The Veracity of Witnesses in Civil and Criminal Proceedings: Section 37 of the Evidence Act 2006

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I INTRODUCTION

Assessments of veracity are fundamentally important to the determination of legal proceedings.[1] The common law trial is oral in nature, with evidence predominantly adduced through the testimony of witnesses who verbally recount their recollection of facts or depose to the authenticity of relevant documents.[2] Most evidence is imbued with an undoubtedly human quality. "Human evidence", Lord Pearce noted, "shares the frailties of those who give it".[3] Since fact-finding involves decision-making on the basis of probabilities rather than certainties,[4] anything that affects the likelihood that a witness is telling the truth affects the probability of the existence of the testimonial facts asserted.[5] In criminal trials especially, verdicts are often based on which witnesses are believed.[6] An evaluation of the veracity of witnesses is a critical component in the trier of fact's process of assessing and weighing the evidence. This article examines the separate and distinct body of law governing the impeachment of the veracity of witnesses, other than the accused,[7] in criminal and civil trials. Its main focus is the use of veracity evidence as a method of impeachment in the context of cross-examination, though the admission of veracity evidence at other stages in a trial is also touched on. In particular, this article examines the recently enacted veracity rules in section 37 of the Evidence Act 2006:

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1 New Zealand Law Commission, *Evidence Law: Character and Credibility: A Discussion Paper: Preliminary Paper 27* (NZLC PP27, 1997) 21 ["*Character and Credibility Discussion Paper*"]; see e.g. *R v Accused (CA 92/92)* [1993] 1 NZLR 553, 556 (CA).

2 Zuckerman, *The Principles of Criminal Evidence* (1989) 86; Eggleston, *Evidence, Proof and Probability* (2 ed, 1983) 50 ["*Evidence*"].

3 *Toohey v Metropolitan Police Commissioner* [1965] AC 595, 608 (CA) ["*Toohey*"].

4 Redmayne, "The Structure of Evidence Law" (2006) 26 OJLS 805.

5 *R v C* [2007] NZCA 115, [9] referring to *R v Young* (1990) 6 CRNZ 520, 522 (HC).

6 Bennett, "Is the Witness Believable? A New Look at Truth and Veracity Character Evidence and Bad Acts Relevant to Truthfulness in a Criminal Case" (1997) 9 St Thomas L Rev 569, 602.

7 Evidence relating to the veracity or character of the accused in a criminal trial has for many years been governed by different rules and policies. The way in which the Evidence Act 2006, particularly ss 38 and 39, changes these aspects of the common law is not the subject of this article.

37 Veracity rules

(1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.

(2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.

(3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
- (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
- (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
- (c) any previous inconsistent statements made by the person:
- (d) bias on the part of the person:
- (e) a motive on the part of the person to be untruthful.

(4) A party who calls a witness—
- (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
- (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.

(5) For the purposes of this Act, veracity means the disposition of a person to refrain from lying, whether generally or in the proceeding.

Section 37, which codifies and alters the common law regime, represents a theoretical shift in the proper approach to the admissibility of veracity evidence. This article clarifies and discusses the implications of this shift. It argues that while the philosophy of section 37 represents a welcome improvement on the common law approach, there are a number of gaps in, and potential difficulties with, the provision. These issues must be resolved in a way that promotes a coherent and principled jurisprudence.

The potential significance of section 37 can only be understood by contrasting it with the complex common law regime. The assumptions and policy choices that underpinned that regime are examined in Part II. In Part III the discussion moves to the scope of the new veracity rules. Analysis

of a number of technical issues with section 37 reveals that delineating its boundaries will prove a complex task for the courts.

Substantial helpfulness is now the essential criterion for the admission of veracity evidence. A key component of this article is an analysis of both the interpretation and implementation of the substantial helpfulness test. A number of key principles and factors not explicitly included in section 37 are identified and discussed in Part IV.

Finally, the extent to which veracity evidence will be emancipated from the collateral issues rule and its "wilderness" of exceptions[8] is considered. While this article advocates a contextual approach to the admissibility of evidence, it is also necessary to examine three evidential categories in which section 37 is likely to alter the common law approach significantly: prior misconduct, criminal convictions, and reputation. This analysis takes place in Part V.

II THE COMMON LAW POSITION ON EVIDENCE OF CREDIBILITY

The rules that governed the impeachment of witnesses at common law, as modified by the Evidence Act 1908, were very technical and complex, and did not always produce rational outcomes.[9] This Part identifies the assumptions and choices that underpinned these rules.

Credibility as the Focus of Impeachment

As the common law governed *credibility*, rather than *veracity*, evidence, appreciating the distinction between these concepts is important to understanding the changes that have been made. Credibility (used synonymously with accuracy and credit) is an objectively based concept, concerned only with the accuracy of testimonial evidence. In contrast, veracity is subjectively based, concerned with the witness's *intention* to be truthful. It does not cover evidence tending to show that a witness's testimony is in error, except where this is attributable to deliberate deception.

Impeaching the accuracy of witnesses' testimony does not invariably involve calling their veracity into question. This impeachment theoretically flows from two different sources. First, the witness might honestly and earnestly give inaccurate testimony due to errors in perceiving, remembering or relating events. The second source is the mendacity of a witness, the deliberate distortion or fabrication of events, for whatever reason. Both sources produce inaccurate evidence that should be disbelieved.

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8 *Nicholls v R* (2005) 213 ALR, [203] (HCA) per Kirby J.

9 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 17–18.

At common law, counsel were under no obligation to identify precisely why the impeached witness should be disbelieved. Under section 37 of the Evidence Act 2006, however, counsel must identify the source of the alleged inaccuracy. The restrictions of section 37 apply wherever it is alleged that the witness is deliberately being untruthful, but are inapplicable where the witness is said to be innocently mistaken.

Cross-Examination as to Credit

The common law drew a stark distinction between the controls imposed on cross-examining witnesses as to their credit and adducing extrinsic evidence as to credit. Counsel were traditionally granted a broad discretion to use cross-examination to discredit witnesses other than criminal defendants.[10] In *R v Tinker* the Court of Appeal permitted a witness to be asked whether one of his associates was a convicted bank robber:[11]

> We are of [the] opinion that the question fairly came within the rule that in order to discredit a witness's testimony he may upon cross-examination be asked any question concerning his antecedents, associations or mode of life which would be likely to have that effect, though he cannot always be compelled to answer....

Further, in *R v Thompson*[12] the Court of Appeal reaffirmed that "robust cross-examination is one of the many options open to counsel, who must be accorded wide discretion".[13]

This wide latitude is explicable on a number of grounds. Wigmore argues that it is primarily an offset to the collateral issues rule, which excludes extrinsic evidence as to the credibility of witnesses.[14] The key principle underlying the rule's exclusionary position — a desire to prevent the court becoming involved in "an interminable series of controversies not directly material to the case"[15] — is not offended by simply asking questions. A further ground is that as cross-examination is the main vehicle for testing the credit of witnesses, and therefore for determining the value of their testimony, courts should be reluctant to impose restrictions. Finally, the liberal cross-examination of witnesses is seen as posing a lesser risk of illegitimate prejudice as compared to cross-examination of the accused.[16]

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10 See e.g. *R v McGlaughlin* (8 September 2005) unreported, Court of Appeal, CA456/04.

11 [1985] 1 NZLR 330, 333 (CA).

12 [2006] 2 NZLR 577, [66] (CA); affd *R v Thompson* [2006] 2 NZLR 577 (SC).

13 An even broader position pertained in England up until the passing of the Criminal Justice Act in 2003 (see s 100). For example, in *Clifford v Clifford* [1961] 1 WLR 1274 a witness was allowed to be impeached with allegations of adultery.

14 Wigmore, *Evidence in Trials at Common Law: Volume 3A* (4 ed, 1970) §944.

15 *Hobbs v Tinling (CT) and Co Ltd* [1929] 2 KB 1, 19 (CA) ["*Hobbs*"].

16 *R v McGlaughlin*, supra note 10, [35].

1 Relevance: Section 13

The common law did, however, impose some limits on cross-examination.[17] The first was relevance: the question asked must relate to a matter relevant to the proceeding, including the witness's credibility. While this may seem trite law, it can easily be overlooked:[18]

> A loose belief doubtless obtains in some minds that almost anything may go in on cross-examination (saving the discretion of the court). Conceptions of this sort should be radically abandoned. Cross-examination is no universal solvent for reducing everything to admissibility.

Questions designed to test the credit of a witness will only be "proper if they are of such a nature that the truth of the imputation conveyed by them would *seriously* affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies".[19] This requirement was reproduced (in almost identical wording) in section 13(2)(a) of the Evidence Act 1908.

Section 13 was not, however, often referred to, and tended to be subordinated to the substantial latitude given to counsel in cross-examining witnesses on their credibility.[20] In *R v Wood* the Court of Appeal noted that questions injuring the character and therefore the credibility of witnesses would ordinarily be relevant.[21] Exclusion of questions under section 13 should be "judged against the general rule that evidence of the character of witnesses, other than an accused, is admissible as going to credit".[22] Questions relating to the witness's convictions and a range of discreditable behaviour, including threatening phone calls, were found to have been wrongly disallowed.[23] In practice, questions were only disallowed where the imputation made had no rational impact on credibility.[24]

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17 But see Wigmore, supra note 14, §983 who argues that the orthodox position in England was to impose "no limitations at all" on the admission of relevant questions. See also *R v McLean (No 2)* (29 March 2001) unreported, High Court, Rotorua Registry, T001096, [8] where the existence of common law powers to stop cross-examination as to credit was questioned.

18 Wigmore, supra note 14, §878.

19 *Hobbs*, supra note 15, 51 (emphasis added). In England it is argued that this rule seems to receive only notional observance. See Tapper, *Cross & Tapper on Evidence* (10 ed, 2004) 381.

20 *Adams on Criminal Law – Evidence* (2007) EC3.12(3). Part of the reason for this may be the large amount of discretion afforded to the trial judge by the difference between proper and improper questions under s 13(2) of the Evidence Act 1908. While a question will be proper if it *seriously* affects the credibility of the witness, it is only improper if it affects the credibility of the witness "in a *slight degree*" (emphasis added).

21 [2006] 3 NZLR 743 (CA).

22 Ibid [39].

23 Ibid [42]–[44]. On the other side of the line is *R v L* (31 October 2006) unreported, Court of Appeal, CA153/06.

24 See e.g. *R v L*, supra note 23, where cross-examination as to the historic rape of the complainant's mother was held to have been wrongly permitted; *Morgan v Steel* (17 August 1992) unreported, Court of Appeal, CA40/91.

2 *Offensive and Scandalous Questions: Section 14*

The second restriction on cross-examination was found in section 14 of the Evidence Act 1908. This required the court to forbid indecent, scandalous[25] or needlessly offensive questions.[26] Even questions that were strictly relevant to the veracity of the witness could be disallowed. Questioning became improper when "calculated to humiliate, belittle and break the witness"[27] or where the cross-examination as a whole was "unduly protracted and harassing".[28] Section 14 set, in effect, the outer limits of aggressive cross-examination, but was rarely invoked.[29] Courts were very reluctant to impose limits where credibility was an important issue.[30]

3 *Good Faith Basis*

The third restriction was the requirement that counsel have a good faith basis for all questions. In practice, this means counsel must have "some good foundation or reason for making an accusation against a witness".[31] This requirement should not, however, be confused with an obligation on counsel to be ready to prove all allegations that are to be put to witnesses. It is inappropriate for a trial judge to require counsel to give an undertaking to call such evidence before allowing questions.[32] Regrettably, the Court of Appeal has, in *R v Rubick*, cast some doubt on this rule:[33]

> Before asking a question in cross-examination, a counsel must have a good faith basis for believing that the impeaching fact is in fact true. Without such a belief, counsel cannot inquire into it. A Judge is entitled to ask counsel to disclose the basis for going into a particular matter. *It is necessary for counsel to be able to prove what is alleged if the witness denies its existence.*

The italicized portion in the above quotation should not be treated as an accurate statement of the law. Such a rule would not be reconcilable with the principle that cross-examination is both a means of *testing* evidence as well as a method of *producing* new evidence. Whilst counsel should not be permitted to go on "fishing expedition[s]",[34] they should be entitled to

25 Evidence Act 1908, s 14(a).

26 Ibid s 14(b).

27 *R v Thompson* (CA), supra note 12, [68].

