

IN THE SUPREME COURT OF NEW ZEALAND

**SC 74/2009
[2010] NZSC 91**

PHILLIP WAYNE HART

v

THE QUEEN

Hearing: 18 November 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: S J Shamy for Appellant
M D Downs and T Epati for Crown

Judgment: 23 July 2010

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
Elias CJ	[1]
Blanchard, Tipping, McGrath and Wilson JJ	[23]

ELIAS CJ

[1] The Evidence Act 2006 is significant legislation which restates the principles upon which evidence is admitted in court proceedings and substantially reforms the pre-existing law. It is the first stop when questions of admissibility arise. And in many cases it will be the last stop. In interpretation of the Act and where the Act is silent on a question of admissibility, ss 10 and 12 permit recourse to the common law, provided the common law is consistent with the purpose and principles of the Act. In this case, turning on the admissibility of a previous consistent statement under s 35(2) of the Act, a topic of conceptually unsatisfactory case law at common law, care needs to be taken not to stray from the text and principles of the new Act.

[2] The complainant in a case of sexual offending was cross-examined in order to provide a basis for the defence case that she had invented the story in order to qualify for a lump sum ACC payment. Having ascertained that the defence intended to close on invention with this suggested motive, the trial Judge permitted the prosecutor in re-examination to lead from the complainant evidence of when she first became aware of her potential eligibility for an ACC lump sum payment and her disclosure of the sexual offending to a family friend before that time. The Crown was also permitted to call the family friend who gave evidence that the complainant had told him about the offending in an apparently spontaneous response to unrelated family stress and confirmed the timing of the disclosure as being some months before the time at which the complainant had said she knew of her eligibility for compensation.

[3] The issue on the appeal is whether the statement made to the family friend should have been excluded in application of s 35(1) of the Act or whether it was admissible within the exception in s 35(2) as an answer to an attack on the complainant's veracity based on recent invention of the account of the incident given in her evidence to the court.

The text, legislative history, and purpose of s 35

[4] Section 35(1) of the Act provides that:

- (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.

[5] Exceptions to the general rule are contained in s 35(2) and (3). Only s 35(2) is of direct relevance to the present appeal. It provides:

- (2) 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.

[6] The wording originally proposed by the Law Commission¹ for what has become s 35 was altered in the text as enacted to limit the relevant challenges to veracity (or "truthfulness", as the Law Commission had it) to those based on a previous inconsistent statement or an allegation of recent invention. The last was an illustration given by the Law Commission in its commentary,² and which in the legislation has been enacted as one of two grounds of challenge to veracity which engage the exception. The change was made on the report of the Select Committee that the exception as recommended by the Law Commission, which had not limited the exception to the two grounds now specified, was too broad.³ The opinion of the Select Committee was that stating the two grounds "would ensure a workable rule, and limit the circumstances in which previous consistent statements could be used to those available under current law".⁴

[7] It is clear from the Law Commission's commentary that s 35 was intended to replace common law and statutory exceptions to a similar common law rule of

¹ Law Commission *Evidence* (NZLC R55(2), 1999) at 98:

37 Previous consistent statements rule

A previous statement of a witness which is consistent with the witness's evidence is not admissible except

- (a) to the extent necessary to meet a challenge to that witness's truthfulness or accuracy; or ...

² *Ibid.*, at [C168].

³ Evidence Bill 2005 (256-2) (select committee report) at 5.

⁴ *Ibid.*

exclusion of repetition with a single principled rule, adapted to any case where repetition tends to prove veracity when it is put in issue. The Law Commission intended the new rule to extend to “recent complaints” in sexual cases and the former s 22A of the Evidence Act 1908 (which allowed the admission of evidence of an earlier description of the offender given by an identifying witness). The trigger for admissibility is the challenge to truthfulness or accuracy: “[i]f there is no such challenge, the evidence will not be necessary”.⁵

[8] 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 superfluous⁶ (although as Thayer points out, before the 19th century it had been usual to lead evidence of consistency of witnesses,⁷ an approach that may have lingered on in respect of “recent complaint” in cases of sexual offending). This is the basis on which the Law Commission put the purpose of s 35.⁸ Evidence of previous consistent statements is not however superfluous when it answers a challenge to evidence either as recent invention or as inconsistent with a previous statement, the two bases of the exception in s 35(2). In the present case the evidence was therefore admissible if “necessary to respond to a challenge to the witness’s veracity or accuracy, based ... on a claim of recent invention on the part of the witness”.

[9] The common law policy against admission of statements which merely repeat evidence given in court (sometimes referred to as a “rule against narrative”⁹) was often obscured by the different policy behind the hearsay rule, a common basis on which previous statements were excluded. Reform of the law of hearsay in the Evidence Act 2006 made it necessary to deal distinctly with what was the

⁵ Law Commission *Evidence* at [C168].

⁶ *Cross and Tapper* describes this reason for the inadmissibility of previous consistent statements (which is credited to Evans’ notes to *Pothier on Obligations*) as a more convincing rationale than the reason, sometimes put forward, that it is based on the ease of manufacture of this kind of evidence. As *Cross and Tapper* suggests, the latter reason would properly affect weight rather than admissibility. See Colin Tapper *Cross and Tapper on Evidence* (11th ed, Oxford University Press, Oxford, 2007) at 322.

⁷ James Thayer “Bedingfield’s Case – Declarations as a Part of the Res Gesta” in James Thayer *Legal Essays* (The Boston Book Company, Boston, 1908) 207 at 222–223.

⁸ Law Commission *Evidence* at [C167].

⁹ See *Cross and Tapper on Evidence* at 322 and JR Spencer *Hearsay Evidence in Criminal Proceedings* (Hart Publishing, Oxford, 2008) at [12.5].

