PREVIOUS CONSISTENT AND INCONSISTENT STATEMENTS[1]

Previous consistent statements

A. Introduction

[1] Section 35(1) of the Evidence Act 2006 governs the admissibility of previous statements of a witness that are consistent with the witness's evidence. This section was amended from 8 January 2017 by the Evidence Amendment Act 2016.

> **35 Previous consistent statements rule**
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> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) applies to the statement.
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> (2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statement—
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> (a) responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
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> (b) forms an integral part of the events before the court; or
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> (c) consists of the mere fact that a complaint has been made in a criminal case.

[2] There was a long lead-up to the section and some controversy, which is summarised in the Court of Appeal judgment in *R v Barlien*.[2] In the end, the legislative approach in s 35 of the Evidence Act was to enact an exclusion rule with general exceptions.

[3] Judges and commentators had expressed concern about the removal of the recent complaint exception. The new s 35(2)(c) does not really answer those concerns.

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1 This paper is based on the 2018 seminar given by Judge Phillip Cooper.

2 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [28]–[31].

B. What is a previous statement?

[4] Section 35(1) states:

> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) applies to the statement.

[5] A "statement" is defined in s 4 as meaning:

> (a) a spoken or written **assertion** by a person of any matter; or
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> (b) non-verbal conduct of a person that is **intended** by that person as an **assertion** of any matter.

[6] The rule only applies to the out-of-court statements of a witness who gives evidence and is able to be cross-examined.[3]

[7] In the words of Elias CJ in *Hart v R*:[4]

> The general rule contained in s 35(1) is based on the experience that, in general, repetition does not add anything to the evidence given by a witness. It has long been treated as superfluous ...

[8] A "previous statement" is defined by s 4 as meaning a statement made by a witness at any time other than at the hearing at which the witness is giving evidence.

Implied assertions not included within the definition of "statement"

[9] The Court of Appeal considered the definition of a statement in *Hitchinson v R*.[5] It accepted the observations of Simon France J in *R v Holtham* that an essential characteristic of a statement is that the person **"asserting", intended** to make that statement or assert that fact or opinion.[6] The definition of statement therefore did not encompass "implied assertions".

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3 Evidence Act 2006, s 4 ("witness").
4 *Hart v R* [2010] NZSC 91.
5 *Hitchinson v R* [2008] NZCA 388 at [31]–[36].
6 *R v Holtham* [2008] 2 NZLR 758 (HC) at [44]–[45].

[10] The issue of what constitutes a statement arose in *Rongonui v R.*[7] The complainant said in court that shortly after the alleged sexual violation, she told her friends "what had happened." It was held by the majority of the Supreme Court that these words amounted to an assertion that she had been sexually violated by the defendant, and that this was inference that the jury were bound to draw.[8] This represents a change in the law from pre-Evidence Act days as expressed in *R v Turner.*[9]

Trial Practice point

Be cautious when you are considering the evidence of what a complainant did after the alleged offence to see whether indeed what on its face might be conduct is in fact an assertion, that goes beyond the mere fact of a complaint (s 35(2)(c)). Obviously a narrative of the detail of what the defendant is alleged to have done would be outside the ambit of s 35(2)(c). If a complaint gives evidence "I went to the police and made a complaint" – that would come within s 35(2)(c). But what about "I went to the police and told them what Bill had done to me." Does that go beyond s 35(2)(c)?

Res gestae

[11] The three principal categories of this sort of evidence are:

(a) spontaneous utterances accompanying an event;

(b) contemporaneous statements explanatory of recent acts; and

(c) statements concerning a present physical or mental condition.

[12] In *Rongonui v R,* the Supreme Court held that statement that formed part of the *res gestae* were outside the scope of the s 35 exclusion.

[13] The new s 35(2)(b) codifies the position:

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7 *Rongonui v R* [2010] NZSC 92.
8 At [32]–[33].
9 *R v Turner* [2007] NZCA 427.

(2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statement—…

(b) forms an integral part of the events before the court.

[14] In *Rongonui,* the majority held, however, that the statement in issue could not be regarded as a spontaneous utterance as there was a distinct, even if short, break between the assault and the witness speaking.[10]

[15] Appellate authorities indicate that an expansive approach will be taken in relation to statements which are part of the events or which immediately, and without a break, follow the events.[11]

Key points re s 35(1)

1. Previous consistent statements are not admissible unless the exceptions in s 35(2) apply.
2. A "statement" is a spoken or written assertion, or non-verbal conduct intended to be an assertion.
3. A "statement" does not include an implied assertion.
4. What was formerly recent compliant evidence in sexual cases is only admissible if it comes with the s 35(2) exception.
5. Statements forming part of the *res gestae* are admissible s 35(2)(b).

C. The s 35(2) exceptions

[16] The s 35(2) exception provides as follows:

(2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statement—

(a) responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or

(b) forms an integral part of the events before the court; or

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10 At [47].

