HEARSAY

The hearsay rule

Section 17 Evidence Act 2006:

> A hearsay statement is not admissible except—
>
> (a) as provided by this subpart or by the provisions of any other Act; or
>
> (b) in cases where—
>
> (i) this Act provides that this subpart does not apply; and
>
> (ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

General admissibility of hearsay

Section 18 Evidence Act:

> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

Definition of hearsay statement

Section 4 Evidence Act:

> **Hearsay statement** means a **statement** that—
>
> (a) was made by a person other than a **witness**; and
> (b) is offered in evidence at the proceeding **to prove the truth of its contents**

"Statement" and "**witness**" are defined in s 4:

> **Statement** means—
>
> (a) a spoken or written assertion by a person of any matter; or
> (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter
>
> **Witness** means a person who gives evidence and is able to be cross-examined in a proceeding.

Identification of hearsay statements

The critical first step is identifying whether the evidence at issue is evidence of a "hearsay statement." This can also be helpfully done in the reverse: what is not a hearsay statement?

Three things that are not hearsay statements

(1) The out-of-court statement of a **witness** is not a hearsay statement.

> The rationale for this extension is that the main concern about hearsay evidence is the inability to test the evidence through cross-examination. If the maker of the out-of-court statement is able to be cross-examined regarding the contents and circumstances of that statement then the dangers of hearsay evidence are addressed. There is an issue, however, when the witness may not have been cross-examined on the statement, and a later witness refers to that statement – arguably it remains hearsay if the maker has not been, or will not be, able to be cross-examined on it. This issue was discussed in *R v Foreman (No 17).*[1]

[1] *R v Foreman* HC Napier CRI-2006-041-1363, 22 April 2008.

In that case, Simon France J held that it remains impermissible under the Act to lead a prior statement "as original evidence in circumstances where the maker of the statement has been a witness but has not himself testified to the truth of the contents".[2]

In a judge-alone trial at least, s 14 (provisional admission of evidence) could be used to admit what is a hearsay statement on the basis that the maker of the statement will later be called as a witness (which will mean the evidence will at that point fall outside the definition of "hearsay statement"). In the 2013 review of the Act, the Law Commission confirmed that this is an appropriate use of s 14.[3]

In *R v Morgan*,[4] Elias CJ questioned whether a person who refused to give any meaningful answers in cross-examination could really be called a witness in a way consistent with the rationale behind the reform of the rule against hearsay.[5] The majority was untroubled by this point, calling the cross-examination "a difficult and unrewarding exercise … by no means uncommon with hostile witnesses".[6]

In *Awatere v R*,[7] the defendant was facing charges relating to alleged domestic violence towards his partner. She was a very reluctant prosecution witness. She resiled from a statement made to the police. She was declared a hostile witness. When questioned further by the prosecutor she said *"I'm not doing this. I'm walking out"* and left the court in a distressed state. Ellis J held that the defendant's partner was no longer within the definition of "witness" in s 4 because she was not able to be cross examined. Therefore, her statement to the police was a hearsay statement.

(2) A statement **not being offered to prove its truth** is not a hearsay statement (for example, when the statement is only offered to prove it was made).

If a statement is not offered to prove its truth then it is not hearsay. This consequence is why it is important that the preliminary inquiry when considering admissibility must

---

2 At [4].
3 LC *2013 Review* at [3.19].
4 *R v Morgan* [2010] NZSC 23.
5 At [11].
6 At [44].
7 *Awatere v R* [2018] NZHC 883.

first be the identification of purpose and then a decision about relevance. The Supreme Court in *R v Gwaze*[8] confirmed the importance of beginning the admissibility inquiry by identifying purpose.[9] In the context of considering the admissibility of an out-of-court statement of a person who is not a witness, the purpose of offering the evidence may take the statement outside the rule against hearsay (s 17).[10] In such a case ss 7 and 8 govern admissibility and not s 18

What about statements allegedly offered (only) to prove a person's (relevant) state of mind? To answer this question, again identify the relevance or purpose of offering the evidence: what is it being offered to prove? What will it be used to prove?

