NSW Law Reform Commission

REPORT 29 OUTLINE (1978) - THE RULE AGAINST HEARSAY

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REPORT 29 OUTLINE (1978) - THE RULE AGAINST HEARSAY

Introduction

"The ideal of the law of evidence

The law of evidence is in constant use. It is basic to the proper administration of justice. Yet in our view much of it is complicated, obscure, irrational, and sometimes unjust in operation. Parts of it are only made tolerable by being ignored, deliberately or inadvertently, by the parties and the courts, particularly in civil cases. Those concerned with the administration of justice - whether practitioners, witnesses, parties, observers or the wider public - will not have respect for our system of trial unless the rules of evidence are rational and just. We think that the ideal to which the law of evidence should move in all areas, unless good cause to the contrary is clearly shown, is to admit such material as an intelligent layman carefully making important decisions in his own affairs would regard as worth taking into account, subject to restrictions demanded by the need to preserve a substantially oral adversary system of trial (where such a system is used) and to dispose of litigation expeditiously. The law falls well short of this ideal."

In these words the Law Reform Commission of New South Wales has stated the ideal to which the law of evidence should move. In its 29th Report the Commission has made recommendations to move a major part of the law of evidence - the rule against hearsay and related rules - closer to that ideal. That Report is heavy reading. It examines in detail the existing law, which is often complex and obscure, and tests its recommendations against that complicated background.

This paper gives an outline of the problems which the Commission has tackled, and of the recommendations which it has made. In order to explain the general nature of the recommendations in a way that is brief and readable, they have often been summarized in a form that does not fully reflect the details. Many subsidiary provisions are not mentioned at all. Those who want only an overview of the policy adopted will find it here. Those who are concerned to be accurate in detail should go to the Report, and, in particular to the draft Bill included in it.

J. H. WOOTTEN
Chairman.

REPORT 29 OUTLINE (1978) - THE RULE AGAINST HEARSAY

Defects Of The Present Law

“Little to do, and plenty to get, I suppose?” said Serjeant Buzfuz, with jocularity.

> “Oh, quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes”, replied Sam.
>
> “You must not tell us what the soldier, or any other man, said, sir,” interposed the judge; “it’s not evidence.”
>
> Dickens, *Pickwick Papers.*

The rule against hearsay evidence has progressed little from the state caricatured by Dickens 140 years ago. It continues to annoy and bewilder witnesses, who are not allowed to tell the court what they know in a natural way. It continues to frustrate litigants, who cannot use obviously cogent evidence to prove their cases. It continues to add to the expense and delay of litigation. Parties who wish to embarrass their opponents can require strict first-hand proof of matters not really in dispute. In short, it lowers public respect for the courts by making their operation less sure, less just, more expensive, less comprehensible, and at times simply ridiculous.

The rule against hearsay, together with some related rules, prevents a witness givin,, evidence that someone else - or indeed he himself - said something out of court. It does not apply if an issue in the case is whether the statement was made, e.g., whether a slander was spoken, or an oral contract made. But it does prevent a statement that something has happened being used as evidence that it did happen, unless the statement is made in court by a witness who himself observed the event.

A moment’s reflection will show that hearsay statements are of many different kinds. Some are worthless, some are very reliable. It is fair to use some, it is unf air to use others. As the law has developed, it has come to recognize some exceptions to the rule against hearsay. Unfortunately the rule and its exceptions have now congealed in a state where the line between what is admissible in evidence and what is inadmissible does nct correspond with the line between what is reliable and what is unreliable, or between what is fair and what is unfair to use.

Injustice

The present hearsay rule can cause serious injustice. Consider these cases, each of which has actually occurred.

1. A worker falls off a scaffolding, unseen by his workmates. He makes his way home, tells his wife what happened, sees a doctor and tells him what happened, then dies of his injuries. His widow seeks compensation, but has no admissible evidence of how he was injured, because neither she nor the doctor can give evidence of what the dead man said about his fall.

