PCLL Conversion Examination
June 2016
Examiner's Comments
Evidence

Students should note that none of the comments below are set out as 'model answers' – these are suggested guidelines only and many students who achieved a pass mark in this exam did so without mentioning every point set out below.

Question 1

Part (i) B was charged with the buggery and murder of a boy. He admitted homosexual activity but said when he saw another man nearby he panicked and ran away. B's description of this other man corresponded closely to M. B said M must have committed the offences.

The prosecution agreed that M was in the area that night and had been investigated by police for murder. M was also known to have engaged in homosexual acts in the past with others. B wanted to call witnesses to say that before the victim's body was found, M had told them that a boy had been murdered.

Is this evidence admissible or inadmissible?

Comment: This question was done well by most students – it was relatively straightforward. This evidence was held inadmissible. The fact in issue was whether B had committed the offences and what was relevant to that was not M's knowledge, but how he had come by it. Since he might have done so in a number of different ways, there was no rational basis on which the jury could infer what the source of that knowledge was or conclude that M and not B was the offender. On that basis, it was held that the evidence had been properly rejected, because it was irrelevant - *See R* v. *Blastland [1986] AC 41 HL*

Part (ii) You act for Y, whose case is that at a meeting on 1 July he made it clear to X that he needed widgets to fit into a high-speed machine. The widgets actually supplied were not fit for that purpose. It is X's case that Y did not even attend the meeting on 1 July and that there was never any mention of high-speed machinery. You intend to call Z whose evidence is: 'I was standing just outside the meeting room. I heard Y's voice saying "We need the widgets for the high speed Q480."

Your purpose in adducing this evidence might be:

(a) To prove that Y attended the meeting, contrary to X's evidence.
(b) To prove that X was told that the widgets were needed for a high-speed machine.
(c) To prove that the widgets were needed for a high-speed machine.

Which of these reasons – a b and/or c (if any), is the judge likely to rule admissible?

Comment: unlike Part (i) this part appeared to present more difficulty although those students who read through the question carefully were able to present a fairly simple answer. As with many other questions too many students overcomplicated their answers – in order to get a pass mark the 'basics' have to be outlined showing clearly demonstrating that the question has been understood before entering into complex argument. Here the simple rules of admissibility needed to be demonstrated – Thus the hearsay rule and the rule against previous consistent statements of evidence might prevent Y relying on this statement for purpose (c) but not for purposes (a) and (b). In other words, it is possible that, solely on the basis of this evidence, the judge could find that Y was present at the meeting and that X was aware that the widgets were needed for a high speed machine, but that there is no admissible evidence as to the actual purpose for which the widgets were required.

Question 2

Generally, a witness who testifies in a court is required to give information relevant to the proceedings on matters upon which he is asked by one or other of the parties or the court. A witness may not refuse to testify on any relevant and admissible matter unless the court holds that the matter is privileged.

Under human rights law as well as at common law, where the court holds that a matter is privileged under one of the various heads of privilege, a witness cannot be compelled to testify as to the question asked. Explain this evidential rule in relation to:

(i) Self-incrimination in a criminal trial
(ii) Legal and professional privilege

Comment: students who mention the HR/BoR and/or Basic Law were given additional marks but not otherwise failed.

Part (i) At common law, in criminal proceedings, a witness is not required to answer any question or produce any document which would, in the opinion of the court, tend to expose the witness to a criminal charge, penalty or forfeiture. The rule is not just a rule of evidence but a substantive and fundamental common law right. That right is now protected - at least to some extent - by the Basic Law. In HKSAR v Lee Ming-tee & Anor, the right was described as a 'deep-rooted' privilege and as one belonging to everyone in Hong Kong. Article 11(2)(g) of the Bill of Rights and Article 14.3(g) of the ICCPR grants to a person charged with a criminal offence.

The privilege is available to all witnesses in criminal proceedings - Section 54(1)(f), Criminal Procedure Ordinance (Cap 221) The accused is protected by the privilege if the question in cross-examination seeks to elicit an answer that would tend to criminate him with respect to matters other than the offence with which he is charged - DPP v Jo (2007) 176 A Crim R 19.

