

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**THE RULE IN *HOLLINGTON v HEWTHORN* IN THE LIGHT OF
SECTION 17 OF THE CIVIL PROCEEDINGS EVIDENCE ACT 25 OF
1965 IN SOUTH AFRICA**



BY

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**A MINI-THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE LL.M DEGREE**

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13 DECEMBER 2018

DECLARATION

I, **Thando Gaqa**, declare that ‘**The Rule in *Hollington v Hewthorn* in the light of section 17 of the Civil Proceedings Evidence Act 25 of 1965 in South Africa**’ is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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30 NOVEMBER 2018

KEY PHRASES

Civil Proceedings Evidence Act (CPEA)

Conviction evidence in subsequent civil courts

Judgement evidence in South Africa

Hollington v Hewthorn

Hollington v Hewthorn in South Africa

Section 17 of CPEA

Section 42 of CPEA

The rule in *Hollington*



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DEDICATIONS

To my Lord and Saviour, Jesus Christ: Your strength, guidance and protection have always been sufficient. Who would I be, were it not for Your love and patience? My strength and wisdom are found only in You. Continue to gather the pieces of my brokenness and fashion them into an incredible vessel of a priceless value. Continue to work my scars into beauty marks that everyone admires.

To my mother, Patience Nombasa Mngqibisa-Gaqa: Thank you for having taken care of me as a youngster growing up. Your strength and wisdom are what encouraged me to pursue things greater than what I could ever have imagined and to fearlessly seek understanding when it hides itself so well. Thank you for everything that you have done and continue to do for our family. Knowing that you worked tirelessly for the family inspired me to work tirelessly too in achieving my goals. I will fulfil my promises to you when the light finally shines on me. Keep well, God will continue to hold your hand and lead you out of the storm of your present-day ill-health. No words suffice for the explanation of my love for you.

To myself, Thando Gaqa: you are the chosen one. Your strength, positivity, focus and endless hard work inspire others. Your qualities will ultimately make you an overflowing spring which, not only you but also your generations to come, will drink from. May your fears not divert you from the bigger things that are meant for you. Remain unique from the rest and fix your eyes on the bigger picture of life as you always do. Continue to take good care of yourself and everyone else around you.

ACKNOWLEDGEMENTS

I am thankful to my supervisor, Prof. Jamil Mujuzi. Although we had started on the wrong foot due to the breakdown of communication you nonetheless extended me Ubuntu and helped me pursue my ambitions. When I was hopeless you showed me your selflessness, you went an extra mile and prioritised my work. Your selflessness did not end there but further led you to scrutinise my thesis with a high degree of professionalism. Again, I am so indebted to you and *assalaamu alaykum wa rahmatullah*.

I am so grateful to Professor Patricia Lenaghan. When I was helpless and trying to prepare my proposal, you enlightened me on certain important aspects of it. I am also grateful for your advice and everything else you have done for me in my academic journey with you.

I am thankful to my former co-ordinators Robert Nanima and Jeremy Smith for helping me with the necessary information when I was in the early phase of this project. I am also grateful for your patience and understanding throughout your tenure as the GLA co-ordinators.

I am so grateful to Dr Tinashe Kondo for lending me his ear and providing me with words of advice notwithstanding his busy schedule. Once again, thank you.

To my colleague and friend, Liyaquat-Alli Mohamed, the IT specialist at the Law Resource Centre, thank you for your assistance on the technical aspect of this work. You've always been helpful to me since I first set foot at the University of the Western Cape. May you further extend your generosity and kindness to others as well. Again, thank you very much Mr Mohamed and *assalaamu alaykum wa rahmatullah*.

I am grateful to my colleague and friend, a lecturer from the EMS faculty, Mr Gordon Adams. Your positive energy and your belief in me have inspired me to become a better person at both the personal and academic level. I hope and wish to continue working with you in bigger projects in the future.