Example (taken from the facts of *R v Baker*):[11] *"I am scared of D. I am worried that he might kill me"* (a statement made by the deceased to a friend, offered by the prosecution to rebut the defendant's argument that the deceased would invite him around to shoot stray cats).

Ask: does the relevance of the statement depend on the truth of its contents? If it does, then it is a hearsay statement.

In this example, the relevance of the statement is to rebut the defence argument that the victim invited him around to shoot stray cats. The Crown wants to offer evidence of what she said to her friends to establish that she was too scared to invite the accused around. Therefore, it does matter whether or not she was in fact scared. That is, the relevance does depend on the truth of its contents.

Another example in relation to the statements made by the deceased to her friends is *R v Rajamani*.[12] In that case the defence of provocation was being run – the defendant claiming that he had reacted to his wife telling him that she wanted a divorce and intended to go and live with a Pakistani man, (the defendant hating Pakistanis). The

---

8 *R v Gwaze* [2010] NZSC 52

9 At [28] ff.

10 See for example *Hunt v R* [2008] 1 NZLR 368 at [21]; *Geraghty v Sutherland* [2013] NZHC 3011 at [43].

11 *R v Baker* [1989] 1 NZLR 738 (CA).

12 *R v Rajamani* [2009] NZCA 225.

Crown sought to lead evidence from witnesses including that the deceased had told one of them of an occasion where she had told the accused that she wanted to divorce him and that the accused had gone and got a knife, and held it and said to her *"if you divorce me I'll kill you and then kill myself"*. In a pre-trial ruling Heath J held that this evidence was not hearsay (not challenged on appeal) – it was led to show the deceased state of mind and was relevant to show that it was less likely that she would have told the defendant that she intended to leave him to live with a Pakistani man.[13]

Contrast this with the statement in *R v Liu*:[14] *"Cindy one day [if I die] you please quickly call the Police and Jack he's the one who will kill me"*. The Crown did not seek to lead this evidence as to the truth of its contents but rather to show there was the relationship between the defendant and the deceased was unhappy and unstable. Katz J held that the evidence had high probative value in that regard, but its prejudicial effect outweighed that probative value – that there was a high risk the jury would impermissibly use the evidence to conclude that the defendant "must have done it"

Recently in *Preston v R*,[15] the Court of Appeal considered the position of statements offered to show the deceased was in fear of the defendant and some previous cases dealing with this type of evidence. Preston was charged with the murder of his wife Mei Fan. She made a number of statement to friends and also to a police officer that she was "really really scared" that the defendant would kill her if she got custody of the children. The Court expressed a view about the High Court decision in *R v Lui* that the comments made by the deceased in that case, should have been treated as hearsay and dealt with under s 18. The Court made this general comment regarding this type of evidence:

> The Evidence Act's approach to the admissibility of hearsay evidence is both simpler and more permissive than under the common law. If the evidence is hearsay, the first inquiry is as to the matters provided in s 18. If that admissibility threshold is met, the evidence must still pass through the gateway provisions of ss 7 and 8. Evidence of a victim's statements expressing fear of a defendant, which is utilised for a hearsay purpose, will be admissible if it passes through the

---

13 *R v Rajamani* HC Auckland CRI-2005-004-1002, 5 June 2008.

14 *R v Liu* [2015] NZHC 1125.

15 *Preston v R* [2016] NZCA 568; [2017] 2 NZLR 358

> gateways of ss 18, 7 and 8. It is not in some special category of evidence which has to pass a higher threshold for admissibility.

The Court also noted:[16]

> To determine if evidence is hearsay, one must identify the purpose for which the evidence is proposed to be called: "there is no such thing as hearsay *evidence* only hearsay *uses.*

It may be that in some cases what the Crown offers as limited use evidence is in reality evidence which is properly characterised as going to the truth of its contents. *R v Lui* is such a case.

An issue to be aware of is that statements not offered to prove their truth may actually be used for all purposes once admitted, including to prove their truth. So where it is clear that the use to which the statement is to be put is limited, an appropriate direction to the jury will be required.