Part (ii) Legal professional privilege: (at little more complicated than Part (i) again, students who set out their basic understanding of the question first tended to score higher

marks - L&PP is divided into two divisions: litigation privilege and legal advice privilege - Three Rivers District Council & Ors v Governor & Company of the Bank of England (No 6) [2005] 1 AC 610; HKSAR v Wong Chi Wai (2013) 16 HKCFAR 539. Therefore L&PP attaches to communications made for the purpose of *giving or receiving legal advice or for use in existing or anticipated litigation.* The legal adviser may be a solicitor or barrister.

Both components are closely related and the policy and constitutional bases of the privilege are essentially the same - R v Derby Magistrates Court, ex parte B [1996] AC 487. The privilege is based on public policy that confidential communications between a person and his legal adviser will never be disclosed without his consent. The privilege also has a constitutional basis. In R v Special Commissioner & Anor, ex parte Morgan Grenfell & Co Ltd, Lord Hoffmann held that legal professional privilege

'is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.'

Once facts are established giving rise to the privilege, it is absolute in nature and there is no discretion in the courts to permit inspection even where the interests of justice or some other competing interest arises.

Lord Halsbury in Bullivant v AG for Victoria [1901] AC 196, 200 put the rule thus:

For the perfect administration of justice and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But of course this limitation has been put, and justly put, that no court can be called upon to protect communications which are themselves part of a criminal or unlawful proceeding.

The fundamental nature of the law concerning legal professional privilege was underlined by Lord Taylor, CJ in R v Derby Magistrates' Court, ex parte B where he observed:

Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

The protection of the confidentiality of the lawyer/client relationship is essential to the operation of the legal system - R v McClure [2001] 1 SCR 445, 195 DLR (4th) 513, 151 CCC (3d) 321

What is prohibited is not simply disclosure contrary to a client's wishes but disclosure to his prejudice as well as contrary to his wishes - A Solicitor v Law Society of Hong Kong (2006) 9 HKCFAR 175, [2006] 2 HKLRD 116

The importance of this guarantee was underlined by Mason PJ in *HKSAR v Lee Ming-tee (No 2) (2003) 6 HKCFAR 336, [2004] I HKLRD 513.* Any statutory encroachment on the right guaranteed by **article 35** would, in order to be regarded as validly enacted, have to be justified as a proportionate limitation of the right. Undoubtedly it extends to protection against disclosure in relation to court proceedings. The fundamental nature of the privilege was underlined in *China Light & Power Co Ltd v Ford Ltd (1998] 1 HKLRD 382* that in applying the privilege, the court was not required to undertake a balancing act of the competing interests of the parties: the balance had been struck in the nature of the privilege.

Article 35 guarantees the privilege by the Basic Law which provides as follows:

'*Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.*'

Article 87 of the Basic Law, which preserves common law rights in criminal proceedings, also guarantees the right to confidential legal advice as follows:

In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.

Question 3

A witness is competent to give evidence if he may be lawfully called to give evidence. A witness is compellable if he may lawfully be obliged to give evidence. In the modem law of evidence, almost all persons are competent to give evidence. Most persons who are competent to give evidence are also compellable.

However, the position of some groups or classes of people are said to be not competent or compellable or both. Explain why in relation to:

(i) Accomplices
(ii) The spouse of an accused in a criminal trial?

Comment: Part (i) - An accomplice is, as a general rule, a competent witness - R v Turner [1975] QB 834, 61 Cr App R 67; R v Chu Kwan-kong Cr App 139/77; R v Tsui Lai Ying & Others [1987] HKLR 857. His evidence is admissible even if it is not corroborated – 2. R v Attwood & Robbins (1787) 1 Leach 464; R v Baskeville [1916] 2 KB 658 However, if an accomplice is jointly charged in the same indictment in the same proceedings with the accused against whom he proposes to testify, he is not competent as a witness for the prosecution - R v Grant [1944] 2 All ER 311; 30 Cr App R 99; R v Shorrock (1947) 32 Cr App R

It is not appropriate for the courts to control the grant of immunity to a witness by the prosecution because it is not for the courts to direct prosecution policy either generally or

in a particular case and the courts do not exercise a disciplinary function over the prosecution. There may be circumstances in which the exercise of this discretion by the executive may give rise to an abuse of the process of the court - HKSAR v Cheung Ting Bong [2006] 1 HKC 286.

