principle of legality states that the law should be as certain as possible (*ius strictum*). Judges should not be allowed to extend the operation of criminal law [rules of evidence] by following their own personal opinions, based on their own social, ideological or religious points of view, as to what conduct ought to be punishable... There is always the danger that a court may be swayed or influenced by passions which the act of the individual accused or the ordeal of the individual complainant may generate. Arguments in Parliament, on the other hand, tend to be more abstract in that they concentrate on the social evil in general; the temptation to be aroused by the passions generated by what happened in a particular instance with a particular accused or complainant is smaller.’<sup>290</sup>

Snyman also adds that “the principle of legality is now a constitutional right under section 35(3)(l) of the Constitution.”<sup>291</sup> While section 35(3)(l) of the Constitution refers to criminal conduct, it is submitted that the same common law principle of legality could have the same effect in ensuring that the rules of evidence should be as certain and definite as possible under section 3(1)(c) of the Act. The uncertainty created by this provisions was also evident in the views shared by Ponnann JA in *Balkwell and another* when commenting on the admissibility of hearsay evidence which was made by a co-accused and implicated an accused but which was not subjected to cross-examination where he asked, “how is an accused person to regulate his conduct and to make informed choices about the conduct of his defence?”<sup>292</sup>

In addition, the rule of law is also a constitutionally guaranteed principle, and section 1 of the Constitution attests to this fact where it states that:

‘The Republic of South Africa is ... democratic state founded on the following values:

....

(a) Supremacy of the constitution and the rule of law.’<sup>293</sup>

Hence the courts are bound to apply laws in compliance with the values protected by this constitutional principle.

Maxeiner seems to agree with these views expressed by Snyman and Ponnann JA on the attributes and significance of this principle, and he adds that:

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<sup>290</sup> C R Snyman “*The Power of the Constitutional Court to Extend the Scope of Existing Crimes*” SALJ (2007) at 678,681. (Emphasis added).

<sup>291</sup> Ibid at 678. Section 35(3)(l) of the Constitution of 1996 provides as follows: ‘Every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.’

<sup>292</sup> *Balkwell and another v The State* [2007] 3 All SA 465 (SCA) at para. 35.

<sup>293</sup> Section 1(c) of the Constitution of the Republic of South Africa, 1996.

'Legal certainty requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'<sup>294</sup>

This principle enables an accused to predict how his case would be handled by the courts and also to ensure the predictability of evidentiary rules.

Maxeiner adds that “a legal system without a modicum of legal certainty is scarcely worthy of the name.”<sup>295</sup>

In addition, the Constitutional Court has questioned the admissibility of hearsay evidence in circumstances which might be viewed as offending this principle in *S v Molimi*, where Nkabinde J stated that, “in order to be said that the accused had a fair trial, he must have known what the case against him was.”<sup>296</sup>

Looking at all these views on the application of the principle of legal certainty in court proceedings, one can ask the following questions?

- Are the provisions which allow a court to consider “any other factor which should in its opinion be taken into account” creating the kind of foreseeability which would allow an accused to conduct his case with the “sufficient precision”?
- Do these provisions create the discretion where its limits are clearly stated in order to protect an accused from subjective and inconsistent application by the courts?
- Does section 3(1)(c)(vii) indicate, with particular intelligibility and simplicity, the scope of the discretion it has created?

When a court is applying this subparagraph to receive hearsay evidence, an accused is unable to comprehend the nature and scope of evidentiary rules and factors which will be used in admitting hearsay statements because the judge's private opinion will also be a relevant factor in deciding his case. Justice Ewaschuk of Canada when commenting on the Hong Kong Law Reform Commission's consultation paper where this provision of the Law of Evidence Act was discussed, he rejected the interests of justice test and stated that “the test of ‘in the interests of justice’ for the admissibility of hearsay evidence is too open-ended and too subjective. It permits of personal value-judgement and is often referred to as ‘palm-tree justice’”.<sup>297</sup>

The Constitutional Court, in *S v Jordan and others (Sex Workers Education and Advocacy Task Force and others as Amicus Curiae)*, has also considered the principle of legality in the South African legal system, and it stated it was necessary

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<sup>294</sup> Maxeiner James R “Some Realism About Legal Certainty in Globalization of the Rules of Law” *Houston Journal of International Law* (2008) at 32.

<sup>295</sup> Ibid.

<sup>296</sup> *S v Molimi* 2008 (2) SACR 76 (CC) at para. 43.

<sup>297</sup> Hong Kong Law Reform Commission 2009 Report *supra* at para.8.20.



that certainty in the definition of crimes was embodied.<sup>298</sup> As shown earlier, this notion of certainty is also required in the application of evidentiary rules.

Furthermore, the Constitutional Court also approved this views when it considered the need for legal certainty in legislations and the role of the courts in interpreting and not creating legislations in its decision in *Investigative Directorate: Serious Economic Offences & others v Hyndai Motor Distributors (Pty) Ltd & others*, and added that:

'It is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation.'<sup>299</sup>

Does section 3(1)(c) comply with the principle enunciated in this judgment of the Constitutional Court or conform to this benchmark? It is respectfully submitted that the answer has to be in the negative because the court is not only empowered to construe these provisions but also has to use its private opinion or a subjective yardstick as opposed to an objective test and apply factors which are not established as law by the legislature. Hence this subparagraph seems to be very wide, and it gives the court the authority to redefine the interests of justice test in a manner which creates uncertainty in the law and might, at the same time, be viewed as legislation which empowers a court to create the law and not only interpret it.

Plato, when commenting on the idea of rule of law which has been in place for centuries and its significance to society, stated that:

'Where the law is subject to some other authority and has none of its own, the collapse of a state, in my view, is not far off, but if the law is the master of government and the government its slave, then its situation is full of promise and men enjoy all the blessings all the gods shower on the state.'<sup>300</sup>

Moreover, the principle of predictability has also been described as an important part of the system of precedent or doctrine of *stare decisis*. Lansberg, when commenting on the notion of predictability and its effect in court proceedings, has argued that, if a court would decide cases without reference to prior cases or existing legal principles, that would lead to the collapse of predictability of the law and the system of precedent would be eroded.<sup>301</sup>

As was stated earlier, the section 3(1)(c)(vii) discretionary rule to admit hearsay evidence makes it impossible for an accused to "appreciate the full evidentiary ambit

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<sup>298</sup> 2002 (2) SACR 499 (CC) at para. 46.

<sup>299</sup> 2001 (1) SA 545 (CC) at para. 24.

<sup>300</sup> John M. Cooper *et al Plato Complete Works* (1997) at 1402.

<sup>301</sup> Brian K. Landsberg "Symposium –Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development – The Role of Judicial Independence" *Global Business and Development Law Journal* (2007) at 334.

he or she faces”,<sup>302</sup> and the nature and scope of the factors that would be used in making this crucial determination cannot be foreseeable in order to enable him to prepare his case accordingly. What this subparagraph does, on the other hand, is to authorise the courts to redefine the interests of justice principle governing the admission of hearsay in a manner that creates uncertainty in the law of evidence.

### 3.4 Conclusion

As the scope and nature of the provisions of this Act can be accurately comprehended only in its proper context if the justification for its existence is to be understood, the fundamental components of this Act have been examined and numerous problems have been identified.

The proposed legislative reforms and the recommendations of the South African Law Commission, which were based on the proposed reforms by Paizes, envisaged a reform to the hearsay rule which included the creation of a judicial discretion to establish the admissibility of hearsay evidence under certain circumstances. The wording of the Act, however, contained no indication of the existence of this discretion. Over the years after the Act’s enactment there has never been a comprehensible jurisprudence on this point because the courts have given contradictory decisions. Given the many conflicting views on the existence of a discretion, if the views which suggest that the Act created a discretion can be accepted as correct, then the discretion is susceptible to attack on another point, viz. it contains latent defects and could be flawed when considering the application and substance of this principle under common law.

The capability of the Act to provide a comprehensible and coherent definition of hearsay evidence has also been questioned and doubted. This state of affairs still exists because, as recently as 2015, the court was again asked to determine whether a certain report compiled by the Public Protector was hearsay or not. In addition, the hearsay definition has also been criticised and questioned because it is thought to have abandoned the implied assertion category of hearsay and included only written or oral statements.

While the objective of the Act was thought to be the development and disentangling of the hearsay rule, it is questioned and disputed whether the wording of the Act has achieved this purpose. The Act is also thought to be incomprehensible and unintelligible.

Moreover, the interests of justice test which forms part of this Act is thought to be “too open-ended and too subjective”<sup>303</sup> and the scope of its application has not been definite. The Act also empowers a court to take into account factors which are not listed in the Act and which are redefined by making reliance on the judge’s private

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<sup>302</sup> *S v Ndlovu supra* at para.18.

<sup>303</sup> Hong Kong Law Reform Commission *Report Hearsay in Criminal Proceedings supra* at para.8.20.

opinions. This point seems to offend one of the fundamental common law principles, viz. legal certainty, which also forms part of the rule of law. Consequently, the Act authorises a court to create the scope and content of the interests of justice principle when making reliance upon its own private opinions in establishing the interests of justice content and scope.

Hearsay evidence admitted through this Act remains evidence which has not been presented in the presence of the adversary and has not been subjected to the constitutional right to challenge evidence or cross-examination. Hence the next chapter will probe the nature and meaning of the right to challenge evidence in the context of the admission of hearsay evidence.

## CHAPTER 4 THE RIGHT TO A FAIR TRIAL: MEANING AND INTENTION OF THE RIGHT TO CHALLENGE EVIDENCE IN THE SOUTH AFRICAN CONSTITUTION

### 4.1 Introduction

The discussion in this chapter will examine the meaning and the intention of the right to challenge evidence as provided by the Constitution,<sup>304</sup> and the focal point will be on the rationale for the existence of this right and the reasons put forward for its protection. This necessitates a probe into the fundamental values which this right helps to guarantee and its role and function in the adversarial trial system. The adversarial trial system, has, according to Paizes, also developed the hearsay rule.<sup>305</sup> Hearsay evidence cannot be challenged through cross-examination, which is one of the adversarial trial system tools for establishing the reliability of evidence; hence cross-examination, which forms part of the principle of orality, will assist in preparing the way to fully comprehending the meaning and intention of the right to challenge evidence.<sup>306</sup>

Section 35(3)(i) of the Constitution guarantees an accused's right to a fair trial which includes the right to challenge evidence.<sup>307</sup> This constitutional right, however, seems to be incomprehensible and incoherent because the Constitution does not define its meaning, content and intention nor whether it includes the right to cross-examination.

The courts, on the other hand, have endeavoured to construe these provisions of the Constitution, but this effort seems not to have yielded constructive results because the courts' decisions on this point remain divergent. These contrasting views are evident in the 2002 decision where the court in *S v Ndlovu and others*,<sup>308</sup> held that the right to challenge evidence does not include the right to cross-examine the original declarant of the hearsay statement.<sup>309</sup> This standpoint on the meaning and content of the Constitution was, however, later rejected in the 2010 decision in *S v Msimango and others*<sup>310</sup> where the court held that the right to challenge evidence includes the right to cross-examination.<sup>311</sup>

In order to understand the nature and scope of the constitutional right to challenge evidence fully, it might be necessary to probe the meaning of the concepts of cross-examination, challenge and confrontation, which, as it will be seen in this chapter, seem to be aimed at protecting similar values which are guaranteed by this right.

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<sup>304</sup> Section 35(3)(i) of the Constitution of the Republic of South Africa, 1996.

<sup>305</sup> AP Paizes thesis *supra* at 15.

<sup>306</sup> PJ Schwikkard *et al Principles of Evidence supra* at 3.

<sup>307</sup> Constitution of the Republic of South Africa, 1996.

<sup>308</sup> 2002 (2) SACR 325 (SCA).

<sup>309</sup> *Ibid* at para. 24.

<sup>310</sup> 2010 (1) SACR 544 (GSJ).

<sup>311</sup> *Ibid* at para. 27.

The 2015 edition of the *Collins English Thesaurus* defined “confrontation” as “to tackle, deal with, cope with, brave, beard, face up to, meet head-on, face, afflict, challenge, oppose, encounter, defy, call out, stand up to, come face to face with, accost, face off”.<sup>312</sup>

The word “confront” seems to have a similar meaning as the word “challenge” which is used in section 35(3)(i) of the South African Constitution. The *Collins English Thesaurus* also described the word “challenge” in a manner that exhibits some resemblance to “confrontation” where it states that it means “dare, provocation, summons to contest, test, trial, opposition, confrontation, defiance, face off, dispute, question, tackle, confront, defy, object to, disagree with, take issue with, invite, throw down the gauntlet, interrogate.”<sup>313</sup>

In addition, the *Collins English Dictionary* describes “cross-examination” as “to question (a witness for the opposite side) in order to check his or her testimony, to question closely or relentlessly.”<sup>314</sup>

The word “question” seems to form a common thread that runs through the definitions of the words “challenge”, “confrontation” and “cross-examination.” Hence what will follow is a probe into the content of the right to challenge evidence which will include the use of these words within the context that has been outlined above.

## 4.2 The principle of orality

Schwikkard and Van der Merwe when commenting on the development and influence of English law on South African law, identified amongst other things the principle of orality as a factor which has given rise to the adversarial trial system and cross-examination as its fundamental attribute, and they pointed out that:

‘most of our exclusionary rules and even some of our rules pertaining to the evaluation of evidence – can be attributed directly to trial by jury. It may be said that the jury was perhaps the single most significant factor in shaping the law of evidence. But the adversarial method of trial, the principle of orality, the oath, the doctrine of precedent and the so-called best evidence rule collectively contributed to our present intricate system in terms of which facts should be proved in a court of law.’<sup>315</sup>

Furthermore, Daniels concurs with Schwikkard and Van der Merwe on the genesis of the principle of orality and its role in the adversarial trial system. He also adds that it can be traced back to the origin of the trial by jury in the common law system of evidence.<sup>316</sup> This scope and nature of the principle of orality is also evident in Jacob’s writing on English common law of evidence and its method of presenting evidence where he states that the principle of orality is a fundamental characteristic of English criminal and civil law. English criminal and civil proceedings have been

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<sup>312</sup> Collins English Thesaurus, 2015.

<sup>313</sup> Ibid.

<sup>314</sup> Collins English Dictionary, 2015.

<sup>315</sup> Schwikkard and Van der Merwe *Principles of Evidence supra* at 5.

<sup>316</sup> C J Daniels “*Advocacy – What is its future?*” – <http://www.oecolaw.co.uk/essays/1995> - last visited 12 February 2016.

governed by this principle for centuries. The principle of orality has also, over the centuries, become a central attribute of the adversary trial system which permits opposing litigants to present oral testimony in the presence of the trier of fact and give them an opportunity to cross-examine witnesses.<sup>317</sup> Jacob also considers the principle of orality to be profoundly inbuilt and deep-rooted English common law principle.<sup>318</sup>

Moreover, De Vos also examined the principle of orality and its role in common law and as a fact-finding tool, and stated that it was based on, and manifests, the notion that parties to a dispute are given the right to put forward their cases by way of “oral evidence and oral arguments.”<sup>319</sup> The parties to a dispute have a right to present their cases in each other’s presence through oral evidence.

Broodryk, seems to agree with these views expressed by De Vos regarding the nature and scope of the principle of orality and adds that it also “entails that evidence on disputed questions of fact should be given by witnesses called before the court to give oral testimony of matters within their knowledge.”<sup>320</sup>

There seems to be a further justification for this principle, and Dennis argues that it allows the parties to “confront through cross-examination those witnesses who testify against them.”<sup>321</sup> While the opportunity to cross-examine a witness remains at the core of this principle, Hoffmann and Zeffertt also add that the use of the principle of orality allows the court to establish another truth-finding tool apart from cross-examination, viz. the demeanour of the witness giving the evidence which enables the determination of reliability of the evidence.<sup>322</sup>

Furthermore, Broodryk comments on the importance of this principle under the common law rules of evidence and points out that:

‘the importance of the principle of orality in the common law of evidence is evinced *inter alia* by the fact that, in South African law of evidence, much greater weight is attached to answers given by witnesses in court on oath or affirmation than to written statements previously made by them.’<sup>323</sup>

The Supreme Court of Appeal concurred with these views expressed by Broodryk in its decision in *S v Adendorff* where the court found it to be prejudicial to an accused that his counsel had prepared a memorandum to be read to the court at the close of the case for the State instead of presenting *viva voce* evidence and the accused be subjected to cross-examination in the presence of the court. The court’s finding was that the accused had been prejudiced by the admission of such evidence because

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<sup>317</sup> Sir Jack Jacob *The Hamlyn Lectures: The Fabric of English Civil Justice* (1987) at 19-20.

<sup>318</sup> *Ibid.*

<sup>319</sup> De Vos “*Civil Procedural Law and the Constitution of 1996: An Appraisal of Procedural Guarantees in Civil Proceedings*” *J S Afr. L.* (1997) at 457.

<sup>320</sup> Theo Broodryk “*The Erosion of the Principle of Orality in South African Civil Procedure: Fact or Fiction?*” *Spectrum Juris* (2014) at 181.

<sup>321</sup> Ian H. Dennis *The Law of Evidence* (1999) at 12.

<sup>322</sup> Hoffmann and Zeffertt *The South African Law of Evidence* (1986) at 352.

<sup>323</sup> *Ibid* at 181.

he was unable to present oral evidence to challenge the evidence presented against him.<sup>324</sup>

Heher JA also noted the absence of the principle of orality in this case in the light of our adversarial trial system, and he stated that, “The result was that the court was deprived of the benefit of hearing him give evidence-in-chief and had no means of assessing the accuracy of his confirmation.”<sup>325</sup>

Hence the reading of the memorandum into record also robbed the court of the opportunity to test and evaluate the exactness and veracity of its contents. This court’s reasoning in this decision also highlights the significant role this principle occupies in our law of evidence.

Furthermore, Schwikkard and Van der Merwe concur with the views of Heher JA in *Adendorff* on the meaning and influence of the principle of orality in presenting evidence, and they argue that litigants should give their testimony verbally in both criminal and civil cases. There is justification for this principle, the argument continues, because “parties should have an opportunity to confront the witnesses against them and should be able to challenge the evidence by questioning.”<sup>326</sup> The rationale for the principle of orality is that the litigants should be able to confront each other through cross-examination.

Schwikkard and Van der Merwe, in justification of these views, add that the “opportunity to confront” and the “ability to challenge the evidence by questioning” are the core notions behind the principle of orality.<sup>327</sup> In other words, the standpoint of Schwikkard and Van der Merwe is that there is a strong link between the ancient principle of orality and the “opportunity to confront witnesses and the ability to challenge evidence by questioning” which is constitutionally guaranteed by section 35(3)(i) of the 1996 Constitution.

In addition, Schwikkard and Van der Merwe also examined the role and use of witnesses in common law and under adversarial trial system and the rationale why oral testimony is the acceptable means of presenting admissible evidence, and they argue that witnesses are required to tender “oral testimony” and “the general receipt of oral testimony established the principle of orality.”<sup>328</sup>

Erasmus, when commenting on the principle of orality in our law stated that the South African procedure in criminal trial is guided by the Criminal Procedure Act<sup>329</sup> and that “in essence a criminal trial is conducted through the medium of the spoken

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<sup>324</sup> 2004 (2) SACR 185 (SCA) at 200.

<sup>325</sup> *Ibid* at 200f.

<sup>326</sup> P J Schwikkard and S E Van der Merwe *Principles of Evidence supra* at ch18-p363.

<sup>327</sup> *Ibid* at ch18-p363.

<sup>328</sup> P J Schwikkard and S E Van der Merwe *Principles of Evidence supra* at 5.

<sup>329</sup> Act 51 of 1977.

word and is, therefore, essentially oral in nature.”<sup>330</sup> Steytler seems to agree with these views expressed by Schwikkard, Van der Merwe and Erasmus in describing the essence of our criminal trials and states that orality is the fundamental and central principle of the South Africa’s adversarial trial system.<sup>331</sup>

While this study does not intend to examine the proceedings of the International Criminal Tribunals, the general application of this principle by these tribunals might, however, be informative at a later stage when making recommendations for reforms. Combs examined the far-reaching influence of the principle of orality as well as the presentation of evidence in the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL) and concluded that that the adversarial trial system was used during these proceedings and “each party was permitted to examine and re-examine the witnesses they call and to cross-examine the opposing party’s witnesses.”<sup>332</sup>

Recently, in the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo and the “Situation in the Central African Republic”*, the principle of orality was also at issue where the accused’s defence counsel had argued that the court should not have received as evidence transcripts of interviews of witnesses which were conducted with those witnesses who did not give evidence during the hearing. The Court agreed with this submission and held that as a general norm “witnesses should be called to give evidence in order to assess the reliability and credibility of the information in their possession.”<sup>333</sup> There seems to be some reluctance on the part of the court to receive hearsay evidence and or to decide a case solely on an out-of-court statement.

The use of oral evidence in English law and the central role it played in trial proceedings have also been seen to be closely linked to the right of confrontation through cross-examination in the adversarial trial system. The verbal nature of testimony under common law and the occasion of cross-examination have been seen to be fundamental characteristics of our law. Hence it is submitted that the principle of orality is a central part of the confrontation which litigants are entitled to have through cross-examination.

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<sup>330</sup> Deon Erasmus “*Procedural Explanations and Choices: The Undefended Accused in a Minefield*” *Law, Democracy and Development Journal*, Nelson Mandela Metropolitan University (2009) at 13.

<sup>331</sup> Nico Steytler “*Making South African Criminal Procedure more Inquisitorial*” *Law, Democracy and Development Journal* (2001) at 3.

<sup>332</sup> Nancy Amoury Combs “*Evidence*”, *College of William and Mary Law School Faculty Publications*. Paper 1178 (2011) at 325.

<sup>333</sup> *SITUATION IN CENTRAL AFRICAN REPUBLIC, IN THE CASE OF THE PROSECUTOR v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, 11 October 2013 at para. 25.



### 4.3 The origin of cross-examination

The origin of cross-examination can be traced back to 605 B.C. where the accusers and adverse witnesses were questioned by, or on behalf of, the accused in order to establish the credibility of the accusations.<sup>334</sup> This is evident from the Book of Daniel where it attests to the fact that the ancient Hebrews had employed cross-examination as a truth-finding process where some elders brought false fornication charges against one female, named Susanna. Daniel, the judge, when setting forth the Hebrew legal system relating to the admission and testing of evidence questioned the accuser and the accused with a view to determining whether the accusations were true.<sup>335</sup>

This idea of truth-finding also has some similarities to one of the trials by ordeal where it was thought that God would judge human disputes and show which party was innocent. Daniel questioned the two witnesses separately in order to determine whether their testimony was reliable and credible. It is also remarkable in the application of the Hebrew law that he was bound to hear oral testimony and examine both the accused and the accuser before deciding which party should be believed.

Younger, on the other hand, when commenting on the development and use of cross-examination in Biblical times, as well as in the ancient Greek era, argued that confrontation between the accused and his accusers was an essential attribute of the proceedings, and cross-examination in the fullness of time became a crucial characteristic of common law trial procedure<sup>336</sup> This fact that cross-examination developed to be an essential characteristic of the common law, as has been shown earlier, was evident in the 1603 treason trial of Sir Walter Raleigh in the House of Lords where, after he was denied an opportunity to face his accuser, complained that “the Proof of the Common law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.”<sup>337</sup>

McCormick agrees with the views expressed in Raleigh’s case, outlining English common law at the time, and giving the opinion that hearsay statements were excluded during that period because the person who made such a statement could not be cross-examined.<sup>338</sup>

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<sup>334</sup> The Babylonian Captivity with Map – <http://www.bible-history.com/babyloniancaptivity>– last seen 20 August 2015.

<sup>335</sup> Ibid.

<sup>336</sup> Irving Younger *Hearsay: A Practical Guide Through the Thicket* (1988) at 2.

<sup>337</sup> T.B. Howell *A Complete Collection of State Trials* (1816) at 15-16.

<sup>338</sup> C.T. McCormick *et al McCormick on Evidence* (1984) at 728.

Moreover, Wellman seems to concur with the views expressed by Young on the ancient role of cross-examination and its influence in common law and points out that:

“the system is as old as the history of nations. Indeed, to this day, the account given by Plato of Socrates’s cross-examination of his accuser, Miletus, while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.”<sup>339</sup>

Church, when commenting on Socrates’ trial in the work of Wellman argues that Socrates found fault in the proceedings because it disqualified him from confronting some of his accusers in that cross-examination was restrained and impeded in Athenian law.<sup>340</sup>

Epstein, on the other hand, urges that caution should be exercised before accepting Wellman’s views on the history of cross-examination, and he argues that “there is no veracity to Francis Wellman’s claim that the system of adversarial cross-examination is as old as the history of nations” because, he adds that, in his view there:

“have been confrontation rights as early as ancient Rome, anonymous accusations were not actionable because the accused had the right to confront his accusers, but these rights did not include cross-examination and were more of the nature of investigative tools rather than trial procedure as we understand the extent of cross-examination today.”<sup>341</sup>

According to Epstein, therefore, cross-examination was originally not used as a procedural tool as it is used today but as form of investigative procedure, and, hence, Wellman’s standpoint on this aspect is questionable and disputed.

Moreover, Graham seems to concur with the views expressed by Epstein detailing the nature and scope of cross-examination in Roman law, and he argues that Roman law did approve the right of cross-examination, but cross-examination was more of an investigative procedure and not a procedural trial device as it is known today.<sup>342</sup>

In addition, Langbein<sup>343</sup> traced the origin of cross-examination to 1730s and concurs with the views expressed by Epstein and Graham that originally cross-examination began as an investigative device. He also found three incidents which justified its changes in English trial procedure, which in his view altered its form and nature into a trial procedural device -: firstly, during 1700s the investigative and trial stages had witnessed an expansion of accused’s persons resorting to defence lawyers-;

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<sup>339</sup> Francis Wellman *The Art of Cross-examination* (1903) at 27.

<sup>340</sup> F.J. Church (trans.) *The Trial and Death of Socrates* (1908) at 40.

<sup>341</sup> Jules Epstein “Cross-examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk”” *Widener Law Rev.* (2009) at 431.

<sup>342</sup> Kenneth Graham “Confrontation Stories: Raleigh on the Mayflower” *Ohio St. J. Crim. L.* (2005) at 211.

<sup>343</sup> John H. Langbein *The Origins of Adversary Criminal Trial* (2003) at 246.

secondly, witnesses who gave testimony that would prove a crime during that era were given a reward and this resulted in an increase in treacherous evidence, and cross-examination became an essential remedy to uncover “the corrupt motive”-; and, thirdly, because of “the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony.”<sup>344</sup> Wigmore, also identified the justification for the development of cross-examination to be a significant fact-finding process, argued that there was a growing perception that mistakes could be made when admitting hearsay evidence, and claimed that the main cause for these mistakes was seen to be the absence of the testing of the reliability of evidence through cross-examination.<sup>345</sup>

#### **4.4 The role of cross-examination as an essential evidentiary testing device**

Emsley, Hitchcock and Shoemaker, when commenting on the position of cross-examination during 1674 to 1913 at the London’s Central Criminal Court (The Old Bailey), argued that it was during this period that judges had began allowing criminal defendants the right to cross-examine witnesses called to testify against them, and they pointed out that:

‘Cross-examinations were conducted by the judges, the defendants, or, increasingly, by defence lawyers. There was no presumption of innocence (until early nineteenth century), and no right to remain silent. Defendants were expected disprove the evidence presented against them and establish their innocence. The assumption was that, if the defendants were innocent, they ought to be able to prove it. They could cross-examine prosecution witnesses and, from 1702, call their witnesses but, unlike prosecutors, they could not compel witnesses to attend. And since trials were not scheduled, it was impossible to predict precisely when a witness would need to appear in court.’<sup>346</sup>

In addition, Wigmore, when commenting on the origin and position of cross-examination in the common law and Anglo-American hearsay evidence trial, claimed that “Cross-examination is the most powerful instrument known to the law in eliciting truth.”<sup>347</sup>

In 1809, Peake, when describing the crucial role of cross-examination, stated that English law did not give recognition to simple allegations which were not made under oath and where the maker of such statement was not cross-examined by the adversary.<sup>348</sup>

The law was said not to give credibility to statements which were made but not accompanied by cross-examination. What was the reason behind this notion? The maker of the out-of-court statement was required to be subjected to an oath and cross-examination and, in order for the evidence he gave to be credible, he was to have personal knowledge of the events.