2. A witness to a document admits, in letters and conversations, that he fraudulently altered the document. A party challenging the document cannot use the witness’s statements as evidence, even if the witness is dead or cannot be found.

3. A customer sues a railway company for not delivering cattle promptly. He cannot use as evidence against the company a statement by an employee in charge of the trains that he forgot to send the cattle.

4. An accused is charged with murdering a four-year-old girl. The prosecution cannot prove what the girl said before her death about the attack on her.

5. On the other hand, an accused is charged with assaulting a four-year-old girl. He cannot use evidence from the girl's mother that the girl described someone quite different as her assailant.

6. A person is injured in a motor accident, and. the driver of the car, who is an employee of its owner, immediately admits that he was at fault and describes what happened. The injured person cannot use this statement in proceedings against the owner.

7. A person who has been assaulted sees his attackers escape in a car, and a few minutes later tells its registration number to another person who writes it down. By the time of the trial the victim can no longer remember the number, yet the person who wrote it down is not allowed to give evidence of it.

8. Just before he dies, an injured police officer gives a description of his attacker to three other policemen. The description cannot be put in evidence when a person is charged with the attack.

9. A witness to an incident gives a statement of what happened. Later he goes into court and gives a completely different account. Even if his evidence in court is shown to be completely wrong, his earlier statement cannot be used to show what really happened.

10. A person is charged with a crime. He cannot put in evidence the fact that someone else has confessed to committing it.

11. A woman injures her hand and sues the company that employs her, claiming that she was injured at work. The company can call witnesses who say that she told them she was injured at home, but she cannot call witnesses (including her doctor) who say that she told them it happened at work.

These are striking examples of how evidence is excluded which any reasonable man would think should be available to a court. The court might not believe the evidence, but because of the hearsay rule the court is not even allowed to consider it.

Effect on witnesses

The day-to-day operation of the rule against hearsay is mostly less dramatic, but it often excludes reliable evidence, confuses witnesses and adds to expense. A witness describing an event will often quite naturally repeat what he said or someone else said at the time. For example: "Another car came round the corner, and I said to my wife (or my wife said to me) 'He's on the wrong side of the road'". The witness is likely to be interrupted and told "Don't say that". He becomes unsure what he can say without objection, and finds it difficult to give his evidence clearly and naturally. He is reduced to answering briefly a series of specific questions asked by a lawyer. This destroys the natural flow of his evidence, and may give him no chance to say some things which he considers important, and which may indeed be important in the case. A number of rules contribute to this result, but the rule against hearsay is an important cause.

Complexity

The rule against hearsay is not simply a rule against repeating what someone has said. It involves a complex set of distinctions and exceptions which bewilder a layman, and which many lawyers will be unable to remember, or will get wrong, when the point suddenly arises in court.

In the first place, evidence of what someone said is admissible if it is relevant to prove, not the truth of what was said, but merely that it was said. Whether or not it was true, it may be relevant that a defamatory statement was made, or a warranty was given in makina a contract, or someone was threatened.

Secondly, attempts over the years to avoid the hardship of the rule have led to a complex patchwork of exceptions, each with its own limitations and qualifications. One group of these exceptions covers statements made by a person who has afterwards died: evidence may be given of a dying declaration of the victim of murder or manslaughter, of a statement against the interest of the person who made it, of a

statement made in the course of duty, or of a statement about relationships within the maker's family. Each of these exceptions, and many others that could be added, may be reasonable as far as it goes, but each is in turn subject to further exceptions. There is no unifying principle running through them; they create gross anomalies and make the law hard to state and to remember.

Not a rule for the best evidence

If the hearsay rule were merely a rule that the best, i.e., the strongest and most direct, evidence of a fact had to be presented to the court, there would be much to be said for it. But it does not always work this way.

In the first place, the hearsay rule often prefers weaker to stronger evidence. What a person said, or wrote down soon after observing an incident may be much more accurate than his faded recollection years later in the witness box. Yet the latter is admissible; the former generally is not. The statement of a deceased person who was directly involved in a matter may be more reliable than the recollection of a casual bystander, or the first-hand evidence of a person with a motive to lie. But again the latter evidence is admissible; the statement of the deceased person generally is not.