To my colleague, a Graduate Lecturer Assistant (GLA) from the law faculty, Bright Mboderi: When I was facing difficult times and setbacks in my postgraduate academic journey you took it upon yourself to help me in my despair even when you were drowning in yours. The support you have given me throughout your tenure as a GLA is so enormous and appreciated. Wherever life puts you in future, I wish you all the best.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

South Africa, among others, has adopted, and is bound by, the so-called ‘rule in *Hollington*’¹ that originated in England in 1943 in *Hollington v Hewthorn* (hereinafter the ‘*Hollington case*’).² The issue, among others, that the English Appeal Court had to determine in this case was whether a judgement of a criminal court could be used in subsequent civil proceedings to prove the liability of either of the litigants. The Court reached the conclusion that a judgement of a criminal court is just an irrelevant and inadmissible opinion in later civil proceedings. The court adopted the view that had a criminal conviction been admissible evidence in civil proceedings, it would lead to a situation where the defendant would end up challenging the propriety of those convictions. In the light of that, the courts would be faced with a duty to retry the criminal case in the midst of the civil proceedings.³

Section 17 of the Civil Proceedings Evidence Act (CPEA)⁴ provides that a conviction or an acquittal can be proved by the production of a document duly certified by the relevant court that acquitted or convicted the person in question. Furthermore, section 18 of the Supreme Court Act (SuCA)⁵ now section 34 of the Superior Courts Act (SupCA)⁶ provides that whenever a judgement, among other things, of a court needs to be proved or referred to in any manner a duly certified copy thereof will serve as *prima facie* evidence thereof. These sections militate against the rule in *Hollington* in that they allow, or at least should be interpreted in a manner that accords with the allowance of, the admissibility of conviction evidence in later civil law suits.

¹ *Yusaf v Bailey* 1964 (4) SA 117 (W); See also *Birkett v Accident Fund* 1964 (1) SA 561 (T) where the SA courts held themselves to be bound by the English judgement, the *Hollington case*.

² *Hollington v Hewthorn* 2 [1943] All ER 35.

³ *Hollington case* at 40 A – E.

⁴ Civil Proceedings Evidence Act 25 of 1965 s17. – ‘The trial and conviction or acquittal of any person may be proved by the production of a document certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such registrar, clerk or other officer, to be a copy of the record of the charge and of the trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof.’

⁵ Supreme Court Act 59 of 1959 s 18.

⁶ Superior Courts Act 10 of 2013, s 34.

The judiciary, including the highest court of the land, has despite the existence of section 17 of the CPEA and section 34 of the SupCA, cited the rule in *Hollington* confirming that it is part of our law.⁷ The South African courts seem to place much reliance on section 42 of the CPEA, the so called ‘residuary section’, in isolation of section 17 of the CPEA. According to section 42, the courts are entrusted with a duty to apply the law of evidence pertaining to civil proceedings that was in force on the 30 May 1961. On that date South Africa followed, and was bound by, the English law that included the *Hollington* case and the rule laid down therein.⁸ Section 42 makes it clear that only and only when the CPEA is silent on a matter will the courts be entitled to seek answers from the jurisprudence that applied on 30 May 1961. The wording of section 42 is peremptory in that it employs the word ‘shall’ and not ‘may’, therefore from this it is clear that this section is not applicable at the judges’ discretion. From the wording of the CPEA, section 42 will not be functional in cases where a matter has already been catered for by other CPEA provisions, not even at judges’ discretion. To date the judiciary still employs section 42 to seek answers elsewhere even though section 17 is already in place and is providing the answers on the admissibility of conviction evidence in civil matters and this will be discussed extensively in chapter 3 of this dissertation. In addition, courts continue to ventilate the rule in *Hollington* by further extending its application to tribunal proceedings.⁹ That state of affairs is controversial¹⁰ and needlessly contributes to litigation costs.¹¹ This dissertation seeks to resolve the problem that ought to have ended in 1965 when the legislature took the initiative and enacted the CPEA including section 17 that abolished the rule in *Hollington*.

⁷ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 42.

⁸ Civil Proceedings Evidence Act 25 of 1965 s42. – ‘The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.’

⁹ *Graham v Park Mews Body Corporate and Another* [2012] 1 All SA 167 (WCC) para 60; *De Sousa and Another v Technology Corporate Management (Proprietary) Limited and Others* [2017] 3 All SA 47 (GJ) para 107.

¹⁰ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] 2 All SA 543 (A) para 556.

¹¹ *Cross Evidence 3ed* (1967) 378.