11 See for example *R v Barlien* at [38] and [50].

(c) consists of the mere fact that a complaint has been made in a criminal case.

[17] Note the changes from the previous s 35(2) which reads as follows:

> A previous statement of a witness that is consistent with the witness's evidence is admissible to **the extent that** the statement **is necessary** to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of **recent** invention on the part of the witness.

D. Challenge to veracity or accuracy – s 35(2)(a)

[18] Section 35(2)(a) requires that before the previous consistent statement can be admitted there must first be a challenge to the witness's veracity or accuracy in a qualifying respect. It must be suggested that the witness is being untruthful or inaccurate in their evidence, based on a previous inconsistent statement or on a claim of invention.

[19] Although the new section no longer includes reference to "the extent necessary," the word "respond" is still an enquiry into probative value. This comment from Tipping J in *Hart v R* still applies:

> Whether the prior consistent statement 'responds' to the challenge to the witness's veracity or accuracy must be measured by whether its contents, viewed in the light of all the circumstances of its making, tend to rebut the claim that the witness has invented the evidence in question.

[20] Section 35(2)(a) does not operate like a floodgate, allowing, for example, unfairly prejudicial evidence in along with the evidence to respond to the challenge: see *R v G.*[12] Any admission of evidence must be subject to a s 8 analysis.

[21] In *R v G,* the complainant had written a letter to his mother complaining of the defendant's sexual assaults on him. There was material in the letter that both the Crown and the defence wanted to rely on. The appeal succeeded because the whole of the letter was admitted in evidence including highly prejudicial material including references to the defendant having sexually abused others.

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12 *R v G* [2009] NZCA 69 at [17].

> While the veracity or accuracy of evidence given in court is not necessarily enhanced because of repetition, the policy of the subsection is that in qualifying circumstances, of which the judge is the gatekeeper, it is significant that a witness has said the same thing before. The trier of fact should be aware of that fact and assess its weight in the light of all the relevant circumstances. (*R v Hart* at [37])

General attack on veracity or accuracy not sufficient

[22] A general attack on a witness's veracity or accuracy is not enough to trigger the operation of subs (2). Similarly, the mere fact a defendant has pleaded not guilty and indicated the alleged events did not happen will not, by itself, trigger s 35(2).[13] The attack must be based either on a previous inconsistent statement or on a claim of invention.

[23] In *Rongonui v R,* the majority was of the view that there may be cases in which the required challenge to the complainant's veracity or accuracy has become sufficiently clear before trial, or during counsel's opening address, to enable a Judge to rule that the complainant may give responding evidence at the start of his or her evidence-in-chief.[14] The majority stated:[15]

> Most defences in sexual cases involve the proposition either that the alleged offending did not occur at all or that the conduct involved was consensual. The very nature of such defences must, at least implicitly, involve a challenge to the complainant's veracity on the basis of invention; that is a contrivance later in time than the events in issue.

[24] Also, in *Hart* Elias CJ stated:[16]

> In many cases a challenge to the 'whole story' told by a witness may well amount to a claim of …. invention. This is particularly likely in the case of a challenge to the veracity of a witness who is a complainant.

[25] When defence counsel opens on the basis of a relevant challenge, that will trigger s 35(2) and allow the previous consistent statement to be led. In *B(CA110/10) v R* the appellant's defence was that the offending never happened.[17]

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13 *H v R* [2012] NZCA 102,
14 At [44].
15 At [43].
16 At [18].
17 *B(CA110/10) v R* [2010] NZCA 493.

This was made clear in defence counsel's opening address and during cross-examination. The Court of Appeal rejected a conclusion that s 35(2) can never be engaged until the challenge is formally made at trial. The circumstances of a particular case must be taken into account. In that case, the evidence that the complainant had told the appellant's mother and her maternal grandmother at various times about the alleged offending was admissible. The evidence complained of was contained in the evidential video interview which became the complainant's evidence-in-chief. To exclude evidence at that stage would have required substantial editing. Also, there was no objection by the experienced counsel at trial to the evidence being admitted.

[26] Where evidence of prior statements comes in under the s 35(2) exception, *Rongonui* makes it clear that there will no longer be the requirement for the complaint to have been made at the first reasonable opportunity.

[27] It may be that using a previous inconsistent statement in cross-examination does not always amount to a challenge to veracity. If the cross-examination is on the basis that the previous statement is truthful, it may not trigger s 35(2).

[28] The use of a witness's previous consistent statement is not just limited to statements made by the witness before the event is alleged to have given rise to the fabrication. A previous consistent statement that is subsequent to the event is now admissible to respond the claim of invention. There is no longer any dependence on timing issues.[18]

What does "veracity' as used in s 35(2) mean?

[29] The definition of veracity in s 37(5) now reads:

> (5) For the purposes of this Act, ***veracity*** means the disposition of a person to refrain from lying.

[18] *Hart v R* at [53] and [63] Tipping J.

