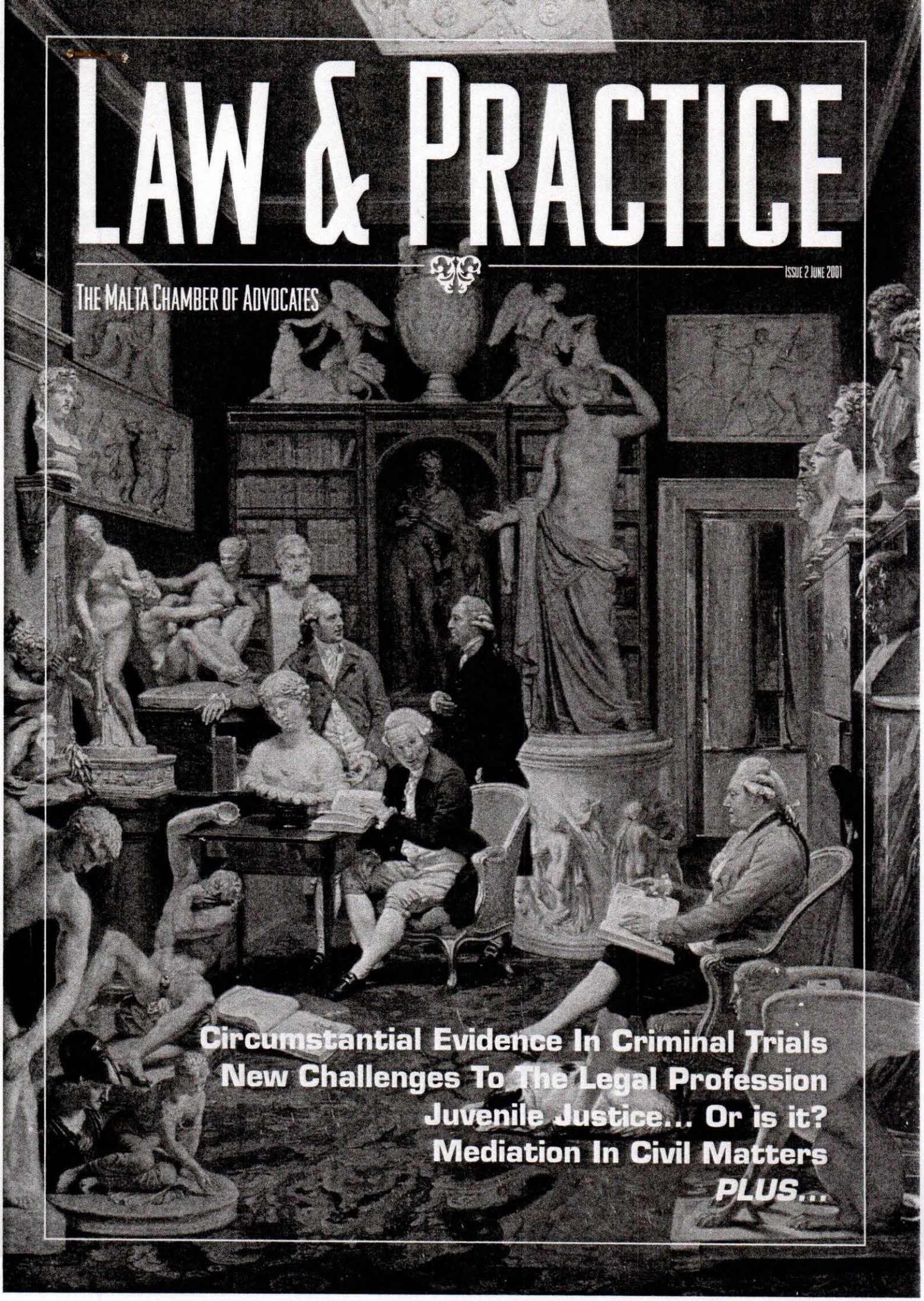
LAW & PRACTICE

ISSUE 2 JUNE 2001

THE MALTA CHAMBER OF ADVOCATES



Circumstantial Evidence In Criminal Trials

New Challenges To The Legal Profession

Juvenile Justice... Or is it?

Mediation In Civil Matters

PLUS...

THE EXCLUSIONARY RULE OF HEARSAY

... A BLESSING OR A CURSE?

