GOING "STRAIGHT TO BASICS": THE ROLE OF LORD COOKE IN REFORMING THE RULE AGAINST HEARSAY – FROM *BAKER* TO THE EVIDENCE ACT 2006

Elisabeth McDonald*

In April of 1989, Cooke P, as he then was, proposed a test for the admissibility of oral hearsay (the fearful remarks of a woman later killed by her estranged husband) in a criminal trial. This common law admissibility test, focussing on the reliability of the statement (while implicitly acknowledging that the maker of the statement was not "available" to testify), was further developed in the Court of Appeal's decision in Bain *(1996), and confirmed to have broad application in* Manase *(2001). The reliability and unavailability test has now become the admissibility test for hearsay evidence in the Evidence Act 2006. In this paper written in his honour, the author discusses the legacy of Lord Cooke in the 21st century liberalisation of the rule against hearsay.*

I INTRODUCTION

In June of 1989 the Law Commission published *Hearsay Evidence – an Options Paper Prepared for the Law Commission by an Advisory Committee on Evidence Law*.[1] As a consequence of this work, in August of the same year the Minister of Justice asked the Law Commission to make recommendations for the reform of the whole of the law of evidence. The purpose of the reference was "[t]o make the law of evidence as clear, simple and accessible as is practicable".[2] This call for simplicity echoed the words of the then President of the Court of Appeal in *R v Baker* earlier in 1989:[3]

* Associate Professor, Faculty of Law, Victoria University of Wellington. I thank my colleague, Dr Yvette Tinsley, for her helpful comments on an earlier draft. This article was submitted for publication in February 2007, prior to the Evidence Act 2006 coming into force.

1 *Hearsay Evidence - an Options Paper prepared for the Law Commission by an Advisory Committee on Evidence Law* (NZLC PP10, Wellington, 1989) [Hearsay Evidence].

2 *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington 1996) ix.

3 *R v Baker* [1989] 1 NZLR 738, 741 (CA) Cooke P (emphasis added).

> At least in a case such as the present it may be more helpful to go *straight to basics* and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards.

Although the Law Commission stated that *Baker* placed a broad interpretation "on the exception to the hearsay rule in respect of declarations [only] as to state of mind",[4] it is now widely accepted that the words used by Cooke P in *Baker* were the first articulation of a general discretion to admit hearsay evidence.[5] This general discretion was later recognised in *Bain*,[6] a decision of the Court of Appeal comprising Cooke P, Gault and Thomas JJ, and more fully developed in 2001 by the Court in *R v Manase*.[7] The existence and scope of the general (or residual) discretion to admit hearsay evidence not otherwise admissible under any statutory regime or specific common law rule has also been reconfirmed by the Court of Appeal on a number of occasions since *Manase*.[8]

In the years between *Baker* and *Manase*, the Law Commission published a discussion paper, *Evidence Law: Hearsay* in 1991,[9] as well as *Evidence: Reform of the Law*,[10] its final report on the evidence project in 1999, which was accompanied by a draft Code and commentary.[11] The Commission's work provided the basis of the Evidence Act 2006, which came into force on 1 August 2007, some 17 years after the decision in *Baker* and the Law Commission's first work on the reform of the rule against hearsay.

In this piece, I will consider the significance of the words of Cooke P in *Baker* in terms of their effect on the development of both the common law and the legislative reform contained in sections 16-22 of the Evidence Act 2006. In doing so, I will examine the meaning of the phrases used by Cooke P in *Baker* – especially "whether in the particular circumstances it is reasonably safe … to

---

4 *Evidence Law: Principles for Reform* (NZLC PP13, Wellington, 1991) para 59.

5 *R v GDA* (1 August 2006) HC AKL CRI 2005-004-017305, para 19 Simon France J; *R v Manase* [2001] 2 NZLR 197, para 20 (CA) Tipping J for the Court; Sir Robin Cooke (ed) *Laws of New Zealand* (Butterworths, Wellington, 1992) para 53A, fn 1; *Nicholls v Nicholls* [1996] NZFLR 311, 315; *R v Ria* [1994] 2 NZLR 212, 217 (HC) Fisher J. Note, however, the comments in JB Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 4th Student Edition, 2005) that on one reading of *Sangkamyon* the decision of Richardson J could be viewed as "the precursor to the revolutionary approach to hearsay advocated by Cooke P in *Baker*." Chapter 2.9.04 (5).

6 *R v Bain* [1996] 1 NZLR 129 (CA).

7 *R v Manase* [2001] 2 NZLR 197 (CA).

8 See for example: *R v Howse* [2003] 3 NZLR 767 (CA); *R v Hamer* [2003] 3 NZLR 757 (CA); *R v M-T* [2003] 1 NZLR 63 (CA).

9 *Evidence Law: Hearsay* (NZLC PP15, Wellington, 1991).

10 *Evidence: Reform of the Law* (NZLC R 55, Volume 1, Wellington, 1999).

11 *Evidence: Evidence Code and Commentary* (NZLC R 55, Volume 2, Wellington, 1999)

admit the evidence"[12] and "the dangers against which the hearsay rule guards"[13] – and discuss the interpretation and application of these phrases in the case law and the legislation, with a view to determining to what extent the exceptions in the Evidence Act 2006 are consistent with the "straight to basics" approach advocated by Cooke P.

II THE SIGNIFICANCE OF COOKE P'S JUDGMENT IN BAKER*: THE FIRST ARTICULATION OF A GENERAL DISCRETION TO ADMIT HEARSAY EVIDENCE*

The Evidence Amendment Act (No 2) 1980 clarified and liberalised the hearsay rule, especially with regard to documentary hearsay and hearsay offered in civil proceedings. The reform retained a number of the limitations on the admission of oral hearsay in criminal proceedings,[14] so it was in this area that the common law remained significant as a potential way to avoid unfairness. It is therefore unsurprising that the case now viewed as the first articulation of a general discretion to admit hearsay evidence concerned oral statements made by a homicide victim.

The out-of-court statements at issue in *Baker* were comments made by the estranged wife of the accused to her friends and members of her family during the four weeks leading up to her death. She was found dead in the bedroom of her flat having been shot through the forehead after suffering a severe blow to her head. Tapes were tied to a bedpost and cords were found in the bed. Her husband, later charged with her rape and murder, was found on the bed, also with a gunshot wound to his head. He claimed that he went to her house with a rifle early that morning, at her request, in order to shoot stray cats. According to him, she then suggested they had intercourse and asked to be tied to the bed. After having sex, he untied her and she picked up the rifle and shot him and then herself.

