HEARSAY REFORMS

Simplicity in Statute, Pragmatism in Practice?

This article examines the new hearsay scheme introduced in 2012, discussing the rules as well as the principles and policies underlying them. It argues that the hearsay scheme, while bringing welcome changes, leaves many problems unresolved, and adds new problems, especially in the form of widely phrased discretions and indeterminate rules.

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> By this means [adducing hearsay statements] you may have any man's life in a week; and I may be massacred by mere hearsay[1]

I. Introduction

1 This article attempts to show that while the new hearsay scheme is definitely an improvement over the previous schemes, it suffers from not addressing several existing problems concerning the concept of hearsay and its regulation in the Evidence Act.[2] The new scheme also adds some new problems in the name of flexibility. The discretion to exclude otherwise admissible hearsay "in the interests of justice" is particularly problematic due to its high generality and lack of guidance from the legislation. Also some of the provisions are capable of interpretation that might be inimical to accused persons in criminal trials. The article examines some fundamental principles that should govern the admissibility of hearsay and ends with some suggestions for further improvement.

2 Hearsay is traditionally treated as an inferior form of evidence as compared with direct testimony by witnesses. The preference for the latter is often referred to as the "primacy of orality" principle. This

1 Attributed to Walter Raleigh. *The Trial of Sir Walter Raleigh* (1603) reprinted in T B Howell, *A Complete Collection of State Trials 1* (1816) and D Jardine, *Criminal Trials* 400 (1832) reproduced in G Fisher, *Evidence* (New York: Thomson Reuters/Foundation Press, 3rd Ed, 2013) at p 374. Raleigh was charged with high treason and complaining that the State was not able to produce a major witness (Lord Cobham) at trial. Cobham had incriminated him in his (Cobham's) confession.

2 Cap 97, 1997 Rev Ed.

principle was fiercely observed in adversarial trials until the second half of the 20th century when many common law jurisdictions relaxed their exclusionary rule of hearsay thus making hearsay easier to adduce as evidence. Singapore has followed suit in 2012 in "relaxing" the rule, and the hearsay "exceptions" in the Evidence Act received their first major restyling since its original enactment in 1893.[3] The changes appear more incremental than radical, at least in form. This approach was to some unduly cautious,[4] given the more drastic approaches in favour of admissibility in other jurisdictions.[5] The exclusionary rule is now subject to new exceptions, while an existing exception (business records) is significantly extended. But there is an important difference between the original and the 2012 exceptions ("new exceptions"): the new exceptions[6] focus on the unavailability of the declarant[7] alone and not on the nature of the statement (as is the case with the old exceptions). The original approach had essentially two steps: first, it must be shown that the declarant could not be called as a witness,[8] and second, that the statement fell within one or more of the "exceptions" based on the nature of the statement adduced, *ie*, it was a dying declaration or a declaration against interest, *etc*. This has led to much criticism as vital and reliable hearsay evidence not falling within the exceptions might be excluded.[9] It is said that the original rule and exceptions lacked flexibility and that this made the application of the rule both under-inclusive and over-inclusive, as well as being overly technical and

3 The date of the first Evidence Ordinance (Ordinance 3 of 1893). The 1976 hearsay amendments were confined to criminal cases and contained in ss 377–385 of the former Criminal Procedure Code. There were minor amendments made to admit hearsay statements when used in cross-examination or to refresh memory in 1976. These remain on the statute book.

4 See, *eg*, Hri Kumar Nair MP's remarks in the debate on the Evidence (Amendment) Bill (Second Reading) (*Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88).

5 See Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007) Part III ("Reform Options"), where the various options are discussed in several jurisdictions. The report and draft Bill, *etc*, showed considerable effort on the part of the Committee to provide for the admissibility of hearsay in civil cases only.

6 That is, ss 32(1)(*i*)–32(1)(*k*) of the Evidence Act (Cap 97, 1997 Rev Ed).

7 This article uses the word "declarant" to refer to a person who makes a statement out of court.

8 These conditions may be referred to as the "preconditions" or "qualifying conditions" (to denote the first stage of admissibility): former s 32 of the Evidence Act (Cap 97, 1997 Rev Ed).

9 Authors on both sides of the Atlantic have already pointed out that there is no unifying principle for all the exceptions that exist, and that the one that seems to stand up most to scrutiny may be the idea that excluding hearsay may generally promote more accurate fact-finding. But this is more presumptive than real. For a summary of the so-called rationales, see, *eg*, United Kingdom, Law Commission, *Evidence in Criminal Proceedings – Hearsay and Related Topics* (LC 245, 1997) at para 7.2 *ff*.

difficult. It also led to judges circumventing the hearsay rule through the use of circumstantial inference or classifying statements as real evidence rather than hearsay. Other jurisdictions, notably Canada, evolved a so-called principled approach to hearsay utilising the concept of reliability. All in all, there was a concerted effort to reform the hearsay rule and exceptions in the common law jurisdictions.

3 Singapore restyled the rule by including new exceptions together with a newly conferred judicial discretion to exclude hearsay (and opinion) evidence "in the interests of justice", while retaining the old exceptions. The intention was to introduce a more flexible hearsay regime, one that was capable presumably of more correct results. Should these new exceptions that allow for hearsay to be admissible simply on proof that the declarant is absent, that admit hearsay by agreement (applying also to criminal cases) and allow hearsay by witnesses reluctant to testify[10] be welcome? Not unreservedly so, as this article purports to show. In part, their statutory formulations give rise to new problems. Uncertainty is bound to follow in the wake of this new legislation that seemingly leaves the judges with a lot to do in terms of determining the meaning and scope of the new exceptions, their relationship to the old, and most indeterminate of all, the proper exercise of the newly conferred discretion to exclude hearsay "in the interests of justice".

4 Old issues also remain unresolved: "hearsay" remains stubbornly undefined, and the scope of the exclusionary hearsay rule technically untouched; the somewhat dated view of implied assertions[11] earlier embodied in the Criminal Procedure Code[12] ("CPC") is retained. There is no special provision for multiple hearsay, suggesting that it may be regarded as a matter of weight and not admissibility.[13] Unlike the previous schemes, the current rules now apply to both civil and criminal cases. However, the use of an accused person's statements taken by law enforcement agencies continues to be governed by the CPC,[14] which

10 See, in particular, ss 32(1)(*j*) (absent declarants), 32(1)(*k*) (agreement), 32(1)(*j*)(iv) and 32(3) (discretion) of the Evidence Act (Cap 97, 1997 Rev Ed).

11 The one provision connected with implied assertions is s 32A of the Evidence Act (Cap 97, 1997 Rev Ed). It was adopted from the former Criminal Procedure Code, which in turn used the draft provision in United Kingdom, *Criminal Law Revision Committee Eleventh Report on Evidence* (Cmnd 4911, 1971).

12 Cap 68, 2012 Rev Ed.

13 But where the Act is silent, can it be argued that only first-hand hearsay is allowed, following the common law? See further, judicial discretion to exclude in the "interests of justice", at paras 50–57 below.

14 For example, cautioned statements are dealt with in s 23, where the suspect is charged or informed that he will be prosecuted. The effect of such statements is provided for in s 261. No mention of s 23 is made in s 261 suggesting that inferences may be drawn in appropriate circumstances even without administering the warning in s 23.

received its "makeover" in 2010.[15] This "division of labour" between two codes still raises the question as to what the prevailing law is in the case of overlap and conflict.

5 How may the current approach to hearsay be described? Hearsay should now be presumptively admissible at least where:

(a) notice is given to adduce, and the hearsay falls within one or more of the categories (which have been re-enacted, redefined and added); OR

(b) parties agree on its admissibility, AND

the judge does not exercise her discretion to exclude "in the interests of justice".

But the rule itself remains an exclusionary rule, if only in name. The "new exceptions" to the rule are widely worded, and at first sight, one might conclude that the exclusionary rule is all but swallowed by them. However, it is not a total abrogation, and care must be taken to examine how the new scheme will operate and whether it will be much better than the ones it replaces.

6 It is argued that while the new scheme is an obvious improvement from the ones it replaces, its deceptive simplicity still leaves several pre-existing problems unresolved and, for good measure, has added some new ones. This article explores the state of the new law of hearsay, which by the Government's own admission, is still a work in progress. The following issues are specifically addressed:

(a) hearsay as a normative construct – defining hearsay;

(b) the "new exceptions" and the principles of reformulation;

(c) the judicial burden: rules *versus* discretion; and

(d) the fate of hearsay – the 2012 Scheme: not the last word?

First, however, it is useful to recount the problems with the "old" law.

7 Prior to 2012, the law of hearsay in Singapore could only be described as an incongruous set of rules provided for in both the Evidence Act and the former Criminal Procedure Code, setting up two regimes for the admission of hearsay in criminal cases (in 1976), and retaining the provisions of the original Evidence Act (circa 1872) for civil cases: the result was contrary to the experience in most common law countries. Singapore was the only common law jurisdiction where

15 This subject is covered by the Criminal Procedure Code (Cap 68, 2012 Rev Ed) confusingly in several parts.

hearsay was theoretically more "admissible" in criminal cases than civil. There was an obvious failure to appreciate the nature of the provisions inserted into the Criminal Procedure Code in 1976, which was the English Criminal Law Revision Committee's response to bringing the rules in criminal cases in England in line with those (as far as possible) in civil cases (the English Civil Evidence Act 1968).[16] The 1976 scheme stood out like a sore thumb in Singapore law for 35 years, and was hardly used, as it was overly elaborate, both in its normative requirements and practical applications. Happily that scheme has now been repealed by the 2012 Act, and consigned to legal history.[17] There is, once more, a single hearsay scheme in the Evidence Act applicable to both civil and criminal cases.

8 The law of hearsay in civil cases, based as it was on 1872 English common law rules, resulted in hearsay being "excluded" once parties adducing it did not lay the basis for admission in terms of the declarants' unavailability to give evidence, as required by the "preconditions" to the then ss 32 and 33. These preconditions had to be satisfied in all cases, and no distinction was made, as in other jurisdictions, between cases where it was considered safe to adduce hearsay despite the availability of the declarants to give evidence, and those where it was necessary to require the party adducing such hearsay to show that the declarant was unavailable before such hearsay was allowed.[18] A failure to show the declarants' unavailability would result in exclusion of the hearsay statement, and severe consequences might follow on the outcome of a case, as *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd*[19] so vividly illustrated. This was so even though the declarants might not be identifiable and, more importantly, helpful even if called as witnesses.

9 In so far as the role of the judge *vis-à-vis* hearsay is concerned, there is a duty on her to rule on whether it is admissible or not, even when both parties were either unaware of it, or did not object to its admission. It is said that this duty is imposed through the mandatory nature of the statutory requirements[20] though it might also be founded

16 c 64.

17 The Law Reform Committee (Academy of Law) published the *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* in May 2007 but the reforms recommended were not implemented. However, remnants of it have been retained, for example, the provision on implied assertions (now s 32A of the Evidence Act (Cap 97, 1997 Rev Ed)).

18 For example, as in the US Federal Rules of Evidence, especially rr 801–807: see *Federal Rules of Evidence (with 2011 amendments)*, reproduced in R C Park & R D Friedman, *Evidence: Cases and Materials* (New York: Thomson Reuters/Foundation Press, 12th Ed, 2013) Appendix A.

19 [2006] 3 SLR(R) 769.