28 *R v McLean (No 2)*, supra note 17, [8].

29 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 25; for a rare example see *R v Eagles* [2004] 2 NZLR 468, [25]–[27] (CA).

30 See e.g. *R v McLean (No 2)*, supra note 17, [6].

31 *R v Griffiths* (5 May 1994) unreported, Court of Appeal, CA545/93, 7.

32 Ibid.

33 (7 July 2004) unreported, Court of Appeal, CA35/04, [28] (emphasis added). It should be noted that in this case counsel had investigated allegations that would have damaged the complainant's credibility but found no factual basis for them.

34 *R v Accused (CA 92/92)*, supra note 1, 556.

seek to prove, through a witness's admission, that which they believe to be true but could not otherwise independently prove. In *R v Ryland*,[35] for example, the Crown was permitted to cross-examine the accused about certain equipment found at his address despite the fact that the judge had earlier ruled photographs of the equipment inadmissible because there was no adequate proof of their link to the accused. The Court affirmed that counsel may attempt to establish through cross-examination the very links that could not be demonstrated in their direct case. Moreover, it is doubtful to what extent, if any, the position enunciated in *Rubick* has been applied in trial courts. Defence counsel, for example, are still routinely permitted to cross-examine complainants on the basis that they are lying, without thereby undertaking to call evidence from the defendant. For these reasons, the requirement on counsel to have a good faith basis for questions put in cross-examination, whilst important, does not allow judges to require undertakings.

Coverage of these restrictions on cross-examination is merited because, to varying degrees, they remain relevant under the Evidence Act 2006.[36] The requirements of relevance and a good faith basis are likely to remain applicable, while section 85 of the Evidence Act 2006 provides similar protections to those contained in the old section 14. Section 37 now applies as an additional restriction on the admissibility of questions relevant to a witness's veracity.

Extrinsic Evidence of Credibility: the Collateral Issues Rule

Besides cross-examination, the credibility of witnesses may also be impeached through extrinsic evidence, such as the testimony of other witnesses. The collateral issues rule governed the admissibility of evidence offered to rebut a witness's answers in cross-examination. The rule is exclusionary in nature: a cross-examining party may not offer evidence to contradict the answer of a witness to a question concerned with matters wholly collateral to the issues in the case.[37] It is often said that the witness's answers to such questions must be taken as "final".[38] This is apt to produce

35 (17 April 2002) unreported, Court of Appeal, CA389/01, CA391/01, CA397/01, [35]–[36]; see also *Lyttle v The Queen* (2004) 235 DLR (4th) 244 (SCC).

36 Many of the restrictions discussed also have an ethical dimension. See New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (7 ed, 2006). Rule 8.04 prohibits practitioners from attacking a person's reputation without good cause. Rule 10.02 prohibits questions that are not supported by reasonable instructions, or lack a factual foundation. While technically the latter rule is restricted to defence counsel in criminal cases, the duty on all counsel not to mislead or deceive the Court (r 8.01) probably covers much the same ground. The new draft rules extend the duty to every lawyer-witness interaction. See r 13.10 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules* (2008) New Zealand Law Society <http://www.legislation.govt.nz/regulation/public/2008/0214/latest/viewpdf.aspx?search=ts_regulation_lawyer> (at 6 August 2008).

37 Mahoney, "Evidence" [2000] NZ Law Rev 101, 115 ["Evidence"].

38 See e.g. Uglow, *Evidence: Text and Materials* (2 ed, 2006) 499; Keane, *The Modern Law of Evidence* (6 ed, 2006) 219; Tapper, supra note 19, 339–340; Mathieson (ed), *Cross on Evidence* (8 ed, 2005) para 9.64; *Palmer v R* (1998) 193 CLR 1, [48] (HCA).

confusion.[39] The cross-examining party is entitled to voice disagreement with the witness's answer and, subject to the court's discretion, continue on that line of questioning. Furthermore, the trier of fact is entitled to disbelieve the witness's answer. The answer is only "final" in that further evidence may not be called.

The simplicity with which the collateral issues rule can be stated belies its complexity and the inherent difficulties in its application. It is first necessary to set out the principled basis for the rule, as these principles will be of special relevance in the application of section 37.

1 Underlying Principles

The collateral issues rule is not a rule of relevance;[40] even relevant evidence, if collateral, may be excluded. The rule is primarily concerned with avoiding a multiplicity of issues.[41] If witnesses were able to have their credibility impeached by the calling of extrinsic testimony, then justice would demand that these additional witnesses be similarly impeachable. This would, however, result in the proliferation of trials within trials and the consumption of vast resources.[42] The multiplication of issues also risks confusing triers of fact with an overwhelming mass of evidence:[43]

> There is an inevitable limit to the amount of evidence that a person, however experienced and talented, can digest. In piling up evidence, albeit relevant, a point will come where any further piece of evidence may detract from, rather than increase, the correctness of the final decision.

A second, and less often recognized, principle underpinning the collateral issues rule is the desire to avoid unfair surprise. It is neither fair nor possible,[44] so the reasoning goes, to expect witnesses to be prepared to disprove every allegation (by calling their own witnesses) that could potentially be levelled against them.[45]

The collateral issues rule was undoubtedly based on important concerns. Indeed, both of these concerns were recognized as far back as 1679. In *Whitebread's Trial* the defendant wanted to prove that the witness

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39 Zuckerman, supra note 2, 104.

40 Wigmore, supra note 14, §878.

41 See e.g. Mathieson, supra note 38, 290; *R v Boskovic* (12 December 2006) unreported, Court of Appeal, CA33/06, [20].

42 Seidelson, "Extrinsic Evidence on a Collateral Matter May Not Be Used to Impeach Credibility: What Constitutes 'Collateral Matter'?" (1990) 9 Rev Lit 203, 203–204. See also *Attorney-General v Hitchcock* (1847) 1 Exch 91, 105 ["*Hitchcock*"].

43 Zuckerman, supra note 2, 49. Although in *Natta v Canham* (1991) 104 ALR 143, 159 (FCA) it was suggested that this rationale does not apply to judges sitting alone in civil litigation; presumably, they cannot be distracted or confused.

44 Tapper, supra note 19, 339; *Natta v Canham*, supra note 43, 159.

45 Wigmore, supra note 14, §979.

had made a false statement in the unrelated trial of one Ireland.[46] North LCJ refused to admit the extrinsic evidence, asking:[47] "How can we prove one cause in another? ... Can he come prepared to make good every thing that he hath said in his life?" Later in the trial, the Judge was forced to return to the matter again:[48]

> If you will come to contradict a Witness, you ought to do it in a matter which is the present debate here; for if you would convict him of any thing that he said in Ireland's trial, we must try Ireland's cause over again.

The main difficulty with the collateral issues rule was not its theoretical role but its application.

2 *Identifying a Collateral Issue*

It has thus far been assumed that the division between collateral facts and facts in issue is practically discernible and, indeed, actually exists. Over the past two decades both assumptions have been criticized. This is of particular relevance because facts relating solely to a witness's credibility are generally regarded as collateral. Indeed, the vast majority of instances in which the collateral issues rule was applied involved cross-examination directed at credibility.[49]

The seminal statement on how to identify a collateral issue is that of Pollock CB in *Attorney-General v Hitchcock*:[50]

> [T]he test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him.

Despite being regularly quoted, the test is of limited utility: it "is easy to state but notoriously difficult to apply".[51] Similarly, in *R v Funderburk* the English Court of Appeal described the test as "circular" and "silent on how you decide whether [a] fact is collateral".[52] It is in fact difficult to read the test as much more than one of sufficient relevance:[53] a fact is not collateral when it is of sufficiently close connection to the facts in issue.

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46 (1679) 7 How St Tr 311.

47 Ibid 374.

48 Ibid 385.

49 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 47.

50 *Hitchcock*, supra note 42, adopted in New Zealand in *R v Katipa* [1986] 2 NZLR 121, 128 (CA) and *R v Accused (CA 92/92)*, supra note 1, 557.

51 *R v Kiriona* (10 April 1991) unreported, Court of Appeal, CA343/96, CA320/96, CA321/96, 7; see also *R v White* (17 December 1998) unreported, Court of Appeal, CA347/98, 6.

52 [1990] 1 WLR 587, 598 (CA).

53 See e.g. *Natta v Canham*, supra note 43, 160–161; *Nicholls v R*, supra note 8, [42]; Tapper, supra note 19, 340.

It is often accepted that a matter will be collateral if relevant only to a witness's credit.[54] Accordingly, the credibility of a witness is by definition a collateral matter rather than a fact in issue.[55] But the *a priori* nature of this statement may be, and has been, questioned: is it logical to draw a distinction between relevance to credibility and relevance to issue?

We have already noted that credibility evidence is important because the value of testimony is inextricably linked with the credibility of the witness giving it. In *R v C* the Court of Appeal discussed the distinction between the credibility of witnesses and facts in issue.[56] It held that evidence crucial to assessing a complainant's credibility can in exceptional cases qualify for admission as of "such direct relevance to facts in issue".[57] Fisher J's statements in *R v Young* were cited with approval:[58]

> [T]he threshold for evidence is that it must be directly or indirectly relevant to the facts in issue. That includes evidence as to credit. Evidence as to credit is admitted only because the credibility of witnesses who tell us about facts in issue indirectly bears upon the probability of the facts in issue themselves. Such evidence is indirectly relevant to the facts in issue.

Further, the Court opined that if evidence passes the section 23A test then "there should be no concern that it infringes the rule against admission of evidence raising a collateral issue".[59] One reading of this dictum is that credibility evidence that is admissible under section 23A should be adduced *despite* breaching the collateral issues rule. This would signify a more flexible approach to the rule.[60] An alternative, and perhaps better, reading is that in certain circumstances the credibility of a complainant is not collateral. Evidence having a major impact on a complainant's credibility can truly be said to have direct relevance to the facts in issue.[61] This is particularly, but not necessarily or exclusively,[62] so in cases of sexual offending because: the complainant's state of mind is often crucial, especially when consent is at issue; the offending often takes place in private, with no physical evidence or additional witnesses; and the result

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54 *Nicholls v R*, supra note 8, [43] per McHugh J.

55 Ibid [38]; *Harris v Tippett* (1811) 2 Camp 637, 638; 170 ER 1277, 1278 (KB); *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533, 545 (HCA) ["*Piddington*"]; *Goldsmith v Sandilands* (2002) 190 ALR 370, [3] (HCA) per Gleeson CJ, [32] per McHugh J.

56 *R v C*, supra note 5, [12]. The case was concerned with s 23A of the Evidence Act 1908, but the discussion is of wider relevance. Section 23A imposed a test of heightened relevance for the admission of evidence relating to the sexual history of complainants in prosecutions for sexual offences

57 Ibid [8]–[9], quoting from *R v McClintock* [1986] 2 NZLR 99, 104 (CA). The same phrase is used in s 44 of the Evidence Act 2006.

58 (1990) 6 CRNZ 520, 522 (HC).

59 *R v C*, supra note 5, [20].

60 *R v M* [1996] 3 NZLR 502 (HC) provides some support for such an approach.

61 See also *R v McClintock*, supra note 57, 104; *R v Viola* [1982] 1 WLR 1138 (CA); but compare *R v Accused (CA 92/92)*, supra note 1.