[30] This relates to a witness's disposition for lying generally and not to the truthfulness of the evidence that has been given in the particular case (*Hannigan v R*).[19]

[31] However, for the purposes of s 35(2), the authorities make it clear that challenges to a witness's truthfulness, or "probative credibility" are sufficient to engage s 35(2) and as such the limited definition of veracity ("moral credibility") cannot be the meaning of veracity as used in s 35(2)(b) (see for example *PM v R*).[20]

Trial Practice Point

Although the new section no longer includes reference to "the extent necessary" s 35(2) it is important to bear in mind that judicial control must always be exercised over the type and number of witness's previous consistent statements that can be admitted under s 35, taking into account s 8 balancing factors and the need to respond to the challenge that has triggered s 35(2). A Judge will also have to consider whether whole or part of a previous consistent statement is admissible. *Moorhouse v R* [2016] NZCA 572 is a recent case where there were a large number of repetitive prior consistent statements, seen by the Court of Appeal as giving rise to unfairness particularly where there was no warning as to repetition.

Key points re s 35(2)

1. There must be a challenge to the witness's veracity or accuracy.
2. This challenge must be based on an inconsistent statement or on a claim of invention.
3. The prior consistent statement is admitted to respond to the challenge.
4. The timing of the prior statement is not as important as in the past. The focus is on the context. The requirements of necessity and response do not depend rigidly on timing issues.
5. A statement once admitted is admitted for all purposes. It can be used as evidence of the truth of its contents and not merely limited to issues of credibility.
6. As always, a trial direction must reflect the issues in the case.

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19 *Hannigan v R* [2013] NZSC 41.
20 *PM v R* [2014] NZCA 522.

E. Has a s 35(2) decision to admit a prior consistent statement become the norm?

[32] In *H(CA671/11) v R,*[21] the Court of Appeal was concerned the ramifications of Tipping J's comment in *Rongonui* that:[22]

> There may be cases in which the required challenge to the complainant's veracity or accuracy has become apparent in a sufficiently clear way before trial or during counsel's opening addresses to enable the Judge to rule that the complainant may give responding evidence as part of her evidence-in-chief.

[33] The trial Judge considered that a "bare denial" of guilt, simply by entering a not guilty plea, was sufficient to engage the situation envisaged by Tipping J.[23] However the Court of Appeal observed:[24]

> We recognise that the practical consequence of the *Hart* and *Rongonui* decisions is that it will be very difficult to cross-examine a complainant in a way that does not amount to a claim of recent invention. This does depend, of course, on the defence. If the defence is, for example, mistaken identity it is probable s 35(2) will not come into play. In most cases s 35(2) will be triggered. But knowing that will happen is quite different from saying that the response thereby authorised by s 35(2) can always occur prior to the triggering events happening. The Supreme Court in *Rongonui* recognised that the implications of its approach were that prior consistent statements would usually emerge in re-examination, and that there would often be further cross-examination. It noted it was an "untidy process", and that the practical implications of the provision appear to have been overlooked. This discussion is very much accepting that trial awkwardness will be inevitable; it reinforces the implication from the earlier passage that leading the statements as part of evidence-in-chief will not be the norm.

[34] The concept of a common practice of anticipating a s 35(2) decision was consequently strongly rejected by the Court. This is softened somewhat by the amendment to s 35(2) which now refers to "a challenge that **will be** or has been made."

[35] However, there would still need to be some indication in advance that a challenge that a challenge will be made – commonly by a defendant's out of court statement, defence counsel's opening statement, or by agreement of counsel.

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21 *H (CA671/11) v R* [2012] NZCA 102.
22 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [44].
23 *H (CA671/11)* at [2].
24 At [13].

Trial Practice Point

That "untidy process" can often be avoided by a discussion with counsel before the trial gets underway. Defence counsel will often make it clear that the challenge is to the witness's veracity and have no difficulty with the evidence of the prior statement coming in evidence in chief. In some cases, the defence want the statement in for defence's own reasons (for example, the prior statement also has inconsistencies or omissions). It is important to record the discussion with counsel in a brief bench note or minute.

F. The s 35(3) exception – repealed – now moved to s 90(7)

[36] Section 90(7) is in exactly the same words as the old s 35(3):

> A previous statement of a witness that is consistent with the witness's evidence is admissible if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
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> (b) the statement provides the court with information that the witness is unable to recall.

[37] Section 90(5) governs the actual process of witnesses refreshing their memory while giving evidence and s 90(7) governs the issue of admissibility of the relevant document.

[38] Section 90(7) will most likely be used in situations where a witness is referred to a previous statement for the purposes of refreshing the witness's memory while giving evidence under s 90, but remains unable to recall the information contained in that statement. If the circumstances relating to the statement nevertheless provide reasonable assurance that it is reliable, then the previous statement may be admitted under s 90(7). This is consistent with the common law position as represented in cases such as *R v Naidanovici.*[25]

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[25] *R v Naidanovici* [1962] NZLR 334.

[39] Section 90(7) could also apply to a case where a witness makes no attempt to refresh their memory but simply testifies that they cannot recall the information contained in the statement.