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<sup>344</sup> Ibid at 168 and 4.

<sup>345</sup> John H. Wigmore “*The History of the Hearsay Rule*” *Harvard L. Rev.* (1904) at 458.

<sup>346</sup> Clive Emsley Tim Hitchcock and Robert Shoemaker, “*Crime and Justice – Trial Procedures*” *Old Bailey Proceedings Online*, <http://www.oldbaileyonline.org> at 18 – last seen 1 August 2015.

<sup>347</sup> 5 Wigmore *On Evidence* supra at 1362.

<sup>348</sup> Thomas Peake *Compendium of the Law of Evidence* (1809) at 10-11.

Epstein, when commenting on cross-examination in common law courts and its position as truth-finding tool, stated that, “It cannot be denied that cross-examination is viewed as a core aspect of the trial process, both in criminal and civil cases, and its use and purported power are omnipresent.”<sup>349</sup>

Underwood seems to concur with the views expressed by Epstein, and, when describing the role of cross-examination, adds that “it carried the power to confront and break the false witness.”<sup>350</sup>

In South Africa, the right to cross-examination is not only a common law principle but also a statutorily regulated right which is provided in section 166 of the Criminal Procedure Act 51 of 1977 which reads:

- (1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.”

Du Toit, when commenting on this right to cross-examination and its meaning and content, expressed the opinion that, “Cross-examination is one of the essential components of the adversarial system of justice. It is the name given to the questioning of the witnesses by the party (or parties) who did not call the witness.”<sup>351</sup>

Hence the central and historical role played by cross-examination in the adversarial trial system seems to have remained intact according to the authors after cross-examination was statutorily regulated in South Africa.

Furthermore, Van der Merwe argues that verbal confrontation, which developed as a form of a trial procedure, is also thought to have included cross-examination, and he states that cross-examination has for centuries formed a central characteristic of the adversarial trial system. He adds that in South Africa it has an actual and symbolical foundation and the accused’s constitutional right to challenge evidence also embodies this right to cross-examination.<sup>352</sup>

According to the author, there is constitutional link between the right of cross-examination which has its origin in common law and the constitutional right to adduce and challenge evidence contained in section 35(3)(i) of the 1996 Constitution. Cross-examination, therefore, is no longer merely a common law or statutory right but also a constitutional right.

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<sup>349</sup> Jules Epstein “*Cross-examination: Seemingly Ubiquitous, Purportedly Omnipresent, and “At Risk”*” *Widener L. Rev. supra* at 430.

<sup>350</sup> Richard H. Underwood “*The Limits of Cross-examination*” *Am. J. Trial Advoc.* (1997) at 117.

<sup>351</sup> Du Toit *et al Commentary on Criminal Procedure Act supra* (2014) at ch22-p76.

<sup>352</sup> SE Van der Merwe “*Regterlike Inkorting Van Kruisondervraging: ‘N Gemeenregterlike, Statutere en Grondwetlike Perspektief*” *Stellenbosch L. Rev.*(1997) at 359. (my translation).

Schwikkard and Van der Merwe, also seem to concur with these views and point out that:

“Cross-examination is a fundamental procedural right. It is one of the essential components of the accusatorial or adversary trial and a natural part of our trial system, where emphasis is placed on orality. Cross-examination is the name given to questioning of an opponent’s witness.”<sup>353</sup>

The court, in its decision in *Caroll v Caroll*,<sup>354</sup> considered the historical development and the objectives of cross-examination and held that the aim of cross-examination was to test the reliability, trustworthiness and worth to be attached to evidence in general. Cross-examination was also found to be a tool to uncover the truth and contradictions in a witness’s statement.

In 1961, the court, in its decision in *R v Ndawo and others*,<sup>355</sup> when commenting on the denial of the right to cross-examination, held that the absence of cross-examination in common law could result in a failure of justice. The accused was considered to have suffered prejudice because of the lack of cross-examination.

In *Distillers Korporasie (SA) Bpk v Kotze*,<sup>356</sup> the court also had to determine the impact on the proceedings of the refusal by the trial court that the defendant be questioned on a certain matter that was also disputed by the plaintiff. Schreiner JA, when commenting on the restrictions placed on cross-examination, held that it was first important to establish whether there was an irregularity in the proceedings. Because the trial court had prevented the defendant from cross-examining adverse witnesses this conduct resulted in an irregularity which also caused immeasurable prejudice to the accused.

The court, in *President of the Republic of South Africa and others v South African Rugby and Football Union and others*,<sup>357</sup> also considered the scope and rationale of cross-examination in common law and the need to challenge evidence through questions put during cross-examination, and it pointed out that:

‘The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct.’<sup>358</sup>

In *S v Boesak*<sup>359</sup> the accused failed to challenge some evidence and documents through cross-examination which formed part of the case for the prosecution. The

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<sup>353</sup> P J Schwikkard and S E Van der Merwe *Principles of Evidence supra* at 341.

<sup>354</sup> 1947 (4) SA 37 (D) at 40.

<sup>355</sup> 1961 (1) SA 16 (N) at 17d.

<sup>356</sup> 1956 (1) SA 357 (A) at 361g-h.

<sup>357</sup> 2000 (1) SA 1 (CC) at 61.

<sup>358</sup> *Ibid.*

<sup>359</sup> 2001 (1) SACR 1 (CC) at para. 25.

Constitutional Court held that, if the accused had failed to confront and challenge certain evidence through cross-examination, he could not be able to argue that such unchallenged evidence should not be admissible.

The important role played by cross-examination in challenging an adverse witness's testimony was highlighted in the court's reasoning.

The court, in its decision in *S v Pistorius*,<sup>360</sup> has also examined the objectives of cross-examination, and, when commenting on unchallenged evidence that was presented by the prosecution, remarked that, if a witness fails to challenge adverse testimony through cross-examination, it could be difficult to argue that such unchallenged evidence contained discrepancies and contradictions.

The court's view in this latter case was that the concept of cross-examination requires that a witness has to be confronted with disputed evidence and be given an opportunity to reply while in the witness-box. Admitting untested evidence might cause prejudice to the party affected by such evidence and the court cited with approval the approach in the *SARFU's* case.<sup>361</sup>

Furthermore, in *S v Mavinini*,<sup>362</sup> the Supreme Court of Appeal also cited with approval the approach in the *SARFU's* case<sup>363</sup> and examined evidence that was untested in the witness-box and commented that a witness had to be challenged through cross-examination while still in the witness-box. The confrontation of a witness was found to be through cross-examination.

The court, in its decision in *S v Naidoo*,<sup>364</sup> also examined the common law right to cross-examination and its impact on untested evidence, and it held that, if the contended issue is left undisputed in cross-examination, "the party calling the witness is entitled to assume that the unchallenged evidence may be considered as correct."<sup>365</sup>

In *S v Fortuin*, however, where the prosecution failed to cross-examine an accused and the court considered the impact of the absence of cross-examination in the proceedings, and it pointed out that:

"there is no absolute rule that a failure by a party to cross-examine a witness precludes such a party from disputing the truth of the witness's testimony, such a failure, especially by a prosecutor in criminal proceedings, may often be decisive in determining the accused's guilt."<sup>366</sup>

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<sup>360</sup> 2014 (2) SACR 314 (SCA) at paras. 23-25.

<sup>361</sup> Ibid.

<sup>362</sup> 2009 (1) SACR 523 (SCA) at paras. 13-14.

<sup>363</sup> *President of the Republic and others v South African Rugby Football Union (SARFU) and others* (2000) (1) SA 1 (CC) at paras. 63-65.

<sup>364</sup> 2010 (1) SACR 369 (KZP).

<sup>365</sup> Ibid at para. 15. See also *S v P* 1974 (1) SA 581 (RA) at 583e-g and *S v Boesak* (2001) (1) SACR 1 (CC) at para. 25.

<sup>366</sup> 2008 (1) SACR 511 (C) at para.14.

These latter views by the court might, however, be questioned and doubted because it seems to be contrary to the Constitutional Court decision in the *SARFU* where it was held that, “if a point is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct.”<sup>367</sup> In other words, the failure to cross-examine a witness might have adverse effect on a party who is required to subject that witness to cross-examination.

In *S v Mdali*,<sup>368</sup> the trial court failed to inform the accused of his right to cross-examine witnesses called by the prosecution against him, and this prompted the following criticism from the review court (High Court) on the admission of what seemed to be uncross-examined evidence: “The accused’s constitutional right to a fair trial, and in particular his right to adduce and challenge evidence, was grossly violated.”<sup>369</sup> The court’s view in this decision is that when an accused was denied his right to cross-examine witnesses his right to challenge evidence was also denied.

In *R v Ndawo and others*,<sup>370</sup> it was held that evidence untested through cross-examination was prejudicial to an accused. The court’s reasoning was that the denial of the common law right to cross-examine witnesses by an accused can never be excusable. The views in this judgement were later reinforced in *S v Tyebela*<sup>371</sup> where it was stated that evidence untested through cross-examination could be prejudicial, and this resulted in a conviction which has been based on such evidence to be set aside.

Furthermore, in *S v Nkabinde*<sup>372</sup> the court examined the efficacy of cross-examination and its influence in uncovering inconsistencies and contradiction from adverse witness’s evidence, and it remarked that, “Cross-examination of the witnesses revealed the flaws inherent in their testimony in this case.”

It is evident from the discussion of the case law that the intention and meaning of the right to cross-examination seems have been closely linked and considered to include the constitutional right to challenge evidence. This is despite the fact that section 166 of the Criminal Procedure Act which protects the right to cross-examination does not also state whether this right includes the constitutional right to challenge evidence or that this provisions should be read together with section 35(3)(i) of the Constitution. The succeeding paragraph will examine the meaning and intention of the right to challenge evidence.

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<sup>367</sup> Ibid at para. 25.

<sup>368</sup> 2009 (1) SACR 259 (C).

<sup>369</sup> Ibid at para.10.

<sup>370</sup> 1961 (1) SA 16 (N) at 17d.

<sup>371</sup> 1989 (2) SA 22 (A) 27d-g.

<sup>372</sup> 1998 (8) BCLR 996 (N) at 1004.

#### 4.5 The meaning and intention of the right to challenge evidence

As stated earlier, the 1996 Constitution remains incomprehensible and unintelligible on whether the right to adduce and challenge evidence includes the right to cross-examine witnesses. In other words, the Constitution alone does not resolve this question. The interpretations and views given by the courts in interpreting these constitutional provisions and the views of academics will now be probed in order to seek clarity and to answer one of the primary questions of this study.

In 2002, the court, in its decision in *S v Ndlovu and others*,<sup>373</sup> has considered this question and concluded that the right to adduce and challenge evidence does not include the right to cross-examine witnesses when hearsay evidence is deemed admissible under section 3 of the Law of Evidence Amendment Act and the core of Cameron JA's reasoning was as follows:

'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.'<sup>374</sup>

According to Cameron JA's reasoning in the *Ndlovu's* case, the right to adduce and challenge evidence does not include the right to cross-examine the witness who made the hearsay statement.

In 1996, the court in *K v The Regional Court Magistrate NO, and others*<sup>375</sup> considered whether section 25(3) of the 1993 Constitution<sup>376</sup> which guaranteed an accused's right to challenge evidence included the right to cross-examine witnesses against him, and Melunsky J held that section 25(3) of the Interim Constitution did not cite the right to cross-examine witnesses but provided the right to challenge evidence, and he added that this right did contain the right to cross-examine witnesses because cross-examination was, in his view, a central right in common law.

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<sup>373</sup> 2002 SACR 325 (SCA) at para. 24.

<sup>374</sup> Ibid.

<sup>375</sup> 1996 (1) SACR 434 (E) at 441i-442b.

<sup>376</sup> Section 25(3)(d) of the Constitution of the Republic of South Africa, Act 200 of 1993 provides: "Every accused person shall have the right to a fair trial, which shall include right to adduce and challenge evidence, and not to be compellable witness against himself or herself."



In 2005, in *S v Manqaba*,<sup>377</sup> the court also examined whether the constitutional right to challenge evidence includes the right to cross-examine witnesses, and Satchwell J held that it was a commonplace notion that cross-examination was included in the basic right to challenge evidence.<sup>378</sup>

Moreover, the court, in its 2008 decision in *S v Mgudu*,<sup>379</sup> also had to determine whether the right to adduce and challenge evidence included the right to cross-examine witnesses, and Madondo J held that cross-examination was included in this constitutional right, and added that:

“Section 35 of the Constitution guarantees the right to a fair trial. The weight of decided cases supports the view that there can be no fair trial without the exercise of the right to cross-examine witnesses called by the opposing party. The continued refusal by the magistrate to recall the witness and to allow the defence attorney to cross-examine her will certainly offend against the right to a fair trial and seriously violate the right to adduce and challenge evidence, in particular, entrenched in section 35(3)(i) of the Constitution.”

In addition, Madondo J, in *Mgudu*, also commented on the common law right of cross-examination and its content and held that the refusal of this right might also have resulted in a violation of the accused’s constitutional right to adduce and challenge evidence. Furthermore, he added that this view was based on what he deemed to be a well-established historical link between the common law right of cross-examination and the constitutional right to adduce and challenge evidence.<sup>380</sup>

The court, in its decision in *S v Mokoena; S v Phaswane*,<sup>381</sup> considered whether section 170A of the Criminal Procedure Act 51 of 1977<sup>382</sup> which provides for the use of an intermediary in certain circumstances violated the accused’s right to challenge evidence, and it held that “the accused is in terms of section 35(3)(i) of the Constitution entitled to ‘adduce and challenge’ evidence. This should include the right to face his or her accuser and to test the averments against him or her, which could only be done through proper cross-examination.” The court’s views in the latter case are also that the accused’s right to challenge evidence includes a right to confront his adversaries and to subject their evidence to the test of cross-examination.

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<sup>377</sup> 2005 (2) SACR 489 (W).

<sup>378</sup> Ibid at para. 44.

<sup>379</sup> 2008 (1) SACR 71 (N).

<sup>380</sup> At paras. 25-28.

<sup>381</sup> 2008 (2) SACR 216 (T) at para.175.

<sup>382</sup> Section 170A provides “(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give evidence through that intermediary. (2) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other through that intermediary.”

Schwikkard, on the other hand, has doubted and questioned Cameron JA's reasoning in *S v Ndlovu* which held that the right to challenge evidence does not include cross-examination and, on the contrary, has maintained that "there can be little doubt that the right to challenge evidence must ordinarily include the right to cross-examine."<sup>383</sup>

Furthermore, in 2010, the Supreme Court of Appeal in *S v Libazi and another*,<sup>384</sup> also expressed some doubt regarding the correctness of Cameron JA's reasoning in *S v Ndlovu* on the content and scope of the right to adduce and challenge evidence, and Mthiyane JA pointed out that:

"the right to challenge adverse evidence is a foundational component of the fair trial rights regime decreed by our Constitution in section 35(3). Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him."<sup>385</sup>

The Supreme Court of Appeal in this decision, viz. in *Libazi* described the right to challenge evidence as including the right to cross-examine witnesses and gave the opinion that a court, when interpreting the Bill of Rights, should employ what it termed a "generous" approach. In addition, this approach by the Supreme Court of Appeal in construing hearsay evidence and the content of the right to challenge evidence also stand in sharp contrast to its earlier decision in *Ndlovu* where it held that the right to challenge evidence did not include cross-examination in similar circumstances where hearsay evidence and the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988 were at issue. Hence this latter decision by this court has also created a dilemma and uncertainty regarding the meaning, intention and content of the right to challenge evidence.

Schwikkard, on the other hand, has identified what she termed the objectives of the constitutional right to adduce and challenge evidence and gave the opinion that, "It also has certain features that arguably cannot be replicated by substituted indicia of reliability. For example, contradictions between witnesses or apparent inconsistency in a witness's statement are better explored through cross-examination than the logic of inferences."<sup>386</sup> In other words, the author's views on this point seem to be that this constitutional right includes cross-examination.

The court's view in *S v Matladi*<sup>387</sup> also seems to concur with the view expressed by Schwikkard where it was held that the accused's right to testify in his own defence can be deemed to include the constitutional right to adduce and challenge evidence.

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<sup>383</sup> PJ Schwikkard *et al Constitutional Law of South Africa*,(2014) at 52-44

<sup>384</sup> 2010 (2) SACR 233 (SCA) at para.11.

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid* at 70.

<sup>387</sup> 2002 (2) SACR 447 (T) at 451b-g.

On the other hand, the court, in *S v Muller and others*,<sup>388</sup> when commenting on the content of the right to adduce and challenge evidence, held this right to be fully articulated in the maxim *audi alteram partem* and the court also found this principle to be “an integral part of the accused’s right to adduce and challenge evidence.”<sup>389</sup> According to the Merriam-Webster Dictionary, the *audi alteram partem* is a Latin expression which means “listen to the other side”, or “let the other side be heard as well”.<sup>390</sup> The Duhaime Legal Dictionary also outlines the link between the *audi alteram partem* and the common law right of confrontation and states that this principle means that, “No person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.”<sup>391</sup> It is submitted, therefore, that there is an historical link between common law right to confrontation and *audi alteram partem* principle, and the justification for both of these principles is that both sides should be able to present their case and confront each other through questioning.

In 2010, in *S v Msimango and another*,<sup>392</sup> the court also had to establish whether the right to challenge evidence included cross-examining a witness who had died before her cross-examination was completed. Mochidi J rejected the notion that this right does not include cross-examination and held that, “The right of an accused person to adduce and challenge evidence as enshrined in section 35(3)(i) of the Constitution, undoubtedly includes the right to cross-examination.”

In reaching this conclusion, Mochidi J, also found that “there was overwhelming and persuasive authority for this proposition.”<sup>393</sup> These views on the scope, meaning and intention of this right, as was shown earlier are undoubtedly in conflict with those expressed by the court in the *Ndlovu* case.

Steytler, when commenting on the right to challenge evidence in the South African Constitution and the confrontation clause contained in the United States Constitution,<sup>394</sup> argued that the right to challenge evidence was rooted in the common law right to cross-examine witnesses and added that:

“The primary interest of the confrontation clause in the Sixth Amendment, the US Supreme Court held in *Douglas v Alabama*, is the right to cross-examination. The same is true in South Africa; the right to challenge evidence includes the right to cross-examine. A prerequisite for cross-examination is that all evidence is produced in court and witnesses testify *viva voce*. Where an accused has been deprived

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<sup>388</sup> 2005 (2) SACR 451 (C).

<sup>389</sup> *Ibid* at 458b.

<sup>390</sup> Merriam-Webster Online Dictionary (<http://www.m-w.com/dictionary/audi+alteram+partem>) last seen 8 March 2016.

<sup>391</sup> (<http://www.duhaime.org/LegalDictionary/A/Audialteram.aspx>) last seen 8 March 2016.

<sup>392</sup> 2010 (1) SACR 544 (GSJ) at para. 27.

<sup>393</sup> *Ibid*.

<sup>394</sup> Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

of the opportunity to cross-examine a witness ... the use of such untested evidence will result in the infringement of this constitutional right.”<sup>395</sup>

The author has established some shared values between these two Constitutions and concluded that our constitutional right to challenge evidence is similar to the right of confrontation provided by the United States Constitution. He also found the objectives of the right to challenge evidence in the South African Constitution to be the need to cross-examine adverse witnesses and argued that it also included the right to cross-examine witnesses.

Furthermore, Naude, when commenting on Cameron JA’s decision in *Ndlovu* which held that the right to challenge evidence does not include the right to cross-examine witnesses, argued that, because an accused has a right to cross-examine witnesses, procedurally the court’s decision in *Ndlovu* might be viewed in different ways.<sup>396</sup> In other words, this view by Naude seems to suggest that cross-examination as procedural tool should be included in the constitutional right to challenge evidence and that the court’s reasoning in *Ndlovu* might be questionable.

Recently, the Supreme Court of Appeal in *S v Nedzamba*<sup>397</sup> also considered the meaning, intent and extent of the right to adduce and challenge evidence as well as the objectives of cross-examination, and it held that, after the accused could not cross-examine witnesses who testified against him, his right to adduce and challenge evidence was violated.

Steytler commented further on the substance of the right to challenge evidence and its link with cross-examination and stated that, at the centre of establishing the reliability of the evidence against the accused, is the right to challenge evidence. He added that cross-examination also brings to light some positive evidence from a witness and that the constitutional challenging of evidence was through cross-examination.<sup>398</sup>

The South African Law Commission, in its 2001 report examined the content and meaning of the right to adduce and challenge evidence and made recommendations which approved Steytler’s views that section 35(3)(i) of the Constitution is sound and comprehensible and that it includes the right to cross-examination.<sup>399</sup>

## 4.6 Conclusion

While the text of the Constitution remains incomprehensible and ambiguous on the question whether the right to a fair trial which includes the right to challenge

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<sup>395</sup> N Steytler *Constitutional Criminal Procedure – A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at para. 4.1.

<sup>396</sup> BC Naude “‘Testimonial’ hearsay and the right to challenge evidence” SACJ (2006) at 320.

<sup>397</sup> (911/2012) [2013] ZASCA 69 at para. 33.

<sup>398</sup> *Ibid* at 346-347.

<sup>399</sup> South African Law Commission Report, *Project 101, The Application of the Bill of Rights to Criminal Procedure, Criminal Law, The Law of Evidence and Sentencing* (May 2001) at paras. 6.1-6-5.

evidence includes the right to cross-examine witnesses, the majority of the court decisions suggest that the values which are protected by these two rights are inseparable and they, consequently, answer this question in the affirmative. In addition, these are also the widespread views of academics.

Moreover, section 35(3)(i) of the Constitution forms part of the Bill of Rights, and when construing provisions contained in the Bill of Rights a court is also enjoined to consider international and foreign laws.<sup>400</sup> Hence the succeeding chapter will examine international and foreign laws relating to this right and the hearsay rule in other common law jurisdictions with a view to understanding fully the true perspective and justification for the existence of this right.

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<sup>400</sup> Section 39(1) of the Constitution provides “When interpreting the Bill of Rights, a court, tribunal or forum – (b) must consider international law; and (c) may consider foreign law.”

## CHAPTER 5 – THE HEARSAY RULE AND THE RIGHT OF CONFRONTATION IN OTHER COMMON-LAW JURISDICTIONS AND IN THE EUROPEAN COURT OF HUMAN RIGHTS

### 5.1. Introduction

The influence of the hearsay rule as a fundamental component of the common law right of confrontation was recently demonstrated in the decision of the European Court of Human Rights in *Al-Khawaja and Tahery v The United Kingdom*<sup>401</sup> which involved the admission of hearsay evidence and the common law right of confrontation. It was argued that the United Kingdom Supreme Court has erred in finding that the admission of hearsay evidence did not violate the accused's right of confrontation and should have considered the influence and effect of these principles (hearsay rule and right of confrontation) and their common law background in other common law jurisdictions which included Australia, Canada, Hong Kong, New Zealand, Ireland, the United States, and South Africa, which was given prominence.<sup>402</sup>

What do these countries have in common? These are all former British colonies and they have inherited the common law hearsay rule<sup>403</sup> which began during the Middle Ages in England.<sup>404</sup> Furthermore, the historical link in the application of this common law principle in these countries which also formed a fundamental part of the accused's submission in *Al-Khawaja supra* will be evident in the discussions that follow.

In this chapter, the objectives of the study will be to examine critically the hearsay rule and its application with regard to the right of confrontation in these countries and in the European Court of Human Rights ["ECHR"] in order to establish how the admission of hearsay evidence impacts on the accused's right to confront witnesses who testifies against him or her. Moreover, South Africa and these countries are also considered the "major common law jurisdictions"<sup>405</sup> and, therefore, the jurisprudence in the area of hearsay evidence in these countries might be informative in answering the questions which form the primary subject of this study on the hearsay rule.

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<sup>401</sup> 26766-05 [2009] ECHR 110.

<sup>402</sup> Eric Metcalfe, a third party submission by JUSTICE, which is the British section of the International Commission of Jurists, para. 4(i).

<sup>403</sup> Wikipedia Encyclopaedia: "Common law (also known as case law or precedent) is that law developed by judges, courts, and similar tribunals, stated in decisions that nominally decide individual cases but that, in addition, have precedential effect on future cases."

<sup>404</sup> [https://en.wikipedia.org/wiki/Common\\_law](https://en.wikipedia.org/wiki/Common_law) last seen 31 March 2016.

<sup>405</sup> *Al-Khawaja and Tahery case supra*, third party submission at para. 4(i).

## 5.2 United States

In the United States the accused's common law right to cross-examine opposing witnesses which originated from Roman law was developed together with the hearsay rule during the beginning of the eighteenth century when the United States was still a British colony. This right became a constitutionalised right during the same period, for example-, the Sixth Amendment (Confrontation Clause) of the United States Constitution which was adopted in 1790 provides that "in criminal cases the accused shall enjoy the right to be confronted with the witnesses against him."<sup>406</sup>

In addition, Taylor, when examining the reason why the common law right of confrontation received constitutional protection, agrees with the views expressed by Pollitt in claiming that there seems to be another reason that motivated this constitutionalisation when he states that:

'in the late 1700's, when the United States Constitution and the Bill of Rights were adopted, the general rule against hearsay had been established in England. The same mistrust of out of court statements that gave rise to the hearsay rule doctrine was present in the mind of the framers of the Constitution.'<sup>407</sup>

It seems that the constitutionalisation of the common law right of confrontation was born out of the fear and concern that hearsay evidence would prejudice an accused and that there was some mistrust about whether government officials who were entrusted with administering the law would not protect this fundamental right as was shown in the Raleigh treason trial above. Taylor's views are also evident in the argument made by John Adams, the second president of the United States who is also considered to be "a principal architect of the United States Constitution," in a case where he represented a trader<sup>408</sup> where he argued that "examinations of witnesses upon interrogatories are only by the Civil Law. Interrogatories are unknown at Common Law, and Englishmen and Common Law Lawyers have an aversion to them if not an abhorrence of them."<sup>409</sup>

In 1895 the United States Supreme Court described the rationale and objective of the inclusion of the right of confrontation in the United States Constitution, and remarked that, "The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits being used against the prisoner"<sup>410</sup> These views expressed by the court are also in accord with those expressed by Taylor and Pollitt above.

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<sup>406</sup> H. Pollitt "The Right of Confrontation: Its History in Modern Dress" *J. Pub. L.* (1959) at 395.

<sup>407</sup> David H. Taylor "Hearsay and the Right of Confrontation in American Trials by Jury". A Paper delivered at Chosun University on June 3, 2011 at 21.

<sup>408</sup> Ibid.

<sup>409</sup> Draft of Argument in *Sewall v Hancock* (Oct.1768 – Mar.1769), in 2 Legal Papers of John Adams at 194, 207.

<sup>410</sup> *Mattox v United States* 156 U.S. 237 (1895) at 242-243.

As was shown in chapter two, however, the *ex parte* depositions were the kind of documents or letters that were at times deemed admissible as evidence and this is evident in the Raleigh treason trial referred to above. In 2004, the same court reiterated the objectives of the Confrontation Clause which seem not to have changed over centuries, when Scalia J stated that:

“the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like *Raleigh’s* [Sir Walter Raleigh was tried for treason, convicted, and later executed, largely based upon on out of court statement]; that the Marian statutes invited; that English law’s assertion of a right of confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.”<sup>411</sup>

Furthermore, Taylor also examined the consequences of integrating the hearsay rule into the Constitution and concluded that it became a constitutionally protected notion that the right of confrontation could no longer be changed in federal courts.<sup>412</sup> In addition, this historical link between the hearsay rule and the right of confrontation led Taylor to conclude that these principles were intended to safeguard the same values.<sup>413</sup>

Read also concurs with Taylor on the interaction between these principles and also argues that one of the values safeguarded by these principles was that of cross-examination.<sup>414</sup>

In addition, Read comments on these values protected by these principles and states that “both the right to confrontation and the hearsay rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined.”<sup>415</sup>

Hence it is the chance to cross-examine witnesses which is safeguarded by the rule

On the constitutionalisation of the rule against hearsay, Wigmore also argues that it created three fundamental factors which courts have to consider when receiving hearsay, and he states that, *firstly*, the primary device in determining hearsay was cross-examination of witnesses who give adverse evidence against an accused. In addition, he argued that the hearsay rule has two components which he termed ‘cross-examination proper’ and ‘confrontation.’ Confrontation, he argued, meant the face-to-face encounter between the accused and his accuser. And he also reasoned that cross-examination was a vital device of confrontation and was one of the key components of the hearsay rule.<sup>416</sup>

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<sup>411</sup> *Crawford v Washington* [2004] USSC 59; 541 U.S.36 (2004) at 50.