62 *Nicholls v R*, supra note 8, [206] per Kirby J who thought it unprincipled to treat cases involving sexual crimes as an exception to the collateral issues rule.

often turns on which of two conflicting accounts is believed.[63] McHugh J has been a particularly vociferous proponent of such an approach:[64]

> Evidence concerning the credibility of a witness is as relevant to proof of an issue as are the facts deposed to by that witness. There is no distinction, so far as relevance is concerned, between the credibility of the witness and the facts to which he or she deposes. The credibility of evidence is locked to the credibility of its deponent. The truth of that proposition is in reality recognised by the rule that a witness can be cross-examined as to matters of credit. Because that is so, it is irrational to draw a rigid distinction between matters of credit and matters going to the facts-in-issue.

Matters in issue and matters of credit are intertwined.[65] Credibility is a necessary condition for any piece of evidence to be relevant and therefore admissible. When a witness deposes to a certain event occurring, the testimony is relevant because it renders the occurrence of the event in question more likely. It only does this, however, where it has some credibility. Credibility forms the connecting link between the testimony and the conclusion based thereon; it cannot be separated from the facts in issue. Testimony that is utter fabrication (for example, the ravings of a lunatic) should not be admitted for it has no relevance to the facts in issue.[66]

3 The Structure of the Collateral Issues Rule

The structure of the collateral issues rule was the product of two competing forces. Pushing in one direction was the undoubted importance of its underlying principles: first, trials must be kept within manageable and appropriate limits; and second, witnesses should not have to be prepared to rebut potentially any allegation about their past. Pulling in the other direction was the difficulty and, indeed, artificiality of drawing a line between collateral matters and facts in issue. Matters affecting the credibility of witnesses are often of such importance that to keep them from the tribunal of fact seems absurd and unjust. Accordingly, the collateral issues rule developed a number of exceptions — categories of questions in which, despite going solely to credit, the witness's answers could be rebutted by extrinsic evidence:[67]

- that the witness has been convicted of a criminal offence;
- that the witness has made prior statements inconsistent with his or her testimony;

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63 Tapper, supra note 19, 352; *R v Funderburk*, supra note 52, 597.

64 *Palmer v R*, supra note 38, [56]; see also *Nicholls v R*, supra note 8, [43].

65 Zuckerman, supra note 2.

66 Ibid 95–96.

67 See e.g. Gans and Palmer, *Australian Principles of Evidence* (2 ed, 2004) para 14.4.2; New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 47–48.

- that the witness is affected by either bias, interest or corruption;
- that the witness suffers from a physical or mental defect that affects his or her credibility;[68] and
- that the witness has a poor reputation for veracity.[69]

The content, rationality, and appropriateness of each of these classes of exception are covered during discussion of the substantial helpfulness test. At this point our discussion is restricted to the overall merit of the structure of the collateral issues rule.

A major issue with any rule and exceptions approach is whether the list of exceptions is closed. The very existence of exceptions, it can be argued, shows that the law is sensitive to the interests of justice over rigid adherence to the general rule.[70] However, the acknowledged exceptions to the rule exist, at least in part, because they are not seen to be at risk of radically undermining the rule's foundational principles.[71] Allowing extrinsic proof of prior convictions, for example, should not normally submerge the court in a multiplicity of issues — they can be proved quickly from official records — and does not constitute an unfair surprise to the witness.

If the traditional exceptions were evolved to promote justice, it is but a small step to say that further exceptions can be developed. This has been the position long advocated in *Cross on Evidence*.[72] Others have called for the "list and exceptions" approach to be completely dispensed with in favour of a flexible approach centred on the "interests of justice".[73] What little judicial comment there has been on the structure of the rule in New Zealand has tended to lean towards a more flexible approach.[74] Baragwanath J, for example, has advocated an approach whereby instead of looking to established exceptions, relevance is weighed against the competing policy considerations underlying the rule.[75]

Section 37(1) of the Evidence Act 2006 has replaced the collateral issues rule with a test of substantial helpfulness. It still remains to be seen to what extent the common law's principles — both those underpinning the exclusionary nature of the rule and those justifying the established exceptions — and approach find their way into this test. It is argued

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68 See e.g. *Toohey*, supra note 3.

69 See e.g. *R v Richardson* [1969] 1 QB 299 (CA); *R v Royal* (29 April 1993) unreported, High Court, Hamilton Registry, T 66/91 & 6/92.

70 *Funderburk*, supra note 52, 591.

71 See e.g. Wigmore, supra note 14, §877.

72 See most recently Tapper, supra note 19, 341: "The indubitable value of the finality rule should not blind us to the undesirability of a closed list of exceptions to it." This was adopted by the English Court of Appeal in *Funderburk*, supra note 52, 599, then retreated from in *R v Edwards* [1991] 1 WLR 207 (CA) (criticized by Pattenden, "Evidence of Previous Malpractice by Police Witnesses and *R v Edwards*" [1992] Crim LR 549).

73 *Nicholls v R*, supra note 8, [55] per McHugh J; see also *Natta v Canham*, supra note 43, 160; Zuckerman, supra note 2, 99–100.

74 *R v Griffiths* supra note 31, 8: "The rule is not absolute. Relevance is a matter of degree." *R v Haig* (2006) 22 CRNZ 814, [92] (CA): "The collateral issues rule is not entirely easy to apply. In practice, it tends to involve a degree of discretion."

75 *R v M*, supra note 60, 509–510.

that whilst the principles underpinning the collateral issues rule remain important, the approach and partialities applied by the common law to evidence of credibility should be jettisoned.

III THE SCOPE OF THE VERACITY RULES

Section 37 represents a significant, although not radical, development in the approach to evidence of credibility.[76] This new approach raises a number of issues and potential problems that are now examined.

What is "Veracity Evidence"?

Section 37 is narrower than the common law, which did not distinguish between error due to deliberate deception (truthfulness) and that due to honest mistake (reliability or accuracy). Veracity, however, is a subset of credibility; the concern is the witness's *intention* to tell the truth. No longer can a witness's credibility be challenged without specifying whether he or she is alleged to be lying or merely mistaken.[77] In order to know whether section 37 is triggered, the reason *why* the witness should be disbelieved must be clear.

The Law Commission originally elected to use the term "truthfulness", defined in the proposed section 4(2):[78]

> (2) In this Act
>
> (a) **truthfulness** is concerned with a person's intention to tell the truth and is not concerned with accuracy or error; and
>
> (b) a reference to evidence about a person's **truthfulness** is to be understood as a reference to evidence that is solely or mainly about the person's truthfulness.

The Justice and Electoral Select Committee substituted the term "veracity" for "truthfulness". The Committee regarded truthfulness as more easily confused with factual correctness, whereas veracity emphasized the intention to tell the truth. Veracity is now defined in section 37(5): "[f]or the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding."

It is immediately clear that section 37 does not cover evidence relating to reliability, which is therefore no longer subject to restrictions. Counsel are free to explore a witness's powers of perception, opportunities

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76 Unless otherwise stated, all statutory references in this part are to the Evidence Act 2006.

77 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 12.

78 New Zealand Law Commission, *Evidence: Report 55 – Volume 2: Evidence Code and Commentary* (NZLC R55 – Volume 2, 1999) 24 ["*Evidence Code*"].

for observation, reasons for remembering the incident, quality of memory, physical or mental disabilities, and in many cases prior inconsistent statements, without necessarily having to satisfy the substantial helpfulness test. Moreover, such evidence will generally be admissible. The House of Lords in *Toohey v Metropolitan Police Commissioner* ruled that medical evidence affecting credibility should be admissible:[79]

> [W]hen a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them.... So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.

The definition of veracity could prove problematic in a number of ways. For a start, it is not immediately clear what is meant by a person's "disposition", nor why the definition has moved away from a focus on the *intention* to lie. Disposition is most synonymous with inclination; apparently contemplated is the existence of a hypothetical character trait that produces an inclination to lie. Indeed, the definition seems to anticipate evidence of a *general disposition* to lie. However, the existence of such general personality traits was strongly rejected by the Law Commission. It found that people cannot be divided into those who are predisposed to truthfulness and those who are not.[80] As is discussed later, it is only sensible to talk of the existence of meaningful personality traits across similar situations.[81]

Section 37's reference to a disposition to "refrain from lying ... in the proceeding" is perhaps a little clearer. Although it is somewhat unusual to talk of a person's disposition in a particular instance to do a particular thing (that is, to lie), the focus is the person's state of mind, not the objective truth of the testimony. It is unfortunate that the definition of veracity does not refer to an intention to tell the truth, despite this being the stated reason behind the change.[82] Evidence of veracity should always be concerned with showing whether the person in question, at the relevant time, is intentionally lying. The proposed definition of truthfulness did this much more concisely and simply.

The reference to the disposition of a person to refrain from lying "in the proceeding" may also prove contentious. Any evidence contradictory to a witness's testimony could arguably fall within this reference and become subject to the veracity rules. Where witnesses give two completely

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79 *Toohey*, supra note 3, 608.

80 See Uviller, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale" (1993) 42 Duke LJ 776, 792 suggesting that the assumption that lack of respect for truth is a pervasive trait is naïve and "reflect[s] a view of human nature more suitable to the nursery than the courtroom".

81 See the discussion of prior misconduct under Part V, below.

82 Justice and Electoral Committee *Evidence Bill (Government Bill) 256–2* (2005) 5.

irreconcilable versions of events, the testimony of each does in a sense impeach the other's veracity. It is submitted, for the following reasons, that contradicting a witness on matters in issue should not be treated as evidence about that witness's veracity.

The rules on hostile and unfavourable witnesses provide some guidance. At common law a party could call evidence contradicting its own witness's testimony, even without the judge declaring the witness hostile. Mere contradiction was not seen as an attack on the witness's credit.[83] This distinction is quantitative rather than qualitative; calling into question large portions of a witness's sworn testimony must logically at some point undermine the witness's veracity and therefore the entire testimony.[84] Where the evidence is mainly proffered for its truth, however, it is not truly "about a person's veracity". Evidence that would have been admissible even when inconsistent evidence had not been given only tangentially shows a disposition (not) to refrain from lying in the proceeding.

This analysis is substantively similar to the distinction between collateral matters and facts in issue. This distinction, although criticized, cannot be completely abandoned. Section 37(4), for example, assumes that veracity evidence is distinguishable from evidence as to the facts in issue.[85] It must also be noted that the main concern underlying criticisms of the distinction is that evidence that is clearly about a witness's veracity should, in certain cases, also be considered directly relevant to the facts in issue and therefore admissible. However, in this analysis the reasoning runs in the opposite direction. The potential argument being evaluated is that in some cases evidence clearly about facts in issue may also be about the witness's veracity. Further, neither of the principles underpinning the exclusionary nature of the collateral issues rule — the avoidance of a multiplicity of issues and fairness to witnesses — provides any justification for subjecting evidence that is directly relevant to the facts in issue to the gauntlet of the substantial helpfulness test. Perhaps even more fundamentally, the mere coincidence that evidence as to the facts in issue contradicts an earlier witness should not change the rules governing its admissibility.

This ambiguity in section 37, as well as others to be discussed, could largely have been avoided by retaining the second prong of the Law Commission's proposed definition of truthfulness:[86] "a reference to evidence about a person's **truthfulness** is to be understood as a reference to evidence that is *solely or mainly* about the person's truthfulness". Such a provision would have clearly defined the scope of the veracity rules. It would also have recognized that evidence is regularly offered for multiple purposes and may be only tangentially relevant to veracity. It is to be

83 *R v Cairns* [2003] 1 Cr App R 662 (CA).

84 Tapper, supra note 19, 329. This position is retained in s 37(4)(b) of the Evidence Act 2006.

85 Section 37(4)(a) prohibits a party offering veracity evidence unless the witness is declared hostile, whereas subs (b) retains the right to offer evidence as to the facts in issue contrary to the evidence of that witness notwithstanding there being no determination of hostility.

86 New Zealand Law Commission, *Evidence Code*, supra note 78, 24 (emphasis added).

hoped that the courts will impose this type of test in setting the scope of section 37.