The statements made by the deceased to her sister and her friends indicated, according to the Crown, that she was so frightened of her ex-husband that it was most unlikely she would have asked him around to shoot stray cats. The Court of Appeal stated:[15]

> Probably the most important evidence is that of a friend who spoke to the deceased the day before her death. This witness would say that after 4pm the deceased told her of a meeting with the accused earlier that afternoon, and that the deceased said that she was scared of him because of the way in which he was threatening her and she did not know what he was capable of.

---

12 *Baker*, above n 3, 741 Cooke P.

13 Ibid, 741 Cooke P.

14 As was intended by the Torts and General Law Reform Committee: see *R v Hovell* [1986] 1 NZLR 500, 507 (CA) McMullin J.

15 *Baker*, above n 3, 740 Cooke P.

These out-of-court statements made by the deceased should have been categorised as hearsay if they were being offered to prove their truth. Pursuant to the decision of the House of Lords in *R v Blastand*[16] however, statements made to a witness by a third party:[17]

> are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind … of the maker of the statement … when the state of mind evidenced by the statement is…of direct and immediate relevance to an issue which arises at the trial.

In considering the application of *Blastand* to the facts of *Baker*, Cooke P stated:[18]

> [I]n the present case it will be in issue at trial whether the deceased telephoned her husband and asked him to come around with a firearm, but in the natural and ordinary use of that language I have reservations about whether her expressed fear of him earlier that day and in the preceding weeks is *directly* or *immediately* relevant to that issue.

Not being satisfied that the statements could be admitted as evidence "solely to prove the state of mind ... of the maker",[19] Cooke P went on to find the evidence was:[20]

> of such cogent indirect bearing on that issue that in my opinion it ought clearly to be admitted. Possibly a liberal interpretation of Lord Bridge's words [from *Blastand*] would allow the evidence; but if not I would be constrained not to favour adopting the test in New Zealand as being too strict.

Following discussion of the difficulties of the hearsay rule, Cooke P went on to make the following influential statement:[21]

> *At least in a case such as the present* it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially the whole question is one of degree, which indeed is partly what Lord Bridge said in his second statement of principle. If the evidence is admitted the Judge may and where the facts so require should advise the jury to consider carefully both whether they are satisfied that the witness can be relied on as accurately reporting the statement and whether the maker of the statement may have exaggerated or spoken loosely or in some cases even lied. The fact that they have not had the advantage of seeing that person in the witness box

---

16 *R v Blastand* [1986] AC 41.

17 Ibid, 54.

18 *Baker*, above n 3, 741.

19 As required by the test in *Blastand*, above n 14, 54.

20 *Baker*, above n 3, 741.

21 Ibid, 741 (emphasis added).

> and that he or she has not been tested on oath on cross-examination can likewise be underlined by the Judge as far as necessary.

In this passage Cooke P proposed that the evidence offered in the case should be subject to a test of sufficient reliability. Although there is some indication later in his judgment that the evidence was offered as being relevant to the deceased's state of mind,[22] the statement is broad in its tenor – and intentionally so presumably, given the use of the introductory words. Cooke P also talked expressly of the "dangers against which the hearsay rule guards", therefore categorising the statements as hearsay as opposed to only being offered to prove "state of mind". Further, the reference to the fact that the jury should be reminded that witness has not been tested "on oath and in cross-examination" is a clear acknowledgement of the dangers involved in offering hearsay evidence, such as the statements at issue in *Baker*. Further, Cooke P went on to apply the reliability test to the statements, holding that they had "considerable relevance and cogency as to her apparent attitude to the accused. The risk of fabrication by the deceased, an intention by her to mislead the persons to whom she was speaking does not seem high."[23]

Most current commentary on the test proposed by Cooke P in *Baker* accepts that its application is not limited to admissibility of state of mind evidence – given that the statements offered in *Baker* were in fact hearsay, being offered to prove their truth. The relevance of the deceased's words that she was scared of her ex-husband was to imply that she would not have invited him around to shoot cats – that is, it would never have been her intention to do so. However, one can only logically infer that lack of intention if she really was scared of her husband because he had threatened her – that is, the statements about his threats proved her fear. Put this way, the statements had relevance to the case only if they were being offered for their truth. In the words of the authors of *Cross on Evidence*:[24]

> It was unclear whether this revolutionary approach should be construed as limited to a case like *Baker* (ie to state-of-mind evidence). The actual ruling travelled outside that category because it permitted evidence to be adduced of the *reason* for the state of mind, ie the accused's threats to the deceased – a classic example of the dangerous type of evidence which the rule at its best was concerned to exclude.

Although "state of mind" evidence is properly seen as falling outside the rule against hearsay if it is not being offered to the truth of the statement, rather only to establish the maker's state of mind,[25] in *Baker* Cooke P recognised that some "state of mind" evidence should properly be regarded as hearsay and assessed accordingly. Whether it is helpful to talk of "state of mind"

---

22 *Baker*, above n 3, 742.

23 Ibid.

24 DL Mathieson (ed) *Cross on Evidence* (8 ed, LexisNexis, Wellington, 2005) 643 (footnote omitted).

25 See for example: *R v Haig* (19 October 1995) CA 408/95.

evidence as a subset of all hearsay evidence is debatable, especially given the move towards reference to a general discretion rather than a category based approach to admissibility.[26]

The authors of *Cross on Evidence*, however, argue that cases following *Baker* did restrict the reliability-based admissibility rule to "state of mind" (hearsay) evidence[27] – but other cases, not cited in *Cross*, have not so limited Cooke P's test.[28] Further, just two years after the decision, the Law Commission considered that the judgment of Cooke P in *Baker* was an indication "that the courts [were] moving towards a broader and less technical approach to hearsay evidence",[29] and used this "indication" as an argument in support of significant rationalisation of the hearsay rule in criminal cases.

Baker was therefore also cited in support of the Commission's rationalisation of the hearsay rule, described this way in *Evidence: Reform of the Law*:[30]

> The Code rule is based on the dual safeguards of necessity (an inquiry into the unavailability of the maker of the statement) and reliability (an inquiry into the circumstances in which the hearsay statement was made), which have developed at common law in a number of jurisdictions including New Zealand.

The reform of the law in this way – that is, a general discretion based on reliability and unavailability, rather than a categories-based approach – was "well supported in the submissions".[31] In 1991, the High Court Judges Committee[32] was of the view that "[t]he theory which underlies present exceptions to the hearsay rule is a mix of necessity (or convenience) and sufficient reliability. That may now be carried forward into a more generalised admissibility [rule] with safeguards."[33]

---

26 See *Manase*, above n 7, para 19 Tipping J for the Court: "We do not consider the Court should confine itself to specific categories."

