The following was an answer to the Semester 2, 2009 Law of Evidence Mid-Semester Assignment. It received a mark of 85.

Lucinda's Testimony

Can Lucinda be called to testify?

The existence of an oral contract between Oscar and James is at issue here. Lucinda's recollection of the conversation between the men is relevant to proving its existence. Her testimony would be of out-of-court assertions – the express verbal assertions of Oscar and James. While this raises questions of hearsay, these assertions relate to the very question in issue, and the truth of these assertions is not being relied upon. As such, the statements have an original use, and are not hearsay. Thus Lucinda could be called to testify about the conversation.

If unwilling to testify, can she be compelled to do so?

At common law, any competent witness is a compellable witness. As there is nothing to question Lucinda's competence, she could be compelled to testify. *Evidence Act 1929* (SA) s 21 provides an exemption for 'close relatives' in criminal cases, but no such exemption exists in civil cases such as this.

Can Lucinda, if compelled to testify, recall the exact words of the conversation by referring in court to a memorandum of the conversation that she dictated to Oscar that evening and had him read back to her to ensure that he had taken it down correctly?

At common law, a witness may only revive their memory from a document with the permission of the court in a *voir dire*. This permission will only be granted where the witness has exhausted their memory of the events in question,[1] and where the document was made by or adopted by the witness contemporaneously, whilst the events were still fresh in their mind.[2]

On the first requirement, it appears that the witness has recollection of the events, just not the exact wording. As such, it may be inappropriate to have the witness refresh her memory before having recounted everything she could from memory alone.

[1] *Hetherington v Brooks* [1963] SASR 321.
[2] *R v Van Beelen* (1972) 6 SASR 534.

Turning to the second requirement, documents do not necessarily need to be written by the witness provided they are affirmed by them at time while the events are still fresh in the witness's mind. Generally this is after the witness has personally read the statement. However, in the case of *R v Van Beelen*[3] a medical expert dictated notes to his secretary, who would read them back to him. He was allowed to refresh from these notes. This sets a strong South Australian precedent for allowing Lucinda to refresh from the notes, but there is a key distinguishing factor here, in that the person who took the notes was a party to both this case and the conversation the notes relate to. This potential for conflict or manipulation could be a key factor in the exercise of judicial discretion.

It is important to note that any document can be used only as an *aide memoir*, and not something to be read to the court verbatim, unless the document cannot trigger any accurate recollection.[4] If this does trigger Lucinda to recall something, her testimony stemming from it is as if she had recalled it independently, and would be an original use of the out-of-court assertions, and not hearsay. However, if Lucinda reads anything verbatim, it arguably has the same character it would if read directly from the document by the court. If the notes were tendered, the statements contained would be written out-of-court assertions, the truth of which would be relied upon.[5] As such, those assertions would be hearsay, and Lucinda reading statements directly from the notes would arguably have this same hearsay character.

Olivia's Testimony

Can Olivia be called to testify?

Olivia's conversation with Oscar could prove relevant in two different ways. It may be relevant to proving that Oscar was assisting his family members, and also to proving that Oscar knew it would threaten funding.

Olivia's (out-of-court) statement to Oscar expressly stated that he had 'arrangements' with his relatives. For this to be relevant to proving that such arrangements existed, we are relying on the fact that this statement is true. As such, this would be a hearsay

[3] (1972) 6 SASR 534.
[4] *Hetherington v Brooks* [1963] SASR 321.
[5] True in the sense that they were an accurate record.

use of this out-of-court statement, and would generally be inadmissible. Coupled with Oscar's reaction though, it may be capable of being an admission, and thus being admissible as an exception to the hearsay rule. Reactions to statements made by someone else can constitute an admission by a party at common law.[6] Given Oscar's nonchalant response to Olivia's almost accusatorial statement, an inference of admission would be open. An informal admission like this would not be binding on Oscar, but could be admitted as evidence in exception to the hearsay rule.

The statement made by Olivia also served to put Oscar on notice that these 'arrangements' could threaten AHAI funding, if he was not already aware of the fact. Such knowledge is an element of the claim against Oscar, and is clearly relevant. The truth of the facts in Olivia's assertions is irrelevant to this point. It is merely that they were said such that it can be shown that Oscar had knowledge of them, and so it may not be hearsay. Oscar's acknowledgement may also lead to an inference that he is aware of these issues, and following *Hughes v National Trustees*[7] contemporaneous statements of state of mind are not hearsay.