1.2 Objective of the Study

This dissertation seeks to argue for the abolition of the rule in *Hollington v Hewthorn* relying on the legal developments in the jurisdiction from which it was derived. The intent is to show how it militates against the relevant prescripts of the CPEA. An analysis of case law will be embarked on in the exploration of the problem.

1.3 The Significance of the Problem

The rule in *Hollington* has been applied by courts in South Africa despite the effects it could have and has had on litigants.¹² Before examining the effect of this rule in the South African setting, it is necessary to consider its effect it had in the first case in which it was formulated, the *Hollington* case. In that case an action for damages emanating from a motor vehicle collision was instituted subsequent to a criminal case in which the court declared the driver to have been negligent. The father (plaintiff) of the deceased (victim) instituted a civil action for damages resulting from the death of his son who died from the sustained injuries. The plaintiff had no direct evidence to prove negligence on the part of the driver and he then tendered the criminal court judgement in which the driver had been convicted of negligent driving following the accident. The court of first instance rejected that evidence on the basis that it was opinion evidence, which enjoyed inadmissibility in proving negligence in subsequent civil proceedings. On appeal, the Appeal Court upheld the court *a quo*'s finding.¹³

As is evident from the above, the application of this rule in that specific instance caused considerable prejudice to the plaintiff. The plaintiff had no other evidence to tender to prove that the driver, as a result of whose driving the plaintiff's child had died, had been negligent apart from the initial criminal court's judgement. The rule in *Hollington* resulted in unfair and unreasonable jeopardy to the plaintiff's claim as the court disregarded the conviction.¹⁴

When the rule was subsequently received into South African law, it was similarly prejudicial to litigants. When plaintiffs wanted to recover their losses that resulted from theft, the civil courts ruled that the fact that a defendant had been convicted of theft by a criminal court was irrelevant and inadmissible as evidence in subsequent civil proceedings in proving that such

¹² *Graham v Park Mews Body Corporate and Another*; 2012 (1) SA 355 (WCC); [2012] 1 All SA 167 (WCC) para 60; *De Sousa and Another v Technology Corporate Management (Proprietary) Limited and Others* [2017] 3 All SA 47 (GJ) para 107.

¹³ *Hollington v Hewthorn* 2 [1943] All ER 35.

¹⁴ Zeffertt DT & Paizes *The South African Evidence* 2 ed (2009) 342.

defendant had in fact commit theft.¹⁵ This rule also affects the plaintiffs' claims in cases of pecuniary loss and in cases of defamation. The court in the case of defamation held that a convicted party could not be liable for fraud in the subsequent civil action for fraud merely based on the reliance by the plaintiff on such initial criminal conviction.¹⁶ A perpetuated application of the rule in *Hollington* by the South African courts after the birth of section 17 of the CPEA in South Africa poses a difficulty for litigants that have no any other better evidence than the criminal court judgement itself. Litigants are deprived of the use as evidence of judgements have been arrived at by the criminal courts after due consideration of all relevant factors surrounding the case as presented to them. The rule will compel prolonged litigation as new evidence is required to prove the same matter that the criminal courts have already pronounced on. That state of affairs completely disregards the cost litigation.

The principle of *stare decisis* is a Latin term that translates 'to stand by things decided'. In the legal context, it translates to: that the decisions made by courts must be followed by other courts as well in subsequent proceedings when they have been approached to determine similar issues.¹⁷ The importance of this principle is that it promotes legal certainty and consistency. Furthermore, it promotes reliance on court rulings and also signifies the integrity of the court process.¹⁸

The doctrine of judicial precedent prescribes that the courts should uphold the law as articulated in previous judgements of the superior, courts and their own decisions. However, a court may deviate from decisions of courts of similar status or its own decisions if it can demonstrate that they were erroneously decided.¹⁹ This doctrine originated in, and was derived from, the English law and it is founded on the notion that the law that was applied to a specific situation previously should likewise be applied in similar situations thereafter. It is

¹⁵ *R v Xaki* 1950 (4) SA 332 (E); *R v Lee* 1952 (2) SA 67 (T); *R v Markins Motors(pty) Ltd* 1959 (3) SA 508; *Du Toit v Grobler* 1947 (3) SA 588 (SWA).