Few would disagree that the rule on hearsay is the most complex and confusing exclusionary rule of evidence. By and large, the exclusionary rule of hearsay dictates that a statement other than that made by a person whilst tendering oral evidence in proceedings is inadmissable as evidence of any fact or opinion stated. This applies equally to all statements made, whether oral, in writing, or by conduct and to hearsay of all degrees.

From the outset, a clear distinction must be drawn between direct testimony on the one hand and hearsay on the other. Direct testimony, although depending to a great extent on the truthfulness of the account, the accurate perception and narrative capabilities of the witness together with a clear recollection of the facts, is relatively safe since it is secured by oath, and rigorously tested through the rules of competency, perjury and cross-examination. In hearsay, on the other hand, the latter rules are absent and consequently the accuracy of statements made or the demeanour of the testimony are lost.

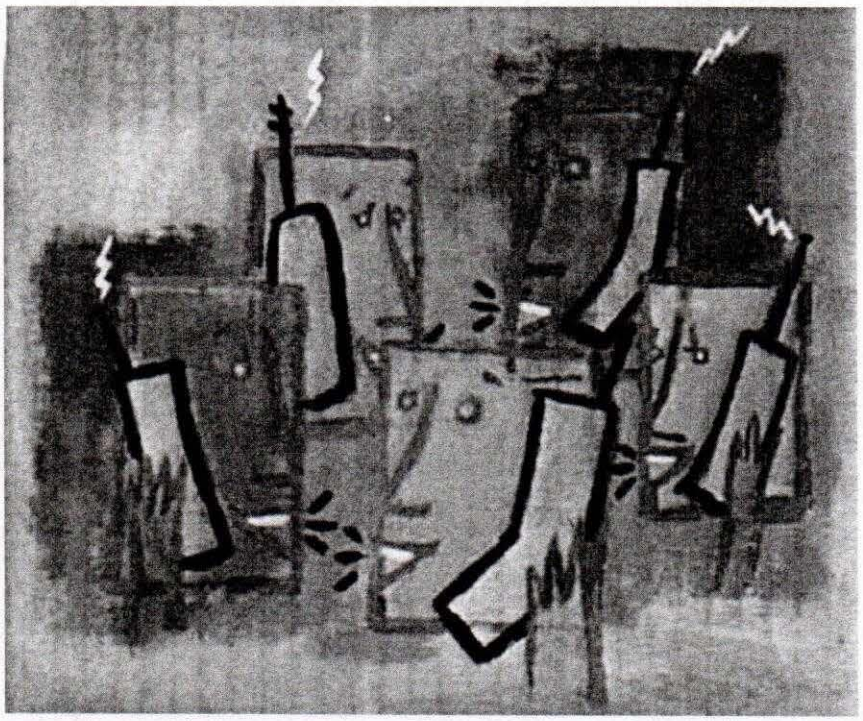
An easy distinction?

In particular, the difficulty with hearsay arises in determining the use of a statement made in a given context. The UK position was clarified by the judgment delivered in Re: Subramaniam v Public Prosecution (1956) wherein it was held that:

"Evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay. It is hearsay and inadmissable when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissable when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made".

The above definition holds water also from a local perspective. Under Maltese law, hearsay is regulated by an exclusionary rule laid down in section 598 of the Code of Organisation and Civil Procedure, Cap. 12, Laws of Malta.

Yet the question remains whether in practice, the distinction is as simplistic as it sounds. The distinction between statements as evidence that those words were uttered and statements to be used to establish the truth of what is contained in the statement, is artificial and cumbersome. Take Subramaniam as an example. There it was decided that where threats were uttered, proof that they were made was admissible, but where adduced to prove that the accused was under duress or that the threatener wanted to kill him was inadmissible.



It is no easy task for a lay juror

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to draw such fine and artificial distinctions in the use of the different forms of evidence, when on the facts presented as a whole, he/she is to determine the guilt or otherwise of the accused. The matter is often compounded by the general direction usually given to jurors who, while warned to discard as inadmissable the truth of a statement said, are directed to consider it as admissible in so far as it proves that the words were uttered. This may in fact be counter-productive as it tends to focus the minds of the jurors on the statement made. As Tapper put it, the jury are being told to ignore the "white elephant!"

Exceptions to an Exclusionary Rule.

