

An Update on Selected and Significant Court Decisions under the Evidence Act 2006
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Since coming into force in August 2007, the Evidence Act 2006 (“the Act”) has generated a large volume of case law at various levels of New Zealand courts. This short talk focuses on a few selected and significant cases that will be of interest to NZ practitioners of criminal law. The presentation is not meant to be exhaustive. Persons seeking more information about the issues or cases discussed are referred to the following sources:

- Mahoney, McDonald, Optican & Tinsley, *The Evidence Act 2006: Act and Analysis* (Thomsen Brookers (now Thomson Reuters): 2007)
- “Evidence”, *Adams on Criminal Law* (Brookers Looseleaf ed, current to 2009) (also available at Brookers OnLine: see “Adams on Criminal Law — Evidence” at www.brookersonline.co.nz)

A summary of selected and notable cases under the Evidence Act 2006 is set out below. The cases are classified under the broad evidence topics they deal with and according to the sections of the Evidence Act at issue in each judgment. Due to constraints of time, the oral presentation will focus on selected cases from those discussed in this paper.

(I) Relevance/ General Exclusion (Prejudice)/ Propensity (ss 7, 8, 40, 41, 43)

(a) R v Bain [2009] NZSC 16 (s 7 – Admissibility of relevant evidence): In *Bain*, the SC reaffirmed the fundamental principle that relevance is a question of law for the judge and, under s 7 of the Act, a necessary condition of admissibility for all evidence offered in a proceeding. In refusing to admit a garbled audio recording of the accused made during a 111 call and claimed by the Crown to contain an admission of guilt, Elias CJ stated:

The question of relevance is fundamental, as s 7 makes clear. It is an aspect of trial fairness that, while the issue of guilt is for the jury, a fair trial requires that the jury should not be invited to act on evidence which is irrelevant. It is necessary for the judge to determine whether tendered evidence is relevant or irrelevant. The test here to be applied by the judge is whether it would be open to the jury, acting reasonably, to rely on the disputed words as an admission. This threshold question is not properly addressed by pointing to expert evidence which cannot exclude one hypothesis or the other. If the judge is not satisfied that the jury can reasonably conclude that the sounds are an admission, then in our view they must be excluded as irrelevant ... If the material is admitted, the jury will have to speculate about its content. That is clear on the voir dire evidence of the experts who listened to the recording under ideal conditions. They thought it impossible for expert or lay listeners to resolve the disputed words. No contextual external evidence that might provide assistance in resolving the dispute was suggested in argument ... If the Judge cannot be satisfied that the jury could reasonably conclude that the sounds are the admission contended for, he is obliged to exclude them from the evidence. As Willes J suggested in *Hollingham v Head*, relevance ends when “speculation begins”. [Paras 58-59]

Her Honour went on to conclude that, even if the audio tape could pass the s 7 test of relevance, it would still be excluded as unfairly prejudicial under s 8 of the Act:

While relevance determines “whether evidence could relate to an issue”, exclusion under s 8 is concerned with whether the connection between the evidence and proof is “worth the price to be paid by admitting it in evidence”. Under s 8 the judge must exclude evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding ... Even had our conclusion on relevance been that the evidence was reasonably capable of supporting proof of the existence of an inculpatory statement, we would be of the view that the disputed sounds should properly have been excluded in application of s 8(1) ... The prejudicial effect on the proceeding could be profound. The jury would, as Mr Raftery acknowledged, be entitled to find the accused guilty simply on the basis of an inculpatory statement unable to be proved to the satisfaction of experts or, in their estimation, of lay people ... In those circumstances, the admission of the disputed sounds could only operate to the prejudice of the defence. [paras 62-67]

(b) *R v Weatherston* [2009] NZCA 267 (s 8 – General exclusion): In upholding the decision of the trial judge to admit post-mortem photographs of the victim showing the nature and extent of the wounds inflicted by the defendant, the CA observed (without specifically mentioning ss 7 & 8 of the Act):

For the reasons given by Potter J and in the Crown submissions before us, it is clear that the Crown should be able to place the photographs in evidence. The photographs are highly relevant to the issues at trial. That there may be other similar evidence or that the evidence could be presented in another form does not diminish their relevance. As Potter J said, the jury is entitled to the best evidence of the nature and extent of the injuries. Diagrams and words are not an adequate substitute ... We accept the Crown's submission that it has selected the photographs carefully to minimise as much as possible the prejudicial effect. Any remaining prejudicial effect is a natural consequence of the nature of the wounds inflicted by Mr Weatherston. It is difficult to envisage a situation in a murder case where no photographs at all of the injuries causing death are shown to the jury. The submission that this should occur in this case was highly optimistic where the nature and extent of the wounds is of such high relevance to one of the main issues the jury has to decide. (paras 29-30)

(c) *R v Healy* [2007] NZCA 451 (s 40, 41, 43 — Propensity rule/ Propensity evidence about defendants/ Propensity evidence offered by prosecution about defendants): In *Healy*, the CA stated that the wording of the Evidence Act regarding the definition and admissibility of propensity evidence needs to be taken as the “starting point” for judicial decision making (para 46). The Court then observed:

[G]iven the shift away from the similar fact terminology and the definition of “propensity” evidence, a danger in reliance on the old similar fact cases is that those cases reflected an environment where the position of the law was that similar fact evidence was not to be used to support propensity reasoning: see Robertson (ed) *Adams on Criminal Law — Evidence* (looseleaf ed) at [ED8.06]. The Evidence Act rejects that approach: s 40.

...

In terms of the propensity provisions, having started with the Act it may occasionally be necessary in a particular case to refer back to the common law. But it has to be remembered that the Act is the product of a long and considerable history of reforms and that one of the objectives in terms of the law relating to propensity evidence was to reduce the previous uncertainty as to the likely approach to the admissibility of this sort of evidence ... The provisions relating to propensity evidence offer the opportunity of a clean slate in this area that should be grasped. (paras 52-54)

See also *R v L (CA 276/2009)* [2009] NZCA 286, para 22 (affirming the observation in *Healy* that “the starting point is the language of the Act” and concluding that the particularity required by s 40(1)(a) “is not of the high level of specificity required by the old cases such as *R v Sims* [1946] KB 351 (CA) which may be read as requiring a ‘striking similarity’ and which no longer represents the law of England or of New Zealand”); *R v Stewart* [2008] NZCA 429, para 23; *R v Beazley* [2009] NZCA 283, para 17.

Following the injunction in *Healy* to apply the Act on its own terms, in *R v Kant* [2008] NZCA 194, the CA stated that, without more, proof of the accused’s lack of previous convictions was inadmissible as propensity evidence under ss 40 and 41. Noting that propensity evidence is defined as the propensity of a person to act “in a *particular way*” or to have a “*particular state of mind*” (s 40(1)(a)), the Court stated:

Under the previous law, evidence of the absence of previous convictions would have been relevant both to the appellant's credibility/veracity and to the unlikelihood he would have committed the offences charged. However we consider the position under the Evidence Act 2006 is materially different. The Act draws a clear distinction between veracity evidence and propensity evidence and defines both concepts in specific ways. While the Act recognises there may be some overlap between the two concepts, the legislation specifically provides that evidence that is solely or mainly relevant to veracity is governed by the veracity rules and the propensity rules do not apply: s 40(4).

In the present case, we do not consider that the appellant's absence of previous convictions is evidence tending to show that he acts in a particular way in terms of the definition of propensity. Rather, we consider, as this Court did in [*R v Falealili* [1996] 3 NZLR 664], that such evidence is generally neutral. It follows that the evidence of the lack of previous convictions would not have been admissible as propensity evidence. (paras 37-38)

See also *R v Wi* [2009] NZCA 81; *R v Alletson* [2009] NZCA 205.

NB: The NZ Supreme Court recently (7/5/09) granted leave to appeal in *Wi* (see *Wi v R* [2009] NZSC 39) on the issue of the admissibility under the Evidence Act of an accused’s lack of previous convictions. See further the discussion of *Kant*, below at V(b), regarding the admissibility of a defendant’s lack of previous convictions as veracity evidence under s 37 of the Act.

Similar to the conclusion reached in *Kant*, in *R v Tainui* [2008] NZCA 119, a sexual offending case, the Court of Appeal ruled that ss 40 and 43 of the Evidence Act were inapplicable to evidence offered by the Crown of statements made by the defendant to the complainant and the complainant’s father. The statements comprised comments from the defendant, on the night before the alleged sexual assault, that “one in five women get sexually abused” and “three in four females are sexually molested by the time they reach a certain age” (para 50). Rejecting the defence contention that such testimony amounted to propensity evidence subject to the balancing test of s 43, the Court observed:

Ms Ablett-Kerr did not develop a reasoned argument to establish her proposition that the evidence was of a propensity nature, and in our judgment her submission reflects a misunderstanding of the

statutory provisions and the nature or constitution of propensity evidence. Propensity evidence is defined as “evidence that tends to show a person's propensity ... to have a particular state of mind, being evidence of acts ... or circumstances with which a person is alleged to have been involved”: s 40(1)(a). The New Shorter Oxford English Dictionary (4ed 2003) defines a “propensity” as an “inclination, tendency, bent, disposition”. The question is whether the evidence of Mr Tainui's statements was led to show a “propensity” to have a “particular state of mind”.

The word “particular” in s 40(1)(a) is decisive. In its statutory context, consistent with the preceding common law, it must connote a characteristic or attribute which can be said to be manifested by, or is special or distinctive to, the person. By its nature, a person's propensity is a state of mind or conduct which is already in existence at the date of offending, as confirmed by the use of the past tense within the definition of the words “with which a person is alleged *to have been involved*”, and by the six factors which a Judge may take into account when undertaking the balancing exercise between prejudicial effect and probative value: s 43(3). Evidence of a person's inclination, tendency or bent to a particular state of mind is admissible because it may be relevant to determination of an issue arising at trial.

A useful illustration of what constitutes a person's propensity is found in this passage from *R v Hanson* [2005] 1 WLR 3169 (CA) at para 9 (cited by this Court in *R v Taea* [2007] NZCA 472 at [38]) as follows:

There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour [not at issue here] or where its circumstances demonstrate probative force in relation to the offence charged: compare *Director of Public Prosecutions v P* [1991] 2 AC 447, 460-461. Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list ... ”

The Crown did not lead evidence of Mr Tainui's statements to show his propensity to have a particular state of mind. The purpose of the evidence was its “tendency to prove ... anything that is of consequence to the determination of the proceeding”: s 7(3). The Judge correctly directed the jury that Mr Tainui's words to both the complainant and her father were relevant to establish whether or not he “had sexual activity in mind from earlier in the evening”: s 7(3), and nothing in the Act otherwise rendered it inadmissible or excluded it: s 7(1). What was said was not propensity evidence but was instead directly material to whether or not Mr Tainui later sexually violated the complainant. This ground of appeal must fail. (paras 53-56)

See *Tainui v R* [2008] NZSC 59 (refusing leave to appeal and noting that “[t]he challenged evidence was not evidence of propensity at all. It was evidence relevant to the appellant's state of mind on the particular occasion and supportive, according to the weight the jury chose to put on it, of the offending charged.” (para 2)). See also *R v S* [2007] NZCA 497 (statement by defendant to witness that witness might want to engage in sexual activity with the defendant and the complainant not propensity evidence subject to s 43 but rather evidence “directly relevant” to the defendant's acknowledgment of an existing sexual relationship between himself and the complainant).