¹⁶ *Yusuf v Baily* (1964) SA 117 (W).

¹⁷ Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another 2002 (7) BCLR 663 (C) at 693.

¹⁸ *Camps Bay Ratepayers' and Resident Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); see also Legal Information Institute 'Stare Decisis' available at https://www.law.cornell.edu/wex/stare_decisis (Accessed 21 February 2018).

¹⁹ Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another 2002 (7) BCLR 663 (C) at 693 .

essentially ingrained in the principle of *stare decisis* and is expressive of the fact that the courts are ordered in a hierarchical fashion.²⁰

1.3.1 Conflict with Judicial Precedent and Stare Decisis

The rule in *Hollington* unreasonably interferes with and militates against *stare decisis* and judicial precedent, the long-standing principles that serve a legitimate purpose in our law. The *Hollington* rule unreasonably puts these principles in abeyance. This translates to: that even if the High Court convicts an accused person as charged, such conviction is not binding on the inferior courts, such as a Magistrate's Court, although it would otherwise be binding in terms of the judicial precedent principle. The rule in *Hollington* entitles a Magistrate to disregard that conviction on the basis that it is irrelevant and therefore is inadmissible in a subsequent civil suit.²¹ This rule entitles the inferior courts to the exercise of powers that were legally never given to them. It also does away with legal certainty and consistency, and takes away from litigants a reliance on, judicial precedent, and tempers with perceived and actual integrity of the court process. This position would lead to a situation where a litigant is made to feel as if having been unjustly treated as the initial judgement applicable to their case was not considered although the facts were materially the same.²²

1.3.2 Conflict with Common Sense

It is a long-standing fundamental principle of South African law that in criminal matters proof beyond a reasonable doubt is the required standard. The Appellate Division (now the SCA) in the case of *S v Mlambo* held that it is sufficient for the State to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, concludes that there exists no unreasonable doubt that an accused has committed the crime with which he is charged.²³ Having outlined the criminal law standard of proof, it is similarly essential to deliberate on the civil law standard in order to juxtapose between them because the rule in *Hollington* tends to disregard their hierarchical order. In civil proceedings, the required standard of proof is on a balance of probabilities.

²⁰ Barratt A & Snyman P 'Researching South African Law' Available at http://www.nyulawglobal.org/globalex/South_Africa1.html#_edn14 (Accessed 23 February 2018).

²¹ *Groenewald N.O and Another v Swanepoel* 2002 (6) SA 724 (E) page 727E.

²² Halho HR & Khan E *The South African Legal System and its Background* (1968) 244.

²³ *S v Mlambo* 1957 (4) SA 727 (A) page 738A-B.

This, according to the Appellate Division in *Pillay v Krishna*, translates to a duty upon litigants to adduce evidence to combat a *prima facie* case made by the opponent litigant.²⁴

It is, or at least should be, clear from the two foregoing explanations that in criminal matters the standard of proof is heavier than it is in civil proceedings. This is so because in criminal matters the State is required to prove the guilt of the accused beyond reasonable doubt, while, on the other hand, in civil proceedings the litigants are only required to show a *prima facie* case against each other. The rule in *Hollington* requires the matter to be started afresh in the civil proceedings and to be proved on a balance of probabilities, a standard which is lighter than the one on which the matter was first proved in the criminal court. This state of affairs militates against logic and common sense as it is irreconcilable to trade a stronger standard of proof for the lighter one.

1.3.3 Conflict with *De Bloedige Hand Neemt Geen Erf Enis* rule

The doctrine of *de bloedige hand neemt geen erf enis* (hereinafter the ‘*bloedige hand* doctrine’) is a Roman-Dutch law derived principle that forms part of South African common law.²⁵ It translates to: that a murder makes the murderer unworthy to inherit from the deceased’s estate, and thus serves to prevent murderers from benefitting from their criminal undertakings.²⁶ In *Danielz NO v De Wet*²⁷ the first respondent (the wife) was married to the deceased (the husband) and was the sole nominated beneficiary of the life insurance policies taken out on the life of the deceased. The wife hired a person to assault the deceased and subsequent to, and in consequence of, that assault the husband died. The criminal court found both the direct and indirect perpetrators guilty of murder. The administrators of the deceased’s estate brought a civil suit to have the wife excluded as a beneficiary in terms of the *bloedige hand* doctrine. It was argued on behalf of the errant spouse that a criminal court conviction is, in terms of the *Hollington* rule (which is English-law derived principle equally forming part of the South African law), inadmissible in later civil suits. Traverso AJP upheld that argument.²⁸

²⁴ *Pillay v Krishna* 1946 AD 946 page 952.