In those circumstances, **section 54 of the Criminal Procedure Ordinance provides that the accomplice is only competent for the defence.** In order to make the accomplice a competent witness for the prosecution, the proper procedure is to terminate his part in those particular proceedings as an accused person. This may be done by:

(1) a plea of guilty by the accomplice to the charge that he faces;
(2) removing the accomplice from the indictment;
(3) filing a *nolle prosequi* in the proceedings with respect to that accomplice;
(4) offering no evidence against the accomplice to secure his acquittal.

Comment part (ii) At common law, the spouse of the accused was generally incompetent to give evidence either for or against the accused. There are a number of common law and statutory exceptions to this rule. In proceedings other than criminal proceedings, section 3 of the Evidence Ordinance renders spouses both competent and compellable both for and against each other. So far as criminal proceedings are concerned, section 6 of the Evidence Ordinance preserves the common law rule.

Statutory modifications: witness for the accused – students should be aware of at least the basics of s. 57 CPO.

The husband or wife of an accused are competent to give evidence on behalf of the accused or a co-accused: section 57(1) of the Criminal Procedure Ordinance. Subject to section 57(5), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused: section 57(2). The failure to call the husband or wife of an accused to give evidence on behalf of the accused or a co-accused shall not be made the subject of any question or comment by the prosecution: section 57(11). The fact that the husband or wife of an accused has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question or comment by the prosecution: section 57A(4).

(1) The husband or wife of an accused shall be competent to give evidence on behalf of the accused or a co-accused and, subject to subsection (5), shall be competent to give evidence for the prosecution.
(2) Subject to subsection (5), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused …

(5) Subject to subsection (6), where an accused and the husband or wife of the accused are standing trial together, neither spouse shall at the trial be competent to give evidence for the prosecution under subsection (1), or be compellable to give evidence under subsection (2) or (3).
(6) Subsection (5) shall not apply to either spouse who is no longer liable to be convicted of any offence in the trial (whether as a result of pleading guilty or for any other reason).

Question 4 All witnesses called to give evidence in a criminal trial (whether for the Prosecution or Defence) are subject to a number of rules of evidence in relation to how they may give their evidence in court. Briefly, explain the rules in relation to each of the following:

(i) Examination in Chief and how this differs from Cross Examination.
(ii) Leading Questions in a Criminal Trial
(iii) Memory-refreshing Documents in Court.
(iv) The Rule of Finality of Answers to Collateral Questions
(v) Hostile Witnesses

Comment: this was a five part question covering some very common evidential issues (each clearly marked on the PCEA syllabus) that often arise in course of evidence in a criminal trial**.** This question was done very well by almost all students**.**

(i) Examination in Chief – (simple answer for both XIC & XX is acceptable) When a party to the trial calls a witness to testify, the process of examining that witness is known as examination-in-chief. Examination-in-chief proceeds by way of counsel for the party who called the witness, asking the witness a series of questions designed to elicit the testimony of that witness. As a matter of practice, only one counsel for a party may examine in chief.

Cross Examination - At the conclusion of the examination-in-chief of a witness, that witness is liable to cross-examination by the opposing party. Article 14(3)(e) of the International Covenant on Civil and Political Rights guarantees a right to cross-examination as a minimum guarantee in criminal proceedings in full equality as follows: 'To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

The object of cross-examination is to: (1) weaken or destroy the testimony that the witness has given in examination-in-chief; and (2) to elicit from the witness facts or matters which are favourable to the party conducting the cross-examination. Questions in cross-examination may be asked on any matter which is relevant to the facts in issue in the trial and as to the credit of the witness. A greater degree of latitude is often shown to counsel for the accused in relation to the requirement that questions be relevant.

(ii) Leading Questions (again a relatively simple answer is required) are those which suggest the answer sought, sometimes by putting a matter in dispute in a way designed to elicit a reply of no more than "yes" or "no", or which are framed in such a way the they assume certain facts not yet established. Such questions are not generally permitted in examination-in-chief. If evidence is elicited by leading questions, it remains admissible, but the weight attached to it may be reduced.

The rule is relaxed in relation to introductory and undisputed matters. To shorten proceedings, and bring the witness as quickly as possible to the material points of the

case, it is not only permissible, but proper, to lead as to matters which are introductory, or not really in dispute.

Leading questions may also be put to a witness whom the judge rules hostile.

Answers to (iii) (iv) and (v) require slightly more detailed explanations.