[40] Theoretically s 90(7) could operate to admit a reliable previous statement, even though s 90(5) would prevent the witness refreshing his or her memory by reference to the statement because it did not meet the s 90(5) freshness requirement.[26] In light of the majority of the Supreme Court equating freshness with reliability in *Rongonui*,[27] it is perhaps unlikely a Court would regard a statement not satisfying the freshness/reliability requirement of s 90(5) but nonetheless satisfying the reliability requirement of s 90(7), particularly as it has been suggested Courts will give greater scrutiny to documents a party is actually seeking to admit under s 90(7) rather than just refer to for the purposes of refreshing memory under s 90(5).[28]

[41] Of course the s 35 prohibition will not be engaged where a witness can give no useful evidence at all, through inability to recall or by reason of hostility, but has made a previous statement. In those circumstances, the previous statement will not be consistent with the witness' evidence, so the s 35 prohibition will not apply.

Section 90 and the meaning of "fresh"

[42] The prohibition in s 35 is to be contrasted with s 90 which sets out a procedure for using a previous statement to refresh a witness's memory. Section 90 allows a document (not otherwise excluded under ss 29 or 30) to be consulted by a witness to refresh his or her memory. If a document is to be used for that purpose, under s 90(5) it must have been made or adopted at a time when the witness's memory was fresh, and the Judge must grant leave for the memory to be refreshed.

[43] The Court of Appeal discussed the meaning of the word "fresh" in the context of s 90 in *R v Rongonui*. The Court pointed out that while contemporaneity will, more

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26 See for example *R v Field (Ruling No 7)* HC Auckland CRI-2007-092-18132, 12 May 2009 discussed in Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleafed, Brookers) at [EA35.16](3).

27 At [52].

28 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 79–80.

often than not, be the touchstone for determining freshness, that should not be the exclusive focus in considering the application of s 90. Such focus would leave aside the possibility that a document made at some later time might still, as a matter of fact, have been made or adopted when, because of the significance of the event or because there has been a continuing need to refer to what had happened for other reasons, the witness's memory of events was "fresh".

[44] In the Supreme Court, the majority in *Rongonui v R* also looked at the issue of freshness. Tipping J stated that "the issue is the freshness of the witness's memory of the events in question at the time of the making or adoption of the document, not the contemporaneity of the document with those events".[29]

[45] It is clear from *R v Rongonui* that the closer in time to those events the document is made, the more likely it is that the memory of the witness will then have been fresh. Freshness was adopted as the touchstone for leave on the basis that freshness of memory can reasonably be equated with reliability of memory. The fresher the memory at the time the document is made or adopted, the more reliable the memory of the witness is likely to have been.

[46] An important factor is the relative significance to the witness of the events described in the document. According to the majority in *R v Rongonui,* the more important the subject-matter to the witness and the more its inherent character is likely to etch itself into the witness's memory, the longer the witness's memory of the subject-matter is likely to remain fresh.[30] Another factor will obviously be how long has elapsed between the events recorded and their recording.

[47] Also relevant will be such evidence as the witness may give concerning the freshness of their memory. A simple conclusory statement that the witness's memory was fresh may not carry much weight unless it is accompanied by convincing reasons for that statement. Of further moment may well be how detailed and lucid the recollection was as recorded in the document to which the witness wishes to resort.

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29 At [52].
30 At [53].

This is not an exhaustive list, as other features may have significance in particular cases.

Key points re s 90(7)

1. Section 90(7) provides for admissibility of prior (consistent) statement where: the statement includes material the witness is unable to recall, and the circumstances relating to the statement provide reasonable assurance that it is reliable.

2. Section 90(5) provides for the process when a witness may consult a prior statement to refresh memory.

3. The document must be made or adopted when witness's memory "fresh".

4. Freshness of memory at the time of making the statement is what is important – not contemporaneity with the events described in the document.

G. Once admitted, previous statement is evidence of the truth of its contents

[48] It is important to note that under the Evidence Act, a witness's previous statement can be used to prove the truth of its contents and not just be used for the purpose of bolstering credibility. This runs contrary to the old recent complaint rule, where it could only be used for credibility purposes. The rule that the recipient of the complaint has to give evidence is gone.

[49] There was a question mark as to whether some aspects of both the majority and minority decisions in *Guy v R* seemed to adopt a more narrow view of the scope and nature of the s 35(2) exception than the earlier cases.[31] For example, Elias CJ stated at [48] that directions to the jury should point out that the previous statement was not additional independent evidence "but simply evidence which might assist [the jury] determining a challenge to her veracity", as compared to the view expressed in *Hart* that such previous statements are evidence of their truth. In *Gillan v R*,[32] the Court of Appeal cited the statements made at para [48] in *Guy* when considering the scope of directions in that case.

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31 *Guy v R* [2014] NZSC 165.
32 *Gillan v R* [2015] NZCA 85 at [33].