In *R v Mata* [2009] NZCA 254, the CA stated that, notwithstanding its comments in *Tainui* that propensity evidence referred to conduct or a state of mind existing “at the date of offending” (*Tainui*, above at para 54), nothing in s 40 limits propensity evidence to acts committed by the accused *before* the alleged offending took place. Instead, the Court observed:

In that regard, in respectful disagreement with the observations in *Tainui*, we take the view there is nothing in s 40(1) which makes only evidence of acts or omissions or the like earlier in time than the alleged offending admissible as propensity evidence under the first limb of s 40(1)(a). Accordingly, evidence which assists in proving a propensity to act or have a particular state of mind relevant to issues in the case can qualify as propensity evidence irrespective of whether those events precede or follow the events with which the accused is charged. Were that not so, there would be real difficulty in cases involving multiple charges of similar offending against different complainants. A jury would need to be told that evidence of earlier alleged offending could be taken into account in relation to counts involving later alleged offending but not vice versa.

The Court agreed with the observation in *Tainui* that a single past act may indicate a propensity of the accused admissible under ss 40 and 43 (*Tainui*, above at para 55 (citing *R v Hanson* [2005] 1 WLR 3169 (CA) at para 9 and *R v Taea* [2007] NZCA 472 at para 38)). However, the Court noted:

We also take the view that while it is logically possible for a single action to demonstrate a propensity, the fewer actions relied upon, the less likely it is that a conclusion that propensity has been proved would be properly reached. That is particularly the case where the action or actions said to demonstrate that propensity are relatively unremarkable. (para 46)

In *R v Stewart* [2008] NZCA 429, the Court noted that the Evidence Act “provides no guidance on how a judge is actually to perform the weighing up process required by s 43(1). It follows that this Court must accept responsibility for drawing the line, guided by Parliament's language and its own experience of the competing interests of justice.” (para 17). In this vein, the Court observed:

The Bill of Act guarantees an accused rights to a fair trial (s 25(a)), to be presumed innocent until proved guilty according to law (s 25(c)), to natural justice (s 27(1)), and to present a defence (s 25(e)). Wrongly used, propensity evidence can imperil each of these rights. So the law requires that it be handled with particular care. (para 15)

...

One theme of s 43 is of related sliding scales: the greater the risk of improper prejudice (ss 43(1) and 8(2)) the more compelling must be its probative value; and the stronger the Crown case in respect of the issue (s 43(2) - (3)) the higher the prospect of securing admission of the evidence. The weight to be given to any admitted evidence is, ultimately, for the jury to determine, but a Judge must necessarily make a provisional assessment of the probative value in order to rule on admissibility.” (para 24)

The Court also accepted the submissions of defence counsel that, when a trial judge sums up in a criminal case, a model set of jury directions on the permissible use of propensity evidence should include the following seven steps:

- (1) State the purpose of the witness's evidence.
- (2) Explain what the propensity evidence is.

While it is defined in s 40(1)(a) (set out above at [14]), “propensity” is a term with which jurors may be unfamiliar. It would be helpful to give the dictionary definition of propensity as from the Shorter Oxford cited in *R v Tainui* [2008] NZCA 119 at [53] namely “inclination, tendency, bent, disposition”, of which we prefer “tendency” as most intelligible. In that case the Court described propensity at [40]:

“In its statutory context, consistent with the preceding common law, it must connote a characteristic or attribute which can be said to be manifested by, or is special or distinctive to, the person. By its nature, a person's propensity is a state of mind or conduct which is already in existence at the date of offending, as confirmed by the use of the past tense within the definition of the words ‘with which a person is alleged to have been involved’, and by the six factors which a Judge may take into account when undertaking the balancing exercise between prejudicial effect and probative value: s 43(3). Evidence of a person's inclination, tendency or bent to a particular state of mind is admissible because it may be relevant to determination of an issue arising at trial.”

(3) Identify the factors relied upon by the Crown establishing the relevant propensity in relation to the issue identified at step (1) and referring to any defence contentions.

It was agreed by the parties that a Judge should refer the jury only to such specific considerations in s 43(3) as are relevant. We agree. While the presence of certain of the factors may be relevant both to the judge's decision as to admissibility and to the jury's as to their verdict, reference to what is not directly relevant would act as a distraction from their task.

(4) Direct the jury that whether propensity existed is entirely a matter for them.

(5) Explain that, if propensity is found to exist, it is to be used as circumstantial evidence to be considered with all other evidence when assessing the issues, including the reliability and credibility of the complainant.

(6) Explain that, if the jury does not accept that propensity is properly established it should put the evidence outside and leave it entirely out of consideration.

(7) Warn the jury not to jump to a conclusion that because the accused has offended on a previous occasion he must have done so in a manner alleged in the charge: *R v Taea* [2007] NZCA 472 at [47].

The Court in *Stewart* concluded that, based on the wording of ss 40 and 43 of the Evidence Act, this multi-step direction was to be preferred to the pre-Act set of directions dealing with “similar fact” evidence in criminal trials (paras 39-40) (see *R v Sanders* [2001] 1 NZLR 257, para 20). Nonetheless, the Court in *Stewart* added the following proviso:

We add that a specific direction on propensity evidence is required to explain to the jury what relevant evidence has been called, to what it is directed and how the jury may use it. While those ideas are captured within [the] seven steps, we do not suggest that a trial Judge should, irrespective of the particular circumstances of the case, follow a specific formula. On the contrary, it is essential that the Judge be given sufficient flexibility to tailor the direction to the needs of the particular case. (para 41)

(II) Eligibility and Compellability/ Oaths and Affirmations (ss 71-78)

(a) *R v Slavich* [2009] NZCA 188 (s 77 – Witnesses to give evidence on oath/affirmation): The common law required all evidence in a proceeding to be given on oath or affirmation, a position now codified in s 77 of the Act. However, under s 9 of the Act, a Judge may admit evidence in “offered in any form or way agreed by all parties” (s 9(b)), including the admission of evidence “that is not otherwise inadmissible”. The CA held that, in light of s 9, the parties to a proceeding may consent to the admission of

unsworn evidence. In *Slavich*, such evidence consisted of the transcript of a teleconference call with a witness where, by agreement, counsel for both the Crown and defence questioned the witness without oath or affirmation and submitted the transcript to the trial judge as evidence in the case.

(III) Opinion Evidence (ss 23-26)

(a) *R v Hutton* [2008] NZCA 126 (s 25 – Expert opinion evidence): In *Hutton*, the CA discussed “the extent to which judges should attempt to assist juries in relation to matters of expert controversy” admitted in evidence under s 25 of the Evidence Act (para 141):

Besides noting that experts are entitled to give opinion evidence and that it is the jury's role to assess what weight is to be given to their evidence, a judge may need to assist the jury in other ways in relation to expert evidence. As Gummow and Callinan JJ said in their joint judgment in *Velevski v R* (2002) 187 ALR 233 (HCA): “[181]... [C]onflicting expert evidence will always call for careful evaluation. So too, because expert evidence by definition deals with generally unfamiliar and technical matters, it will always need careful, and usually more elaborate treatment by the trial judge in directing a jury about it.”

In particular, the judge may be required to identify and elaborate the critical points on which the experts differ, and to explain how those differences relate to the elements which the Crown must establish to secure a conviction and how they affect the operation of the burden of proof. The judge may need to suggest a means by which the jury might address the expert evidence (by, for example, indicating topics for consideration or suggesting a decision tree). How far the judge needs to go in any particular case will be determined by factors such as the importance of the evidence, its complexity, the way the witnesses have presented it and its treatment by counsel. We recognise that the task will often be difficult and that there are risks associated with it. But it is unrealistic to leave the jury to grapple unaided with complex expert evidence in unfamiliar areas. (para 143)

The CA also offered the following postscript regarding the conduct of expert witnesses in criminal cases:

Postscript — expert evidence

As appears customary in criminal cases, none of the experts involved in this case was shown the Code of Conduct for expert witnesses in the High Court Rules, which expert witnesses in civil cases must accept (see r 330A and Schedule 4 of the High Court Rules). As this Court has previously noted, the High Court Rules dealing with expert witnesses do not apply in the criminal context (*R v Seu* CA81/05 8 December 2005 at [81]). Nevertheless, the obligations of an expert witness in a criminal case do not differ from those of an expert witness in a civil case, in the sense that, in both contexts, the witness must not to be an advocate for any party but must assist the Court impartially on matters within his or her area of expertise.

This Court summarised the relevant principles in *R v Carter* (2005) 22 CRNZ 476 as follows:

“The following principles are uncontroversial and apply in all cases where expert evidence is called:

- (a) an expert must state his or her qualifications when giving evidence;
- (b) the facts, matters and assumptions on which opinions are expressed must be stated explicitly;
- (c) the reasons for opinions given must be stated explicitly;
- (d) any literature or other material used or relied upon to support opinions must be referred to by

the expert;

(e) the expert must not give opinion evidence outside his or her area of expertise;

(f) if an expert witness believes that his or her evidence might be incomplete or inaccurate without some qualification, that qualification must be stated;

(g) an expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise; and

(h) an expert is not an advocate for any party.