(3) An utterance or evidence that is not a **statement** (that is, when it constitutes an implied or "unintended" assertion) is outside the hearsay rule.

The Law Commission's intention to put implied "assertions" outside the rule has been confirmed by Simon France J in *R v Holtham.*[17] His Honour concluded that the use of the word "assertion" clarified the position in that asserting requires an **intention** to assert. In *Holtham,* a significant number of unanswered text messages to an alleged drug supplier in which the senders used jargon to place an order for methamphetamine were classified as falling outside the definition of hearsay, as the relevance of the texts was as circumstantial evidence from which it may have been inferred that the accused was a drug supplier. The texts did not themselves amount to assertions of the sender

---

16 At para [64] referring to Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 385 (original emphasis).

17 *R v Holtham* [2008] 2 NZLR 758.

that the accused was a drug dealer. The messages therefore fell to be considered solely under ss 7 and 8.[18]

The Evidence Act 2006 therefore makes it clear that implied or unintended assertions fall outside the rule against hearsay (this is because any concerns about the maker of the statement do not arise when the maker is not intending to assert anything that is claimed to be relevant). It is therefore important to recognise whether words or conduct amount to an implied or unintended assertion.

One way that may assist to identify an implied assertion:

- **Step one:** Identify the relevance of the words or conduct.

- **Step two:** If the relevance of the words or conduct arises entirely from the inferences which can be logically drawn from the words or conduct or surrounding circumstances then it is an implied or unintended assertion, not a statement, and outside the definition of hearsay in the Act.

If the relevance of the statement depends on the truth of the *contents* of the utterance (not the inferences drawn from what was said or written), then it is a "statement" (and hearsay if the maker will not be a witness).

Some examples:

- *Dyer v R*,[19] where the Court of Appeal held that a single text, in which the sender conveyed to the defendant her opinion that the air at the defendant's premises was poisonous, was an assertion. The Court of Appeal held that the relevance of the statement did depend on the truth of its contents and was therefore hearsay. The prosecution was seeking to rely on the fact that air in the premises was in fact noxious to establish the defendant's awareness that methamphetamine was being cooked in another part of the premises.

---

[18] See also *Dyer v R* [2014] NZCA 34; *Payne v R* [2012] NZCA 529 at [12]; *Commissioner of Police v Dryland* [2013] NZCA 247 at [33]; *McKenzie v R* [2013] NZCA 378 at [25]; *R v Manase* [2001] 2 NZLR 197.

[19] *Dyer v R* [2014] NZCA 34.

- In *Commissioner of Police v Dryland*[20], in which the Court held the text messages were assertions and so hearsay statements. The text messages in this case contained quite specific references to drug dealing and mentioned the defendant by name, unlike the situation in *Holtham* the conversations were actual assertions and not implied assertions and were therefore hearsay.

- An exclamation that is a spontaneous response to a witnessed event is not hearsay because the person who made the statement did not mean to assert anything.[21]

Admissibility of hearsay statements: the general exception s 18

Section 18 Evidence Act:

> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

If the evidence is hearsay then it cannot be admitted (s 17), unless pursuant to an exception either in the Evidence Act or pursuant to some other enactment. Note that because of the operation of s 5(1) of the Act, if another Act governs the admissibility of the particular type of hearsay statement (for example, the Land Transport Act 1998) then the provisions of that Act apply, not the Evidence Act.[22]

Under the Act there is one general exception for admitting hearsay, s 18, which depends on unavailability (or "necessity") and reliability.

---

20 *Commissioner of Police v Dryland* [2013] NZCA 247 at [29]–[33].
21 See for example, *R v Pula* [2018] NZHC 1141.
22 See *R v Pope* [2008] NZCA 284 at [15] (which concerned the provisions of the Misuse of Drugs Act).

The common law exceptions have not been preserved.[23] Under the Act there is also no distinction drawn between written and oral hearsay, single or multiple hearsay,[24] and whether the evidence is being offered in criminal or civil proceedings (except for the operation of s 20). All these matters are taken into account when determining reliability (s 16(1)) and the balancing test under s 8.