[50] However, in *Penman v R,*[33] the Court of Appeal referred to a number of previous cases, including *Gillan, Hart, Singh,*[34] and *Guy*. French J (delivering the judgment of French J, Heath J, and Mallon J) said:

> Secondly, Mr Turkington's argument and the directions he suggested the Judge should have given appeared (at times) to rest on the erroneous assumption that evidence of a previous consistent statement admitted under s 35 only goes to credibility. It is, however, now well-established following the Supreme Court decisions of *Hart v R* and *Singh v R* that once admitted under s 35 a previous consistent statement is evidence of the truth of its contents. Contrary to a submission made by Mr Turkington, we do not consider the judgment of the Chief Justice in *Guy* is to be interpreted as departing from that well-established principle. If any change had been intended, it would have been expressly acknowledged and reasons given.
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> As also noted by this Court in *Gillan v R*, the passages in *Guy* about the direction that would have been necessary in that case should not be read as prescribing a standard direction for all previous consistent statement evidence. Such evidence can vary widely and the direction to be given in a particular case must reflect the issues in the case ….

[51] Another case where the Court of Appeal reinforced that once admitted a previous consistent statement is admissible for all purposes is *Carseldine v R.*[35]

H. The importance of judicial warnings

[52] The Court of Appeal have made it clear that previous consistent statement evidence should normally be accompanied by a jury direction:[36]

> [61] Where a complainant's previous consistent statements have been admitted, it will often be necessary for the judge to direct the jury that the previous consistent statements are not additional evidence independent of the complainant and corroborative of the evidence given at trial, and to warn the jury that repetition does not of itself make something true, because an untruthful person might have repeated a lie. A judge should consider whether such direction is needed. Generally it will assist a jury, but there is no absolute requirement for such direction, and failure to give a repetition direction will not necessarily be fatal. Where the evidence that has been admitted under s 35 is not capable of affecting the result, a failure to give the appropriate direction will not result in a miscarriage of justice.

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33 *Penman v R* [2015] NZCA 364.
34 *Singh v R* [2010] NZSC 161.
35 *Carseldine v R* [2016] NZCA 573.
36 *W v R* [2017] NZCA 259.

[53] Repetition warnings are more important where there are numerous previous consistent statements, or multiple complainants whose testimony already has the effect of bolstering each other's credibility. *Moorhouse v R* concerned four incidents of sexual offending against four young girls, who all laid complaints many years later.[37] The Court of Appeal considered the trial judge had erred in not including a warning emphasising to the jury that the statements were included to rebut the defence proposition that the allegations were recent inventions, rather than to bolster the complainant's credibility. The cumulative effect of some 26 previous consistent statements, as well as the presence of four complainants giving testimony, meant that the trial miscarried.

[54] A direction must reflect the issues in the case. Generally, it will prudent to include the purpose for which the evidence is admitted; that the prior consistent statement is evidence that what is said to have happened did in fact happen; but that it is not additional evidence independent of the witness; that repetition of itself does not necessarily make something true and that this prior consistent statement is simply one piece of evidence the jury can take into account in deciding what actually did happen.

[55] A number of appellate cases stress the importance of trial Judges recording accurately in their rulings their understanding of the purpose of the cross-examination. As noted by the Court of Appeal in *R v Hart* [2009] NZCA 276 at [53], the view of the trial Judge on such topics is particularly deserving of weight where trial counsel's approach to the suggestion of recent invention or reconstruction has been more oblique than direct.

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37 *Moorhouse v R* [2017] NZCA 572.

Prior inconsistent statements

Introduction

[56] Prior to the enactment of the Evidence Act 2006, a witness's prior inconsistent statement was hearsay evidence, and therefore only admissible as evidence of its content if its content was expressly adopted as true by the witness in the witness box. Under the Evidence Act a previous inconsistent statement is not hearsay evidence because of the definition of hearsay evidence. If the previous statement is not excluded by any of the exclusionary principles in the Act, then its admissibility is to be determined under ss 7 and 8.[38]

[57] Section 96 regulates cross-examination on previous statements of witnesses. The provisions contained in s 96 are largely procedural, and do not affect the admissibility of the statement.

Trial Practice Point

Since previous inconsistent statements are no longer hearsay, different directions to the jury about their use are now required if the previous inconsistent statement is put to a witness during the course of cross-examination. The prior inconsistent statement, if not accepted by the witness as true, is no longer relevant only in the assessment of the veracity and reliability of that witness. Even if not accepted by the witness, the statement is evidence of the truth of its contents. It can be part of a general factual mix for the jury to consider.

The evidence of hostile witnesses

[58] Prior to the Act, the rule was that a party could not impeach the credibility of the party's own witness by general evidence of bad character but could contradict the witness by other evidence.[39]

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38 *R v Davidson* [2008] NZCA 410 at [69].
39 Evidence Act 1908, s 9.