Those propositions reflect the truism that expert evidence must be based on reason as opposed to conclusions incapable of being tested in any meaningful manner. It is for that reason that underlying assumptions and reasons for opinions reached must be stated explicitly. ”

We consider it desirable that counsel refer expert witnesses in criminal cases to this statement of principles and that witnesses should state at the outset of their evidence that they understand and accept them. (paras 169-171)

Similarly, in *CIR v BNZ Investments Ltd* [2009] NZCA 47, the CA discussed the requirement imposed by the High Court Rules (see rule 9.43(2) and Schedule 4) that expert witnesses have “an overriding duty to assist the court impartially’ and are not to act as advocates for the party that has engaged them” (para 24). The CA observed:

In the New Zealand context, the question for decision is whether the proposed expert evidence will meet the tests set out in ss 7 and 25 of the Evidence Act. To the extent the Simcock/McLeod evidence is evidence of fact, it must be relevant, and to the extent it is expression of an opinion, it must be substantially helpful to the fact finder. We accept that there may be cases in which the position of the proposed expert is so lacking in independence as to make it obvious that an opinion he or she expresses in evidence will not be able to be substantially helpful, and in those circumstances it may be appropriate to rule out the evidence at the pretrial stage in order to avoid the costs which may otherwise be incurred in responding to it. (para 22)

(b) *R v Little* [2007] NZCA 491 (s 25 — Expert opinion evidence): Focussing on the s 25 test of substantial helpfulness and the s 7 requirement of relevance under the Evidence Act, the CA stated in *Little* that, as with experiments and demonstrations, there was no categorical prohibition on evidence in a criminal case being offered in the form of a reconstruction. In *Little v R* [2008] NZSC 7, the Supreme Court refused leave to appeal that determination. Referring to the computer animation evidence offered by the Crown’s expert witness — which reconstructed potential scenarios of the defendant’s actions at the crime scene based on the physical evidence in the case — the SC observed:

The essence of this evidence was undoubtedly admissible as the opinion of a properly qualified expert. The fact that he used a computer animation to demonstrate to the jury how he reached his opinion rather than using a diagram, verbal description, drawing on a whiteboard or some other means, did not make the computer animation inadmissible. It represented simply the use of modern technology to illustrate the basis upon which the witness had come to this conclusion.

We regard the proposition that this evidence should not have been admitted as untenable. There was nothing unfairly prejudicial in the method the witness adopted or in the content of the evidence itself. (paras 2-3)

Little affirms the proposition that the classification of evidence as a demonstration, experiment or reconstruction will no longer be a pertinent consideration with respect to admissibility in a criminal trial. Instead, the judicial focus will be on whether the offered

scientific demonstration satisfies criteria of relevance (s 7) and substantial helpfulness (s 25) by: (a) accurately reflecting the physical evidence in the case; and (b) being based on reliable scientific techniques of forensic investigation.

(c) *R v Frost* [2008] NZCA 406 (s 25 — Expert opinion evidence): In *Frost* (a murder case where the defence was provocation), the CA confirmed that s 21 of the Act — which states that a defendant in a criminal case may not offer his own hearsay statement in evidence without giving evidence himself (s 21(1)) — forbids a defence psychiatric expert from giving evidence of statements made the defendant to the psychiatrist relating to the circumstances leading up to and including the victim’s killing. Section 25(4) of the Act did not apply because the expert was not giving evidence about the defendant’s sanity. Moreover, the s 18 rule regarding the general admissibility of hearsay had to be read subject to the clear mandate of s 21.

The Court did not discuss the ruling of Heath J in the HC permitting the psychiatrist to refer to statements made by the defendant’s family regarding his (the defendant’s) background. In *R v Frost (No 2)* (HC New Plymouth, 21/2/08, CRI-2007-043-471, **Heath J**), the Court admitted those hearsay statements under s 18(1)(b)(ii), ruling that, while the family members were not unavailable, undue delay would be caused if they were required to be witnesses. The Court also found that, at least provisionally, the statements of the family members passed the s 18(1)(a) reliability test for the admission of hearsay evidence.

(IV) Direct Examination (ss 27, 35, 90)

(a) *R v Tepu* [2008] NZCA 460 (s 27 — Defendant’s statements offered by the prosecution): In *Tepu*, the CA ruled admissible under s 27 of the Act the pre-trial statement of a defendant containing a material lie. See the discussion in part V(a) below.

(b) *R v S* (CA592/07) [2008] NZCA 152 (s 35 — prior consistent statements offered to rebut a charge of recent fabrication): In *R v S*, the CA discussed when a judge can conclude that the veracity of a witness has been challenged based on a claim of recent fabrication so as to trigger the admissibility of the witness’s prior consistent statement under s 35(2):

It was not enough at common law, and it will not be enough to engage s 35(2), that the complainant is subjected to robust cross-examination designed to attack his or her credibility or reliability. Nor will it be enough if counsel puts directly to the witness that they are lying and that their evidence is contrary to the defendant’s story. While no specific form of words is required, the cross-examination must be able to be categorised as attacking the witness’ veracity on the basis that his or her account is a recent invention or is reconstructed, even though without conscious dishonesty. In this context, recent means after the event, not late in the sense of time scale: *R v Wilson* [(2004) 21 CRNZ 418 (CA)] at [20].

See also *R v Hart* [2009] NZCA 276 (noting that, in order to respond to a challenge to the witness’s veracity based on a claim of recent invention, the previous consistent statement must have been made a time sufficiently early to be inconsistent with the claim

of recent invention and before any alleged motive to fabricate had arisen).

In *R v C* [2008] NZCA 372, the complainant's veracity was challenged through cross-examination by defence counsel on inconsistencies between her previous statements and between those statements and her testimony in court. Holding that s 35(2) was clearly triggered in the circumstances, the CA ruled that the whole of the witness's previous consistent statement could be admitted into evidence. The defence had argued that, based on the language of s 35(2), the complainant's previous consistent statement should only be admitted "to the extent necessary" to respond to the challenge to veracity developed in cross-examination. Rejecting this view, the Court concluded that the complainant's entire previous consistent statement was correctly admitted into evidence "[g]iven the intensive and wide ranging cross-examination of the complainant by reference to her earlier statements" to the police (para 26). See also *R v Stewart* [2008] NZCA 429 (admitting previous consistent statements of complainant in a sexual offence case as relevant to all charged counts notwithstanding defence argument that a claim of recent invention had only been alleged with respect to certain specific counts).

(c) *R v Barlien* [2009] 1 NZLR 170 (ss 27, 35 – Defendant's statements offered by the prosecution/ Prior consistent statements): Noting that s 35(2) had eliminated the "recent complaint rule" in sexual offence cases, the CA held in *Barlien* that, at first instance, s 35(2) rendered inadmissible the previous consistent statement of a complainant in such a proceeding. However, based on the circumstances of the case, the Court found an alternative ground of admissibility for the complainant's statement under s 27(1) of the Act — which allows the prosecution to offer into evidence at a criminal trial a statement "made by" the defendant. The Court noted that, shortly after the alleged offending took place, the mother of the complainants confronted the defendant with what the complainants had told her that the defendant had done. The Court then concluded:

In this case, however, the essential allegations made by R (above at paras 6-12) on 13 January 2006 would have been before the jury in any event. This is because Mrs S confronted Mr Barlien in the driveway on 13 January 2006 just after the allegations had been made and put the allegations to him — see above at para 10. Mr Barlien's statements in reaction to the allegations put to him by Mrs S were clearly admissible — see s 27(1) of the Act (set out above at para 27). His reaction is so tied up with the allegations (being effectively an answer to those allegations) that what Mrs S put to Mr Barlien must be seen as part of Mr Barlien's statements and therefore admissible, in the same way that the allegations put to an accused in a police interview (as required by the Chief Justice's Practice Note [2007] 3 NZLR 297, at para 4) would be admissible. Section 27(3) provides that the rule in s 35 relating to previous consistent statements does not apply to defendants' statements offered by the prosecution. This exclusion must encompass the allegations put.

The reasoning in *Barlien* has been adopted in subsequent cases where an allegation of sexual offending, along with the defendant's response, has been admitted under s 27(1) notwithstanding the restrictions imposed by s 35(2). See *R v Saunokonoko* [2008] NZCA 393; *R v H* [2009] NZCA 16.

Barlien also confirms that, when the previous consistent statement of a witness is admitted under s 35(2), it can be used in evidence by the fact-finder for all purposes,

including the truth of its contents (para 20). See *R v Hart* [2009] NZCA 276, para 61. However, in the “adopted admission” scenario discussed above, the CA restricted the evidential use of the allegation of sexual misconduct. In *R v H* [2009] NZCA 16, the Court stated:

[The prosecutor] accepts that C's allegation of rape, while forming part of H's statement, will not be independently admissible at trial as evidence of the credibility or reliability of C's complaint. The trial Judge will direct the jury accordingly, thereby eliminating the possible prejudice which underlies [defence counsel's] argument. (para 19)

Notwithstanding the conclusion reached in *Barlien* — that s 35 has eliminated the common law “recent complaint” rule — in *R v Rongonui* [2009] NZCA 279, the Court of Appeal held that evidence of the *fact* of a complaint, without reference to the actual words spoken by the complainant, is not rendered inadmissible by the prohibition contained in s 35(1). Noting that s 35(1) only applied to the “statement” of a witness, the Court observed:

This evidence is of a similar kind to that given in *R v Turner* [2007] NZCA 427 (leave to appeal refused: [2008] NZSC 11). The complainant in that case gave evidence that she told her friend what had happened: at [19]. The question is whether, once the [Evidence] Act came into force, evidence of that type is excluded on the basis that it amounts to an inadmissible previous consistent statement.

The definition of ‘statement’ in the Act (see para [40] above) includes “a spoken or written assertion by a person of any matter”. From the evidence actually given, the jury discovered that two things happened when the complainant reunited with her friends. The jury discovered that the complainant told her friends what had happened. They also discovered that they took her back to the hostel. The jury did not hear what the complainant had told her friends, though an inference could readily be drawn that she had told them she had been sexually assaulted.

...

Evidence of what a person did is different in kind to evidence of what that person said. In general terms (moving away from the particular subject of complaint evidence in sexual cases), a witness will be permitted to give evidence of speaking to another person, without disclosing what was said; either to avoid the possibility of introducing inadmissible hearsay evidence or distorting the conversation by reference only to what that particular witness said. Such evidence is regularly admitted as part of the narrative of events.

...

Barlien does not affect that conclusion. *Barlien* involved repetition of a victim's oral statement that the appellant had “touched her on the fanny and kissed her like a grown-up”: at [12] and [18]. *Barlien* dealt with the words that were actually spoken. In contrast, the complainant's evidence in this case was directed to what happened.

In our view, this Court's judgment in *Turner* remains good law despite s 35. The characterisation of the nature of the evidence cannot change. The complainant, by saying she had told her friends what occurred, put in context what happened afterwards. It was not a previous consistent statement as defined. It was direct evidence of something that happened that was relevant to the narrative of events.

In our view, because evidence was not given of anything actually said by the complainant, the evidence did not fall within s 35. Therefore, being both relevant and cogent evidence going to the complainant's credibility (see [38] above), it was admissible.