<sup>412</sup> *Ibid* at 22.

<sup>413</sup> *Ibid* at 22-23.

<sup>414</sup> *Ibid* at 6.

<sup>415</sup> *Ibid* at 15.

<sup>416</sup> Wigmore *supra* at 27.



*Secondly*, he argued that the main question to be considered when determining whether the right of confrontation was protected is whether the accused was allowed the opportunity to cross-examine the witnesses. Wigmore adds to these views and states that, “If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation.”<sup>417</sup>

*Thirdly*, Wigmore argues that if the above two components are proved then the “the rule sanctioned by the Constitution (referring to the sixth amendment right of an accused to confront the witness against him) is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found.”<sup>418</sup>

In addition, Wigmore examined what he termed the similarities and connection between the right to cross-examination and the right of confrontation and argued that:

‘there never was at common law any recognised right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This is very clear from the history of the hearsay rule, and from continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.’<sup>419</sup>

It seems that the constitutional right to be confronted with witnesses was protected and articulated through cross-examination, and cross-examination and the right of confrontation were different terms which protected the same values.

Friedman, however, disagrees with the views of Taylor, Pollitt and Wigmore that the confrontation clause had constitutionalised the rule against hearsay and suggests that the result of the constitutional provision was that:

‘The Clause should not be regarded as a constitutionalisation of the rule against hearsay. Rather, it reflects a principle of long standing in common law systems, and even in some other circumstances, that a statement that is testimonial in nature may not be introduced against a criminal defendant unless he has had an opportunity to confront and examine the witness who made the statement.’<sup>420</sup>

According to Friedman, there has never been a constitutionalisation of the rule against hearsay but rather a recognition that hearsay evidence should not be admissible unless the accused had an opportunity to “confront and examine” the original declarant. In addition, he points out that:

‘the confrontation clause gives the accused more than a right to confront “all those who appear and give evidence at trial”. Its primary impact is to ensure that prosecution witnesses do give their

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<sup>417</sup> Wigmore *supra* at 127.

<sup>418</sup> Wigmore *supra* at 128-30.

<sup>419</sup> Wigmore *supra* at 127.

<sup>420</sup> Richard D. Friedman “‘Face to face’: Rediscovering the Right to Confront Prosecution Witnesses”, *International Journal of Evidence & Proof* (2004) at 1.

evidence at trial, or if necessary at pre-trial proceedings at which the accused is able to confront them.<sup>421</sup>

Like Wigmore, Friedman also identified what he termed 'values' or factors that can be accomplished through face-to-face confrontation between the accused and his accuser, and he states that confrontation ensures truthfulness and honesty in the procedure; confrontation enables the accused to expose shortcomings in the testimony against the accused; confrontation disheartens deception and untruthfulness in testimony.<sup>422</sup>

In Friedman's views, therefore, confrontation can be used as a procedural tool while it also assists the court in observing the demeanour of the witness and, at the same time, uncovers the untruthfulness in statements. Nevertheless, it seems Friedman does agree with Wigmore in one thing, viz. that the right of confrontation as contained in confrontation clause provides an accused with an opportunity to cross-examine the prosecution's witnesses.<sup>423</sup>

Park, on the other hand, argues that the confrontation clause which has been viewed by some academics to be constitutionalising the rule against hearsay enables an accused more than simply an opportunity to be gazed at during the trial but it also contains cross-examination which he considers to be more important than a mere face-to-face encounter with the prosecution witnesses.<sup>424</sup>

Furthermore, Friedman is in accord with these views expressed by Park, and he states that "it is clear that confrontation ordinarily includes the accused's right to have those witnesses brought "face-to-face", in the time honoured phrase, when they testify. But confrontation is much more than this "face-to-face" right. It also comprehends the right to have witnesses give their testimony under oath and to subject them to cross-examination."<sup>425</sup>

Confrontation includes, and takes into account, the right to cross-examine witnesses and not only a 'face-to-face' encounter. Wigmore, for instance, has also articulated similar views in the following terms, "the defendant demands confrontation not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination".<sup>426</sup> Cross-examination is the primary objective for the right of confrontation rather than only enabling an accused to stare and look at his/her accusers.

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<sup>421</sup> Ibid at 3.

<sup>422</sup> Ibid at 16.

<sup>423</sup> Ibid at 16.

<sup>424</sup> Roger C. Park "Purpose as a Guide to the Interpretation of the Confrontation Clause" *Brooklyn L. Rev.* (2005-2006) at 298.

<sup>425</sup> Richard D. Friedman "Confrontation: The Search for Basic Principles" *Geo. L.J.* (1998) at 1011.

<sup>426</sup> John H. Wigmore, *Evidence, Chadbourn rev.* (1974) at 150.

In addition, Douglas, when commenting on the purpose and meaning of the confrontation clause, argued that confrontation signifies and implies deed and exploits and includes intense and rigorous cross-examination.<sup>427</sup> These views are in accord with those expressed by Wigmore above on the primary objective of the right of confrontation.

There seems to be overwhelming consensus by academics that the confrontation clause's fundamental objective is to protect the right to cross-examination and that the constitutional right of confrontation also includes cross-examination. On other hand, as was shown above, academics have divergent views on the point of whether the confrontation clause has constitutionalised the hearsay rule.

What will follow is an examination of how the United States Supreme Court has construed these constitutional provisions in cases where the hearsay rule was also seen to be applicable with a view to establishing the content and meaning of this constitutional provision.

- In *Barber v Page*<sup>428</sup> the State brought an application that transcripts of an interview of some witnesses which were taken during the preliminary hearing be admitted as evidence against the accused in lieu of oral testimony. It was argued on behalf of the accused that the admission of these transcripts would deny the accused his right to be confronted with the witnesses against him. The court held that admitting these transcripts would deny the accused his right to be confronted with witnesses against him and also that this right included cross-examination.
- The court in *Crawford v Washington*<sup>429</sup> examined the content, intention and meaning of the Confrontation Clause in the light of the hearsay rule, and it held that the confrontation clause was fulfilled and realized through cross-examination.
- In *Idaho v Wright*<sup>430</sup> the court had to determine whether a hearsay statement which was given by a child to a paediatrician denied the accused's right to be confronted with the witnesses against him. The court considered the meaning of the right and the hearsay rule, and it held that the accused's right to be confronted with the witnesses against him was denied by the admission of the hearsay statement and amongst the reasons for its exclusion, was the absence of an opportunity for cross-examining the declarant of the statement.
- The court in *Greene v McElroy*<sup>431</sup> examined the hearsay rule and the meaning of the right to confrontation and cross-examination, and it held that the values protected by these principles "have ancient roots. They find expression in the

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<sup>427</sup> John G. Douglas "Admissibility as Cause and Effect: Considering Affirmative Rights under the Confrontation Clause" *Quinnipiac L. Rev.* (2001-2003) at 1047.

<sup>428</sup> 390 US 719 at 725.

<sup>429</sup> [2004] USSC 59; U.S. 36 at 61-62.

<sup>430</sup> [1990] USSC 128; 497 U.S. 805 at 813-827.

<sup>431</sup> [1959] USSC 122; 360 U.S. 474 at 496.

Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right to ‘to be confronted with the witnesses against him.’”

- In *Pointer v Texas*,<sup>432</sup> the court also considered the meaning and intention of the constitutional right to be confronted with witnesses and the hearsay rule and stated that cross-examination and the right of confrontation formed an essential component of the constitutional right. The court was also in accord with the views that the right to be confronted with witnesses included cross-examination.
- The court in *California v Green*,<sup>433</sup> when examining the hearsay rule and accused’s right to confrontation, held that these concepts safeguard much the same values and that the constitutional right of confrontation allowed “personal examination and cross-examination.”
- In *Mattox v United States*<sup>434</sup> when examining the hearsay rule and confrontation clause, it was held that the fundamental objective of the constitutional right to confrontation was to allow an opportunity for the cross-examination of witnesses.
- The court in *Dutton v Evans*<sup>435</sup> was also in accord with its views in *California v Green* that the accused’s constitutional right to be confronted with the witnesses and the hearsay rule originated from the protection of similar principles and that an opportunity for cross-examination realised this constitutional right.
- In *Chambers v Mississippi*,<sup>436</sup> the court held that the right of cross-examination was inherent and contained in the constitutional right of confrontation after a detailed examination of the historical background of the hearsay rule.
- The court in *Douglas v Alabama*,<sup>437</sup> held that the right of confrontation required a face-to-face encounter between the accused and adverse witnesses during the trial, and that the fundamental value protected by this constitutional right was that of cross-examination.
- In *Kentucky v Stincer*,<sup>438</sup> the court also held that the fundamental objective of the constitutional right of confrontation was to enable an accused an opportunity to cross-examine witnesses.
- The court, in *Pennsylvania v Ritchie*,<sup>439</sup> was also in accord with its decision in *Kentucky v Stincer* that the accused’s right to be confronted with witnesses is safeguarded by the right cross-examination.
- In *Maryland v Craig*,<sup>440</sup> the court, when considering the fundamental objective of the right of confrontation and the hearsay rule, held that cross-examination was one of primary features of the right of confrontation.

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<sup>432</sup> [1965] USSC 68; 380 U.S. 400 at 403.

<sup>433</sup> [1970] USSC 157; 399 U.S. 149 at 151-152.

<sup>434</sup> [1895] USSC 34; 156 U.S. 237 at 242-243.

<sup>435</sup> [1970] USSC 205; 400 U.S. 74 at 93-100.

<sup>436</sup> [1973] USSC 32; 410 U.S. 284 at 295-298.

<sup>437</sup> [1965] USSC 63; 380 U.S. 415 at 418.

<sup>438</sup> [1987] USSC 124; 482 U.S. 730 at 736-739.

<sup>439</sup> [1987] USSC 23; 480 U.S. 39 at 40.

<sup>440</sup> [1990] USSC 130; 497 U.S. 836 at 844-850.

Hence the court's interpretation of the right to be confronted with witnesses seems to be consistent in finding that this right includes cross-examination when considering the application and scope of the hearsay rule.

Furthermore, the hearsay rule in the United States has in recent years witnessed legislative reforms which have resulted, as was shown earlier, in the inclusion of the residual hearsay exception which allows for the admission of hearsay evidence in the interests of justice.<sup>441</sup> This reform is contained in the Federal Rules of Evidence which was adopted in 1975.<sup>442</sup> The Federal Rules of Evidence contained residual hearsay exceptions that permit trial judges, under certain circumstances, to admit hearsay that did not fit within specific exceptions to the hearsay rule under common law.<sup>443</sup>

A close look at the Federal Rules of Evidence 803(24) and 804(b)(5), which were briefly discussed in chapter 3, shows that they contain the residual hearsay exceptions when they state that:

'Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the opponent can produce through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence...'

Furthermore, as was discussed in chapter 3, Yasser stated that the Senate Committee when enacting these residual hearsay exceptions intended that they [residual hearsay exceptions] would be used very rarely and only in exceptional circumstances and that no "broad licence should be given to trial judges" to admit hearsay evidence because of the concern such admission would have on the accused's right to be confronted with the witnesses against him/ her.<sup>444</sup> The residual hearsay exception, which allows the admission of hearsay evidence in the interests of justice, seems to be the primary feature in the legislative reforms to the hearsay rule in the United States.

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<sup>441</sup> Ray Yasser "Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule" *Tex. Tech. L. Rev. supra* at 587.

<sup>442</sup> *Ibid* at 589.

<sup>443</sup> *Ibid* at 587. See Federal Rules of Evidence 803 and 804.

<sup>444</sup> *Ibid* at 593.

### 5.3 United Kingdom

English common law placed importance on the idea of face-to-face confrontation between the accused and his accusers as a guarantee of both the reliability of the evidence and the fairness of proceedings.<sup>445</sup> The common law right of confrontation is said to have laid the basis for English common law and is thought to be linked with the hearsay rule.<sup>446</sup> This view is also affirmed by Swergold, and he argues that the right to confrontation became a customary part of English trials during the late sixteenth century.<sup>447</sup>

In addition, Lord Bingham was also in accord with this view expressed by Swergold in *Davis v R*,<sup>448</sup> and he stated that, “it was a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.” English common law recognised that an accused has a right to confrontation so that he may cross-examine his accusers.

In recent years the English common law which regulates the admission of hearsay evidence has been legislatively reformed by the enactment of the Criminal Justice Act 2003 (“CJA”).<sup>449</sup> This legislation bears similar provisions to the South African Law of Evidence Amendment Act 45 of 1988. Furthermore, section 114 of the Criminal Justice Act 2003 provides as follows:

‘Admissibility of Hearsay Evidence –

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
  - (a) any provisions of this Chapter or any other statutory provision makes it admissible,
  - (b) any rule of law preserved by section 118 makes it admissible,
  - (c) all parties to the proceedings agree to it being admissible, or
  - (d) the court is satisfied that it is in the interests of justice for it to be admissible.
- (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –
  - (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
  - (b) what other evidence has been, or can be, given on that matter or evidence mentioned in paragraph (a);

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<sup>445</sup> See *Amicus Curiae* submission by Justice cited above, note 9 in para. 8.

<sup>446</sup> A JUSTICE Report, *Secret Evidence*, June 2009 at 18. See also JUSTICE, third party submission in *AL-Khawaja and Tahery v United Kingdom supra* at para. 7.

<sup>447</sup> Jason Swergold “Taking ‘Blind Shots at a Hidden Target’: Witness Anonymity in the United Kingdom” *B.C. Int’l & Comp. L. Rev.*(2009) at 477.

<sup>448</sup> [2008] UKHL 38 at para. 5.

<sup>449</sup> <http://en.wikipedia.org/wiki/Hearsay> in English law dated 20 February 2015.

- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.’

The court is provided with a discretion to admit hearsay evidence in the interests of justice under section 114(1)(d). Furthermore, the court, when admitting hearsay evidence in the interests of justice, can also consider any other factor which it deems to be relevant under section 114(2). As in the South African law of evidence Act 45 of 1988, some of the factors to be considered when interpreting section 114(2) of the CJA are not statutorily provided, but the court is empowered to make use of its private opinions in establishing or redefining these factors.

Moreover, the CJA does not expressly state whether the interests of justice exception should be applied sparingly or not. The court in *Sak v Crown Prosecution Service*,<sup>450</sup> however, held that “the interests of justice provision is a limited inclusionary discretion to be used only exceptionally.” In addition, in another decision the court also reiterated these sentiments, in *R v Z*,<sup>451</sup> where it was held that “section 114(1)(d) ... is to be cautiously applied.” Moreover, Choo seems not to be favourably moved by these decisions by the courts, and he argues that they are not helpful to trial judges in indicating the balance that ought to be struck on the application of these provisions of the 2003 Act because, he adds, there’s lack of express provisions in the Act suggesting such application.<sup>452</sup> Hence the author’s views are that the legislation in question, the CJA, is incomprehensible and does not expressly provide whether this discretion to admit hearsay evidence in the interests of justice should be applied sparingly or not and that a court might not be suitably capable of making an informed determination that the provisions should be applied only in a certain manner. As was discussed in chapter 3, this difficulty in interpreting similar provisions contained in the South African law of evidence, the 1988 Act, has also attracted divergent views from the courts and academics, and it also remains unresolved.

Because the Law Commission, when surveying the English hearsay rule, had to look at Article 6 of the European Convention for Human Rights<sup>453</sup> which provides an accused’s right to examine witnesses against him, it has asked the question, “Will a statement be inadmissible if the accused has never had a chance to question the

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<sup>450</sup> [2007] EWHC 2886 (Admin) (Div.Ct.) at para. 20.

<sup>451</sup> [2009] EWCA Crim 20 at para. 20.

<sup>452</sup> Choo, A.L.-T “*Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and Human Rights*” *Canada Criminal Law Review*. A Paper presented at a seminar at the School of Law, University of Wolverhampton in March 2012 at 232.

<sup>453</sup> Article 6(3)(d): “Everyone charged with a criminal offence has the ... right to examine or have examined the witnesses against him...”

witness?”<sup>454</sup> The Commission gave an answer to this question and stated that: “in a literal reading of Article 6, the answer might well be in the negative. If the evidence in question counts as the statement of a witness it may not be used in evidence unless the defence had a chance to put its questions to the witnesses.”<sup>455</sup> In addition, the court in *R v Central Criminal Court ex parte Bright and others*<sup>456</sup> seemed to concur with the Law Commission’s latter assertion that the common law right of confrontation had fundamental links with the Article 6 right to examine witnesses and that the hearsay rule requires out-of-court statements to be subjected to question by adverse witnesses.

Moreover, in the English Court of Appeal, in *Martin v R*,<sup>457</sup> the defendant’s conviction was based mainly on untested evidence which amounted to hearsay evidence and which was read to the jury. On appeal, it was held that the defendant had been denied the opportunity to challenge the evidence by cross-examination and this had resulted in a violation of his right to a fair trial. This conclusion was reached after the court had considered the hearsay rule and its exceptions.

In *Al-Khawaja v R*,<sup>458</sup> the defendant was convicted based on a written statement that was made by the complainant, who had since died, in a sexual assault charge. The accused opposed the admission of the hearsay statement and argued that it would violate his common law right to confront witnesses which, as was stated earlier, is thought to be the origin of the right to examine witnesses under the European Convention. The trial court held that it was in the “interests of justice” for the complainant’s statement to be received in evidence. Al-Khawaja has appealed this decision in the European Court of Human Rights, and he argued that his basic human rights, which included the right to examine witnesses against him, were violated by the admission of hearsay evidence. As will be shown later when the jurisprudence of the European Court for Human Rights is discussed, that court [European Court for Human Rights] when considering the hearsay rule, held that the admission of hearsay evidence against Mr Al-Khawaja had violated his right to examine witnesses under the Convention.

Furthermore, in *Sellick and another v R*,<sup>459</sup> some statements were read to the jury as evidence based on the fact that some witnesses had been kept away and were in fear of their lives. The submission was made that the defendants were not given an opportunity to challenge the statements through cross-examination. The court held that “evidence must normally be produced at a public hearing and as general rule

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<sup>454</sup> At para. 5.13.

<sup>455</sup> Ibid para. 5.13. The Commission has, however, noted that the right to examine witnesses was not absolute, see para. 5.17. See also *X v Austria* Appl. 44228/70, (1972) 15YB EHRR 264, where the European Commission rejected the appellant’s complaint as inadmissible on the ground that there was no absolute right to examine opposition witnesses.

<sup>456</sup> [2000] EWHC 560 (QB) at para. 87.

<sup>457</sup> [2003] EWCA Crim 357 at paras. 61-62.

<sup>458</sup> [2005] EWCA Crim 2697 at paras. 16,26-31.

<sup>459</sup> [2005] EWCA Crim 651 at paras. 2-4.



Article 6(3)(d) requires a defendant to be given a proper and adequate opportunity to challenge and question witnesses.<sup>460</sup> The Court also stated that the accused's right to examine witnesses against him had been breached through the admission of hearsay and that such conduct had rendered the trial unfair because the defendants were not given an opportunity to cross-examine the declarants of the statements.<sup>461</sup>

On the other hand, the *Davis v R*<sup>462</sup> case also involved evidence from an anonymous witness who was cross-examined by the counsel for the defendant behind a screen because his identity could not be disclosed to the accused for fear that his life would be in danger. Here the Court held that the trial had been fair and that the defendant had been correctly convicted.<sup>463</sup> The defendant appealed to the House of Lords in *Davis v R*<sup>464</sup> where Lord Bingham held that for centuries the custom of confronting defendants with their accusers so that they may be cross-examined and the truth established was recognised by English authorities such as Sir Matthew Hale in 1820,<sup>465</sup> Blackstone<sup>466</sup> and Bentham as one of its fundamental principles.<sup>467</sup> The latter author had regarded the cross-examination of adverse witnesses as “the indefeasible right of each party, in all sorts of causes” and condemned the inquisitorial trial system used on the continent of Europe, where admission of evidence would take place under a “veil of secrecy” and the opportunity was created for “wide open to mendacity, falsehood, and partiality.”<sup>468</sup> Lord Bingham further stated that the “basic common law rule required witnesses on issues in dispute to be identified and cross-examined with knowledge of their identity and permitting the defence to know and put to witnesses otherwise admissible and relevant questions about their identity.”<sup>469</sup> He also expressed some concerns and misgivings that the right to cross-examination was hindered by the witness's anonymity and concluded that the defendant could not be said to have had a fair trial.<sup>470</sup> The court in another case has held that the common law right of confrontation under England's law was also said to be forming a fundamental principle of the law in England and Wales and that “in criminal trials witnesses giving evidence are to be examined in court at the trial.”<sup>471</sup>

In addition, another case which involved anonymous witnesses is *R v Mayers, Glasgow and others*.<sup>472</sup> In this case, the Criminal Evidence (Witness Anonymity) Act 2008 was applied. This Act was said to represent Parliament's response to the

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<sup>460</sup> At para. 50.

<sup>461</sup> At para. 68.

<sup>462</sup> [2006] EWCA Crim 1155.

<sup>463</sup> At para. 138-140.

<sup>464</sup> [2008] UKHL 36.

<sup>465</sup> *The History of the Common Law of England* (1820) at 345-346.

<sup>466</sup> *Commentaries on the Law of England* (1794) at 373.

<sup>467</sup> *Rationale of Judicial Evidence* (1827) at 404.

<sup>468</sup> At para. 5.

<sup>469</sup> At para. 98.

<sup>470</sup> At para. 96.

<sup>471</sup> *R v Ibrahim* [2012] EWCA Crim 837 at para. 36.

<sup>472</sup> [2008] EWCA Crim 2989.

decision in *R v Davis*,<sup>473</sup> discussed in the preceding paragraph. The common law rules providing for anonymous witness were nullified by this legislation.<sup>474</sup> Section 1 of the Witness Anonymity Act 2008 created new rules which apply to witness anonymity in criminal proceedings. The section provides that

‘(2) The common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants) are abolished. (3) Nothing in this Act affects the common law rules as to the withholding of information on the grounds of public interest immunity.’

The defendant’s right to know the identity of witnesses who incriminate him was maintained and fully asserted by this Act.<sup>475</sup> The Act, however, also introduced circumstances in which the identity of witnesses can be withheld from the defendants. In *R Mayers, Glasgow and others* the witnesses’ identity was kept away from the defendants and, when applying this new provisions to the evidence of the anonymous witnesses, the court held that, because this evidence was precise and scrupulously probed the accused has not been prejudiced by its reception. The court also concluded that the accused’s right to examine witnesses was not denied by these provisions.<sup>476</sup> In other words, the statutory reforms which provided for the anonymity of prosecution witnesses under certain circumstances is considered not to be violating an accused’s right to examine witnesses against him if the conditions stipulated in the respective legislation are met.

In *Y v R*,<sup>477</sup> a man termed Y was charged and tried alone. The Crown applied, under section 114(1)(d) of the Criminal Justice Act 2003, that the court should admit hearsay evidence contained in a confession made by X in separate court proceedings which incriminated Y despite the fact that Y did not have an opportunity to cross-examine X. The court considered the hearsay rule and held that this hearsay evidence was admissible in the interests of justice despite the lack of opportunity for the accused to cross-examine the witnesses. It is notable that, when English common law hearsay rule was argued by the counsel appearing on behalf of the accused, he stated that “in common law, a confession was admissible, as an exception to the general exclusion of hearsay, but the exception extended only to make it admissible in the case of the person making the confession.”<sup>478</sup> In addition, reference was also made to an unreported case, *R v Ibrahim*, in the Woolwich Crown Court 4 June 2007, where Fulford J held that, “The interests of justice provisions in section 114(1)(d) is incompatible with the common law rule. The latter rule is absolute in prohibiting the use of a confession against a defendant who was not present when it was made, whereas a discretionary decision under section 114(1)(d) admitting confession evidence would result in the confession becoming generally

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<sup>473</sup> [2008] UKHL 36.

<sup>474</sup> *R v Mayers, Glasgow and others supra* at para.1.

<sup>475</sup> *R Mayers, Glasgow and others supra* at para.5.

<sup>476</sup> *Ibid* at para. 87.

<sup>477</sup> [2008] EWCA Crim 10 at paras. 60-61.

<sup>478</sup> *Ibid* at para.30.

available for use against the defendants who were not present when the incriminating out of court statement was made.”<sup>479</sup>

The views expressed by the court in *R v Ibrahim* were that the interests of justice test was contrary to the common law, that English common law had recognised an accused’s right to confront witnesses, and that the interests of justice exception failed to take into account what the court deemed to be common law evidentiary rules applicable to confessions made by co-accused.

Furthermore, the human rights organisation, JUSTICE,<sup>480</sup> during the consultation stage of the Criminal Justice Bill in the House of Commons, which led to the adoption of the Criminal Justice Act 2003, made the following submission that

‘the provisions on hearsay in Chapter 2, Part 11 of the Criminal Justice Bill allow a wide exceptions that the general exclusionary rule is more or less redundant. Far from simplifying the law, these clauses are highly complex, are likely to lead to uncertainty for those involved in trial preparation, and will lead to lengthy legal arguments as to whether evidence should be admitted in a particular case.’<sup>481</sup>

As shown earlier, the concerns were based on the extent of the uncertainty which would be introduced by the inclusion of the interests of justice hearsay exception, in that these provisions do not enable an accused to know the evidentiary rules applicable to his case. Furthermore, these provisions are also seen not to have caused the law of evidence to be more comprehensible or predictable.

In addition, Lord Thomas of Gresford QC, during the consultations stage of this Bill, also argued that “the interests of justice” test provided in clause 114 was “extremely vague and broad and introduced into the law of evidence in criminal cases hearsay evidence wholesale.”<sup>482</sup>

Cross and Tapper, when examining the admission of hearsay evidence in the interests of justice under the 2003 Act also argue that the Law Commission anticipated the discretion in section 114(1)(d) to be “very limited exception” and that it could be formidable how this legislative objective can be accomplished where the legislation in question [the 2003 Act] does not expressly make such provision.<sup>483</sup> These views are also in accord with those expressed by Choo and other academics

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<sup>479</sup> *R v Ibrahim* (unreported, Woolwich Crown Court 4 June 2007) at para.22.

<sup>480</sup> JUSTICE briefing on part 11, Chapter 2 of the Criminal Justice Bill at Committee stage in the House of Commons, January 2003.

<sup>481</sup> JUSTICE briefing on part 11, Chapter 2 of the Criminal Justice Bill at Committee stage in the House of Commons, January 2003 *supra*.

<sup>482</sup> Hansard, House of Lords debates, 18 September 2003 col 1109. See the speech of Home Office Minister Baroness Scotland of Asthal, House of Lords debates 19 November 2003, col 2005: “In the House of Lords what is now section 114 fell victim to an unholy alliance between those who would have preferred a more liberal regime and those who thought the safety valve should be removed, being too vague and over-reliant on judicial discretion. For a while the Bill tottered along without its key definitional section, although the Government managed to reinstate it, on Third Reading, modified so as to permit the use of the safety valve where it is positively ‘in the interests of justice’ to do so.”

<sup>483</sup> Collins Tapper, *Cross and Tapper on Evidence* (2007) at 565.

as shown in this chapter in identifying the difficulty in the application of this legislation.

In addition, Blackstone,<sup>484</sup> when examining ‘the “interests of justice” test in section 114(1)(d) of the Criminal Justice Act 2003, seems to be in agreement with the views expressed by Cross and Tapper that this concept was initially thought by the Law Commission to be a safeguard for the admission of evidence that would otherwise be inadmissible in extraordinary circumstances only and that there is nothing contained in legislation indicative of this intention of the legislature in section 114(1)(d).