20 The judge in *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR(R) 534 at [17] held that as the statutory provisions are mandatory, even if the parties did not object to the admissibility of hearsay, it will not be allowed. However, the

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on a common law duty on the judge to act only on admissible evidence. In *Keimfarben GmBH & Co KG v Soo Nam Yuen*,[21] a document purporting to be a letter of offer from a third party to purchase a disputed consignment of paints was tendered to prove the value of the consignment. As the offeror (maker of the document of offer) was not called to give evidence of the price he offered, the judge ruled the document of offer inadmissible by reason of it being hearsay despite the fact that the parties did not object to its admissibility. The letter of offer was hearsay because it was tendered to prove the fact that the paints were of the value stated in it, a fact in issue.[22]

10 Another problem in the treatment of hearsay which has perplexed many is the lack of both a definition of "hearsay" as a normative construct and a statement of the exclusionary rule. This issue is one which every student of evidence faces when she comes to the subject of hearsay for the first time: what is the approach to be taken in determining whether a statement is admissible in evidence? Is it necessary to first ask, "is a statement proffered as hearsay or original evidence"? Or can one simply turn to one of the many provisions on statements and find an appropriate "relevancy" section? Stephen's novel idea of "relevancy" as embodying both "logical" and "legal relevancy" (meaning that the fact is both "logical" and "*admissible*") exacerbates the problem. However, though Stephen clearly meant to exclude hearsay subject to exceptions provided in the Indian Evidence Act 1872,[23] he also seemed resolved not to refer to "hearsay" in the Act, presumably on the basis that the concept, as it then was, was extremely difficult to define, and that its various meanings were best gleaned from the various exceptions.[24] A clear definition of "hearsay" in 1872 was not likely given the uncertain state of the common law and was not attempted then.

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improper admission of evidence would not entitle the party adversely affected to a new trial, or a reversal of the verdict if there was sufficient other evidence to justify the verdict: s 169 of the Evidence Act (Cap 97, 1997 Rev Ed). *Cf Lim Guan Cheng v JSD Construction Pte Ltd* [2004] 1 SLR(R) 318 (waiver of right to object to hearsay was held fatal to the appeal).

21 [2004] 3 SLR(R) 534. Had a proper foundation for non-availability of the declarant been laid, the document could easily have been admitted as a business record under the previous s 32(*b*). There will be no difficulty now under the current s 32(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) even if it was not shown that the declarant was unavailable.

22 Normally expressions of offer are not hearsay, when they are relevant to show whether there was a contract in existence or not. This is because the judge only needs to assess whether the words used by the alleged offeror amounted to an offer, objectively speaking. In other words, the statement is not tendered to prove that the "offeror" (subjectively) intended to make an offer. The judge uses the statement (and the words contained in it) as "direct evidence".

23 Act No 1 of 2872.

24 See discussion of hearsay in James Fitzjames Stephen, *The Principles of Judicial Evidence (being an Introduction to the Indian Evidence Act I of 1872)* (Calcutta: Thacker, Spink & Co, 1872) at p 4 *ff*. "As the rule is nowhere laid down in an

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11 Stephen's hesitation to mention "hearsay" in the Indian Evidence Act 1872 has been much misconstrued. Judicial decisions such as *Lim Ah Oh v R*[25] and *Soon Peck Wah v Woon Chye Chye*[26] insisted that there must be an exclusionary rule somewhere in the Act, and that it is "found" or "reflected" in what is now s 62 of the Evidence Act (dealing with direct oral evidence).[27] This somewhat fruitless exercise – the search for a non-existent "exclusionary" rule – serves to confuse more than enlighten generations of legal professionals trying to understand "hearsay" under the Evidence Act. The main responsibility for this confusion, however, has to be placed in large part on the Privy Council in its landmark decision, *Public Prosecutor v Subramaniam*,[28] which admittedly still remains one of the most cited judgments as to what constitutes hearsay. Much as the common law jurisdictions might approve of the case, both in terms of the *dicta* and result, it remains a poor example of jurisprudence in fact when it comes to applying the Evidence Act. This is because the Privy Council chose to ignore the Evidence Act altogether and went straight to common law to determine whether threats uttered by "bandits" (out-of-court statements) were hearsay (when recounted by the accused in court) and hence inadmissible.[29] Had the Privy Council approached the issue purely from the Evidence Act viewpoint, it could have resolved the matter without reference to hearsay at all. The threats made by the "bandits" were clearly "relevant" by virtue of s 8(2) and used to explain the conduct of the accused (why he was in possession of arms).[30] This alone would have meant the "threats" were admissible in evidence, as circumstantial evidence that the accused carried the ammunitions and arms under duress.

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authoritative manner, its meaning has to collected from the exceptions to it, and these exceptions … imply at least three different meanings of the word 'hearsay'".

25 [1950] MLJ 269.

26 [1997] 3 SLR(R) 430.

27 Presumably on the basis that if there was no exclusionary rule, how could "relevant" evidence be excluded or when do the exceptions, say in s 32 of the Evidence Act (Cap 97, 1997 Rev Ed), apply? These are all wrong questions to ask.

28 [1956] 1 WLR 965 (on appeal from the Federation of Malaya); the Privy Council comprised Lord Radcliffe, Lord Tucker, and L M D De Silva (who delivered judgment). Little is known of this Privy Councillor other than that he was originally from Sri Lanka, and appointed to the Privy Council. He was also a King's Counsel and an Honorary Fellow of St John's College, Cambridge.

29 The accused was relying on the defence of duress.

30 Explanation 2 of s 8(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states that: "When the conduct of any person is relevant any statement *made to him* or *in his presence and hearing* which affects such conduct is relevant." [emphasis added] For a discussion of the common law cases besides *Public Prosecutor v Subramaniam* [1956] 1 WLR 965, see P Murphy & R Glover, *Murphy on Evidence* (Oxford University Press, 12th Ed, 2011) at para 7.13.2. See also Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) at para 4.019 *ff*.

12 In so far as "relevancy" entails "admissibility" in Stephen's scheme, that should have been enough to answer the issue before the court.[31] Other statements that in common law would be treated as hearsay would have to be "legally relevant" and rendered admissible through reference to one of the subsections in s 32 or other specific provisions. A court would technically never need to enter into the analysis at all as to whether the statement adduced is hearsay. V K Rajah JA in the recent case of *Lee Chez Kee v Public Prosecutor*[32] examined the state of the law of hearsay and its relationship with the Evidence Act (and in that case, the Criminal Procedure Code provisions, which have now been repealed). He concluded:[33]

> As can be seen, the popular judicial views in relation to the admissibility of hearsay evidence in Singapore can be faulted on two grounds. First, it can be said that the courts have not made reference to the EA but have consistently restated the common law formulation of the hearsay rule, even though there is an inconsistency between the conceptual bases of the common law and the statutory approaches. Strictly speaking, such an approach is forbidden by s 2(2) of the EA, which repeals all rules which are not saved by statute and which are inconsistent with the provisions of the EA. Secondly, where the courts have sought to link the common law approach with the EA, the reason given, *ie*, that s 62 reflects the common law hearsay rule (via s 62 of the EA), is not convincing and is, at its heart, conceptually erroneous. In my view, these judicial views, epitomised by the *dictum* of this court in *Soon Peck Wah*, ought not to be followed.

13 However attractive V K Rajah JA's observations are, severing the link with the common law would mean that a good number of local cases on hearsay might need to be reconsidered and perhaps, more importantly, the practice or approach of the judges and lawyers in relation to hearsay might need to be deliberately changed.[34] The concept of "hearsay" is deeply ingrained in the consciousness and language of lawyers and judges in Singapore,[35] as it is in all other common law

31 Illustration (*f*) of s 8 of the Evidence Act (Cap 97, 1997 Rev Ed) is pertinent:

> The question is whether *A* robbed *B*.
>
> The facts that after *B* was robbed, *C* said in *A*'s presence: 'The police are coming to look for the man who robbed *B*', and that immediately afterwards *A* ran away are relevant.
>
> The statement explains *A*'s conduct.

In the same way, the "threats" explain Subramaniam's conduct in carrying arms.

32 [2008] 3 SLR(R) 447. The other two judges expressed no views on the issue.

33 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [75].

34 One could also include the legislators in this group, who in the debate on the Bill, obviously referred to the provisions as hearsay exceptions, and the retention of the exclusionary rule as desirable for the time being: see *Singapore Parliamentary Debates, Official Report* (14 February 2012) "Evidence (Amendment) Bill" vol 88.

35 The latest decision from the Court of Appeal is *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573, where with reference to s 33 of the Evidence Act (Cap 97, 1997 Rev Ed), the Court of Appeal (comprising Sundaresh Menon CJ and

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jurisdictions. Though the "statement" approach[36] (avoiding the word "hearsay") might be more faithful to the original intention of the statute, it seems a high price to pay to revert to it in current circumstances. Adopting the "statement" approach in the Evidence Act may also give rise to the danger of not recognising that one is dealing with "hearsay" (with all its acknowledged epistemic and other forensic risks). The "hybrid" approach (combining both common law and statute) that requires the judge to rule on whether a statement offered in court as evidence is hearsay or not (common law) and if it is, whether any of the "exceptions" (statute) apply to render it admissible is now well established. In fairness, it should be noted that the judge's solution is really for the Legislature to reformulate the whole area. This it has almost done, but the current scheme presupposes that the concept of hearsay and its exclusionary rule would still be operative. It is submitted therefore that the starting point should still be whether a statement tendered is "hearsay" and since there is no definition of the term or the exclusionary rule in the statute, its meaning has to be obtained from the common law.[37] Ascertaining its meaning at common law also entails sketching out the scope of the exclusionary rule, for what is not ascribable as "hearsay" need not be admitted under the "exceptions"; it will be regarded as original evidence.

II. Hearsay as a normative construct

14 In the immediate paragraphs above, we see that the judicial treatment of "hearsay" has been, and still is, deeply problematic. Stephen's placement of hearsay "exceptions" in Pt I of the Evidence Act, which deals with "Relevancy of Facts", is not helpful either, as it seems to designate hearsay as "objects of proof" rather than as a "means of proof".[38] Sections 6–16 of the Evidence Act essentially deal with "objects of proof" (facts in issue and relevant facts (circumstantial facts), whereas "hearsay" (dealt with in subsequent sections) is regarded by most common law lawyers and writers as a "means of proof" (together

Chao Hick Tin and V K Rajah JJA) used the language of hearsay in analysing the case. In other words, it took the "hybrid" approach.

36 For want of a better term, Stephen's approach can be called "the statement approach", focusing as it does purely on the relevancy of statements as evidence without reference to the problem of hearsay.

37 Though it would have been a simple matter to have a statutory definition as found, for example, in s 1(2) of the English Civil Evidence Act 1995 (c 38). Other definitions are conveniently discussed in P Murphy & R Glover, *Murphy on Evidence* (Oxford University Press, 12th Ed, 2011) ch 7.