“independent common law ban on proof of the previous oral or written statements of the witness as evidence of his consistency”.¹⁰ Section 35 provides the restatement and reform of the rule against admission of previous consistent statements and its exceptions. The former overlap between hearsay and repetition is removed by the definition of hearsay to exclude out of court statements made by a witness.¹¹ Care therefore needs to be taken to ensure that authorities under the former law, in which evidence of a previous consistent statement by a witness was excluded to meet the policies behind the exclusion of hearsay (and which have been largely overtaken in the reforms), do not distort the application of s 35. The policy behind the exclusionary rule in s 35(1) is, rather, “to prevent the parties from inundating the courts with voluminous amounts of repetitive material in order to shore up a witness’s consistency”.¹²

[10] “Consistency” is not a term defined in the Act. The Law Commission expressed the view that consistency is not “lack of inconsistency”.¹³ It considered that if the witness’s evidence omitted something contained in the previous statement, the omitted information is not within the exclusionary rule of s 35(1). That is also the view taken in cases such as *Nominal Defendant v Clements*.¹⁴ It is supported by Gallavin.¹⁵ The New Zealand edition of *Cross*, however, takes the view that “consistent” is properly to be interpreted as “not inconsistent”.¹⁶ The second meaning seems to be that required in s 35(3),¹⁷ which however was acknowledged by the Law Commission to be strictly unnecessary and to have been included to prevent dispute.¹⁸ If the rationale for the rule of exclusion is unnecessary repetition, then the better view may well be that remedying an omission in evidence

¹⁰ *Cross and Tapper on Evidence* at 321–322.

¹¹ Evidence Act 2006, s 4.

¹² Law Commission *Evidence* at [C167].

¹³ *Ibid.*

¹⁴ *Nominal Defendant v Clements* (1960) 104 CLR 476 at 479–480,

¹⁵ Chris Gallavin *Evidence* (LexisNexis NZ Ltd, Wellington, 2008) at [4.6].

¹⁶ Donald Mathieson (ed) *Cross on Evidence* (looseleaf ed, LexisNexis NZ Ltd) at [EVA35.4].

¹⁷ Section 35(3):

A previous statement of a witness that is consistent with the witness’s evidence is admissible if–

(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

(b) the statement provides the court with information that the witness is unable to recall.

¹⁸ Law Commission *Evidence* at [C169].

through admitting a previous statement does not engage the rule of exclusion in s 35(1). Production of the statement may then require assessment of reliability, as both s 35(3) and the rules for admission of hearsay statements envisage, a symmetry that makes sense and may assist in the application of the rule of general exclusion in s 8. These matters do not require resolution here because the statement was clearly admitted on the basis of its consistency, not to remedy an omission in evidence.

“Necessary to respond”

[11] A statement within the exception to the general rule of inadmissibility in s 35(1) must comply with the overarching requirement of relevance under s 7: the previous consistent statement must have “a tendency to prove or disprove anything that is of consequence to the determination of the proceeding”,¹⁹ namely here the veracity or accuracy of the complainant when attacked on one of the two bases specified by s 35(2).

[12] To be relevant, the circumstances must invest the statement with greater probative value than is available from the mere fact of repetition. But more restriction than the text provides should not be read into the section. “[N]ecessary to respond” is a requirement of logical connection which, consistently with the fundamental principle contained in s 7 of the Act, permits admission if the statement “has a tendency to ... disprove” the suggestion of recent invention. If there is a challenge to the veracity of the witness on the basis of invention, a previous statement which is an answer to the challenge is made relevant and will be admitted to the extent necessary to meet it. This meaning is consistent with the Law Commission’s explanation of its purpose.²⁰ The inquiry for the Judge in ruling on admissibility under s 35(2) is contextual. That is why, in *Fox v General Medical Council*, Lord Radcliffe emphasised that whether a previous consistent statement is admissible “cannot be formulated with any great precision, since its application will

¹⁹ Evidence Act 2006, s 7(3).

²⁰ Law Commission *Evidence* at [C168].

depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it”.²¹

Previous consistent statement of complainant

[13] A denial of the offending related by a complainant in evidence is an allegation of invention after the event, or “recent invention” in the terms in which it is expressed in the Act. Wigmore considered that a challenge to the veracity of a witness based on recent invention (which he termed “recent contrivance”) was closely connected with a challenge by self-contradiction (now found in the other ground of exception in s 35(2)):²²

The charge of recent contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, i.e., as a self-contradiction.

In such circumstances, the “supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story”.²³ The leading of recent complaint evidence in sexual offending before enactment of the Evidence Act 2006 may in part have been to anticipate the question of self-contradiction in this sense. Thayer considered that in such cases “the evidence is really put in by way of supplying a thing which in this particular case is deemed essential to the witness’s credit”.²⁴ Under the Act, whether such a challenge is being made is no longer a matter of doctrine, as formerly was the case in respect of recent complaint evidence. It is, rather, a matter for assessment.

[14] The Law Commission clearly considered that recent complaint evidence would continue to be admissible where it meets an allegation of recent invention:²⁵

²¹ *Fox v General Medical Council* [1960] 1 WLR 1017 (PC) at 1025.

²² John Henry Wigmore *Wigmore on Evidence* (Chadbourn revision, Aspen Law & Business, United States, 1972) vol 4 at §1129.

²³ *Ibid.*

²⁴ Thayer at 223.

²⁵ Law Commission *Evidence* at [C168].

Section 37(a) [now s 35(2) of the Act] replaces the law on recent complaints in sexual cases: such complaints will now be admissible under this subsection, but only to meet a challenge to truthfulness – for example, an allegation of recent invention. However the complaints need not be “recent”, and can be admitted to prove the truth of the contents.

The Select Committee report did not suggest departure from this statement of effect. Section 35 as enacted preserves the Law Commission’s intent that what was formerly admitted as “recent complaint” evidence in cases of sexual offending should continue to be admissible if relevant and to the extent necessary to answer a challenge to veracity on the basis of invention after the event.