Moreover, Murphy also expressed some concerns relating to the impact the admission of hearsay evidence under section 114(1)(d) in the interests of justice would have, and he argued that it will, however, lead to “serious question as to whether the fairness of the trial is harmed by giving the judge such a wide and largely unbridled power to admit hearsay evidence and thereby depriving the accused of the right to cross-examine the witnesses against him.”<sup>485</sup>

Hence, the general sentiments among most academics seem to be that the interests of justice test contained in section 114(1)(d) of the Criminal Justice Act 2003 was to be used only in rarely and in exceptional circumstances. As stated earlier, however, the provisions of the Act failed to state expressly that this would be the case.

Mulcahy<sup>486</sup> concurs with the views expressed by Murphy on the impact the interests of justice test might have on the accused’s right to be confronted by witnesses as guaranteed by the European Convention of Human Rights and argues that these provisions violates an accused’s right to a fair trial. He reasoned that:

‘the Law Commission needed to pay attention to the mandates and work of the European Convention on Human Rights. In aftermath of World War II, a number of European countries decided to codify certain basic fundamental rights within a treaty, and this resulted in the Convention. The rights contained in the Convention are similar to the sentiments expressed by the United Nations in the Universal Declaration on Human Rights.’<sup>487</sup>

Furthermore, Mulcahy adds that the admission of hearsay evidence in the interests of justice is a very contentious and disputed issue because of its impact on an accused’s right of confrontation in common law and the main problem being the fact

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<sup>484</sup> Duncan Atkins and Tim Moloney *Blackstone Guide On Criminal Procedure* (2010) para. F16.20, at 2567.

<sup>485</sup> Peter Murphy *Murphy on Evidence* (2007) at 219.

<sup>486</sup> Conor Mulcahy “*Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant’s Right to a Fair Trial Under the European Convention on Human Rights*” *B.C. Int’l & Comp. L. Rev.* (2005) at 416.

<sup>487</sup> At 409. See Universal Declaration of Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810, at 71 (1948).

the provisions are too broad and gives unbridled powers to a court to use personal beliefs.<sup>488</sup>

On the other hand, there was a strong disagreement with Mulcahy's views that the Criminal Justice Act 2003, in admitting hearsay evidence in the interests of justice, is inconsistent with the right to a fair trial and the right to confrontation as well as the right to examine witnesses as provided for in Article 6(3)(d) of the European Convention on Human Rights when the England and Wales Court of Appeals, in *Horncastle and others v R*,<sup>489</sup> held that the provisions of the Criminal Justice Act 2003 do not deny an accused the right of confrontation. The court further held that the "principled solution provided for by the Criminal Justice Act 2003 in relation to hearsay evidence is consistent with the right of confrontation."<sup>490</sup>

Furthermore, Brodin seems to agree with the views expressed by Mulcahy on the constitutional validity of the interests of justice legislation and argues that the enactment of the Criminal Justice Act 2003 which gives courts discretion to admit hearsay evidence in the interests of justice have brought about unfair consequences. He also adds that the:

'CJA has achieved its goal of inviting more hearsay into criminal trials (usually in the prosecution's case). Conviction rates have gone up since its adoption from 75 to 83 percent,<sup>491</sup> including a slight rise in rape convictions, but it is of course not possible to attribute that increase to any one factor, such as ready admissibility of out-of-court statements.'<sup>492</sup>

Brodin also argues that the hearsay law reforms introduced by the CJA have merged and integrated the "traditional exceptions with open-ended discretion," a process, he argues, has resulted in the failure to make this law more comprehensible and intelligible.<sup>493</sup>

In addition, Birch and Hirst<sup>494</sup> seems to agree with these views expressed by Brodin in examining the consequences of the CJA in providing that hearsay could be admissible in interests of justice, and they, during 2010, bemoaned the fact that:

'For years, the English courts had struggled but failed to provide a clear, watertight definition of what was or was not hearsay at common law. Six years on, however, it seems that the new concept of hearsay under the CJA is no more satisfactory, and no better understood, than the old. One set of complexities has merely been exchanged for another, and the complexities include some that the courts have yet to master.'

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<sup>488</sup> Ibid at 416.

<sup>489</sup> [2009] EWCA Crim 964 at para. 79.

<sup>490</sup> At paras. 79 and 81.

<sup>491</sup> England and Wales Ministry of Justice, *Criminal Justice Statistics: Quarterly Update to March 2014* at 12.

<sup>492</sup> Mark S. Brodin "The British Experience with Hearsay Reform: A Cautionary Tale" *Fordham Law Rev.* (2016) at 1426.

<sup>493</sup> Ibid at 1426.

<sup>494</sup> Diane Birch and Michael Hirst "Interpreting the New Concept of Hearsay" *Cambridge L.J.* (2010) at 72.

Furthermore, Birch and Hirst also note a scenario which seems to be more difficult and vexatious to comprehend in that they also argue that the CJA has considerably strengthened and enhanced “the chances of a trial being influenced by second-hand evidence of which the witness in court has not first-hand knowledge.”<sup>495</sup> These concerns seem to be directed at the “interests of justice” test and the admissibility of hearsay because it is deemed reliable.

Brodin<sup>496</sup> also agrees with the views expressed by Birch and Hirst and further argues that defence attorneys have also shown dismay at the CJA lowering and running down the right of confrontation.<sup>497</sup> Furthermore, the provisions of the CJA which admit hearsay evidence in the interests of justice and the right of confrontation were recently at issue in a case that appeared in 2012, and Lord Justice Aikens, when commenting on England’s common law, stated that, “the basic rule of the law of England and Wales in criminal trials is that witnesses giving evidence are to be examined in court at the trial. It has long been recognised as a vital principle and is sometimes called the “right of confrontation.””<sup>498</sup>

Besides the interests of justice statutory test, the UK’s hearsay jurisprudence also makes provisions for the admission of hearsay evidence when it is considered to be reliable by the court. The court in *Horncastle* had to consider the admissibility of hearsay evidence which was deemed to be reliable and found that such evidence could not be said to be denying an accused his right of confrontation; Lord Justice Thomas reasoned as follows:

‘a court can be trusted to assess the reliability of hearsay. When the hearsay is demonstrably reliable, or its reliability can properly be tested and assessed, the right of the defence are protected, there are in the language of the European Court of Human Rights sufficient counter-balancing measures, and the trial is fair.’<sup>499</sup>

Nevertheless, this views that hearsay evidence should be admitted because it is found by the court to be reliable and, therefore, not violating an accused’s right to be confronted with witnesses, are disputed by Justice Scalia where he held that “dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>500</sup> Furthermore,

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<sup>495</sup> Ibid at 76.

<sup>496</sup> Ibid at 1427.

<sup>497</sup> See e.g. Eric Metcalfe, *Time for the UK Supreme Court to Think Again on Hearsay*, GUARDIAN (Dec.15, 2011), <http://www.theguardian.com/law/2011/dec/15/uk-supreme-court-rethink-hearsay> [perma.cc/83TS-C72Y]. Last seen 13 April 2016, where it was argued that: “Once again the European Court of Human Rights has protected a right apparently better understood abroad than at home. So important was this common law right to cross-examine witnesses against you that it became the basis for the “confrontation clause” in the sixth amendment of the US Bill of Rights, as well at the right to cross-examine witnesses under the International Covenant on Civil and Political Rights and the European Convention on Human Rights.”

<sup>498</sup> *R v Ibrahim* [2012] EWCA Crim 837 *supra* at para. 36.

<sup>499</sup> At para. 65 and 79.

<sup>500</sup> *Crawford v Washington* [2004] USSC 59; 541 U.S. 36 at 61-62. Sixth Amendment provides: “in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.”

Scalia J also stated the reasons in support of his views that the reliability test cannot be trusted as a tool to determine the reliability of evidence and protecting the right to be confronted with witnesses when he said that, “reliability is an amorphous, if not entirely subjective, concept. Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.” Hence, in Scalia J’s words, the reliability test is irregular, unstructured, non-objective, intuitive, biased and unconstitutional. Moreover, the above decision of the Court of Appeals in *Horncastle* was confirmed by the United Kingdom Supreme Court where Lord Phillips held that the Court of Appeals’ decision that the 2003 Act in allowing hearsay evidence to be received when considered reliable was compatible with the accused’s right to examine witness against him<sup>501</sup> The correctness and accuracy of this finding by the UK Supreme Court was, however, later questioned by the European Court of Human Rights in *Al-Khawaja and Tahery v The United Kingdom*.<sup>502</sup> In this matter *Al-Khawaja* complained that, “the trial judge’s decision to allow the statement of a witness to be read at his trial meant that he was denied the opportunity to examine or have examined the witness against him, whose evidence was the sole or decisive evidence in respect of one of his convictions”. In the latter decision the court doubted the soundness of a safeguard that would consider hearsay reliability when determining whether the accused’s right to examine witness has been violated. What the court also took into account in reaching this outcome-, was the argument that hearsay evidence should not be admissible because it was considered reliable, and it was stated that it was because “it would violate this ancient right of confrontation and the right of cross-examination for a person to be convicted solely or to a decisive extent upon uncross-examined testimony, regardless of how reliable it may otherwise appear.”<sup>503</sup>

In addition, it can be noted that, in chapter 3 when the South African law of evidence was discussed, in particular section 3 of the Law of Evidence Amendment Act 45 of 1988, it was established that Cameron JA in 2002 in *S v Ndlovu*,<sup>504</sup> when construing the provisions of this Act on the admissibility of hearsay evidence, also made use of the reliability of hearsay test when establishing that the hearsay evidence presented by the State against the accused was admissible against his co-accused, and he held that such evidence did not violate an accused right challenge evidence. He also cited the 1992 decision of the United States Supreme Court in *White v Illinois*<sup>505</sup> where it was held that hearsay evidence might be admissible if the existence of “sufficient guarantees of reliability” are proved and that that would “satisfy the Confrontation Clause”. This test, termed “sufficient guarantees of reliability” of hearsay evidence, was also applied by the United States Supreme Court in the 1980

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<sup>501</sup> *Horncastle and others v R* [2009] UKSC 14 at paras.106-107.

<sup>502</sup> *Ibid* at paras. 42-43.

<sup>503</sup> JUSTICE, third party submission *supra* para. 4(iii).

<sup>504</sup> 2002 (2) SACR 325 (SCA) at paras. 25 and 45.

<sup>505</sup> 502 US (1992) 346 at 356.

decision in *Ohio v Roberts*<sup>506</sup> where it was held that “the right to be confronted with the witnesses against him does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears adequate indicia of reliability”.<sup>507</sup> In its 2004 decision in *Crawford v Washington*<sup>508</sup> the Supreme Court, however, reversed and rejected this decision in *Roberts*, where Scalia J, as was discussed earlier, held that admission of hearsay evidence had denied the accused his confrontation clause right because “the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.”<sup>509</sup> In addition, Scalia J also described why hearsay evidence, even if considered to be reliable, violated the confrontation clause, and he stated that, “the Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one.”<sup>510</sup> According to Scalia J, reliability of evidence can be determined through confrontation and cross-examination in terms of the accused’s Constitutional right to be confronted with witnesses against him. Furthermore, the court’s reasoning in *Crawford* was also to the effect that uncross-examined and untested evidence can never be deemed to be reliable, irrespective of how adequate the indications of reliability might appear to a judge. These decisions on the reliability of hearsay seem to support an overwhelming view which cast far-reaching and grave doubts on the safeguards and soundness of the reliability of hearsay evidence test, and, it is submitted, bring forth some fundamental flaws and cracks in Cameron JA’s reasoning in *Ndlovu* on the trustworthiness, logic and rationale of this test. Scalia J’s views expressed above did find some support amongst academics, viz. Friedman who argued that the reliability of hearsay evidence approach is an unsatisfactory, mediocre, deficient and below par benchmark for deciding whether evidence is permissible or not.<sup>511</sup> Like Scalia J, Friedman also added that “reliability is notoriously difficult to determine. It puts the cart before the horse, essentially asking whether the assertion made by the statement is true as a precondition to admissibility.”<sup>512</sup> In addition, Friedman also identifies another problem relating to the comprehension and application of the term reliable hearsay evidence and seems to be deeply perplexed by what he finds to be a lack of understanding of this concept. He argues that the reliability of hearsay evidence is a widely misapprehended and misconstrued principle and that, as a result, most people when talking about it are unable to define it.<sup>513</sup> This state of perplexity has prompted Friedman to give a definition of the reliability of evidence approach, and he states that, “Evidence is

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<sup>506</sup> 448 US (1980) 56 at 64-66.

<sup>507</sup> Ibid at 66.

<sup>508</sup> [2004] USSC 59;541 US 36.

<sup>509</sup> Ibid at 42-69.

<sup>510</sup> Ibid at 61-62.

<sup>511</sup> Richard D. Friedman “*Confrontation: The Search for Basic Principles*” *Geo. L.J.*(1998) at 1027.

<sup>512</sup> Ibid at 1028.

<sup>513</sup> Richard D. Friedman “*The Mold that Shapes Hearsay Law.*” *Fla. L. Rev.*(2014) at 445.



reliable proof of a given proposition if and only if, given the evidence, it is highly improbable that the proposition is false.”<sup>514</sup>

Furthermore, the trial court must be convinced that evidence given against an accused is reliable before it can lead to a conviction, but-, a court must also determine whether it would have made a difference to an accused if he had had an opportunity to cross-examine the adverse witness. The *caveat* was sounded by Megarry J in *John v Rees*,<sup>515</sup> where he said that

‘As everybody who has anything to do with the law well knows, the path of the law is strewn about with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a charge. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their afforded any opportunity to influence the course of events.’

People seem to show indignation and bitterness towards a decision in matters which affect them and if such decision was made without their participation. A similar warning was sounded by Lord Justice Sedley, in *Secretary of State for the Home Department v AF and others*,<sup>516</sup> where he reasoned that:

‘There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side’s testimony. Some have appeared in cases in which everybody was sure of the defendant’s guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits judges from practitioners, judges need to carry this sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong.’<sup>517</sup>

The above reasoning by the courts testifies to the fact that it is difficult for the adversarial trial truth-finding process to uncover the truth if one party to the dispute was not allowed to confront his accusers and without adherence to the values protected by the hearsay rule and cross-examination. Moreover, these views, expressed by academics and the decisions by the courts, also articulate the fundamental features of these values protected by these principles in English law.

## 5.4 Canada

Canada has over centuries not reformed its common law hearsay rule by legislation despite the fact that other major common-law jurisdictions have enacted statutory

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<sup>514</sup> Ibid at 445.

<sup>515</sup> [1970] Ch 345 at 402.

<sup>516</sup> [2008] EWCA Civ.1148.

<sup>517</sup> Ibid at para. 113.

reforms relating to this rule. Canada's hearsay reforms are "entirely by judicial precedent."<sup>518</sup>

The latter observations resulted from the Canadian Supreme Court identifying the contemporary hearsay exclusionary rule in Canada to have originated from the common law of evidence rather than from any statute or constitutional provision.<sup>519</sup>

In 1982, Canada adopted a Constitution which provides the right to a fair trial, however, this constitutional right does not indicate whether an accused has a right to examine or cross-examine adverse witnesses. In addition, section 7 of the Constitution, which is also termed the Canadian Charter of Rights and Freedoms, guarantees the "right of life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>520</sup> In other words, the right to confrontation is not constitutionally guaranteed in Canada.

Madden examined this provisions of the Canadian Constitution and concurs with the view that it does not expressly provides an accused's right to be confronted witnesses against him nor does it states whether an accused has a right to cross-examination and or a right to challenge evidence. On the other hand, Madden argues that, this constitutional provision is construed to be providing the right of confrontation and cross-examination indirectly.<sup>521</sup> These views were expressed by the author after he examined the historical link between the hearsay rule and the right to cross-examination in Canada's adversarial trial procedure.<sup>522</sup>

In addition, the Supreme Court of Court of Canada held that the common law position which states that hearsay evidence is presumed to be inadmissible is still applicable and forms part of the Canadian law of evidence.<sup>523</sup> Furthermore, when interpreting the hearsay rule the Supreme Court of Canada, in *R v Khan*,<sup>524</sup> held that a hearsay statement was admissible if it was necessary and reliable. In applying this approach the court was creating a whole new test for the admission of hearsay evidence and at same time the court was also extended the hearsay rule exceptions. The necessity and reliability approach was also applied by this court in *R v Smith*.<sup>525</sup> This approach taken by the court in applying the hearsay rule seems to endorse the

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<sup>518</sup> Marian K. Brown "Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, and Canada, with Special Regard to Prior Inconsistent Statements" 2007 Annual Conference of the International Society for the Reform of Criminal Law Paper at 1.

<sup>519</sup> *R v Starr* [2000] 2 S.C.R.144 at para.153. ("The law of hearsay in Canada and throughout the common law world has long been governed by a strict exclusionary rule relaxed by a complex array of exceptions").

<sup>520</sup> Part I of the Constitution Act,1982.

<sup>521</sup> Mike Madden "Anchoring the Law in a Bed of Principle: A Critique of, and Proposal to Improve, Canadian and American Hearsay and Confrontation Law" *B.C. Int'l and Comp. L. Rev.*(2012) at 418.

<sup>522</sup> *Ibid.*

<sup>523</sup> *R v Khelawon* [2006] 2 R.C.S. 788 at 819.

<sup>524</sup> [1990] 2 R.C.S. 531 at 548.

<sup>525</sup> [1992] 2 R.C.S 915 at 933.

views articulated by Brown that the Canadian Supreme Court and not the legislature creates the rules regulating the admission of hearsay evidence.

Stuesser concurs with the above views when examining the Canadian hearsay rule and adds that Canada's common law hearsay rule is not changed or repealed by statutory reforms but rather that the Canadian Supreme Court has, over decades, created new exceptions to the hearsay rule by introducing the notion of "necessity and reliability".<sup>526</sup> He further states that "necessity" stems from material evidence that might be defunct if not admitted through the hearsay rule. In addition, "reliability", he argues, stems from the fact that the trial court has to consider two statements made by the same witness, one made out-of-court and the other made during the trial and in the presence of the court.<sup>527</sup> In Stuesser's words, the new hearsay exception created by the Supreme Court of Canada directs that:

'the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation; the statement is videotaped in its entirety; and the opposing party has a full opportunity to cross-examine the witness respecting the statement.'

Furthermore, the requirement providing for an opportunity for cross-examination in these new hearsay exceptions can be traced back to the historical link which was discussed earlier between the common law hearsay rule and the right of confrontation.

On the other hand, Tanovich also examined the necessity and reliability approach created by the Canadian Supreme Court and, he argues that the necessity of the hearsay statement can be considered in the event that the declarant who made the out-of-court statement has died or is not competent to testify. Reliability, on the other hand, the author argues, stems from the consideration given to the "declarant's sincerity, memory, and ability to communicate at the time the statement was made."<sup>528</sup> In addition, Tanovich also gives as the primary reason for the existence of the 'reliability' approach in the hearsay rule-, the fact that the adversarial trial system requires that an accused be given an opportunity to cross-examine witnesses against him, and, when assessing the reliability of an out-of-court statement, the court is empowered to honour this fundamental principle which forms part of the common law and the adversarial system.<sup>529</sup>

Moreover, the correctness of Stuesser's views on the Canadian hearsay rule were also evident in Charron J's reasoning in *R v Khelawon*.<sup>530</sup> When describing the Canadian hearsay rule it was stated that:

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<sup>526</sup> Lee Stuesser "A Comparison of the Law of Evidence" *Journal of the Australian Law Teachers' Association* (2011) at 78.

<sup>527</sup> *Ibid* at 78.

<sup>528</sup> David M. Tanovich "Starr Gazing: Looking into the Future of Hearsay in Canada" *Queen's L.J.* (2003) at 397-398.

<sup>529</sup> *Ibid* at 398.

<sup>530</sup> *Ibid* at 814.

'Canada's adversarial system is based on the assumption that sources of untrust-worthiness or inaccuracy can best be brought to light under the test of cross-examination. "In addition, the approach of admitting hearsay evidence if it is considered to be necessary and reliable has been referred to by the Canadian Supreme Court" as the principled approach.<sup>531</sup>

In *Khelawon*, Charron J added that:

'Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns.'<sup>532</sup>

Furthermore, Ewaschuk, when commenting on the Canadian hearsay rule, argued that this principle forms a fundamental part of the criminal procedure and cross-examination is a powerful and primary device to test inaccuracies and discrepancies in witness's testimonies.<sup>533</sup>

In addition, these views expressed by Ewaschuk were evident in the court's reasoning in *R v Lyttle*,<sup>534</sup> where it was held that:

'Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. That is why the right of an accused to cross-examine witnesses for the prosecution ... is an essential component of the right to make all answer and defence.'

The court in *R v Khelawon* further described the relationship between cross-examination and the constitutionally protected rights which was discussed above and is understood to imply providing an accused the right to confront witnesses. It stated that the Canadian Constitution did not expressly provide the right to confront witnesses or the right to cross-examination but the adversarial trial system which forms a fundamental part of Canadian law protects these rights.<sup>535</sup> These views seem to be in accord with those expressed by Madden above.

Moreover, Choo argues that the necessity requirement for the admissibility of hearsay evidence is an important principle because there might be circumstances that necessitates that an out-of-court statement be admitted as evidence and that a court needed to seek to find a balance between the admission of such hearsay and the accused's right to confrontation.<sup>536</sup>

On the other hand, Tapper criticises the Canadian Supreme Court's approach in reforming the hearsay rule in Canada and argues that the courts involvement in

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<sup>531</sup> *R v Smith* [1992] 2 S.C.R.915 at 933.

<sup>532</sup> At para. 35.

<sup>533</sup> E.G. Ewaschuk "Hearsay Evidence" *Osgoode Hall Law Journal* (1978) at 409.

<sup>534</sup> [2004] 1 S.C.R.193 at paras.1-2.

<sup>535</sup> *Ibid* at 819.

<sup>536</sup> *Ibid* at 232.

statutory reforms should be kept to the minimum. The legislature, as the elected representatives of the people, he reasons, should lead the way and create new hearsay exceptions in its legislative capacity.<sup>537</sup>

In addition, Botterell concurs with the views expressed by Tapper that the more judges have input into the criminal justice system, the less likely it is that the rule of law will be upheld because it would be impossible for an accused to predict with certainty how individual rules will be applied and what their outcome might be.<sup>538</sup> In the author's words, courts should be more concerned with interpreting the law and less with creating it, and this would maintain a clear balance in the separation of powers and rule of law principles.

## 5.5 Australia

The Canadian approach, where the Canadian Supreme Court has played what has been termed "judicial activist role" where the court created new hearsay exceptions<sup>539</sup> was roundly condemned by the Australian Supreme Court as not being sensible in *Bannon v R*<sup>540</sup> where the court held that it was not the court's constitutional role or function to create laws or extend the hearsay exceptions.

Moreover, Australia has no constitutional provisions protecting an accused's right to examine the witnesses against him.<sup>541</sup> The only rights expressly protected by the Commonwealth of Australia Constitution Act 1900 are trial by jury for indictable offences,<sup>542</sup> freedom of religion,<sup>543</sup> and non-discrimination on the grounds of out-of-state residency.<sup>544</sup>

Nevertheless, in *Dietrich v The Queen*,<sup>545</sup> the Supreme Court of Australia held that an accused has a right to a fair trial which includes the right to examine the

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<sup>537</sup> Colin Tapper "The Law of Evidence and the Rule of Law" Cambridge L.J. (2009) at 68.

<sup>538</sup> Andrew Botterell "Reconciling the Principled Approach to the Hearsay with the Rule of Law" *Supreme Court Law Rev.* (2014) at 145.

<sup>539</sup> *Ibid* at 78.

<sup>540</sup> (1995) 185 CLR at 1.

<sup>541</sup> See, *The Overview – Australia's Constitution* on page viii it states that: 'The Constitution has no Bill of Rights, such as that found in the United States Constitution which prevents a legislature from passing laws that infringe basic human rights, such as freedom of speech. Some express protections, however, are given by the Constitution against legislative or executive action by the Commonwealth, but not by the States.'

<sup>542</sup> Section 80 provides: 'The trial on indictment on any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.'

<sup>543</sup> Section 116 provides: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

<sup>544</sup> Section 117 provides: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.'

<sup>545</sup> [1992] HCA 57 at 57

witnesses against him, and it referred to Article 14(3) of the International Covenant on Civil and Political Rights which guaranteed this right.<sup>546</sup>

As in Canada, the common law applied in Australian hearsay evidence provides that hearsay evidence is not admissible unless it falls under one of the recognised exceptions to the exclusionary rule.<sup>547</sup> The rationale for the rule against hearsay in Australia was discussed by the Australian Supreme Court in *R v Lee*<sup>548</sup> -:

‘The common law of evidence has long focused upon the quality of the evidence that is given at trial and has required that the evidence that is given at trial is given orally, not least so that it might be subject to cross-examination. That is why the exclusionary rules of common law have been concerned with the quality of the evidence tendered – by prohibiting hearsay, by permitting the giving of opinions about matters requiring expertise by experts only, by the “best evidence rule” and so on. And the concern of the common law is not limited to the quality of evidence; it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination are of central significance to the common law adversarial system of trial.’<sup>549</sup>

The right of confrontation and cross-examination are essential components in the adversarial trial procedure and in the assessing of the quality and reliability of the evidence given by the parties. Hence evidence given orally during the trial and subjected to cross-examination is deemed to be a fundamental attribute of the adversarial trial system.

Furthermore, Williams argues that the best evidence rule and the hearsay rule have distinct origins; the former developed as a general maxim, and, in its application, eventually came only to survive in the rule excluding secondary evidence while the latter was developed as a consequence of the marking off of the function of witnesses from those of jurors.<sup>550</sup>

In addition, Williams also identified some dangers encountered when presenting hearsay evidence in Australia. These are:- *firstly*, that hearsay evidence could not be considered the principal evidence; *secondly*, hearsay evidence was given not under the sanction provided by an oath; *thirdly*, the demeanour of the witness who made the out-of-court statement cannot be tested; and, *fourthly*, the accused is denied the opportunity to cross-examine the witness who made the statement.<sup>551</sup>

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<sup>546</sup> Article 14(3)(e):- “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

<sup>547</sup> I. A. Wilson “*Documentary Hearsay: The Scope of the Queensland Evidence Act*” *QLD. Institute of Technology Law Journal* (1985) at 111.

<sup>548</sup> [1998] 195 CLR 594.

<sup>549</sup> *Ibid* at 602.

<sup>550</sup> C R Williams, “*Issues at the Penumbra of Hearsay*” *ADEL. L. R.* (1987) at 114.

<sup>551</sup> *Ibid* at 114-115. See also *R v Teper* [1952] AC 480 at 486 where Lord Normand stated: ‘The rule against hearsay admission is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and

It seems that in Australia the hearsay rule and the opportunity of cross-examination are considered to be the fundamental tools in the adversarial process which could be used to test assertions made against an accused.

Moreover, the Australian Law Reform Commission which investigated reforms and improvements to the law of evidence recommended that “the exclusionary rule for hearsay evidence should be continued. Evidence by hearsay should not be admissible to prove the truth of what is asserted.”<sup>552</sup> Hence the common law hearsay rule and its exceptions remain part of Australian law.

In addition, the Evidence Act 1995 also states that a party may question any witness who testifies or gives evidence against him.<sup>553</sup>

This Act also makes provisions on how hearsay evidence would be admissible and provides that:

‘The hearsay rule – exclusion of hearsay evidence: (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the presentation. (2) Such a fact is in this Part referred to as an asserted fact.’<sup>554</sup>

The Law Reform Commission further stated its views regarding the future status of the hearsay rule in Australia and reported that, “hearsay should be defined to encompass all out of court assertions, express or implied, intended or unintended and whether made by words or conduct.”<sup>555</sup>

Moreover, the High Court of Australia, in *Bannon v The Queen*,<sup>556</sup> considered the hearsay rule and the admissibility of hearsay evidence and held that such evidence may be admissible in certain circumstances including where it is considered extremely credible and reliable.<sup>557</sup> While the Australian Supreme Court disagreed with the Canadian Supreme Court’s judicial activist approach in creating new hearsay exceptions, as was shown above, it considered it to be sensible to adopt the Canadian approach which admits hearsay evidence by making reliance on the “reliability approach”. Hence the difference between the Canadian hearsay evidence reforms and the Australian law can be seen in that statutory reforms in Australia have taken place, and these resulted in the inclusion of the hearsay exception which admits hearsay because it is considered to be reliable while in Canada such reforms have been introduced by the Canadian Supreme Court.<sup>558</sup>

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accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.’ See also *R v Blastard* [1985] 3 WLR 345 at 350.