[59] Section 37(4)(b) preserves the right of a party to offer evidence as to the facts in issue contrary to the evidence of the party's witness. The general rule that a party may not offer evidence to challenge that party's witness's veracity is also maintained. But s 37(4)(a) adds a proviso to this providing that a party who calls a witness may not offer evidence to challenge that witness's veracity *unless* the Judge determines the witness to be hostile.

[60] Section 37(4)(a) is to be read together with s 94. Section 94 provides that the party who calls a witness may cross-examine the witness if the Judge determines that the witness is hostile and permits cross-examination, but only to the extent permitted by the Judge.

Definition of hostile witness

[61] Hostile witness is defined in s 4 of the Evidence Act:[40]

> **Hostile**, in relation to a witness, means that the witness–
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> (a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or
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> (b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or
>
> (c) refuses to answer questions or deliberately withholds evidence.

[62] Although a common basis for a declaration of hostility will be inconsistencies between a witness's evidence, and a previous statement, more is required. The definition is "gives evidence that is inconsistent with a statement made by that witness *in a manner* that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness." In *Penney v Police,*[41] Priestley J discussed the definition. He said that when the hostility arose from an alleged inconsistency, once the inconsistency was established the focus then shifted to the "manner" in which the evidence was given. Although "manner" clearly covered a witness's demeanour, it

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40 As to ability to call witness known to be hostile see *R v Vagaia* [2008] 2 NZLR 516 (HC).

41 *Penney v New Zealand Police* HC Auckland CRI-2008-404-301, 4 December 2008 at [32].

had a wider ambit. He said that the nature and frequency of the inconsistencies and their centrality to a party's case would be a consideration. In that case, Priestley J described the witness's evidence as spectacularly inconsistent with her previous statement in all its facets, and upheld the lower court Judge's grant of leave for cross-examination.

[63] The pre-Evidence Act rule against calling a witness known to be likely to be hostile, no longer applies. In *Morgan v R*[42] it was concluded that the primary rationale for the rule described in *R v O'Brien*[43] that the Crown should not call a witness if the witness is known to be intractably hostile, or to be likely to give false evidence no longer existed by reason of the reshaping of the law in relation to hearsay evidence. Under the Act, as previous statements of a witness are no longer hearsay evidence, the rule had no foundation in principle. In *Kerr v R*, concerning witnesses who would inevitably be declared hostile, the Court of Appeal remarked that "the policy behind admitting previous inconsistent statements in relation to hostile witnesses is designed for situations such as these."[44]

[64] The majority in *Morgan* emphasised that trial judges should be particularly vigilant in the case of a hostile witness to ensure that the evidence of the witness does not require exclusion under s 8.[45] Wilson J, writing for the majority, stated:[46]

> [40] ... the judge must be satisfied that leading evidence based on the statement, or its production, will not have an unfairly prejudicial effect on the proceeding. Issues of fairness may arise when a witness is expected to be hostile and is called for the purpose of getting the unsworn statement before the jury. Unfairness may be present or exacerbated if the hostility of the witness results in the accused being unable sensibly to cross-examine on the statement.
>
> [41] Parliament has legislated to make previous statements of a hostile witness admissible as proof of their contents without adoption, presumably on the basis that the witness will be subject to cross-examination ... The ultimate question will always be whether the evidence is unfairly prejudicial in all the particular circumstances of the case, of which opportunity for realistic cross-examination will always be important.

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42 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [14].
43 *R v O'Brien* [2001] 2 NZLR 145 (CA) at [21].
44 *Kerr v R* [2017] NZCA 498 at [23].
45 At [40].
46 Footnotes omitted.

> [42] In some cases it may be necessary for the judge to hear what the witness says and how he or she reacts to cross-examination by counsel for the accused, in the absence of the jury ... [J]udges should not hesitate to hear submissions and, if appropriate, evidence in the absence of the jury when dealing with hostility and related exclusion issues.

[65] The Supreme Court stated in *Singh v R*:[47]

> Much has changed with the Evidence Act 2006. Spousal immunity has been abolished. Prior out-of-court statements by a witness now have independent evidential value. This means that the approach taken in *O'Brien* no longer applies, except perhaps in much attenuated form. The consequence is that a prosecutor in a domestic violence case is now far less dependent on the co-operation of the complainant. We are satisfied that this represents a conscious legislative policy decision based on the recommendations of the Law Commission.

[66] The Court of Appeal in *Kerr* considered a submission from the defence that because three of the Crown's witnesses had refused to answer questions in cross-examination, they were in effect unavailable for cross-examination so were not "witnesses" in the s 4 definition. The Court dismissed this submission:[48]

> [27] With respect, we are of the view that [the witnesses] were in fact witnesses in the trial. Each of them entered the witness box and was sworn or affirmed. Each of them was asked a number of questions, both by the prosecution and the defence, and each of them answered some questions. They were then "able to be cross-examined in a proceeding", but were equally hostile to both the prosecution and defence. There is no substantive requirement in the definition concerning the content of a witness' answers or the effectiveness of such cross-examination.