27 *Cross on Evidence*, above n 24, 646, fn 3. *Bain*, above n 6, is cited as an example of such an application – but the Court of Appeal never categorised the evidence in this way, although it was clearly only relevant as evidence of Robin Bain's possible motive. In *Manase*, above n 7, para 26, the Court of Appeal noted that the decision in *Bain* "use[d] the concept of sufficient relevance in a context wider than that of *Baker* and the state-of-mind cases."

28 See for example: *R v M-T*, above n 8, *Nicholls v Nicholls*, above n 4, *R v Ria*, above n 4.

29 *Evidence Law: Hearsay*, above n 9, para 30.

30 *Evidence: Reform of the Law*, above n 10, para 49 footnote omitted.

31 *Evidence: Reform of the Law*, above n 10, para 54.

32 Made up of: McGechan, Robertson and Fisher JJ.

33 "Submissions Analysis: The Rule Against Hearsay", Law Commission paper, March 1997, 22 (on file with author) [Submissions Analysis].

The test proposed by Cooke P in *Baker*, if read as a general discretion to admit hearsay, having significant implications for oral hearsay offered in criminal cases, was also the first articulation of such a test in the appellate courts of Anglo-American common law jurisdictions.[34] Although Sir John Salmond in 1917, writing as Solicitor-General, argued that the courts should have a broad discretion to admit or exclude hearsay evidence,[35] it was not until September of 1990 that the Supreme Court of Canada handed down its judgment in *R v Khan*.[36] *Khan* is widely cited in common law jurisdictions, in both case law and law reform reports, as the leading decision referring to the dual requirements of necessity and reliability when assessing the admissibility of hearsay evidence. Cooke P's judgment in *Baker*, however, which also emphasised the significance of assessing reliability, pre-dated *Khan* by some 16 months. The content of that reliability test has been developed further by New Zealand courts in the years following *Baker* – most significantly by the decisions of the Court of Appeal in *Bain* and *Manase*. The Evidence Act 2006, in following the Law Commission's draft Code, has arguably more tightly prescribed the scope of the reliability inquiry.

III THE CONTENT OF THE RELIABILITY INQUIRY

In *Baker* Cooke P stated that an inquiry into reliability required members of the jury to consider "whether they are satisfied that the witness can be relied on as accurately reporting the statement and whether the maker of the statement may have exaggerated or spoken loosely or in some cases even lied."[37]

For a fact-finder, of course, these sorts of considerations are relevant to assessments of weight rather than admissibility.[38] However, these inquiries should be made by the judge as part of the admissibility decision, as Cooke P made clear in *Baker* when applying these considerations to the facts of that case. In more general terms, these inquiries go to the accuracy of observation of the witness and the credibility (including accuracy) of the maker of the statement. These "indicia" of reliability were further developed by the Court of Appeal in the case of *Bain*, a case in which Thomas J delivered the judgment of a bench which included Cooke P.

---

34 See however, *R v Walton* (1989) 84 ALR 59. In a judgment of the High Court of Australia, delivered on 9 February 1989, Mason CJ proposed a reliability test for implied (as opposed to express) assertions.

35 *Evidence Law: Hearsay*, above n 9, para 39. Note also the comment from *Wigmore on Evidence* (2 ed 1923, vol 3-1420, 153) in 1923 that there should be greater flexibility in the application of the rule "based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability". Cited in *R v Khelawon* [2006] 2 SCR 787, para 42 Charron J for the Court.

36 [1990] 2 SCR 531.

37 *Baker*, above n 3, 741 Cooke P.

38 In relation to judges as decision makers and the weight to be attached to hearsay evidence, see section 17 of the Evidence Amendment Act (No 2) 1980.

In *Bain* the evidence at issue was a statement allegedly made by one of the deceased members of the Bain family to a friend, Mr A. The statement was helpful to the accused as it may have provided another member of the family, the father, with a motive to commit the homicides.[39] With reference to the passage cited above from *Baker*, the Court stated:[40]

> When dealing with this exception to the hearsay rule, therefore, it is preferable to have regard to the substance of the proposed evidence, who made the statement, the manner in which it was made, and all other relevant circumstances, including whether the original or direct evidence is available, and then to make an overall assessment whether the evidence is sufficiently relevant and reliable to be admitted notwithstanding that it is hearsay evidence. The question is necessarily a matter of degree, and will almost invariably be decided by the application of the trial Judge's discretion having regard to the overall interests of justice.

The Court therefore added to the reliability inquiries noted in *Baker*, instructing judges to also consider the content of the statement, the manner in which it was made, as well as "all other relevant circumstances, including whether the original … evidence is available".[41]

The Court in *Bain* also acknowledged that reliability is a matter of degree – the hearsay evidence needs to be of such reliability "that it can reasonably be said that the dangers in hearsay evidence do not exist".[42]

The first version of the draft sections for the Code appeared in the 1991 discussion paper, *Evidence Law: Hearsay*.[43] Section 4(1) provided that in criminal proceedings hearsay is admissible if "the circumstances relating to the statement that is hearsay provide reasonable assurance that the statement is reliable". Section 1(4) defined "circumstances relating to the statement" as including:

(a) the nature and contents of the statement; and

(b) the circumstances in which the statement was made; and

(c) any circumstances that relate to the credibility of the maker of the statement.

The draft Code provision which was published in 1999 made no change to this list of considerations (or "indicia" of reliability) but separated (c) into two separate inquiries (into

---

39 The substance of this evidence has since been produced in the unreported Court of Appeal decision: *R v Bain* (15 December 2003) CA 98/03, para 146 and following, Tipping J for the Court.

40 *Bain*, above n 6, 133 Thomas J for the Court.

41 Ibid.

42 *Bain*, above n 6, 133 Thomas J for the Court.

43 *Evidence Law: Hearsay*, above n 9, 32 and following.

truthfulness and accuracy), in keeping with the wording of the Code, which did not refer to "credibility" as a unified concept, rather to its two parts.

A Reliance on Corroborating or Conflicting Evidence

The Commission did discuss, but ultimately rejected, a specific reference to "the existence and nature of other evidence available on the issue".[44] Supporting evidence, which was identified as adding weight to the hearsay statements, was referred to in *R v L*[45] and the relevance of corroborative evidence in the context of the admissibility decision has more recently been the subject of a Supreme Court of Canada case, *R v Khelawon*.[46] In that case, the Supreme Court took the opportunity to reject the approach in *R v Starr*,[47] that "the presence of corroborating or conflicting evidence" should not be considered as part of the admissibility decision.[48] The Court in *Khelawon* was of the view that the dissenting opinion of Kennedy J in *Idaho v Wright*[49] "better reflects the Canadian experience on this question."[50] Kennedy J stated:[51]

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.