Secondly, the hearsay rule excludes evidence when it is not merely the best evidence, but is the only evidence available. In the first illustration given above, the statements of the worker to his wife and doctor were the only evidence of what had happened to him, but they could not be put in evidence.

Reasons For The Present Law

Weaknesses of hearsay evidence

If the hearsay rule has so many bad effects, how did it come into existence? Why should it not be abolished, root and branch?

There are drawbacks about hearsay evidence. It may range all the way from very reliable evidence to idle or malicious gossip, and may have been distorted or embroidered in retelling. There has always been a fear that to relax the hearsay rule would be to open a floodgate and inundate the courts with a mass of dubious evidence. One strand in the history of the rule against hearsay has been the fear of the judges that juries might be unduly influenced by unreliable hearsay statements.

The rule against hearsay has a number of other links with traditional aspects of our system of trial. Firstly, evidence in court is taken on oath, and most hearsay statements are not made on oath. The taking of an oath is not so seriously regarded in the community today as it once was, but evidence in court is given deliberately on a solemn occasion and under observation, whereas out-of-court statements are made on all sorts of occasions.

Secondly, evidence in court is subject to cross-examination. This is important not only as a means of exposing lies, but also to show that an honest witness may be mistaken, or have been misled, or have had limited powers of perception or limited opportunities for observation, or be biased, or have an unreliable memory. It may also sift out any ambiguities in what the witness says. If the maker of a hearsay statement is not called as a witness, these advantages are lost. Our system relies very heavily on cross-examination as a means of exposing falsehood or error, and few other means of discrediting a witness are permitted.

Thirdly, our system of trial is to a considerable extent geared to the idea of a single occasion in court, with the trial going continuously from start to finish. This has advantages and disadvantages, but one consequence is a judicial reluctance to permit the multiplication of evidence on a point, the investigation of side issues, and the admission of evidence which it may be hard for a party to anticipate and deal with quickly. Hearsay evidence can raise these problems, and therefore arouses resistance.

Fourthly, our system of trial is based on the “adversary” system. The judge keeps the ring, but does not enter the fight. For the most part, it is his job to decide the matter on the basis of what the parties present to him, rather than to conduct his own inquiry. Witnesses are called and examined by the parties or their lawyers, rather than by the judge. A party preparing his case needs to have a reasonably clear idea of what evidence the court will be willing to receive, both from him and from his opponent. Hence the adversary system, in contrast to the Continental “inquisitorial” system, is characterized by an elaborate law of evidence. Part of the elaboration is the rule against hearsay, which, by and large, tells the parties that they must call the witness who can verify a fact from his own observation, rather than merely repeat what others have said.

Problems Of Reform

Should the hearsay rule be abolished?

The Commission has not only studied the mass of writings and reported cases on the subject, and drawn on the experience of its own members, but it has discussed the subject with many other practising lawyers and judges. Nearly everyone agreed that reform of the hearsay rule was necessary, but there was much less agreement on how the rule should be changed.

Some lawyers, including some judges for whose opinion the Commission has great respect, strongly advocated outright abolition of the rule. Others equally strongly opposed this course.

Those who opposed abolition of the rule stressed that the rule against hearsay protects the courts against being presented with a mass of unreliable evidence, and that the rule is bound up with some features of our traditional system of trial-the adversary system, the reliance on oral evidence and cross-examination before the court, the continuous trial. Abolition would lead to reliance on second-hand documentary evidence which could not be tested.

Those who supported abolition argued that the fears were unfounded, and that the matter could be left to the good sense of lawyers and judges. Everyone is used to hearsay information outside the court, and to deciding whether to rely on it in making important decisions in his own affairs. Why should judges, magistrates and jurors not do the same in court? Competent advocates, and for that matter intelligent laymen, would not bother the court with dubious hearsay statements if better evidence were available. Witnesses giving evidence would not be constantly interrupted for technical breaches of the hearsay rule.