[15] The Act defines “previous statement” in s 4 to mean “a statement made by a witness at any time other than at the hearing at which the witness is giving evidence”. By application of the definition of “previous statement”, s 35 fulfils the stated purpose of the reform to remove the former requirement that an admissible complaint be “recent” (in the sense of being made at the first reasonable opportunity).²⁶ Instead of the former restrictions, the exception now applies when the statement is “necessary to respond to a challenge to the witness’s veracity or accuracy” based either on a previous inconsistent statement or on a claim of recent invention by the witness. As already indicated, the previous consistent statement is admissible only to the extent necessary to respond to that challenge.

[16] In the context of the definition of “previous statement” as one made “at any time other than at the hearing at which the witness is giving evidence”, “recent”, as used in s 35(2), must mean invention after the events which are the subject of the evidence.²⁷ The “consistency” which is material is consistency with the evidence given. The s 35(1) rule against repetition applies except in circumstances where the previous statement is relevant to an attack on the veracity of the witness *in the evidence given* (as opposed to being a general attack about the witness’s veracity

²⁶ Law Commission *Evidence* (NZLC R55(1), 1999) at [144].

²⁷ *R v Ellard* 2009 SCC 27, [2009] 2 SCR 19 at [33]; *R v Stirling* 2008 SCC 10, [2008] 1 SCR 272 at [5].

subject to the veracity rules).²⁸ It applies to any “invention” more recent than the events described.

[17] For the reasons already given, I am unable to agree with the view expressed by the Court of Appeal in *R v Barlien* that s 35(2) of the Act “left out” the former exception for complaints in sexual cases.²⁹ Section 35(2) is framed to include previous statements by complainants in sexual cases if within the single principled basis that such evidence is relevant to answer a challenge as to veracity or accuracy based on a claim of recent invention. Nor, as appears from the reasons I give in *Rongonui v R* (which are being delivered contemporaneously with this judgment), do I consider *Barlien* is correct in the view that s 35 excludes evidence of speech which is part of the events in issue and formerly regarded as forming part of the *res gestae* (a Latin label avoided, wisely, by the Evidence Act 2006 and which should not be judicially re-introduced).³⁰ What is said as part of the events in issue is not excluded by the rule in s 35(1). Such utterances, if relevant, are admissible in themselves and not as exceptions to the rule of exclusion to prevent repetition of testimony. Where the events end may be a difficult judgment, but that does not alter the principle to be applied.

[18] Where a complainant is challenged as to veracity in respect of evidence of the offending, the challenge will very often entail a claim of invention after the event.³¹ *Fox v General Medical Council* is sometimes cited for the proposition that a general

²⁸ The distinction between the veracity rules contained in s 37 and the admissibility of previous consistent statements under s 35 was explained by the Law Commission in *Evidence* (NZLC R55(2), 1999) at [C171]. Using its terminology, in the present case the previous consistent statement went further than bearing on the complainant’s general veracity “as such”. In the circumstances it was, rather, “capable of supporting the truth of her testimony because the contents of the two are the same”.

²⁹ *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [35]. Although not necessary for determination here, I also doubt whether *Barlien* was correct in the view that the terms of s 35(2) did not carry through the exception formerly provided by s 22A of the Evidence Act 1908 in cases of claimed recent invention. (And s 35(3) is likely to be resorted to in cases where the witness, although not challenged for recent invention, is unable to recall the information.)

³⁰ *Rongonui v R* [2010] NZSC 92 at [10].

³¹ Whether invention entails conscious fabrication is not a matter that arises for decision here, but is contrary to Australian and Canadian authority: *Nominal Defendant v Clements* (1960) 104 CLR 476 at 479 per Dixon CJ; *R v Ellard* 2008 BCCA 341, (2008) 239 CCC (3d) 233 at [86].

challenge to a witness's account does not raise a claim of recent invention,³² such as would justify admission of a previous consistent statement. But it is clear that the evidence sought to be led in *Fox* was simply repetitive of the account given in evidence in disciplinary proceedings by the doctor charged and was not relevant as tending to answer a challenge on the basis of recent invention.³³ The case itself emphasises the need for contextual assessment of the challenge and the way in which the previous statement meets it. In many cases a challenge to the "whole story" told by a witness may well amount to a claim of recent invention. That is particularly likely in the case of a challenge to the veracity of a witness who is a complainant.

[19] A defence that sexual connection was consensual will almost always amount to an attack on the veracity of the complainant in the evidence he or she gives on the basis of recent invention.³⁴ The effect of s 35 on evidence formerly called as recent complaint evidence may not greatly affect its availability in practice. In dropping the requirement of proximity in time to the offence and in extending the principle of admissibility beyond sexual offending, the Act expands the availability of such evidence, in apparent recognition of its usefulness in fact-finding. In putting the matter on the basis of response to challenge of recent invention, the reform may affect the sequence in which such evidence is led, since there must first be a challenge, which may not be apparent until the complainant is cross-examined. But in many cases the defence may open on the basis of challenge to the complainant's evidence or may consent to the previous consistent statement being led by the prosecution in examination in chief, rather than leaving such evidence to be called in re-examination.

[20] In some cases where the claimed invention may be pinned down in time, evidence of a statement before the opportunity for invention arises will be cogent for that reason. But I do not consider that s 35 supports an interpretation that the previous statement is not admissible wherever it is impossible to place it in time before the invention alleged occurred. I do not therefore see the ability to pose and

³² *Cross and Tapper on Evidence* at 326; JD Heydon (ed) *Cross on Evidence* (looseleaf ed, LexisNexis) at [17305].

³³ At 1026.