If the statement were found to be hearsay with respect to knowledge, it may be that it is admissible in exception to the hearsay rule as an admission, following the same logic as in the statement's other potential use.

James' Documents

The two documents are together relevant to showing that assistance to family members was against Ministerial policy, and therefore against AHAI policy. They also are relevant to showing that grants could be withdrawn by the Minister at any time. They establish these things via express written assertions. It is arguable though that we are not relying upon the truth of these assertions – they do not purport to contain facts, rather they set out terms, and may be originally relevant in the same manner as a written contract. Furthermore, those terms that have been reduced into writing represent the best evidence of the policies, rather than having a witness testify to them. There may be an issue, however, with the fact that these are copies and not original documents, which may not meet the best evidence requirement.

---

[6] Andrew Ligertwood, *Australian Evidence* (4th ed, 2004) [8.98].
[7] *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134.

If these documents are considered hearsay, then there may be grounds for admitting both documents in exception to the hearsay rule as apparently genuine documents under *Evidence Act 1929* (SA) s 45B. This would avoid the issues with photocopies, as these are explicitly allowed by s 45B(6)(b). There may be issues, however, of whether both documents relate to matters that were of the personal knowledge of the person by whom the documents were prepared, in s 45B(2). However that subsection also allows for the matter to be in the knowledge of the person at whose discretion the document was prepared, and it would be given that the AHAI board and the Minister would have such knowledge.

Telephone Calls

Are any of these calls relevant and admissible?

Anonymous Calls

The series of anonymous calls could be relevant to showing both that money was being spent on the relatives, and also that James was aware that this might threaten funding.

To prove that Oscar was assisting his relatives, we would be relying on express verbal out-of-court assertions. Moreover, we would be relying on the truth of those assertions. This would be a hearsay use of the evidence, and generally inadmissible. This is to be distinguished from *McGregor v Stokes*,[8] where the truth of the callers' assertions was irrelevant, it was merely relevant that they were calling. Here though, to prove that money was being spent from these calls relies on the truth of the allegations in the calls, and is hearsay.

The fact that there were calls complaining about arrangements with relatives might be originally relevant to proving that Oscar was aware his arrangements threatened AHAI funding – an element of one of the alleged breaches. The truth of the allegations would not be relied upon, merely the fact that they were made. It is possible though that they would only be relevant when combined with further evidence to show that Oscar was personally aware of these calls. If this were so, the calls may be admissible for proving this point. Note though that in the absence of

[8] [1952] VLR 347.

evidence that independently proves that relatives were getting funding, it may be more prejudicial than probative to admit this evidence. To have evidence of a large number of allegations before the court without any independent proof them may overrule the limited use this evidence has in proving the knowledge component.

Oscar's brother's call

Oscar's brother's identification on the telephone may fall outside the hearsay rule, as *Pollitt*[9] shows statements of identification over the telephone may be admitted in exception to the hearsay rule. However there may be question as to the reliability of this identification. Having someone identify himself as a nameless brother of the Chairman, calling on his behalf, may be too unreliable to admit without further inquiry.

The potential relevance of the call is to proving the existence of arrangements for relatives. Not only here are we relying on the truth of the assertion that he is 'looking after' the relatives, we are relying on the accuracy of the caller's recollection of Oscar's statement. Hence this would be hearsay.

There is question as to whether this could be an admission, admissible as an exception to hearsay. Generally though, admissions are only admissible against the party who made the admission. To admit this as an admission would probably require independent evidence to prove that Oscar's brother was acting with Oscar's authority, which seems unlikely.

Collette's Testimony

Should this objection be upheld by the trial judge?

Collette's testimony is potentially relevant to proving two things – that Oscar knew he was not to assist his relatives, and that Oscar did not assist his relatives.

Oscar supposedly gave an express verbal out-of-court assertion that he was not allowed to assist relatives. This is relevant to the questions of his knowledge that arise in this case. The truth of the assertions is not relied upon for this purpose – it matters not to questions of knowledge whether Oscar's statement that he cannot lend

[9] *Pollitt v R* (1992) 174 CLR 558.

to family is true. It only matters for this purpose that he knew it. As such this can be considered an original use, not hearsay. This also accords with the decision in *Hughes v National Trustees*,[10] discussed above.

An inference could also be drawn from Oscar's statements and refusal to help Collette that he did not assist family members. He said that he had already 'turn[ed] down others in the family,' but this statement is only relevant to proving he had not assisted others if the statement is true. As we are relying on the truth of this out-of-court assertion, it is hearsay, and not admissible.