The Commission’s approach

The Commission sympathizes very much with the point of view of those who supported abolition. It agrees that the present rule against hearsay should be abolished, but it does not think,it would be workable, at this stage of our legal development, to have no rules at all on the subject. It recommends a new set of rules, which will allow the courts to receive a very much wider range of evidence and will make unnecessary much of the interruption of witnesses. These rules are based on a reasonably consistent set of principles which are easy to understand and remember.

The basic approach is to let the court have as much reasonably reliable evidence as possible, but at the same time to preserve the opportunity to test evidence by cross-examination wherever it is practicable to do so.

Reliability has two aspects-the reliability of the original statement, and the reliability of the process by which it is relayed to the court. To secure the first kind of reliability, it is recommended that a statement should only be repeated. to the court if the person who originally made it out of court had knowledge which was based on his own observations of what he was talking about. To secure the second kind of reliability, it is recommended that the statement must either be repeated to the court by a witness who himself observed it being made, or be in a document or record, or chain of documents or records, made in a reliable way.

The opportunity to cross-examine depends on the person who made the statement being a witness. If he is, we recommend that a statement which satisfies the reliability test be admissible as evidence, whether it supports the evidence he gives in court, contradicts it, or fills in a gap resulting from lapse of memory or other cause. If he is not to be a witness, a party who wishes to put his statement in evidence will have to show justification for not calling him. The draft Bill spells out what is sufficient justification.

That is the main group of recommendations, but there are many subsidiary proposals, including a discretion in the court to accept evidence which, although it does not pass the main tests, is nevertheless reliable. There are provisions to deal with evidence which it seems fair to use against a person, such as his own statements or those of some of his employees or agents, or signs displayed in the course of his business. There are provisions for the admission of statements which experience shows are commonly reliable but whose authors may be hard to trace or unlikely to have any useful recollection-entries in business or public records, post-marks on letters, labels on goods, phone books and street directories and so on.

The need for realism

A major reason for not recommending complete abolition at this stage is that reforms which appear simple and sweeping are sometimes self-defeating. If the whole mass of hearsay evidence available on a topic were admissible, advocates, judges and magistrates would still have to sift out of it what was to be presented to the court, or acted on or given weicht by the court. The law is and will be administered by lawyers who have long been accustomed to reject or scorn hearsay. If the law gave no guidance by new rules about hearsay, there would be a real risk that in one way or another the old rules would continue to have considerable effect on what happened. An apparently sweeping abolition of all rules against hearsay might have less effect in practice than our apparently more modest recommendations. Perhaps in the future, when the profession has become accustomed to handling and evaluating a wide range of hearsay evidence as a result of our recommendations, more extensive reform will be appropriate.

The framing of new rules gives the opportunity to ensure that the worst fears of those who oppose the abolition of the hearsay rule are not realized. Our recommendations do not open the floodgates to all hearsay; they allow in an extensive, but measured, controlled and rationally based range of hearsay evidence. They include measures to protect our oral system of trial from undue erosion; they preserve opportunities for cross-examination wherever it is reasonable and practicable to do so; they give litigants a great deal of guidance on what sort of evidence will be acceptable; they give the court a discretion to avoid injustice in those extreme cases for which not even detailed rules can provide. The Commission thinks that in present circumstances these recommendations will be more effective, more certain, and more just than complete abolition.

The Commission's Recommendations

General nature

If the Commission's recommendations are accepted, the old common law of hearsay evidence will be abolished, and for the most part the law will be found in one statute. There will be a general prohibition against proving a fact by means of a statement which someone has made out of court, unless the statement can gain admission through one of the gateways provided in the legislation.

The main gateway is one which allows certain more reliable classes of hearsay evidence (defined by their closeness to the original source) to be used, if the person who made the statement is called as a witness, or if there is justification for not calling him.

Another gateway, which existed. at common law, allows in an admission by an opponent in the case. Under the proposal this gateway is opened more widely, and some statements of other people connected with the party may be put in evidence against him.