38 In fairness to Stephen, his "relevancy" scheme only admits of "statements" either as "facts" (original evidence) or as "statements containing relevant facts" (hearsay). He cannot be blamed for this common law taxonomic problem as he never intended the Act to be burdened by the word "hearsay". He nonetheless recognised the term and its use in evidence through exceptions.

with "testimony and documents"), the subject of Pt II of the Act.[39] To speak of a hearsay statement as a "fact" is misleading – a hearsay statement contains "facts", which may be "objects of proof" but it is not itself an "object of proof". However, statements can be "facts" if tendered as non-hearsay, that is, their relevance is in their *existence* rather than what they contain. The lack of clarity is seen even in Stephen's explanation of hearsay in his work.[40] In his Note IX to Art 14, he said:[41]

> There is no real difference between the fact that a man was heard to say this or that, and any other fact. *Words spoken may convey a threat, supply the motive for the crime, constitute a contract, amount to slander*, &c, &c; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of someone who heard them. The important point to remember about them is that, *bare assertions must not, generally speaking, be regarded as relevant to the truth of the matter asserted*. [emphasis added]

Later editions of the *Digest* (*eg*, the 12th edition) omitted this passage as it is evidently clear that the examples given by Stephen (the first italicised part above) were of "facts" that would be "relevant" by virtue of one or more of ss 6–16, namely, they are examples of "legally operative" facts and therefore not hearsay. They cannot be put together with pure hearsay statements, as Stephen himself acknowledged in his last sentence in the quotation above (the second italicised part). The statements cited as examples are either facts in issue (*eg*, words constituting a contract) or facts relevant to facts in issue (*eg*, threats, as relevant to the defence of duress). The only feature in common that these statements have with hearsay statements is that they must be proved by witnesses who heard these utterances (first-hand hearsay) direct from the declarants, or heard them as reported by others (multiple hearsay) or that they are available in documents that could be tendered in court after authentication (which brings with it the problem of primary or secondary evidence).

15 Hearsay requires a separate explanation of its nature and scope.[42] This is because hearsay is not so much a means of proof

39 See, *eg*, C Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ch 1. Stephen did not consider real evidence as a separate type of evidence, as his view was that such objects would need testimony or documentary evidence to explain its significance; in this, he was partially right, as the trier of fact could rely on her own senses with regard to certain types of real evidence (*eg*, photos, views and demeanour of witnesses) to "find facts".

40 James Fitzjames Stephen, *Digest of the Law of Evidence* (St Louis: F H Thomas & Co, 2nd Ed, 1879).

41 James Fitzjames Stephen, *Digest of the Law of Evidence* (St Louis: F H Thomas & Co, 2nd Ed, 1879) at pp 167–168.

42 T Honore, "The Primacy of Oral Evidence" in *Crime Proof and Punishment: Essays in Memory of Sir Rupert Cross* (C Tapper ed) (London: Butterworths, 1981) ch 9

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(so classified in traditional texts)[43] as a way of using statements (whether oral or documentary or conduct) as evidence.[44] Hearsay unlike other forms of physical evidence (such as testimony or documents or things) does not even exist in the physical world – in fact, digital images or information has more of a physical existence than hearsay. Hearsay is essentially a normative conception: its characteristics will differ according to how it is being defined. At its most basic form, a "statement" is not hearsay when the purpose is to use it for a direct inference of relevant fact or fact in issue.[45] Sometimes the distinction is extremely difficult to draw and may depend on whether the trial judge is willing to say whether the inference can *legitimately* be drawn from the fact that the statements were made without more, or whether it can *only* be drawn relying on the assertions of their declarants, which would render it hearsay.[46] For instance, in the case of *R v Kearley*,[47] the minority (Lords Griffith and Browne-Wilkinson) was willing to draw a circumstantial inference from the supposedly large number of callers (both through the phone and in person) asking the accused to supply drugs. Had there been only one or two callers, it would have been a

(discussing "modes of proof" and the nature of "report evidence", that is, oral testimony, documentary evidence and hearsay): see especially pp 186–192.

43 *Eg*, C Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at p 54.

44 As emphasised by P Roberts & A Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd Ed, 2010) at p 396: "There is no such thing as hearsay evidence, only hearsay uses."

45 The leading case in this distinction between circumstantial evidence and hearsay is the Privy Council decision in *Ratten v R* [1972] AC 378 (on appeal from Australia). Lord Wilberforce pointed out that the telephonist's testimony of the statement by the wife asking for the police in a sobbing and hysterical voice had evidential value purely from the way she spoke, suggesting fear. The statement was not used "testimonially", *ie*, as an assertion by her as to her fear of her husband, the accused. The evidence therefore was original circumstantial evidence.

46 In *R v Kearley* [1992] 2 AC 228, the majority of the House of Lords was unwilling to go beyond holding that the telephone calls and other callers to the accused's house were actually (implied) assertions by the declarants that the recipient was a drug dealer, whereas the minority was willing to hold that given the number of telephone calls and actual callers, that was sufficient evidence to infer directly that there was a market for drugs, *ie*, evidence of the calls, *etc*, was receivable as circumstantial evidence. This case remains highly controversial and the majority view was reversed by statute. For a more sympathetic account of the majority view, see H L Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008) ch 5, at pp 279–281 and also P Roberts & A Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd Ed, 2010) at p 368, fn 18, where the authors observed that:

> Even those who find the suggestion of police impropriety too morbid to contemplate should concede that, especially in the murky world of drugs and vice prosecutions, it would be better if convictions rested on more than the unsubstantiated word of a policeman.

47 [1992] 2 AC 228.

brave judge indeed who would confidently draw a circumstantial inference that the accused was trafficking in drugs.

16 Quite apart from the circumventing of the strict hearsay rule by using a statement as a piece of circumstantial evidence, judges have employed other means of classification to admit statements. For example, if a statement could be regarded as "real evidence" (which apparently means that it is *not* hearsay as it is evidence offered for direct perception by the trier of fact), the statement could be admitted in evidence, even though it could also be analysed as hearsay: a classic example of this is in the English case of *R v Rice*[48] where a used airline ticket was admitted to prove that one of the accused persons (Rice) had travelled on it. Winn J, giving judgment for the Court of Criminal Appeal, spoke of the relevance of the air-ticket in the following manner:[49]

> The court has no doubt that the ticket and the fact of the presence of that ticket in the file or other place where tickets used by passengers would in the ordinary course be found, were facts which were in logic relevant to the issue whether or not there flew on those flights two men either of whom was a Mr Rice or a Mr Moore.
>
> The relevance of that ticket in logic and its legal admissibility as a piece of real evidence both stem from the same root, *viz*, the balance of probability recognised by common sense and common knowledge that an air ticket which has been used on a flight and which has a name upon it has more likely than not been used by a man of that name or by one of two men whose names are upon it.

Such ways of circumventing the strict hearsay rule have been well described as "hearsay fiddles"[50] and may recede in importance where the hearsay rule has been relaxed or abolished altogether though they remain viable options for parties to take. Given that one does not have to, for instance, give notice to adduce statements if non-hearsay or be subject to challenge as to the credibility of declarants, such alternative

48 [1963] 1 QB 857.

49 *R v Rice* [1963] 1 QB 857 at 871. While the court's approach in *R v Rice* could be defended as correct, there is little, if any, merit in another English decision adopting a similar approach with respect to a photofit created from a victim's description of the accused: *R v Cook* [1987] QB 417. This approach is no longer needed in the UK as s 115(2) of the English Criminal Justice Act 2003 (c 44) includes photofits as "statements" which are admissible by virtue of s 120(5). For a local case adopting a similar approach, see *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1 and discussed by Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) ch 4, at para 4.059 *ff*.

50 D J Birch, "Hearsay-logic and Hearsay-fiddles: *Blastland* Revisited" in *Criminal Law Essays in Honour of J C Smith* (P Smith ed) (London: Butterworths, 1987); see also, R Roberts & A Zuckerman, *Criminal Evidence* (Oxford University Press, 1st Ed, 2004) at pp 609–623 (not reproduced in full in the second edition).

analyses might still be preferred. Using these forms of analysis when the risks of hearsay are present would be generally undesirable.

17 In so far as definitions are concerned, one key issue is whether implied assertions (*ie*, statements not intended to be assertive, but nonetheless "rest on some assumption of fact believed by the declarant of the statement")[51] should be regarded as hearsay.[52] For example, can *W* testify to hearing *M* greet *T*, saying "Hi, *T*, how are you?", to show that *T* was present. Should this type of utterance be regarded as hearsay? The definition can also be extended to actions, such as the action of the sea captain in Baron Parke's famous example given in *Wright v Doe d Tatham*.[53] He cited the example of a sea captain who after inspecting his ship took his whole family aboard – the fact impliedly asserted being that the ship was seaworthy. A full doctrine of implied assertions would include both statements and actions. Though implied assertions are technically hearsay, to exclude all types of implied assertions as hearsay would be to exclude much reliable evidence – the argument being that they are much more reliable because the declarant of the statement or the doer of the act had no intention of communicating the facts he or she is assuming. The risks of manufactured evidence or insincerity are said to be much lessened and may be safely left to the trier of fact's decision as to weight. Currently, the approach in several major jurisdictions is not to regard statements or conduct not intended to communicate facts implied as hearsay.[54]

18 Section 32A of the Evidence Act which preserves the former Criminal Procedure Code provision[55] states: "For the purposes of section 32(1), a protest, greeting or other verbal utterance may be treated as stating any fact that the utterance implies." This provision is curious for several reasons: first, it seems to provide for implied assertions by utterances as distinct from actions (that is, it can be interpreted as not including conduct).[56] Second, if one were to refer to the original intention of the draftsman (of the draft Bill contained in the

51 J D Heydon, *Evidence: Cases and Materials* (London: Butterworths, 1975) at p 317.

52 An extensive discussion of implied assertions (at least six positions can be taken) is to be found in J D Heydon, *Cross on Evidence* (LexisNexis Australia, 8th Ed, 2010) at paras 31035–31065.

53 (1837) 7 Ad & E 313.

54 Prominent among these are the US Federal Rules of Evidence (1975, currently 2014 edition): see R C Park *et al*, *Evidence Law* (St Pauls MN: West, Thomson Reuters, 3rd Ed, 2010) ch 7 at §7.01, p 254; for the English position, see ss 115(2) and 115(3) of the English Criminal Justice Act 2003 (c 44).

55 Section 378(4) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). It was reproduced in the Criminal Procedure Code 2010 (Act 15 of 2010) but has since been repealed by the Evidence (Amendment) Act 2012 (Act 4 of 2012) and re-enacted as s 32A of the Evidence Act (Cap 97, 1997 Rev Ed).

56 However, can one argue that the Evidence Act (Cap 97, 1997 Rev Ed) is silent on implied assertions by conduct?

Criminal Law Revision Committee Eleventh Report on Evidence (General)),[57] the inclusion of this provision was to ensure that an "utterance" would not be rejected as evidence on the ground that it could not be a "statement". Standing on its own, without a definition of a statement, it is clearly out of place.[58] The late Rupert Cross argued that greetings such as "Hello *X*" would be assertive hearsay as they "express not merely greeting but also recognition and they are therefore just as much hearsay … when tendered as evidence of the presence of the addressee". He sought to distinguish actions from utterances or statements – actions might show the beliefs of the actors, but "at no stage in the reasoning justifying its admissibility is the court asked to assume that something said by one person to another was true".[59] However, it must be shown that such beliefs are relevant.[60] It is suggested therefore that s 32A supports the view that implied assertions that are statements or utterances would be regarded as hearsay, but not actions not intended to be assertive. While s 32A is still on the statute book, it is perhaps not open to challenge the view implicit in its formulation. But it is submitted that its repeal would hardly be noticed, let alone create even a ripple of dissent.[61]

19 Enough has been said in the preceding paragraphs to underline the difficulties inherent in defining and applying the exclusionary hearsay rule. Yet if one were to avoid the hearsay route, and use the "statement" route,[62] the draftsman may be faulted for not even supplying a working definition of "statement"[63] from which one could proceed analytically. Even if one were to keep to the language of hearsay,

57 United Kingdom, *Criminal Law Revision Committee Eleventh Report on Evidence (General)* (Cmnd 4991, 1972) at p 251.

58 *Cf* s 257 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) where "statement" includes any representation of fact, whether made in words or otherwise.