³⁴ At least where there is no issue as to the complainant's ability to recall events.

answer the question “when did you first invent this story”³⁵ as a necessary condition for admissibility in all cases. The circumstances of the earlier disclosure may have some compelling feature of their own which bear on the veracity or accuracy of the evidence given. Such features may for example be present when a previous statement occurs in circumstances suggestive of spontaneity rather than contrivance. They may arise where delay in making a complaint provides the opportunity to suggest fabrication,³⁶ if the circumstances of the statement explain the delay (as where they disclose removal of earlier inhibition on disclosure, such as may often be the case in respect of sexual offending). As already emphasised, whether the statement is admissible as a response to the challenge depends on context.

Disposition

[21] In the present case, the Judge was right to consider that the defence was that the complainant had invented the allegations after the events in issue. That is recent invention within the meaning of s 35(2). The challenge of recent invention did not arise out of the suggested motive alone, although if the complainant was unaware of her entitlement to seek an ACC lump sum payment at the time of her complaint to the witness, that fact in itself tended to rebut the suggested motive for fabrication. The apparently spontaneous disclosure to the witness was however also evidence which tended to rebut the suggested invention, irrespective of the timing of the knowledge suggested as providing motive. The evidence of the disclosure was not mere repetition both because it arose in circumstances suggestive of spontaneity rather than invention and because it tended to rebut the suggested motive for the invention. I consider it was rightly admitted by the trial Judge as necessary to respond to the challenge to the complainant’s veracity on the basis of recent invention.

[22] The Court being unanimous, the appeal is dismissed.

³⁵ See *Cross and Tapper on Evidence* at 326, which cites *Flanagan v Fahy* [1918] 2 IR 361 (KB) at 375 per Dodd J for this question.

³⁶ On the basis suggested by Wigmore and discussed at [13] above.

BLANCHARD, TIPPING, McGRATH AND WILSON JJ

(Given by Tipping J)

[23] This appeal concerns the admissibility and use in a criminal trial of a previous consistent statement made by the complainant. It is brought following dismissal by the Court of Appeal of the appellant's appeal against conviction on charges of sexual offending involving the complainant.

[24] The appellant and the complainant's mother had had an intermittent relationship when the complainant was aged between 7 and 13. During her cross-examination at the trial in February 2008 the complainant accepted that "a few years ago" she had been aware that her mother had claimed to have been sexually abused as a child. She was asked if she was aware that "in late 2005-2006" her mother had received "a substantial amount of money from the Government". She did recall that, but said she was not aware of why her mother had received the money. It was then put to her by defence counsel (not Mr Shamy) that she was aware that her mother "had money in her account from ACC [the Accident Compensation Commission]". The complainant again replied that she was aware that her mother had received money "but I didn't know where she got it from". The cross-examination continued:

Q. Now you have received counselling over your allegations of sexual abuse from ACC, correct.

A. Yes.

Q. And I put it to you you're aware that at a later stage you could be entitled to make a claim for a lump sum payment.

A. Yes.

Q. You're aware of that.

A. Yes I am.

[25] Counsel for the Crown then sought leave under s 35 of the Evidence Act 2006 to call the evidence of a Mr Loos to whom the complainant had first spoken about the offending. That section reads:

35 Previous consistent statements rule

- (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.
- (2) 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.
- (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) the statement provides the court with information that the witness is unable to recall.

Counsel argued pursuant to subs (2) that the cross-examination had impugned the complainant's veracity or accuracy. There was a discussion between the Judge and counsel about whether the defence had been challenging the complainant's evidence as a recent invention. Counsel for the appellant said it had not been put to the complainant that the only reason she had made the complaint was so she could make an ACC claim. The Judge responded that counsel had raised the motive, namely "you've learnt it from mum, you're doing it yourself". It was a subject that would be in the jury's mind and no doubt one that defence counsel would close on. The Judge also observed that one of the theories of the defence case was that "mum's had an ACC payment, the daughter has learnt from mum so this is all recent invention". Defence counsel agreed, but pointed out that the proposed evidence of Mr Loos would relate to what the complainant said to Mr Loos in May 2006, followed by a complaint to the police in July 2006. The Judge commented that the complainant had received ACC counselling after that.

[26] Defence counsel also submitted to the Judge that he had not actually put to the complainant that she had made a recent invention for the purpose of getting an ACC payment. The Judge responded:

You conceded to me you didn't need to because you are going to close to the jury on the basis that this has all been invented because mum got a payment, mum's put her up to it, she's put herself up to it and if I allow you to do that

without the Crown being able to lead the evidence they want to lead that would be unfair to the Crown. If I don't allow [the prosecutor] to do what she's wanting to do, then what I'm saying is if you object then I may have to come down on you and say I'm not going to let you close, I'm not going to let you put that to the jury.

[27] In re-examination, the complainant said that it was either the woman police officer in charge of the case or a doctor who had given her the idea of going to a counsellor and it had been the counsellor who had told her she could claim for a lump sum payment from ACC for abuse at the hands of the appellant. She also said that the first person she told about the abuse was Mr Loos. It had happened after her stepfather (who was not the appellant) and her mother had had a fight and her mother had tried to kill herself. The complainant had gone to Mr Loos's house where she told Mr Loos that the appellant had sexually abused her. In his evidence, Mr Loos recalled and described these events. We will revert to his evidence in more detail later.

[28] Crown counsel submitted in her closing address that the disclosure to Mr Loos appeared to have been made several months before the complainant said she first learned of the availability of an ACC payment. Reference was also made to the fact that a witness from ACC had said that the complainant had to that point made no application for any such payment.

[29] The Court of Appeal³⁷ said that it was very clear that the Judge regarded the cross-examination of the complainant as amounting to an assertion of recent invention on her part. It thus amounted to an attack on her veracity under s 35, opened the way to evidence on that topic under s 37 and also justified the Crown in applying for an order "that [the complainant's] statement to Mr Loos was admissible under s 35(2) as being consistent with her police complaint some two months later and her evidence".³⁸ The Court said that the view of the trial Judge on such topics was deserving of weight particularly where, as here, trial counsel's approach to the suggestion of recent invention had been more oblique than direct. There was a sufficient evidential foundation for the Judge's view and no basis for interfering with his decision under s 35.