A very important gateway relates to business records. The Commission made recommendations on this subject in an earlier Report. They were adopted by the State Parliament in 1976 and by Federal Parliament in 1978. These provisions are incorporated in the new Act which we recommend, with some changes prompted by experience or further thought.

There are also a number of other gateways, some of which existed at common law, and some of which are new.

Finally, there is a gateway in the form of an overriding discretion in the court to admit reliable hearsay evidence which cannot get in through any other gateway. It is balanced by other overriding discretions to exclude hearsay evidence if the interests of justice require.

There are a number of ancillary provisions in the proposals, some of which will be mentioned below.

The main gateway

The most important gateway is one that allows in certain classes of hearsay evidence (defined by closeness to the original source) if the person who made the statement is called as a witness, or there is justification for not calling him. Normally a person who observed the making of the statement must be called if the person who made it does not himself give evidence. This gives an opportunity for cross-examination both about the circumstances in which the original statement was made and the accuracy of the repetition. However, as will be explained, in the case of documentary evidence the gateway is a little wider. Two points call for elaboration. What classes of evidence are to be allowed through the gateway? What justifications are enough to open the gate?

(a) What classes of hearsay will be admissible?

A witness can give evidence of an event by speaking of his own observations of the event. "I saw Jones hit Smith". The hearsay problem arises where he did not observe the event, but can only repeat what someone else has told him. If his information comes from someone who did observe the event, it is first-hand hearsay. "Black told me that he saw Jones hit Smith". Although less reliable than evidence by an observer of the event, first-hand hearsay is likely to be more reliable than second-hand hearsay, which occurs where a witness in court repeats a statement by a person who in turn was repeating what he was told by the person who observed the event. "White told me that Black told him that he saw Jones hit Smith". Every repetition means more risk of divergence from the original statement, and also more difficulty in testing both the accuracy of the original statement, and the accuracy of the repetition. Where

the chain of information is entirely oral, the Commission's main recommendations provide wide opportunities for first-hand hearsay to be placed before the court, but exclude second-hand and more remote hearsay.

The problem of inaccuracy due to repetition is not so acute when the evidence is tendered in a documentary form. (In the Commission's scheme, a document includes a tape and any other record of information.) Some methods of mechanical copying allow a long chain of copying to occur without loss of accuracy. Even where there is human intervention, the circumstances may inspire confidence that one document is a true copy of, or a fair extract from or a fair summary of, another document. Hence although the Commission's main proposal for extensive admissibility is limited in the case of oral evidence to first-hand hearsay, in the case of documentary evidence it applies no matter how many links there are in the chain of copies I or fair extracts or summaries), so long as the chain goes back to a reliable source. That source may be a record made by the person who made the original statement, or by someone who observed him make it. Where the original statement was made in a document, the document itself may also be the source.

(b) When is hearsay evidence admissible?

Although hearsay evidence of the type described is picked out as being usually more reliable, it is not recommended that it be automatically admissible. If the person who made the statement is not already a witness, the party who wishes to use it should present him for cross-examination if it is at all reasonable for him to do so. The recommendations therefore include a list of circumstances which will be sufficient justification for not calling as a witness the person who made the statement. Actually there are two lists a longer one for civil cases and a shorter one for criminal cases. This is one of several points on which we make different recommendations for civil and criminal cases. The reasons for the differences will be mentioned later.

Under the recommendations there is justification in either a civil or a criminal case for not calling the person who made the statement if he is dead or unfit to give evidence, if he refuses to be sworn although compellable to give evidence, or if he cannot be identified or cannot be found. In a civil case, there is also justification if the person is outside New South Wales and reasonable steps have failed to secure his testimony; if he is not compellable and refuses to give evidence; if undue delay, expense or inconvenience would be caused; if he cannot reasonably be expected to have a useful recollection; or if it is unreasonable to expect the party who wishes to use the statement to call him, because of his relation with any party. The last category covers the case where the person who made the statement is so clearly in the opposing camp that it would be unreasonable to expect the party to call him as his witness.