Local academics and practitioners appear to be of a similar view:[52]

> Judges are likely to find reliability when…the victim's statements are made close to the time of the assault and after a 111 call brings police to the scene; and there is *corroborating physical evidence showing that the victim was attacked*.

---

44 "Submissions Analysis", above n 33; see also the discussion in *Evidence Law: Hearsay*, above n 9, para 34 and following.

45 *R v L* [1994] 2 NZLR 54, 64 (CA) Richardson J for the Court.

46 *Khelawon*, above n 35 Charron J for the Court.

47 *R v Starr* [2000] 2 SCR 144.

48 *Khelawon*, above n 35, paras 93-94 Charron J for the Court. The Supreme Court also held that the maker's reputation for truthfulness should not be considered as part of the reliability inquiry.

49 *Idaho v Wright* 497 US 805 (1990).

50 *Khelawon*, above n 35, para 100 Charron J for the Court.

51 Ibid, para 98 Charron J for the Court.

52 Scott Optican and Peter Sankoff "The Evidence Bill 2005: A New Approach to Hearsay" [2005] NZLJ 446, 447 (emphasis added). The Criminal Bar Association in their submission on the Evidence Bill 2005 stated, at page 6: "Hearsay evidence may only be acceptable if supported by a proper foundation of other admissible evidence."

In the Law Commission's commentary to the draft Evidence Code, however, the Commission expressed the view that:[53]

> The [reliability factors] do not include either the truthfulness of the witness who relates the hearsay or the consistency of the statement with other evidence not directly related to the statement….It is important to distinguish between the circumstances relating to the statement and other evidence in the case: hearsay that the circumstances relating to the statement indicate to be reliable should not be held inadmissible because it contradicts other evidence.

In *Evidence Law: Hearsay* the Commission had also stated its view that whether there is other corroborating or conflicting evidence should be a matter "canvassed before, and assessed by, the fact-finder",[54] rather than considered as an admissibility question, as "[l]ogically, the general strength of the case does not affect the reliability of individual items of evidence."[55] The Commission also thought it desirable to limit the set of circumstances to be taken into account to those relating to the statement – as this would allow an admissibility decision to be made at the time the statement is offered in evidence (when the existence and weight of other evidence will not be known).

A reliability assessment can, and sometimes should, in the interests of fairness to the accused for example, be made by reference *only* to the matters which relate to the statement ("inherent" reliability). However, if the admissibility decision is made pre-trial (as was the recommendation of the Law Commission, reflected by the notice requirement discussed below), then there may well be helpful reference to other evidence without the admissibility decision developing into an unnecessarily extensive consideration of all of the evidence in the case.[56] It is certainly the case that in exercising the discretion to reject unduly prejudicial evidence under section 18 of the Evidence

---

53 *Evidence: Evidence Code and Commentary*, above n 11, C 75.

54 *Evidence Law: Hearsay*, above n 9, para 34.

55 *Evidence Law: Hearsay*, above n 9, para 35.

56 This is the recommendation of Andrew Palmer: see "The Reliability-Based Approach to Hearsay" (1995) 17 Sydney Law Review 522, 547. The Law Reform Commission of Hong Kong in its "Consultation Paper on Hearsay in Criminal Proceedings" (November 2005) also followed the New Zealand Law Commission's approach but added to the list of "circumstances" which may be taken into account the following: "whether the statement is supported by other admissible evidence" <www.hkreform.gov.hk/> (last accessed 20 April 2007). The Australian Law Reform Commission, however, in its recent review of the Uniform Evidence Act, stated, contrary to the Federal Court's decision in *R v Williams*, that judges should consider "the circumstances in which a representation was made and to the circumstances bearing on reliability, rather than also requiring the trial judge to form a view about the actual reliability of the representation. An inquiry into whether the representation is reliable is likely to require the trial judge to consider the whole of a prosecution case and determine guilt before admitting the question as reliable. This would sit uncomfortably with safeguards designed to afford the defendant a fair trial." Australian Law Reform Commission *Uniform Evidence Law* (ALRC 102, Sydney, 2005).

Amendment Act (No 2) 1980 the courts have noted the existence of other evidence with a view to determining whether cross-examination would have made a difference.[57] Further, the common law residual discretion allows the admissibility inquiry to also focus on the consistency between the hearsay evidence and other evidence.

The Court of Appeal's decision in *R v Manase*,[58] the next significant common law development of the residual discretion, is one example. The case concerned an appeal from a High Court decision of Glazebrook J, who had ruled that statements (including drawings) made by a young complainant in a sexual abuse case should be admitted in the trial of her relative. The Court of Appeal disagreed, finding the evidence was not sufficiently reliable, and in doing so outlined the "present New Zealand position" concerning the general residual discretion. In doing so, the Court placed reliance on *Baker*, stating that "[i]n New Zealand the common law development of a general exception to the hearsay rule received its first major impetus in the judgment of Cooke P in *Baker*."[59]

As part of the Crown's argument that the evidence was of "sufficient apparent reliability",[60] reference was made to "consistency between the hearsay evidence and what the appellant had said about the lollipop."[61] The Court was of the view that the evidence did not support that argument, which relied on family acceptance of the meaning of "lollipop". The Court went on to find "problematic inconsistencies in the two drawings" made by the complainant,[62] also indicating the Court's willingness to consider other conflicting or corroborative evidence when determining admissibility.

The difficulty in allowing consideration of other evidence when making decisions about admissibility turns in part on the wording of the Code provision which refers to "circumstances relating *to the statement*".[63] "Circumstances" are also now limited to those relating to the statement in section 16 of the Evidence Act 2006. However, section 17 of the Evidence Amendment Act (No 2) 1980 also contains a reference to "circumstances" when the court determines weight: "the Court shall have regard to all the circumstances from which any inference can reasonably be drawn relating to the accuracy or otherwise of the statement". This has not been interpreted as preventing reference to other evidence not directly related to the statement.

---

57 See for example *Hamer*, above n 8, para 31: The Court must consider "any indications ... which emerge from a consideration of the other evidence".

58 *Manase*, above n 1.

59 *Manase*, above n 7, para 20 Tipping J for the Court.

60 *Manase*, above n 7, para 30 Tipping J for the Court.

61 *Manase*, above n 7, para 38 Tipping J for the Court.

62 *Manase*, above n 7, para 39 Tipping J for the Court.

63 *Evidence: Evidence Code and Commentary*, above n 11, section 16 (emphasis added).