³⁷ *R v Hart* [2009] NZCA 276 per O'Regan, Hugh Williams and MacKenzie JJ.
³⁸ At [52].

[30] Although the Court recorded a submission for the appellant by Mr Shamy that where fabrication of the complainant's story is asserted a consistent statement is admissible under s 35 only if made before, not after, the time of the alleged fabrication,³⁹ the Court did not expressly deal with that argument. We will be doing so in the course of these reasons.

[31] Moving to the trial Judge's direction in his summing-up, the Court noted that in *R v Barlien*⁴⁰ it had said that if statements are admissible under s 35, they are admissible to prove the truth of their contents. The Judge's direction was "more reminiscent of directions on prior consistent statements ... regularly given prior to the 2006 Act coming into force than to the terms of s 35 itself."⁴¹ The court concluded that:⁴²

The nub of the direction, however, was that the jury was told M's statement to Mr Loos was, depending on its view of the evidence, consistent with M's trial evidence and that was a factor the jury could take into account in assessing the credibility and truthfulness of her trial evidence. If anything, that direction was helpful to the appellant because, as *Barlien* says (at [20]), once the evidence is given, it is admitted for all purposes.

Submissions

[32] Mr Shamy for the appellant submitted that the cross-examination of the complainant on the subject of accident compensation was designed to inquire into one of two possible motives she might have had to fabricate her allegations and did not amount to putting forward a claim of recent invention. Hence the complainant's previous statement to Mr Loos should not have been admitted. Counsel also submitted that in the light of other evidence called by the Crown regarding the timing of the complainant's interactions with the Accident Compensation Corporation, the admission of the complainant's previous statement was not "necessary" in terms of s 35(2). That subsection, it was further submitted, had not changed the previous law which was that the statement had to precede the claimed invention, nor had it changed the use to which previous consistent statements could

³⁹ At [39].

⁴⁰ *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [20].

⁴¹ At [60].

⁴² At [61].

be put by the jury when admitted in response to a claim of recent invention, namely that such evidence went only to consistency and was not evidence of the truth of the matters asserted in the statement.

[33] The Crown argued that the Court of Appeal had been correct to find the evidence of Mr Loos was admissible. Mr Downs submitted that in light of the definition of a previous statement and the text of s 35 the consistent statement did not have to predate the claimed recent invention. The Crown also argued that, once admitted, the statement should be treated as evidence tending to prove the truth of its contents, rather than going only to consistency.

Issues

[34] It can therefore be seen that the appeal involves three issues. The first concerns the admissibility of the evidence of the complainant's statement to Mr Loos. The second concerns the use to which that evidence could be put if it was admissible, and the third concerns how the answers to those two issues affect the validity of the appellant's convictions in this case.

Previous consistent statements

[35] The current rule on this subject is contained in s 35 of the Act, the full text of which has been set out earlier.⁴³ The starting point in terms of subs (1) is that a previous statement of a witness that is consistent with the witness's evidence as given in Court is not admissible unless it is rendered admissible by either subs (2) or subs (3). It is subs (2) which is in issue in the present case. It provides that a witness's previous consistent statement is admissible to the extent that the admission of the statement is necessary to respond to a challenge to the witness's veracity or accuracy. The challenge referred to is not a general challenge but one based either on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.

⁴³ See [25].

[36] Hence the first thing that must be shown by the party seeking to adduce a witness's previous consistent statement under subs (2) is that there has been a challenge to the witness's veracity or accuracy in a qualifying respect. It must have been suggested, on one or other of the bases referred to in the subsection, that the witness is being untruthful or inaccurate in their testimony. Next it must be shown that it is necessary to admit the witness's previous statement in order to respond to the challenge to the witness's veracity or accuracy. In recent invention cases the challenge is obviously to the witness's veracity. The concept of necessity in this context means that it is necessary to admit the prior statement to do justice to the witness's testimony in court in the light of the attack on that testimony.⁴⁴ A witness who is attacked for lack of veracity or accuracy on either of the statutory bases is entitled, to the extent necessary, to support their testimony in court by reference to a consistent statement made out of court on an earlier occasion. The touchstone is necessary extent of response, with relevance being implicit in the concept of necessity.

[37] 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.

[38] It is important however, to reiterate that a general attack on a witness's veracity or accuracy is not enough to trigger the operation of subs (2). The attack must be based either on a previous inconsistent statement or on a claim of recent invention. Conceptually the former is quite straightforward. But, although there was no significant difference between counsel as to the common law concept of recent invention, it is necessary to examine that subject, albeit quite briefly, in order to understand the effect of the subsection.

⁴⁴ See s 6(c) which states that a purpose of the Act is promoting fairness to parties and witnesses.

Common law background

[39] The phrase “recent invention” was a familiar one in the common law jurisprudence on the subject of the admission of previous consistent statements. As the Crown accepted, there is no basis for concluding that Parliament was using the phrase in a sense different from its common law meaning. To do that would have been a most misleading thing for Parliament to have done. It is important to point out, however, in view of the timing issue to which we are about to come, that it does not necessarily follow that when there is a claim of recent invention in the sense understood at common law, the statutory ability to “respond” to, that is to rebut, that claim should be equated with the common law approach to the timing of that response.

[40] In general terms the common law rationale for admitting a previous consistent statement to rebut a claim of recent invention was that the statement was made at a time inconsistent with the proposition that the witness’s evidence in court had been invented. If the statement preceded the claimed invention, it clearly rebutted the claim. The commentary in *Cross on Evidence*⁴⁵ is a helpful starting point:

The fact that the whole of the witness’s testimony is attacked will not bring the exception into play. The cross-examination must be such that it can be interpreted as containing the direct question, “when did you first invent this story?” (footnotes omitted)

[41] In *R v H*⁴⁶ Anderson J referred to this statement with approval and gave the following explanation:

... The elements of time in the exception presently being considered is timing in relation to the alleged concoction of a story so that the expression in the principle ... “or at a time sufficiently early to be inconsistent with the suggestion that his account is a later invention or reconstruction” is concerned with time before the moment of reconstruction rather than time after the moment of alleged offending.