With regard to the requirement of necessity, the maker must either be unavailable to be a witness (defined in s 16(2)) or undue expense and delay would be caused if they were required to be a witness (s 18(b)(ii)).

Unavailability of witness - s 18(2)(b)

Section 16(2) and (3)

> (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
>
> (a) is dead; or
>
> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
>
> (c) is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.
>
> (3) Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

It is important to bear in mind that both the necessity limbs refer to the ability to call or efficiency of calling the maker as a witness. It may be, therefore, that even though the maker is not in New Zealand they will not qualify as being "unavailable" if it is possible to receive their evidence via video link.[25]

---

23 To the extent that common law exceptions are relevant it may be that they provide assistance in applying the indicia of reliability: see *R v Mills* [2010] NZCA 286 at [11].

24 *R v Gwaze* [2010] 1 NZLR 646 at [88]; *R v Gwaze* [2010] NZSC 52 at [43]; *R v Key* [2010] NZCA 115 at [26].

25 *Solicitor General v X* [2009] NZCA 476 at [36]; *R v Foreman (No 17)* HC Napier CRI-2006-04101363 21 May 2008 at [10].

For cases that discuss unavailability see:

- *R v Osborne* (expert had gone on a pre-arranged cruise to the Greek Islands);[26]
- *GO v PS* (witness was a young child);[27]
- *R v Alovili* (witness had treatment-resistant paranoid schizophrenia);[28]
- *Booth v R* (brain injury and loss of memory).[29]

For cases that discuss undue expense or delay see:

- *R v Wallis* (the calling of numerous witnesses);[30]
- *Carr v Ambler Homes Limited* (the maker was counsel for the appellants);[31]
- *R v Foreman (No 17)* (expert witness).[32]

Clout v Police,[33] in a case which had turned on unavailability, undue expense and an assessment of the prejudice arising from inability to cross-examine. A German tourist who had been assaulted was back in Germany by the time of the trial. There was no issue about the reliability of his statement to police. He was able to give evidence by video link at a cost of $760-870 per hour (2013 costs) but with significant inconvenience for travel and accommodation to give evidence "in the middle of the night". As the defendant was claiming self-defence and the tourist was not the only witness, it was inevitable the defendant would have to give evidence and unlikely the tourist would have been shaken in cross-examination. Taking

---

26 *R v Osborne* HC Auckland CRI-2007-090-2 22 September 2009 (not unavailable).
27 *GO v PS* FC Lower Hutt FAM-2008-032-132, 7 April 2008 at [11] (witness deemed unavailable).
28 *R v Alovili* HC Auckland CRI-2007-404-612 27 June 2008 at [26] (witness deemed to be not unavailable).
29 *Booth v R* [2013] NZCA 371 (unavailable).
30 *R v Wallis* HC Auckland CRI-2007-092-8480, 16 March 2009 at [20] (no "undue" expense).
31 *Carr v Ambler Homes Ltd* HC Auckland CIV-2009-404-93, 19 May 2009 at [23] (undue expense would be caused as he would then have been disqualified from acting as counsel in the matter).
32 *R v Foreman (No 17)* HC Napier CRI-2006-041-1363, 21 May 2008 at [10] (undue expense not demonstrated).
33 *Clout v Police* [2013] NZHC 1364 at [17]–[18].

into account the relatively low-level charge the District Court was justified in concluding this was admissible hearsay and not unfairly prejudicial.

The High Court has also commented that if evidence is of little consequence to an issue in the trial, or is formal or unassailable, then the undue expense threshold will be relatively low. Conversely if the evidence is of real significance to the issues in the trial and is contentious, the threshold will be higher.[34]

The circumstances relating to the statement provide reasonable assurance that the statement is reliable - s 18(1)(a)

The other element of the admissibility rule in s 18 is "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". The definition of "circumstances" is in s 16(1).