If the original statement was made orally, and justification is established for not calling the person who made it, it may be proved by the evidence of someone who observed him make it. Evidence b y such a person is first-hand hearsay, and is the limit of the oral evidence that is made admissible under the main proposal. However if no such person can be called (justification being determined by the same tests as with the maker of the statement), a documentary record of the sort mentioned earlier may be put in evidence.

If the original statement was made in a document, the document should be produced to the court, or its contents proved by other evidence in those circumstances where the present law allows the contents of a document to be proved without producing it. For example, if the document is lost or destroyed, or cannot be brought to court, or is withheld by the opposing party or by someone who cannot be compelled to produce it, a copy may be used, or someone familiar with its contents may give oral evidence. The recommendation goes further than this in providing that if it is not practicable to prove the statement by the document, a record of the sort mentioned earlier may be used.

This proposal will not make admissible, in either civil or criminal proceedings, statements by an anonymous accuser, i.e., a person who has refused to disclose or has deliberately concealed his identity.

Admissions and like statements

At common law it is possible to use as evidence against a person a statement which he has made or authorized. Such a statement is called an admission. However, the existing law is not well adapted to present conditions where the principal party to many transactions, or the person responsible for activities which injure another, is frequently a company or other remote employer with whom the public has no direct contact. All dealings are with employees, but unless it can be proved that an employee was authorized by the employer to make statements, what he says cannot be used as evidence in a case against the employer. This sometimes makes it very difficult for a person with a good, case against a large organization to prove it, as is illustrated by examples (3) and (6) given earlier in this paper. The classic example is the admission by a lorry driver after an accident that he was not looking or was speeding, or was otherwise negligent. Although the driver's employer is legally responsible for his employee's negligence, the driver's statements cannot be put in evidence.

To overcome this the recommendations provide a new category of statements "affecting a party", which may be used against him. Even if an employee or agent did not have authority to make a statement, what he says will be admissible against his employer or principal if-

(a) he appeared to have authority to make it;
(b) it related to a matter within the scope of hi's employment or agency, and was based on personal knowledge;
(c) it related to a matter of which he had superintendence; or
(d) it related to a matter which it was within the scope of his employment or agency to discuss with a person to whom he made the statement.

Business records

Records which are systematically kept, for example in business or government, are often reliable, even though the person who compiles them relies on information supplied by others. But at common law the rule against hearsay frequently made it impossible to use them. The Commission made a report on this subject which led to N.S.W. legislation in 1976 making business records admissible in a wide variety of circumstances. The Commonwealth adopted it this year.jhe legislation seems to be working satisfactorily, and with minor amendments, mainly to clear up doubts about its full extent, it is incorporated in these recommendations. It will overlap in many cases with other parts of the recommendations, but no harm is done if there is more than one gateway throu-h which a piece of evidence may get before the court.

Other gateways

Most of the common law exceptions to the rule against hearsay are made unnecessary by the width of the Commission's main recommendations. However there are a number which seemed worth preserving as special gateways, although in most cases we have clarified or extended them.

These include rules about the admissibility of evidence given by expert witnesses, and of reputation as evidence of certain matters. They also allow the use of works of authority, published compilations, and many public documents. Arguments about the admissibility of telephone books, street directories, electoral rolls and bus timetables should be put to rest.

Some new gateways on specific matters of everyday occurrence have been provided, to remove doubts or overcome objections to their use as evidence. They include labels on goods, business signs displayed on or in land, buildings and vehicles, and post-marks.

Discretionary admission

So far as possible, the recommendations give definite rules on when hearsay evidence will be admissible. This is important in an adversary system where parties are responsible for preparing and presenting their cases. However it is unlikely that any rules, however satisfactory in the general run of cases, can fail to throw up the old case of hardship.

In the past the law has proceeded on the basis that such hardship provides no ground for waiving the strict application of the rules of evidence. The one exception has been in criminal trials, where the judge has a discretion to reject evidence which, although admissible, would be unfairly prejudicial to the accused. While the Commission accepts the desirability of certainty in the law of evidence, it does not think that this should be pressed to the point of denying the court any discretion to relax the rules, no matter how valuable the evidence or how absurd or unjust its exclusion.