(iii) Memory-refreshing Documents – A witness may refresh his memory from his or her own statement outside the courtroom and before giving evidence. The pre-conditions which apply in the case of memory-refreshing documents **in court** have no application. However, concerning inspection and cross-examination upon a document used to refresh the memory **outside court**, the rules are the same as those applying to the use of memory-refreshing documents in the witness box.

However, these rules do not prevent a witness looking at a document during examination in chief for the purpose of refreshing his or her memory, so long as the document in question was created reasonably soon after the events recorded . A witness may refresh his or her memory in the witness box by reference to a document that the witness made or verified provided that:

(a) the document was made or verified at the time of the events in question or so shortly thereafter that the facts were fresh in the witness's memory;
(b) the document is produced in court for inspection; and
(c) the document is, in cases where the witness has no recollection of the events in question, but simply gives evidence as to the accuracy of the contents of the document, it is the original.

Assuming the use of the document in this way does recall to the witness's mind the matters recorded, then the evidence given is the witness's oral evidence of a present recollection (albeit a revived recollection) and **the document** itself still has no evidential status at all. It is the oral testimony that is the evidence, in the normal way.

If a document is used for refreshing memory in this way, then both the judge and the opposing advocate are entitled to see the document.

(iv) Collateral Evidence Rule: Finality of Answers - Where cross-examination of a witness goes to facts in issue in the case, the party asking such questions is entitled to call evidence to contradict the answers given by the witness. However, as a general rule, where the questions go solely to collateral matters (such as issues of credit) the answer is final - *HKSAR v Wong Sau Ming* (2003) 6 HKCFAR 135, [2003] 3 HKC 463.

In such a case, the cross-examiner may not call evidence to contradict the answers given - *HKSAR v Wong Sau Ming* (2003) 6 HKCFAR 135, [2003] 3 HKC 463. Collateral matters include matters which go to the credit of the witness. However, collateral matters are not limited solely to matters of credit. The basis of the rule is

there must be some limit to the matters which can be introduced in a trial. The rationale for the rule was expressed by Rolfe B in *A-G v Hitchcock* as follows:
If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, and for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible enquiry as to the truth of the statements made.

As was said in *McConnell v Police* It is a rule used as one means of limiting the area of inquiry to matters having reasonably direct relevance to the issues before the court.' In *HKSAR v Wong Sau Ming* Li CJ pointed out that the rule is conducive to a fair trial. He observed:

Its rationale is that, as a matter of common sense, a criminal trial should be kept within proper limits. The court should focus on the issues in the case. Its attention should not be diverted to collateral issues such as credit, the exploration of which may unnecessarily blur or confuse the real issues in a cloud of detail. Although the rule has sometimes been criticized, it is well-established and necessary. However, the distinction between questions going to the issues in the case and those going to credit is sometimes difficult to draw and in some cases, can be a rather thin one.

Very competent students may mention, in addition that there are five well-established exceptions to the rule relating to the finality of answers to questions in cross-examination as to collateral matters. These are:

i) Prior convictions of the witness.
ii) Bias or interest of the witness.
iii) Prior inconsistent statements.
iv) Acquittal in a previous trial because a prosecution witness in the present trial demonstrated to have lied in the previous trial.
v) Bad character.
vi) Physical or mental unreliability of the witness.

The list of exceptions is not closed and may be relaxed as the common law of Hong Kong develops.

(v) Hostile Witnesses - As a general rule, the party calling a witness is not allowed to impeach the testimony of that witness. That includes when the party re-examines the witness following cross-examination. *Willis v Magistrates Court* (1996) 89 A Crim R 273, 279. The classical statement of the rule is in *Ewer v Ambrose* (1825) 107 ER 910 is as follows:

"If a witness proves a case against the party calling him, the latter may show the truth by other witnesses. But it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that the witness is not to be believed on his oath, but he may show by other evidence that he is mistaken as to the fact which he is called to prove."

However, if a witness 'by his conduct in the witness box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination' *Clarke v Saffrey* (1824) 171 ER 966. In Stephen's *Digest of the Law of Evidence,* the editor says that:

"If a witness appears to the judge to be hostile to the party calling him, that is to say, not desirous of telling the truth to the court at the instance of the party calling him, the judge **may in his discretion** permit his examination by such party to be conducted in the manner of a cross-examination to the extent to which the judge considers necessary for the purpose of doing justice. The discretion vested in the trial judge to allow a party to contradict his own witness by cross-examination is derived from common law."