59 R Cross, *Cross on Evidence*, Ch XVII (London: Butterworths, 4th Ed, 1974) at pp 409–410. Note that express assertions by conduct would still be hearsay: *Chandrasekera v R* [1937] AC 220.

60 While this view could be supported to some extent, there is criticism that it is artificial and illogical to distinguish statements from conduct though it could be justified on the ground that to include non-assertive conduct as hearsay would raise "a multiplicity of issues": J D Heydon, *Cross on Evidence* (LexisNexis Australia, 8th Ed, 2010) at para 31050.

61 There does not appear to be a single reported case of implied assertions in Singapore to date.

62 This entails employing the distinction between "statements as facts" (not hearsay) and statements containing relevant facts (hearsay) as specified in the Evidence Act (Cap 97, 1997 Rev Ed).

63 Though the current Legislature could easily have remedied that by using the definition already supplied in s 257 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). It could be improved by including the word "opinion" as hearsay opinions are recognised in the 2012 scheme.

a definition of "statement" may also help resolve other problems, such as that of negative inferences.[64]

III. The exceptions: Principles of reformulation

20 The parliamentary debate on the Bill offers little in terms of policy and principle behind the new law. The most significant change, besides the adding of new "exceptions" and the repeal of the Criminal Procedure Code scheme was the removal of the so-called "preconditions" from the preamble in s 32 of the Evidence Act. In the past, before any hearsay could be admitted under s 32, it had to be shown that the declarant could not testify due to death, incapacity or some other reason as to his unavailability.[65] Only on satisfactory evidence that the declarant was unavailable was one allowed to adduce hearsay. But there was a second requirement, namely, that the statement must fall within one of the categories,[66] for example, as a dying declaration or declaration against interest. The court was not allowed to create new exceptions outside of written law.[67] This has always been the bug-bear of the law of hearsay: a closed category of exceptions, which resulted in an inflexible application, where reliable and probative hearsay may be excluded as it did not fall within any of the bright-line exceptions. Wigmore described the situation well when he observed:[68]

> The needless obstruction to investigation of truth caused by the hearsay rule is due mainly to the inflexibility of its exceptions, to the rigidly technical construction of those exceptions by the courts, and to the enforcement of the rule when its contravention would do no harm, but would assist in obtaining a complete understanding of the transaction.

21 The remedy therefore was to restyle the hearsay rule and its exceptions to increase "flexibility" in the admissibility of reliable hearsay, coupled with the need to provide safeguards against unreliable hearsay.

64 There is no need to re-invent the wheel: r 801 of the US Federal Rules of Evidence (as restated in 2011) has a comprehensive model defining "statement", "declarant", "hearsay" and "non-hearsay" statements. The rule (r 802) declared in exclusionary form, and the exceptions (rr 803–807) are laid out clearly, including dealing with multiple hearsay (r 805). There are many such definitions in other common law jurisdictions but the US version is extremely clear.

65 Note that similar conditions remain in s 33 of the Evidence Act (Cap 97, 1997 Rev Ed), which was left untouched by the re-enactment: see *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573.

66 Under the pre-2012 scheme, these were contained in ss 32(*a*)–32(*h*).

67 Though there is no local authority for this proposition, it seems that the non-interventionist approach taken in *Myers v Director of Public Prosecutions* [1965] AC 1001 will be followed, that is, it is up to the Legislature to amend the hearsay rule. No judicial exceptions will be created.

68 *Wigmore on Evidence* vol 5 (Boston: Little Brown, 3rd Ed, 1940) at para 1427.

Such increase in flexibility was through new exceptions that are more widely worded, and by providing the court with a discretion to exclude hearsay "in the interests of justice",[69] together with the power "to assign such weight as it deems fit"[70] to any statement admitted. As for safeguards, the powers of a party against whom hearsay is admitted are enhanced in terms of the extent to which it can impeach the credit or credibility of a declarant of a statement.[71] However, the fact that the powers of impeachment have increased on paper does not necessarily translate into a safer environment for hearsay to be admitted too readily. Again, the discretion to exclude hearsay "in the interests of justice" might be pertinent here.

22 As to the approach taken, whether to be more extreme and "abolish" the rule against hearsay, or whether to retain the exclusionary rule and tweak the exceptions, it is clear that the choice was for the latter – a cautious approach. According to the Minister: "There is still a core of sense – commonsense – in the hearsay rule that, *prima facie*, a statement should not be admitted to prove the truth of its contents if its declarant cannot be cross-examined as to its veracity."[72] It may be difficult to square this broad sentiment with the abolition of the "preconditions" in s 32, which required hearsay to be admitted only with proof that the declarant was unavailable for a legitimate reason.[73] One could, however, venture the thought that even though the "preconditions" of unavailability have been removed in s 32, it remains to be seen whether counsel, for tactical reasons, will *in fact* use hearsay where *better* evidence is available. Thayer pointed out (in 1898) that "always, morally speaking, the fact that any given way of proof that a man has, must be a strong argument for receiving it, if it be in a fair degree probative; and *the fact that a man does not produce the best evidence in his power must*

69 Evidence Act (Cap 97, 1997 Rev Ed) s 32(3). This newly conferred discretion is also applied to opinion evidence (s 47(4)) and is to be distinguished from the "inherent general discretion" to exclude evidence where its prejudicial effect outweighs its probative value. See the debate on the second reading of the Evidence (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (14 February 2012) "Evidence (Amendment) Bill" vol 88).

70 Evidence Act (Cap 97, 1997 Rev Ed) s 32(5). This is an odd provision in that it seems to be stating the obvious: a judge must necessarily "assign" the weight that he believes the evidence deserves.

71 In s 32C(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed), for example, the rule on finality to collateral answers is waived, and even if the declarant were a witness, and could not be contradicted in his answer to a credibility question, it would be allowed under the section with leave of the court.

72 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88.

73 Now the "preconditions" are enacted as a free standing exception: s 32(1)(*j*) of the Evidence Act (Cap 97, 1997 Rev Ed) provides that hearsay may be admitted simply on proof of unavailability of the declarant.

always afford strong ground of suspicion"[74] [emphasis added]. This principle holds true today as it did at the time Thayer enunciated it.

23 Thayer's principle may be apposite as the guiding principle of the 2012 restatement: hearsay should be admitted only if it has "fair" probative value,[75] and no other better form of evidence is available.[76] The best evidence is still oral evidence, and the primacy of orality is still the governing principle however liberal the admissibility of hearsay has become: Roberts and Zuckerman observed that "[c]ultural allegiance to English law's traditional commitment to orality remained strong".[77] The common law's preference for oral testimony is much more robust in criminal cases and is usually justified on forensic grounds (relating to the accuracy of the witness's testimony) and on grounds of procedural fairness (based on the idea of a "right to confront one's accusers").[78] Considering the Jamaican provisions for hearsay (quite similar to the new Singapore scheme), the Privy Council reiterated the primacy of orality principle even amidst the relaxation of the hearsay rule:[79]

> The evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence, and should continue to be so regarded. Any departure from that practice must be justified.

Though hearsay is made more readily admissible, it should only be resorted to if direct evidence in the form of oral testimony or documentary evidence is not available and the judge decides that it is not "in the interests of justice" to exclude it.

24 In the case of the so-called "right to confrontation", which is recognised in several major jurisdictions constitutionally or in a

74 J B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown & Co, 1898) at p 507. (A digital reproduction of the original text available at <http://home.heinonline.org>.)

75 One way of ensuring that hearsay has probative value is to ensure that *its reliability can be properly verified and challenged*. See H L Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008) ch 5.

76 Even if this is perhaps not totally accurate as a matter of law, it is submitted that this would be the *de facto* situation under the 2012 scheme.

77 P Roberts & A Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd Ed, 2010) at p 379.

78 The right to confront accusers may be said to have a strong historical lineage – a famous case being that of the trial of Walter Raleigh for treason in 1603 where he demanded to confront his accusers: (see T B Howell, *A Complete Collection of State Trials 1 (1816)* reprinted in George Fisher, *Evidence* (New York: Thomson Reuters/Foundation Press, 3rd Ed, 2013) at pp 374–376).

79 *Grant v The Queen* [2007] 1 AC 1 at [14]. For further discussion of this case, see paras 54–56 below.

supra-national instrument,[80] Singapore does not have the "right of confrontation" expressly provided for in written law. It may, however, be said to be recognised in the current scheme when the decision was made to retain the exclusionary nature of the rule against hearsay. There will hardly be any objection to the following observation of the High Court of Australia in *Lee v The Queen*[81] that: "Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial." The so-called right may be weakened somewhat by the increased number of hearsay exceptions, especially the free standing s 32(1)(*j*), which allows for the admissibility of hearsay once it is shown that the declarant is unavailable as a witness at trial. But it remains a viable and important principle underlying the law of evidence in Singapore, especially in criminal trials.

25 In discussing the general policy behind the 2012 hearsay scheme, it must also be noted that often hearsay is said to be excluded not just because of uncertainty of the quality of the evidence, it is also said to raise a multiplicity of issues and to increase both court time and costs, particularly in establishing the credibility of the absent declarants without the benefit of cross-examination under oath. These concerns remain and may even be said to be exacerbated by increasing the number of exceptions. In civil cases, where there are provisions in the rules for case management, considerations of length of trial and costs of challenging hearsay evidence may well restrict the introduction of such evidence.[82] Such concerns may be even more serious in the case of criminal trials, as defendants may not have the necessary funds to

80 As a constitutional right: the US Constitution (Sixth Amendment) states that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …". As in a supra-national instrument: Art 6 ("Right to a Fair Trial"), especially Art 6.3.d, of the Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) which provides that an accused person standing trial has the "'minimum right' to examine or have examined witnesses against him …". Read literally, these types of provisions would render all hearsay inadmissible. But this is not the case and they have been interpreted by the respective courts to allow hearsay in certain circumstances. For example, in *Ratten v R* [1972] AC 378 at 387, Lord Wilberforce said: "A question of hearsay only arises when the words spoken are relied upon 'testimonially', *ie*, as establishing some fact narrated by the words." Extended discussion of this "confrontation right" is beyond the scope of this article.

81 (1998) 72 ALJR 1484.

82 Where a decision is made to allow hearsay in evidence, the costs saved from calling a declarant should be measured against costs incurred to the other party in challenging her credibility. The costs may shift from the one adducing the evidence to the one challenging it: fairness to parties may be a serious consideration in this respect.

employ counsel, let alone employ the means to challenge the credibility of absent declarants.[83]

26 The restyled set of exceptions can be conveniently classified into two categories according to whether there is a need to show the unavailability of the declarant as a condition to admissibility: the first category comprises the exceptions in ss 32(1)(*a*)–32(1)(*h*) (the original exceptions) where there is now no need to show why the declarant is unavailable, and the second category are the "modern" exceptions added in ss 32(1)(*i*)–32(1)(*j*) where there is a requirement to show the unavailability of the declarant as a witness. Strictly speaking, there is a third category that is *sui generis*, namely, hearsay by agreement (s 32(1)(*k*)), which is based simply on the parties' mutual consent to admit hearsay. A distinguishing feature between the first two is that the first category is statement-oriented (that is, the nature of the statement is the key to admissibility) whereas the second category is declarant-oriented (that is, based on proof of the declarant's unavailability, and nothing is said about the nature of the statement made). These categories will be discussed in turn below.