(d) *R v Foreman* [2008] NZCA 55 (s 90 — Refreshing memory): dissenting in part in

the judgment, Hammond J made the following comments regarding counsel's use of a document to refresh memory under s 90 of the Act. Discussing the contemporaneity requirement of s 90(5), his Honour stated:

The position prior to trial is uncontroversial and is unaffected by the Evidence Act 2006. The principle is that witnesses are free to use whatever means they choose to refresh their memories prior to trial, although the means used can affect the weight that is given to their evidence. It is perfectly permissible, for instance, for witnesses to re-read their briefs before trial. The brief may have been taken (say) five years earlier. That is why there is a salutary practice on the part of competent counsel of taking a brief in the witness's own words — not in counsel's translation — and requiring one's own witness to sign the brief. Of course opposing counsel is perfectly entitled to explore what means, if any, were undertaken to refresh a witness's memory and there has long been thought to be a discretion to order the relevant document to be produced to opposing counsel. (para 47)

...

This Court has said that the new Act must be seen in its own terms; it is a new beginning. So as matters now stand, s 90(5) has to be approached anew. There will be a number of problems to be solved with respect to this provision. It is sufficient for present purposes to say that contemporaneity is the statutory bedrock, and there is no doubt that was satisfied in this case. Even so, the laying of a proper basis must still be attended to. The exercise of refreshing a witness's memory should not be confused with a "reconstruction". Resort should be had to this technique only if the witness actually needs to have her memory refreshed. The rule is intended to facilitate testimony that would otherwise be unavailable, not to bolster evidence a witness can provide in any event. The witness should be able to rely on the document or electronic record to assist in presenting her testimony only if she is able to assert that the document accurately represents her recollection at the time it was made. Neither is it right to enable counsel to control the evidence the witness will supply. Counsel should not attempt to have a witness use the particular record as a sort of script. That would be quite improper leading. Finally, the aid is just that; it is not evidence. (para 50)

Considering s 90(5) of the Act in the lower court proceeding in the case, Simon France J had stated that s 90(5) does not require the document actually to be a contemporaneous record (for example, as would be the case with a police officer's entry in his or her notebook). Instead, s 90(5) requires only that the document be "made or adopted" at a time when the witness's "memory was fresh" (s 90(5)). See ***R v Foreman (No 8) 28/4/08, HC Wellington, CRI-2006-041-1363, Simon France J*** (para 17).

Similarly, in ***R v Rongonui [2009] NZCA 279***, the Court of Appeal observed:

An exclusive focus on the contemporaneity of the document leaves to one side the possibility that a document made at some later time may still, as a matter of fact, have been made or adopted when the witness's memory of events was "fresh". Situations often arise when a person is not asked about a particular event for many months but, because of the significance of the event or because there has been a continuing need to refer to what had happened for other reasons, his or her memory of what occurred remains "fresh".

In our view, it is impossible to draw a line as to the point at which a particular witness' memory is no longer "fresh". While contemporaneity will, more often than not, be the touchstone, in each case a factual inquiry must be made to determine whether the jurisdictional prerequisite to use of s 90(5) has been met. In a sufficiently contentious situation, this may require the Judge to hear evidence, in the absence of the jury, to make that determination ... (paras 64-65)

(V) Cross-Examination (ss 37, 38, 44, 92, 94, 96)

(a) *R v Tepu* [2008] NZCA 460 (ss 37-38 — Veracity rules/ Evidence of Defendant’s veracity): In *Tepu*, the CA discussed the relationship between s 27 of the Act (Defendant’s statements offered by the prosecution) and the rules in ss 37-38 governing evidence offered by the Crown regarding the defendant’s veracity. The Court held that the veracity rules in ss 37-38 do not bar prosecution evidence of a statement by the defendant that is a lie. The Court said that, as set out in s 27(2), the only bars to such evidence are those found in ss 28, 29 & 30. The Court concluded:

In summary, s 27 deals specifically with defendants' statements in criminal cases. We are satisfied that such a statement is admissible against a defendant even if it contains a material lie which the prosecution will be able to use as evidence of guilt, and/or as a basis for suggesting to the jury that a defendant's evidence at trial is not to be believed. Where the latter occurs, it will not, without more, amount to a challenge to the defendant's veracity for the purposes of ss 37 and 38, as we now go on to discuss (para 17)

Discussing the definition of “veracity” in s 37(5), the Court stated:

Section 37(5) defines veracity to mean “the disposition of a person to refrain from lying, whether generally or in the proceeding”. “Disposition” in this context means a natural tendency or inclination to act in a particular way (*The New Zealand Oxford Dictionary* (2005)). It goes to the defendant's character or qualities as a person. While the definition envisages that a “disposition” may be manifested “in the proceeding”, it must still be a tendency or an inclination. An allegation that a defendant lied in a statement to the police does not, of itself, involve an allegation that he has a disposition to lie. That confuses lying on a particular occasion with a tendency or an inclination to lie more generally. (para 19)

Likewise, in *R v Davidson* [2008] NZCA 410, the CA confirmed that a witness’s prior inconsistent statement may be offered for a purpose other than as evidence “about a person’s veracity” pursuant to s 37(1). Indeed, since the prior inconsistent statements of witnesses can now be offered for their truth under the Evidence Act as non-hearsay evidence (see the definition of hearsay in s 4), the admissibility of such statements for that purpose will not engage the s 37 veracity rule. This will be true even if the incidental effect of the prior inconsistent statement being admitted is to cause the fact-finder to reject the truth of the witness’s testimony at trial. As the Court noted in *Davidson*, this result would be “only a subsidiary effect of the evidence and not its purpose” (para 71). The Court also observed that s 96 did not govern the admissibility of a witness’s prior inconsistent statement:

Section 96 does not govern the admissibility of previous inconsistent statements, rather it imposes procedural requirements on a party seeking to rely on such statements in evidence. If a statement is inconsistent with the witness’ evidence, then any party cross-examining the witness in relation to that statement must follow the procedure set out in s 96. (para 70)

In *R v Lahina* [2008] NZCA 251, the CA cited s 38(3)(c) of the Act to reject the notion that the defendant had opened the door to cross-examination regarding his previous convictions for dishonesty simply by answering the prosecution’s question: “Do you

consider yourself to be an honest person?” (para 39). The Court took a similar view with respect to the prosecution’s cross-examination of the accused with respect to his previous convictions for violence:

The permissible boundaries were overstepped by the Crown and the Judge should not have granted permission to cross-examine either or both appellants for previous offences of violence. They did not in reality fall within the veracity rules which, for example, in s 37(3)(b) refer only to a “propensity for dishonesty or lack of veracity”. The real purpose of the cross-examination of James Lahina was to show a propensity to act violently ...

The Crown submitted that the answers by the appellant to questions such as “Are you a violent person?”, if denied, opened the door for the Crown to cross-examine in terms of s 38. We are of the view that this cannot be the case otherwise it would undermine the provisions of that section. It was not open to the Crown to ask whether the appellants considered themselves to be violent so as to convert any answer into an assertion of honesty, and thereby enable cross-examination as to veracity.

This was “propensity evidence” and s 43 only permits that in certain circumstances, which did not arise here, and the Judge did not, in fact, determine the admissibility of that evidence based upon propensity issues. (paras 45-47).

(b) *R v Kant* [2008] NZCA 194 (s 37 — Veracity rules): In *Kant*, the CA stated that, without more, evidence of the accused’s lack of previous convictions was inadmissible on the issue of the accused’s veracity pursuant to s 37. The Court stated:

[G]enerally speaking, a lack of previous convictions will not be admissible as veracity evidence for two reasons. First, it does not bear on the appellant's disposition to refrain from lying. A person with no previous convictions may be just as likely to lie or refrain from lying as one who has convictions (unless perhaps the convictions are for dishonesty or perjury). Secondly, even if evidence of a lack of previous convictions were regarded as veracity evidence, it could not have been admitted because it would not meet the substantial helpfulness test under s 37(1). It is essentially neutral in effect. (para 39).

See also *R v M* (CA259/2007) [2008] NZCA 358; *R v Wi* [2009] NZCA 81; *R v Alletson* [2009] NZCA 205.

NB: The NZ Supreme Court recently (7/5/09) granted leave to appeal in *Wi* (see *Wi v R* [2009] NZSC 39) on the issue of the admissibility under the Evidence Act of an accused’s lack of previous convictions. Noting that such leave had been granted, the CA in *Alletson* suggested the desirability of the permanent CA or the NZSC addressing the “broader topic” of the admissibility of the accused’s “good character” under the Evidence Act (para 45). See further the discussion of *Kant*, above at I(c), regarding the admissibility of a defendant’s lack of previous convictions as propensity evidence under ss 40 & 41 of the Act.

(c) *R v Dewar* [2008] NZCA 344 (s 92 – Cross-X Duties): In discussing a party’s cross-examination duties under s 92 of the Act, the Court held:

The so-called rule in *Browne v Dunn* (1893) 6 R 57 (HL) — that a witness should be cross-examined if a court is to be asked to disbelieve them — has been justified on the grounds of fairness by this Court in *Gutierrez v R* [1997] 1 NZLR 192 ... On any view of the matter, the rule

is not absolute, and [counsel] did not so contend. In *R v Ladher* CA327/96 19 November 1996, Gault J said that ‘there is no absolute duty to cross-examine on evidence the Court is to be asked to reject where it is apparent that the matter is at the heart of the trial issue’. Whatever a complete list of exceptions to the common law rule might be, which is an issue we were not invited to consider in this case, it has been accepted that the rule need not be slavishly followed where the witness is perfectly well aware that his or her evidence is not accepted on a particular point: see *Hewinson v Police* (above at [43]), and *R v Accused* CA273/91, 20 December 1991. (para 44)

See also *R v Soutar* [2009] NZCA 227.

In *R v K* (CA531/2007) [2009] NZCA 97 — a sexual offending case — the CA suggested that slavish adherence to s 92 could actually undermine the trial tactics of defence counsel in a particular case:

Where the defence is that allegations of abuse have been fabricated, there is little to be gained and much to be lost by a detailed exploration of the allegations. Often such an approach would serve only to give the complainant an opportunity to repeat damaging allegations. The defence position was put squarely to A [the complainant] and trial counsel could not be criticised for electing not to continue putting propositions which had already been rejected. He described A as a compelling witness and judged that prolonging her cross-examination would not be in the appellant’s interests. (para 15)

(d) *Penney v Police* (HC Auckland, CRI-2008-404-301, 4/12/08, Priestley J) (s 94 — Cross-X by Party of Own Witness): In *Penney*, the HC discussed one definition of “hostile witness” contained in s 4(b) of the Act:

(4) *hostile*, in relation to a witness, means that the witness—

(a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or

(b) *gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness;*
or

(c) refuses to answer questions or deliberately withholds evidence.