The common law has been supplemented by section 12 of the Evidence Ordinance which provides as follows:

"A party producing a witness in any proceedings shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness, in the opinion of the court, proves adverse, contradict him by other evidence or, by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony, but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

Section 12 is derived from section 3 of the Criminal Procedure Act 1865 (**Denman's Act**). The section only contemplates one situation. That situation is when the witness proves adverse or hostile by reason of his testimony. A witness may be adverse or hostile before he utters a word of evidence. The right to apply to declare a witness hostile arises also when the witness is being re-examined.

In order for the rule at common law to operate or for **section 12 of the Evidence Ordinance** to come into operation, the witness must be 'adverse'. In this context, the witness must be 'hostile' and not merely 'unfavourable'.

Finally, t**he decision to treat the witness as hostile is a matter within the discretion of the trial judge**. The discretion is one which rarely be interfered with on appeal. The hostility must manifest itself at the trial. It must manifest itself in open court. The fact that a witness was hostile at earlier proceedings (such as committal proceedings) is not of itself sufficient justification for declaring the witness hostile at trial. The court should, where appropriate, explore other avenues than declaring the witness hostile and in some cases, the preferable course might be to invite the witness to refresh his memory from a witness statement. This may indicate whether the witness was genuinely hostile or not.

Question 5

As Lord Reid pointed out in *Myers v DPP* [1965] AC 1001, 107, 'it is difficult to make any general statement about the law of hearsay which is entirely accurate'.

The rule against hearsay has proved difficult to define with precision because of the large and varied number of exceptions to this rule.

(i) Give a brief definition of the basic hearsay rule and then explain how and/or why each of the following examples are generally considered to be exceptions or partial exceptions to the basic rule.
(ii) Dying Declarations
(iii) Declarations in the Course of Duty
(iv) Res Gestae
(v) The Opinions of Qualified Experts

Comment: Another five-part question that was done very well by most students – all parts required simple and straightforward outlines (to get a good mark) before attempting more detailed exposition – which in any event was often superfluous.

(i) Definition of hearsay, basic rule – 'Any statement made otherwise than by a person while giving oral evidence in the proceedings, which is tendered as evidence of the matters stated'. Other wording and variations are, of course, acceptable – if correct. For example - Hearsay is an out of court statement, made in court, to prove the truth of the matter asserted. In other words, hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing in question and that is offered to prove the truth of the matter stated. For example, Witness A in a murder trial claimed from the witness box: "Witness B (the "declarant") told me that the defendant killed the victim." The definition of hearsay is not too difficult to understand.

(ii) Dying Declarations - The oral or written statement of a person made as that person was dying is, under some circumstances, admissible as evidence of the cause of his death at the trial of another **but only is a case involving the murder or manslaughter** of the deceased.

The declaration may be by way of signs - Chandrasekera v R [1937] AC 220. The declaration, often known as a dying declaration, is not admissible for any other purpose - R v Mead (1824) 107 ER 509; Nembhard v R [1981] 1 WLR 1515, [1982] 1 All ER. Such a declaration is only admissible if at the time that it was made, the maker of the statement was under a settled, hopeless expectation of death - R v Peel (1860) 7 F & F 21; Sussex Peerage Case (1844) 11 Cl & Fin 85.

It is not sufficient that the declarant subsequently was in a settled hopeless expectation of death. The expectation must exist at the time of the declaration. R v Hope [1909] VLR 149; R v Austin (1912) 8 Cr App R 27.

For completeness Sections 70 and 73 of the Evidence Ordinance provide limited extensions of the dying declarations rule but the rule only applies to the prosecution – students who noted this were given extra marks – most did not.

(iii) Declarations in the Course of Duty - Where a person makes an oral or written statement in the course of his trade, business, profession or occupation in pursuance of a

duty to do so and the maker of the statement dies, that statement is admissible as evidence of the truth of the contents of the statement. In order for the statement to be admissible there must be strict proof of:

(1) The death of the person making the statement or declaration. The mere fact that the person is missing at trial is not sufficient proof; Myers v DPP [1965] AC 1001

(2) There must be a duty to make the report, and the report must concern some aspect of the deceased's duty. 'It is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates and then to make a report or record of it' - Smith v Blakey (1867) LR 2 QB 326

There must have been a specific duty owed to another to record or report acts of the type recorded or reported. Notes which were merely written for the guidance of the maker do not come within this category - Mills v Mills (I920) 36 TLR 772. See also Pirie v Geddes [1975] Crim LR 107.