This is a wide-ranging inquiry that is not limited to examining the situation in which the statement was made (for example, to a police officer), or to the nature of the statement (for example, written and signed by the maker).[35] The fact that the trial judge failed to consider the reliability of the contents of the statement itself, was one of the concerns about the admissibility decision expressed by the Supreme Court in *R v Gwaze*:[36]

> The Judge seems to have taken the view that reliability under s 18(1)(a) was established if there was sufficient assurance that Professor Rode's words had been accurately captured and communicated by Professor Beasley to Detective Johannsen and then accurately recorded by Detective Johannsen. Because the Judge had formed a favourable view of Professor Beasley's reliability and because the occasion was an exchange of views of medical practitioners, immediately and responsibly relayed to the police, he took the view that the circumstances provided an assurance of reliability. But the definition of "circumstances" for the purpose of hearsay evidence makes it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making. The Judge's approach, in considering only the reliability of the capture and recording of the information, was not sufficient discharge of the responsibility under ss 17 and 18 to exclude evidence except where the circumstances provide reasonable assurance of reliability.

---

34 *R v Leaitua* [2013] NZHC 2910 at [16] – [18].

35 See for example *Werahiko v R* [2018] NZCA 425.

36 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [45].

"Circumstances" is defined in s 16(1) as:

> **circumstances**, in relation to a statement by a person who is not a witness, include–
>
> (a) the nature of the statement *(or the type of the statement – whether it is written or oral, recorded in some way, signed or witnessed, authentic,*[37] *prepared by an independent person with experience,*[38] *first-hand*[39]*);*
>
> (b) the contents of the statement *(whether it is an oral statement accompanying and explaining a relevant act, what is the level of detail,*[40] *is there consistency throughout,*[41] *lack of ambiguity, is it a declaration against interest or a self-serving statement*[42]*);*
>
> (c) the circumstances that relate to the making of the *statement (the physical environment, when it was made – in relation to the event the statement refers to, was it a 'spontaneous utterance',*[43] *was it voluntary or prompted,*[44] *what was the relationship between the maker and the witness, did the maker realise that the statement could be repeated or used in evidence*[45]*);*
>
> (d) any circumstances that relate to the veracity of the person *(who is not the witness - the 'maker');*[46]
>
> (e) any circumstances that relate to the accuracy of the observation of the person *(who is not the witness - the 'maker').*[47]

Generally, the veracity and reliability of the witness (who reports the statement) will not be taken into account. Those matters can be tested before and assessed by the fact-finder.[48] However, the veracity and reliability of the witness may be considered where the veracity or accuracy of the witness is such that it would be a time-wasting exercise to have the jury hear the

---

37 *Orji v R* [2013] NZCA 629 at [55] – [56].

38 *Adams v R* [2012] NZCA 386 at [35].

39 See *R v Key* HC Auckland CRI-2006-092-12705, 2 March 2009; *R v Goodman* [2008] NZCA 384; *R v Check* [2009] NZCA 548.

40 In *Booth v R* [2013] NZCA 371, the Court of Appeal excluded evidence of what the complainant had told her sister, on the basis that it was "completely general, and consequently completely unspecific": at [47].

41 *R v Bishop* HC Gisborne CRI-2008-416-3, 28 February 2008.

42 *Commissioner of Police v Hayward* [2013] NZHC 1358 at [32].

43 *R v Mills* [2010] NZCA 286;

44 In *TK v R* [2012] NZCA 497 the very young complainant's statement to an adult, ST, was held to be inadmissible, the Court of Appeal finding that the question amounted, in the context, to a "direct prompt following from the conversation of [ST and his grandmother] which the child would have heard: at [18].

45 *R v Kereopa* HC Tauranga CRI-2007-087-411, 11 February 2008; *Police v Bell* [2008] DCR 681.

46 Such evidence is still subject to the substantial helpfulness test in s 37(5).

47 "Maker" is not defined in the Act – an issue about who is the maker may arise when more than one person is involved in "making" the statement: see *R v Hovell* [1986] 1 NZLR 500 and *R v Harriman* [2008] NZCA 53.