B The Meaning of "Sufficient Apparent Reliability"

Despite the common law allowing reference to more matters than the Act does when determining admissibility, the breadth of such a reliability inquiry may actually mean the residual discretion is being applied too strictly – contrary, presumably, to the desire to liberalise the rule in situations where the "dangers inherent in hearsay evidence do not exist, or do not exist to an appreciable extent, or, if they do, can be reasonably met by giving the jury an instruction".[64] Significantly perhaps, the Court of Appeal in *Manase* talked of the dangers needing to be "displaced" when discussing the decision in *Bain*.[65]

The Court of Appeal in all three judgments does, however, reserve for the jury the role of assessing the weight any hearsay evidence (hence the function of judicial directions and the use of the words "reasonably safe" in *Baker*).[66] In *Manase* the Court explained its use of the phrase "sufficient apparent reliability":[67]

> We use the expression "apparent reliability" to signify that the Judge is the gatekeeper and decides whether to admit the evidence or not. If the evidence is admitted, the jury or Judge, as trier of fact, must decide how reliable the evidence is and therefore what weight should be placed on it.

Despite expressly reserving for the fact-finder the role of assessing the value of hearsay evidence (or its "ultimate" reliability), the application of the general discretion to admit hearsay seems, in some cases, to leave little room for assessment of the evidence solely because it is hearsay.

I make this argument based on the courts' unwillingness to admit hearsay evidence except in cases where "cross-examination would have been very unlikely to have made any difference" to the jury's assessment of the evidence.[68] In the context of considering the maker's credibility, this amounts to a determination of whether the statement is actually true,[69] rather than whether it might be true (that is, "sufficiently" reliable to allow admission). If the decision is made that cross-

---

64 *Baker*, above n 3, 133.

65 *Manase*, above n 7, para 26.

66 See also *R v Olamoe* [2005] 3 NZLR 80, 88 (CA) William Young J for the Court .

67 *Manase*, above n 7, para 30.

68 For cases in which this inquiry has been the basis of the admissibility decision see *R v Hovell* [1987] 1 NZLR 610, 613 (CA) Casey J for the Court; *Brokenshire* (23 June 2005) CA 418/04, para 59 Glazebrook J for the Court; *R v Hughes; R v Shortland* (24 August 2006) HC WHA, CRI 2005-088-4349, para 45 Williams J; *R v Howse*, above n 8, para 33. The focus on the impact of no cross-examination is also undertaken as part of the section 18 of the EAA decision where the courts consider (in proceedings with a jury) whether an ability to cross-examine would make "no relevant difference to the weight given to the hearsay statement". See *R v J* [1998] 1 NZLR 20 (CA).

69 See *Hamer*, above n 8; *Manase* above n 7 ; *Howse*, above n 8.

examination of the maker would have made no difference, then the fact-finder's acceptance of that evidence must be based only on the weight of conflicting evidence, not on the "inherent" reliability of the statement. If conflicting evidence is also considered as part of the admissibility decision, even this analysis seems pre-determined.

The current application of the reliability test, as a discretionary based exercise rather than one founded on categories, perhaps therefore over-emphasises the significance of cross-examination as fundamental to the fact finding process.[70] However, this emphasis is consistent with other common law approaches to hearsay admission – reliability (or a "circumstantial guarantee of trustworthiness") being viewed as a substitute for cross-examination.[71]

IV THE DANGERS OF HEARSAY EVIDENCE: THE SIGNIFCANCE OF CROSS-EXAMINATION

Cooke P certainly referred to "the dangers against which the hearsay rule guards" in *Baker*,[72] although the "dangers" were not expressly referred to. In *Bain*, Thomas J noted that the dangers "arise from the severance of any direct link between the witness's testimony and the evidence the Court is invited to accept",[73] and cited the list of concerns from *Cross on Evidence*: "increased dangers of impaired perception, bad memory, ambiguity and insincerity, coupled with the decreased effectiveness of conventional safeguards and, in particular, the absence of any opportunity to probe the evidence by cross-examination."[74]

The Supreme Court of Canada has most recently outlined these dangers in the following way:[75]

> While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's finding of fact, not impede its truth-seeking function.

---

70 *Hamer*, above n 8, is a case that establishes the difference of outcome where other evidence is considered rather than just "the circumstances in which the statement was made" – which were all circumstances which pointed to reliability. The admissibility decision may not have been decided differently under the Act, however, if her other statements could be seen as impacting on her veracity.

71 See for example Palmer, above n 56.

72 *Baker*, above n 3, 741.

73 *Bain*, above n 6, 132 Thomas J for the Court.

74 Ibid.

75 *Khelawon*, above n 35, para 2.

If the main "danger" which the hearsay rule guards against is the inability to test the evidence for reliability in the traditional way (cross-examination), then logically evidence which is inherently reliable, or can be tested or evaluated for reliability without the need for cross-examination, could be admitted "notwithstanding the dangers against which the hearsay rule guards."

Cross-examination is, of course, only one way of "testing" evidence and deciding what weight to accord it in the decision making process.[76] Some writers even argue that cross-examination can interfere with rather than enhance accurate credibility determinations.[77] The fact-finder may, for example, evaluate the evidence by considering the extent to which it is corroborated by other evidence in the case. Aspects of hearsay evidence which may not be adequately tested without cross-examination relate to the perception and credibility of the maker of the statement – however, even in relation to such issues, other evidence may be offered to assist the finder of fact. Some commentators are therefore of the view that the hearsay rule "is simply based on a fundamental distrust of the ability of the jury to correctly evaluate evidence without having the potential defects drawn out and demonstrated before it".[78]

Judicial opinion on the importance of cross-examination is reasonably consistent. As discussed above, what is more contentious is *when* lack of cross-examination should prevent the admission of hearsay evidence.

The Law Commission was also of the view that the main contemporary harm of hearsay evidence is the fact that it cannot be tested by cross-examination.[79] This position led the Commission to re-define hearsay for the purposes of the draft Code,[80] a definition also adopted in the Evidence Act 2006, which has the effect of deeming out-of-court statements of witnesses[81] to be outside of the rule. The rationale for this is that the maker of the statement is available to be cross-examined so the primary danger the rule was intended to guard against does not exist.[82] The

---

76 The Australian Law Reform Commission recently stated that "where relaxation of the hearsay rule leads to an increase in the hearsay evidence admissible, safeguards should be employed to minimise surprise and the possibility of fabrication, and to enable the party against whom the evidence is led to investigate, meet and test the evidence, *whether by cross-examination or other means*" emphasis added. Australian Law Reform Commission, above n 52, para 7.15.

77 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (Oxford University Press, Oxford, 2004) 597.