A. Exceptions that can apply without proof of declarants' unavailability[84]

27 This category covers all the original exceptions[85] that previously required proof of the unavailability of the declarant. In terms of practical significance, s 32(1)(*b*) of the Evidence Act, that is, "statements made in the course of trade, business, profession or other occupation"[86] is probably the main one, as it covers all types of commercial and professional records and has been extensively reworded with its coverage substantially increased. The original subsection mentioned only business and commercial documents and was restricted to first-hand documentary hearsay as it required the document to be "dated, written or signed" by the maker. Books kept "in the discharge of professional duty" are included, but the commercial context of the subsection is quite evident. The amended subsection adds the words "trade … profession or other occupation" to the original formula; one of the key issues, therefore, would be the reach of the extended phrase. Quite apart

83 This may need to be dealt with under the discretion to exclude hearsay "in the interests of justice". See paras 50–57 below.

84 This article is restricted to a discussion of the "new" formulation for s 32(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed).

85 As to which, see Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) ch 6. There will be no discussion of the unamended "exceptions" other than their relationship with the new exceptions.

86 The formula is also used in s 117 of the English Criminal Justice Act 2003 (c 44).

from the commercial connotations of "trade, business", "profession[87] or other occupation" could include a wide variety of non-commercial jobs, such as jobs in charitable or grassroots organisations, or in public institutions.[88] Increasing the scope of this exception to capture the gamut of commercial and professional activities seems correct given the diversity of organisations in modern society. But there will be a need to recognise that businesses and other organisations bound by law to keep accurate records would probably produce records that are much more reliable than those provided by unincorporated associations or volunteer organisations (especially those at the civic level).

28 Three other problems may be briefly mentioned: the first is whether this provision includes statements by persons doing voluntary (*ie*, unpaid) work for, say, a charitable organisation or grassroots organisation (given the wide meaning of the word "occupation").[89] It is obvious that there will be a wide divergence in standards of record keeping if one were to have a broad view of the phrase. One cannot expect a volunteer grassroots worker to keep records as precisely as a company secretary in a multinational company, where there are legal obligations to be accurate. However, this might be treated as an issue of weight or exclusionary discretion depending on the circumstances.

29 The second problem is whether this provision is restricted only to documentary hearsay. The tenor of the subsection suggests that this exception covers only documentary statements.[90] All the "particular" statements referred to (that is, ss 32(1)(*b*)(i)–32(1)(*b*)(iv) mention "books" receipts (written or signed), market quotations, tabulations and lists and 'document constituting … records") are examples of documents rather than oral statements. It is submitted that the subsection here should be read *ejusdem generis* and limited to

87 A "profession" in the *Oxford Dictionary of English* (3rd Ed, 2010) is defined as "a paid occupation, especially one that involves prolonged training and a formal qualification". It is likely that "occupation" could even include unpaid jobs – such as volunteers in charitable organisations. In the *Oxford Dictionary*, its most apposite meaning is "a way of spending time".

88 *Quaere*: Is this term wide enough to cover, for example, statements made by law enforcement agents, or other public enforcement officers, such as Land Transport Authority or Agri-Food and Veterinary Authority officers? Is law enforcement a business or commercial enterprise? Certainly, auxiliary police forces (such as CISCO) may be so regarded as are other private organisations providing security or investigation services.

89 But there is no mention of "unpaid" jobs, which is found in other legislation (such as s 117 of the English Criminal Justice Act 2003 (c 44)). The English Criminal Justice Act adds the phrase "holder of a paid or unpaid office" to the formula "trade business profession or other occupation", making it clear that it can cover persons in unpaid jobs.

90 This interpretation is further reinforced by the exclusion of this subsection from s 32(2) of the Evidence Act (Cap 97, 1997 Rev Ed), which concerns the situation when a declarant requests another to reduce an oral statement into writing.

documentary hearsay.[91] Given the ubiquitous use of technology for record-keeping these days, it may come as a surprise that no reference is made at all to hearsay in documentary records stored electronically.[92] It is likely that one will need to rely on the presumptions contained in s 116A (which were also introduced into the Evidence Act in 2012). These provisions may in the main not be problematic when applied in civil cases. There is a laudable attempt in the legislation[93] to exclude records made by investigating officers in a criminal proceeding. But it is by no means clear that records compiled by another officer (not directly involved in the investigation other than recording the statement) are not permissible.[94]

30 The third problem is whether the provision includes "compound" or "multiple" hearsay statements. The subsection provides that the exception includes "a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons". Thus, the compiler (maker) of the record could be different from the supplier of information, and information supplied could be from multiple sources ("other persons").[95] It would also have been useful to have a general provision as to whether multiple hearsay would be acceptable in relation to the other hearsay exceptions.

31 The scope of this exception will probably be determined by the rationales that justify it. These include the presumption that those who are professionals or in commerce keep proper records as they are likely to be acting under a legal or professional duty to do so, and they compile such records regularly, building up their necessary skills and knowledge bases. Generally speaking, such persons keeping records or such documents are also usually neutral individuals who would have no

91 As to proof of such documents, see s 67A of the Evidence Act (Cap 97, 1997 Rev Ed), which states:

> Where in any proceedings a statement in a document is admissible in evidence by virtue of section 32(1), it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it, authenticated in a manner approved by the court.

92 A detailed discussion of hearsay and electronic evidence is beyond the scope of this article.

93 Section 116A(2) read together with s 116(4) of the Evidence Act (Cap 97, 1997 Rev Ed).

94 The illustration to s 116A(2) of the Evidence Act (Cap 97, 1997 Rev Ed) points to a "neutral third party" compiler but more in relation to business records. Also, in a criminal investigation, even if the officer recording the statement is not actively involved in the investigation, it would be unrealistic and imprudent to say that she is "a *neutral third party*" (as in the Illustration).

95 Does this mean that in the case of the other exceptions they are all limited to first-hand hearsay?

motive to falsify facts or opinions contained in the statements.[96] There is also the very real prospect of regular audit by independent or official bodies, and the prospect of dismissal or legal liability if a record keeper is careless or in any way fails to be diligent.

32 The rest of the original exceptions remain the same. However, in the case of dying declarations, the issue was raised whether it was needed since a wider exception – s 32(1)(*j*) – based solely on unavailability due to the death of the declarant is available.[97] Presumably, the new provision would not be as restricted as s 32(1)(*a*) in terms of what the statement should refer to. It need not be a "dying declaration" as such, since the statement may have nothing to do with the circumstances of the declarant's death.[98] The retention of s 32(1)(*a*) raises a more general issue, that of the relationship between the exceptions that do not require proof of unavailability (the old), and those that do (the new). On proof that a declarant died before the trial, *ex hypothesi*, his statement would be admissible under s 32(1)(*j*). Thus, an accomplice's statement incriminating an accused person would be admissible under s 32(1)(*j*) if he died before the trial of the latter[99] even though his statement might have nothing to do with the circumstances of his death.[100] It would be up to the party tendering the statement to choose which of the exceptions it would rely on for admissibility, but given the wider scope of s 32(1)(*j*)(i), the choice is reasonably obvious.

B. Exceptions on proof of the unavailability of the declarant

33 The new exceptions based solely on the unavailability of the declarant as a witness or on her unwillingness to testify are obviously

96 The extension of the subsection to "unpaid occupations" might weaken these rationales somewhat, but that could probably depend on the circumstances.

97 The English legislation (Criminal Justice Act 2003 (c 44)) abolished both this exception and "declarations against interest" as being "defunct".

98 Actually the dying declaration exception in the Evidence Act (Cap 97, 1997 Rev Ed) was already conceived to be much wider than the common law was – in the latter case, there was a need to prove that the declarant was in "settled hopeless expectation of death", and it was only available in homicide trials.

99 See *Lee Chez Kee v Public Prosecutor* [2008] SLR(R) 447. (Sylvia Lim MP discussed this case in the Debate, but with reference to other issues (*Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88).)

100 The relationship between ss 32(1)(*a*) and 32(1)(*j*)(i) was raised directly by Desmond Lee MP (*Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88) and the Minister's somewhat unconvincing reply was as follows:

> But the reason why we decided to leave these two provisions alone is that there is really a very substantial body of case law not only from Singapore but around the world which has guided our courts. We would lose something by deleting when the courts have been able to get guidance on both provisions.

Actually, there were only a handful of cases on s 32(1)(*a*) dating back to the first half of the 20th century and no case in recent times. The common law exception was abolished in England without any sentimentality.

meant to make hearsay in such instances more readily admissible. The two new provisions are ss 32(1)(*i*) and 32(1)(*j*). In the case of s 32(1)(*i*) a party may introduce the previous out of court statement of its own witness, if the latter refuses to testify or even to be sworn or affirmed as a witness. The only condition is that the declarant must be a compellable witness, and since competency entails compellability, it follows that the only condition of admissibility that the party adducing the hearsay needs to satisfy is that the declarant must first of all be a competent witness.[101] But such a declarant must attend court or be brought before the court and make his refusal or reluctance to testify known. It is also a reasonable inference that at the time the statement was made out of court, the declarant must have been a competent witness. The operative idea here is that the statement *replaces* the testimony the declarant would have otherwise given, had he been willing. Thus, this provision would not cover potential witnesses who are out of jurisdiction and who refuse to return to Singapore to testify; this situation would come under s 32(1)(*j*). Another point to note is that in criminal proceedings, the Prosecution cannot make use of this particular subsection with regards to statements by an accused person (or by a co-accused) in so far as they are not competent witnesses for the Prosecution.[102] Finally, if a witness were to give evidence but was cross-examined (whether by the opposing party or the party calling her) on the basis of an earlier inconsistent statement, her prior statement would come to be considered under a different exception.[103]

34 Section 32(1)(*i*) is rather narrow in scope – it applies to a declarant who is produced in court, and who could be a witness but refuses. In that sense he is unavailable to testify. The broader types of unavailability are dealt with in s 32(1)(*j*). In s 32(1)(*j*)(i) the declarant may be dead or is too ill (physically or mentally) to attend court. As discussed above, there is the overlap with s 32(1)(*a*) but given the wider scope of s 32(1)(*j*)(i), it is more than likely that the dying declarations exception in s 32(1)(*a*) will fall into desuetude. Proof of death or severe illness disabling the witness from testifying ought to be sufficient,

101 For a discussion on competency and compellability of witnesses, see Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) ch 11, section D.

102 Evidence Act (Cap 97, 1997 Rev Ed) s 122(3). This is implied by the subsection providing competency but not compellability for accused persons. An accused person is of course competent for himself or his co-accused, but never compellable. But an accomplice, not on trial together with the accused, would be both competent and compellable for the Prosecution. Again, the so-called problems in *Lee Chez Kee v Public Prosecutor* [2008] SLR(R) 447 have to be dealt with.

103 Evidence Act (Cap 97, 1997 Rev Ed) s 147(3). This would include accused persons as witnesses. The Prosecution is entitled to cross-examine an accused person on his prior inconsistent statements (provided these are otherwise admissible).

without further need to show that the statement was *about the circumstances of his death*, as required in s 32(1)(*a*).