48 *Adams v R* [2012] NZCA 386 at [25]; Evidence Code para C75.

witness's evidence only to have the witness undermined under cross-examination to the extent that the evidence must be completely discounted.[49]

The existence of other supporting or conflicting evidence was not something the Law Commission thought should be taken into account when considering circumstances relating to the statement. However, in *R v Kereopa*[50] consistency with other evidence was seen as relevant to the accuracy of the maker.

In *R v Check*[51] it was seen as a matter to be taken into account when undertaking the balancing exercise under s 8 – that is, the probative value of the hearsay evidence. The impact of the inability to cross-examine the maker is also something to be taken into account when considering the unfairly prejudicial effect under s 8.[52]

Business records exception: s 19

> (1) A hearsay statement contained in a business record is admissible if—
>
> (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
>
> (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or
>
> (c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

---

49 *R v Shortland* [2007] NZCA 37 (decided before the Act came into force).

50 NZLC PP15 at [35]. But see *R v Kereopa* HC Tauranga CRI 2007-087-411, 11 February 2008

51 *R v Check* [2009] NZCA 548 at [48] see also *R v Mills* [2010] NZCA 286 at [21].

52 See *R v Bishop* HC Gisborne CRI-2008-416-3, 28 February 2008 at [25]; *Police v Bell* [2008] DCR 681; *R v Holtham* HC Nelson CRI-2006-042-2569, 9 May 2008 at [12]. Note however the Court of Appeal in *Werahiko v R* [2018] NZCA 425 at [35]: "We begin by observing that a mere inability to cross-examine the statement maker is inherent whenever hearsay evidence is admitted. Something more is required to reach the threshold in s 8."

"Business" and "Business record" is defined in s 16:

> (1) In this subpart,—
>
> **business**—
>
> (a) means any business, profession, trade, manufacture, occupation, or calling of any kind; and
>
> (b) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society.
>
> **business record**—
>
> (a) means a document—
>
> (i) that is made—
>
> (A) to comply with a duty; or
>
> (B) in the course of a business, and as a record or part of a record of that business; and
>
> (ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but
>
> (b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding.

The core justification for this exception is to facilitate admission of documents that reflect repetitive or routine processes in the creation of business records, or non-judgemental or non-discretionary applications of a system for creation of such records. Resort to s 19 will most easily be justified where there is evidence that a system was operated by the business for the creation of such records. Caution should be exercised in relying on the exception to admit documents, the further away they are from this core rationale.

The definition of "business record" was amended by the Evidence Amendment Act 2016 to exclude statements of witnesses or victims made to the police. "Business record" has been held to include a copy of an Information,[53] and various medical records.[54] In *Burrell*

---

53 *Pakai v Police* HC Invercargill CRI-2008-425-37, 13 March 2009.

54 *Tucker v Police* HC Palmerston North CRI-2008-454-16, 12 March 2008; *Knight v Crown Health Agency* HC Wellington CIV 2005-485-2678, 16 November 2007.

Demolition v Wellington City Council,[55] however, Clifford J stated that even though the documents at issue were prepared "in the context of [the Council's] regulatory activities" he required "further submissions before accepting that the correspondence constituted a 'business record'".

Section 19(1)(b) extends the "necessity" test to include where a witness cannot reasonably be expected to recollect the matters dealt with in the information he or she supplied.

In *Keshvara v Blanchett*,[56] the High Court admitted hearsay business records related to a company the liquidators of which successfully sued its director for breach of duties. An appeal to the Court of Appeal and an application for leave to appeal to the Supreme Court were dismissed.[57] The documents had been produced seven years earlier by a former employee who could not reasonably be expected to recollect the contents, so s 19(1)(b) applied: no useful purpose would be served by requiring him to be a witness. Further, because the objection was made very late, it would have been necessary to adjourn the trial to try to locate him, so s 19(1)(c) also applied.

The business records exception contains no requirement of reliability as contained in s 18. However, a s 8 inquiry is required and this would include reliability when assessing probative value.

Section 8 assessment of probative value/prejudicial effect required

The assessment of admissibility does not end with a consideration of ss 18 or 19. It is still necessary to consider the s 8 inquiries – the probative value of the statement and any prejudice arising, especially with regard to inability to cross-examine the maker of the statement, and if there is other supporting evidence in the case.