<sup>552</sup> Australian Law Reform Commission *Paper Evidentiary Aspects: Improvements and Reforms – Children Witnesses* (2008) at 185.

<sup>553</sup> Section 27 of the Evidence Act 1995.

<sup>554</sup> Section 59(1) and (2) of the Evidence Act 1995.

<sup>555</sup> *Ibid* at 10.

<sup>556</sup> [1995] 185 CLR 1.

<sup>557</sup> Section 59(2)(c) of the Evidence Act 1995 (Commonwealth).

<sup>558</sup> Evidence Act 1995, section 65(2).

A close look at the 1995 Evidence Act shows that it provides for this exception in section 65(2), and it states as follows:

'Exception: Criminal proceedings if maker is not available:

The hearsay rule does not apply to evidence of previous representation that is given by a person who saw, heard, or otherwise perceived the representation being made if the representation was:

- (a) made under a duty to make that representation or to make representations of that kind; or
- (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
- (c) made in circumstances that make it highly probable that the representation is reliable; or
- (d) against the interests of the person who made it at the time it was made.'

The reliability of the hearsay evidence test which is applied in Canadian and Australian jurisdictions as part of an exception to the hearsay rule, is also applied in New Zealand as will be shown below.

## 5.6 New Zealand

Unlike the position in Australia, the New Zealand Bill of Rights does guarantee an accused's right in criminal proceedings to "examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecutions."<sup>559</sup>

In 1999, the New Zealand Law Commission, in its report, expressed the view that the hearsay rule "should operate to exclude evidence only if there are sound policy reasons for so doing."<sup>560</sup> The Commission further added that the rationale for these considerations would be to facilitate the admissibility of material and pertinent and also reliable evidence.<sup>561</sup> The report clearly recommended that the admissibility of hearsay evidence should be based on two considerations: reliability and necessity.<sup>562</sup> The "reliability approach" takes into account the state of affairs and conditions in which the out-of-court statement was taken while, on the other hand, the "necessity approach" requires a court to examine the grounds and cause for the unavailability of the out-of-court witness.<sup>563</sup> In addition, the Law Commission took a step further and outlined the function and role of the law of evidence in the New Zealand legal system and stated that "under an adversarial system, parties present evidence to a judge or jury who make a decision after applying the relevant law to the facts. The fact-finder must first decide what the facts are by assessing the evidence offered by the parties."<sup>564</sup>

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<sup>559</sup> Section 25(f) of the New Zealand Bill of Rights Act 1990.

<sup>560</sup> New Zealand Law Commission, *Evidence*, Volumes 1 and 2 (August 1999) at 48.

<sup>561</sup> *Ibid* Vol 1, at para. 48.

<sup>562</sup> *Ibid* Vol 1, at para. 49.

<sup>563</sup> *Ibid* Vol 1, at paras.15-17.

<sup>564</sup> *Ibid* Vol 1, at para.1.



The fundamental principle articulated by this provision which also forms the core of the New Zealand law of evidence can be said to be the fact that evidence is given orally in the presence of the accused and the jury.

Moreover, the above recommendations of the Law Commission resulted in the enactment of the Evidence Act 2006 which came into force in 2007, and this legislation has implemented the Law Commission's recommendations. Section 18(1) of that Act provides that hearsay statement is admissible if:

'(a) the circumstances relating to the statement provide reasonable assurances that the statement is reliable and (b) either: (i) the maker of the statement is unavailable as a witness; or (ii) the judge considers that undue expense or delay would be caused if the maker of the statement were required to be witness.'

Furthermore, this statutory provisions attests to the fact that the New Zealand legislature had adopted the approach taken by the Canadian Supreme Court in *R v Smith*<sup>565</sup> where Chief Justice Lamer said that, "hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, when the circumstances under which the statements were made satisfy the criteria of necessity and reliability." In other words, New Zealand hearsay evidence also contains the hearsay exception which allows the admission of hearsay evidence because it is considered reliable. In addition, just as in Australia, in New Zealand the reliability approach was introduced through statutory reforms and not by the courts as was the case in Canada. Section 16 of the Evidence Act 2006 also provides for "circumstances" which includes those relating to "veracity and accuracy". This provision defines the "circumstances relating to the statement" as including:

- "(a) the nature and contents of the statement; and
- (b) the circumstances in which the statement was made; and
- (c) any circumstances that relate to the truthfulness of the maker of the statement; and
- (d) any circumstances that relate to the accuracy of the observations of the maker of the statement.<sup>566</sup>

These are the factors which a court has to consider when determining whether an out-of-court statement is reliable or not in order for such a hearsay statement to be admissible as evidence.

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<sup>565</sup> [1992] 75 CCC (3d) 257, 273-274.

<sup>566</sup> Section 16 of the Evidence Act 2006.

Prior to the enactment of the Evidence Act 2006, however, the New Zealand Court of Appeal had extended and liberalised the hearsay rule by recognising a common law discretion to admit hearsay in *R v Manase*, where the Court summarised this discretionary approach as follows:

‘Whether to admit hearsay evidence under the general residual exception therefore turns to three distinct requirements: relevance, inability and reliability.

- (a) Relevance. This is not strictly a requirement directed to this exception to the hearsay rule. Rather it is an affirmation and a reminder of the overriding criterion for the admissibility of all and any evidence... The evidence in question either has sufficient relevance or it does not...
- (b) Inability. This requirement will be satisfied when the primary witness is unable for some reason to be called to give the primary evidence. If the primary witness is personally able to give that evidence, it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.
- (c) Reliability. The hearsay evidence must have sufficient apparent reliability, either inherent or circumstantial, or both, to justify its admission in spite of the dangers against which the hearsay rule is designed to guard. ... The inability of a primary witness to give evidence is not good reason to admit unreliable hearsay evidence.<sup>567</sup>

This decision is thought to have led to the statutory reforms contained in the 2006 Act because the Law Commission, in its report, cited the rationale and approach of this case and recommended that statutory reforms should be handled by the legislature and not the courts. These recommendations resulted in the adoption of Evidence Act 2006. The legislature seems to have intervened by introducing statutory reforms which have halted the path of judicial activism that was started by the *Manase* decision.<sup>568</sup> Moreover, in New Zealand, the reliability approach is also applied to determine the admissibility of hearsay evidence and is also thought to be a safeguard which protects an accused’s right to cross-examination and ensures the right to a fair trial.<sup>569</sup>

Furthermore, Section 8(1) of the Evidence Act 2006 provides that “judges must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceedings or needlessly prolong the proceedings.” This legislation also created a balance between the probative value of the hearsay evidence and extent of the prejudice its admission might cause to the concerned party, a provision which is similar to the Australian Evidence Act 1995 above.<sup>570</sup>

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<sup>567</sup> [2001] 2 NZLR 197 (CA) at 206 paras. 30-31.

<sup>568</sup> Law Reform Commission of Hong Kong, *Report, Hearsay in Criminal Proceedings*, (November 2009) at para. 9.70.

<sup>569</sup> *Ibid* at para. 9.70.

<sup>570</sup> *Ibid* Sections 135 and 137.

## 5.7 Hong Kong

The Hong Kong's Constitution, in Article 39 of the Basic Law,<sup>571</sup> provides that the rights guaranteed in the International Covenant on Civil and Political Rights [ICCPR] remain in force in Hong Kong. Article 14(3)(e) of the ICCPR guarantees an accused person the right to examine the witnesses against him, and it provides that:

'3(e) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality, to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'<sup>572</sup>

Under the common law applied in Hong Kong, the hearsay rule is an exception to the general principle that all material evidence should be admitted in criminal proceedings.<sup>573</sup> Sections 70 and 73 of the Evidence Ordinance<sup>574</sup> provide for circumstances for out-of-court statements made by persons who, owing to certain circumstances, are unavailable to give evidence at the trial.

In its 2005 report, the Law Reform Commission of Hong Kong also noted that the rule against hearsay was still part of the law of Hong Kong and that the basis for excluding hearsay evidence was the assumption that indirect evidence might be untrustworthy and unreliable because it was not subjected to cross-examination.<sup>575</sup> The Commission further stated that the justification for the exclusion of out-of-court statements was that the evidence was not given under oath and not tested by the procedural device called cross-examination.<sup>576</sup>

In addition, these above recommendations by the Law Commission also identified the prejudice caused to an accused if an out-of-court statement is received in lieu of evidence tested through cross-examination and the right of confrontation.

Moreover, in its 2009 report the Law Reform Commission of Hong Kong also confirmed that the hearsay rule was still part of the law of evidence of Hong Kong.<sup>577</sup> Regarding whether the courts should introduce reforms into the hearsay rule, the Commission went further by stating that, "the view is taken that the proper path for reform is legislative."<sup>578</sup> In *Wong Wai-man v HKSAR* the Court of Appeal in Hong

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<sup>571</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, effective from 1 July 1997.

<sup>572</sup> International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

<sup>573</sup> Robertsons "Reform of the Hearsay Rule" Newsletter, Spring 2011 at 3.

<sup>574</sup> Criminal Procedure Ordinance 1995.

<sup>575</sup> Law Reform Commission of Hong Kong, *Report on Hearsay in Criminal Proceedings*, (30 November 2005), at para. 3.

<sup>576</sup> *Ibid* at para. 8.

<sup>577</sup> *Ibid* at para. 1.2.

<sup>578</sup> *Ibid* at para. 1.9. In *Wong-Wai-man v HKSAR* [2001] 1 HKLRD 473 (CA) the court held as follows: 'It is true it was only by a majority of three to two that the House of Lords held in *Myers v DPP* [1965] AC 1001 that it was for the Legislature, rather than the Judiciary, to create new exceptions to the hearsay rule. And in *R v Khan* [1990] 59 CCC (3d) 92, the Supreme Court of Canada preferred the

Kong cited with approval the United Kingdom and Australian decisions<sup>579</sup> where it was held that the creation of new exceptions to the hearsay rule would need statutory reform. As shown earlier, this approach would be contrary to the Canadian Supreme Court's "judicial activism" approach where the court creates new hearsay exceptions to the rule.

The Law Commission further proposed preserving the hearsay exclusionary rule and argued that there should be a clarification of the existing exceptions and that a discretion should be introduced "on the basis of a defined test of necessity and threshold reliability."<sup>580</sup> The discretion used to determine whether hearsay evidence was admissible would be based on necessity and threshold reliability. Hence the necessity and reliability approach, which is the same approach used by the Canadian Supreme Court and the Australian and New Zealand jurisprudence, also forms part of the hearsay statutory reforms in Hong Kong. Furthermore, the Law Commission also discussed the decision of the European Court of Human Rights in *Al-Khawaja*<sup>581</sup> where the admission of hearsay evidence was held to be denying an accused's right of confrontation and found the decision to be correct and recommended statutory reforms [which would allow hearsay evidence admissibility to be determined on necessity and reliability] which would also protect an accused's right to a fair trial and the right cross-examine witnesses.<sup>582</sup> In addition, the Law Commission also considered and rejected the UK reforms introduced by the 2003 Act which provided the "interests of justice" exception where it was said that "its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are open-ended and vague."<sup>583</sup> This same criticism was noted regarding the South African Law of Evidence Act 45 of 1988 which contained the interests of justice approach.<sup>584</sup> This conclusion was reached after the Law Commission had cautiously considered the accused's right to examine witnesses against him/her as guaranteed in ICCPR, the hearsay rule and Hong Kong's Basic Law. The Law Commission also concluded that the interest of justice test was not a proper and sound safeguard that might ensure a fair trial.<sup>585</sup> Moreover, the Law Commission also found the English reforms contained in the

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approach of the minority in *Myers v DPP*. But it did so without referring to and perhaps without the benefit of having cited to it – *R v Blastard* [1986] AC 41. In *R v Blastard*, all the other Law Lords hearing the appeal agreed with Lord Bridge of Harwich who (at p.52h) referred to the principle established in *Myers v DPP* 'never since challenged, that it is for the Legislature, not the Judiciary, to create new exceptions to the hearsay rule.' In *Bannon v R* (1995) 185 CLR 1, a case before the Australian High Court, Brennan CJ said (at p.12) that the creation of a new exception to the hearsay rule 'would require a general review of the hearsay rule, its history, purpose and operation.' The Law Reform Commission would appear to be the best body suited to conduct a general review.'

<sup>579</sup> Ibid.

<sup>580</sup> Ibid at para. 8.4(e).

<sup>581</sup> 26766/05 [2009] ECHR 110 at paras. 42-43.

<sup>582</sup> Ibid at paras. 9.74-9.76.

<sup>583</sup> Ibid Recommendation 7 on page 103.

<sup>584</sup> Ibid at para. 8.20.

<sup>585</sup> Ibid Recommendations 7 on page 103.

Criminal Justice Act 2003 to be “open-ended and vague” and not capable of ensuring the reliability and credibility of evidence.<sup>586</sup>

Furthermore, the Law Commission also criticised and rejected the UK approach which admits hearsay evidence in the interests of justice on another ground being that it deviated from the well-founded common law hearsay tradition, and it “admits hearsay regardless of how unfair or how unreliable or how relevant such hearsay might be.”<sup>587</sup>

## 5.8 Ireland

Irish law has not only incorporated the European Convention on Human Rights [ECHR] into its legal system but has also created a legal framework in which components of the Convention were adopted into its domestic law and, therefore, formed part of its law.<sup>588</sup> In addition, the relevant Irish legislation provides that:

‘2 – (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.’

De Londras terms this procedure adopted in Ireland as the “transportation of the Convention rather than its incorporation.”<sup>589</sup> The rationale for these provisions seems to be that Irish Courts have to interpret and apply domestic laws in a manner which is compatible with the provisions of the Convention, for example Article 6(3)(d) of the Convention which guarantees an accused person a right to examine the witnesses against him.

The Irish Supreme Court has also examined these statutory provisions, and it held that Articles 38(1) and 40(3)(1) of the 1937 Irish Constitution<sup>590</sup> guarantees a right to fair trial procedures, including the right to confront and cross-examine witnesses.<sup>591</sup> Moreover, Irish law recognises a general exclusion of hearsay with a number of exceptions. This could be seen in the Irish Supreme Court decision in *Cullen v Clarke*,<sup>592</sup> where Kingsmill-Moore J outlined Irish hearsay rule and held that:

‘it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the

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<sup>586</sup> Ibid Recommendation 7 on page 103.

<sup>587</sup> Ibid para. 5.5

<sup>588</sup> Fiona de Londras “*Using the ECHR in Irish Courts: More Whispers than Bang?*” PILA Seminar, the Distillery Building, Dublin 13 May 2011, at 1.

<sup>589</sup> Ibid.

<sup>590</sup> Constitution of Ireland enacted 1<sup>st</sup> July 1937.

<sup>591</sup> *Re Haughey* [1971] IR 217, at 220. See also *The State (Healy) v Donogue* [1976] IR 325, at 330. Article 38(1) provides: ‘No person shall be tried on any criminal charge save in due course of law.’ Article 40(3)(1) provides: ‘The State guarantees in its laws to respect, and, as far practicable, by its laws to defend and vindicate the personal rights of the citizen.’

<sup>592</sup> [1963] IR 368 at 378.

truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath.’

The Irish common law of evidence recognises that evidence needs to be tested by cross-examination and that hearsay evidence might be considered admissible under such circumstances.

In addition, the Law Reform Commission of Ireland published a report on hearsay evidence in 2010 after considering the accused’s right to confront witnesses and the substance and application of the hearsay rule. This report stated that “the right to cross-examine is one of the foundations for the hearsay rule and that the right of confrontation forms an important component of the criminal trial under the Irish Constitution and at common law.”<sup>593</sup> What is also evident from this report is that the Law Commission has traced the original historical link between the hearsay rule and the right of confrontation and found that it included the right of cross-examination and remained an important component of Irish law which included common law.<sup>594</sup>

Just as the Hong Kong Law Commission did, the Irish Law Commission criticised and rejected the hearsay reforms undertaken by the UK as contained in the Criminal Justice Act 2003, in particular the interests of justice statutory test. It was also concerned that these provisions were too wide and “relaxed the rule in such a manner as to potentially render the rule against hearsay redundant.”<sup>595</sup> Furthermore, the Commission was also distressed in that a wide discretion to admit hearsay in the interests of justice failed to appreciate and fully comprehend that at the core of the hearsay rule was the recognition of the accused’s right to cross-examination. In addition, similarly to the Hong Kong Law Commission’s recommendations, the Irish Law Reform Commission also recommended that the traditional common law hearsay rule should be maintained, but that an exception be included in which the admissibility of hearsay evidence would be determined by making use of the reliability approach.<sup>596</sup>

The determination of the admissibility of hearsay evidence on reliability seems to be one of the primary factors in the reforms that shaped the hearsay rule in Ireland, Hong Kong, Australia, New Zealand and Canada, UK, United States and South Africa. As has been discussed above, the reliability of hearsay evidence as a benchmark for determining the admissibility of evidence has received mixed reactions and criticisms from academics, lawyers and courts and this has also raised some doubts relating to its credibility.

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<sup>593</sup> Law Reform Commission, *Hearsay in Civil and Criminal Cases* (LRC CP 60, March 2010) at para. 2.51.

<sup>594</sup> *Ibid* at para.2.51.

<sup>595</sup> *Ibid* at para. 5.32.

<sup>596</sup> *Ibid* paras. 5.47 and 5.49.

## 5.9 European Court of Human Rights

The hearsay rule and the right of confrontation, which are principles guaranteed in the European Convention on Human Rights are viewed to be the major developments in the protection of human rights which emerged after World War II, after the Convention for the Protection of Human Rights and Fundamental Freedoms also termed the European Convention on Human Rights was entered into as a treaty by numerous countries in Western Europe.<sup>597</sup> In addition, the human rights principles identified in the Convention were similar to those provided for in the Universal Declarations of Human Rights adopted by the United Nations in 1948.<sup>598</sup> Furthermore, the European Convention on Human Rights was unparalleled and previously unheard of because it established a system in which violations of human rights would be enforced, and this mechanism is the European Court of Human Rights (ECHR).<sup>599</sup>

Article 6(3) of the European Convention on Human Rights provides that:

‘Everyone charged with a criminal offence has the following minimum rights,(d) to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...’

The Convention, however, does not prescribe whether the right to examine witnesses includes or means the common law right of confrontation and/ or whether it bars the admission of hearsay evidence.

The first case which was heard by the ECHR involving hearsay evidence was *Unterpertinger v Austria*,<sup>600</sup> which was an application made by the accused (defendant) who was convicted for assaulting his wife and her daughter. Both these witnesses turned down the opportunity to give evidence at the trial. These two witnesses were also the only witnesses, and the prosecutor presented as evidence their depositions which they have given to the police and their statements where the crimes were initially reported. It was on the premise of this evidence that the accused had been found guilty. In addition, the ECHR, when construing the accused’s right to a fair trial which includes the right to examine witness, concluded that the admission of this hearsay evidence had violated these rights. The ECHR also stated the reason that these rights had been violated was that the accused was unable to cross-

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<sup>597</sup> Roger W. Kirst “*Hearsay and the Right of Confrontation in the European Court of Human Rights*” *QLR* (2001-2003) at 777.

<sup>598</sup> *Ibid* at 777. See also, G.A. Res. 217(iii), U.N.Doc. A/810(1948) at 71.

<sup>599</sup> See Council of Europe, “The European Convention on Human Rights,” available at <<http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM>> (last visited 15 September 2015). See also Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights* 3-14 (2ed.1986).

<sup>600</sup> 110 Eur. Ct. H.R. (Ser. A), 13 Eur. H.R. Rep. 175 (1986).

examine both witnesses, and that their evidence formed the primary foundation for the conviction.<sup>601</sup>

Following this case, the ECHR also had to determine the admissibility of hearsay evidence in *Barbera v Spain*.<sup>602</sup> The hearsay evidence was contained in a written declaration by an erstwhile partner in crime of the accused, in which he informed the police that it was the accused who had committed murder and that he, the accomplice, had not taken part. This declarant of this statement vanished and could not be located when the trial was heard. The ECHR concluded that “above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in appellants’ presence and under the watchful eye of the public” was the ground for stating that the accused did not receive a fair trial. The admission of the hearsay statement was found to have violated the accused’s rights guaranteed by Article 6(3)(d) of the Convention.<sup>603</sup>

Furthermore, in *Bricmont v Belgium*,<sup>604</sup> the hearsay evidence against the accused was contained in complaints which were not taken under oath from the victims but were taken by the court in a private context in the absence of the accused and “without the accused ever having had an opportunity, afforded by an examination or a confrontation, to have evidence taken from the complainant, in his presence.”<sup>605</sup> The complainant was a Prince and Regent of the Kingdom of Belgium, and this fact would necessitate a royal decree being issued before he could be sworn in to testify in court proceedings. The ECHR held that the accused’s right to examine witnesses and the right to a fair trial had been violated by the admission of this statement.

Moreover, in *Kostovski v Netherlands*,<sup>606</sup> the accused was found guilty of robbery, and the premise for this conviction was a depositions made by unnamed witnesses who also refused to testify at the trial. The trial court received as evidence testimony from two magistrates and a police officer who had interrogated the witnesses. All these parties testified that the witnesses’ fears were material and that they had found these witnesses to be reliable.<sup>607</sup> The ECHR, after considering the hearsay evidence and the accused’s right to examine witness stated that “all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.”<sup>608</sup> In addition, the ECHR also stated that, “these rights required an accused to be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his

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<sup>601</sup> Ibid at 15.

<sup>602</sup> 146 Eur. Ct. H. R. (Ser. A), 11 Eur. Ct. H.R. Rep. 360(1989).

<sup>603</sup> Ibid at 37-38.

<sup>604</sup> Eur. Ct. H. R. (Ser. A) 99 (1989).

<sup>605</sup> Ibid at 30-31.

<sup>606</sup> 166 Eur. Ct. H. R. (Ser. A).12 Eur. H. R. Rep. 434 (1989).

<sup>607</sup> Ibid at 11-12.

<sup>608</sup> Ibid at 20.



statement or at some later stage of the proceedings.”<sup>609</sup> Hence the hearsay statements were found to be inadmissible.<sup>610</sup>

It is notable that the decisions taken by the ECHR have drawn the attention of some academics to the application of the hearsay rule and the right of confrontation which are regulated by the Convention, and they have also prompted some mixed views which claim that the Convention and the decisions of the ECHR have “adopted a hearsay-confrontation rule for criminal bench trial,”<sup>611</sup> “recognised a strong right of confrontation,”<sup>612</sup> “recognised the right of the defendant to confront and cross-examine adverse witnesses,”<sup>613</sup> “limited the courts from convicting solely on uncorroborated hearsay,”<sup>614</sup> “established a right of confrontation,”<sup>615</sup> or “founded that the failure to allow confrontation of witnesses can violate the Convention.”<sup>616</sup>

There is, therefore, a very strong consensus that the Convention and the ECHR have created a right of confrontation or have given powerful support to the hearsay rule and its link to the right of confrontation.

Furthermore, Winter argues that the provisions of the Convention guarantee an accused’s right to cross-examine a witness against him but the traditional hearsay exceptions are still applicable and recognised in the ECHR proceedings.<sup>617</sup> In addition, Friedman disapproves of the view that such a fundamental right to confrontation should have exceptions, and he argues that “just as the right to jury trial and the right to counsel are not subjected to exceptions, the right to confront an adverse witness should not be subjected to exceptions - though the accused can waive the right or forfeit it by misconduct.”<sup>618</sup>

Moreover, Swergold argues that, under the European Convention of Human Rights, the right to confrontation is generally satisfied so long as the accused has the opportunity to cross-examine an adverse witness.<sup>619</sup>

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<sup>609</sup> Ibid.

<sup>610</sup> Ibid.

<sup>611</sup> Craig Callen “*Hearsay and the Informal Reasoning*,” *Vanderbilt. L. Rev.* (1994) at 71.

<sup>612</sup> Richard D. Friedman “*Is Barking Up the Wrong Tree Assertive Conduct?*” *Miss. C. L. Rev.* (1995) at 87,88.

<sup>613</sup> Richard S. Fraser “*Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses*” *W. VA. L. Rev.*(1998) at 773,779.

<sup>614</sup> Gordon Van Kessel “*Hearsay Hazards in the American Criminal Trial: An Adversary Oriented Approach*” *Hastings L.J.*(1998) at 523.

<sup>615</sup> Amicus Brief of the American Civil Liberties Union in *Lilly v Virginia*, 527 U.S. (1999) at 116.

<sup>616</sup> Ronald J. Allen & Brian Leiter “*Naturalised Epistemology and the Law of Evidence*” *VA. L. Rev.* (2001) at 1513.

<sup>617</sup> Lorena Bachmaier Winter “*Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR’s Case Law*” *Utrecht Law Rev.* (September 2013) at 134.

<sup>618</sup> Richard D. Friedman “*‘Face to Face’: Rediscovering the Right to Confront Prosecution Witnesses.*” *Int’l J. Evidence & Proof*,(2004) at 4.

<sup>619</sup> Jason Swergold *Taking “Blind Shots at a Hidden Target”: Witness Anonymity in the United Kingdom*” *B.C. Int’l Comp. L. Rev.*(2009) *supra* at 478.

The European Court of Human Rights in *Luca v Italy*,<sup>620</sup> also considered the “proper opportunity to question witness” as forming part of the right of confrontation and the use of hearsay evidence, and it held at follows:

‘As the Court stated on a number of occasions, it may prove necessary in certain circumstances to refer to depositions made during instigations stage (in particular, where a witness refuses to repeat his depositions in public owing to his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not contravene Article 6(3)(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.’<sup>621</sup>

The court’s views are that the admission of out-of-court statements should be based on clearly defined grounds and the fairness of a conviction emanating largely from such statements violates the right to a fair trial.

In addition, in the case of *Van Mechelen and others v The Netherlands*,<sup>622</sup> the defendants were convicted of armed robbery. The trial court held that the reasons for the witnesses remaining anonymous were well-founded. As in *Kostovski*, the court remarked that “all evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.”<sup>623</sup> The court also found that the accused’s right to examine witnesses and his/her right to a fair trial had been violated by the admission of hearsay evidence.<sup>624</sup>

Moreover, the court, in *A.M.v Italy*,<sup>625</sup> restated its views in *Van Mechelen and others*, claiming that “all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.” The court also held that the accused’s right to examine witnesses, which included his right to a fair trial, had been violated by the admission of hearsay statements which were not tested through cross-examination.<sup>626</sup> In addition, in *Visser v The Netherlands*,<sup>627</sup> the court also stated that “all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.”<sup>628</sup> The court also held that the lack of the opportunity to examine witnesses against him resulted in the accused not being given a fair trial.<sup>629</sup> In the cases of *Al-Khawaja and Tahery v The*

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<sup>620</sup> [2003] 36 EHHR at 807.

<sup>621</sup> At para. 40.

<sup>622</sup> 21363/93 [1997] ECHR 22.

<sup>623</sup> At para. 51.

<sup>624</sup> At para. 50.

<sup>625</sup> 37019/97 [1999] ECHR 141 at para. 25.

<sup>626</sup> At para. 27-28.

<sup>627</sup> 26668/95 [2000] ECHR 108.

<sup>628</sup> Ibid at para. 51.

<sup>629</sup> Ibid at para. 51-52.