78 *Hearsay Evidence*, above n 1, para 7.

79 *Evidence: Reform of the Law*, above n 10, para 50.

80 *Evidence Law: Hearsay*, above n 9, para 13 and following.

81 A witness is defined as someone who is able to be cross-examined (see section 4 of the Evidence Act 2006).

82 Out of court statements of a witness are therefore outside the hearsay rule but are still subject to other admissibility rules and the general exclusion.

Commission also discussed the importance of judicial directions concerning the weight of hearsay evidence, once it is admitted.[83]

V JUDICIAL WARNINGS

Cooke P in *Baker* also expressly referred to the desirability of judicial directions concerning how to evaluate hearsay evidence once it is admitted. He stated that the judge may, and sometimes should, advise the jury to consider whether the witness accurately reported the maker's statement, whether the maker had any motive to lie and the fact that "they have not had the advantage of seeing [the maker] in the witness box" and so they have not "been tested on oath and in cross-examination".[84]

In *Bain* Thomas J stated that:[85]

> The evidence must be of such relevance and reliability that it can reasonably be said that dangers inherent in hearsay do not exist, or do not exist to an appreciable extent or, if they do, can be reasonably met by giving the jury an instruction along the lines suggested by Cooke P [in *Baker*].

This passage acknowledges that the reliability of hearsay evidence will differ from case to case – sometimes a warning as to its dangers will not be needed, at other times the jury must be directed to consider those dangers or else, presumably, the evidence should not be admitted. This acknowledgement of variations in reliability may reflect the division discussed in the Canadian decisions between "threshold reliability" and "ultimate reliability".[86] That is, hearsay evidence may be reliable enough to be admitted but may be still be given very little weight by the fact-finder.

The extent to which a jury, as fact-finder, is given an opportunity to assess the weight of hearsay evidence does currently seem to turn in part on judicial assessment of jury competence, coupled with the courts' traditional reluctance to accept hearsay evidence. Jury directions as to the dangers of hearsay evidence will be more important when the courts demonstrate less reluctance to admit hearsay evidence. In some cases, as noted above, the courts seem unwilling to admit hearsay evidence except if cross-examination would make no difference. In such cases presumably there is not the need to direct the jury on the dangers of hearsay evidence – that is, the admissibility decision and the weight decision have both effectively been made by the court.

The Law Commission's draft Code contains a general warning provision in situations where "unreliable" evidence has been admitted. Section 108 of the Code provides:

---

83 *Evidence: Reform of the Law*, above n 10, para 70.

84 *Baker*, above n 3, 741.

85 *Bain*, above n 6, 133 Thomas J for the Court.

86 See for example, *Khelawon*, above n 35.

> (1) If the judge in a criminal proceeding tried with a jury is of the opinion that evidence may be unreliable, the judge must warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it.

Subsection 2 provides that in the case of hearsay evidence (and some other classes of evidence) the judge *must* consider whether to warn the jury.

The Commentary to the Code suggested an adaptation of the warning issued by the Judicial Studies Board of Great Britain, which includes the following words:[87]

> [X's] statement is evidence in the case which you can consider, but as he/she did not come to court, his/her evidence has not been tested under cross-examination, and therefore you have not had the opportunity of seeing how the evidence survived this form of challenge. You must therefore consider the evidence of X in the light of this limitation.

This model direction also makes it clear that it is the absence of cross-examination which should be taken into account by the jury when assessing hearsay evidence. However, if the judge has decided as part of admissibility inquiry that cross-examination would have made no difference, presumably there is no need to address the jury in this way.

Section 122 of the Evidence Act 2006 adopts the wording of section 108 of the Code, except that "must warn" in subsection 1 is replaced with "may warn",[88] and the list of types of evidence in subsection 2 has been added to.

The reference in both *Baker* and *Bain* to the significance of not being able to cross-examine the maker of the out-of-court statement (this being the reason that the evidence, if offered to prove its truth, is hearsay), is also related to the traditional requirement for admissibility that the maker is "unavailable". The reason unavailability is usually seen as a pre-requisite for admissibility is because the evidence, which may be reliable as well as significant, will not otherwise be heard unless under an exception to the hearsay rule. It may well be in the interests of fairness to admit hearsay as the "best evidence". The comparable Canadian inquiry is into the "necessity" of offering the evidence – a phrase that more clearly encapsulates the argument for admissibility when the maker is unable to give evidence in court. However, in both *Baker* and *Bain* there is no express reference for the maker of the statement to be deemed "unavailable" before the evidence is admitted.

---

87 *Evidence: Evidence Code and Commentary*, above n 11, C 386.

88 The rather contentious justification for the change is found in the Select Committee Report on the Evidence Bill 2005: "Leaving this matter to the judge's discretion would be more effective than making it mandatory."

VI MATTERS NOT CONSIDERED IN BAKER

A Unavailability of the Maker of the Statement

The Evidence Amendment Act (No 2) 1980 includes a definition of "unavailability" in section 2(2). Unavailability is an admissibility requirement for sections 7 and 8 of that Act and is one of the "necessity" requirements in section 3. The Act's definition provides:

> For the purposes of section 3 to 8 of this Act, a person is unavailable to give evidence in any proceeding if, but only if, he –
>
> (a) Is dead; or
>
> (b) Is outside New Zealand and it is not reasonably practicable to obtain his evidence; or
>
> (c) Is unfit by reason of old age or his bodily or mental condition to attend; or
>
> (d) Cannot with reasonable diligence be found.

In both *Baker* and *Bain* the maker of the relevant statement(s) were victims of murder, allegedly at the hands of the accused, so no issue arose as to their availability. The meaning of the phrases "reasonably practicable" and "reasonable diligence" in the statute have, however, been the subject of a number of decisions.[89] At common law, the development of the concept of "unavailability" has occurred in the context of the more recent clarification of the scope of the general discretion to admit hearsay, undertaken in *Manase* and *R v M-T*.[90]

The Court in *Manase* preferred the use of the term "inability" to testify, rather than "unavailable" to testify. Such an inquiry focuses on whether "the primary witness is unable for some reason to be called to give the primary evidence"[91] – but does not include those witnesses who would merely prefer not "to face the ordeal of giving evidence".[92] Such an inquiry is wider than the definition in the Evidence Amendment Act (No 2) 1980. The complainant in *Manase* was deemed "unable" to testify on the grounds that because of her young age at the time she could not, at the time of trial, 18 months later, "remember her statements and drawings".[93] The Court of Appeal was firmly of the view that "inability" must be established and that sufficient relevance and reliability was insufficient grounds to admit the evidence.[94]

---

89 See for example: *R v M* [1996] 2 NZLR 659 (CA); *R v Tonga* (23 August 2001) CA 107/01.

90 *R v M-T*, above n 8.