An "Offer of Evidence"

Section 37 applies to any "offer" of evidence about a person's veracity.[87] Although on a cursory reading the focus appears to be on offers of extrinsic evidence, such as the calling of additional rebuttal witnesses, it is a mistake to assume that section 37 is limited to these situations.[88] The definition of "offer evidence" in section 4 confirms that the veracity rules apply equally to questions asked in cross-examination: **"offer evidence** includes eliciting evidence by cross-examining a witness called by another party".[89]

The Evidence Act has thus subtly made a major change. Cross-examination as to veracity is now subject to much stricter controls than existed at common law. As already discussed, cross-examination must still meet the requirements of relevance and good faith; and improper and unfair questions will still be disallowed.[90] But now, questions impeaching a witness's veracity must also be substantially helpful in assessing that person's veracity. No longer will cross-examining counsel be able to justify blackening the character of witnesses[91] on the weak grounds of relevance to credibility.[92]

The policy behind this change is sound for two reasons. First, it reflects a growing concern to protect witnesses from abuse. Wigmore argues that the witness box should not unnecessarily become "the slaughterhouse of reputations", both because it offends common decency and courtesy, and because it will effectively suppress the availability of evidence by discouraging witnesses from testifying.[93] An increasing concern about the common law's failure to prevent the routine character-blackening of witnesses is apparent.[94] A recent English study found that a large proportion

87 Evidence Act 2006, s 37(1).

88 Cull and Eaton make this mistake. See Cull and Eaton, "Veracity and Propensity" in Young and Chambers JJ (chairs), *Evidence Act 2006* (2007) 61, 75.

89 This was recognized by the Court of Appeal in *R v Smith* [2007] NZCA 400, [14].

90 Evidence Act 2006, s 85.

91 See the comments in *R v Duncan* [1992] 1 NZLR 528, 535 (CA); Jackson and Wasik, "Character Evidence and Criminal Procedure" in Hayton (ed), *Law's Future(s)* (2000) 349, 358–359.

92 See e.g. *R v Sweet-Escott* (1971) 55 Cr App R 316, 320 (Ct of Assize); *R v Edwards*, supra note 72, 214.

93 Wigmore, supra note 14, §983; Australian Law Reform Commission, *Report 26 – Volume 1: Evidence (Interim)* (ALRC 26, 1985), [817] ["*Report 26*"]. In particular, note the development of "rape shield" laws, which protect victims of sexual offending who testify.

94 Jackson and Wasik, supra note 91, 358–359; Uglow, supra note 38, 485; Eggleston, "The Assessment of Credibility" in Morris and Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (1972) 26, 41 ["Assessment of Credibility"] argues that most cross-examination on witnesses' alleged discreditable conduct is really designed to create feelings of prejudice against them.

of witnesses felt that they were badly treated in cross-examination, which in turn correlated with an unwillingness to be a witness in the future.[95]

Second, allegations made in cross-examination significantly harm the credibility of witnesses even where the alleged conduct is flatly denied or the judge sustains an objection to the question.[96] The common law's restrictions were not particularly effective at preventing the practice of putting questions implying serious misconduct for the sole purpose of "wafting unwarranted innuendo into the jury box".[97] Trial judges exhibited an unwillingness to circumscribe cross-examination.[98] In order to avoid distortions in the fact-finding process, cross-examination as to veracity must be subject to greater restrictions than those imposed at common law.

As the section 37 test applies as much to asking questions in cross-examination as to adducing extrinsic evidence, a loose approach to the former cannot be justified. Indeed, where a question about a person's veracity is considered substantially helpful, evidence rebutting the witness's answer should ordinarily also qualify for admission.[99] The same statutory test is mandated in both situations.

The Overlap between Propensity and Veracity Evidence

The only potential evidentiary overlap recognized by the Evidence Act 2006 is that between propensity and veracity evidence. The propensity rules, which allow the free admission of propensity evidence in relation to non-defendant witnesses,[100] do not apply to evidence that is "solely or mainly" relevant to veracity.[101]

This is undoubtedly a useful provision. A significant amount of veracity evidence "tends to show a person's propensity to act in a particular way".[102] Perjury convictions, for example, show a propensity to testify dishonestly and therefore render it more probable that the witness will not refrain from lying in the current proceeding. Such evidence is solely or mainly relevant to veracity.

A more difficult situation arises where an accused argues self-defence. If the complainant has convictions for violent offending, the defence will

95 Angle, Malam and Carey, "Witness Satisfaction: Findings from the Witness Satisfaction Survey 2002 (Home Office Online Report 19/03)" United Kingdom Home Office (2003) <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr1903.pdf> (at 2 August 2008).

96 Kassin, Williams and Saunders, "Dirty Tricks of Cross-Examination: the Influence of Conjectural Evidence on the Jury" (1990) 14 Law and Human Behavior 373. Interestingly, innuendo was found not to harm the credibility of a rape victim.

97 Underwood and Fortune, *Trial Ethics* (1988) 346 quoted in Kassin, Williams and Saunders, ibid 374.

98 Jackson and Wasik, supra note 91, 365.

99 This is very much the position adopted under s 100 of the Criminal Justice Act 2003 (UK): see Uglow, supra note 38, 490 and Tapper, supra note 19, 389–390.

100 Evidence Act 2006, 40(2). Complainants in sexual cases also have additional protections with respect to evidence of their sexual experience (see s 44).

101 Evidence Act 2006, s 40(4).

102 Evidence Act 2006, s 40(1)(a).

want to admit them.[103] However, it is not immediately clear which section governs admissibility. The starting point is to identify the evidential uses of these convictions. First, they tend to show that the complainant has a propensity for violence and thus make it more probable that he or she was the aggressor. Second, where the complainant's testimony is incompatible with a claim of self-defence, they increase the likelihood that he or she is lying and bolster the accused's veracity.[104] Finally, where the accused knew of these convictions, they may also be relevant to the subjective element of self-defence: what the accused believed the circumstances to be.[105]

The Law Commission believed that the veracity rules would govern such situations.[106] This is questionable. Such evidence is more often considered primarily relevant to the complainant's propensity for violence rather than credibility.[107] The Court of Appeal has held that it is wrong to restrict the use of a complainant's previous violent offending to credibility.[108] Indeed, doing so may "effectively exclud[e] the evidence from any real role in the trial".[109] The mere fact that this propensity evidence contradicts a witness's testimony should not force it within section 37. The veracity inference is not the dominant purpose of the evidence; that it undermines the complainant's testimony and bolsters that of the accused is only a collateral function. By way of comparison, evidence of perjury convictions would be adduced to attack the complainant's veracity. If the complainant could not remember the incident, the perjury convictions would be much less relevant; but those for violent offending would remain highly relevant.[110]

The Admissibility of Previous Inconsistent Statements

At common law, a witness's previous statements were hearsay[111] and could only be offered for their truth if adopted by the witness at trial.[112] Under section 4, however, a testifying witness's past statements are not hearsay, the rationale being that since the witness is available to be cross-examined, the

103 See e.g. *R v Evans* [1992] Crim LR 125 (CA); *R v Farquhar* (20 March 2006) unreported, Court of Appeal, CA4/06; *R v Lologa* (8 December 2006) unreported, High Court, Auckland Registry, CRI-2005-092-7703.

104 *R v Farquhar*, supra note 103, [18].

105 Crimes Act 1961, s 48; and see *R v Li* (28 June 2000) unreported, Court of Appeal, CA140/00, CA141/00, [19].

106 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 33; see e.g. *R v Evans*, supra note 103, although in this case the complainant's convictions also included dishonesty offences.

107 *R v Davis* [1980] 1 NZLR 257, 262 (CA); *R v Wilson* [1991] 2 NZLR 707, 712–713 (HC); *R v Taunoa* (23 September 2002) unreported, Court of Appeal, CA155/02, [11].

108 *R v Farquhar*, supra note 103, [17].

109 Ibid.

110 Compare with *R v Wilson*, supra note 107, where the deceased's drug related offences were inadmissible as irrelevant to self-defence.

111 See e.g. *R v Birkby* [1994] 2 NZLR 38 (CA).

112 See e.g. *R v King* (15 December 2003) unreported, Court of Appeal, CA227/03, [33]. A previous statement was also admissible at common law if it fell within an exception to the hearsay rule (for example, an admission), was a recent complaint, or was necessary to rebut an allegation of recent fabrication.

dangers against which the hearsay rule guards are not present.[113] Previous inconsistent statements are therefore now more readily admissible.[114] They may be offered for their truth, to undermine the witness's accuracy, or to impeach the witness's veracity; but where a statement is offered for multiple evidential uses, it is uncertain which rules will govern its admissibility.

With the exception of propensity evidence, it is unclear the extent to which evidence must be "about a person's veracity" to fall within section 37. Given the absence of any qualification, it is arguable that the section catches all evidence that tends to affect a person's veracity. Section 37(3) in particular seems to assume that previous inconsistent statements will be offered in relation to veracity and deserve special consideration under the substantial helpfulness test. Where the previous statement is about an important matter in issue, however, counsel will often ask that it be accepted for its truth.[115]

The degree of inconsistency will be an important factor. Where there is a head-on conflict between the prior statement and the present testimony, the tribunal of fact will often have to conclude that the witness is lying in order to accept the statement for its truth. Conversely, where the inconsistency is less stark, the inference may be that the prior statement was made when the witness's recollection was likely to be more accurate and he or she may now be mistaken. In this situation, the statement is not offered as evidence about the witness's disposition to refrain from lying. Admissibility will depend solely on relevance.[116]

The subject matter to which the previous statement and the present testimony relate is also of crucial importance. Where the previous statement relates to the facts in issue, the veracity rules should not govern admissibility. The rationales behind both the collateral issues rule and the substantial helpfulness test are wholly inapplicable to evidence of the facts in issue.

Furthermore, where a statement is not offered for its truth, it will most likely relate to a matter of little consequence to the determination of the proceedings and it is difficult to envisage any inconsistency as being of substantial helpfulness in assessing the witness's veracity. Previous inconsistent statements are therefore likely to be only rarely admitted pursuant to section 37.

The Complex Interaction between Veracity Evidence and Hearsay Statements

A final potential area of complexity is the interaction between hearsay statements and veracity evidence. Offers of evidence about veracity may

113 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 36–37.

114 Ibid 38.

115 See e.g. *Adam v The Queen* (2001) 207 CLR 96 (HCA).

116 Evidence Act 2006, s 7.

come in the form of hearsay statements.[117] In such a situation not only must the circumstances that relate to the statement provide reasonable assurance that the statement is reliable,[118] but also the imputation made in the statement must be substantially helpful in assessing the witness's veracity.

A more complex situation arises where the veracity of the person quoted in a hearsay statement is of significance.[119] Should this person's veracity be examined as a part of the test for the admissibility of hearsay, or only when it comes into issue once the statement has been admitted? In either case, section 37 is potentially applicable since it covers evidence offered about the veracity of any person, not just testifying witnesses.[120] Given that one of the perceived dangers of hearsay evidence is the absence of any opportunity to probe the evidence by cross-examination,[121] it makes sense when deciding on admissibility to consider the veracity of the person quoted.[122] Indeed, section 16(1)(d) defines the circumstances relating to the statement as including "any circumstances that relate to the veracity of the person" making the statement. In *R v Howse*[123] the Court of Appeal ruled that hearsay statements (allegations by the deceased victim about being sexually abused by the accused) were wrongly admitted. The decision was based on severe doubts about the veracity of the victim in making such allegations.[124] This suggests that the veracity of the person quoted in a hearsay statement should meet a "threshold requirement of sufficient apparent reliability".[125] Although this area requires much fuller analysis than space permits, it suffices to say that when the admissibility of a hearsay statement is decided in a voir dire, veracity evidence may be offered in respect of the hearsay declarant. Furthermore, even if the statement is admitted, the opposing party will remain entitled to call substantially helpful evidence challenging both the veracity of the person quoted and the testifying witness.

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117 The Law Commission's draft rules dealt with the situation where evidence about a person's reputation for veracity came in the form of hearsay, but these provisions were removed along with the reference to reputation evidence, see New Zealand Law Commission, *Evidence Code*, supra note 78, 108 (proposed s 39(4)).