Under our proposals, the court would in every case, civil or criminal, have a discretion to admit a statement if there were reasonable grounds for thinking it might be reliable, notwithstanding that it was hearsay and not admissible through any other gateway. On the other hand, there would be a discretion to reject evidence in certain circumstances, e.g., if its weight was too slight to justify its admission, or if its utility was outweighed by its tendency to prolong the proceedings, or to operate unfairly against a party, or to mislead a jury, or if it would unfairly surprise a party. Instead of rejecting the evidence, the court could admit it on terms, e.g., of allowing an adjournment to a party taken by surprise.

The recommendations preserve the existing discretion to reject evidence which would operate unfairly against an accused. They also give an important new discretion to admit evidence which would tend to support the acquittal of an accused.

These discretions, and particularly the discretion to admit reliable evidence, will not only provide relief in exceptional cases, but will allow the courts to continue the development of the law, without the need lor intervention by Parliament. Precedents can be established by judicial decisions for the admission of certain classes of hearsay evidence which come to be recognized as reliable, whether as a result of technological proaress or any other reason.

Other recommendations

No attempt is made to summarize here all the provisions of the recommended legislation, some of which deal with matters of technicality. For example, at present a judge or jury may be required to take a piece of evidence into consideration for one purpose, but not for another. This can be confusing or artificial, and the recommendations seek to reduce the circumstances where such rules apply.

There are also many provisions which are ancillary to the main recommendations discussed in this paper, and a number which are included to reduce doubts and arguments. Some of these are referred to in the text section.

Some Policy Issues

Differences between civil and criminal cases

The law of evidence has to be applied in both civil and criminal cases. It is desirable as a matter of simplicity and consistency to keep it as uniform as possible. However it has always been recognized that there are features of criminal cases that call for special rules of procedure and evidence. Because liberty and reputation are at stake, it is accepted that the law should be tender to the rights of the accused, and be more ready to risk the acquittal of the guilty than the conviction of the innocent. A well-known example is the higher standard of proof demanded in criminal cases. Civil liberties are involved not only in the courtroom, but in the police investigation, and one strand in the law of evidence has been an attempt to discourage bad police practice by rejecting evidence obtained in certain ways.

The Commission has borne these considerations in mind in making its recommendations. It has also borne in mind that the prosecution usually has skilled professional investigators at its disposal, in the form of the police force, and that the ordinary accused, and for that matter the ordinary civil litigant, does not have similar resources. It is therefore reasonable to expect more of the prosecution in the way of locating and producing evidence. The Commission's proposals distinguish in a number of ways between civil and criminal cases, and some of them may be mentioned here.

In the main recommendation, failure to call as a witness the person who made a statement is more easily justified in a civil case than in a criminal case. In a criminal case it is not sufficient justification that he is outside New South Wales and reasonable efforts have failed to procure his testimony, or that, not being compellable, he refuses to give evidence, or that he cannot reasonably be expected to have a useful recollection, or that undue delay, expense or inconvenience would be caused, or that having regard to his relations with any party to the proceeding, it is unreasonable to expect the party tendering the out-of-court statement to call him as his witness. Notwithstanding such difficulities, he must normallv be got to court if his statement is to be used. This applies equally to prosecution and defence, but as already mentioned, the court has discretions which it may exercise in favour of an accused.

Where an out-of-court statement by one accused person is admitted on the basis of justification or discretion, it cannot be used against another person charmed in the same proceeding unless he consents. There are also restrictions on the admissibility in criminal proceedings of statements made after the police investigation of the alleged offence had commenced.

The special rules which now govern the admissibility of confessions in criminal cases are not affected by the recommendations. The findinas of a Royal Commission or similar body would become admissible in civil but not in criminal proceedings. Provisions about the admissibility of a witness's proofs are mentioned later.