⁴⁵ Donald Mathieson (ed) *Cross on Evidence* (6th ed, Butterworths, Wellington, 1997) at [9.42].

⁴⁶ *R v H* (1989) 5 CRNZ 13 (HC) at 16.

Addressing the use of the same word “recent” in the expressions “recent complaint” and “recent invention” Anderson J said that the recency required in respect of the former derived historically from the concept that a hue and cry would be made a reasonably short time after a sexual attack. But the time element in relation to recent invention was concerned with the timing of the previous statement in relation to the claimed concoction. If the statement was made before the alleged concoction it would logically disprove the claim of concoction.

[42] In *R v I*⁴⁷ the Court of Appeal referred to Anderson J’s judgment with approval. In that case Panckhurst J, writing for the Court, cited at [31] the following passage from the judgment of Dixon CJ in *Nominal Defendant v Clements*:⁴⁸

... inasmuch as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen ... the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack.

At common law a previous consistent statement admitted on this basis was admitted not for the purpose of proving the truth of the witness’s trial evidence, but to disprove a claim of concoction. At common law the use of recent complaint evidence and the use of evidence rebutting a claim of recent invention were both limited in this broadly similar way.

[43] The common law position in the United Kingdom was the same as that described above.⁴⁹ The same approach applies in Canada, albeit more rigorously perhaps in respect of time. In *Stirling* the Supreme Court of Canada said that prior

⁴⁷ *R v I* [2002] 3 NZLR 477 (CA) at [34].

⁴⁸ *Nominal Defendant v Clements* (1960) 104 CLR 476 at 479–480.

⁴⁹ *R v Roberts* [1942] 1 All ER 187 (CA).

consistent statements have probative value where they “illustrate that the witness’s story was the same even before a motivation to fabricate arose”.⁵⁰

[44] As we have seen, the common law view that the statement was probative and therefore admissible if it predated the circumstances claimed to have given rise to the “motivation to fabricate” came close to the heart of the rationale for the common law rule. In order to let in the prior consistent statement at common law the party claiming that the witness’s evidence was a “recent” invention had to accuse the witness of inventing their evidence at a certain point of time and generally had to identify that time by reference to the circumstance giving rise to the alleged motivation.

[45] But the “recency” spoken of in the expression “recent invention”, as used at common law, did not require the alleged invention to have occurred within a short period before the giving of the witness’s evidence at trial. As Menzies J put it in *Nominal Defendant*, the doctrine applied when the evidence was impeached as a later contrivance; the “later” being a reference to a contrivance later in time than the events about which the witness was testifying.⁵¹ In *Fox v General Medical Council*⁵² Lord Radcliffe, giving the advice of the Privy Council, said that the rule could not be formulated with any great precision since its application would depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. The application of the rule was, within limits, a matter of discretion for the trial Judge.

[46] It must be recognised, nonetheless, that at common law, as Mr Downs properly accepted, virtually all the authorities required the previous consistent statement to have been made before the alleged fabrication. The Supreme Court of Canada, in its very recent decision in *R v Ellard*,⁵³ confirmed this when making two important points. The first was that, as we have seen, to be “recent” the fabrication or invention could occur at any time after the events about which the witness is testifying. The second was that to rebut an allegation of recent invention at common

⁵⁰ *R v Stirling* 2008 SCC 10, [2008] 1 SCR 272 at [5].

⁵¹ At 490.

⁵² *Fox v General Medical Council* [1960] 3 All ER 225 (PC) at 230.

⁵³ *R v Ellard* 2009 SCC 27, [2009] 2 SCR 19 at [33].

law it was necessary to establish that the statement of the witness was made “prior to the existence of a motive or of circumstances leading to fabrication”. The Court emphasised that in all cases the timing of the prior consistent statement will be “central” to whether it is admissible. Similarly, a majority of the Supreme Court of the United States held in *Tome v United States*⁵⁴ that a prior consistent statement must predate the alleged invention in order to qualify for admission under the “recent fabrication or improper influence or motive” limb of the Federal Rule of Evidence 801(d)(1)(B).

[47] In summary, therefore, at common law a “recent” invention need not have occurred within a relatively short period before the trial. The concept might have been better rendered by using the single word invention without adjectival addition.⁵⁵ The great preponderance of authority suggested that in order to be admissible to rebut an allegation of invention the witness’s statement must have preceded the circumstances giving rise to and hence the alleged invention.

[48] But it cannot be said that the common law has been totally and universally clear on this point. For example, in the recent English case of *R v Athwal*⁵⁶ the Court of Appeal said the ultimate “touchstone” for application of the doctrine was whether the prior consistent statement might “fairly assist the jury in ascertaining where the truth lies”. That approach may be thought to support the view that a measure of discretion should be vested in trial Judges as regards timing issues.⁵⁷ While previous consistent statements are not generally admissible, there may be something about the content of or circumstances in which the statement was made which make it truly of assistance to the jury, even if it was made after the alleged invention.

⁵⁴ *Tome v United States* 513 US 150 (1995). The majority comprised Stevens, Kennedy, Scalia, Souter and Ginsburg JJ; the minority Rehnquist CJ, O’Connor, Thomas and Breyer JJ.

⁵⁵ As was done in s 120(2) of the Criminal Justice Act 2003 (UK), which employs the word “fabricated” on its own.

⁵⁶ *R v Athwal* [2009] EWCA 789, [2009] 1 WLR 2430 at [58].

⁵⁷ This was also the view cogently expressed (at 172ff) by the minority in *Tome*, in which the Court, as here, was interpreting a codification of the common law. The minority judgment gives some excellent examples of circumstances in which a “post-motive statement” may tend to rebut a claim of fabrication.