According to Priestley J:

The focus ought not to have been on whether there was an inconsistent statement but rather on the *manner* in which the victim was giving her evidence. Did that “manner” exhibit or appear to exhibit an intention to be unhelpful to the prosecution? ... The fact the victim had given a previous statement which was inconsistent with the evidence she was giving *viva voce* did not in itself lead to a conclusion that the witness was exhibiting an intentionally unhelpful stance (paras 25-26)

In *Penney*, a prosecution witness gave evidence that was “spectacularly inconsistent” with her pre-trial statement to the police (para 35). Arguing that the definition of hostility in s 4(b) was not satisfied, defence counsel claimed that, on the stand, the witness had tried to be helpful and to explain why her current testimony was true and her previous statement was false. However, ruling that the witness was hostile pursuant to the definition in s 4(b) of the Act, Priestley J observed:

The clear application of the provision is to situations where a witness is giving evidence inconsistent with a statement made by that witness. If there is no such statement the provision is inapplicable. The focus then shifts to the *manner* in which the witness is giving the inconsistent evidence. In my judgment, although “manner” clearly covers such matters as the witness's demeanour, the word has a wider ambit. The nature of the inconsistencies is relevant to an assessment of manner. Relevant too would be the frequency of inconsistencies and their centrality to a party's case. (para 32)

In ***R v Carnachan* [2009] NZCA 196**, the CA discussed the common law rule that a party should not call a witness known to be hostile. Rejecting that view under the terms of the Evidence Act, the CA observed:

A hearsay statement is defined in s 4 of the Evidence Act as a statement made by a person other than a witness which is offered in evidence to prove the truth of its contents. Prior inconsistent statements of hostile witnesses are admissible pursuant to s 37(4)(a). Once the statutory test has been met, a prior inconsistent statement is admissible for the truth of its contents, rather than (as under the common law) simply as a tool to impugn the credibility of a witness. The rationale for the rule in *O'Brien* was to prevent a party knowingly putting itself in a position to put inadmissible hearsay statements before the Court. That rationale no longer exists ... In ***R v Vagaia* [2008] 2 NZLR 516 (HC)** Asher J concluded that there is now no general rule restricting the calling of witnesses known to be hostile. Asher J's decision was endorsed by this Court in ***R v Morgan* [2008] NZCA 537** at [31]. There is no reason for us not to follow this very recent decision of this Court. (paras 37-38)

See also ***R v Mata* [2009] NZCA 254**.

(e) *R v C* [2007] NZCA 439 (s 44 — Cross-x of complainant in sexual offence case regarding prior sexual experiences with persons other than the accused): In *R v C*, the defence sought to cross-examine the complainant in a sexual offence case regarding numerous and allegedly false allegations of sexual offending made by her against other men. Concluding that the veracity rule of s 37 “does not trump s 44” (para 22), the Court stated that the proposed cross-examination would need to pass the strict “direct relevance” test of s 44:

Where the evidence which an accused wishes to offer is clear evidence that a complainant has previously made a false complaint (a ‘clean case’ to use the words of *[R v] MacDonald* (CA166/04, 8/4/05)) at [36]), and the falsity goes to whether any sexual activity took place between the complainant and the defendant, leave to offer the evidence is likely to be granted under s 44 if it would otherwise be admissible under s 37. The sexual context in such cases will be seen as tangential to the issue of the veracity of the complainant and the focus will therefore be on s 37.

In other cases, where the truthfulness or falseness of the past complaints is in issue, the matter will fall to be determined (under s 44) in essentially the same way as it was under s 23A [of the Evidence Act 1908] (though bearing in mind that s 44 now prohibits absolutely evidence of reputation in sexual matters).

This is not a ‘clean case’. It is not manifestly clear that the complainant’s earlier complaints were false: in fact, they are far from demonstrably false. The sexual context of the proposed evidence is not merely tangential.

(VI) Hearsay (ss 16-22)

(a) R v Rajamani, HC Auckland, 5/6/08, CRI-2005-004-1002, Heath J (s 4 — definition of hearsay): In *Rajamani*, the Court affirmed the common law rule that a statement admitted as circumstantial evidence of a deceased person's state of mind was not offered for the "truth of its contents" and thus not hearsay under s 4 of the Evidence Act.

Similarly, in *R v Lenaghan* [2008] NZCA 123 (leave refused *Lenaghan v R* [2008] NZSC 53), the CA ruled that the label "H.A." on a package was not hearsay evidence when offered to prove that the package contained hypophosphorous acid. The Court concluded that the label "had an evidential significance other than hearsay and was therefore admissible under s 7 of the Act" (para 12). Underlying its reasoning, the Court focused on the evidential circumstances related to the defendant ordering the H.A. combined with the appearance of the label on the package. Based on these factors, the jury was entitled to conclude that the package did contain H.A. because they could have confidence in the chemical supply company's "underlying business system" that caused products to be labeled and delivered correctly when they were sold (para 13).

In *R v Holtham* [2008] 2 NZLR 758, Simon France J noted that, in order to qualify as "hearsay" under s 4 of the Act, the evidence must consist of a "statement" as defined in s 4. However, the s 4 definition of "statement" makes clear that it includes only *intended* assertions by a person and excludes *implied* assertions — whether oral or written. See *R v Vagaia and Ati (No 2)* (HC Auckland, 20/3/08, CRI-2006-092-16228, Asher J) para 19.

The issue in *Holtham* involved the prosecution's application to admit evidence of numerous unanswered text messages to the accused's cell phone. The Crown coupled that evidence with testimony from an expert police witness that the text messages used code words requesting the defendant to sell methamphetamine. Simon France J ruled that the text messages were not hearsay evidence subject to the s 18 reliability test for admission. Instead, the messages were implied assertions offered simply to "boost the inference that Mr Holtham was selling drugs" (para 25). The Court also examined a number of factors to conclude that evidence of the text messages was relevant under s 7 of the Act and not subject to exclusion for unfair prejudice under s 8 (para 31). See also *R v Hsu & Sun* (HC Auckland, 17/7/09, CRI 2006-004-26378, Chisholm J) (letter written to defendant Hsu by incarcerated co-participant in a drug selling ring admissible as non-hearsay evidence when its purpose was merely to show that Hsu had a keen interest in drug related activities).

(b) R v Frost [2008] NZCA 406 (s 18 – General admissibility of hearsay): In *Frost*, the CA held that the s 21 prohibition on a defendant offering his own hearsay statements without taking the witness stand forbid a defence psychiatric expert from referring to the defendant's statements regarding the circumstances leading up to and including the victim's murder. For further discussion of *Frost*, see III(c) above.

(c) *R v Alovili* (HC Auckland, 27/6/08, CRI-2007-404-162, Wylie J) (16(2) — definition of unavailability): In *Alovili*, the HC held that a prosecution witness was not “unavailable” under s 16(2)(c) merely because he was schizophrenic. Instead, Wylie J concluded:

There must be a high threshold before it can be said that a person is unavailable as a witness because of a mental condition. Mental condition can embrace a wide range of conditions from somebody who is simply distressed or depressed, to somebody who is in a catatonic stupor. The former would not render a person unavailable; the latter would clearly do so. Of itself mental condition does not suffice to render a person unavailable as a witness. (para 26)

...

The wording used in s 16(2) suggest that the assessment required to be made of a person's fitness or otherwise has to be made as at the date he or she has to be a witness. The section uses the words “if the person is unfit to be a witness”. The focus is on the person's fitness to be a witness at trial. The fact that a person may suffer consequences after giving evidence is not, in terms of the statutory wording, directly relevant to the issue of whether they are fit to give evidence at the time the evidence is given. That s 16(2) is concerned with fitness at the time of trial when the evidence is required to be given is borne out by the fact that the Court can make directions about the mode in which a witness suffering from, *inter alia*, psychiatric impairment gives evidence — s 103(3)(b). I accept that the fact that a person with a pre-existing mental condition could exacerbate that mental condition by giving evidence could, in certain circumstances, impact on a person's availability to be a witness. But such cases in my view are likely to be rare. In the present case Dr Simpson's evidence is not strong enough to compel to the conclusion that Michael Humm cannot give evidence because of his anticipated mental state. There is no certainty that Michael Humm will suffer a relapse, and there are strategies which can be put in place to ameliorate, albeit probably not totally negate, the consequences for Michael Humm of giving evidence. (para 30)

His Honour subsequently gave directions — pursuant to s 103(3)(b) of the Act (alternative ways of giving evidence) — that the witness testify from a remote location outside the courtroom via CCTV.

(d) *R v Kereopa*, HC Tauranga, 11/2/08, CRI-2007-087-41, Cooper J) (s 19 – admissibility of hearsay statement contained in business records): Under s 19 of the Evidence Act, a hearsay statement contained in a “business record” (defined in s 16(1)) is admissible without any further need for a judge to assess its reliability under s 18. However, in *Kereopa*, Cooper J refused to admit prosecution evidence consisting of a written hearsay statement made to the police by a subsequently deceased eyewitness to an assault. The Court recognised that the statement would be *prima facie* admissible as a police “business record” under s 19(1) (see *R v Hovell* [1986] 1 NZLR 500 (CA)). However, unconvinced of the reliability of the statement, Cooper J applied the general exclusionary rule of s 8:

[I]t would also be necessary to apply s 8. Here, I am in no doubt that the probative value of the evidence is outweighed by the risk that the evidence would have an unfairly prejudicial effect on the proceeding, bearing in mind the defendant's right to offer ‘an effective defence’. Those words, used in s 8(2) of the Act, seem both to emphasise and perhaps carry further the right to ‘present a defence’ set out in s 25(e) of the New Zealand Bill of Rights Act 1990.

Kereopa thus stands for the important proposition that statements of witnesses contained in police business records may be excluded as unreliable under s 8 of the Evidence Act even where they would clearly qualify for admissibility under s 19 and without having to

pass a reliability test.

(VII) Reliability/ Oppression/ Improperly Obtained Evidence (ss 28-30)

(a) R v Ullah [2008] NZCA 244 (ss 28, 29 & 30): In *Ullah*, the CA held that, while “the accused has the burden of raising an evidential foundation that a statement is unreliable, or made under oppression, or improperly obtained” — see, respectively, ss 28, 29 & 30 of the Evidence Act — the correct practice under s 344A of the Crimes Act 1961 is for the prosecution to be the first party to call evidence during a hearing held to determine the admissibility of material challenged by the defence under one of those sections.