118 Evidence Act 2006, s 18(1)(a). These circumstances do not include the veracity of the witness who relates the statement in court. See *R v Shortland* [2007] NZCA 37, [43]; compare with *R v Bain* [1996] 1 NZLR 129 (CA) and see Sayles, "*Manase* and the Evidence Act 2006" [2007] NZLJ 413, 414–415.

119 *Cross on Evidence* (LexisNexis NZ, University of Auckland Library) (at 14 August 2008) EVA 37.5.

120 Evidence Act 2006, s 37(1).

121 *R v Bain*, supra note 118, 132–133.

122 Note that in *R v Manase* [2001] 2 NZLR 197, 206 the Court of Appeal mandated an inquiry into whether the evidence has "sufficient apparent reliability ... to justify its admission".

123 [2003] 3 NZLR 767 (CA); decision affd [2006] 1 NZLR 433 (PC) without discussion of the hearsay ruling.

124 Ibid [27]–[28].

125 Ibid [28].

IV THE SUBSTANTIAL HELPFULNESS TEST: GENERAL PRINCIPLES

The key to the admissibility of veracity evidence is the substantial helpfulness test.[126] Although this universal standard for admissibility effectively abolishes the collateral issues rule by not re-enacting it, its underlying principles remain relevant.[127] This part highlights a number of factors that, although not set out in section 37, should be important in the development of a new jurisprudence for the substantial helpfulness test.

The Meaning of Substantial Helpfulness

The phrase "substantially helpful in assessing ... veracity"[128] was preferred over the Australian nomenclature, "substantial probative value".[129] The Australian courts have, however, interpreted their legislation so as to read much like our veracity rules.[130] Australian cases will, therefore, provide useful guidance in the development of a section 37 jurisprudence.

The word "substantially" sets a higher threshold than mere relevance.[131] Its purpose is to exclude relevant but "potentially misleading or low value evidence",[132] while allowing for the admission of evidence that offers "real assistance to the fact-finder".[133] A large range of matters can potentially affect a person's veracity, but not all will offer real assistance.[134] In *R v Ronen (No 4)* Whealy J drew a distinction between "significant" and "substantial", and held that veracity evidence must have "such potential to affect the jury's assessment of the credit of the witness in respect of the evidence he or she has given that the credit of the witness cannot adequately be determined without regard to it".[135]

There is little to be gained from providing additional analogous

126 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 26.

127 *R v Smith*, supra note 89, [14].

128 Evidence Act 2006, s 37(1).

129 See e.g. Evidence Act 1995 (Cth), s 103(1); Evidence Act 1995 (NSW), s 103(1); Evidence Act 2001 (Tas), s 103(1). The Law Commission noted that as "probative value" is generally used in relation to facts-in-issue — that is, matters to be proved — as opposed to witnesses' veracity, the phrase could produce confusion. See New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 26. Indeed, this type of confusion has arisen in Australia: see e.g. Odgers, *Uniform Evidence Law* (7 ed, 2006) para 1.3.7740; *R v RPS* (13 August 1997) unreported, Court of Criminal Appeal, New South Wales, 60583/96. The Australian Law Reform Commission has recommended substituting the phrase "substantially affect the assessment of the credibility of the witness" to codify what has become the approach of their courts. See Australian Law Reform Commission, *Report 102: Uniform Evidence Law* (ALRC 102, 2005) [12.25] ["*Report 102*"].

130 See e.g. Odgers, supra note 129; *R v RPS*, supra note 129.

131 *R v Smith*, supra note 89, [16]; Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007) 140 ["*Evidence Act 2006*"].

132 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 23.

133 New Zealand Law Commission, *Evidence: Report 55 – Volume 1: Reform of the Law* (NZLC R55 – Volume 1, 1999) 44–45.

134 See e.g. *R v RPS*, supra note 129; Australian Law Reform Commission, *Report 102*, supra note 129, [12.28]: Credibility evidence must have "a genuine bearing on the assessment of the evidence".

135 (2004) 211 FLR 297, [42] (NSWSC).

phrases. It is more profitable to isolate some of the important considerations that should be factored into the application of the test. First, important matters not immediately obvious on reading section 37 are identified and discussed. Second, some of the matters explicitly put forward for consideration under the test are examined in depth in Part V.

Relative Remoteness in Time

Remoteness in time was originally set out by the Law Commission as a specific factor to be considered.[136] It was believed that such a provision would "have the effect of preventing evidence of 'ancient' convictions or lies coming before the court".[137] A comparison was drawn with the federal position in the United States, where convictions that are more than ten years old cannot be used for impeachment unless the court "determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect".[138]

Without explanation, temporal remoteness of the evidence was removed as a specific consideration. Despite this omission, the Commission's commentary on its draft code still ostensibly regarded remoteness as a relevant consideration:[139]

> It may also be appropriate for the judge to consider the time that has elapsed since the occurrence of the events to which the evidence of truthfulness relates. Thus, evidence of "ancient" convictions or lies is unlikely to be substantially helpful in assessing the truthfulness of a witness's testimony.

Cull and Eaton suggest, however, that temporal remoteness "is not a matter which the judge can currently take into consideration in admitting the evidence about veracity".[140] This approach should be rejected. It fails to recognize that the matters set out in section 37(3) are non-exhaustive and requires the irrational divorcing of a piece of evidence from its full context. The fact that a conviction is 40 years old is just as important as the offence that was committed.[141]

The Evidence Act 2006 requires a judge in a criminal proceeding to consider warning the jury about the unreliability of evidence given about a defendant's conduct that occurred more than ten years previously.[142] This

136 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 124; compare Evidence Act 1995 (Cth), s 103(2).

137 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 125.

138 Rule 609(b) USC 28 Federal Rules of Evidence; and see Best, *Evidence: Examples and Explanations* (5 ed, 2004) 146.

139 New Zealand Law Commission, *Evidence Code*, supra note 78, 107.

140 Cull and Eaton, supra note 88, 76.

141 See e.g. *R v Sweet-Escott*, supra note 92.

142 Evidence Act 2006, s 122(2)(e).

encourages the consideration of temporal remoteness under section 37 by implicitly acknowledging the importance of such information. The fact that consideration will only need to be given to the warning in a limited range of circumstances, particularly when propensity evidence about a criminal defendant is offered, further suggests that it is not a substitute for consideration under section 37. If the judge has doubts about the reliability or value of evidence relevant to a person's veracity, the evidence is unlikely to be substantially helpful.

The Nature, Number, and Similarity of the Alleged Events

The Law Commission's review of the empirical research on character found that multiple observations of a person's personality are needed to ascertain character traits. Substantial helpfulness will generally require that there be more than a single instance of conduct. These instances of conduct should also have a degree of similarity.[143] Finally, in order to have predictive power, the contexts in which they occurred should be sufficiently similar to the giving of evidence under oath. These considerations are reflected in section 37(3)(a) and 37(3)(b), which indicate that not all past bad acts or criminal offences will be substantially helpful.

The Importance of the Witness's Evidence to the Case

Section 37 evidence must be substantially helpful *in assessing a person's veracity*. The Act makes no mention of its value to the proceedings as a whole. Moreover, the definition of veracity suggests that a person's general disposition for veracity may be an evidential *end*, not just a *means* for assessing a person's veracity in the proceeding. However, a witness's general disposition for veracity is not always of great consequence to the proceeding. Large numbers of witnesses are common in criminal cases. If veracity evidence on every witness were permitted, especially as to general disposition, it would defeat the goal of preventing a multiplicity of issues and the protraction of hearings.

The English solution is to require both that the evidence be of substantial probative value in relation to credibility *and* that credibility be "of substantial importance in the context of the case as a whole".[144] Impeaching evidence must therefore make a major dent in the credibility of a witness who is giving important evidence.[145] This received a degree of recognition in *R v Lologa*,[146] where the issue was the requested disclosure of the criminal convictions of the victim and other witnesses. Baragwanath

143 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 14–15.

144 Criminal Justice Act 2003 (UK), s 100(1)(b)(ii).

145 Spencer, *Evidence of Bad Character* (2006) 41–42, para 3.13; see e.g. *R v Osbourne* [2006] 1 WLR 2948 (CA).

146 *R v Lologa*, supra note 103.

J held that the "bad character of a witness whose evidence is not disputed is simply irrelevant".[147]

Although section 37 does not appear to allow for consideration of the importance of the witness's testimony to the outcome of the proceeding, section 8 may be invoked to exclude otherwise admissible evidence. In particular, a judge must exclude evidence if its probative value is outweighed by the risk that it will "needlessly prolong the proceeding".[148] It is submitted that where a witness's testimony is not of great importance to the resolution of the proceeding, and the evidence to be offered is only substantially helpful in assessing the witness's general disposition for veracity, it should be excluded pursuant to section 8.

The Marginal Helpfulness of Evidence

The probative value of a piece of evidence depends on the effect of earlier evidence offered, as well as its likely interaction with forthcoming evidence. The marginal helpfulness of evidence refers to both phenomena, and will affect the evaluation of any piece of veracity evidence. Substantial helpfulness cannot be assessed in isolation.

Where there has already been considerable evidence adduced as to the veracity of a witness, the substantial helpfulness of further evidence must be determined in the context of the picture already painted. Given what is already known, is this piece of evidence substantially helpful in assessing the veracity of the witness? This principle is discernible in the Supreme Court's decision in *R v Thompson*.[149] At issue was whether prejudicial material disclosed by the complainant about the accused during robust cross-examination had caused a miscarriage of justice. This material included that: (a) the accused had served a previous sentence of imprisonment in Australia; (b) he had been serving a seven-year sentence when his offending began; (c) he had gang associations; and (d) he used pure methamphetamine while living with the complainant.[150] In isolation the mistaken admission of this evidence would have been highly prejudicial. The Court held, however, that no miscarriage of justice had occurred because similar, albeit less specific, material was already legitimately before the jury. In this context, the additional information was unlikely to have had any real influence on the verdicts.[151] Such reasoning is equally applicable in assessing the helpfulness of veracity evidence: consideration must be given to what is already known about the witness's veracity.[152]

The second situation is the flip side of the first. A piece of evidence may lack substantial helpfulness when viewed in isolation, but in combination

147 Ibid [13].

148 Evidence Act 2006, s 8(1)(b); see e.g. *R v Smith*, supra note 89, [18].

149 *R v Thompson* (SC), supra note 12.

150 Ibid [5].

151 Ibid [18].

152 See *R v Galea* (2004) 148 A Crim R 220, [117] (NSWSC) and Odgers, supra note 129.

with other evidence the cumulative effect may be highly persuasive.[153] For example, one unproven allegation of dishonesty as an employee may not, on its own, be substantially helpful. However, a pattern of allegations from multiple employers and colleagues about similar behaviour may be closer to the line.[154]

Veracity evidence should not be too readily admitted on this justification, as it could encourage counsel to put as many different accusations as possible to a witness in the hope that their cumulative effect be considered substantially helpful. This is undesirable as it could result in the proliferation of confusing side issues and the unnecessary prolongation of trials. The Law Commission's research into character evidence suggests that there must at least be a common thread running through the individual offers of evidence.

The Helpfulness of a Line of Questioning

While the test of substantial helpfulness now applies to questions asked in cross-examination, it should not be applied on a question-by-question basis. The definition of "offer evidence"[155] suggests that the focus should be on the value of the evidence to be elicited through the questioning. This point was put eloquently in *R v RPS*:[156]

> Counsel must, however, be given some freedom in cross-examination – whether it relates to a fact in issue or to credit. They are not obliged to come directly to the point; they are entitled to start a little distance from the point and to work up to it. Some counsel are more succinct than others. Some will put the point quickly and clearly. Others will worry the point, like a dog with a bone, and will set the teeth of everyone (including the jury) on edge. Trial judges are expected to have the patience (but, hopefully, not the poverty) of Job.