35 The next two subsections (ss 32(1)(*j*)(ii) and 32(1)(*j*)(iii)) deal with the situation where there are active (reasonable) steps taken to find the declarant, and either he cannot be found or he is out of Singapore, "and it is not practicable to secure his attendance". What active steps are taken, and whether they are reasonable depends very much on the nature of the duty required of the party attempting to adduce the prior statement. On this issue there has been very little judicial guidance until very recently. The Court of Appeal in *Teo Wai Cheong v Crédit Industriel et Commercial*,[104] in considering a similar formula in s 33[105] of the Evidence Act contrasted a "due diligence" or "reasonable diligence" approach with that of "best efforts" suggested by the other party.[106] The court preferred the test of "due diligence" saying that this nonetheless requires details of the efforts made to secure the attendance of the declarant. Such details should include the instructions given to, say, specially hired private investigators or one's own employees to carry out the search. The details of their efforts should also be given, presumably by testimony or obtaining affidavits from such people.

36 It is not clear how different the "best efforts" test would be, or whether it should be applied to criminal cases (instead of the due diligence test) as there arguably should be more rigorous measures taken in a criminal case to secure the availability of witnesses at the trial, especially key witnesses. The outcome of a string of English cases[107] regarding this issue is neatly summarised in an English text[108] as follows:

> Given the importance of the right to confrontation, all possible effort should be made to find the witness and get the witness to court. Unless the facts are agreed by the parties, evidence must be presented of the steps that have been taken to find the witness. In deciding whether all reasonable steps were taken, the cost of a possible step … is relevant, but there must be evidence of that cost. The relative importance of the witness is to be taken into account but not the seriousness of the offence with which the defendant is charged.

104 [2013] 3 SLR 573.

105 Section 33 of the Evidence Act (Cap 97, 1997 Rev Ed) deals with evidence provided in an earlier judicial proceeding being used in a later proceeding as evidence of facts stated. Other conditions besides unavailability have to be satisfied, especially the right to cross-examine being available at the earlier proceeding. This provision was left untouched in 2012, and closely examined by the Court of Appeal in *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573.

106 *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 at [30]–[31].

107 *R v Adams* [2008] 1 Cr App R 35; *R v TD* [2009] EWCA Crim 1213; *R v H* [2003] EWCA Crim 1296.

108 *Phipson on Evidence* (H M Malek, J Auburn & R Bagshaw eds) (London: Thomson Reuters, 17th Ed, 2010) at para 30-19.

37 It would clearly be insufficient for a party (particularly the Prosecution, given its standard of proof generally) to merely "keep in touch" with a witness (especially a key witness) and to "remind him to attend court at a certain day".[109] Absence of a key witness may elicit an unfavourable response from the court, even though the hearsay evidence is strictly admissible.[110] Of greater concern to the courts would be a deliberate attempt to keep witnesses away. If that were shown to be the case, it is difficult to deny that an injustice has been perpetrated on the party against whom the hearsay is to be used and the hearsay statement should not be received in evidence.[111] It is also submitted that lukewarm attempts to find a witness, *eg*, just calling him or her on the phone, should not be regarded as "reasonable".

38 In s 32(1)(*j*)(iii), besides showing that a potential witness is "out of Singapore", there is the further requirement that it must be shown that "it is not practicable to secure his attendance".[112] There is scant authority (as expected) in Singapore on this matter, but a similar formula (the phrase, however, is "reasonably practicable") generated a fair amount of case law in England.[113] Thus, for instance, calling potential witnesses in another country and asking them whether they are prepared to attend the trial (without checking with their employers) could not be construed as a practicable step to secure their attendance.[114] Not contacting potential witnesses in good time (so that arrangements for bringing them to the trial) might also be regarded as failing to satisfy the formula.[115] Naturally, other factors such as the importance of the absent witnesses or the danger of prejudice (in not making them available for cross-examination) have to be taken into account in determining whether it is practicable to secure their attendance.

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109 *R v Adams* [2008] 1 Cr App R 35.

110 Illustration (*g*) of s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) states: "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". Would it be a fitting case to exercise the discretion to exclude "in the interests of justice"? See para 50 *ff* below.

111 It is inconceivable that a court would allow evidence of prior statements of a witness who was deliberately prevented from testifying by the party relying on the statement. To do so would be to make the court complicit in the obstruction of justice.

112 In civil proceedings, s 62A of the Evidence Act (Cap 97, 1997 Rev Ed) might be utilised to give evidence by "video link" and this might be a consideration rather than admitting a hearsay statement. However, this option is not available in a criminal matter, where such a mode of giving evidence only relates to limited cases where the witness is in Singapore: s 281 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

113 In Singapore, the phrase is used and litigated upon most frequently with respect to factory conditions.

114 *R v De Orango* (1993) 96 Cr App R 399.

115 *R v Adams* [2008] 1 Cr App R 35: also, no material difference can be made between a witness who cannot be found, and one who cannot be contacted.

39 It must be noted that in this "exception" it is a question of fact whether the party tendering the hearsay can show that "it is not practicable" to bring the declarant to testify. No doubt, costs would be a factor. However, it should be emphasised that it would be a matter of grave concern if in a case where an accused is charged with a relatively petty offence, hearsay is admitted *for that reason*, *ie*, it would be "too costly" to bring a key witness given the minor offence. In so far as an accused person is concerned, when facing a charge that would involve a loss of liberty or property or reputation, it is difficult to justify a balancing test between costs and the nature of the offence. The key consideration, it is submitted, is not costs but the importance of the absent witness to the case. Given that the Prosecution has to satisfy the burden beyond reasonable doubt, it would be a risky business (especially if the declarant happens to be the only witness) to rely on hearsay alone in any prosecution.

40 But what if the Defence wishes to adduce a hearsay statement from a person who allegedly witnessed a crime and positively asserted that it was not the accused who was the perpetrator? Would the Defence be under a similar obligation to bring in the witness? What if, unlike the Prosecution, he does not have the resources to do so? Or that the witness is reluctant to return to Singapore to testify, whatever the cost? Obviously the situation concerning the Defence is somewhat different, given the lower standard, even if the Defence bears the legal burden. *A fortiori*, where the accused only bears an evidential burden: in such cases, hearsay may be sufficient evidence provided it is cogent and reasonably reliable. On principle, it would seem that greater allowance needs to be given to an accused person in terms of admissibility of hearsay evidence since the outcome for him may be a serious one in the event of being found guilty.[116] On the other hand, it would not be wrong to exclude such statements if the source were not identified, or if identified, were to be severely discredited by the Prosecution as unworthy of credit or biased.[117] All in all, this subsection needs to be applied with care and circumspection. It should not be used as a "rogue's charter"[118] where witnesses provide untruthful statements prior

116 Of course, it can be argued that the Prosecution should be entitled to have the evidence excluded to the same extent that the defence might be entitled to do on unverifiable hearsay evidence. But the principle of equality does not apply to criminal cases.

117 The identity of declarants must be known for any attempt to be made to verify their reliability or credibility. This had been laid down in certain statutes like the English Criminal Justice Act 2003 (c 44), but not in the local scheme. Of course, it could be argued that this might go only to weight; but what is the point of admitting evidence from unknown declarants, and then holding that no weight should be attached to it?

118 *R v Bailey* [2008] EWCA Crim 817 at [40]. The argument can work both ways: "rogue" declarants for the Prosecution incriminating the accused and staying away, or "rogue" declarants exculpating the accused and staying away.

to the trial, and then deliberately leave the jurisdiction so as not to testify. In the final analysis, the parties should not be "hamstrung" by a complete lack of knowledge about the identity or whereabouts of a declarant, and why he or she could not attend court (especially if he or she is a key witness): that would not only be unfair, but be seen to be unfair, especially in criminal cases, where an accused person may be convicted on such statements.

41 Section 32(1)(*j*)(iv) is a particularly troublesome provision: it states that "where a witness is competent but not compellable" to give evidence on behalf of the party tendering the (hearsay) statement, he refuses to do so, the statement may be admissible. Given that the general rule is that competence entails compellability, there is only one category of witness that falls within the description in the subsection, and that is accused persons and co-accused persons in a joint trial. Section 122(3) of the Evidence Act provides: "In any criminal proceedings, the accused shall be competent to give evidence on behalf of himself or any person jointly charged with him, but shall not be compellable to do so." Thus, if an accused person were to refuse to testify when called upon to do so by the co-accused, his previous statement would be admissible in evidence. While it is true that the Prosecution cannot rely on this provision as the accused is by implication not competent for the Prosecution,[119] the accused's statement, once admitted may be used in evidence by all parties.[120] However, one consequence of using the accused's statement by the co-accused may be that he would be regarded as having "given evidence against" the accused (if the statement were to incriminate the accused) and the shield protecting the co-accused's character will drop, which would be detrimental to him if he were someone with a record. There is little doubt that in joint trials, while this provision presents the option of adducing statements by any of the accused persons, caution as to its effect must be uppermost in the minds of defence counsel so as not to engage in "cut-throat" defences.

C. Notice requirements[121]

42 The notice requirements are imposed on all parties wishing to adduce hearsay statements. This obviously is to allow the other parties ample time to verify the credibility or otherwise prepare for other means to impeach the declarants. Again, it is clear that for such a notice to be

119 The Evidence Act (Cap 97, 1997 Rev Ed) does not actually say that the accused is not competent for the Prosecution, but it is a necessary inference from s 122(3) quoted above that he is incompetent for the Prosecution.

120 There is no disabling clause for the use of such statements by the Prosecution.

121 See Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) at paras 6.042–6.048 for a detailed discussion of the relevant Orders for civil and criminal trials.

served, the identities of the declarants need to be known even if their whereabouts are not known. Once notice is correctly served, the hearsay statement would be *prima facie* admissible, unless the judge were to rule it inadmissible, presumably in exercise of his statutory discretion to exclude "in the interests of justice".[122] It need hardly be pointed out that the giving of notice may on principle be regarded as ensuring fairness to the party against whom the hearsay is tendered, but in reality, especially in criminal cases, there may be no resources available to accused persons to mount a serious challenge to the evidence. It will be worse if the accused does not have counsel, as it is unlikely that a layman would know what hearsay is, let alone the skills needed to impeach the absent declarant.[123] In such cases, it would seem that the judge might need to ensure that the accused is properly advised "in the interests of justice". Another troubling feature in the notice requirements, especially in criminal cases,[124] is the lack of a time frame for the filing of the requisite notice. In the event, it may be possible for such a notice to be filed during the trial itself although such lateness in giving notice may need a convincing explanation, such as the prospective witness failing to turn up on the day of the trial or having simply disappeared and could not be contacted. If a notice is filed at a late stage *vis-à-vis* the trial, it is only fair and just to allow the other party time to prepare a challenge as cross-examination is no longer an option. It would be extremely harsh to continue a trial even though hearsay is admitted in substitution for a witness.

D. Hearsay by agreement

43 Admitting hearsay by agreement is by no means new. It was introduced into Singapore law via the Criminal Procedure Code in the

122 Evidence Act (Cap 97, 1997 Rev Ed) s 32(3). See paras 50–57 below.

123 In *Public Prosecutor v Haryani bte Ariffin* [2013] SGDC 329, the accused (unrepresented) apparently failed to file a notice to adduce a hearsay statement by an identified declarant who was not in Singapore. The District Judge pointed out that she (the accused) also sought admissibility under the wrong subsection (s 32(1)(*i*) of the Evidence Act (Cap 97, 1997 Rev Ed)). The document was disallowed in evidence as the Prosecution objected to admissibility and the accused was faulted on the above grounds. The judgment did not indicate whether the judge attempted to explain the various provisions or procedures to the accused or that the statement could have been tendered under s 32(1)(*j*)(iii), especially since she was conducting her own defence. In *Public Prosecutor v Tsang Kai Mong Elke* [1993] SGHC 268, the trial judge suggested that the Prosecution could adduce evidence of hearsay under the appropriate Criminal Procedure Code provision (since repealed) and that the court had the power to extend time for notice, but the Prosecution did not take advantage of the judge's advice in this instance. Unfortunately, to say the least, the judgment in *Public Prosecutor v Haryani bte Ariffin* did not mention any expository assistance to the accused on this issue.