(b) R v Hawea [2009] NZCA 127 (s 28 — Exclusion of unreliable statements): In *Hawea*, the CA discussed s 28 of the Act (“Exclusion of unreliable statements”):

Section 28 deals with the exclusion of unreliable statements. The section deals with a situation in which the prosecution offers or proposes to offer a statement of a defendant in evidence. If the defendant against whom the statement is offered raises an evidential foundation about the reliability of the statement (or the Judge raises the issue himself or herself), the Judge must exclude the statement, unless satisfied on the balance of probabilities that the circumstances in which it was made were not likely to have adversely affected its reliability: s 28(1) and (2). In determining whether to exclude the statement, the Judge is required to take account of specified personal characteristics of the person who made the statement: s 28(4) (para 23)

Unlike the Oppression Rule of s 29 (see s 29(3)), s 28 of the Act does not specifically refer to the truth of the statement as an irrelevant consideration in the judicial assessment of unreliability. However, the text of s 28 refers not to the *actual* reliability of the statement itself, but to whether “the *circumstances* in which the statement was made” were “likely to have adversely affected its reliability” (s 28(2)). An emphasis on such circumstances can be found in *R v Cameron [2007] NZCA 564* and *R v Jamieson* (HC Timaru, 10/9/08, CRI-2008-76-328, Pankhurst J). See also *R v Turaki [2009] NZCA 303, para 106*. Nonetheless, in *R v Cameron [2009] NZCA 87* — a second appeal in the 2007 *Cameron* case noted above — the Court of Appeal focused on the actual reliability of the defendant’s inculpatory admission to an undercover police officers, observing that “[r]eliability is concerned with whether what was said was sound” (para 35). See also *R v Patten* (HC Auckland, CRI 2006-004-3200, 8 April 2008, Harrison J).

In an earlier *Cameron* appeal, the CA also confirmed that 28(4)(d) makes a “threat, promise, or representation” by *any* person a matter which must be taken into account in assessing the reliability of a defendant’s statement. There is no longer a requirement, as there was under the common law test of voluntariness, that such threats or inducements had to be held out by a “person in authority”. *R v Cameron [2007] NZCA 564, para 66*.

(c) R v Spark [2008] NZCA 561 (s 29 – Exclusion of statements influenced by oppression): In *Spark*, the CA held that persistent requests by the police for information from a criminal suspect — coupled with the police involving members of the suspect’s family in asking him to provide the requested information — did not amount to

“oppressive, violent, inhuman, or degrading...treatment of the defendant” (s 29(5)(a)) rendering the suspect’s statement eligible for exclusion under s 29.

Similarly, in ***R v Hawea* [2009] NZCA 127**, the CA stated:

If an evidential foundation for the proposition that oppressive conduct has been used to extract the confession, the Crown must prove, beyond reasonable doubt, that the confession was obtained without such influence. A high threshold is set to meet the standard of oppressive conduct: s 29(5) speaks of “oppressive, violent, inhuman, or degrading conduct ... or treatment ...,” or a threat of such. In other words, no confessional statement will be admitted unless the Crown can exclude the reasonable possibility of oppressive conduct. The fact that the confessional statement is true is beside the point. The absence of a discretion to admit a reliable statement influenced by oppression demonstrates that the rule is designed to discourage oppressive interrogation techniques. (para 31)

Applying this high standard, the CA held that, while the detective interviewing Hawea had delivered a monologue to the defendant that was “intimidatory or belittling”, it fell “well short of the type of opprobrious conduct required to bring the oppression rule into play” (para 37). The Court observed that it was “important to confine s 29 to the type of illegitimate police conduct that is designed to extract a confession that may not be true or reliable” (para 37). See also ***R v Hanford* (HC Auckland, CRI 2007-057-1922, 24 July 2008, Priestly J)**; ***R v Patten* (HC Auckland, CRI 2006-004-3200, 8 April 2008, Harrison J)**.

In *Patten*, Harrison J noted that:

The infringing conduct must be the exercise of authority or power in a burdensome, harsh or unjust manner, which is of itself improper ... Its offensive characteristic is its inherently coercive tendency to overbear and thus adversely affect the truth of a statement. But the existence of oppression of itself is not determinative; its causal effect is critical. In the event that an evidential foundation of oppression is established, then the inquiry must focus on whether or not it influenced the statement. (para 29)

On this point, *Adams on Criminal Law* (Brookers OnLine edition) observes:

- It may often be difficult for the prosecution to counter the suggestion that the defendant’s statement was *influenced by* oppression if this test requires the prosecution to prove that there was no possibility of any causal link between any oppression and the defendant’s decision to make a statement. Proving a negative is always difficult particularly in an area such as causation. If a Judge determines that oppression was present, it will be rare that a finding of a breach of the Oppression Rule does not follow. (See *Adams on Criminal Law – Evidence*, EA29.03 at www.brookersonline.co.nz)

(d) *R v Barker* [2009] NZCA 4 (s 30 — Exclusion of improperly obtained evidence): In *Barker*, the CA noted that applications under s 30 of the Evidence Act to admit or exclude evidence in a criminal trial involved the “exercise of a discretion” pursuant to s 344A of the Crimes Act 1961 (para 5). As a result, leave to appeal to the CA under s 379A of the Crimes Act may not be readily granted. Citing ***R v Leonard* [2008] NZLR 218 (CA)** (setting out factors relevant to the granting of leave to appeal under s 379A), the Court of Appeal concluded that, where no error of law was alleged, leave would not

be granted “simply to seek to convince this Court to take a different view” of the balancing process undertaken by the trial judge pursuant to s 30(2).

In *R v Yeh* [2007] NZCA 580, the CA considered the statement in *R v Williams* [2007] 3 NZLR 207 (CA) that, for the purposes of reaching a conclusion under the s 30 balancing test, an offence will be considered serious under s 30(3)(d) when: (a) the sentencing starting point is four years or more imprisonment; or (b) when the offence involved a threat to public safety (*Williams* at para 135). Opting for a more nuanced approach, the Court stated:

There is a suggestion in the decision of Courtney J, and in the submissions on behalf of the respondent, that any offence likely to attract a sentence of imprisonment of less than four years is not serious. That is to overstate the effect of *Williams*. A lengthy term of imprisonment for the offending is a proper element to take into account in ascertaining seriousness of offending. But there are other factors to be considered. As can be noted from [135] of *Williams*, any thought that there should be a benign attitude to drug offences is incorrect. It is proper for a Court, in carrying out the balancing act and determining the seriousness of the offence, to take into account the pernicious nature of certain types of offending and the consequences arising from that. In relation to methamphetamine dealing that has frequently been commented upon. While the four-year period mentioned in *Williams* is a useful guideline, it should not be applied as a mathematical formula. The ascertainment of the level of seriousness of the offending requires a consideration of all surrounding circumstances, as *Williams* makes clear.

In *R v Lethborg* [2008] NZCA 236, the Court of Appeal noted that, in contrast with the pre-Evidence Act approach, s 30 abolished the concept of “standing” as a prerequisite to the defendant’s ability to claim that evidence offered against him had been improperly obtained by the police. Citing *R v Williams* [2007] 3 NZLR 207 (CA), the Court observed:

“Section 30(1)(a) states that the issue of improperly obtained evidence can be raised by ‘the defendant against whom the evidence is offered’. Section 30(5)(a) states that improperly obtained evidence includes evidence obtained in breach of any enactment or rule of law by a person to whom s 3 of the Bill of Rights applies. Neither subsection requires that the defendant personally be the victim of any breach. However, the degree of connection of a defendant to the property searched or the objects seized would remain relevant to the determination of the seriousness of the breach (see s 30(3)(a) of the Evidence Act and below at para [124]).” [*Williams* at para 78]

We think that s 30(5)(a) is not to be read down as confined only to breaches of the rights of the defendant. That said, we do not wish to give any encouragement to arguments of the sort relied on by the appellant in this case nor to defence counsel trawling through the details of police investigations with a view to uncovering possible irregularities which did not involve the defendant.

See also *R v Maney* (HC Rotorua, 27/8/08, CRI-2006-063-004598, Gendall J).

In *R v Hsu & Sun* [2008] NZCA 469, the CA accepted the holding of *Lethborg* “in principle” (para 29), but added:

Despite this, whether or not there has been a breach of either of the respondents’ NZBORA rights is relevant to the balancing process under s 30. The focus of granting a remedy where there has

been a breach of a person's NZBORA rights is to vindicate the breach, not to punish or discipline those responsible for it: see, for example, *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA), especially per Richardson J at 427 — 428. Where no privacy, proprietary or other relevant interest has been infringed in respect of a particular person, there is no need for vindication of that person's rights. In such cases, the focus of the enquiry is, as the Court in *Williams* indicated, on whether there has been unfairness or an abuse of process such as to justify the court in utilising its jurisdiction to exclude evidence. (para 30)

...
[E]xclusion of evidence to punish or discipline the police for breaching rights is not a model that has been adopted in New Zealand. In any event, there is no question of bad faith on the part of the police in this case, nor is there anything that might be characterised as an abuse of process... (para 36)

In *R v Tocker* [2009] NZCA 165 — a case involving charges of robbery and intentionally damaging a motor vehicle by fire — the CA accepted that, when taking an initial statement from a criminal suspect, a police breach of the s 30(6) Practice Note or s 23 of the Bill of Rights could taint a subsequently obtained statement despite the fact that proper procedures had later been followed. See *R v Williams* [2007] 3 NZLR 207 (CA); *R v Alo* [2008] 1 NZLR 168 (CA). Citing *Alo*, the Court observed:

This Court explained in *R v Ene-Louis Alo*:

“[21] The reason why post-caution admissions are excluded where there has been an earlier breach of the Judges' Rules is because once the first admission is made, the suspect becomes committed to the interview process, including the admission which has already been made. This appears clearly enough from *R v Williams* CA101/00 31 July 2000 at [28] and *R v Johansen* CA487/99 2 December 1999 at [25] ... ”

Whether the suspect has become committed to the interview process is, of course, fact specific. We turn therefore to the facts of this case.

The Court in *Tocker* concluded that the failure to caution the accused and advise him of his rights under the NZBOR during the taking of the first statement did not taint the subsequent interviewing process at which the second statement was made. Focussing on the fact specific nature of the enquiry, the Court noted:

Before the notebook interview [the first interview] began the accused had admitted that he had gone down Caledonian Road at about 9pm to pick up his car. In other words, he placed himself in the vicinity of the Subaru car about the time it was set on fire. That admission had been made with full knowledge that the police were investigating the two robberies and the burning out of what the police believed was the “offending vehicle”. Thus, in the overall context, the admission was of some significance.

If the accused was committed to the interview process (and we doubt that this was the case) it must have been because of his admission prior to the notebook interview rather than any admissions made during the course of the notebook interview. We agree with Judge Holderness that although the written statement was provided immediately after the notebook interview, that interview did not provide the detective with any advantage over the accused that was unfairly or improperly used when the written statement was being taken. We do not accept Mr Norcross' submission that it would be artificial to conclude that the written statement was unaffected by the notebook interview. In all the circumstances the written statement arose from a new phase in the interview process which did not attempt to build on the earlier notebook interview phase.