Preservation of traditional trial procedure

An argument acainst the wider admission of hearsay evidence has been that it would undermine traditional features of our trial system, such as the giving of direct oral evidence before the court, the testing of evidence by cross-examination, and the continuous trial. The recommendations are moulded in a number of ways to minimize these risks.

Under the main recommendations, a person whose statement is tendered must be called, unless there is one of the acceptable justifications for not calling him. If he is called, the court may require that he gives oral evidence before the statement is tendered. If he is not called, it is necessary in most cases to call someone who can give direct evidence of, and be cross-examined about, the making of the statement.

Proofs of evidence, i.e., statements taken to set out a proposed witness's possible evidence, may be excluded if he is called as a witness. In a criminal case they are not admissible even if there is justification for not calling him, unless the court so orders for special reasons.

Moreover the fact that evidence is made admissible does not mean that it will be believed. It has to be weighed by the court, and the recommendations list a number of matters to be considered. The first is whether there is available evidence of greater weight which is not tendered. Hence parties will have an incentive to call the strongest available evidence on any matter seriously in dispute.

Some attempts in other countries to reform the rule against hearsay require a party wishing to use such evidence to give notice to the other side, so as to eliminate surprise and possible applications for adjournment. The Commission considers that such a requirement is not generally necessary, and would create too great an obstacle to the use of the wide range of evidence which it thinks should be admissible. Sometimes, too, there is good reason for not disclosing in advance the availability of evidence which exposes the falsity of an opposing case.

However there will be many cases in which it is reasonable to expect a party to give notice of his intention to give hearsay evidence, and if he fails to do so, he will run the risk of being penalized. Under the recommendations, if evidence is tendered which unfairly surprises a party, the court may reject it, or admit it on terms. Hence it could require a party to pay the costs of an adjournment, if the adjournment was the result of his unreasonable failure to give notice to the other party.

In case substantial difficulties should arise in the future, it is recommended that there should be power to make rules of court about the giving of notice.

Conclusion

The Commission believes that the implementation of these recommendations will be a substantial contribution to making the administration of justice more certain, more fair and more intelligible.

Witnesses will be allowed to give evidence in a natural way. Many of the statements to. which a witness is likely to refer will be automatically admissible, e.g., his own and those of other witnesses. Many others will not be worth objecting to because of the probability that the court will admit them.

Litigants will be more likely to get just decisions, because the courts will be able to consider a wider range of useful evidence. To illustrate this, consider what will happen in the cases used as examples on pp. 4 and 5, if the recommendations are implemented.

1. Both the wife and the doctor will be able to give evidence of the dead worker's description of his accident.
2. It will be possible to prove the witness's admissions, either through his letters or the evidence of someone who heard him make the statements, if he is dead, or if he is called as a witness, or if there is justification for not calling him.
3. The customer will be able to put in evidence against the railway company the statements of the employee, because they related to a matter of which he had superintendence.
4. As the girl is now dead, her statement about the attack will be able to be proved by someone who heard her make it.
5. The girl's statement will be admissible if she gives evidence or is too young to, give evidence, or if the court thinks the statement is reliable. If none of these avenues is available the court will be able to admit it as a statement tending to support the acquittal of the accused.
6. The driver's statement will be admissible in evidence against his employer because the driver was speaking of something within the scope of his employment of which he had personal knowledge.
7. If the victim of the assault is called as a witness, the person to whom he told the number will be able to give evidence of it, and the piece of paper it was written down on will also be admissible.
8. The other police will be allowed to give evidence of the dead man's description of his attackers.
9. As the witness is giving evidence, his earlier statement will not only be available to attack his recollection or truthfulness, but will be admissible as some evidence of what really happened.
10. The court will be able to admit the evidence of the other person's confession as evidence tending to support the acquittal of the accused, if it is not admissible in some other way.
11. If the woman gives evidence herself, she herself, the doctor and the other persons will be allowed to give evidence of her statements that she was injured at work.

Although the recommendations deal with what may seem at first sight a technical matter for lawyers, their implementation will make a big difference to ordinary people who come to the courts, whether as witnesses or as civil litigants, or accused of a criminal offence.