This is not to advocate a return to the permissive common law governance of cross-examination. It is simply a recognition that cross-examination takes place along lines of questioning, with each line designed to elicit a certain piece of evidence. The substantial helpfulness test is concerned with the value of the evidence the questioner wishes to elicit, not necessarily with the desired answer to each individual question.

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153 See *Piddington*, supra note 55, 551–552 per Starke J; *R v Z* [2000] 2 AC 483 (HL) where evidence was allowed to be given of multiple rape charges where Z's defence was consent, despite the fact that four of the five cases had resulted in acquittals.

154 *R v Edwards*, supra note 72, 216; see also the reasoning in *R v Z*, supra note 153.

155 Evidence Act 2006, s 4.

156 *R v RPS*, supra note 129, 29–30.

The Helpfulness of the Desired Response

In assessing the substantial helpfulness of any evidence to be offered, the court should generally assume that the allegation made is true.[157] At the admissibility stage, a judge should not pre-empt either the answer given by a witness under the heat of cross-examination[158] or the likelihood of the jury believing an allegation, unless no reasonable jury could reasonably find it to be true.[159] It should be assumed that a line of questioning will elicit the desired response,[160] and that extrinsic evidence about a person's veracity will be accepted as true.[161] Counsel must, of course, still have a good faith basis for the question.

V THE SUBSTANTIAL HELPFULNESS TEST: CONTROVERSIAL CATEGORIES OF EVIDENCE

Section 37(3) sets out five matters that a judge *may* consider when applying the substantial helpfulness test. The temptation to treat these matters as exhaustive should be resisted.[162] Although they are reminiscent of the settled exceptions to the collateral issues rule, no longer is any category of evidence automatically admissible; under section 37 each offer of evidence must be assessed separately.

This article focuses on the categories of evidence set out in section 37(3) in which substantial change from the common law position is likely: prior instances of misconduct and convictions. All of the categories set out in section 37(3) are "negative" in that they tend to indicate a lack of veracity.[163] Despite this, evidence supporting a person's veracity is also discussed. Finally, the position of evidence of reputation relevant to veracity is considered.

The position of previous inconsistent statements has already been discussed and does not require further treatment. Paragraphs (d) and (e) (bias and motive to be untruthful) also do not merit detailed discussion. They probably cover the same ground as the common law exceptions

157 *R v Lodhi* [2006] NSWSC 670, [27]; *R v Beattie* (1996) 40 NSWLR 155, 163 (NSWCCA).

158 *R v Beattie*, supra note 157, 163.

159 *R v Griffiths*, supra note 31, 5.

160 See e.g. *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, [93], [102] (FCA) ["*Jacara*"]; *R v Beattie*, supra note 157, 163.

161 This assumption is explicitly required under the Bad Character provisions of s 109 of the Criminal Justice Act 2003 (UK).

162 Cull and Eaton, supra note 88, 74 fail to resist this temptation, arguing that these five factors are the only matters a judge can consider and that "proposed evidence *must* tend to show one or more" of the matters set out (emphasis added); see also *R v C (CA391/07)* [2007] NZCA 439, [21].

163 Mahoney, *Evidence Act 2006*, supra note 131, 144.

to the collateral issues rule for evidence showing bias,[164] interest,[165] and corruption.[166] Although each individual offer of evidence must be assessed for its substantial helpfulness, it is likely that most evidence showing one or more of these proclivities will pass the threshold.

Prior Misconduct

1 The Common Law Position

At common law, witnesses' credibility could easily be impeached with questions about prior discreditable conduct not resulting in convictions. Rebuttal evidence could not be adduced, however, as prior misconduct was regarded as a collateral matter, which was not subject to an established exception to the exclusionary rule. This position was not based on relevance concerns. Indeed, cross-examination was permitted because misconduct was seen as indicating bad character, which increased the chances of the witness testifying falsely.[167] The exclusion of extrinsic (rebuttal) evidence was based squarely on the policy considerations underlying the collateral issues rule.[168]

Section 37 is likely to reduce the ability to ask questions suggesting the prior misconduct of a witness. However, extrinsic proof of this misconduct will be more readily admitted. These changes were largely based on the Law Commission's review of psychological research on character. These findings must be considered in order to understand properly the operation of section 37 generally and, in particular, its treatment of both prior misconduct and convictions.

2 The Value of Character Evidence

Character evidence is admitted on the assumption that people have a set of character traits that, when identified, will assist fact-finders in determining a person's behaviour (for example, whether an individual is telling the truth) in a given instance.[169] Psychologists generally agree that people do, to a certain extent, have character (or personality) traits that are more or

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164 *R v Chignell* [1991] 2 NZLR 257, 273 (CA) (witness a paid informer for prosecution); *R v Green* (1893) 11 NZLR 736 (CA) and *Thomas v David* (1836) 7 Car & P 350; 173 ER 156 (witness in a sexual relationship with a party or another witness); *R v Busby* (1982) 75 Cr App R 79 (CA) (witness having threatened another witness to deter him from giving evidence); *R v Phillips* (1936) 26 Cr App R 17 (CCA) (witness coached into giving evidence); *R v Lintott* (25 September 1995) unreported, Court of Appeal, CA168/95 (witness having a history of bad feeling towards a party).

165 For example, having a financial interest in the outcome of the proceeding: see e.g. *R v C*, supra note 162; *R v H* (22 April 2002) unreported, High Court, Whangarei Registry, T012509; *Maritime Union of New Zealand v TLNZ Ltd* (2007) 4 NZELR 652 (EC) (relating to expert opinion evidence).

166 See e.g. *R v Lawrence* [2002] 2 Qd R 400, 409 (CA); *R v White*, supra note 51 (an offer not to testify in exchange for money).

167 Australian Law Reform Commission, *Report 26*, supra note 93, [408].

168 Wigmore, supra note 14, §876.

169 Australian Law Reform Commission, *Report 26*, supra note 93, [405].

less stable,[170] but maintain that the influence of these traits on the behaviour of an individual is highly dependent on situational variables.[171]

Traditional trait theory posited that individuals have a stable set of traits that produces consistent behaviour across a wide variety of situations. Thus, a person classified as dishonest would be expected to behave dishonestly whenever the opportunity arose. This theory has now largely been abandoned in favour of "modified trait theory", which regards "the behavioural response of an individual in a given instance ... [as] determined by an interaction between his 'psychic structure' and the 'situation'".[172] It is only legitimate to expect an individual to exhibit consistent behavioural responses across similar situations.[173]

People cannot be divided into those who are predisposed to truthfulness and those who are not.[174] No modern psychologist would regard personalities as so highly integrated.[175] This is not to say that character evidence is never probative. To have high predictive value, an assessment of a person's veracity must be based on a number of instances of prior conduct relevant to veracity, proximate in time, and in similar circumstances.[176] So where a witness has a history of making false statements in court or lying to protect family members, it is reasonable to infer that he or she may do so again.[177] In contrast, where past lying is confined to certain sensitive issues, it is not reasonable to infer that dishonesty will permeate all subsequent testimony.[178]

The common law was content to adopt traditional trait theory. This resulted in character evidence being too readily admitted without regard to its inherent risks, in particular its potential to distort the fact-finding process.[179] People tend to give character evidence disproportionate weight and utilize traditional trait theory when evaluating others.[180] The dangers of character evidence largely stem from two recognized psychological phenomena:[181]

- *The halo effect*: a tendency to categorize a person as either "good" or "bad" and then allow this to colour all subsequent judgements

170 Ibid [796]; New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 14.

171 Okun, "Character and Credibility: a Proposal to Realign Federal Rules of Evidence 608 and 609" (1992) 37 Vill L Rev 533, 547.

172 Australian Law Reform Commission, *Report 26*, supra note 93, [796].

173 See e.g. Jackson and Wasik, supra note 91, 363.

174 Uviller, supra note 80, 792 suggests that the assumption that lack of respect for truth is a pervasive trait is naïve and "reflect[s] a view of human nature more suitable to the nursery than the courtroom".

175 Australian Law Reform Commission, *Report 26*, supra note 93, [798].

176 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 15; Jackson and Wasik, supra note 91, 363.

177 Australian Law Reform Commission, *Report 26*, supra note 93, [798].

178 Ibid.

179 Ibid [799].

180 Thus we assume an indivisibility and consistency of character in others, whereas explain our own behaviour with greater reference to situational factors. See ibid [794].

181 See generally ibid [799]; New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 15–16.

pertaining to the person. First impressions not only last, but are also pervasive.

- *Attribution theory*: a tendency to take one observation of a person's behaviour and view it as indicative of a stable personality trait, which is then attributed to him or her. Situational or other factors are generally not considered when assessing the personalities of others. As noted, this view of personality has long been abandoned by psychologists.

The Law Commission concluded that character and credibility are often assessed on a superficial basis that can result in misleading assessments of individuals' propensity to behave in certain ways.[182] A balance must be struck between the common-sense assumption that it is helpful for the fact-finder to have information about the witness's character, and the concern that such information may be misused and therefore be unfairly prejudicial to one party.[183] The Commission advocated limiting character evidence to conduct occurring in circumstances similar to those in question.

3 The Evidence Act 2006 Position

The rejection of traditional trait theory dispenses with the assumption that all bad character evidence is relevant to veracity. A case like *R v Tinker*,[184] where cross-examination of a witness about his association with a convicted robber was permitted, is unlikely to be decided in the same way under section 37. The substantial helpfulness test, therefore, *narrows* the range of permissible cross-examination.

However, an *expansion* on the common law position with respect to extrinsic evidence, particularly that of prior misconduct, is also likely. This is reflected in section 37(3)(a), which provides that, in applying the substantial helpfulness test, a judge may consider whether the proposed evidence tends to show a "lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration)".[185] This provision implies that certain instances of prior misconduct will qualify for admission. Indeed, this provision almost certainly arose from the Law Commission's conclusion that helpful predictions of a witness's veracity can be made on the basis of conduct in situations similar to that of testifying under oath.[186]

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182 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 16.

183 Although the risk of unfair prejudice is at its highest when it is the defendant in a criminal prosecution on the stand, an erroneous assessment of a witness's credibility can also prejudice the party who called the witness (for example, where he or she is giving alibi evidence).

184 *R v Tinker*, supra note 11.

185 It is reasonable to infer that the provision was largely based on s 106(e) of the Australian Evidence Act 1995: "The credibility rule does not apply to evidence that tends to prove that a witness: ... (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth."

186 Australian Law Reform Commission, *Report 26*, supra note 93, [817]–[819].

On a literal reading of section 37(3)(a), it could be argued that evidence showing that the witness has lied in the *current* proceeding will normally be admissible. Rebuttal of any part of a witness's present testimony could be deemed substantially helpful as it would show a lack of veracity when under a legal obligation to tell the truth.[187] However, it is very unlikely that this was intended, as it could lead to a flood of veracity evidence.[188] Further, the references to other types of evidence in section 37(3) would be superfluous if questions could be asked on the basis that a witness might answer untruthfully and thereby display a lack of veracity when testifying under oath. This would result in a laissez-faire approach to cross-examination and extrinsic evidence that is completely at odds with the policy of section 37. It would also be at odds with the principle that the evidence itself (especially a question asked) should relate to events or circumstances that in themselves are substantially helpful in assessing a person's veracity; substantial helpfulness cannot come solely from the hope that a witness will answer a question untruthfully. A better reading of the provision is that it refers to a lack of veracity in situations other than the present.

There are a huge number of situations in which people are legally obliged to tell the truth, for example when filing tax-returns or testifying in judicial proceedings.[189] Evidence of a lack of veracity in these situations will generally be regarded as substantially helpful in assessing a person's veracity.[190] Cross-examination may take place and rebuttal evidence should be admissible.