Oscar's refusal to help Collette could lead to an inference that he has similarly denied other requests from his family. If we are basing this inference on his statement though, we are relying on the truth of his statement. If treat this as conduct though, we might avoid the hearsay rule.[11] Rather than proving that he did not assist family via his statements out-of-court, it could be better to just have Collette testify that he refused to help her, and did not help her, and this would just be conduct that would not be excluded by the hearsay rule.

Can Collette be cross-examined to suggest she is not a relative of Oscar? If Collette denies these allegations in cross-examination, can a witness be called to testify about his conversation with Collette at the pub?

Collette can be cross-examined to this effect. Her conversation at the pub is a prior inconsistent statement. *Evidence Act 1929* (SA) s 28 provides the procedure for dealing with such statements in cross-examination. The circumstances of the supposed statement, sufficient to designate the particular occasion, should be mentioned to Collette, and she should be asked whether or not she made the statement.

If these procedures have been complied with, and the prior statement is denied, s 28 allows evidence of the statement to be called. In this case that would allow the witness to be called to testify about his conversation at the pub. This evidence would

[10] *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134.
[11] *Walton v R* (1992) 174 CLR 558.

only be able to be used to discredit the witness,[12] and not as proof of any fact in question.

Oscar's Documents

The AHAI ledger book may be relevant to proving that none of Oscar's relatives were assisted. The ledger essentially consists of a collection of written out-of-court assertions as to who was assisted. If they are to be relevant to proving who was assisted, we are relying upon the truth of these assertions. Therefore they would be hearsay, and generally inadmissible. Also, the fact that it is a photocopy that is sought to be tendered may be an issue, as the common law best evidence requirement would require that only the original document be tendered.

There are a number of statutory exceptions that may allow this document in, however. Two primary exceptions are those for business records,[13] and apparently genuine documents.[14] In this case, as the list is part of a 'document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business,'[15] it would be preferable to use the business records exception. Any apparently genuine business record can, under *Evidence Act 1929* (SA) s 45A(1) be admissible without any further proof, and be evidence of any fact stated in the document. This exception also avoids the difficulties of the best evidence rule with respect to this photocopy, as it specifically allows for reproductions of business records.[16] One issue that may arise in attempting to admit this document may be if the court is of the opinion that it would rather hear from the person by whom the document was prepared.[17] Whilst we do not have on the facts who prepared the document, it may be that before the court is willing to accept the document that that person may need to be called.

The anthropological compilation is a document based primarily on interviews – that is, out-of-court assertions, the truth of which we are relying upon. As a general rule, expert evidence should be based upon admissible facts, and not hearsay. However,

[12] *Alchin v Commissioner of Railways* (1935) 35 SR (NSW) 498.
[13] *Evidence Act 1929* (SA) s 45A.
[14] *Evidence Act 1929* (SA) s 45B.
[15] *Evidence Act 1929* (SA) s 45A(4)(a).
[16] *Evidence Act 1929* (SA) s 45A(4)(b).
[17] *Evidence Act 1929* (SA) s 45A(2)(a).

the decision of Blackburn J in *Milirrpum v Nabalco*[18] provides precedent for allowing anthropological studies of Aboriginal people to be admitted in exception to the hearsay rule. If this document were sought to be tendered following *Milirrpum*, the expert who prepared the report may need to be called to authenticate the document, attesting to its contents and how it were prepared.

No Case To Answer

Is the judge entitled to compel such election before considering this submission?

It appears that the submission of AHAI is of the nature of a 'no case to answer' submission, and not a sufficiency/*Prassad* submission. This is said because they are submitting that even if you took the evidence of the defendant at its highest, there would be no contract and thus no case to answer. As such, the defendant is seeking a directed verdict on grounds that the evidential burden has not been met.

Generally, a court will hear such a submission without requiring such election from the defendant. However there is no right in a civil trial to have this submission heard, and as such it remains discretionary. Therefore the judge may in their exercise of discretion ask the defendant to elect to call no evidence.

Note that as there are two defendants, James and AHAI, it would generally then be appropriate for the judge to defer his opinion on AHAI's submission until after James' evidence had been heard. At that point, if the AHAI still wishes to make its submission, he might call them to elect.[19]

[18] *Milirrpum v Nabalco Pty Ltd and Commonwealth* (1971) 17 FLR 141.
[19] Ligertwood, above n 6, [6.40].