124 Criminal Procedure Code (Notice Requirements to Admit Hearsay Evidence) Regulations 2012 (S 336/2012).

1976 amendments.[125] During its 30 odd years on the Statute Book of Singapore, it does not appear to have been litigated on, and would seem to be a forgotten provision. It is by no means as straightforward a provision as it seems. Section 32(1)(*k*) simply provides: "when the parties to the proceedings agree that for the purpose of those proceedings the statement may be given in evidence". This applies to both civil and criminal cases. Previously, it was not possible to admit hearsay evidence by this route in civil cases. There are two limitations imposed statutorily: first, the Prosecution cannot rely on the exception if the accused or any of the accused are not represented by counsel.[126] Second, it does not apply to High Court proceedings, where an agreement is made at a Magistrates committal hearing.[127] However, this exception is not subject to the requirement of notice, as *ex hypothesi*, both parties should have notice of the matter on which they are agreeing to.[128] There must, presumably, be evidence of agreement reached though no formality (such as writing) seems to be required. Can an unrepresented defendant "agree" with the Prosecution to admit hearsay? It would appear not as s 32(6) requires the accused to be represented.

44 Where several accused persons are tried jointly, however, the provision is capable of being interpreted to require only that *any* of the accused is represented for a valid agreement to be made, and that an agreement with an unrepresented defendant is therefore possible. However, it is submitted that this literal interpretation of the provision is wrong. If an agreement cannot be valid in the case of one unrepresented defendant, it cannot be valid in the case of any unrepresented defendant. By necessary implication, the Prosecution has to agree with defence counsel of the relevant defendant to admit hearsay under this exception. Any alternative interpretation would be contrary to the spirit and intent of the exception. Indeed, it could be said to be against the very idea of legal representation and adversarial trial if accused *A* has legal representation and that is considered sufficient to validate an agreement between the Prosecution and co-accused *B* (who is unrepresented). It need hardly be said that the accused persons' interests may not coincide and it would be grossly improper if the fact that one accused person has counsel would validate the admissibility of hearsay statements made by the other co-accused.

125 The Criminal Procedure Code hearsay scheme has now been repealed: s 268 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) now simply provides that: "In any criminal proceedings, a statement is admissible as evidence of any fact stated therein to the extent that it is so admissible by this Code, the Evidence Act (Cap. 97), or any other written law." All hearsay admitted in criminal cases must generally be through a statutory exception, though common law exceptions may be included where they have been saved by statute.

126 Evidence Act (Cap 97, 1997 Rev Ed) s 32(6).

127 Evidence Act (Cap 97, 1997 Rev Ed) s 32(7).

128 Evidence Act (Cap 97, 1997 Rev Ed) s 32(4).

45 One final issue with respect to this exception is the nature of the agreement needed.[129] Obviously there must be some evidence of agreement. But no formalities are statutorily mandated. Would the lack of an objection at trial to the admission of a hearsay statement amount to an implied agreement? Such a view was expressed in a recent English case concerning a similar exception (hearsay by consent) in the Criminal Justice Act 2003.[130] In *Williams v Vehicle and Operator Services Agency*,[131] Keene LJ said that the provision:

> … does not necessarily require some contract analysis of 'offer' and 'acceptance' nor does it require some formal recording of the position by the court, nor does it necessarily require express agreement between the parties in all the circumstances. Those experienced in criminal litigation are familiar with the situation whereby something is done in the course of a hearing by one party without demur from the other side. Judges … regularly hear evidence admitted without anything formal being said by the parties to the court. The tribunal infers, in the absence of objection or submission, that there is no objection to the admissibility of the evidence, and thus that there is agreement to its admissibility. In effect the agreement is implicit, or capable of being implicit, in the circumstances pertaining before the court, and *particularly in circumstances where the appellant has the benefit of legal representation*. [emphasis added]

46 Given that the local provision (s 32(6) of the Evidence Act) envisages the need for legal representation in criminal trials, at least this wide interpretation would not apply to unrepresented defendants on trial when the Prosecution is adducing the hearsay, and there is no objection.[132] Whether this subsection should have the effect of superseding such a rule or not in other cases is a matter of judicial policy yet to be determined.[133]

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129 One cannot dismiss some form of full express agreement complete with conditions to be satisfied before the hearsay is admitted, *eg*, disclosing any "weaknesses" in the credibility of the declarant or the circumstances in which the statement was obtained.

130 c 44. Section 114(1)(c) of the English Criminal Justice Act 2003 (c 44) simply states that "all parties agree to it being admissible".

131 [2008] EWHC 849 at [13]–[14].

132 *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR(R) 534. The case proffering the opposing view is *Tee Chun Feng v Public Prosecutor* [2005] SGHC 181, where the appeal judge regarded it as being too late to object on appeal, as it was not done at trial, and the hearsay was admitted. In so far as this aspect was concerned, it seems to have been decided *per incuriam*. However, the two cases could be reconciled on the basis that the hearsay statement in the first case was critical to the issue, and it was the only evidence available. In the latter case, there was found to be other evidence on the issue such that the admissibility or rejection of the hearsay would not have mattered to the outcome: see s 169 of the Evidence Act (Cap 97, 1997 Rev Ed).

133 The judge in *Williams v Vehicle and Operator Services Agency* [2008] EWHC 849 pointed out that the accused had legal representation.

E. Challenging the credibility of hearsay declarants

47 One of the main objections, if not the main objection, to the admissibility of hearsay has always been the difficulty of impeaching the credibility of the declarants – as they are not in court, and cannot be subject to cross-examination, including having their credit or credibility impeached.[134] In order to lessen the risks of relying on unverifiable and hence potentially unreliable hearsay, the party against whom the hearsay is adduced has several methods of challenging the declarants even though the latter may not be in court. In its original form, the Evidence Act in s 160 provided that:

> … all matters may be proved either in order to contradict or to corroborate [the hearsay statement], or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

48 This section thus provides the powers of impeachment akin to what the party would have had had the declarant been a witness. However, subsequent amendments (including especially the ones inserted in 2012) have extended these powers in several important aspects. Section 32C provides for challenges to the "credibility"[135] of the declarant; together with s 160 (concerning credit) the party opposing the admissibility of hearsay would have powers of discrediting a declarant beyond those that he might have had had the declarant given evidence in court. In particular, s 32C(1)(*b*) creates an exception to the so-called rule of finality to collateral answers, where in general, a party may not call evidence or otherwise contradict a witness's answers to questions on matters of credit.[136] What this subsection does is to provide almost a *carte blanche* for an opposing party to introduce any evidence adverse to the declarant's credibility. However, it may be argued that even though a party may have such wide latitude in attacking the credibility of absent declarants, he may not have the resources to do so. This is especially the case in criminal cases, where accused persons may not have the means to pursue such a recourse. In an English case on a similarly worded provision, *R v Horncastle*[137] ("*Horncastle*"), Thomas LJ

134 See s 157 of the Evidence Act (Cap 97, 1997 Rev Ed).

135 The distinction between "credit" and "credibility" is maintained in the Evidence Act (Cap 97, 1997 Rev Ed), especially in ss 148(*a*), 148(*c*) and 150. For a discussion of the two related concepts, see *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR(R) 211 especially at [19]–[21].

136 *Harris v Tippett* (1811) 2 Camp 637; *Attorney-General v Hitchcock* (1847) 1 Exch 91. There are other exceptions to the rule: these are (a) bias; (b) previous convictions; (c) reputation for lying; and (d) medical or psychiatric evidence of unreliability of witness: see, *eg*, *Phipson on Evidence* (H M Malek, J Auburn & R Bagshaw eds) (London: Thomson Reuters, 17th Ed, 2010) at paras 12-46–12-52 and 30-74.

137 [2005] EWCA Crim 964.

referred to a code on the Criminal Justice Act 2003 detailing the operation of the equivalent provision in England:[138]

> In most cases also …, a defendant who is faced with hearsay evidence will be entitled to ask the court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it. That exercise will ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose what is already in its possession and capable of undermining its case; it will require active investigation of the *bona fides*, associates and credibility of the witness, so as to provide the defendant with, in addition to anything he already knows, everything capable of being found which can be used to test the reliability of the absentee.

49 Of course, where the Prosecution is adducing the hearsay statement, it would take pains to convince the judge of the credibility of the declarant, and hence, the reliability of the statement.[139] However, the *Horncastle* approach requires the Prosecution to disclose *anything in its possession that could undermine its case concerning the hearsay*. This might be akin to shooting oneself in the foot from the Prosecution's point of view, but it would even the odds somewhat and certainly serves the interests of justice in the sense of promoting accurate verdicts if such an approach were institutionalised. It seems unlikely though as criminal disclosure is still in its infancy in Singapore and assisting the Defence in this manner might be regarded as a step too far.

IV. The judicial burden: Rules *versus* discretion[140]

A. Exclusionary discretion "in the interests of justice"

50 One of the new additions to the hearsay scheme is the discretion to exclude otherwise admissible hearsay "in the interests of justice". It is said to be different from, and in addition to, the judicial discretion to exclude evidence on the basis that its prejudicial value overwhelms its

138 *R v Horncastle* [2005] EWCA Crim 964 at [16].

139 It needs to do so given that it shoulders the burden of proof beyond reasonable doubt. But is it under any duty to mention anything that would weaken its case?

140 For the discretion to exclude evidence in Singapore law, see the comprehensive articles by Jeffrey Pinsler, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systemic Approach" (2013) 25 SAcLJ 215; Jeffrey Pinsler, "Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 SAcLJ 335; H L Ho, "National Values on Law and Order and the Discretion to Exclude Wrongfully Obtained Evidence" (2012) JCCL 232. Also see Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) ch 10.

probative value.[141] The courts have recently indicated that it favours a narrow discretion in the exclusion of otherwise admissible evidence – even narrower than the common law discretion recognised in *R v Sang*.[142] The new statutory discretion on the other hand is phrased in the highest generality; for the phrase "in the interests of justice" without qualification has been described, for instance, by Pattenden to be "so open-ended as to be almost useless".[143] It might be thought that it is close to providing the trial judge with a *carte blanche* power to exclude hearsay[144] according to what he thinks that phrase means, and that the trial judge's decision is non-appealable. But that surely cannot be intended by the Legislature, as such a wide power would be inconsistent with the Rule of Law.[145]

51 As parties prepare their cases by reference to rules of evidence, broad principles built into discretions tend to render uncertain whether the evidence proffered will be received or not. However, the decision to go to court has to be made before judicial deliberation on the admissibility of items of evidence. While evidence is strictly admissible *according to the rules of evidence*, so the party proffering such evidence may think, the exercise of the discretion to exclude it may trump such rules, and that may result in adverse consequences on the party relying on the "excluded" evidence. The uncertainty of phrases such as "in the interests of justice" provides no sure guide beforehand, and will lead to not just uncertainty but also confusion, and most likely in the long run, a lack of cohesion in the law. This is because of the "highly subjective" nature of the phrase, "in the interests of justice".[146] Judges may reasonably differ in their views as to what constitutes "in the interests of justice" in a particular case. It has been observed that appellate courts are reluctant to overturn decisions based on discretion, limiting

141 One jurisdiction that has adopted this formula for its discretion to exclude hearsay is Jamaica: see s 31L of the Evidence Act 1995 (Jamaica) and the discussion on *Grant v The Queen* [2007] 1 AC 1 at paras 54–56 below.

