

## CHAPTER 9: The rule against hearsay

1. *'No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded'* (Myers v DPP [1965] AC 1001 per Lord Reid at 1024). Discuss this statement in light of the Criminal Justice Act 2003.

In *Myers v. DPP* the Crown was refused leave to adduce hearsay evidence whose likely accuracy no one doubted. Against this background the House of Lords made clear that the list of exceptions to the hearsay rule would not be extended by the courts. The Criminal Justice Act 2003 could be said to have altered the picture in at least two ways. First, it has enlarged several of the existing exceptions to the hearsay rule and, secondly, has given the courts explicit discretion to admit otherwise inadmissible evidence if they consider it in the interests of justice under s. 114(1)(d) and 114(2) and under s. 121(c). The courts have made considerable use of this discretion, and not necessarily in the manner foreseen by the Law Commission.

2. *Bishop discovers his friend, Haze, suffering from acute poisoning in the car park of a public house. Bishop had gone looking for Haze when he failed to return from the toilets. Haze, who was pretty inebriated before setting off for the toilets, tells Bishop in a slurred voice: 'It was Tarwater what done it. I thought that I saw him slip something into my ale. But don't worry about me. There is nothing much you can do. Just get the police and the emergency services as quick as you can.'* Dr Quack, a local GP who has been drinking heavily in the public house that evening, arrives on the scene shortly afterwards. When he asks Haze what appears to be the trouble, Haze replies: 'I've got a hell of a pain in my guts. Tarwater poisoned me. I'm 110 per cent positive.' Finally, an ambulance and a police car arrive in the car park. PC Panda gets out of his police car and asks Haze: 'Good evening, sir. What seems to be the problem?' Haze answers: 'Just as I told Bishop and the doctor, Tarwater has done me in.' Haze lapses into unconsciousness and dies shortly afterwards in the ambulance. Tarwater is charged with Haze's murder. At his trial, Tarwater wishes to call his sister, Gabrielle, to give evidence that she later heard someone, whom she does not now recollect, in the same public house mention that Polonius had subsequently confessed to having spiked Haze's beer with arsenic. Discuss.

This hearsay problem requires you to consider exceptions to the hearsay rule. Regarding testimony B, Q and P might give at trial, you must first determine whether their evidence is hearsay within the meaning of ss. 114 and 115 of the CJA 2003, looking particularly at whether they will be asked to give evidence of matters stated, as defined in s. 115(3). Once you have decided whether the evidence is hearsay, it remains to consider whether it falls within one or more exceptions to the hearsay rule. You will want to think about statements of unavailable witnesses under s. 116. You will also need to think about various forms of *res gestae*, one of the common-law exceptions preserved by s. 118. Were any or all of the statements made by H when he was "so emotionally overpowered

by an event that the possibility of concoction or distortion can be disregarded”? In relation to the statement made to Q, you will also need to consider rule 4(c) and relevant case law. Viz. the relevance of H’s inebriated state, see e.g. *Turnbull* (1984) 80 Cr App R 104.

Regarding G’s evidence, although the party whose speech is reported is ‘unavailable’, s. 116(1)(b) has to be satisfied before such evidence becomes admissible. This does however resemble one of the situations evoked by the Law Commission when recommending the introduction of the inclusionary discretion now embodied in s. 114(1)(d), bearing in mind the conditions of admissibility enumerated in s. 114(2).

3. *Following an accident at his watersports centre in which a jet-ski, driven by a novice, left the portion of a lake dedicated to jet-skiing and collided with a powerboat, killing a water-skier whom it was towing, Drip was convicted on various charges brought under the Health and Safety at Work Act 1974, and notably for failing to make a suitable and sufficient risk assessment contrary to s 33. Since the prosecution had to prove that the separate parts of the lake used for waterskiing and jet-skiing, respectively, were not sufficiently clearly demarcated, the principal contested issue at trial was what amounted to good practice at other similar watersport facilities. In order to establish what amounted to generally recognised levels of good practice, an expert hired by the local authority had sent a questionnaire to other local authorities, enquiring how they managed similar facilities. It was not certain who had supplied the information contained in the eighteen or so completed questionnaires—either council officers or other unidentified parties answering from their personal knowledge, or someone simply responding on the basis of information derived from telephone conversations with the relevant facilities. The trial judge admitted this evidence under the Criminal Justice Act 2003, s 117. Advise Drip, who is considering an appeal.*

Section 117 concerns the admissibility of business and other documents. The provision imposes a number of basic requirements which the party seeking to adduce the evidence must satisfy. Clearly, s. 117(2)(b) will pose an issue. There may also be issues of multiple hearsay under s. 121 of the CJA 2003.

4. *When, if ever, will hearsay statements be admitted in a criminal trial in which they constitute the sole or decisive prosecution evidence?*

This question invites consideration of Article 6(3)(d) of the ECHR and the skirmish between the English courts in *R v. Horncastle* [2009] 2 Cr App R 15 and [2010] 2 WLR 47 and the ECtHR’s understanding of that provision, notably in *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1. The saga and its outcome are analysed, notably in paras. 9.110 - 9.117.

5. *In what circumstances will the concealment of the identity of witnesses in likelihood be held to be compatible with an accused’s right to a fair trial?*

This question requires consideration of the use of anonymous witnesses, a matter now regulated by the Coroners and Justice Act 2009. The relevant provisions, and the background, are discussed in paras. 9.118-9.128.