One interesting issue is the extent to which results in earlier proceedings may be used to throw doubt on the veracity of those who testified. In *R v Cooke*[191] the issue was whether two acquittals, which had entailed the rejection of a police officer's evidence of admissions made to him, could be used to impeach his veracity in a third trial arising out of the incident. It was held that the details of these acquittals could be used in cross-examination.[192] Under section 37, such evidence would probably be regarded as substantially helpful, though an assessment will turn on the complexity of the previous cases and the inferences that can be drawn from the results.[193] In a similar way, evidence that a witness is currently facing charges for making false declarations or other fraud is potentially

187 Odgers, supra note 129, para 1.3.8220.

188 Although, given that the asking of questions is covered by the substantial helpfulness test, it is unlikely such a flood would practically ensue.

189 See e.g. Crimes Act 1961, ss 108–111 and the Oaths and Declarations Act 1957.

190 *R v Wood*, supra note 21, [43] (alleged fabrications contained in affidavits supporting unrelated proceedings filed under the Harassment Act); *R v Cooke* (1987) 84 Cr App R 286, 290 (CA).

191 Supra note 190; see also *R v Meads* [1996] Crim LR 519 (CA).

192 It should be noted that in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, [41] (HL) Lord Phillips MR held that evidence that a police officer has previously fabricated admissions "is not evidence 'as to credit alone', if it is alleged that the same officer has fabricated evidence in a subsequent case".

193 See e.g. *R v Potter* [2007] NZCA 156, [19], [45].

admissible.[194] The witness will, however, be able to claim the benefit of the privilege against self-incrimination so as to refuse to answer.[195]

Finally, since section 37(3) is not exhaustive, evidence showing that a person has exhibited a lack of veracity when under a duty analogous to a legal obligation to tell the truth may sometimes be admissible. One example would be a witness who has repeatedly engaged in misleading or deceptive conduct under section 9 of the Fair Trading Act 1986.[196] It is debatable whether this section imposes an obligation to tell the truth, but given that its contravention attracts civil liability, it is at least closely analogous. Even closer to the line is the decision in *R v Lodhi*,[197] where it was held that alleged lies in a job application form were of substantial probative value in assessing an accused's credibility. In borderline situations such as this, much will turn on the nature and extent of the lies told.

Convictions

Cross-examination on previous criminal convictions is one of the strongest and most common ways to discredit a witness, but this method of impeachment is likely to be restricted under the Evidence Act 2006. Both the psychological research on character and the wording of section 37(3)(b) strongly suggest that many convictions that would have been admitted at common law will be excluded. Section 37(3)(b) sets out as a matter for consideration "that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity".

1 The Common Law Position

The common law's concern to protect criminal defendants from the unfair prejudice of having their convictions exposed in court stands in stark contrast to its approach to other witnesses.[198] Non-defendant witnesses could, generally speaking, have their credit impeached by cross-examination on any convictions they possessed.[199] Section 12 of the Evidence Act 1908 explicitly allowed for cross-examination on, and rebuttal proof of, indictable offences. The Court of Appeal commented in *Wilson v Police* that this was not intended to limit the common law position, but merely to overcome the collateral issues rule in respect of indictable offences.[200] Questions as to summary offences remained permissible, but the discretionary control granted to the court under section 13 to control

194 *R v Ronen (No 4)*, supra note 135.

195 *R v Chignell*, supra note 164, 269; *R v Kiriona*, supra note 51; Tapper, supra note 19, 384.

196 Compare *Jacara*, supra note 160.

197 *R v Lodhi*, supra note 157.

198 *R v Wood*, supra note 21, [36]; New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 30.

199 *Clifford v Clifford*, supra note 13, 1276.

200 [1992] 2 NZLR 533, 537 (CA).

cross-examination required leave to be sought before undertaking any cross-examination on convictions.[201]

Wigmore argues that the policy considerations underlying the collateral issues rule do not apply to convictions.[202] First, there is no risk of a confusion of issues because the fact of conviction proves the witness's conduct. Second, there is no unfair surprise because witnesses are well aware of their convictions, which can be conclusively proved by official records. The admission of convictions at common law was thus based more on considerations of expediency than on any inherent probative value. Nevertheless, the first matter to be considered is the relevance of convictions to a witness's veracity.

2 *The Relevancy of Convictions*

There are two general schools of thought regarding the relevancy of convictions. The first considers that all convictions point to the witness's general bad character, and that a person of bad character is more likely to give deliberately false evidence.[203] This school is based on a highly simplistic view of character traits that has largely been abandoned. Although it is rare nowadays for the point to be taken directly in court,[204] this type of reasoning is still not uncommon.[205] In *R v Wood,* for example, the Court of Appeal allowed the complainant to be cross-examined on his convictions, including ones for contravening a restraining order and assault, on the grounds that "[c]redibility can be affected by convictions other than for dishonesty. A lack of trustworthiness may be demonstrated by repeated instances of contempt for the law."[206]

The second school of thought argues that only certain convictions are relevant to veracity.[207] Many courts have recognized the truth in this position,[208] which has also found favour with the Law Commission.[209] The perennial problem is determining which convictions so qualify. The only guidance offered by the Evidence Act 2006 is the suggestion that offences

201 See New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 31.

202 Wigmore, supra note 14, §980.

203 For example in *Bugg v Day* (1949) 79 CLR 442, 471 (HCA) McTiernan J stated that: "a witness may be asked any question which tends to discredit him.... It tends to his discredit to ask him whether he has ever been convicted of a criminal offence. An offence against the traffic laws is not an exception to this rule. The objects of the traffic laws are order and safety on the roads. A conviction for an offence against such law may reflect upon the credit of the offender according the circumstances."

204 Eggleston, Assessment of Credibility, supra note 94, 41.

205 *R v Lumsden* [2003] NSWCCA 83, [56]; Rule 609(a) of United States Federal Rules of Evidence allows witnesses to be impeached with any conviction for a crime punishable by death or imprisonment in excess of one year: see Best, supra note 138, 146; see criticism of this provision by Okun, supra note 171. Also note the very broad range of convictions identified in *Wilson v Police*, supra note 200, 197.

206 *R v Wood*, supra note 21, [41].

207 Spencer, supra note 145, para 3.15.

208 *Wilson v Police*, supra note 200, 542; *R v* G (1992) 8 CRNZ 9 (CA); *R v Sweet-Escott*, supra note 92; *Bugg v Day*, supra note 203, 467 per Dixon J.

209 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 33.

that "indicate a propensity for dishonesty or lack of veracity" will be substantially helpful.[210]

3 Convictions Relevant to Veracity

The first point of interest is whether section 37 requires consideration of the elements of the offence or of the conduct that precipitated the conviction when assessing its evidential helpfulness. The latter would appear to be of more evidential use, especially where the circumstances surrounding the commission, investigation, and prosecution of the offence are included. Given that a person's behaviour is most likely to show consistency across similar situations, the more circumstantial information that is available the more helpful it will be in assessing a person's veracity.[211] The label given to an offence provides little insight into the offender's actual conduct.[212] What should be of most interest is the means by which the crime was perpetrated; when this involves deception, the conviction will be more likely to be substantially helpful.

Aside from perjury, the conduct involved in committing most offences does not closely correlate with the act of giving evidence under oath. It could be argued that the conviction of a person following a trial in which he or she testified indicates a lack of veracity when giving evidence under oath.[213] The same reasoning that allows for imputations to be cast on prosecution witnesses following acquittals should apply. Conversely, where the witness pleaded guilty, the fact of conviction may not assist in ascertaining the witness's veracity.[214] This is particularly so where the commission of the offence did not involve patent dishonesty. We must be careful, however, not to assume that wherever a plea of not guilty was rejected the conviction will be admissible. The test remains *substantial* helpfulness. As Eggleston has noted, the likelihood that a person will lie fluctuates according to their interest in having the lie believed and the chances of the truth being discovered.[215] There is perhaps no situation where a person is more likely to lie than when charged with a crime;[216] we must be careful not to extrapolate too readily to the situation where the person is merely a witness in another trial.[217]

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210 Evidence Act 2006, s 37(3)(b).

211 Uviller, supra note 80, 803.

212 See e.g. *R v Hanson* [2005] 1 WLR 3169, [12] (CA).

213 *R v Razaq* [2006] 1 WLR 2948, [73] (CA); *R v Hanson*, ibid [13].

214 See e.g. *R v Gilmore* [2005] 1 WLR 3169, [38] (CA) (holding that convictions for shoplifting following pleas of guilty do not show a propensity to be untruthful).

215 Eggleston, Assessment of Credibility, supra note 94, 33.

216 Uviller, supra note 80, 813–814.

217 Spencer, supra note 145, para 3.23: "If D is on trial for assault and W, an independent witness who was undoubtedly present and who has no obvious motive to lie, asserts that D was the aggressor, it is of little relevance that W has a conviction for obtaining by deception. The main issue on these assumed facts is not W's honesty but his ability to observe. On the other hand, if W was a friend of the victim, or if W had come forward in response to the offer of a reward, then his honesty is a live issue and his track-record as a proven liar is obviously relevant."

While it is important for a judge to take cognizance of the circumstances of an offence, this does not render the actual offence irrelevant. Courts tend to look first at the type of crime, and only secondarily, when the information is available, at the means of its commission or at other circumstances. The Law Commission noted that "it is ... unhelpful – if not impossible – to list in advance the kind of convictions which may or may not be put to a witness during cross-examination".[218] Instead, the generic criteria of dishonesty and lack of veracity are used.

Convictions falling outside those indicating a propensity for dishonesty or lack of veracity will not usually be substantially helpful. This presumption is supported by psychological research: it is the similarity of the conduct in question to the event of giving evidence under oath that is of most value. The fact of conviction does not imbue the underlying conduct with any greater helpfulness. If a person's propensity for violence is irrelevant to veracity, the situation should be no different where such conduct precipitates convictions. The same reasoning pertains to the use of illicit drugs.[219] The court's concern should be the person's conduct, not the resultant consequences.[220]

Dishonesty is a broad and rather uncertain term that could prove problematic. Its use in section 37(3)(b) suggests that it refers to behaviour distinct from a lack of veracity. The definition of dishonestly in the Crimes Act 1961 was changed in 2003:[221]

> [D]ishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority....

This definition is problematic as it does not require *moral* dishonesty. Knowingly acting without consent or authority, even in the belief of moral justification (for example, that the owner *would* consent to the taking if he or she knew), is technically dishonest and may result in conviction.[222] This definition is too broad, especially for use under section 37. An action that is not *morally* dishonest should not be regarded as at all helpful in assessing a person's veracity, even if it results in a conviction. Since all offences involving the element of dishonesty under the Crimes Act now apply this definition, it will not be possible from the fact of conviction alone to be sure that the person was not acting in a morally honest manner.

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218 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 33.

219 *R v Kiriona*, supra note 51; *R v Galea*, supra note 152; *R v Lumsden*, supra note 205; *R v Yaxley-Lennon* [2006] 1 WLR 1885 (CA).

220 Australian Law Reform Commission, *Report 26*, supra note 93, [410]; but compare *R v Wood*, supra note 21, [41].

221 Crimes Act 1961, s 217.

222 For a full discussion see Simester and Brookbanks, *Principles of Criminal Law* (3 ed, 2007) 686–688.

This definitional problem is mitigated by recourse to the fact that substantial helpfulness is the overriding criterion for admissibility. Convictions for offences usually regarded as indicative of dishonesty are not automatically admissible.[223] Substantial helpfulness is a high threshold that will not ordinarily be met merely by reference to the offence committed. A range of other matters must be considered before an offer of evidence can satisfy the test.

Reputation for Veracity

1 The Common Law Position

At common law, evidence of a witness's reputation for veracity was admissible as of right.[224] Despite the very long history of this rule, it was rarely invoked in practice.[225] This was probably because reputation evidence is generally thought of as "typically bloodless, ritualistic and a bit dull",[226] as well as "cumbersome, anomalous and unconvincing".[227]

2 The Law Commission's Position

Reputation evidence is also based on the discredited assumption that people possess stable traits of truth-telling or lying.[228] The Law Commission concluded that such evidence was generally of weak probative value.[229] Notwithstanding this, it recommended that reputation evidence remain admissible because there "may be occasions on which [it] might have a useful bearing on that witness's truthfulness or lack of it. An example might be an individual's reputation within a small rural community for being a habitual liar."[230]

The original truthfulness rules did not refer to reputation either positively or negatively. In the draft code, reputation appeared in section 39(4): "Subpart 1 (hearsay evidence) and Subpart 2 (opinion evidence and expert evidence) do not apply to exclude evidence about reputation that relates to truthfulness." When the Evidence Bill came before Parliament,

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223 *R v G*, supra note 208, 12–13; see *R v Burns* (2003) 137 A Crim R 557 per Sully J.