91 *Manase*, above n 7, para 30.

92 Previously considered by the Law Commission: see "Submissions Analysis", above n 30.

93 *Manase*, above n 7, para 32.

94 In doing so, the CA said they were rejecting the Canadian position which was argued as being "very close to saying that hearsay passes the reasonable necessity test simply if it is relevant." *Manase*, above n 7, para 14 .

In *R v M-T*, the Court of Appeal had to consider the admissibility of a statement made to police by the victim of an assault by her boyfriend. The trial judge had excused her from testifying under section 352(1) of the Crimes Act 1961, seemingly on the grounds of physical health (she was pregnant at the time and there was concern about the impact of the stress of the proceedings on the well-being of the unborn child).[95] The issue then became whether her statement to the police as well as the transcript from the complainant's deposition evidence should be admitted at trial. The judge ruled the evidence was admissible as it was "cogent, relevant and sufficiently contemporaneous and spontaneous to avoid any real possibility of concoction". The evidence had also been given willingly and "there had been the opportunity to test its veracity under cross-examination during the depositions hearing."[96] The judge was therefore satisfied that the statements were sufficiently reliable.

On appeal, the Court of Appeal held that there was no evidence that the judge had considered whether "the requirement of inability" was met – therefore it was "necessary for this Court to do so in order to decide the appeal."[97] Although the Court was of the view that the discretion to excuse the complainant was a correct application of judicial discretion,[98] they also found that the complainant was "personally able to give evidence"[99] and so the requirement of "inability" was not met.[100]

This decision has recently been applied in a case involving a spouse who refused to testify. In *R v GDA*, Simon France J felt unable to distinguish *R v M-T*, although he expressed his own view that a non-compellable witness (arguably including one excused by a judge pursuant to section 352(1)) should be considered "unable" to testify for the purpose of the general discretion.[101]

Section 16(2) of the Evidence Act 2006 enacts the Law Commission's definition of "unavailable" for the purpose of the hearsay admissibility rules and therefore seems to resolve the issue in *R v M-T* by providing that persons who cannot be compelled are considered "unavailable as a witness".[102]

---

95 *R v M-T*, above n 8, para 8.

96 Ibid, para 12.

97 Ibid, para 30.

98 Ibid, para 19.

99 Ibid, para 36.

100 Elisabeth McDonald "Hearsay in Domestic Violence Cases" [2003] NZLJ 174 for critique of this decision.

101 *R v GDA*, above n 5, para 28.

102 Section 71 of the Evidence Act 2006 provides that any person, including an accused's spouse, is now a compellable witness for the prosecution (contra section 5 of the Evidence Act 1908).

The inquiry into the availability of the maker of the statement and the value of cross-examination in any particular context is also related to the "scope" of the hearsay rule – more specifically the definition of hearsay. Traditionally the definition of hearsay has focussed on the place the statement was made (out-of-court) and the purpose for which it is being admitted (to prove its truth). This means, as discussed above, that even an out-of-court statement of a witness who is testifying and is able to be cross-examined about that statement, is considered to be hearsay at common law. In *Baker* and *Bain* the Court of Appeal did not directly address the scope of the rule. The Supreme Court of Canada has, however adopted the following adaptation of the historical definition:[103]

> The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the [maker].

This focus on an "opportunity" to cross-examine the maker means that statements traditionally thought of as hearsay may fall outside the scope of the rule if such statements can be subject to "contemporaneous" cross-examination. Under *Baker*, the opportunity to test the maker's statement in this way would go to the issue of reliability, rather than be considered a definitional issue.

The Evidence Act's definition of hearsay, which means out-of-court statements of testifying witness are not hearsay (even if offered to prove the truth) may, however, create some difficulties. These include the treatment of out-of-court statements of a reluctant witness (who may give no evidence or evidence which is contrary to the out-of-court statement), or a witness who is forgetful.[104] In these cases the evidence that might be most helpful to the fact-finder (if sufficiently reliable) may not be admissible, even though it is not within the scope of the hearsay exclusionary rule.

One way to address this difficulty, which turns on the effectiveness of cross-examination of such witnesses, may be to incorporate these examples into the definition of unavailable witnesses.[105] The Act's definition of witness as a person "able to be cross-examined"[106] should also be interpreted strictly in keeping with the policy behind the re-defining of hearsay – that is, the out-of-court statement must be able to be the subject of *effective* cross-examination in court or it will be caught by the hearsay rule (and therefore be made subject to unavailability and reliability requirements).

---

103 *Khelawon*, above n 35, para 35.

104 See Optican and Sankoff, above n 52, 448.

105 As actually proposed and rejected by the Commission: see "Submissions Analysis", above n 33.

106 Section 4 of the Evidence Act 2006.

B Implied Assertions

The other "definitional" matter left unexplored in *Baker* and *Bain* is the extent to which implied (sometime referred to as "unintended") assertions should be subject to the hearsay rule. This issue is currently unresolved at common law,[107] although the Court of Appeal's decision in *Manase* is sometimes presented as holding that such assertions should be subject to the rule.[108]

In that case, the Court was of the view that the drawings of the complainant were only relevant as establishing that the complainant had seen the accused's penis ("lollipop") – which was an inference from the drawings and what she said about them as opposed to the drawings themselves being an assertion of that fact. Therefore, the Court held: that the drawings, offered "to prove the truth of that implied assertion", should also be subject to the hearsay rule.

The Evidence Act 2006 follows again the approach of the draft Code in excluding from the definition of statement unintended assertions, whether spoken, written or non-verbal.[109] The rationale for excluding unintended assertions from the scope of the rule is that someone cannot sensibly be considered to be vouching for the truth of an assertion they are not intending to make.[110] The presence of an intention to assert is also viewed "as the most defensible watershed between hearsay and non-hearsay both as a matter or logical coherence and of practical commonsense".[111]

The on-going difficulty with this area of the law, now that the policy decision has been made that implied (unintended) assertions are not subject to the hearsay rule, is whether judges and practitioners will be able to distinguish between assertions and implied assertions for the purpose of the rule,[112] and therefore the need to give or require notice of offering hearsay evidence.

C Other Procedural Safeguards: Giving Pre-trial Notice of the Intention to Offer Hearsay Evidence

The draft Code and the Evidence Act 2006 require that notice of an intention to offer hearsay evidence in criminal proceedings must be given to all other parties and the court "in sufficient time

---

107 *R v GDA*, above n 5, para 16.