When giving evidence before Judge Holderness the accused acknowledged that he had understood his rights after he had been cautioned and given his Bill of Rights following the notebook interview. He also acknowledged that, having been given his rights, he was asked whether he wished to have a video interview or make a formal written statement, and that he elected to make a written statement to “help clarify”. Significantly there was no suggestion that he felt compelled to make the written statement or that he was in any way confused about his rights. We also note that the written statement is largely exculpatory.

Our conclusion is that Judge Holderness was right when he concluded that the notebook interview did not taint the written statement. It is admissible accordingly.

When considering whether a statement taken by police has been obtained unfairly under s 30(5)(c), s 30(6) requires that the guidelines set out in the s 30(6) Practice Note be taken into consideration by the judge. However, even if those guidelines have been breached, a finding of unfairness is not inevitably required. Moreover, like all improperly obtained evidence, the admissibility of statements obtained unfairly must still be determined by application of the s 30(2) proportionality-balancing test.

Discussing these issues, in *R v Hawea* [2009] NZCA 127, the CA observed:

A nice question is whether a confessional statement obtained in breach of the Chief Justice’s *Practice Note* amounts to a breach of an enactment or rule of law by a police officer (s 30(5)(a)) or should be treated as having been obtained ‘unfairly’ (s 30(5)(c)). In the context of this particular case, the breach must fall within one or other of those provisions. We leave open, for determination in a more appropriate case, which of those two provisions applies and whether breach of cl 5 of the *Practice Note* [preferring statement evidence to be videotaped (if possible) or recorded permanently on audio tape or in writing with the interviewee being given the opportunity to review the audio tape or amend a written record before signing it as correct] ought to be given less weight on a s 30(3) balancing process than a more significant breach, for example of the need to advise a suspect in respect of rights stemming from the Bill of Rights.

For an extensive discussion of the potential applicability of the s 30(6) Practice Note to the questioning of young persons by police under the provisions of the Children, Young Persons and their Families Act 1989 (“the CYPFA”), see *R v Z* [2008] 3 NZLR 342 (CA).

With respect to para 1 of the Practice Note, the Court suggested in *R v Z* that it would be breached if police intimated to parents that a young person had to submit to police questioning under the CYPFA “and the only choice was whether that should be done at the police station or at home” (para 59).

With respect to para 2 of the Practice Note, the CA observed:

Under para 2 of [the] Practice Note, the police are now required to advise that legal advice is available without charge under the PDLA Scheme. Such advice must be given where the police have sufficient evidence to charge a person with an offence or whenever the police question a person in custody. The Practice Note obviously applies to children and young persons as well as adults. We leave open whether the requirement to give an explanation as to the PDLA scheme would be imported into s 215 of the CYPFA from 1 August 2007 [the effective date of the Note]. We also leave open whether such advice should be given in all cases where a child is being questioned in respect of the commission of an offence rather than being confined (as is the case

under the Practice Note) to cases where there is sufficient evidence to charge that child or young person or where the child or young person is in custody. (para 44)

With respect to para 3 of the Practice Note, the CA noted the pre-Evidence Act position that, when interviewing a criminal suspect, there is nothing objectionable about police “testing explanations offered by questions in the nature of cross-examination ... provided the process is not oppressive, overbearing or unfair” (para 100). However, in *R v Z*, the CA left open the question (para 103) whether that legal test still applies under para 3 of the Practice Note, which states categorically that “[q]uestions of a person in custody or in respect of whom there is sufficient evidence to lay a charge *must not* amount to cross-examination” (emphasis added).

The Court in *R v Z* also assumed, without explicitly deciding the point, that a police breach of questioning protocols for young persons under s 215 of the CYPFA would be subject to the specific exclusionary rule contained in s 221 of that Act. Exclusion would therefore take place without recourse to the balancing exercise contained in s 30(2) of the Evidence Act 2006 (para 41).

Paragraph 4 of the Practice Note was considered by the HC in *R v Witoko (HC Rotorua, 3/3/09, CRI-2007-063-5128, Rodney Hansen J)*. It states:

4. Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.

In *Witoko*, Rodney Hansen J observed:

[Para 4 of the Practice Note] applies when a person is being questioned *about* statements made by others or about other evidence. Mr Witoko was not being questioned about the statements of others. He was being asked about matters which had been addressed in statements made by others. That is a very different thing. It is a perfectly legitimate tactic for police to question a witness or suspect without divulging information in their possession or the source of that information. When, later in the interview, Detective van Kempen disclosed that Mr Hohepa's brother had made a statement, he fairly put to Mr Witoko what the witness had said.

There was nothing unfair or improper in the way Mr Witoko was questioned. (paras 23-24)

Finally, in a postscript to their March 2009 decision in *Gallichan v Police [2009] NZCA 79*, the CA critiqued the new police “rights” form ostensibly drafted to reflect the requirements of the s 30(6) Practice Note:

Postscript: the new police “rights” form

We said above at [9] we intended to comment on the change in police practice since the introduction of the Chief Justice's Practice Note...We do think there is some merit in Mr Mohamed's concern about the way in which the police have recently altered their “rights” form, at the same time emphasising, however, that the new form does comply with the Practice Note.

Prior to the Practice Note, police practice as to how s 23(1)(b) rights were conveyed to motorists varied around the country. One form that was in use conveyed rights in the following language:

“You are advised that you have the right to consult and instruct a lawyer without delay and to carry out that right in privacy. You also have the right to refrain from making a statement.

These rights will continue throughout the breath/blood alcohol procedures. A telephone will be made available for that purpose as soon as practicable and before you undergo an evidential breath test, blood test or both. You will have a reasonable time to consult and instruct a lawyer from the time a telephone is made available to you. If you do not have your own lawyer a list will be provided of on call lawyers for you to choose from. These lawyers are available to give advice free of charge. ”

The new post-Practice Note form conveys “rights” information in slightly different terms:

“You are advised that you have been detained for the carrying out of breath or blood test procedures.

You have the right to refrain from making a statement and to remain silent.

You have the right to consult and instruct a lawyer without delay and in private. *This right may be exercised without charge under the Police Detention Legal Assistance Scheme.* You may also exercise this right before deciding to answer any questions that may be put to you.

Anything said by you will be recorded and may be given in evidence.

These rights will continue throughout the breath/blood alcohol procedures. If you wish to consult and instruct a lawyer a telephone will be made available for that purpose as soon as practicable and before you undergo an evidential breath test, blood test or both. You will have a reasonable time to consult and instruct a lawyer from the time a telephone is made available to you. ”

For the purposes of discussion, we have italicised the sentence which Mr Mohamed criticises. He submits this sentence is less clear than the corresponding sentences in the earlier form in three respects:

(a) The earlier form made it clear that “lawyers [would] give advice free of charge” ie the motorist would not have to pay. The new form, on the other hand, talks of exercising rights “without charge under the Police Detention Legal Assistance Scheme”. This omits the crucial word “free”. Further, “charge” is a word of more than one meaning. Some, particularly intoxicated motorists, might interpret this sentence as meaning that the right can be exercised *prior to a charge being laid* under the Police Detention Legal Assistance Scheme. Mr Mohamed's point was that most people would have no idea what the Police Detention Legal Assistance Scheme was; it is not immediately obvious to lay people it this is a legal aid fund administered not by the police (as the name suggests) but rather by the Legal Services Agency. Some might not realise therefore that the advice was free.

(b) The new form omits the helpful information that the police hold a list of on call lawyers from which the motorist can choose.

(c) Reference to the Police Detention Legal Assistance Scheme is potentially misleading, as it may suggest to some motorists that the lawyers involved in the scheme are associated with the police, and are not independent lawyers.

While we are not to be taken as accepting all of Mr Mohamed's concerns, we think nonetheless the old form was arguably clearer than the new form in conveying:

(a) That if the motorist does not have his or her own lawyer, the police hold a list of on call lawyers from which the motorist can choose; and

(b) Those lawyers are available and will give free advice.

We note Judge O'Driscoll also considered the drafting of the new form could be improved: at [18]-[20] and [23]. He also considered that, if reference to the Police Detention Legal Assistance Scheme was to continue, the Legal Services Agency should consider seeking to have the name of the scheme changed so as to remove the third concern Mr Mohamed articulated: at [29]. We agree with all of Judge O'Driscoll's comments. (We note, incidentally, that Judge Mathers did also at sentencing: at [1]. And so did Judge David Harvey in *Police v Broad* DC MAN CRI2008-092-002201 19 June 2008 at [36] and [45].) Of course, the name of the scheme does not need changing if the scheme itself is not mentioned in the "rights" information. In our view, it does not need to be mentioned. It is simpler if the police merely advise they hold a list of lawyers available to give free advice. We appreciate the Practice Note refers to the Police Detention Legal Assistance Scheme, but that was simply to identify which scheme the Chief Justice had in mind. The Practice Note does not require that the scheme under which free advice is provided be specifically mentioned. What is important is the substance and intelligibility of the advice, not any specific form of words.

We direct the registrar to send a copy of this judgment to the Commissioner of Police for his consideration. We do not expect any response from him. (paras 22-28)

(VII) Visual Identification Evidence/ Judicial Warnings (ss 45, 122, 126, 127)

(a) *R v Stewart* [2008] NZCA 429 (s 122 — Judicial directions about evidence that may be unreliable): In *Stewart*, the CA dealt with a case where the defendant was convicted of historical sex offences occurring 40 years earlier. In considering the nature and scope of the warning given by the judge to the jury under s 122, the CA observed:

Parliament stated, in s 127, that a judge may tell the jury that there may be good reasons for delay or failure to make a complaint. In s 122 it has left to the trial judge the exercise of judgment whether to give a warning ...