The text and purpose of s 35

[49] The definition of the expression “previous statement” in s 4 is “a statement made by a witness at any time other than the hearing at which the witness is giving evidence”. This reference to “any time” certainly does not circumscribe the statement temporally, but that point does not directly relate to whether there is of necessity a temporal requirement inherent in the concept of responding to a claim of recent invention.

[50] Thus the key present question in interpreting s 35(2) is whether a prior consistent statement can be said to respond to a claim of recent invention if it was not made prior to the occasion of the alleged invention. As we have said, respond in this context means tend to rebut. To respond to a claim of recent invention the statement must tend to rebut the proposition that the witness’s trial evidence has been invented. While a consistent statement made before the occasion of the alleged invention clearly does so, it does not follow that a consistent statement made after the occasion of the alleged invention cannot do so.

[51] The concept of invention carries with it the connotation of deliberately misleading the Court for some reason or other. In determining whether invention is being suggested it is the effect overall of the challenge to the witness’s evidence that matters, not the language in which the challenge is made. Once the claim of invention criterion under s 35(2) is met, what is required is that the admission of the prior consistent statement be “necessary to respond” to the challenge. Necessity is a matter of judicial assessment in respect of which the common law experience is likely to be of assistance. 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 the circumstances of its making, tend to rebut the claim that the witness has invented the evidence in question.

[52] An allegation of invention or fabrication may be made with or without a clearly suggested or implied motive for the fabrication; albeit without a plausible motive the allegation may appear inherently unpersuasive. If there is a motiveless allegation of fabrication it is not possible to relate the prior consistent statement, in

terms of its timing, with the presence or occurrence of a motive. When there is an allegation of fabrication accompanied by a clearly expressed or implied motive it may be possible to compare the timing of the statement with the timing of the motive and thus satisfy the strict view of the common law, but it will not always be possible to pinpoint with accuracy when an alleged motive and the consequent decision to fabricate first came into the witness's mind.

[53] These inherent difficulties support our view that in interpreting s 35(2) the Courts should not follow the general common law approach as to timing when that is not mandated by the statutory language.⁵⁸ They should anchor themselves firmly in the statutory concept of the previous consistent statement being necessary to “respond” to the claim of invention. Whether the requirements of necessity and response are satisfied do not depend rigidly on timing issues. A consistent statement made later than the occasion of the claimed invention may, depending on its contents and the circumstances of its making, have sufficient cogency in rebutting the claim of invention to enable it to be viewed as a response to the claim within the meaning and purpose of s 35(2). We would therefore hold that to be admissible the previous consistent statement does not have to precede the occasion or motive of the claimed invention.

The purpose for which the statement is admitted

[54] At common law the purpose of a previous consistent statement admitted to rebut a claim of recent invention was, as we have seen, to rebut invention via consistency and not to prove the truth of its contents. Much the same fine distinction was drawn at common law in respect of recent complaint evidence. Both tended to evoke glazed looks from the jury when the judge directed them in these terms. The general approach of the Evidence Act does not support the concept of limited admissibility of this kind. The statute proceeds on the basis that generally speaking evidence is either admissible for all purposes or it is not admissible at all. Specific

⁵⁸ Indeed the Act is designed to make a break from the common law: see s 10.

use provisions are expressly adopted when intended and appropriate.⁵⁹ The primary touchstone for admissibility is relevance; and relevance is regarded as a general rather than a limited concept. The artificiality and practical awkwardness of a rule which has certain evidence relevant to consistency but not directly to truth leads me to the view that the Act should not be construed as leading to that result unless that conclusion is unavoidable. We are satisfied that it is not. Indeed, as the Crown submitted, there are factors which suggest that the distinction formerly drawn between consistency and truth has deliberately not been included in the Act.

[55] The limitation on the use of this kind of evidence to consistency was originally adopted mainly to avoid what would otherwise have amounted to a clash with the old hearsay rule. To allow the evidence to go to consistency was regarded as not breaching the rule, whereas to allow it to go to truth of the contents of the statement would have done so.⁶⁰ Now this kind of evidence is no longer within the definition of hearsay,⁶¹ as the maker of the statement is a witness, a key underpinning of the rationale for the restriction on use has gone. The Act's general move towards simplification of the law of evidence would not be enhanced by reading in a limited use restriction when Parliament has not chosen to state that restriction expressly.

[56] Although Mr Shamy, rightly, did not advance the proposition, it has been suggested⁶² that the words "to the extent that" in subs (2) are intended to signal that a previous consistent statement, if admitted, goes only to the question of the witness's veracity or accuracy via consistency or by showing that the witness said the same thing when the events were fresher in the mind. While semantically that may perhaps be a possible interpretation, we consider it is not the correct one.

⁵⁹ See ss 27(1), 31, 32 and 34(2).

⁶⁰ See JD Heydon *Cross on Evidence* (7th ed, LexisNexis Butterworths, Australia, 2004) at 498 and *Papakosmas v R* [1999] HCA 37, (1999) 196 CLR 297.

⁶¹ A hearsay statement is defined in s 4 of the Evidence Act as meaning 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.

⁶² See Bernard Robertson "Prior Consistent Statements" [2009] NZLJ 347.

[57] The words “to the extent that” are linked with the concept of the evidence being necessary to respond to a claim of recent invention. It is in this way that the evidence goes to the witness’s veracity or accuracy. The introduction of the concept of necessary extent points much more cogently to the extent of the evidence to be admitted rather than to its use once admitted. The provision is designed to ensure that a previous consistent statement is not admitted beyond what is necessary to respond to the challenge to the witness’s veracity. It is also designed to avoid the introduction of more evidence than is necessary when more than one statement has been made to similar effect. Even without reference to the Law Commission’s work on which the statutory language is based, that seems to us, both in principle and from a practical point of view, to be the purpose of that language. Reference to the Commission’s work confirms that view. The Commission indicated that, once admitted, this kind of evidence was intended to be admitted for all purposes.⁶³ Nothing occurred during the Parliamentary history of the Act to suggest that Parliament was indulging in the inherently unlikely exercise of limiting the purpose for which the evidence was admissible while retaining language which the Law Commission had adopted with a wholly different purpose.