*United Kingdom*,<sup>630</sup> which originated from United Kingdom of Great Britain and Northern Ireland, both applicant's convictions were based solely on hearsay evidence. Al-Khawaja, the first applicant complained to the ECHR that in his trial for indecent assault his right to examine witnesses under Article 6(3)(d) had been violated because the complainant had died before the trial, and her statement to the police was read to the jury.<sup>631</sup> In addition, the second applicant, Tahery, also complained that his trial for assault with intent to do grievous bodily harm had also violated his right to examine witnesses because an out-of-court-statement from the witness was read to the jury instead of the witness appearing before the jury and giving his evidence.<sup>632</sup> It is important to note that in the Al-Khawaja's trial the judge directed the jury that:

"It is important that you [the jury] bear in mind when considering her [the complainant's] evidence that you have not seen her give evidence; you have not heard her give evidence; and you have not heard her evidence cross-examined [by the applicant's counsel], who would undoubtedly have had a number of questions to put to her. Bear in mind that this evidence was read to you. The allegation is completely denied, you must take that into account when considering her evidence."<sup>633</sup>

The trial judge, when applying English law, remained aware of the dangers inherent in the admission of hearsay evidence under common law, and, when highlighting these dangers, also stated that the problem with the hearsay statement stemmed from the fact the accused had had no opportunity to cross-examine the witness who had made the out-of-court statement. Furthermore, the ECHR held that the convictions based on these hearsay statements were violating the accused's right to examine witnesses against him which included his right to a fair trial. In addition, the court also stated that there was another reason why the admission of hearsay evidence was found to have violated the accused's right to examine witnesses, which was that the hearsay evidence was not permitted to be the only evidence on which a conviction is based.<sup>634</sup> This rule is also called the "sole or decisive rule."<sup>635</sup>

The reasoning of the ECHR in the above cases in finding a link between the right to examine witnesses which includes the right to a fair trial under the Convention and the admissibility of hearsay evidence are in accord with the views expressed by Gasper on the contents of these principles where he argues that the "ECHR addresses hearsay evidence and frames the issue in broader terms of whether the defendant received a fair trial."<sup>636</sup> These views are also in accord with those shared

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<sup>630</sup> [2009] 49 EHRR 1.

<sup>631</sup> *Ibid* at para. 3.

<sup>632</sup> *Ibid* at para. 3.

<sup>633</sup> *Ibid* at para. 10.

<sup>634</sup> *Ibid* at paras. 41- 48.

<sup>635</sup> *Ibid* paras. 47-48. See also JUSTICE submission *supra* para 27.

<sup>636</sup> Brandie Gasper "Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism" *American University International Law Rev.* (2005) at 285.

by Kirst<sup>637</sup> where he argues that, “if hearsay evidence imposes many handicaps on the defence, the EHCR is likely to consider the use of the hearsay evidence unfair”.

## 5.10 Conclusion

The hearsay rule and the common law right of confrontation are said to have developed during the same period. Furthermore, these principles are thought to be aimed at protecting the values which are safeguarded by the right to cross-examination.

The hearsay rule has its origin in England, and it was later incorporated into the legal systems of former British colonies. In addition, in most of these jurisdictions the hearsay rule has been statutorily reformed, and new hearsay exceptions created, amongst others, the interests of justice and the reliability of hearsay evidence. Furthermore, this exception is also rejected for failing to honour the common law principle that requires evidentiary rules to be predictable.

Moreover, in the United States the hearsay rule is applied and has also been statutorily reformed to include the frameworks termed the interests of justice and the guarantees of reliability. In this jurisdiction the interests of justice exception is also criticised for being too wide and not sufficiently protecting an accused’s right to be confronted with witnesses against him/her. In addition, the reliability of hearsay evidence approach is also criticised for being a non-objective and unstructured benchmark that could not protect the Confrontation Clause.

Furthermore, in Canada there are no statutorily reforms to the hearsay rule, and the courts have created new hearsay rule exceptions. This approach is, however, criticised as failing to uphold the rule of law and the separation of powers. The Supreme Court has through a process termed “judicial activism” created the necessity and reliability approach for the determination of the admissibility of hearsay evidence. This latter approach, however, finds support in Wigmore’s views, who, when commenting on the admissibility of hearsay evidence in common law, argues that the necessity and reliability of the evidence was the initial common law framework for determining the admissibility of such evidence.<sup>638</sup>

In Australia the hearsay rule is also applied. The rule has been statutorily reformed, and hearsay evidence is received if considered to be reliable. There is no constitutional right to fair trial but the ICCPR right to a fair trial which includes the right to examine witnesses is incorporated into the Australian legal system.

In New Zealand the hearsay rule is also applied. There is a constitutional right to examine witnesses which is included in the right to a fair trial. As in Canada, the hearsay rule has been reformed to receive hearsay evidence using the reliability and necessity approach. While in New Zealand this hearsay reforms have been driven by

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<sup>637</sup> Kirst *supra* at 782.

<sup>638</sup> Wigmore *supra* at paras. 1420-1423.

the legislature, the Canadian Supreme Court and not the legislature has introduced a similar hearsay reform framework in Canada.

In Hong Kong the hearsay rule is applied. The Hong Kong Basic Law, as in the Constitution of Australia, incorporates the ICCPR right to a fair trial, including the right to examine witnesses, into Hong Kong legal system. In addition, the hearsay rule has also been statutorily reformed and hearsay evidence is admissible on the basis of the necessity and reliability.

In Ireland the hearsay rule is also applied. As in Australia and Hong Kong, the Irish legal system has incorporated the ICCPR right to a fair trial which includes the right to examine witnesses. In addition, the hearsay rule has been statutorily reformed and hearsay evidence is admissible if it is considered to be reliable. On the other hand, the common law right to cross-examination is also considered to be one of the core features of the hearsay rule and the right of confrontation.

The European Court of Human Rights applies the hearsay rule and the common law right of confrontation. In addition, this court also applies the provisions of the Convention which guarantees an accused's right to a fair trial which includes the right to examine witnesses. This court, when it considers a denial of the right to examine witnesses to have occurred, considers all other circumstances in order to determine when the lack of opportunity to examine witnesses resulted in a violation of the right to a fair trial. It is equally important to note that this court also considers hearsay evidence admissible, but not when it is the sole or decisive evidence against an accused.

What will be examined in the next chapter will be the provisions of section 3 of the 1988 Law of Evidence Amendment Act in the context of the constitutional right to a fair trial.

## **CHAPTER 6 THE CONSTITUTIONAL VALIDITY OF SECTION 3 OF THE LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988**

### **6.1 Introduction**

The content of the discussion in this Chapter will form two separate components, each of which will examine critically the primary tests used in determining the admissibility of hearsay evidence under section 3, viz. the interests of justice and the reliability of evidence statutory tests from diverse standpoints with the objective of probing the constitutionality of this provision of the 1988 Act:-

Section A: The constitutionality of section 3 of the 1988 Act, a South African perspective.

Section B: The constitutionality of the interests of justice and the reliability of evidence statutory tests – an international perspective or comparative analysis.

The constitutionality of these benchmarks has vexed courts and academics and has resulted in divergent views on whether these benchmarks provide adequate countervailing factors which guarantee a fair trial. The study in Section A will, therefore, probe the views of South African courts and academics on the constitutionality of section 3. This requires an investigation into how this provision of this Act is interpreted and applied by South African courts and academics in the light of the accused's right to a fair trial. Section B, on the other hand, requires that the constitutionality of these benchmarks, namely, the interests of justice and reliability of evidence be investigated with the aim of establishing how the constitutionality of these tests has been construed and applied in other jurisdictions, viz. the United Kingdom, United States of America and the European Court of Human Rights in the light of the accused's right to a fair trial. As was discussed in Chapter 5, these are the international jurisdictions which, like South Africa, also apply these tests when determining the admissibility of hearsay evidence.

### **6.2 Section A: The constitutionality of section 3 of the 1988 Act – a South African overview**

In South Africa, the constitutionality of section 3 has never been subjected to constitutional scrutiny before the courts ahead of the enactment of the 1996 Constitution. In addition, in 1993, prior to the enactment of the 1993 Constitution,<sup>639</sup> De Vos and Van der Merwe<sup>640</sup> examined the constitutionality of this Act, and, in their survey, they considered the United States Sixth Amendment (confrontation clause) which provides the right to be confronted with adverse

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<sup>639</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>640</sup> W le R de Vos and S E van der Merwe "*Hoorse: Verlede, Hede en 'n Handves*" *Stell. L. Rev.* (1993) *supra* at 40.

witnesses, and they seem to have adopted the view expressed by Griswold<sup>641</sup> that “the confrontation clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence.” Moreover, De Vos and Van der Merwe concluded that the question of the constitutionality of section 3 can be “answered with reference to the jurisprudence of the USA in absence of South African jurisprudence in this point,” and they found that the provisions of section 3 were constitutionally sound.

In 2000, the constitutionality of these provisions was argued in *S v Ndlovu and others*,<sup>642</sup> at the Witwatersrand Local Division, before Goldstein J, and it was contended that this Act was unconstitutional because it violated an accused’s right to challenge evidence as provided by section 35(3)(i) of the Constitution. Goldstein J rejected this argument and concluded that the provisions of section 3 of the 1988 Act are compatible with the right to a fair trial which also included the right to challenge evidence as provided by section 35(3)(i) of the Constitution. Furthermore, in reaching this conclusion, Goldstein J cited with approval the views expressed by Steytler,<sup>643</sup> who also seems to be of the opinion that these provisions of the 1988 Act are consistent with the right to a fair trial. Furthermore, Steytler’s views are that the provisions of section 3 are consonant with the constitutional right to challenge evidence which is included in the right to a fair trial but he also adds that these provisions of the Act should be used by courts with alertness and wariness, because, in his view: - such an approach would align the admission of hearsay evidence under this Act with the constitutional right to a fair trial.<sup>644</sup> In expressing this latter view, however, the author falls short of elaborating on how such an approach can guarantee the constitutional right in question. This case, *Ndlovu*, later appeared in the Supreme Court of Appeal during 2002,<sup>645</sup> and the constitutionality of section 3 of the 1988 Act was once more argued by the accused, and Cameron JA examined the provisions of the Act, and, in particular, the admission of hearsay evidence in the interests of justice and the constitutional right to a fair trial which also includes the right to challenge evidence, and he concluded that the Act “provides a constitutionally sound framework for the admission of hearsay evidence.”<sup>646</sup> Cameron JA, when reaching this conclusion, gave four reasons which were as follows:<sup>647</sup>

- Firstly, because comprehensive or “wholesale admission” of hearsay was not allowed by the provisions of this Act. For centuries common law has identified the risk presented by the admission of hearsay evidence and this Act did not

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<sup>641</sup> Erwin N. Griswold “*Due Process Revolution and Confrontation*,” *Univ. of Pennsylvania L. Rev.*(1971) at 714.

<sup>642</sup> 2001 (1) SACR 85 (W) at paras. 62-63.

<sup>643</sup> Nico Steytler *Constitutional Criminal Procedure* (1998) *supra* at 350-353.

<sup>644</sup> *Ibid* at 351.

<sup>645</sup> *S v Ndlovu and another supra*.

<sup>646</sup> *Ibid* at para. 26.

<sup>647</sup> *Ibid* at paras. 13-26.

alter that common law principle. As part of this common law principle was applied by South African courts, he cited Schreiner JA's remarks in *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours*,<sup>648</sup> where it was stated that "hearsay, unless it is brought within one of the recognised exceptions, is not evidence, i.e. legal evidence, at all."

- Secondly, Cameron JA stated that because the provisions of this Act are of a nature that they provide an exception to the hearsay rule, and have developed a flexible criterion for the admission of hearsay in the interests of justice. Thus, according to Cameron JA the Act has created sufficient safeguards which were absent and not recognised in common law.
- Thirdly, Cameron JA also noted that, because the Act has created a primary criterion which admits hearsay evidence in the interests of justice, this test must be construed to be in line with the principle of a fair trial guaranteed by the Constitution and is consistent with the provisions of the Constitution because it distinguishes between criminal and civil proceedings and recognises the need for an accused's guilt to be proved beyond reasonable doubt. Moreover, Cameron JA also identified three safeguards which in his view would ensure that an accused's right to a fair trial was protected by the provisions of the Act: (1) the court has duty to ensure that hearsay evidence was not inadvertently introduced against an accused but an accused was informed about the latent defect and dangers of hearsay evidence and the risk it carries; (2) that the provisions of the Act should not be used against an unrepresented accused unless the dangers it contains has been explained to the accused; and (3) that the State should signal its intention to introduce hearsay evidence before it closes its case, and the court should make a ruling on such evidence's admission before an accused was required to present his case in order to enable an accused to know the evidence which was used against him.
- Fourthly, Cameron JA also examined the kind of powers which the provisions of the Act gave to a court when admitting hearsay evidence and he stated that, because the Act created a rule and not discretion, this framework was an adequate safeguard which guaranteed an accused's right to a fair trial because, in his view, this wide and flexible admission of hearsay evidence was also in line with the criterion of the reasonable necessity and reliability approach which was created by the Canadian Supreme Court when determining the admissibility of hearsay evidence. In addition, Cameron JA also considered and approved the residual hearsay exception applied under the United States Federal Rules of Evidence which allows for the admission of hearsay evidence when it was considered to bear "sufficient guarantees of reliability."<sup>649</sup> He concluded that section 3 of the Act can be construed to be containing a similar test, the reliability of evidence test. This latter test, Cameron JA concluded, authorised the admission of hearsay evidence under the 1988 Act and was, in his view,

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<sup>648</sup> 1958 (3) SA 285 (A) at 296f.

<sup>649</sup> *White v Illinois* 502 US 346 (1992) at 356.



also deemed to have reassured the accused's right to be confronted with the witnesses against him when considering the constitutionality of these provisions in the light of the Sixth Amendment of the United States Constitution.<sup>650</sup>

Moreover, Cameron JA, when applying the interest of justice and the reliability of evidence tests and the need to consider the prejudice the admission of hearsay might cause to an accused, reasoned that, where hearsay is admissible in the interests of justice and such admission results in strengthening the state's case against the accused, this outcome cannot be considered to be prejudicial.<sup>651</sup>

On the other hand, Du Toit, when commenting on the court's decision in *Ndlovu* and the constitutionality of section 3, argued that the provisions of section 3, while it conflicts with an accused's right to a fair trial, should be construed as a "reasonable and justifiable limitation of the right in terms of section 36 of the Constitution."<sup>652</sup> This notion that the admission of hearsay evidence remains prejudicial and does not violate an accused's right to a fair trial but instead should be deemed an acceptable and well-founded limitation in terms of section 36 of the Constitution is also shared by Paizes.<sup>653</sup>

As was stated in chapter four, in the judgment of *S v Molimi and another*,<sup>654</sup> it was argued on behalf of the accused that the admission of hearsay evidence in terms of the provisions of section 3 of the Act violated his right to a fair trial, because it allowed for the admission of evidence which was not subjected to the constitutional right to challenge evidence. In addition, the court was also asked to reverse or overrule the approach in *Ndlovu* where the provisions of this Act were found to be consonant with the right to a fair trial. Nkabinde J, however, did not decide on the soundness of the approach in *Ndlovu* because this aspect of that case was, in her view, not disputed or questioned when this case, *Molimi*, was heard by the Supreme Court of Appeal. Nkabinde J did, nevertheless, find that hearsay evidence of a similar nature which was the primary source of the conviction in the *Ndlovu* decision was inadmissible against an accused because she concluded that the admission of such evidence would violate a fair trial.<sup>655</sup> This reasoning by Nkabinde J seems to suggest that there are circumstances, which also existed in *Ndlovu*, where the admission of hearsay evidence might infringe the right to a fair trial.

The court, in *S v Libazi and another*,<sup>656</sup> also questioned the correctness of the approach in *Ndlovu* on the admission of hearsay evidence in the light of the right to a fair trial but did not decide whether section 3 of the 1988 Act was constitutional or

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<sup>650</sup> Ibid.

<sup>651</sup> Ibid at para. 50.

<sup>652</sup> Du Toit *et al Commentary on the Criminal Procedure Act*, (2013) *supra* at ch24-p50Q.

<sup>653</sup> DT Zeffertt and A P Paizes *South African Law of Evidence*, *supra* at 417.

<sup>654</sup> 2008 (2) SACR 76 (CC) at paras. 46-47.

<sup>655</sup> Ibid para. 43.

<sup>656</sup> 2010 (2) SACR 233 (SCA) at paras. 11-12.

not. Nonetheless, the court gave a *caveat* which should be borne in mind when receiving hearsay evidence, and it stated that “failure to respect an accused’s person’s fair trial rights has rightly been viewed as having the potential to undermine the fundamental adversarial nature of judicial proceedings, which also imperils their legitimacy.” On the other hand, Naude<sup>657</sup> seems to find no fault with the approach in *Ndlovu* and the constitutionality of the provisions of section 3 of the Act based on that reasoning, and, after he had examined the court’s reasons in *Ndlovu* where it was held that section 3 of the Act was consonant with the right to a fair trial, he argued that “our current structure provided in section 3 of the Act is well able to resolve any confrontation between the right to challenge evidence and the admissibility of hearsay.” In other words, Naude’s views are that section 3 of the Act provides adequate countervailing factors which guarantee a fair trial.

Furthermore, the difficulty in assessing the admissibility of hearsay evidence by making reliance on the interests of justice test where fundamental values which are protected by the Constitution are at issue is also evident in the decisions of the Supreme Court of Appeal and the Constitutional Court, viz. *S v Ndlovu and others*<sup>658</sup> and *S v Mhlongo; S v Nkosi*,<sup>659</sup> where the right to a fair trial and the right to equality before the law are concerned.<sup>660</sup>

In *Ndlovu*, the hearsay statement which was held to be admissible through the interests of justice test and found to be consonant with the right to a fair trial- was an out-of-court admission made by one accused which incriminated his co-accused. On the other hand, in *Mhlongo*, the Constitutional Court has also considered the interests of justice test contained in section 3 of the Act, the common law standpoint prior to *Ndlovu*, and the fundamental values guaranteed by the Constitution, and it held that “the common-law position before *Ndlovu* which was that extra-curial statements against co-accused were inadmissible, must be restored. Admitting extra-curial admissions against a co-accused unjustifiably offends against the right to equality before the law.”<sup>661</sup> This decision by the court could be understood to mean that the interests of justice test if applied to receive certain hearsay statements might result in achieving an unintended unconstitutional effect for an accused. In other words, the court in *Mhlongo* held that the same hearsay evidence which was considered to be admissible in the interests of justice and not violating the right to a fair trial in *Ndlovu* was not only unconstitutional but also offending against the common law hearsay rule. Furthermore, this decision by the Constitutional Court also brings into question the efficacy and soundness of the views expressed by Paizes that receiving hearsay evidence in the interests of justice in *Ndlovu* “might have been regarded as constituting a limitation of the accused’s right to challenge

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<sup>657</sup> B C Naude “*Testimonial*” hearsay and the right to challenge evidence” SACJ (2006) at 333.

<sup>658</sup> *S v Ndlovu and other* 2002 (2) 325 (SCA) at para. 24.

<sup>659</sup> 2015 (2) SACR 323 (CC).

<sup>660</sup> Section 9 of the Constitution: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

<sup>661</sup> *Ibid* para. 44.

evidence, a limitation that is both reasonable and justifiable in terms of section 36 of the Constitution.<sup>662</sup>

We turn now to the discussion on the reliability of evidence factor which is not expressly stated to form part of section 3 but is thought to be an implicit component of sections 3(1)(c)(ii) and 3(1)(c)(iv)<sup>663</sup> of the Act and is also regarded as having its roots from the common law.<sup>664</sup> The reliability factor was also a factor which was considered by the court in *Hewan v Kourie NO and another*<sup>665</sup> and found to be an important component in assessing the admissibility of hearsay evidence in terms of section 3.

The view that the reliability of evidence factor forms part of section 3 of the Act is also shared by Goldstein J in *Ndlovu*.<sup>666</sup> When assessing the probative value of the hearsay evidence, he found that the circumstances surrounding the taking of the out-of-court evidence were reliable, and he concluded that such evidence should be admissible in the interests of justice. In addition, Cameron JA also concurred with these views and held that the question of the probative value of the evidence in *Ndlovu* was resolved because the “guarantees of reliability are high.”<sup>667</sup>

Schwikkard, on the other hand, when commenting on the constitutionality of section 3, the reliability of evidence approach and its impact on the right to challenge evidence, states that if adequate indicia of reliability could lead cross-examination to be rerieved and avoided- then the reasonable and pertinent consequence must be that hearsay evidence can be admitted even if the person who made the out-of-court statement is not available.<sup>668</sup> In other words, Schwikkard held the view that the reliability of evidence approach is constitutional if there are sufficient grounds for suggesting that the hearsay evidence is reliable. Naude has also examined the constitutionality of section 3 of the Act and its use of the reliability of evidence approach and the right to challenge evidence and seems to agree with the views expressed by Schwikkard. He concludes that the reliability of evidence approach is capable of guaranteeing a fair trial.<sup>669</sup>

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<sup>662</sup> DT Zeffertt and A P Paizes *The South African Law of Evidence* (formerly Hoffmann and Zeffertt) *supra* at 417.

<sup>663</sup> CWH Schmidt and H Rademeyer *Law of Evidence supra* at 18-13.

<sup>664</sup> Wigmore *On Evidence supra* at paras. 1420-1423.

<sup>665</sup> *Ibid* at 238f-i.

<sup>666</sup> *S v Ndlovu and others supra* at para. 55.

<sup>667</sup> *Ibid* at para. 45.

<sup>668</sup> P J Schwikkard “*The Hearsay Challenge*” *supra* at 71.

<sup>669</sup> B C Naude “*Testimonial*” *hearsay and the right challenge evidence*” *supra* at 333.

## 6.3 Section B: The constitutionality of the interests of justice and the reliability of evidence tests – a comparative analysis

### (i) United States of America

The United States Federal Rules of Evidence provides for the admission of hearsay evidence in the interests of justice and where such evidence is considered to be reliable.<sup>670</sup> The “equivalent circumstantial guarantees of trustworthiness” test provided by the Rules has been construed to include the reliability of the hearsay evidence.<sup>671</sup> On the other hand, the constitutionality of these statutory tests where hearsay evidence and the accused’s constitutional right to be confronted with adverse witnesses are to be assessed, has been disputed and doubted by the United States Supreme Court and academics.

Raeder has termed the exceptions of the Federal Rules of Evidence which provides for the admission of hearsay evidence-, the “catchall hearsay exceptions” and, when commenting on these legislative reforms and their effect on an accused’s right to be confronted with witnesses, he argued that the constitutionality of the exceptions and their efficacy was absolutely disputed and doubted because they exhibit a wide outlook about the admission of hearsay evidence.<sup>672</sup> Furthermore, Raeder’s views are that the wide outlook which characterises these hearsay exceptions has resulted in their consuming and annihilating the accused’s constitutional right to be confronted with adverse witnesses.<sup>673</sup> Raeder also argues that these hearsay exceptions were included in the first draft of the legislative reforms only by way of explanation and not restriction. The author adds that these exceptions have not been well received by criminal lawyers because they contain a judicial discretion to admit hearsay which is considered to be too extreme and that they allow judges unrestricted authority to shape and influence what he termed the hearsay debate and controversy.<sup>674</sup>

Park, seems to concur with Raeder with regard the criticism levelled against the effect of these hearsay exceptions on the right to confrontation. He adds that these

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<sup>670</sup> Rules of Evidence for the United States Courts and Magistrates Pub. L. No. 93-395,88 Stat.1926 (1975), Rule 804(b)(5): “If the declarant is not available the following is admissible: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence...”

<sup>671</sup>Richard D. Friedman “*Confrontation: The Search for Basic Principles*” *Geo. L. J.* (1998) at 1018-1020.

<sup>672</sup> Myrna S. Raeder “*The effect of the Catchalls on Criminal Defendants: Little Red Riding Hood meets the Hearsay Wolf and is devoured*” *Loy. LA. L. Rev.*(1992) at 925.

<sup>673</sup> *Ibid* at 925.

<sup>674</sup> *Ibid*.

statutory hearsay exceptions have empowered judges to redefine and create hearsay evidence in each case and this has resulted in the weakening of the accused's right cross-examine witnesses which-, he considers to be a fundamental part of the constitutional right to be confronted with witnesses.<sup>675</sup>

Furthermore, Raeder argues that the drafters of Federal Rules of Evidence had no grounds to judge and appraise the significance and effect of the catchalls in criminal cases in 1975, especially in cases where the original declarant of the statement was not giving oral evidence and being subjected to cross-examination because the confrontation clause and hearsay rule had not received increased focus in the Supreme Court's jurisprudence and it was at its early development phase.<sup>676</sup> In addition, a closer look at the debate in the United States House of Representatives' where the Bill, which later became Rule 804(b)(5), was debated also attests to the discontent expressed by the legislature with regard to the effect of these this hearsay exceptions on the right to be confronted with witnesses.<sup>677</sup> For example, a House of Representatives member, Ms Holtzman, made an outcry which illustrates this disenchantment and stated that the proposed Rule 804(b)(5), would:

"Basically abolishes the rules against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay that he wants. One of the basic assumptions in our system of jurisprudence is that the defendant in criminal trials has the right to confront his accuser. To abolish all prohibitions against hearsay really abridges our concept of a fair trial, aside from creating some Sixth Amendment problems."<sup>678</sup>

The objection was that these hearsay exceptions violated an accused's constitutional right to be confronted with witnesses against him and so has invalidated the hearsay rule.

In addition, members of the House of Representatives, Messrs Eckhardt and Daniels, concurred with Ms Holzman's view and also raised some concerns that these hearsay exceptions would have negative and damaging effect on the right to be confronted with witnesses and the right to cross-examination.<sup>679</sup> On the other hand, the House of Representatives member, Mr Dennis, argued that "I prefer to leave this 'catchall' provision out, but I do not think it is not really as bad as has been made out here, and certainly in a criminal case if there is anything unconstitutional about it it cannot be done, of course."<sup>680</sup> To these concerns he added that, "I am supporting it as a reasonable compromise which really does not add a whole lot because common law courts already could and occasionally did graft new exceptions onto the hearsay rule."<sup>681</sup> Furthermore, the House of Representatives

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<sup>675</sup> Roger C. Park "The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson" *Minn. L. Rev.*(1986) at 1060.

<sup>676</sup> *Ibid* at 931.

<sup>677</sup> 120 U.S. Congress Records 40 (1972).

<sup>678</sup> *Ibid* at 892.

<sup>679</sup> *Ibid* at 40, 893-894.

<sup>680</sup> *Ibid* at 40, 894.

<sup>681</sup> *Ibid*.

member, Ms Holtzman, seemed not to be content with these answers which supported the inclusion of the interests of justice and reliability of evidence tests and enquired whether these exceptions would allow for the admission of statements taken by police even if such statements were excluded under certain legislations.<sup>682</sup> To this question, the House of Representatives member, Mr Dennis, answered that, “I cannot see how anybody could suggest that introducing such a report is possible.”<sup>683</sup> In other words, there was some guarantee that the interests of justice and reliability of evidence statutory tests might not be applied to statements taken by police from the declarant because of the concern that admitting such statements into evidence might violate the constitutional right to be confronted with witnesses. Moreover, Raeder, when examining the minutes of the debates in the House of Representatives where this Bill was debated, also identified the reasons which led to the adoption of these statutory tests and argued that a petition was made that, if Congress rejected the draft proposal providing the catchalls, two years of congressional reviews and seven years of work surveyed by the Advisory Committee would be undermined. Membership of the Judiciary Committee was about to end and “this very complicated subject would have to be taken up from scratch by new members having no familiarity with it.”<sup>684</sup> Therefore, according to Raeder, these statutory tests, viz. interests of justice and reliable evidence were included into the United States hearsay evidence on two grounds:- *firstly*, when the accused’s right to be confronted with witnesses had not fully developed: and, *secondly*, it was considered as an excusable compromise because the term of office of the Judiciary Committee was about to end. In addition, Raeder, when commenting on the “circumstantial guarantees of trustworthiness” framework which also provides the reliability of hearsay framework, argued that it is difficult to apply and assess such criteria because “even speculative gossip can sound believable, otherwise why would someone repeat it?”<sup>685</sup> The “circumstantial guarantees of trustworthiness” approach was, however, applied by the United States Supreme Court in 1980 in *Ohio v Roberts*,<sup>686</sup> and evidence received through its application was held to be constitutionally sound after the court has considered the admissibility of hearsay evidence and the accused’s right to confrontation. It was also held that a hearsay statement can be considered to be complying with the reliability test in one of two methods, viz. *firstly*, the hearsay statement may be found to falling within a “firmly rooted” hearsay exception, and, *secondly*, there might be “a showing of particularised guarantees of trustworthiness” which strengthen the hearsay statement.<sup>687</sup> In other words, the court in *Roberts* held that hearsay evidence, if admitted because it is considered by the court to be reliable, does not violate an accused’s right to be confronted with witnesses against him.