But implicit in the s 122 authority is the assessment of whether to give a warning and, if so, what intensity of warning to give. As to the historical nature of the charges, it cannot be said that the decision to give the less emphatic warning was itself an error of law. (paras 96-98)

...
Had the evidence of the complainant stood alone we should have regarded the warning as inadequate in the light of the defence contentions, which included fantasy as well as malice and greed ... Here, however, we have held that the evidence of A is admissible as propensity evidence, that of B as directly relevant to the complainant's alleged relationship with the appellant, and that of C and D is admissible as evidence of the truth of the allegations made to them by the complainant. There is also the appellant's admission of the single episode of sexual intercourse with the complainant when she was of an age to consent. We have said (at [24]) that the stronger the Crown case in respect of propensity evidence the higher the prospect of securing admission of the evidence. We consider that the same may be said of a s 122 warning: the greater the support of other evidence, the less the need for such warning. The Judge could have given a stronger warning, dealing with both limbs of s 122(1). But there is no basis for apprehension that the witnesses experienced any real difficulty in remembering the essential points of what must, on their evidence, have been memorable events. It is also to be recalled that warnings based on s 122(2)(e) and s 127 will, in many cases, cancel each other out. Considering the nature of the warning given, in the light of the whole of the evidence, we are not satisfied that there has been

miscarriage in this respect (para 122)

In *R v Ngarino* [2009] NZCA 200, the CA considered a proceeding where evidence of a confession allegedly made by the accused was given by a jailhouse informant who contacted the police immediately following the informant's release from prison and pending his (the informant's) sentencing on another matter. Ruling that the s 122 warning given by the trial judge was inadequate in the circumstances, a majority of the CA stated:

When evidence falls within one of the categories in s 122(2), the Judge must consider whether to give a warning. Accordingly, they provide some statutory guidance as to the circumstances in which a warning should be given. Mr Wallace's evidence fell squarely within subpara (d) and, on the defence case, also came within subpara (c). Although not the only evidence implicating Mr Ngarino, and so not falling within subpara (b), the evidence was nevertheless crucial to the Crown case. There were therefore compelling reasons why a warning should have been given.

...

Evidence of a confession by one prisoner to another when both are incarcerated is generally to be received with suspicion because of the risk that the evidence may be concocted for the purpose of obtaining favourable treatment ...

In directing a jury of the need to treat such evidence with caution, a Judge must necessarily point to the reasons why caution is required. It cannot be assumed that a jury will appreciate the reasons why a jailhouse confession must be approached with particular caution and, without an awareness of what those reasons might be, the jury is poorly placed to evaluate the evidence.

...

In our view, a warning under s 122 is unlikely to be effective if it does not explain to the jury the reasons why the evidence may be unreliable. The Judge should have referred to all the reasons why Mr Wallace might have been motivated to concoct his evidence. This would have included reference to the motive suggested by counsel but should also have alerted the jury to the possibility that Mr Wallace might have been seeking to achieve a personal advantage. The fact that, through defence counsel's omission, the Judge could not refer to any particular benefit, was no reason not to mention the possibility. The reasons which may motivate a prisoner to lie about a fellow prisoner's confession will not always be readily identifiable...

...

The prospect of reward does not have to be immediate to be operative. As this case shows, assistance to the authorities can work to the advantage of a recidivist offender on sentence for later offending...

...

The Judge should also have reminded the jury of the importance of taking into account evidence of Mr Wallace's bad character to the extent that it was disclosed. It would also have been appropriate to remind the jury that, among the reasons why the evidence should be approached with caution, is the absence of safeguards against fabrication which apply when confessions are made to the police or others in authority. (paras 40-49)

(b) *R v Turaki* [2009] NZCA 310/ *R v Edmonds & Keil* [2009] NZCA 303 (ss 45, 126 — visual identification evidence/ judicial warnings about identification evidence): In *Turaki* and *Edmonds*, the same three judge panel of the CA (Glazebrook, Potter & Asher JJ) took the opportunity presented by each case to deal with various issues related to: (a) the definition and admissibility of visual identification evidence under s 45 of the Evidence Act; and (b) the requirement of judicial warnings with respect to visual identification evidence under s 126 of the Act. The following is a summary of the issues canvassed in each decision as provided by the Court at the conclusion of each judgment.

(1) *Turaki* (per Glazebrook J for the Court) (paras 83-94):

Summary – identification directions

[83] In this section we provide a summary of the different types of evidence we have talked about in this judgment and their relationship to the mandatory s 126 statutory warnings.

Visual identification evidence

[84] Visual identification evidence is where a witness identifies a particular person as being at or near the scene of an offence, such identification being based wholly or partly on what that witness saw: see s 4 of the Evidence Act.

[85] Visual identification evidence also encompasses evidence asserting that a person was at or near a place where an act constituting circumstantial evidence of the commission of an offence was done. For example, this would include an assertion that a person was seen fleeing the scene of a crime. However, for brevity we refer, in the remainder of this summary, only to evidence of a person being at or near the scene of the offence.

Recognition evidence

[86] Recognition evidence is where the witness identifies a person as being at or near the scene of an offence through prior acquaintance between that person and the witness. This is a form of identification evidence and falls within the wide scope of the s 4 definition of visual identification evidence.

Full s 126 warning required

[87] Where evidence of visual identification is given, and the case against the defendant depends wholly or substantially on the correctness of that evidence, a full s 126 warning, including all the mandatory elements in s 126(2), must be given. This also applies to recognition evidence. Not to give a full warning will constitute an error of law.

[88] The mandatory warning in s 126(2)(a) that a mistaken identification can result in a serious miscarriage of justice may seem inappropriate where the evidence is recognition evidence that is of an exceptionally good quality, as outlined by Lord Lane CJ in *Bentley*: see above at [78]. However, even in such circumstances a full s 126 warning is required .

[89] If a full s 126 warning is not given in the situations where it is required, the Court will be required to determine, in accordance with the proviso to s 385(1) of the Crimes Act, whether the failure to give such a warning has resulted in a miscarriage of justice in that case. As the differing results in *Uasi* and *Hohepa* illustrate, whether the proviso will be applied will be dependent on the particular circumstances of each case. Accordingly, trial judges should ensure that a full s 126 warning, which, of course, includes the s 126(2)(a) direction, is given in each case where s 126 is engaged.

Contents of s 126 warning

[90] A s 126 warning must be tailored to the circumstances of the case. This means that a trial judge should include, as appropriate, directions beyond those prescribed by s 126(2). In this regard, a trial judge should consider whether any of the additional warnings suggested by the Law Commission in *New Zealand Law Commission Evidence Code and Commentary* (NZLC R55-Volume 2 1999) at C398, are appropriate for the particular circumstances of the case. These included warnings about:

(a) The ways in which events surrounding the witness's observation of the defendant may have influenced the quality of the identification evidence (e.g., time of observation, lighting, distance of witness from offender, weather conditions, the stress inherent in the situation, whether violence was used, or whether a

weapon was involved);

(b) The ways in which any factors particular to the individual witness may have influenced the quality of the identification evidence (e.g., poor eyesight or hearing, or bias)

(c) The fact that, if the witness and defendant are of a different race/ethnicity, the identification may be less reliable;

(d) The greater the period of time between the sighting and the identification, the greater the likely deterioration of memory;

[91] The suggested warnings outlined in Turnbull, discussed above at [45], could also provide guidance as to the factors that could be included, as appropriate, by a trial judge in a s 126 warning.

Observation evidence

[92] Observation evidence, on the other hand, is evidence about the actions of a person, including evidence of an offender's alleged participation in the offence. Observation evidence differs from identification evidence, because it is not the presence of the offender at the scene of the offence that is in dispute, but rather his or her role in the offending.

[93] Where the accused accepts that he or she was present at or near the scene of the offending and the only issue in the trial is whether or not the accused participated in the offence, then identification will be not an issue at trial. It will only be the observation evidence of the witness (of the alleged actions of the accused) that is challenged. In such circumstances, s 126 has no application. Of course it may nevertheless be appropriate for the judge to direct the jury on some of the matters set out above at [90] – [91].

Resemblance evidence

[94] A distinction must also be drawn between “visual identification evidence” and resemblance evidence. Resemblance evidence is a form of circumstantial evidence and refers to evidence that a person shares certain features or attributes in common with the accused. Description evidence, by which an eyewitness describes the physical characteristics of an individual involved in an offence, thus falls within the scope of resemblance evidence. Section 126 has no application to description or resemblance evidence, although again it may be appropriate for the judge to direct the jury on some of the matters set out above at [90] – [91].

(2) *Edmonds & Keil* (per Glazebrook J for the Court) (paras 129-145):

The legal position

[129] Under s 45, the formal identification procedure described in s 45(3) must be conducted, unless there is a good reason not to do so. Section 45(4) sets out a number of circumstances which constitute good reasons.

[130] Under s 45(4)(d), a good reason for not following a formal procedure is that no officer involved could reasonably anticipate that identification would be an issue at trial.

[131] There is a distinction between identification evidence (whether or not someone was present at the scene) and observation evidence (what the person was observed to have been doing). In some circumstances, officers may reasonably believe that, while the observation evidence would be challenged, identification (ie presence at the scene) would not be: see above at [42] - [43].

[132] Under s 45(4)(e), a good reason not to conduct a formal identification procedure is that the

identification occurred soon after the offence was reported and in the course of the initial police investigation.

[133] While the original Law Commission proposal was for this exception to apply only where the identification took place soon after the commission of the offence took place, this was not carried through into the legislation. Under s 45(4)(e), time runs from the time the offence is reported: see above at [50].

[134] Section 45(4) does not provide an exhaustive list of good reasons for not following a formal procedure. The proposed wording of the Law Commission's draft code, intended to render the list provided by the subsection exhaustive, did not survive the legislative process: see above at [64].

[135] A further good reason for not following a formal identification procedure is that the witness recognised the accused, unless a formal identification procedure would serve a useful purpose, such as where the prior acquaintance is very slight: see above at [73].

[136] If a formal procedure was not followed without good reason, s 45(2) requires the Crown to prove beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

[137] Accordingly, the Crown must prove under s 45(2) is that the identification evidence is such that the jury can rely on it. The threshold is a high one and the judge must be sure the evidence is sufficiently reliable to be used by the jury.

[138] Reliability is not measured solely by reference to the degree of compliance with the formal identification procedures under s 45(3), although that will be one relevant factor: see above at [100].

[139] While the phrase "circumstances of the identification" in s 45(2) should not be construed narrowly, the wording does not extend to allow consideration of all the other evidence. The phrase does extend to both external (e.g. lighting, distance) and internal (eg state of sobriety) factors relating to the witness and to the circumstances of any identification procedure followed: see above at [112]

[140] An eyewitness's confidence is one factor that can be used to gauge reliability, as long as it is measured at the time the identification evidence is obtained: see above at [120].

...

Identification warning under s 126

[145] It is likely that identification will remain an issue at trial, even bearing in mind the distinction between identification and observation evidence (see *R v Turaki* at [65] - [73]). A full s 126 warning should be given by the judge, including the mandatory matters in s 126(2)(a) and (b). Section 126(2)(c) is inapplicable as Mr Biddle is the sole identification witness. As noted in *R v Turaki* at [90], a s 126 warning should include, as appropriate, directions beyond those prescribed by s 126(2), including, for example, a warning about the ways in which events surrounding the witness's observation of the defendant, or the ways in which any factors particular to the individual witness, may have influenced the quality of the identification evidence.