224 *R v B* (5 October 2006) unreported, Court of Appeal, CA133/06; although certain rules had to be followed: *R v Richardson*, supra note 69, 304–305; accepted in New Zealand in *R v Royal*, supra note 69; see also *R v Brosnan* [1951] NZLR 1030 (CA) and *R v Accused (CA442/99)* (2000) 17 CRNZ 577 (CA).

225 Mathieson, supra note 38, 298; none of the Law Lords and none of the counsel involved in *Toohey*, supra note 3, could remember ever being concerned in a case where reputation evidence was called (at 606); see also *R v E* (1998) 16 CRNZ 506, 507 (DC) where the Judge had never heard of the rule.

226 Lempert and Saltzburg, *A Modern Approach to Evidence* (1977) 230–231 quoted in Australian Law Reform Commission, *Report 26*, supra note 93, [802].

227 Tapper, supra note 19, 392.

228 Australian Law Reform Commission, *Report 26*, supra note 93, [817].

229 See the extensive analysis in Australian Law Reform Commission, *Report 26*, ibid [395]–[396], which concluded at [817] that reputation evidence should be prohibited.

230 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 36.

reputation had been included as a matter to be considered under the substantial helpfulness test.[231]

3 The Admissibility of Reputation Evidence under Section 37

An important unanswered question posed by section 37 is whether reputation evidence remains admissible. The Justice and Electoral Select Committee removed all apparent support for reputation evidence from the Evidence Bill because "a person's reputation is irrelevant and should not be considered when assessing the veracity of their evidence".[232] Cull and Eaton interpret these events and section 37 as rendering reputation evidence inadmissible.[233] This view has received some obiter support in the recent decision of *R v C*,[234] a case decided under section 44.

While this may have been the intention of the Select Committee, there are two main arguments against such an interpretation. First, the veracity rules mirror the original proposals of the Law Commission in the sense that neither refers to reputation evidence. The Law Commission recognized that this left some room for reputation evidence to be admitted in the rare event that it would be substantially helpful. Second, the Select Committee chose expressly not to prohibit reputation evidence about veracity. This may be contrasted with the changes it made to section 44, prohibiting evidence about the sexual reputation of a complainant in a sexual case.[235]

It is better to view reputation evidence as potentially admissible, but only in exceptional cases. Most commentators are of the opinion that reputation evidence is rarely of much value.[236] As such it is unlikely to reach the standard of substantial helpfulness,[237] and, even if it does, may be subject to the hearsay rule[238] or the opinion rule.[239] In general, it will be more profitable for a party to offer evidence of a person's specific conduct relevant to veracity rather than his or her general reputation.[240]

Evidence Bolstering a Person's Credibility

1 The Common Law Position

Under the previous law, it was not permissible to offer evidence to bolster

231 Evidence Bill 2005, cl 33(3)(f): "that the person has a reputation for being untruthful".

232 Justice and Electoral Committee, supra note 82. The Committee also altered the Bill to prohibit any evidence of a complainant's reputation in sexual matters. See Evidence Act 2006, s 44(2).

233 Cull and Eaton, supra note 88, 75; see also *Garrow and Turkington's Criminal Law in New Zealand* (LexisNexis NZ, University of Auckland Library) (at 14 August 2008) APPVIII.6.

234 *R v C*, supra note 162, [21].

235 Mahoney, *Evidence Act 2006*, supra note 131, 141.

236 Compare Spencer, supra note 145, para 3.26.

237 See the comments in *R v B*, supra note 224, [18].

238 Evidence Act 2006, s 17.

239 Ibid s 23.

240 Uviller, supra note 80, 803.

a witness's credibility.[241] Since every witness is assumed to have a "normal character for veracity", such evidence is unnecessary.[242] It also risks being given disproportionate weight by the tribunal of fact.[243]

This is not to say, however, that "oath-helping" never occurred. Witnesses are routinely presented to the court in respectable attire and are questioned by the party calling them about their employment or rank, and marital status.[244] Such evidence is designed to enhance the witness's credibility.[245] In England, judges may even expressly permit the jury to take into account a witness's occupation in evaluating his or her credibility.[246]

Bolstering — perhaps more accurately classified as rehabilitative evidence — was also permissible in response to an attack on a witness's credibility.[247] The common law was in an uncertain state in relation to both the evidence that could be offered as well as the precise circumstances that rendered bolstering permissible.[248] Thankfully, this body of law has largely been jettisoned.[249]

2 The Law Commission's Position

The Law Commission regarded the general premises of the common law as sound. Evidence bolstering the veracity of a witness was only to be admitted when in response to a challenge[250] and substantially helpful.[251] But these requirements did not make it into the draft code.[252]

3 The Evidence Act 2006 Position

Section 35 is the only provision that expressly deals with evidence in support of a person's veracity. Previous *consistent* statements may be admitted when necessary to respond to a challenge to a witness's veracity or accuracy. A discussion of this complex area of law is outside the scope of this article.[253]

Other evidence in support of a person's veracity is admissible

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241 *R v W* (30 August 2004) unreported, Court of Appeal, CA235/04, [16]; *R v B (an accused)* [1987] 1 NZLR 362, 369 (CA).

242 Bennett, supra note 6, 575.

243 Orchard, "Directions on a Defendant's Good Character" [1994] NZLJ 56, 58.

244 Tapper, supra note 19, 378.

245 It may properly do this. See *Meek v Fleming* [1961] 2 QB 366, 376 (CA).

246 *R v DS* [1999] Crim LR 911 (CA).

247 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 44.

248 Ibid 44; Orchard, supra note 243, 58.

249 For discussion see Orchard, ibid.

250 New Zealand Law Commission, *Character and Credibility Discussion Paper*, supra note 1, 45; see also *Sungsuwan v R* [2006] 1 NZLR 730, [83] (SC).

251 Section 9 of the draft rules read: "If the truthfulness of a person is challenged ... a party may offer evidence for the purpose of supporting the truthfulness of the person if that evidence is likely to be substantially helpful." See New Zealand Law Commission, *Character and Credibility Discussion Paper*, ibid 124.

252 New Zealand Law Commission, *Evidence Code*, supra note 78, 108.

253 For a discussion of s 35 see *R v Barlien* [2008] NZCA 180.

where substantially helpful. One must doubt whether such evidence will often reach this standard, especially when it is evidence of general good character. Just as evidence of bad character is largely unhelpful in assessing veracity, evidence of good character is equally unhelpful.[254] Moreover, in the absence of an attack, and given the assumption of a normal character for veracity, supporting evidence is generally of little value.[255] Section 8(1)(b) provides a further backstop exclusion: such evidence is likely to "needlessly prolong the proceeding".[256]

In some situations, however, it is possible that evidence supporting a witness's veracity will be substantially helpful. In particular, this will be where the evidence presented shows the witness to have been truthful in a situation similar to that of testifying in a trial. The helpfulness of any particular piece of bolstering evidence will depend on the underlying conduct and its context.

VI CONCLUSION

A new era in New Zealand evidence law is underway. The Evidence Act 2006 introduced a host of changes to the rules surrounding the admissibility of evidence. This article has examined the new regime governing evidence about the veracity of witnesses in civil and criminal proceedings.

Section 37 represents a welcome development in the way in which veracity evidence is handled. The common law regime was complex and lacked a coherent theoretical basis. Advances in psychology have shown that many of the assumptions made were misplaced and the distinctions employed unhelpful. The permissive treatment of cross-examination, for example, allowed a wide range of allegations to be put to witnesses in an attempt to blacken their character. Research has not only shown that many of the allegations put were of little or no value in assessing veracity, but also that merely putting allegations to witnesses carried the risk of unfairly prejudicing their testimony. Section 37 addresses this issue by subjecting all questions relating to the veracity of a witness to the substantial helpfulness test. Whether this change is given full effect by significantly limiting cross-examination lies predominantly in the hands of trial judges.[257] It will

254 Jackson and Wasik, supra note 91, 365.

255 Compare the comments in *R v Lologa*, supra note 103, [13]. Consider also the discussion of the marginal helpfulness of evidence, above at Part IV.

256 Mahoney, *Evidence Act 2006*, supra note 131, 142–143.

257 Jackson and Wasik, supra note 91, argue, at 365, that trial judges were unwilling to restrict cross-examination to that seriously affecting the credibility of the witness as required by *Hobbs*, supra note 15, 51.

also be interesting to see to what extent these decisions will be justiciable on appeal.[258]

One of the weaker aspects of section 37 is the difficulty in determining its precise scope. The definition of veracity evidence focuses on the "disposition" of a person to refrain from lying, an ambiguous phrase that seems to lend support to the discredited notion that a person may have a general disposition in relation to veracity. It is unfortunate that the definition is not more clearly focused on the person's intention to tell the truth.

Similarly, apart from propensity evidence, it is unclear how to decide whether evidence that is offered for multiple purposes is governed by the veracity rules. A direction that the veracity rules only apply to evidence that is "solely or mainly" about a person's veracity would have been desirable. It remains to be seen whether such a qualification will be read into the section by the courts.

Veracity evidence has been emancipated from the rigid collateral issues rule: the rubric of substantial helpfulness now governs. Perhaps the fundamental philosophy behind section 37 is that admissibility depends on an individual assessment of the evidence's substantial helpfulness in assessing a person's veracity, not on its categorization. This is a welcome development and should result in the admission of better quality evidence.

As the key measure of admissibility, the phrase "substantially helpful" must be given some content. Analysis of both overseas developments and psychological research results in a number of important factors and principles to guide the development of a substantial helpfulness jurisprudence. Since section 37 represents a move away from a category based approach to admissibility in favour of a single overarching criterion, it is regrettable that instead of setting out general principles underlying the application of the test, there has only been a partial reproduction of the old exceptions to the collateral issues rule. It will be interesting to see to what extent the courts allow substantial helpfulness to supplant the collateral issues rule and its exceptions.

This article has considered how the substantial helpfulness test will apply to certain types of veracity evidence in which significant change to the common law position is to be expected. The empirical research underpinning section 37 suggests that evidence of a witness's prior misconduct will be substantially helpful where it takes place in circumstances similar to that of giving evidence under oath. Therefore, two key changes are likely. First, many instances of misconduct will no longer be available for use in cross-examination. Second, evidence of past misconduct can now potentially be offered in rebuttal to a witness's answers on cross-examination. Both of these changes are rational and empirically justifiable.

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258 Under the Criminal Justice Act 2003 (UK) the Court of Appeal has shown a reluctance to interfere with the decisions of trial judges where their "feel" for the case is usually the critical ingredient contextual decisions. See *R v Osbourne*, supra note 145, [57].

The convictions of witnesses should also be treated rather differently. No longer will all convictions be admissible in cross-examination and as extrinsic evidence. Instead, the conduct that resulted in conviction must be carefully considered and compared with the situation of giving evidence on oath. Reference should not merely be made to the name of the offence. There is no justification for simply assuming that a wide range of offences is presumptively admissible for assessing a witness's veracity.

Although questions remain about the application of section 37 and its interaction with other provisions, on the whole the section represents a welcome reform. With the Evidence Act 2006 now in force, it is only a matter of time before the issues identified come before trial and appellate courts. This article has endeavoured to identify the key principles and factors that should be considered in resolving these issues and in the development of a coherent section 37 jurisprudence. If section 37 is implemented in accordance with its driving philosophy, one can expect substantial changes to the operation of trials.