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<sup>682</sup> Ibid at 40, 895.

<sup>683</sup> Ibid.

<sup>684</sup> Ibid at 935.

<sup>685</sup> Ibid at 940.

<sup>686</sup> [1980] USSC 137; 448 U.S.56.

<sup>687</sup> Ibid at 66.

In 2004, the United States Supreme Court, in *Crawford v Washington*,<sup>688</sup> in a judgement by Scalia J rejected and reversed the use of the reliability of hearsay approach in *Roberts* and held this approach to be unconstitutional. Scalia J's justification for this finding was that:

"the confrontation clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one."<sup>689</sup>

In other words, this court's decision held that cross-examination was the constitutionally decreed manner of evaluating the trustworthiness of evidence and not the reliability of hearsay mode created in *Roberts*.

Scalia J also added that, "the State's use of Sylvia's statement made out-of-court has violated the confrontation clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."<sup>690</sup> In addition, in concluding that the reliability of hearsay approach was unconstitutional, Scalia J had also attempted to clarify his reasoning by stating that:

"*Roberts*' framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of *Roberts*' tests is its demonstrated capacity to admit core testimonial statements that the confrontation clause plainly meant to exclude."<sup>691</sup>

The confrontation clause was originally intended to exclude evidence deemed admissible through the approach adopted by the court in *Roberts* which allows for the admission of hearsay because a judge thinks that such evidence is trustworthy. To this reasoning Scalia J also stated that, "dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."<sup>692</sup>

Friedman concurs with these latter views expressed by Scalia J in *Crawford* and questions the court's reliance on the reliability of hearsay evidence in *Roberts*. He also contends that the reliability of evidence was an unconstitutional framework for determining the admissibility of hearsay evidence and adds that:

"this approach devalues the confrontation clause, treating it as a constitutionalisation of an amorphous and mystifying evidentiary doctrine, the continuing value of which is widely questioned. We may well wonder whether the *Roberts* framework, as initially presented by the Court and as

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<sup>688</sup> [2004] USSC 59; U.S. 36.

<sup>689</sup> Ibid at 61-62.

<sup>690</sup> Ibid at 42-69.

<sup>691</sup> Ibid at 62-65.

<sup>692</sup> Ibid at 65.

subsequently developed by it, fails to capture some enduring values reflected by the clause. I believe the answer is affirmative.”<sup>693</sup>

Friedman also argues that the reliability of the hearsay approach contained some latent dangers or deficiencies which make it difficult to justify its use. He points out that:

“reliability of hearsay evidence is a poor criterion to determine whether admissibility of the evidence will advance the truth-determination process. Reliability is notoriously difficult to determine. It puts the cart before the horse, essentially asking whether the assertion made by the statement is true as a precondition to admission.”<sup>694</sup>

In summary, according to Scalia J, in the 2004 decision of the United States Supreme Court in *Crawford v Washington*,<sup>695</sup> the reliability of evidence approach is an unconstitutional procedure for determining the admissibility of hearsay evidence when the confrontation clause is at issue. Moreover, the efficacy of the interests of justice statutory test as a device that could protect constitutional values, as will be shown below, is questioned and disputed.

## **(ii) United Kingdom**

The United Kingdom’s Criminal Justice Act 2003 provides for the admission of hearsay evidence in the interests of justice. Section 114(1) of this Act provides that, “In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, and only if – (d) the court is satisfied that it is in the interests of justice for it to be admissible.” The court has a discretion to receive hearsay evidence and amongst the factors that should be taken into account in the application of this discretion, are the probative value of the evidence, the reliability of the evidence and whether other oral evidence was available.<sup>696</sup> On the other hand, there are divergent views on whether this discretion to admit hearsay statements in the interests of justice is compatible with the right to a fair trial and or the common law right of confrontation.

In *R v Z*,<sup>697</sup> the court considered the admission of hearsay evidence through the interests of justice test, the fact that such evidence was untested through the cross-examination, the right to fair trial principle, and the fact that “section 114(1)(d) is to be cautiously applied.” This resulted in the hearsay evidence which was admitted by the trial court when convicting the accused to be found not to be admissible because this court was concerned that the interests of justice test was too wide and that it might have prejudicial effect on an accused.<sup>698</sup> However, the court in *R v Y*,<sup>699</sup>

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<sup>693</sup> Ibid at 1022.

<sup>694</sup> Richard D. Friedman “*Truth and Its Rivals in the Law of Hearsay and Confrontation (Symposium: Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law)*” *Hastings L.J.* (1998) at 552.

<sup>695</sup> Ibid.

<sup>696</sup> Section 114(2) of the Criminal Justice Act 2003.

<sup>697</sup> [2009] EWCA Crim. 20.

<sup>698</sup> Ibid at paras. 17-20, 25-30.



disputed the views that the interests of justice test should be applied circumspectly and held that “section 114(1)(d) does not contain the cautionary reminder.”<sup>700</sup> The court, however, did note that the Law Commission’s draft bill which preceded this legislation did contain cautious language and provided that:

“9. In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if the court is satisfied that, despite the difficulties there may be in challenging the statement; its probative value is such that the interests of justice require it to be admissible.”<sup>701</sup>

Moreover, the court, in *R v Taylor*,<sup>702</sup> also disputed the views that the interests of justice test should be applied cautiously and held that there was nothing in the legislation stating such application but only that the court’s decision in exercising this discretion must be informed by the factors numerated in section 114(2) of the Act.<sup>703</sup>

Recently, in *Riat and others v R*,<sup>704</sup> the court was required to determine whether the hearsay evidence admitted through the interests of justice had violated the right to a fair trial, and it held that “the right of confrontation is a longstanding requirement of the common law”<sup>705</sup> and in criticising the interests of justice test, it was also held that this common law principle (right of confrontation) was constrained by this approach (interests of justice statutory test) and that a conviction reached through such hearsay evidence might be correct if the provisions of the Act are applied properly.<sup>706</sup> In other words, the interest of justice test was found to be a statutory limitation which could be allowed to curb the common law hearsay rule and not infringe a fair trial right.

On the other hand, Brodin questions and disputes the constitutionality of the UK Criminal Justice Act 2003 which provides for the admission of hearsay evidence in the interests of justice, and he forewarns other jurisdictions against adopting similar hearsay reforms by arguing that “the ideal goals of a criminal trial which are truth-finding, accuracy, and avoidance of wrongful convictions – are usually best served

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<sup>699</sup> [2008] EWCA Crim.10.

<sup>700</sup> Ibid at paras. 55-56.

<sup>701</sup> Ibid. See also UK Law Commission, Criminal Justice Bill 2003 at para. 9.

<sup>702</sup> [2006] EWCA Crim.260 at paras. 38-39.

<sup>703</sup> Section 114(2) of the Criminal Justice Act 2003: “In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) – (a) how much probative value the statement has ...; (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a); (c) how important the matter or evidence mentioned in paragraph (a) is in context of the case as a whole; (d) the circumstances in which the statement was made; (e) how reliable the maker of the statement appears to be; (f) how reliable the evidence of the making of the statement appears to be; (g) whether oral evidence of the matter stated can be given and, if not, why it cannot; (h) the amount of difficulty involved in challenging the statement; (i) the extent to which that difficulty would be likely to prejudice the party facing it.”

<sup>704</sup> [2012] EWCA Crim.509.

<sup>705</sup> Ibid at para. 87.

<sup>706</sup> Ibid at para. 88.

by presentation of first-hand live testimony.”<sup>707</sup> Metcalfe concurs with these views expressed by Brodin on the constitutionality of this legislation and argues that the primary and indispensable common law principle of confrontation “has long been one of the most basic safeguards of the common law right to a fair trial” and that “the same dodgy piece of legislation that eroded the right of trial by jury” could never be expected to protect an accused’s right to a fair trial.<sup>708</sup> In addition, Metcalfe also disputes the constitutionality of this UK legislation, viz. in section 114(2)(e) and (f) where it admits hearsay evidence because it is considered to be reliable,<sup>709</sup> and he argues that “it would violate this ancient right of confrontation and the right of cross-examination for a person to be convicted upon uncross-examined testimony, regardless of how reliable it may otherwise appear.”<sup>710</sup>

Moreover, Friedman also questions and doubts the constitutionality of the interests of justice test applied to admit hearsay evidence contained in section 114 of the Criminal Justice Act 2003 and argues that these provisions have weakened and sacrificed the right to confrontation.<sup>711</sup> Requa, is in accord with these views expressed by Friedman and further contends that “the flexibility in the 2003 Act has the potential for fair trial violations.”<sup>712</sup> As it was shown in chapter 5, the UK reforms providing a discretion to admit hearsay in the interests of justice based on reliability was recently rejected by the Hong Kong Law Reform Commission and the Irish Law Reform Commission on grounds that it violates an accused’s right to a fair trial because it is unclear and imprecise.<sup>713</sup> Hence there seems to be overwhelming views suggesting that the interests of justice and the reliability of hearsay statement statutory tests are unconstitutional.

### (iii) European Court of Human Rights

Article 6 of the European Convention guarantees the accused’s right to a fair trial and specifically protects the right to examine witnesses. On the other hand, the Convention does not include any provision paralleling the hearsay rule, and Friedman has given a justification for this state of affairs where he argues that it is “because most of the judicial systems falling under it do not have hearsay law.”<sup>714</sup> The fundamental duty of the European Court of Human Rights was expressed by the

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<sup>707</sup> Mark S. Brodin “*The British Experience with Hearsay Reform: A Cautious Tale*” *Fordham Law Rev.* (2016) *supra* at 1426.

<sup>708</sup> Eric Metcalfe “*Time for the UK Supreme Court to think again on hearsay*” <<http://www.theguardian.com/law/2011/dec/15/uk-supreme-court-rethink-hearsay>> at 1-2. Last seen 2 June 2016.

<sup>709</sup> *Ibid.*

<sup>710</sup> Eric Metcalfe, Third Party Intervention by JUSTICE, *Al-Khawaja and Tahery v United Kingdom* APP. NOs. 26766/05 and 22228/06 at para. 4(iii).

<sup>711</sup> Richard D. Friedman “‘*Face to Face*’: *Rediscovering the Right to Confront Prosecution Witnesses*” *The International Journal of Evidence and Proof* (2004) *supra* at 14.

<sup>712</sup> Marny Requa “*Absent witnesses and the UK Supreme Court: Judicial deference as judicial dialogue*” *The International Journal of Evidence and Proof* (2010) at 208.

<sup>713</sup> *Ibid.*, Hong Law Reform Commission recommendation 7 on page 103 and Irish Law Reform Commission paras.5.47 and 5.49.

<sup>714</sup> *Ibid* at 13.

Court in *Delta v France*<sup>715</sup> as being “to ascertain whether the proceedings considered as whole, including the way in which evidence was taken, were fair.” In addition, amongst the various factors this Court takes into account in determining whether the proceedings were fair when hearsay evidence and the right to a fair trial are at issue-, are the reliability of evidence and the interests of justice tests.

In *R v Arnold*, the court has added the caveat which points to some latent dangers and defects contained in the interests of justice test in the light of the accused’s right contained in Article 6 of the Convention where it stated that:

“very great care must be taken in each case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read... Even if it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.”<sup>716</sup>

Furthermore, the court also applied the reliability of evidence approach in *Delta v France* where the accused’s conviction for robbery was based on hearsay statements obtained from two witnesses who failed to attend the trial. The court held that because the accused “were unable to test the witness’s reliability or cast doubt on their credibility... the rights of the defence were subject to such restrictions that Mr Delta did not receive a fair trial.”<sup>717</sup> As, in *Crawford* above, a decision of the United States Supreme Court, this court did cast some doubts on the constitutionality of the reliability of hearsay framework in the light of the accused’s right to examine witnesses who testify against him. On the other hand, in *Al-Khawaja and Tahery v United Kingdom*,<sup>718</sup> the Fourth Section of the European Court of Human Rights on the 20<sup>th</sup> January 2009 heard two applications against the United Kingdom government where both applicants complained that their convictions had been unfair because hearsay statements made to the police had been received in lieu of oral testimony from the prosecution witnesses. It was argued on behalf of the Government of the United Kingdom that the trials had been fair because the trial courts had relied on several countervailing factors which had included the interests of justice and- that this test was sound and complied with the right to fair trial values provided by Article 6 of the European Convention.<sup>719</sup> In *Al-Khawaja* the reason the victim could not attend the trial was that she had committed suicide before the trial had commenced and there was other corroborating evidence which the trial court found to be reliable and credible when applying the interests of justice test. When considering the hearsay evidence and all the countervailing factors, including the interests of justice, the European Court of Human Rights found this test not to have safeguarded a fair trial and held that “the Court does not find that any of these factors, taken alone or together, could counterbalance the prejudice to the defence ... The Court finds a

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<sup>715</sup> 11444/85 [1990] ECHR 30 para. 35.

<sup>716</sup> [2004] EWCA Crim.1293 at para. 30.

<sup>717</sup> Ibid at para. 36.

<sup>718</sup> 26766/05 and 22228/06 [2009] ECHR 110, European Court of Human Rights Fourth Section Judgement at para. 3.

<sup>719</sup> Ibid at paras. 31-32.

violation of Article 6(1) of the Convention in respect of Mr Al-Khawaja.”<sup>720</sup> The court also considered the hearsay evidence which was admitted in Mr Tahery’s case, and was told that the complainant had failed to appear owing to fear of intimidation. The countervailing factors which had led to the hearsay statement being considered admissible by the trial court were that the accused did have an opportunity to question other evidence which the prosecution had presented against him and he had also testified in his defence. It was also felt that it was in the interests of justice to admit the complainant’s hearsay statement because her fear of intimidation was found to be legitimate by the trial court. The European Court of Human Rights held that the interests of justice test in the light of the “the right of an accused to give evidence in his defence cannot be said to counterbalance the loss of opportunity to see and have examined and cross-examined the only prosecution eye-witness against him.” Hence, this Court then found that the admission of the hearsay statement against Mr Tahery had also infringed the accused’s right to fair trial provided by Article 6(1) of the Convention.<sup>721</sup>

The government of the United Kingdom approached the Grand Chamber of the European Court of Human Rights to reconsider these 2009 judgements of the Fourth Section of this Court in the cases of *Al-Khawaja and Tahery*.<sup>722</sup> The Grand Chamber of this Court had to determine whether the trial judges’ application of the “interests of justice” test when receiving each hearsay statement had safeguarded the accused’s right to a fair trial as provided by Article 6(1) of the Convention.<sup>723</sup> The third-party intervener argued that the common law right of confrontation acknowledged the risk inherent in receiving hearsay statements and that “the essence of the common-law right of confrontation lay in the insight that cross-examination was the most effective way of establishing reliability of a witness’s evidence.”<sup>724</sup> In other words, the submission made was that reliability of evidence at common law was determined through cross-examination and that hearsay evidence should not be received even if it was deemed to be in the interests of justice where such evidence would violate the common law right of confrontation. Furthermore, the constitutionality of the UK’s legislation which provides for the admission of hearsay evidence in the interests of justice which was applied by the trial court when admitting the hearsay evidence in question was also disputed. It was also argued that the interests of justice test has not only reformed the hearsay rule but has also ameliorated the “common-law right of confrontation,” a process which, it was argued could not have been warranted or intended by the legislature.<sup>725</sup> In the *Al-Khawaja* case, however, the Grand Chamber held that it was in the interests of justice to receive the hearsay evidence of the

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<sup>720</sup> Ibid at paras. 42-43.

<sup>721</sup> Ibid at paras. 46-48.

<sup>722</sup> European Court of Human Rights Grand Chamber, *Case of Al-Khawaja and Tahery v The United Kingdom* (Applications numbers 26766/05 and 22228/06).

<sup>723</sup> Ibid at para. 102.

<sup>724</sup> Ibid at paras. 114-115.

<sup>725</sup> Ibid.

deceased witness and that there was no infringement of the right to a fair trial.<sup>726</sup> On the other hand, in the *Tahery* case, this Court held that it was not in the interests of justice to admit the hearsay statement of witness who refused to testify at the trial because of fear of intimidation and that when admitting her hearsay statement in the interests of justice the accused's right to a fair trial had been infringed.<sup>727</sup> Metcalfe concurs with the Court's decision in the *Al-Khawaja and Tahery's* cases that the interests of justice test could not safeguard the right to a fair trial when hearsay evidence was received, and argues that this test had been applied by the trial court in convicting the accused after it had been introduced by a "dodgy piece of legislation."<sup>728</sup> In addition, Mulcahy also argues that the interests of justice test when used to determine the admissibility of hearsay evidence in the light of the right to a fair trial could lead to "unfair consequences" because the "ECHR has held repeatedly that a trial is unfair if the defendant's conviction was predicated on an uncorroborated hearsay statement and the defendant never had the opportunity to question the statement's author."<sup>729</sup>

Furthermore, Maffei examined the application of the right to a fair trial in the Convention and the right to examine witnesses which also forms part of the fair trial right, and he argues that if a right is "fundamental it cannot be taken away simply by showing that a majority of people would be better off if it were not applied in a given situation."<sup>730</sup> Maffei also examines the balance that should be made when considering fundamental rights and the interests of society and notes that, "a right would hardly be worthy of description as fundamental if it could be curtailed by a simple reference to the public interest."<sup>731</sup> These views, expressed by Maffei, on the primary feature of a fundamental right seem to be in accord with those articulated by Dworkin on this principle where he argues that:

"It cannot be an argument for curtailing a right simply that society would pay a further price for extending it. There must be something special about that further cost, or there must be some other feature of the case, that makes it sensible to say that although great social cost is warranted to protect the original right, this particular cost is not necessary. Otherwise Government failure to extend the right will show that its recognition of the right in the original case is a sham."<sup>732</sup>

The views shared by these authors seem to suggest that a fundamental right, like the right to a fair trial, should not be readily sacrificed in the face of "public interests" and that, in the event that such an infringement takes place, that could be an indication that the government's understanding and acknowledgement of the right in

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<sup>726</sup> Ibid at paras. 156-158.

<sup>727</sup> Ibid at paras. 159-165.

<sup>728</sup> Eric Metcalfe "Time for the UK Supreme Court to think again on hearsay" *supra* at 2.

<sup>729</sup> Conor Mulcahy "Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant's Right to a Fair Trial Under the European Convention on Human Rights" *supra* at 416,423-424.

<sup>730</sup> Dr S. Maffei *The Right to Confrontation in Europe, Absent, Anonymous and Vulnerable Witnesses* (2012) at 11.

<sup>731</sup> Ibid.

<sup>732</sup> Ronald M. Dworkin *Taking Rights Seriously* (1977) at 200.

question was a pretence and spurious. It is submitted that the notions of a fundamental right envisaged by Maffei and Dworkin are in startling contrast to the scope, application and nature of the interests of justice test as used by the trial court in the *Al-Khawaja and Tahery's* cases as well as the provisions of the South African Law of Evidence Amendment Act 45 of 1988 in safeguarding the right to a fair trial, a right which is commonly understood to be a fundamental right.

#### **6.4 Conclusion**

South African courts and academics seem to be in accord in holding the view that section 3 of the Act and the tests it uses to determine the admissibility of hearsay evidence, namely, the interests of justice and the reliability of evidence are constitutional and do not violate an accused's right to a fair trial.

The United States Supreme Court, on the other hand, considers the reliability of evidence approach to be unconstitutional and not capable of protecting an accused's right to a fair trial. In addition, academics also concur with these views expressed by the Court in finding the reliability of evidence test to be unconstitutional. While this Court seems not to cast doubts on the constitutionality of the interests of justice test as model for determining the admission of hearsay, the constitutionality of this test was questioned and doubted by the legislature when the draft Bill containing this legislation was debated in the House of Representatives. The Bill was later adopted as a compromise when the right of confrontation jurisprudence had not been fully developed. Moreover, academics seem to agree that the interest of justice framework is an unconstitutional mode of determining the admissibility of evidence and further that it gives judges unrestrained and unchecked powers to redefine and re-establish the hearsay rule. The majority of the United Kingdom courts' decisions view the interests of justice and the reliability of evidence tests to be constitutional and not violating an accused's common law right of confrontation. However, this is not the unanimous standpoint of the UK courts. Academics, on the other hand, consider these tests and the legislation which contained it to be unconstitutional and infringing an accused's right to a fair trial and the common law right of confrontation. Furthermore, the European Court of Human Rights seems not to be fully persuaded that the interests of justice test is capable of protecting a fair trial and the right to examine witnesses under the Convention. Academics, on the other hand, are in accord in concluding that this framework violates an accused's right to a fair trial provided by the Convention.

In summary, while the South African perspectives seem to suggest that section 3 and the tests it uses when receiving hearsay evidence, namely, the interests of justice and the reliability of evidence tests, are compatible with the right to a fair trial and, therefore constitutionally sound, the international jurisprudence in the application, nature and scope of these tests contains divergent views. Hence these latter views, assertively cast well-founded doubts and scepticism on the constitutionality of the admission of hearsay evidence through section 3 of the Act.

## **CHAPTER 7: CONCLUSION**

### **7.1 Conclusion**

The hearsay rule as an English common law principle was developed with the objective of excluding hearsay evidence if such evidence was deemed not to be falling within the well-known common law exceptions. This principle also formed an integral part of the adversarial trial system, a system which requires that both adversaries to the dispute should appear in person and give their evidence before the trier of fact. In addition, this principle also requires that the accuser and the accused's evidence should be tested through certain procedural devices amongst which, cross-examination, was deemed to be the primary procedural test to establish reliability of evidence.

The accused's right to cross-examine adverse witnesses is an ancient principle which is not only an English common law notion but which was also applied under Roman law. In addition, English common law developed one of the trials by ordeal termed "trial by battle" which required that litigants engage in a physical fight which was accompanied by a prayer to God to judge or show the guilty party. This trial procedure later developed and required that litigants should verbally confront each other through cross-examination. The origin of the accused's right to cross-examine adverse witnesses and the hearsay rule are thought to have been at the roots of this medieval era trial by ordeal.

This fundamental principle of English common law, where both the litigants appear in person before the trier of fact, give their evidence in each other's presence, and where the reliability of their evidence is tested through cross-examination was commonly known as the principle of orality. Hearsay evidence, on the other hand, was admissible, and there were scepticism about its reliability and credibility as evidence because it was evidence which was not subjected to cross-examination. This was the English common law that was received in South Africa in the form of case law and the writing of English academics. While this English common law received through case law and writing of academics included the hearsay rule, it also contained divergent views on the nature and scope of the hearsay rule, including the definition of hearsay evidence. This state of affairs soon created problems of its own in that the South African hearsay jurisprudence which was formed through these contrasting standpoints later became difficult to apply and interpret. It was the application of this jurisprudence which made the need for legislative reforms of the hearsay rule in South Africa inevitable.

This state of affairs led the South African legislature to investigate and reform the hearsay rule and recommendations were made which contained some reforms which were adopted and became the Law of Evidence Amendment Act 45 of 1988. In addition, the South African Law Reform Commission, in its recommendations, also

identified the need for legislative reforms to the hearsay evidence which would provide for a judicial discretion to admit hearsay evidence. When, however, the legislature adopted the Act and incorporated the Law Commission's recommendations, it did not state whether the Act had created discretion to admit hearsay because the wording of the Act does not state whether it contains such discretion. As a result of this aspect of the Act not being comprehensible there have also been divergent views from courts and academics regarding the existence of such discretion, an issue which still remains unresolved through courts' interpretation of the legislature's intention in the Act.

Moreover, the Act also provides that courts should be allowed to use their private opinions when determining whether to admit hearsay evidence in the interests of justice, a practice which would be contrary to the application of judicial discretion at common law, because the use of discretion could not include private opinions at common law.

While the objective of the Act seems to be clear in that it was intended to simplify and develop the hearsay rule's dilemma which was created when interpreting English common law, it remains questionable whether the text of the Act has accomplished the much-needed reform of South African hearsay evidence.

The definition of the hearsay evidence, on the other hand, also presents another dilemma in that there have been contradictory views on the scope and nature of hearsay evidence when courts and academics have construed the provisions of the Act through this definition. This definition is also thought to be confusing and incomprehensible, and hence it is disputed whether it has intelligibly reformed our hearsay evidence.

The Act also admits hearsay evidence when the admission of such evidence is considered to be in the interests of justice. The effect of the application of this test on the accused's right to a fair trial has been that, because it creates an unpredictable framework for the admission of evidence, and hence it violates the principle of legal certainty which forms part of the notion of the rule of law, it is an unconstitutional tool used to establish whether hearsay evidence is admissible or not. In addition, the Act also receives hearsay evidence when such evidence is deemed to be reliable. The United States Supreme Court in *Crawford v Washington*<sup>733</sup> has held that this test, viz. the reliability of hearsay evidence, is unconstitutional when applied in the light of the accused's right to be confronted with witnesses against him.

Furthermore, the meaning and intention of the right to a fair trial, which includes the right to challenge evidence, is also an issue which has caused some divergent views from the courts and academics. The fundamental defect in the text of the Constitution remains the fact that it fails to state whether this right includes the right to cross-examine witnesses. While the historical background and majority of the

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<sup>733</sup> Ibid.



views by courts and academics seem to suggest that this right cannot be separable from cross-examination, this aspect remains incoherent in the text of the Constitution.

The hearsay rule and the right of confrontation also form part of the legal system of major common law jurisdictions. The United States Constitution also provides for the accused's right to be confronted with witnesses against him. While hearsay evidence was held to be admissible when it was deemed to be reliable in the *Roberts* case, this reliability of hearsay approach was also found to be unconstitutional in the 2004 decision of the United States Supreme Court in *Crawford v Washington*.<sup>734</sup>

The United Kingdom, on the other hand, like South Africa and the United States, also recognises the common law right of confrontation and has statutorily reformed the hearsay rule and has incorporated a test in which hearsay evidence would be admissible if the court would consider the admission of such hearsay to be in the interests of justice and based on reliability. The constitutionality of this test and the Criminal Justice Act 2003 (UK) which introduced it remain questionable and disputed. In the United Kingdom the interest of justice approach is thought to be violating an accused's right to a fair trial and to be unconstitutional because, it is argued, it is too wide and unpredictable.

Canada has also reformed and introduced reforms to its hearsay rule which allows for the admission of hearsay evidence on two tests, viz. necessity and reliability. Australia, on the other hand, also recognises the hearsay rule and has reformed it to admit hearsay when such evidence is considered to be reliable. In addition, New Zealand has also reformed its hearsay rule and receives hearsay by making reliance on the necessity and reliability test which is also part of Canadian hearsay law. In addition, the Hong Kong Law Reform Commission has approved and adopted the Canadian approach which admits hearsay evidence on the two-pronged test, viz. necessity and reliability. As in Hong Kong, Ireland has also rejected the UK hearsay reform which admits hearsay through the interests of justice test and has also raised some concerns about the impact of this approach on a fair trial. Ireland, however, has also approved an approach in which hearsay evidence would be admissible because it is deemed to be reliable. Hence the reliability of hearsay evidence approach forms part of the hearsay jurisprudence of Ireland, Hong Kong, Australia, New Zealand, UK, USA and South Africa. As was discussed above, in *Crawford v Washington* the United States Supreme Court recently held that to admit hearsay evidence because it was deemed to be reliable to a court was an unconstitutional procedure and it infringed upon an accused's right to be confronted with witnesses against him.<sup>735</sup>

While the European Court of Human Rights admits hearsay evidence by making reliance on the reliability of evidence and the interests of justice test, this Court has

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<sup>734</sup> Ibid.

<sup>735</sup> Ibid.

recently held that the interests of justice is not an adequate countervailing factor which can protect an accused's right to a fair trial.