This case

[58] We come now to the circumstances of this case against that legal background. The first point is whether the cross-examination of the complainant by counsel for the appellant at trial amounted to a claim of recent invention. As earlier indicated, it is the overall effect of the challenge to veracity or accuracy that matters, not the precise language in which the challenge is made or the intent of the cross-examiner. Clearly here there was a challenge to veracity and accuracy in a general sense. Mr Shamy appropriately did not suggest otherwise. He contended that there had been no suggestion of invention. But the trial judge and the Court of Appeal both considered that in substance the complainant was being challenged in cross-examination with making up her evidence in order that she might obtain money from the Accident Compensation Corporation. The trial judge is in the best

⁶³ Law Commission *Evidence* (NZLC R55(2), 1999) at [C168].

position to judge whether invention is being suggested and appeal courts should be cautious about taking a different view because they do not have the same appreciation of the flavour and atmosphere of the cross-examination.

[59] In this case there was no purpose and no relevance in the reference to ACC issues unless counsel was attempting to sow in the minds of the jury at least the seeds of the suggestion that the complainant's evidence had been fabricated for financial advantage. Although linguistically that proposition was not directly put, the cross-examination would undoubtedly have been understood by the jury in that sense. It would have been sufficient, despite its obliqueness, to allow counsel to address the jury on that basis. We have little doubt that the trial Judge was correct in regarding this aspect of s 35(2) as satisfied. The complainant's veracity was challenged on the basis of a claim that her evidence had been fabricated.

[60] The next question is whether the admission of the evidence of the complainant's conversation with Mr Loos was "necessary to respond" to the claim of invention. Mr Shamy argued there was no necessity in the light of the other Crown evidence. In our view the trial Judge was entitled to regard the admission of what we will call the Loos evidence as a necessary response. Although trial judges are not normally involved with the "necessity" of evidence as a criterion for its admissibility, it is clear that in this instance the concept of necessity is focussed on the overall interests of justice and, in particular, fairness to the witness. The claim here was, in essence, that the witness had fabricated her evidence in the hope of financial advantage. That is a serious allegation and both in the interests of justice between Crown and accused and in fairness to the witness, the trial judge was entirely justified in taking the view that a response from her via her previous consistent statement was necessary for those purposes.

[61] The next issue is the timing aspect of the response question. This case is a good example of the difficulties that would arise if precise attention to timing issues were held to be a mandatory ingredient of the response issue. Let us assume Mr Shamy is right in his submission that the complainant's statement to Mr Loos was not proved to have been made before the ACC motivation arose. If that is so it is because the point was not explored at trial with any precision. Indeed the cross-

examination was very loose and unspecific on this point. In what may have been a claim of evolving motivation, the question whether the Loos evidence pre-dated the occasion and motivation for invention may never have been able to be clearly resolved. It is, however, a more than tenable view that the making of the statement did precede the ACC motivation.

[62] The ultimate question in this situation is, nevertheless, as earlier identified, whether the circumstances in which the rebutting statement was made and its contents were sufficient to enable the statement to be viewed as responding to the claim of invention. In our view the circumstances in which the complainant made her statement to Mr Loos gave it strong circumstantial cogency as a response to that claim. The circumstances were such that the complainant was most unlikely to have made an invented claim of rape to Mr Loos at that time. She spoke to him immediately after her mother had tried to kill herself. Mr Loos said that when she became aware of her mother's attempt at suicide, the complainant became hysterical. He took her to his house and, after she had stopped crying, she told him that the appellant had raped her when she was young. As we have said, on one view of the evidence this statement, in May 2006, was made several months before the complainant became aware of the availability of an ACC payment. If that were the case the statement qualified for admission on conventional lines. But, even if the timing were otherwise, and it were to be accepted that the complainant knew of that availability "in late 2005-2006", the statement was made in circumstances which justified its admission as a response to the allegation of invention.

[63] Whether the circumstances in which a statement is made and its contents are sufficient to be a response to a claim of invention is a matter of evaluation for the trial judge. The judge must be alive to the risk that the statement may have been made in an attempt to rebut a legitimate claim of invention. Hence the less room for artifice there is in the circumstances the more circumstantial cogency there will be in the statement as a response. Beyond that we do not consider it is appropriate to go, in giving guidance in this area. In this case the trial judge was right in ruling that the Loos evidence should be admitted as a necessary response to the claim that the complainant had invented her evidence.

Summing up

[64] In summing up the Judge directed the jury that the relevance of the Loos evidence lay in its capacity to show consistency between what the complainant said to him and what she was now saying at trial. Any such consistency might assist the jury in assessing the complainant's credibility in what she was saying to the jury. This direction was unduly favourable to the appellant. It represented the position at common law, whereas under the Act, as we have seen, the evidence of a previous consistent statement is admissible for all purposes and thereby constitutes evidence of the truth of the contents of the statement. There is therefore no basis for concluding that this direction gave rise to a miscarriage of justice.

Conclusion

[65] We can conveniently summarise our conclusions as follows:

- (1) The previous consistent statement of the complainant was correctly admitted under s 35 (2) of the Evidence Act 2006;
- (2) The trial Judge did not correctly direct the jury on the use to be made of that statement but his misdirection was favourable to the appellant and no miscarriage of justice thereby arose.

[66] In view of these conclusions there is no need to explore the circumstances in which trial counsel withdrew the objection to the admissibility of the Loos evidence and the effect of that withdrawal.

[67] The appeal should be dismissed.