(3) The report may only concern the actions of the person making the report or matters which were within his personal knowledge. Thus a report of a scientific officer concerning a suspicious fire made in the course of his duty and who subsequently died was admissible as to the facts contained in it and the investigations that he made, but was not admissible to prove his opinion as to the cause of the fire - R v McGuire (l 985) 81 Cr App R 323.

(4) The report must be relatively contemporaneous with the act reported on. - The Henry Coxon (I878) 3 PD 156; R v McGuire (I985) 81 Cr App R 323.
In the case of a diary, contemporaneity would be presumed - Esch v Nelson (1885) 1 TLR 610

(5) There must have been no motive to misrepresent the matters contained in the report - Marks v Lahee (1837) 3 Bing NC 408

It is suggested in **Cross on Evidence** (page 650) that the report or declaration, even if it qualifies under the strict rules set out above, cannot be used to prove collateral matters.

(iv) Res Gestae - Often the act the subject of a criminal prosecution is part of an event or series of events which is complex in nature. In order for the court to gain an understanding of the criminal act, it may be necessary to place it in its context of complex facts. In some cases, in order to give a complete picture of such events, it may be necessary to give evidence of other events which may not be directly probative of the fact in issue or may be inadmissible because one or more of those events offend the rules of evidence. The doctrine of **res gestae** provides some limited assistance in getting over some of the problems of admissibility thus created. The doctrine makes admissible matters which are said or done in the context of a complex fact situation where those matters would otherwise be inadmissible.

The doctrine of res gestae is only partly an exception to the hearsay rule. Although most res gestae issues are concerned with words spoken by some person who is not giving testimony, and the prosecution seeks to prove those words for the purpose of proving that what was said is true, the res gestae rule also relates to actions and opinions as well - R v Bond [1906) 2 KB 389, 400; O'Leary v R (1946) 73 CLR 566; R v Karetai (1988) 3 CRNZ 564.

It is convenient to discuss the res gestae rule using the well-recognised classifications employed by Cross - see Cross on Evidence 7th edition page 658-674. However, those classifications are merely aspects of a single rule - R v Callender (Archbold News 13 March 1998).

Thus, where the statement would be, by itself, hearsay, but it accompanies a relevant act, if the statement is so mixed up with the act that it cannot in truth be separated then the statement may be given in evidence of the truth of what is asserted. For a hearsay statement to be admissible under this head it must be (see *R v Wong Wing-chun* [1978) HKLR 326.):

(1) A statement which relates to the act it accompanies;
(2) The statement must be contemporaneous with the act;
(3) The statement may be made by a party to the act including the victim.

(v) The opinions of qualified experts – an exception to the rule forbidding the expression of opinions concerns the evidence of properly qualified expert witnesses. This exception is recognition of the fact that there are many topics outside the scope of the knowledge or experience of the tribunal of fact which hears and determines a case. In such a case, a court may receive the evidence of an expert to provide the court with a basis for the tribunal of fact considering and understanding the evidence placed before it which might otherwise have little or no meaning or not be understood. The purpose and limitations of expert evidence is perhaps best expressed in Davie v Lord Provost [1953] SC 34. (See also R v Turner [1975] QB 834, 841; 61 Cr App R 67 and R v Yeung Kwok-fai Mag App 901/95) In answer to a contention that uncontradicted expert evidence should be accepted by a court in the absence of competing evidence, the Court of Session held:

Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or a judge sitting as jury, any more than a technical assessor can substitute his advice for the judgment of the court … Their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole of other evidence in the case, but the decision is for the judge or the jury.

There are numerous areas in which expert evidence may be of great assistance to the court. Essentially the subject matter for the testimony of an expert must relate to an

art or science relevant to the proceedings which requires form of study, learning or experience.

Some fairly obvious examples would include: medicine, surgery, poisons, psychiatry, property valuation, engineering, botany, chemistry, physics, voice prints, fingerprints, dangerous drugs, DNA, the nature of Chinese triad societies, computers, foreign law, foreign customs and usage, lip reading, accounting and so on.