[67] The Court nonetheless acknowledged the "question of whether the legislative policy behind relaxation of the definition of hearsay was met in circumstances where effective cross-examination was not possible is highly relevant to the question of prejudice in the admission of the statement."[49]

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47 *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322 at [23].
48 *Kerr v R* [2017] NZCA 498.
49 At [28].

R v Hannigan and the relationship between ss 37(4); 89(1)(c); and 94

> **37 Veracity rules:**
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> ...
>
> (4) A party who calls a witness—
>
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
>
> **89 Leading questions in examination in chief and re-examination**
>
> (1) In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless—
>
> ...
>
> (c) the Judge, in exercise of the Judge's discretion, allows the question.
>
> (2) Subsection (1) does not prevent a Judge, if permitted by rules of court, from allowing a written statement or report of a witness to be tendered or treated as the evidence in chief of that person.
>
> **94 Cross-examination by party of own witness**
>
> In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

[68] In *R v Hannigan* the defendant's wife was a Crown witness. She gave evidence in cross-examination inconsistent with her answers in evidence in chief and inconsistent with a statement made to the police. At the trial, the prosecution had been permitted to put the earlier statement to her without a declaration of hostility under s 94. Although the inconsistencies were stark, there was nothing in her evidence suggestive of hostility.

[69] The majority said at [90] and [91]:

> [90] At this point, it would have been premature for the Judge to have made, and thus for counsel to have sought, a determination of hostility. Mrs Hannigan had not otherwise said anything suggestive of hostility and although the inconsistency was stark, it was conceivable that she would be able to explain it if given a fair opportunity. Such explanation was likely to involve her saying

> that she had been mistaken either in what she had told the police or in her answers in cross-examination.
>
> [91] All of this means that when it came to re-examination, there were three options which were practically open to the prosecutor:
>
> (a) He could have invited Mrs Hannigan to refresh her memory from her prior statement. This would not have necessitated the use of leading questions but would have required the leave of the Judge under s 90(5). With the assistance of her statement, she may have reverted to the account which she had given to the police. Alternatively she may have sought to adhere to the account she had given in cross-examination. A repudiation of the 26 June statement (depending on the way it was expressed) may have set the scene for a determination of hostility.
>
> (b) He could, with the leave of the Judge given under s 89(1)(c), address leading questions to Mrs Hannigan as to the statement. This is the course he adopted.
>
> (c) He could have required the 26 June statement to be produced as an exhibit. This could have been effected through either Mrs Hannigan or the interviewing police officer.
>
> These options are not mutually exclusive. The availability of option (c), which did not require the leave of the Judge, was highly relevant to any decisions which the Judge had to make in relation to options (a) and (b)".

[70] The majority held that the questioning had been permitted by the Judge under s 89(1)(c). As it was not evidence challenging veracity under s 37(4), no declaration of hostility was required. Elias CJ dissented, holding that the evidence was a challenge to the witness' veracity despite the absence of hostile questions, and there should have been a declaration of hostility.

[71] The majority decision now makes it possible for the prosecution, if faced with a complainant's prior inconsistent statement, to obtain permission to put it to the complainant even if there has been no indication of hostility by the witness towards the prosecution.

[72] Two questions arose for the Supreme Court's decision: first, was the line of questioning improper given the lack of a declaration of hostility allowing the Crown to cross-examine its own witness? And secondly, was the line of questioning a challenge to the witness' veracity that had not passed the veracity sections of the Act? William Young J, writing for the majority of the Court, answered both questions in the negative.

[73] Answering the first question required consideration of the interaction between ss 89 and 94 of the Act. On the one hand s 89(1)(c) allows a Judge, in his or her discretion, to permit leading questions to be put to a party's own witness. On the other hand, s 94 allows a Judge, also in his or her discretion, to permit cross-examination of a party's own witness following a declaration of hostility. The majority held:[50]

> We see resort to s 89(1)(c) as appropriate where counsel wishes to explore (for instance, by seeking an explanation for) ambiguities in the evidence of a witness or apparent inconsistencies between the evidence of that witness and other evidence which is, or will be, before the court. We also see it as appropriate where the point of the exercise is to ensure that admissible and relevant evidence is placed before the court. In contrast, questioning which is primarily addressed to the breaking down (or impeachment) of the evidence of a witness might properly be seen as requiring a prior determination of hostility. The distinction between these two categories of questions is not hard and fast and its application in particular cases will call for the exercise of judgement. We have no doubt, however, that in the present case, the questions were in the former and not the latter category and that the Judge was right to allow them without a prior determination of hostility.

[74] On the second question, the majority held that the "clarification" of Mrs Hannigan's evidence via the prosecution's questioning did not amount to the prosecution attempting to adduce evidence demonstrating a disposition of Mrs Hannigan to tell lies. As a result, the strictures of the veracity rules had no application. However, the Court went on to consider what the result would have been had the veracity rules been engaged.

[75] The majority's consideration focused on s 37(4), which provides:

> (4) A party who calls a witness—
>
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness."