142 [1980] AC 402.

143 R Pattenden, *Judicial Discretion and Criminal Litigation* (Oxford: Clarendon Press, 2nd Ed, 1990, reprinted 2003) at p 22 (the leading treatise on discretion in criminal cases in Commonwealth law).

144 By virtue of s 47(3) of the Evidence Act (Cap 97, 1997 Rev Ed), an identically worded discretion is enacted to exclude otherwise admissible opinion evidence, though it is even more difficult to see its application on matters of opinion evidence.

145 See especially C Tapper, "The Law of Evidence and the Rule of Law" (2009) Camb LJ 67. J D Heydon, a judge of the Australian High Court, spoke of the dangers of judicial activism to the rule of law, and in part, decried the use of wide discretions: see his article, "Judicial Activism and the Death of the Rule of Law" (2004) 10 Otago L Rev 493.

146 R C Park *et al*, *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* (St Pauls, MN: West, 3rd Ed, 2011) at p 383, commenting on the identical phrase in a residual exception for *admitting* hearsay that is outside the other rule-based exceptions in the US Federal Rules of Evidence.

themselves to whether the trial judge took into account the proper criteria or guidelines and did not act capriciously or irrationally.[147] However, even that angle may not be open to review when no such criteria or guidelines are provided, as is the case with statutory discretions phrased as vaguely as the one in s 32(3).[148]

52 Most trial judges might be tempted not to exercise the discretion at all, given the vagueness in the phrase, seeking rather to rely on determining the weight of the hearsay admitted, where by s 32(5) it is provided that "the court shall assign such weight as it deems fit to the statement".[149] This might seem the safer option to take, but if every judge were to take that view, the discretion becomes just a meaningless (and useless) power. It is also necessary to realise that the judicial role differs very much according to whether the issue is examined at the admissibility stage or the weight stage.[150] At the admissibility stage, the judge, as a trier of law, is not primarily assessing the evidence proffered for its actual probative value, even though the degree of relevancy is sometimes material.[151] He is primarily concerned with arguments on admissibility based on interpretation of rules or principle or policy that are most likely extraneous to the issue of cogency of the item of evidence being considered. That in fact is why we have a broad discretion – "in the interests of justice" – though no doubt, justice will also be served by admitting reliable hearsay having great probative value *vis-à-vis* the facts in issue or relevant facts. But that value may be counterbalanced by other principles or policies to such an extent that they ought to prevail and the evidence excluded despite its probative value. On the other hand, when assessing the weight of evidence already admitted, the judge has in mind the sole issue of the cogency of the evidence in establishing any fact in issue or relevant fact. Any matter extraneous to this role should by this time be irrelevant. Thus it would be wrong on principle to let in a piece of evidence that ought to have been excluded on the ground that the judge could decide to give little or

147 See C Tapper, "The Law of Evidence and the Rule of Law" (2009) Camb LJ 67. Also see, R Pattenden, *Judicial Discretion and Criminal Litigation* (Oxford: Clarendon Press, 2nd Ed, 1990, 2003 Reprint) ch 10.

148 J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2004) 10 Otago L Rev 493, referred to a quote of Lord Camden on discretion:

> The discretion of a Judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper, passion. – In the best it is often times caprice: In the worse it is every vice, folly and passion, to which human nature is liable.

149 The inclusion of this provision is surely *ex abundante cautela*: it cannot be supposed that judges as triers of fact would not be under a duty to assign the proper weight (according to the canons of reasoning and common experience) to any item of received evidence. Does this provision restrict appellate review?

150 See Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 4th Ed, 2013) at paras 1.080–1.081.

151 The evidence may be insufficiently relevant and on that ground declared irrelevant.

no weight to it subsequently. That could be regarded as a failure to act, which could result in a successful appeal.[152]

53 The correct approach is to recognise that there is a role for discretion – not in the sense that it will be exercised regularly (for that would also defeat, indeed annul, the purpose of relaxing the hearsay rule) but exceptionally, where, for example, the hearsay proffered is of questionable quality and there is no way of challenging it (*eg*, as in statements by bystanders who are not identifiable[153] or identified), or the party proffering the hearsay makes desultory attempts to secure the attendance of the declarant or is deliberately not calling the declarant (so as to avoid cross-examination) or by showing no interest in calling a declarant as a witness first.[154] Needless to say the discretion can be exercised at the behest of any party, plaintiff or defendant, prosecution or accused. It would be wrong, in other words, to assume that the discretion can only be exercised in favour of the accused in a criminal trial. But a judge might be especially mindful of injustice being caused by the admission of hearsay that an accused person has no way of challenging.

54 A recent Privy Council decision – *Grant v The Queen*[155] – is especially pertinent to the discussion of the exclusionary discretion in hearsay cases.[156] The accused was charged and subsequently convicted of murder. The Prosecution gave notice to tender two out-of-court (unsworn) statements against him, one by B (highly incriminating for the accused) and another by K (inconsistent with B's statement and supportive of the accused's account as to what happened). At the trial, the Prosecution decided only to use B's statement and not K's. The trial judge ruled B's statement admissible, but not K's statement (which was technically admissible). One of the grounds of appeal was that the judge acted wrongly in admitting B's statement alone. The Privy Council agreed, saying that fairness also required that K's statement be admitted together with B's. The conviction was quashed. The Privy Council declared a key statement of principle as follows:[157]

152 See the discussion on *Grant v The Queen* [2007] 1 AC 1 at paras 54–56 below.

153 *Eg*, *Teper v The Queen* [1952] AC 480.

154 This would only be applicable to exceptions where the absence of the declarant is required to be shown.

155 [2007] 1 AC 1.

156 The Jamaican legislation (Evidence Act) contains similar (not identical) provisions to Singapore's hearsay scheme (see ss 31A–31L), and admissibility, like Singapore's, is based on notice. It also takes the exclusionary discretion approach, unlike the English or other Commonwealth jurisdictions. But its discretion is framed more in terms of probative value *versus* prejudicial effect. (The constitutionality of these provisions was challenged – but not relevant to the current discussion as the Privy Council held the provisions constitutional.)

157 *Grant v The Queen* [2007] 1 AC 1 at 14G.

> In any event, it is in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair in the sense that *it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself*. [emphasis added]

55 The Board applied it to the case and decided that the accused was unfairly disadvantaged by the admission of B's statement but not K's. The trier of fact should have both the statements to consider in determining the guilt of the accused. Depriving the trier of fact of the statement that was favourable to the accused clearly puts him and his defence at a serious disadvantage. This decision is doubly curious as the Board did not even consider the applicability of the narrower discretion provided by the statute (to exclude hearsay where its prejudicial effects outweigh its probative value), other than mentioning its existence.[158] The Board made the further point that had the defendant been responsible for the absence of the declarant (*eg*, by threatening him or his family if he were to give evidence) it would be "intolerable" to allow the defendant to succeed in blocking the admission of the statement. But in any other case of absence, the main consideration would be whether the admissibility of the statement would result in the accused suffering an "unfair disadvantage". Finally, the Board opined that had B's statement stood alone, it would have been admissible, presumably because there would not be the other statement (of K's) to contradict it.

56 The case is also instructive in that the admissibility of hearsay might have to be considered in the context of the duties incumbent on the Prosecution and the judge in a criminal trial: the Prosecution, as a minister of justice, has a duty to call witnesses as to primary facts unless they are unworthy of belief or repetitive of other evidence. The discretion to call or not to call a witness is to be based on fairness. The trial judge also has an overall duty to ensure a fair trial; in the view of the Board, the judge failed in this case by admitting B's statement, and excluding K's. She could have decided to admit B's statement only if K's statement was also admitted.[159] Thus, the exercise of a discretion (even one conferred by statute) must be done in the context of the broader duty a judge has to ensure a fair trial. Other illustrations can easily be made – for example, it seems to be grossly unfair to agree with an unrepresented defendant to admit hearsay (as that possibility is provided in s 32(*k*)), or it may be improper to refuse permission for the

158 The Board took the position that the narrow view of the *R v Sang* [1980] AC 402 discretion was only supported by two of the Law Lords deciding the case (Lord Diplock and Viscount Dilhorne), and that the majority (Lords Salmon, Fraser and Scarman) were not so constrained in their views. The Board then enunciated the wider principle cited above (*Grant v The Queen* [2007] 1 AC 1 at 14E–14H).

159 *Grant v The Queen* [2007] 1 AC 1 at 17A–17D.

Prosecution to tender a hearsay statement once it is shown that the declarant is afraid of the defendant or that he or his family might have been threatened by the defendant. It may be suggested that a discretion to exclude "in the interests of justice" may be no more than a discretion to exclude hearsay when it will put the other party "at an unfair disadvantage or deprive him unfairly of the ability to defend himself".[160] The judge has to be mindful of her other duties in exercising this discretion.

57 In the case of civil trials, the principal consideration for the exercise of an exclusionary discretion "in the interests of justice" may be based on equal treatment of the parties, and on the proportion of additional time and costs to be taken if hearsay were adduced.[161] Given the availability of pre-trial conferences, discovery and other pre-trial devices to manage the evidence in a civil case, it is unlikely that there will be too many occasions when it would be necessary to exercise the discretion in s 32(3).

V. The fate of hearsay – The 2012 scheme: Not the last word?

58 It is hoped that the above evaluative survey of the 2012 hearsay scheme has shown that while there have been positive steps taken to facilitate the use of hearsay in Singapore, still more needs to be done to clarify and define the role for this doctrine in the law of evidence. Conceptual problems remain, and unless the Legislature decides to take the initiative to detach the evidence code from the shackles of Stephen's approach, particularly in his preference for stating what should be admissible without defining the exclusionary concept of hearsay, for instance, no solution will be entirely satisfactory.

59 It may be asked whether it is fair for judges to be given the primary burden of defining the troublesome concepts of hearsay, and of providing guidelines on how much of hearsay should be admissible and under what circumstances. It may also be asked whether it is fair to the practitioners to be asked to deal with an increased number of rules and practices (*eg*, the notice provisions), and yet be uncertain about the eventual admissibility of the evidence due to the open-ended discretion given to exclude hearsay (and opinion). In addition to that uncertainty, it is noteworthy that no rules or guidelines are provided to determine the weight of hearsay.[162] One must not underestimate the dangers posed

160 *Grant v The Queen* [2007] 1 AC 1 at 14G.

161 One could obtain some guidance from rr 32.1(1)–32.1(3) of the English Civil Procedure Rules 1998 (SI 1998 No 3132).

162 See, for example, the detailed list of factors to be taken into account in determining weight of hearsay in s 4 of the English Civil Evidence Act 1995 (c 38). By providing these guidelines, they not only guide judicial decision, but also guide lawyers in

(*cont'd on the next page*)

to the rule of law by the use of open-ended discretions that supposedly would lead to just decisions but may very well lead to opposite and undesirable results. The success or failure of the current hearsay scheme depends very much on the pragmatism not just of judges but also of the parties in their use of hearsay evidence. Above all, justice requires that the best evidence should always be proffered to ensure the accuracy of verdicts and only if the best evidence available is hearsay should it be used. The current scheme is a means to that purpose, but much still remains to be done, both by the courts and the Legislature.

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assessing their evidence and, eventually, their judgment on how strong or weak their case can be; this may be crucial to the decision whether to go to trial or not.