If the exclusionary rule of evidence, which rule intrinsically depends on the use to be made of statements uttered, were problematic, the matter is rendered even more complex with the introduction of various specific inroads to the exclusionary rule. The most common hearsay exception in common-law jurisdictions is the res gestae exception, in virtue of which statements uttered even by third parties, during the period in question, being so intimately linked with the facts of the case, are considered to be admissible. In fact, the threats uttered in Subramaniam could easily have fallen under this exception. From a domestic perspective a similar concept is adopted in section 599 of the Code of Organisation and Civil Procedure. Statements made a tempo vergine, or those statements so closely linked with the facts in question are vested with this exceptional character.

Implied Assertions

One must resist the temptation to be over-zealous and to permit all hearsay statements to be considered as excepted admissible statements in judicial proceedings. This is particularly so, within the context of implied assertions. Take the phrase "Hello X", which prima facie is a simple statement of fact. Cross (Cross & Tapper on Evidence, 9th Ed.) writes that such phrase is a positive, although indirect, assertion of the identity of the person greeted - an implied assertion.

This leads us to consider other judgements such as Teper v R, where the phrase "your place is burning and you going away from the fire", shouted out by an unidentified woman to the accused at the time of the incident was held to be inadmissible since it contained a positive, indirect, assertion as to the identity of the person fleeing. In Wright v Tatham, letters containing phrases to the effect that the testator was blessed with health were held to be inadmissible as they contained implied statements that the testator was sane.

The point with implied statements in relation to hearsay is that it is difficult at times

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to draw a line and determine what is permissible and what is not. In Percy Smith (1976) and Cook (1987), drawings and photofit pictures drawn or assembled under the direct instruction of another third party were deemed to be admissible identification evidence. Surely, however, these sketches or photofit pictures are implied statements of identification as defined in the Teper scenario and consequently ought to be considered inadmissable.

Implied Assertions by Conduct?

Can conduct of a person amount to an implied assertion/statement? If so would such statement be subject also to the exclusionary rule of hearsay? In R v Kearley (1992), the prosecution proposed to adduce evidence of phone calls to prove that the accused was in business of supplying drugs. Although this was permitted in the court of first instance and appellate court, the House of Lords stressed the irrelevance of the calls as direct evidence of the state of mind of the callers. Therefore the evidence was inadmissible because it was irrelevant not because it was tantamount to hearsay. Of particular interest was a passage by Lord Ackner who writes "the jury would not be entitled to infer from the fact that the request (s) was made that the appellant was a supplier of drugs". This suggests that if the evidence were admissable (and in fact such evidence in other common-law jurisdictions is admissible), the evidence would, in so far as it embodies an implied assertion, be subject to the exclusionary rule. Following this judgement it is generally agreed that conduct may amount to implied statements or assertions which is subject also the exclusionary rule.

Conclusion: Should the rule be exclusionary in nature?

"... the law of evidence does not consist of rules which determine what kinds of evidence are admissible; it consists of rules which ... exclude kinds of evidence and treats them as inadmissible in law, though logically relevant in fact".
- *Salmond J in R v Kearley*

The question as to whether the rule is best expressed as exclusionary or not really depends on what one considers to be at the core of the law of evidence. If the purpose of the law of evidence is solely to ensure that proper, reliable, probative evidence is adduced in proceedings then one might argue for such an exclusionary rule. This however may very well lead to a Catch 22 situation, since such a rule may itself exclude evidence which would otherwise have been safe, probative and extremely relevant to the case in issue, but is inadmissible owing to a technical, and inflexible categorisation of that evidence as "hearsay". Further, such exclusionary rule results in most cases in increased costs for the litigators who constantly and at all costs have to procure direct evidence. Abolition of such rule also curtails length of trials reducing pleadings as to nature of the evidence tendered, allowing the court to focus better on the fact in issue.

The position obtaining in other countries concerning the exclusionary rule of hearsay varies. Judicial reform in Canada and New Zealand, for example, while widening the exceptions to the hearsay rule, uphold the exclusionary rule. In South Africa, the revolutionary Evidence Amendment Act No.45 of 1988, upholds the exclusionary rule in the phrase "hearsay is not admitted except...". The Scots abolished the rule altogether in civil proceedings in their Civil Evidence (Scotland) Act 1988, s.2(1). England itself has abolished the rule in civil proceedings in the Civil Evidence Act 1995. Clarity of the rule is better achieved by a non-exclusionary rule. Indeed it is much simpler to lay down what evidence should be excluded, rather than creating ad hoc exceptions to a general exclusionary rule. ■

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