²⁵ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C).

²⁶ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C) para 37; see also *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) at 752GH for more grounds upon which a person will be deemed unworthy to inherit.

²⁷ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C).

²⁸ *Danielz NO case* para 17-18.

The rule in *Hollington* stands out to compete and conflict with the common law doctrine of *bloedige hand* which doctrine serves to advance the legitimate demands of public policy. The *Hollington* rule defeats the *bloedige hand* and renders it useless in that it makes it difficult for it to achieve the very purpose for which it was intended. Put differently, the *Hollington* rule presents itself as an obstacle to the *bloedige hand* doctrine. In future it will be difficult for the courts to render the litigants unworthy to inherit on the basis of their misdeeds because the rule in *Hollington* forces them to turn a blind eye on the pronouncements of the criminal courts.

1.3.4 Conflict with Separation of Powers Doctrine

The doctrine of the separation of powers, also known as *trias politica*, denotes that State power is divided among three spheres of government. Had the State power been bestowed on only one government authority, that would have led to an abuse of power.²⁹ That abuse of power is prevented by a split of governmental authorities into legislative, executive and judicial authorities which are exercised by different government units.³⁰ The legislative authority denotes the power to enact, amend and repeal legislation and is conferred on the parliament. The judicial authority, on the other hand, has the power to determine what the law is and apply it to disputes.³¹

The legislature decided to exercise its legislative authority in 1965 by enacting the CPEA, coming with it section 17 that allowed as admissible proof a conviction and/or an acquittal as reflected in the judgements of the criminal courts. Be that as it may, the courts decided to disregard that valid legislation and assumed the legislative authority by imposing on litigants the rule in *Hollington*. This can be seen as an intrusion by the judiciary into the domain of the legislature in that it constitutes a breach of the separation of powers doctrine. Alternatively, the courts are misinterpreting the CPEA as long as they disregard section 17 thereof in favour of section 42, which permits the incorporation of English law only and only when the CPEA is silent on the particular evidential matter at hand.

1.4 The Research Questions

In the light of the above problems, the important questions are: What does section 17 of the CPEA mean and require of the courts to do insofar as judgement evidence in later civil suits is

²⁹ Rautenbach IM *Rautenbach-Malherbe Constitutional Law* 6ed (2012) 59.

³⁰ Rautenbach IM *Rautenbach-Malherbe Constitutional Law*, page 59.

³¹ Rautenbach IM *Rautenbach-Malherbe Constitutional Law*, page 59.

concerned? What is the actual or perceived effect of section 17 in relation to the rule in *Hollington*? Is the prolongation of the rule in *Hollington* by the courts despite the prescripts of section 17 of the CPEA not defeating, or at least tampering with, a valid legislative enactment? Does section 42 of the CPEA apply in isolation of, or override, section 17?

Moreover, if a criminal court judgement in later civil proceedings is hearsay evidence because its probative value depends on the credibility of the criminal court judge who is not present to testify in the civil court, then why it is not admitted as an exception in terms of section 3 (1) (c) of the Law of Evidence Amendment Act (LEAA)?³² What are, and should be, the implications of a stronger standard of proof (beyond a reasonable doubt) on the “not-so-strong” standard of proof (balance of probabilities) in South African jurisprudence? This dissertation is essentially a rigorous exploration of these questions and will further contribute solutions that our courts may take into account when they are tempted to further perpetuate the *Hollington* rule that was criticised as being controversial.³³

1.5 Proposed Arguments

This dissertation argues that it is now high time for the courts to reconsider the rule in the *Hollington*. It must be accepted that after it was laid down by the English Court of Appeal in 1943 the South African courts applied it, and that was more than two decades before the birth of the CPEA in 1965.³⁴ This means that before the South African legislature enacted the CPEA, South African courts were at liberty to apply the law taking into account the law as in England, a jurisdiction from which some of the South African common law derives.³⁵ The CPEA was enacted in South Africa in 1965, including section 17 which, upon its enactment and still today, is clear, and contrary to and abolished the *Hollington* rule. The construction of section 17 is wide enough that it, when the literal approach to interpretation is employed, makes itself available to all the litigants whether or not they were parties to initial criminal proceedings.