108 See Donna Buckingham's submission on the Evidence Bill 2005, on this specific point.

109 Evidence Act 2006, s 4 (which closely follows the drafting of section 801 of the Federal Rules of Evidence).

110 "If the implied assertion is unintended, then it is unlikely than there was any deliberate attempt to mislead." *Evidence* (ALRC Interim Report 26, Vol 1, 1985) para 604.

111 Australian Law Review Commission, Sydney, above n 56, para 7.59, citing the UK debate.

112 Section 115(3) of the Criminal Justice Act 2003 (UK) provides one definition; the ALRC has proposed another as an amendment to section 59 of the Uniform Evidence Act, which also focuses on the purpose or intention of the maker: "what a person in the position of the maker of the representation can reasonably be supposed to have intended". Ibid, Report 102, Recommendation 7.1.

before the hearing".[113] The Act expands on the Code provision by including what should be stated in the notice. The purpose of the notice provision is to encourage admissibility decisions about hearsay evidence to be made pre-trial and to allow parties to adequately test the evidence at trial.[114]

VII THE EVIDENCE ACT 2006: STRAIGHT TO BASICS?

The Evidence Act 2006, although enacting most of the draft Code's provisions with regard to hearsay, does include three new sections, two of which the Law Commission considered unnecessary to re-enact or include in the Code (sections 19 and 20), and one (section 21) which is contrary to the policy position adopted by the Commission, which I will not discuss in further detail here.

With regard to section 19 of the Act, the admissibility of hearsay statements contained in business records (effectively a re-enactment of section 3 of the Evidence Amendment Act (No 2) 1980), allows for these particular pieces of hearsay to be offered on the basis that they are presumed to be inherently reliable.[115] However, the inquiry into whether it serves no useful purpose to call the witness as they cannot be expected "to recollect the matters in the information" could have been added, if necessary, to either section 18 or to the definition of "unavailability."[116] It is also not necessarily the case that all business records will be sufficiently reliable to be admitted, and although those which are not could be excluded by section 8 of the Act, it is more consistent with the reform goal of simplicity, accessibility (and therefore predictability) to subject all hearsay evidence to the same admissibility test – especially in the context of criminal proceedings.[117]

Section 20 (which provides for the admissibility of hearsay statements in certain documents in civil proceedings) similarly adds nothing to the admissibility rules in the Act. The rationale given for the addition can only be found in the overview of the changes to the Bill given to the House by Chris Finlayson MP:[118]

> The second change, which is contained in clause 18B [section 20], picks up on a couple of High Court Rules that deal with hearsay, or statements of belief, in certain circumstances. In civil proceedings, hearsay statement and documents related to interlocutory applications, interrogatories, or discovery will

---

113 Section 22(4) of the Evidence Act 2006.

114 *Evidence: Reform of the Law*, above n 10, 19 and following.

115 (21 November 2006) NZPD 6644 Vol 635; Chris Finlayson MP stated the change was made "following on from submissions" (21 November 2006) NZPD 6642.

116 This would also address the forgetful witness problem and the child complainant in *Manase*, above n 7.

117 See the comments of Bernard Robertson for example, when discussing the residual discretion in *Manase*: "[w]ith the exceptions of confessions ... it is difficult to see why any other exception to the hearsay rule should be necessary." Bernard Robertson "What is Left of Hearsay?" [2001] NZLJ 421, 424.

118 (21 November 2006) Vol 635 NZPD 6642.

> be admissible, provided that grounds are given. It is appropriate that those sorts of rules are contained in the Evidence Act and are not simply contained in the High Court Rules or their equivalent.

This statement does not provide a sufficient explanation for the addition. There is no reason given as to why this version of a number of High Court Rules should be contained in the Act but not others. In civil proceedings, section 9 of the Act would cover most of the documents and circumstances listed in section 20,[119] and to the extent that such material could not be admitted by consent, it would seem appropriate for the hearsay, if any, contained in the documents to be subject to an assessment of reliability.

VIII CONCLUSION

The development of the exceptions to the rule against hearsay over the 18 years since Cooke P's call to go "straight to basics" and focus on the reliability of the evidence, have demonstrated the soundness and visionary nature of his approach. Lord Cooke's proposed test for admissibility in 1989 provided the basis for both the development of the common law residual discretion to admit hearsay, as well as the rationale for the Law Commission's reform proposals, now codified in the Evidence Act 2006.

In terms of Lord Cooke's encouragement to "go straight to basics" by examining reliability, the Act is therefore both faithful to and contrary to that vision.

The Act does (with the exception of sections 19 and 20) subject all hearsay to the same admissibility requirements.[120] This will ensure that reliability and unavailability are the guiding principles for admission of hearsay evidence – at present there is uneven consideration of the residual discretion in *Manase*.[121] It is an improvement on the current common law expressed in *R v M-T* (a development which cannot be traced back to *Baker*) given that non-compellable witnesses are now considered to be unavailable for the purpose of the rule. The Act takes a clear position on implied assertions (rendering them outside the rule) but does not offer any guidance on how to recognise them. The reliability inquiry is limited to an analysis of the circumstances "relating to the statement", but the reference to "circumstances relating to the veracity of the [maker]"[122] may mean

---

119 Section 83 of the Act also provides that the offering of affidavits in accordance with rules of Court is one of the "ordinary ways" of giving evidence.

120 This includes, for example, what would now be admitted as *res gestae.* Under the Evidence Act 2006, all hearsay evidence (with the exception of that covered by ss 19 and 20) will be subject to the same admissibility regime, depending on how courts may choose to interpret ss 10 and 12 of the Act with regard to the use of the common law.

121 See for example *R v Carse* (25 August 2006) CA 211/06 Wild J for the Court; *Bailie v Police* (9 March 2006) HC CHCH CRI 2006-409-000007 Fogarty J; *R v Morris* (18 May 2006) CA 405/05 Potter J for the Court; *R v Rajamani* (20 December 2006) CA 140/06 Ronald Young J for the Court; *Goodship & Pranfiled Holdings v Ministry of Fisheries* (15 August 2006) HC WN CIV-1997-485-13 (CP 185/97) Mackenzie J.

122 Section 16(1) of the Evidence Act 2006.

the courts' admissibility decisions may amount to a finding of credibility. This means that only in cases where cross-examination will make no difference will the evidence be admitted.

Although the scope of the reliability inquiry contained in the Evidence Act 2006 has yet to be fully determined, the admissibility rules in the Act are for the most part as "clear, simple and accessible as practicable", in keeping with the purpose of the evidence reference given to the Law Commission in 1989, as well as being faithful to Lord Cooke's "straight to basics" approach. May appellate interpretation and application of the Act remain true to his directive.