In summary, the constitutionality of section 3 of the Law of Evidence Amendment Act 45 of 1988 remains questionable because it provides a discretion to admit hearsay evidence based on the interests of justice and reliability of evidence framework, which has been found to be unconstitutional by both the United States Court Supreme Court and the European Court of Human Rights. A similar reform provided by the UK Criminal Justice Act 2003 which also provides this residual discretion, as was shown above, was recently rejected by the Hong Kong Law Reform Commission and the Irish Law Reform Commission. As it was discussed above, in its 2009 report the Hong Kong Law Reform Commission has also examined this provisions of the South African Law of Evidence Amendment Act 45 of 1988 which provided the interests of justice framework and rejected such reform because it "was concerned about the open-endedness of the discretion (i.e. 'admitted in the interests of justice')." <sup>736</sup> In addition, the constitutionality of the reliability of hearsay evidence test, which also forms part of the admissibility requirement under this Act, is also questioned and disputed.

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<sup>736</sup> Ibid para. 8.20.

## BIBLIOGRAPHY

### Statutes

- *Law of Evidence Amendment Act 45 of 1988.*
- *The Constitution of the Republic of South Africa, 1996.*
- *England's Treason Act 1554.*
- *Act for Regulatering of Tryals in Cases of Treason and Misprison of Treason Act of 1695-1696.*
- *Civil Proceedings Evidence Act 25 of 1965.*
- *Criminal Procedure Act 51 of 1977.*
- *Federal Rules of Evidence of the United States and Magistrates' Court Pub. L. No. 93-595, (1975) U.S. Code Congress & Ad. News (88 Stat.).*
- *Constitution of the United States, 1787.*
- *Criminal Justice Act 2003, United Kingdom.*
- *Witness Anonymity Act 2008, United Kingdom.*
- *The Constitution Act, 1982 Canada.*
- *Commonwealth of Australia Constitution Act 1900.*
- *Evidence Act 1995, Australia.*
- *New Zealand Bill of Rights Act 1990.*
- *Evidence Act 1996, New Zealand.*
- *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1987.*
- *Evidence Ordinance Act, Criminal Procedure Ordinance 1995, Hong Kong.*
- *Constitution of Ireland, 1937.*
- *Criminal Justice Bill House of Commons Standing Committee Debate, 28 January 2003 (United Kingdom).*
- *Criminal Justice Bill House of Lords Second Reading Debate, 18 September 2003 (United Kingdom).*
- *Constitution of the Republic of South Africa, Act 200 of 1993.*

### Cases

- *Estate De Wet v De Wet* 1924 CPD 341.
- *Horncastle and others v R* [2009] UKSC 14.
- *S v Ndlovu and others* 2002 (2) SACR 325 (SCA).
- *S v Msimango and others* 2010 (1) SACR 544 (GSJ).
- *S v Balkwell and another* [2007] 3 All SA 465 (SCA).
- *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC).
- *Mattox v United States* [1895] USSC 34.
- *Coy v Maryland* [1990] USSC 130.
- *Lutterell v Reynell* (1670) 86 Eng. Rep.(K.B.).

- *Green v Gatewick* (1672) Eng. Rep. (K.B.), in Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1772).
- *Trial of Sir Walter Raleigh* (1603), reprinted in *Criminal Trials* (1832) by David Jardine.
- *Lord Morley's Case* (1666) House of Lords, reprinted in T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the Earliest Period to the Year 1783* (1816).
- *Henry Harrison's Case* (1692) Old Bailey Criminal Court, reprinted in T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the Earliest Period to the Year 1783* (1816).
- *The King v Payne* (1695) 87 Eng. Rep. 584 (K.B.).
- *Fernwick's Case* (1696) (House of Lords), reprinted in T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the Earliest Period to the Year 1783* (1816).
- *King v Eriswell (Inhabitants)* [1790] Eng. Rep. 1934.
- *Berkeley Peerage Case* 4 Camp. 401 Eng. Rep. (House of Lords) (1811).
- *Rusmarc (SA) (Pty) Ltd v Hemdon Enterprises (Pty) Ltd* 1975 (4) SA (W).
- *Die Bergkelder v Delheim Wines (Pty) Ltd* 1980 (3) SA 1171 (C).
- *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 (2) SA 285 (A).
- *R v Miller and another* 1939 AD 106.
- *International Tobacco Co. (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 (3) SA 343.
- *S v Van Niekerk* 1964 (1) SA 729 (C).
- *Kroon v JL Clarke Cotton Co. (Pty) Ltd* 1983 (2) SA 197 (E).
- *Wright v Doe d Tatham* (1837) 7 Ad. & El. 313.
- *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA).
- *Metedad v National Employers' General Insurance Co. Ltd* 1992 (1) SA 494 (W).
- *Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A).
- *The South African Broadcasting Corporation and others v Democratic Alliance and others* (313/2015) [2015] ZASCA 156 (8 October 2015).
- *Sharp v Wakefield* (1891) 64 L.T. Rep. 180 Ap. CA.
- *Hewan v Kourie NO and another* 1993 (3) SA 233 (T).
- *S v Cekiso and another* 1990 (4) SA 20 (E).
- *S v Ndlovu and others* 1993 (2) SA 69 (A).
- *Hlongwane and others v The Rector, St Francis College and others* 1989 (3) SA 318 (D).
- *Mnyama v Gxalaba and others* 1990 (1) SA 650 (C).
- *McDonalds's Corporation v Joburgers Drive-Inn Restaurants (Pty) Ltd* 1997 (1) SA 1 (A).
- *S v Shaik and others* 2007 (1) SACR 247 (SCA).

- *Giaseck & Devrient Southern Africa (Pty) Ltd v The Minister of Safety and Security* (749/10) [2011] ZASCA 220 (30 November 2011).
- *S v Aspeling* 1998 (1) SACR 561 (C).
- *S v Ndlovu and others* 2001 (1) SACR 85 (W).
- *S v Molimi and others* 2008 (2) SACR 76 (CC).
- *Aetiology Today CC t/a Somerset Schools v Aswegen and another* 1992 (1) SA 807 (W).
- *Skilya Property Development (Pty) Ltd Llyods of London Underwriting* 2002 (3) SA 765 (T).
- *S v Ramavhale* 1996 (1) SACR 639 (A).
- *S v Jordan and others (Sex Workers Education and Advocacy Task Force and others as Amicus Curiae)* 2002 (2) SACR 499 (CC).
- *Investigative Directorate: Serious Economic Offences & others v Hyundai Motor Distribution (Pty) Ltd & others* 2001 (1) SA 545 (CC).
- *S v Adendorff* 2004 (2) SACR 185 (SCA).
- *Situation in Central African Republic, in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, (11 October 2013).
- *Caroll v Caroll* 1947 (4) SA 37 (D).
- *R v Ndawo and others* 1961 (1) SA 16 (N).
- *Distillers Korporasie (SA) Bpk v Kotze* 1956 (1) SA 357 (A).
- *President of Republic of South Africa and others v South African Rugby and Football Union and others* 2000 (1) SA 1 (CC).
- *S v Boesak* 2001 (1) SACR 1 (CC).
- *S v Pistorius* 2014 (1) SACR 314 (SCA).
- *S v Mavinini* 2009 (1) SACR 523 (SCA).
- *S v Naidoo* 2010 (1) SACR 369 (KZP).
- *S v Fortuin* 2008 (1) SACR 511 (C).
- *S v Mdali* 2009 (1) SACR 259 (C).
- *S v Tyebela* 1989 (2) SA 22 (A).
- *S v Nkabinde* 1998 (8) BCLR 996 (N).
- *K v The Regional Court Magistrate NO, and others* 1996 (1) SACR 434 (E).
- *S v Manqaba* 2005 (2) SACR 489 (W).
- *S v Mgudu* 2008 (1) SACR 71 (W).
- *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T).
- *S v Libazi and another* 2010 (2) SACR 233 (SCA).
- *S v Matladi* 2002 (2) SACR 447 (T).
- *S v Muller and others* 2005 (2) SACR 452 (C).
- *S v Nedzamba* (911/2013) [2013] ZASCA 69.
- *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 110.
- *R v Davis* [2008] UKHL 36.
- *Sewell v Hancock* (October 1768), draft heads of argument in legal papers of John Adams.

- *Barber v Page* 390 U.S. 719.
- *Idaho v Wright* [1990] USSC 128; 497 U.S. 805.
- *Green v McElroy* [1959] USSC 122; 360 U.S. 474.
- *Pointer v Texas* [1965] USSC 68; 380 U.S. 400.
- *California v Green* [1970] USSC 157; 399 U.S.149.
- *Dutton v Evans* [1970] USSC 205; 400 U.S. 74.
- *Chambers v Mississippi* [1973] USSC 32; 410 U.S 284.
- *Douglas v Alabama* [1965] USSC 63; 380 U.S.415.
- *Kentucky v Stincer* [1987] USSC 124; 482 U.S.730.
- *Pennsylvania v Ritchie* [1987] U.S.480.
- *Maryland v Craig* [1990] USSC 130; 497 U.S. 836.
- *Sak v Crown Prosecution Service* [2007] EWHC 2886 (Admin) (Div. Ct.).
- *R v Z* [2009] EWCA Crim. 20.
- *R v Central Criminal Court Ex Parte Bright and others* [2000] EWHC 560 (QB).
- *R v Martin* [2003] EWCA Crim. 357.
- *Al-Khawaja v R* [2005] EWCA Crim. 2697.
- *Sellick and another v R* [2005] EWCA Crim. 651.
- *Davis v R* [2006] EWCA Crim. 1155.
- *R v Ibrahim* [2012] EWCA Crim. 837.
- *R v Mayers, Glasgow and others* [2008] EWCA Crim. 2989.
- *Y v R* [2008] EWCA Crim. 10.
- *R v Ibrahim* (unreported, Woolwich Crown Court, 4 June 2007).
- *R v Horncastle and others* [2009] EWCA Crim. 964.
- *Horncastle and others v R* [2009] UKSC 14.
- *Ohio v Roberts* 448 U.S. (1980) 56.
- *White v Illinois* 502U.S. (1992) 346.
- *John v Rees* [1997] Ch. 345.
- *Secretary of the State for the Home Department v AF and others* [2008] EWCA Civ. 1148.
- *R v Starr* [2000] 2 S.C.R. 144.
- *R v Khelawon* [2006] 2 R.C.S.787.
- *R v Khan* [1990] 2 S.C.R. 531.
- *R v Smith* [1992] 2 R.C.S. 915.
- *R v Lyttle* [2000] 1 S.C.R. 193.
- *Bannon v R* (1995) 185 CLR.
- *Dietrich v The Queen* [1992] HCA 57.
- *R v Lee* [1996] 195 CLR.
- *R v Teper* [1952] AC 480.
- *R v Smith* [1992] 75 CCC (3d) 257.
- *R v Manase* [2001] 2 NZLR 197 (CA).
- *Wong Wai-man v HKSAR* [2000] 1 HKLRD 473 (CA).
- *Re Haughey* [1971] IR 217.

- *The State (Healy) v Donogue* [1976] IR 325.
- *Unterpertinger v Austria* 9120/80 [1986] ECHR 15.
- *Barber v Spain* 146 Eur. Ct. H.R. (Ser. A) (1989).
- *Kostovski v Netherlands* 11454-85 [1989] ECHR 20.
- *Bricmont v Belgium* 10857-84 [1989] ECHR 12.
- *Van Michelen and others v Netherlands* 21363/93 [1997] ECHR 22.
- *Luca v Italy* [200] 36 EHRR 807.
- *A.M. v Italy* 37019/97 [1999] ECHR 141.
- *Visser v Netherlands* 66668/95 [2000] ECHR 108.
- *S v Mhlongo; S v Nkosi* 2015 (2) SACR 223 (CC).
- *S v Carstens* 2012 (1) SACR 485 (WCC).
- *R v Taylor* [2006] EWCA Crim. 260.
- *R v Riat and others* [2012] EWCA Crim. 1509.
- *Delta v France* 11444/85 [1990] ECHR 30.
- *R v Arnold* [2004] EWCA Crim. 1293.
- *Al-Khawaja and Tahery v United Kingdom* 26766/05 and 22228/06 Grand Chamber Judgement, 15 December 2011.

## Books

- D. T. Zeffertt and A. P. Paizes *The South African Law of Evidence* (formerly Hoffmann and Zeffertt), (2009).
- John H. Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940).
- James B. Thayer *A Preliminary Treatise on Evidence at Common Law* (1898).
- R.W. Baker *The Hearsay Rule* (1950).
- Holy Bible, New King James Version, 1982.
- Gene Fedele *Heroes of the Faith* (2003).
- A. Esmein *A History of the Continental Procedure with Special Reference to France: Continental Legal History Series* (1968).
- P. J. Schwikkard *et al Principles of Evidence* (2009).
- Peter Stein *Legal Institutions: The Development of Dispute Settlement* (1984).
- G. D. Nokes *An Introduction to Evidence* (1967).
- William Forsyth *History of Trial by Jury* (1878).
- John H. Wigmore *A General Survey of Rules of Evidence, in Selected Essays in Anglo-American Legal History* (1968).
- David P. Paton and George W. Derham *A Text-book of Jurisprudence* (1972).
- Sir William Holdsworth *A History of English Law* (1956).
- John H. Langbein *Prosecuting Crimes in the Renaissance: English, Germany and France* (1974).
- John H. Langbein *Torture and Law of Proof* (1977).
- J.W. Cecil Turner *Kenny's Outlines of Criminal Law* (1966).
- W. Blackstone *Commentaries of the Laws of England* (1768).

- J. Stephen *History of the Criminal Law of England* (1883).
- Catherine D. Bowen *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1957).
- M. Hale *Pleas of the Crown* (1730).
- W. Hawkins *Pleas of the Crown* (1787).
- Jeremy Bentham *The Works of Jeremy Bentham* (1843).
- CHW Schmidt *Bewysreg* (1982).
- Alfred V. Landsdowne and Jean Campbell *South African Criminal Law and Procedure* (1982).
- Du Toit *et al Commentary on the Criminal Procedure Act* (Revised Service 2015).
- L.H. Hoffmann and D.T. Zeffertt *South African Law of Evidence* (1988).
- CHW Schmidt and H Rademeyer *Law of Evidence* (2003).
- Bouvier's Law Dictionary (1839).
- Collins English Thesaurus (2015).
- Collins English Dictionary (2015).
- John Cooper *et al Plato Complete Works* (1997).
- Sir Jack Jacob *The Hamlyn Lectures: The Fabric of English Civil Justice* (1987).
- Ian H. Dennis *The Law of Evidence* (1999).
- L. Hoffmann and D. T. Zeffertt *The South African Law of Evidence* (1986).
- Irving Younger, *Hearsay: A Practical Guide through the Thicket* (1988).
- C.T. McCormick *et al McCormick on Evidence* (1984).
- Francis Wellman *The Art of Cross-examination* (1903).
- F. J. Church *The Trial and Death of Socrates* (1908).
- Thomas Peake *Compendium of the Law of Evidence* (1809).
- P. J. Schwikkard *et al Constitutional Law of South Africa* (2014).
- Duhaime's Legal Dictionary – <http://www.duhaime.org/LegalDictionary.aspx> – last seen 21 July 2016.
- Merriam-Webster Dictionary – <http://www.m-w.com/dictionary> - last seen 8 March 2016.
- Nico Steytler *Constitutional Criminal Procedure – A Commentary of the Constitution of the Republic of South Africa, 1996* (1998).
- John H. Wigmore *Evidence* (1940).
- Collin Tapper *Cross and Tapper on Evidence* (2004).
- Peter Murphy *Murphy on Evidence* (2007).
- Sir Mathew Hale *The History of the Common Law of England* (1820).
- Sir William Blackstone *Commentaries on the Law of England* (1794).
- Jeremy Bentham *Rationale of Judicial Evidence* (1827).
- Collin Tapper *Cross and Tapper on Evidence* (2007).
- Duncan Atkins and Tim Moloney *Blackstone's Guide to the Criminal Procedure* (2010).



- Dr S. Maffei *The Right to Confrontation in Europe, Absent, Anonymous and Vulnerable Witnesses*, (2012).
- Ronald M. Dworkin *Taking Rules Seriously* (1972).
- Tim Hitchcock Robert Shoemaker, Clive Emsley et al *The Old Bailey Proceedings Online, 1674-1913* – [www.oldbaileyonline.org.uk](http://www.oldbaileyonline.org.uk)
- David Jardine *Criminal Trials* (1832).

## Journal Articles

- Raoul C. Caenegem “*Proceedings of the Second International Congress of Medieval Canon Law*”: Boston College 12-16 August 1963: *Monumenta Juris Canonica*, (1963).
- W de Vos “*Civil Procedural Law and the Constitution of 1996: An Appraisal of Procedural Guarantees in Civil Proceedings*” *Journal of South African Law* (1997).
- Jules Epstein “*Cross-examination: Seemingly Ubiquitous, Purposely Omnipotent, and ‘At Risk’*” *Widener Law Rev.* (2009).
- S.E. Van der Merwe “*Die Evolusie van die Mondelinge Karakter en Uitsluitingsreels van die Engelse Gemene Bewysreg*” *Stellenbosch Law Rev.* (1991).
- M. R. Damaska “*Evidentiary Barriers to Convictions and Two Models of Criminal Procedure*” *University of Pennsylvania Law Rev.* (1972).
- Jerome H. Scolnick “*Scientific Theory and Scientific Evidence*” *Yale Law Journal* (1991).
- H. Mannheim “*Trial by Jury in Modern Continental Law*” *Law Quarterly Rev.* (1937).
- Robert H. White “*Origin and development of trial by jury*” *Tennessee Law Rev.*(1961).
- M. D. Forkosch “*The Nature of Legal Evidence*” *California Law Rev.*(1971).
- John H. Langbein “*The Origin of Public Prosecutions at Common Law*” *A Paper presented at the 1972 Meeting of American Society of Legal History, Williamson.*
- Richard D. Friedman “*The Mold that Shapes Hearsay*” *Florida Law Rev.* (2014).
- Tim Donaldson “*The Gradually Exploded: Confrontation vs. The Former Testimonial Rule*” *St Mary’s Law Journal* (2015).
- John H. Wigmore “*The History of the Hearsay Rule*” *Harvard Law Rev.* (1904).
- John McGuire “*The Hearsay System: Around and through the Thicket*” *Vanderbilt Law Rev.*(1961).
- Roger C. Park “*McCormick on Evidence and the Concept of Hearsay: A Critical Analyses Followed by Suggestions to Law Teachers*” *Minnesota Law Rev.* (1981).
- L.C. Hoffmann “*Implied Assertions as Hearsay*” *SALJ* (1964).

- Edmund Morgan “*Hearsay Dangers and the Application of the Hearsay Concept*” *Harvard Law Rev.* (1948).
- P. J. Schwikkard “*The Challenge of Hearsay*” *SALJ* (2003).
- Adrian Rall “*The New Hearsay Rules*” *Consultus Law Journal* (1990).
- S.E. Van der Merwe and W le R de Vos “*Hoorse: Hede en ‘n Handves*” *Stellenbosch Law Rev.* (1993).
- P. J. Schwikkard “*Extra-Curial Statements and the Definition of Hearsay*” *SALJ* (1991).
- Richard B. Spindle “*Judicial Discretion in Common Law Courts*” *Washington & Lee Law Rev.*(2012).
- B.C. Naude “*‘Testimonial’ Hearsay and the Right to Challenge Evidence*” *SACJ* (2006).
- Shelley Crittendon Zwick “*Hearsay Evidence and the Federal Rules: Expanding the Limits of Admissibility*” *La. Law Rev.*(1975).
- R.W. Baker “*The Right of Confrontation, The Hearsay Rule, and the Due Process –A Proposal for Determining when Hearsay may be used in Criminal Trials*” *Conn. Law Rev.*(1974).
- Ray Yasser “*Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*” *Tex. Law Rev.* (1980).
- Mark S. Brodin “*The British Experience with Hearsay Reforms: A Cautionary Tale*” *Fordham Law Rev.* (2016).
- Edmund M. Morgan “*The Hearsay Rule*” *Washington Law Rev.* (1937).
- C.R. Snyman “*The Power of the Constitutional Court to extend the Scope of existing Crimes*” *SALJ* (2007).
- James R. Maxeiner “*Some Realism about Legal Certainty in Globalization of the Rule of Law*” *Houston Journal of International Law* (2008).
- Brian K. Lansberg “*Symposium – Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development – The Role of Judicial Independence*” *Global Business and Development Law Journal* (2007).
- Theo Broodryk “*The Erosion of the Principle of Orality in South African Civil Procedure: Fact of Fiction?*” *Spectrum Juris* (2004).
- Deon Erasmus “*Procedural Explanations and Choices: The Undefended Accused in a Minefield*” *Law Democracy and Development Journal*, Nelson Mandela Metropolitan University (2009).
- Nico Steytler “*Making South African Criminal Procedure More Inquisitorial*” *Law Democracy and Development Journal* (2001).
- Nancy Amoury Combs “*Evidence*” *College of William and Mary Law School Publications Paper* (2011).
- Kenneth Graham “*Confrontation Stories: Raleigh on the Mayflower*” *Ohio St. Journal of Criminal Law* (2005).
- Richard H. Underwood “*The Limits of Cross-examination*” *American Journal of Trial Advocacy* (1997).

- S.E. Van der Merwe “Regterlike Inkorting van Kruisondervraging: ‘N Gemeenregtelike, Stature en Grongwetlike Pespektief” Stellenbosch Law Rev. (1997).
- Frank T. Read “The New Confrontation – Hearsay Dilemma” South California L. Rev. (1972).
- H. Pollitt “The Right to Confrontation: Its History in Modern Dress” Journal of Public Law (1959).
- David H. Taylor “Hearsay and the Right of Confrontation in American Trials by Jury” A Paper delivered at Chosun University on 3 June 2011.
- Richard D. Friedman “‘Face to face’: Rediscovering the Right to Confront Prosecution Witnesses” International Journal of Evidence & Proof (2004).
- Roger C. Park “Purpose as a Guide to the Interpretation of the Confrontation Clause” Brooklyn Law Rev. (2005-2006).
- Richard D. Friedman “Confrontation: The Search for Basic Principles” Geo. L.J. (1998).
- John H. Wigmore “Evidence” Chadbourne rev. (1974).
- John G. Douglas “Admissibility and Effect: Considering Affirmative Rights under the Confrontation Clause” Quinnipiac L. Rev. (2001-2003).
- Jason Swergold “Taking ‘Blind Shots at a Hidden Target’: Witness Anonymity in the United Kingdom” B.C. International & Comparative Law Rev. (2009).
- A.L.T. Choo “Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and the Rights” Canada Criminal Law Rev. A Paper presented at the School of Law, University of Wolverhampton in March 2012.
- Conor Mulcahy “Unfair Consequences: How the Reforms to the Rules Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant’s Right to a Fair Trial under the European Convention of Human Rights” B.C International & Comparative Law Rev. (2005).
- Diane Birch and Michael Hirst “Interpreting the New Concept of Hearsay” Cambridge L.J. (2010).
- Marian K. Brown “Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, Canada, with Special Regard to Prior Inconsistent Statements” 2007 Annual Conference of the International Society for the Reform of Criminal Law.
- Lee Stuesser “A Comparison of the Law of Evidence” Journal of the Australian Law Teachers’ Association (2011).
- David M. Tanovich “Starr Gazing: Looking into the Future of Hearsay in Canada” Queen’s L.J. (2003).
- E.G. Ewaschuk “Hearsay Evidence” Osgoode Hall Law Journal (1978).
- Collin Tapper “The Law of Evidence and the Rule of Law” Cambridge L.J. (2009).
- Andre Bothrell “Reconciling the Principled Approach to the Hearsay with the Rule of Law” Supreme Court Law Rev. (2014).

- I.A. Wilson “*Documentary Hearsay: The Scope of the Queensland Evidence Act*” *QLD Institute of Technology Law Journal* (1985).
- C.R. Williams “*Issues at the Penumbra of Hearsay*” *Adelaide L. Rev.* (1987).
- Robertsons “*Reforms of the Hearsay Rule inn Criminal Proceedings*” *Hong Kong, Newsletter Journal, Spring* 2011.
- Fiona de Londras “*Using the ECHR in the Irish Courts: More Whispers than Bang?*” *PILA Seminar Dublin* 13 May 2011.
- Roger W. Kirst “*Hearsay and the Right of Confrontation in the European Court of Human Rights*” *QLR* (2001-2003).
- Craig Callen “*Hearsay and the Informal Reasoning*” *Vanderbilt. L. Rev.*(1994).
- Richard S. Fraser “*Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses*” *W. VA. L. Rev.* (1998).
- Gordon Van Kessel “*Hearsay Hazards in the American Criminal Trial: An Adversarial Oriented Approach*” *Hastings L.J.* (1999).
- Ronald J. Allen and Brian Leiter “*Naturalised Epistemology and the Law of Evidence*” *VA. L. Rev.* (2001).
- Lorena Bachmeier Winter “*Transnational Evidence and Confrontation: Lessons from the ECHR’s Case Law*” *Utrecht Law Rev.* (September 2013).
- Brandie Gasper “*Examining the Use of Evidence Obtained Under Torture: The Case of the Britain Detainees May Test the Resolve of the European Convention in the Era of Terrorism*” *America University International Law Rev.* (2005).
- Myrna S. Raeder “*The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood meets the Hearsay Wolf and is devoured*” *Loy. LA. L. Rev.* (1992).
- Roger C. Park “*The Hearsay Rule and the Stability of verdicts: A Response to Professor Nesson*” *Minn. L. Rev.* (1986).
- Richard D. Friedman “*Truth and Its Rivals in the Law of Hearsay and Confrontation: Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law*” *Hastings Law Journal* (1998).

### **International Conventions**

- Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A(iii) 1948.
- International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966.
- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1966 (hereinafter European Convention on Human Rights).

## Law Commission Reports

- South African Law Commission *Report on the Review of the Law of Evidence, Project 6* (1986).
- Australian Law Reform Commission, *RP3 Hearsay Evidence Proposal* (1981).
- South African Law Commission, *Discussion Paper 113, Project 126, Review of the Law of Evidence (Hearsay and Relevance)* (30 June 2008).
- South African Law Commission *Report, Project 101, The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing* (May 2001).
- The Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC 245: April 1997) United Kingdom.
- Australian Law Reform Commission *Paper, Evidentiary Aspects: Improvements and Reforms – Children Witnesses* (2008).
- New Zealand Law Commission, *Evidence*, Volumes 1 and 2 (August 1999).
- Law Reform Commission of Hong Kong, *Report, Hearsay in Criminal Proceedings* (November 2009).
- Law Reform Commission of Hong Kong, *Report on Hearsay in Criminal Proceedings*, (30 November 2005).
- Law Reform Commission of Ireland, *Hearsay in Civil and Criminal Cases*, (LRC CP 60, March 2010).
- United Kingdom Law Commission *Criminal Justice Bill 2003*.

## Other Articles (Dissertations and Papers)

- Andrew Peter Paizes “*The Concept of Hearsay with Particular Emphasis on Implied Hearsay Exceptions*” a Thesis submitted at the Faculty of Law, Witwatersrand University 1983.
- Wikipedia Encyclopaedia.
- *Al-Khawaja and Tahery v United Kingdom* 26766/05 [2009] ECHR 110, Third party submission by JUSTICE (British Section of the International Commission of Jurists).
- Report by JUSTICE, *Secret Evidence* in United Kingdom (June 2008).
- JUSTICE briefing on *Part 11, Chapter 2 of the Criminal Justice Bill* at Committee Stage in the House of Commons, January 2003.
- England and Wales Ministry of Justice, *Criminal Justice Statistics: Quarterly Update to March 2014*.
- Eric Metcalfe, *Time for the UK Supreme Court to think again on hearsay*, The Guardian, 15 December 2011 – <http://www.theguardian.com/law/2011/dec/15/UK-Supreme-court-rethink-hearsay> – last seen 19 September 2014.
- Amicus brief of the Civil Liberties Union in *Lilly v Virginia* 527 U.S. (1999).
- United States Congress Records 40 (1972) *Federal Rules of Evidence Draft Bill*.

- *Union of South Africa* – <http://www.sahistory.org.za/dated-event/union-south-africa-officially-ceases-exist> - last seen 16 July 2015.
- *The Babylonian Captivity with Map* – <http://www.bible-history.com/babyloniancaptivity-> last seen 20 August 2015.
- C.J. Daniels, Advocacy, *What is its future?* Essay (1995) – <http://www.oeclaw.org.uk/essays/1995-> last seen 12 February 2016.