---

55 *Burrell Demolition v Wellington City Council* HC Wellington CIV-2006-485-1274, 12 March 2008 at [12].
56 *Keshvara v Blanchett* [2011] NZCCLR 34 (HC).
57 [2012] NZCA 553, (2012) 21 PRNZ 475; [2013] NZSC 23.

Notice and warning provisions

The exceptions in ss 18 and 19 are further subject to the s 22 notice requirement in criminal cases. The rationale for the notice requirement is to encourage admissibility decisions to be made pre-trial where possible and to allow the opposing party to obtain rebuttal evidence when the hearsay is admitted.[58] There is ability for the judge to waive the notice requirement.[59]

Finally, with regard to a jury trial, the need to give a warning in the case of unreliable evidence under s 122(1) must be considered with regard to hearsay evidence: s 122(2)(a). It is not entirely clear why a warning should be given once the statement has been classified as having sufficient reliability and passed the s 8 test regarding whether the lack of inability to cross-examine would have made a difference.[60] However, when there may still be concerns about relative weight, this should be brought to the attention of the jury.[61]

Limitation on the admissibility of a defendant's hearsay statements

Section 21 Evidence Act:

> (1) If a defendant in a criminal proceeding does not give evidence, the defendant may not offer his or her own hearsay statement in evidence in the proceeding.
>
> (2) To avoid any doubt, this section does not limit the previous consistent statement rule.

In *R v King*,[62] the Court of Appeal confirmed that although s 21 may have been intended just to reverse the practical effects of *R v Tozer*,[63] its scope, on the plain words of the section, is significantly wider – the Court stating: "there is comparatively little scope for a defendant to tender an out-of-Court exculpatory statement."[64] However, the Court went onto say that, notwithstanding the section:[65]

---

58 *R v Morgan* [2010] NZSC 23 at [16]. See also *R v Foreman (No 17*) HC Napier CRI-2006-041-1363, 22 April 2008 at [14].

59 For cases dealing with dispensing with notice see: *Erskine v MSD* HC Whangarei CRI-2008-488-68, 24 July 2009; *R v Robinson* HC Rotorua CRI-2007-063-2028, 30 July 2009; *R v Foreman (No 17*) HC Napier CRI-2006-041-1363, 22 April 2008; *Hastie v Police* HC Christchurch, CRI-2010-409-222, 9 September 2011, *Collier v Police* [2013] NZHC 2273.

60 *R v Tait* DC Auckland CRI-2008-090-005831, 29 March 2010 at [34].

61 *Adams v R* [2012] NZCA 386 at [27].

62 *R v King* (2009) 24 CRNZ 527 at [18].

63 *R v Tozer* [2002] 1 NZLR 193.

64 (2009) 24 CRNZ 527 at [15].

65 At [18].

> [W]e do not see prosecutors as having an uncontrolled discretion not to lead such evidence given the powers which trial Judges have to control the criminal trial process. … In the event of an unfair decision by a prosecutor not to lead evidence as to what the appellant said at a police interview, it would thus be open to the Court to require that evidence to be lead.[66]

The Court also left open the possibility that, despite s 21, a defendant who does not give evidence may still refer to his or her pre-trial statements when attempting to impugn the veracity of prosecution witnesses through cross-examination.[67]

Boyd v Police [2012] NZHC 713 and *Paewhenua v R* [2015] NZHC 1831 are examples of the application of s 21.

In *Boyd* Allan J put it this way:

> [23] The Judge was plainly right to decline to receive the videotaped statement, comprising as it did a carefully prepared exculpatory account of the incident by the appellant. The statement was inadmissible. Mr Boyd complains that because the statement was ruled out, he was compelled to give evidence on oath. But an accused person has no right to require the Court to accept a hearsay out-of-court exculpatory statement in substitution for evidence given under oath at the trial. While the appellant was perfectly entitled to elect not to give evidence at all, he was not entitled to insist that his hearsay statement be admitted, whether as part of the prosecution case or his own.

