

PCLL Conversion Examination
8th January 2010
Examiner's Comments
Evidence

Question 1.

A simple explanation of the term hearsay would be that 'when A tells a court what B has told him, that evidence is called hearsay'. Under the existing law, hearsay evidence is inadmissible in criminal proceedings unless it falls within one of a number of common law or statutory exceptions.

What is the principle justification for the exclusion of hearsay evidence in criminal trials and what are the main statutory exceptions?

10 Marks

This question was done well by more students. Most understood that the principal justification for the exclusion of hearsay is that, since the evidence is presented to the court second-hand by someone other than the original statement-maker, there is no opportunity for the other side to test the reliability of the evidence by cross-examining the original statement-maker as to what was actually said.

Any difficulties, where they arose, concerned the list of exceptions to the rule. Good students added as a preamble that in *Myers v DPP [1965] AC 1001, [1964] 2 All ER 881, HL*, it was decided that the courts no longer have the power to create new exceptions to the hearsay rule, which function must be left to Parliament.

The actual main exceptions that ought to have been noted were in regard to documentary hearsay; statements relating to the existence of the bodily or mental condition of the maker; declarations made by deceased persons, in particular, dying declarations by the victims of murder or manslaughter; statements of facts forming part of the *res gestae*; certain depositions; certain evidence on previous occasions; certain written statements and certificates; evidence of reputation to prove a marriage in criminal proceedings other than for bigamy; statements in the presence of a party; confessions; and finally statements contained in public records. The principle example of statutory exceptions was, of course under **s. 22 and s 22A Evidence Ordinance (Cap 8)** and the majority of students got this point.

Question 2

A defendant has given evidence from the witness box during his trial; he has no previous convictions and is of positive good character. In a criminal trial where a defendant is said to be of 'good character' the tribunal of fact (judge or jury) may take this fact into account in two main ways in deciding guilt or innocence of the charge. What are they?

10 Marks

This question was also done well and the vast majority of students got the, so-called Vye Direction and the 'two-limbs'. Those that did understand this passed well. A judge should direct as follows:

First limb: In the first place, the defendant has given evidence, and as with any man of good character it supports his credibility. This means it is a factor which you should take into account when deciding whether you believe his evidence. In considering his/her evidence and what weight you should give it, you should bear in mind that it was made by a person of good character, and take that into account when deciding whether you can believe it.

Second limb: In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now.

These are matters to which you should have regard in the defendant's favour. It is for you (the jury) to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, [...] and [...]. Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character, and at this stage the benefit of this to a defendant whose good character justifies it may be pointed out to the jury, with words such as: Having regard to what you know about this defendant you may think that he is entitled to ask you to give [considerable] weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

See R v Vye, Wise and Stephenson 97 Cr App R 134; R v Aziz and Others [1995] 2 Cr App R 478.

Question 3

In civil proceedings letters written and oral communications made between the parties to a disputer are often said to be "Without Prejudice"

(a) What does this mean and what is the evidential status of documents so marked?

5 Marks

(b) What is a 'Calderbank Letter' and what is its primary purpose?

5 Marks

This was also a question that was generally done well and most students appeared to know the authority of Calderbank. However, there was a clear divide and those that got this question wrong appeared to get it badly wrong. One student even mentioned criminal law when the question started: 'In civil proceeding ...' The contents of a communication made 'without prejudice' are admissible when there has been a binding agreement

between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are not otherwise admissible. In matrimonial proceedings relating to finance (ancillary relief), a party may make a compromise offer in respect of financial provision or property without prejudice to that issue at the hearing, but reserving the right of the party making the offer to refer to it on the issue of costs: see **Calderbank v Calderbank** [1975] Fam 93, [1975] 3 All ER 333, CA (Eng). Calderbank offers may be made whether the contemplated proceedings are matrimonial or not and will be admissible on the question of costs: *Cutts v Head* [1984] Ch 290, [1984] 1 All ER 597, CA (Eng).

Question 4

What is the general evidential rule regarding the admission of a previous consistent statement in a criminal trial and what are the five main exceptions to this rule?

10 Marks

Previous Consistent Statements

This was clearly a question many students found difficult and was the least well answered in general. Many students appeared to struggle not only with the general rule but also what a PCS actually was. These students clearly had no idea of the main exceptions. Thus, the general rule is that a witness may not state, nor may evidence be given to prove, that he has previously made a statement consistent with his evidence. Such evidence is, however, admissible in the following circumstances: (1) in sexual cases, where the victim made a complaint shortly after the incident complained of; (2) in criminal cases where the accused made a statement when confronted with incriminating facts; (3) where the statement forms part of the *res gestae* of the matter in issue; (4) where it has been suggested that a witness's evidence has been recently fabricated; and (5) in civil proceedings where a previous statement made by a person called as a witness, other than a statement made while giving oral evidence in those proceedings, is admissible (subject to certain conditions) as evidence of any fact contained in it.

Question 5

In a criminal trial a witness of fact who gives evidence from the witness box does so having previously made a witness statement to the police. In the course of giving evidence in chief, the witness explains that he can no longer remember some of the evidence he wrote in his statement.

How will the court deal with this witness?

Answer

Reference to Documents to Refresh Memory

After question 4, question 5 was perhaps where the next largest batch of weak answers were noted. This may have been because the question also required some knowledge of criminal procedure and the calling of witnesses. Again, many who got this question wrong, got it badly wrong or attempted to guess.

Upon application of the side calling the witness in chief (usually the prosecution) having laid the ground with questions to establish that the witness has merely 'forgotten' or 'cannot remember' what he said in his witness statement: Questions such as 'did you read your witness statement before coming into court?' Subject to the leave of the judge such a witness, may be permitted to refresh his memory in the course of his evidence by reference to documents or memoranda (usually his witness statement to police). The document or memorandum must have been made either at the time of the events described in it or so shortly afterwards that the facts were fresh in the witness's memory. In criminal trials the appellate courts have, repeatedly, emphasized the overriding importance of not allowing the rules of evidence to deprive the court of the best opportunity to learn the truth of the matter. Documents may be used by a witness to refresh his memory even if they would not be admissible in evidence if tendered as such. Documents may be read over to a witness who has become blind to refresh his memory. A copy of a document may not be used by a witness to refresh his memory if the original is in existence or its absence is not accounted for. Even where the original is not in existence, a copy cannot be used unless it is proved to be correct. It is not necessary that the witness should have any independent recollection of the facts to which he testified and of which he seeks to refresh his memory, apart from the document to which he refers.