[76] The question for the Court was what should occur where the evidence involves both a challenge to a witness's veracity *and* is relevant to facts in issue, contrary to the witness's account. The majority held that the section should now be read as:

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50 At [107].

(4) A party who calls a witness—

(a) may not lead evidence which challenges that witness's veracity, unless the Judge determines the witness to be hostile; but

(b) this restriction does not apply to evidence which is offered as to the facts in issue contrary to the evidence of that witness.

[77] The majority held that "the exclusionary operation of the veracity rules is confined to evidence which is not admissible independently of those rules". The rules were accordingly "not applicable to Mrs Hannigan's police statement which was directly relevant to the facts in issue".[51]

[78] Following this judgment, and in line with commentary in *Mahoney on Evidence*, the Law Commission have recommended that s 37(3)(c), that evidence may be veracity evidence because it exposes previous inconsistent statements, be repealed, because it is now redundant. This is because a witness's previous inconsistent statement will almost always have some relevance to the facts in issue, and consequently virtually all admissible previous inconsistent statements will fall outside the scope of the veracity rules.[52]

[79] *R v Hannigan* is a reminder of the importance of the discretion in s 89(1)(c). It provides an alternative way for a Judge to deal with a Crown witness if the evidence of that witness is different from an earlier statement. Counsel who called the witness can be given permission to put the prior statement in a neutral way. However, there is a tension that can arise from not declaring such a witness hostile, which can be seen from the minority judgment of Elias CJ. A Crown prosecutor that relies on a prior inconsistent statement from a complainant may be tempted, as happened in *R v Hannigan*, to either expressly or implicitly challenge the partiality of a reluctant complainant. It is difficult to challenge the testimony of your own witness with a prior inconsistent statement, without at least implying hostility.

[80] The facts of *R v Hannigan* were unusual in that the issue only arose in re-examination, rather than evidence-in-chief where it would normally arise and the

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51 At [119].

52 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [14.15].

defence still has a chance to cross-examine. Judges may still prefer to follow the declaration of hostility process in such circumstances.

[81] Finally, it is relevant to note that in *R v Hannigan* the majority observed that a voir dire was not likely to be appropriate where a witness's evidence departs from a previous statement and a determination of hostility is under consideration. In such a situation, which will normally occur in evidence-in-chief, a prosecutor should be able to explore the issue in a preliminary way with open questions. This can include an invitation to the witness to refresh his or her memory from the statement assuming that s 90(5) can be invoked. Sometimes the witness will give evidence in accordance with the prior statement. In other instances, the way in which the witness responds may enable the Judge to make a determination of hostility. It is better for the jury to see the evidence unfold during the process and make of it what it will.[53]

[82] Some cases which illustrate the way in which *Hannigan* has been applied are: *Wilson v R*, [54] *McLaughlin v R*,[55] and *Tafunaina v Police.*[56]

How to approach previous inconsistent statements

[83] Kos J (as he then was) explained in *Richmond v Police* how fact-finders should approach cases where a witness has made previous inconsistent statements:[57]

> [27] It is a not infrequent experience in summary trials that a complainant resiles from his or her original statement. That original statement may be evidence-in-chief (introduced in the form of an evidential interview), it may be introduced through another witness (such as a police officer) or it may be put to the tergiversating witness as a previous inconsistent statement. Sometimes, but certainly not always, the complainant may be hostile to the prosecution.
>
> [28] It remains a question for the fact finder (whether a jury, or in the summary context, a Judge) whether, in the face of this internal conflict, any part of the evidence given by the complainant remains credible and reliable. The fact of conflict, just as with inconsistencies, does not prevent a jury or Judge from relying on part, and rejecting the rest. The weight to be given to a witness's evidence, and to the warring parts of a witness's evidence, is essentially a question for the fact finder. Having performed that weighing and screening function, then so long as there is sufficient evidence available on which the fact

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53 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [108]–[109].
54 *Wilson v R* [2015] NZHC 2653.
55 *McLaughlin v R* [2014] NZCA 547.
56 *Tafunaina v Police* [2015] NZHC 2144.
57 *Richmond v Police* [2013] NZHC 356.

finder could reasonably be satisfied to the required standard as to guilt, then there is no basis in law to reverse that finding.

Key points re prior inconsistent statements

1. A prior inconsistent statement is admissible subject to ss 7 and 8 of the Evidence Act 2006.

2. If the party calling the witness wishes to challenge that witness's veracity or cross examine the witness based on the prior inconsistent statement a declaration of hostility is required.

3. If the intention is not to challenge the witness's veracity or to break down the witness's evidence, but merely to seek clarification or an explanation for inconsistencies or ambiguities a declaration of hostility is not required.

4. Section 89(1)(c) gives the Judge a discretion to allow leading questions to be put to a party's own witness and is appropriate in the circumstances of 3 above.

5. A statement once admitted is admitted for all purposes. It can be used as evidence of the truth of its contents and not merely limited to issues of credibility.