Co-conspirators rule – now s 22A

Section 22A provides:

> In a criminal proceeding, a hearsay statement is admissible against a defendant if—
>
> (a) there is reasonable evidence of a conspiracy or joint enterprise; and
>
> (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
>
> (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

---

66 At [19].

67 At [23] ff. This issue arose for consideration in *R v Felise (No3)* (2010) 24 CRNZ 533 in which Lang J permitted trial counsel to offer (through cross-examination of Crown witnesses) exculpatory statements made by the defendant: at [23] ff. Query whether raising an exculpatory statement made to a police officer could be referred to in cross-examining that officer.

This section was inserted by the Evidence Amendment Act 2016 to replace "the temporary" s 12A. It codifies the common law exception to the hearsay rule and incorporates the position based on the New Zealand authorities prior to the amendment. Those authorities include *R v Qiu*[68] and *R v Messenger.*[69]

In *R v Messenger,* the Court referred to the rationale for the rule:

> [8] In circumstances where the co-conspirators exception applies, statements made or acts done by one or more alleged offenders in the absence of the accused but in furtherance of the common purpose are admissible against the accused and, in the case of statements, as evidence of their truth. Whether such statements and acts are admissible is a question of law for the trial Judge, but if properly admissible, they become evidence which the jury is entitled to consider — see *R v Qiu*.
>
> …
>
> [10] The rationale for the admission of evidence of the acts or words of one member of a criminal conspiracy or joint enterprise against another member is that the joint enterprise to commit a crime is considered as implying an authority to each of the members of that enterprise to act or speak in furtherance of the common purpose on behalf of the others.

In *Kayrouz v R,*[70] the Court of Appeal repeated the principle:

> [23] It is also clear that the defendant's membership of the conspiracy cannot be proved by reference to what the conspirators have said about the accused in his absence. As this Court said in *R v Messenger*:
>
> > … the accused's membership of the conspiracy or joint enterprise cannot be shown by reference to what the conspirators have said about the accused in his or her absence. It is necessary for the Crown, having shown that there is reasonable evidence of a conspiracy or joint enterprise, to prove the accused's membership of it to the requisite standard by independent evidence, external to the statements which have been made in the absence of the accused.

Section 22A includes statements by co-defendants engaged in a joint criminal enterprise, even if the charge is not one of conspiracy.

Note that the notice provisions of s 22 apply to hearsay statements sought to be admitted pursuant to s 22A.

---

68 *R v Qiu* [2007] NZSC 51; [2008] NZLR 1

69 *R v Messenger* [2008] NZCA 13; [2011] 3 NZLR 779

70 *R v Kayrouz* [2014] NZCA 137.

The Law Commission's March 2019 report recommends extending s 22A to apply to any statement made by a defendant, whether or not it is a hearsay statement.[71] In support of that recommendation the Commission cites Palmer J in *R v Wellington*:[72]

> [68] A purposive reading of s 27 faces a stiff interpretive challenge in the wording of s 22A, which refers to "hearsay" three times and is located in a subpart of the Act entitled "Hearsay evidence". It may be possible to meet that challenge by reading the references to "hearsay" in s 22A, when applying s 27, as harking back to the old common law meaning of hearsay which would include all out-of-court co-defendants' statements.
>
> [69] However, I prefer to rely on the clear meaning of s 27. Section 27 refers to "evidence of a statement made by a defendant". It does not qualify that as referring to hearsay statements only. Read in light of its purpose and legislative history, I consider s 27 may make admissible a statement of a co-defendant if it is admissible under the legal test of s 22A irrespective of whether it is a hearsay statement. While legislative amendment would be far preferable to establish that, I would be prepared to interpret s 27 that way if necessary in the interests of justice. Given my conclusions the communications here were admitted by consent under s 9 and were not statements for the purposes of s 27, I do not need to determine that. I include my reasoning on the point in the hope it might assist further reform of the law.

---

71 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [15.21].

72 *R v Wellington* [2018] NZHC 2080.