There exists no need for the enactment of new legislation to finally lay the rule in *Hollington* to rest because the CPEA is already clear on that. This dissertation argues that courts have various and divergent means by which to finally abolish the rule. If South African courts, for

³² Law of Evidence Amendment Act 45 of 1988 s 3(1)(c).

³³ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] 2 All SA 543 (A) page 556.

³⁴ *Du Toit v Grobler* 1947 (3) SA 588 (SWA); *R v Xaki* 1950 (4) SA 332 (E); *R v Lee* 1952 (2) SA 67 (T); *R v Markins Motors(pty) Ltd* 1959 (3) SA 508.

³⁵ Barratt A et Snyman p ‘Researching South African Law’ Available at http://www.nyulawglobal.org/globalex/South_Africa1.html#_edn14 (Accessed 23 February 2018).

whatever reasons, give section 17 a different meaning than the one anticipated in this dissertation, then they can make use of the Constitution and develop the common law in terms of section 173 read with section 39(2).³⁶ Section 39(2) bestows on the courts a power to develop the common law while, on the other hand section 173, explains the nature of that power and the courts anticipated to exercise it. Section 173 provides that it is a power inherent in the superior courts namely the High Court, the SCA and the Constitutional Court. The superior courts may, as an alternative to the use of section 17 of the CPEA, accept the duty to develop the common law using sections 173 and 39(2) of the Constitution by finally putting the rule in *Hollington* to rest. This is so because even in England, a jurisdiction where this rule originated, it was, following its criticism by the Law Reform Commission,³⁷ abolished by the Civil Evidence Act.³⁸

Alternative to the use of section 17 of the CPEA and the development of the common law in terms of sections 173 and 39 (2) of the Constitution, there is another method that South African courts may use to properly deal with the rule in *Hollington*. Section 3 (4) of the LEAA defines hearsay as evidence whether in oral form or in writing whose probative value depends on the credibility of a person other than the one adducing it.³⁹ The verdict of a criminal court judge being adduced as evidence by a litigant in later civil suits to prove guilt or innocence is hearsay because its probative value depends on the credibility of that criminal court judge and not the litigant that is adducing it now.⁴⁰ It can therefore be argued that the judgement evidence complements and aligns with the prescripts of the LEAA, and if it does then its admissibility must be regulated in terms of the LEAA. As a general rule, hearsay evidence is not admissible both in criminal and civil proceedings.⁴¹

An exception exists in terms of which hearsay evidence may, despite the general rule, be admissible when the courts are of the view that its admissibility is in the interest of justice.⁴² The judgement evidence may therefore be admissible by way of that exception as being in the interest of justice because it is not in the interest of justice to ignore a decision that has been arrived at following the employment of a stronger standard of proof. Adjudicating afresh, but not on appeal, the matter that has already been decided militates against the principle of

³⁶ Constitution of the Republic of South Africa, 1996 ss 39 (2) & 173.

³⁷ 15th Report (The Rule in *Hollington v F Hewthorn & Co Ltd*) (1967) Cmnd 3391, para 4.

³⁸ Civil Evidence Act 1968 s 11.

³⁹ Law of Evidence Amendment Act 45 of 1988 s3(4) (Hereinafter 'LEAA').

⁴⁰ Zeffer DT 'The Rule in *Hollington v Hewthorn* Revisited (1970) 87 SALJ 334.

⁴¹ LEAA s 3 (1).

⁴² LEAA s 3 (1) (c).

finality in litigation.⁴³ The South African courts must now, in the light of the foregoing contributions, turn off the ventilator that has long been aiding the rule in *Hollington* in the era of section 17 of the CPEA.



⁴³ Jordaan DW 'Taking a Second Bite at the Appeal Cherry: *Molaudzi v S*' (2016) 19 *PER/PELJ* 2.

1.6 Literature Review

Most legal scholars in South Africa have criticised the application of the rule in *Hollington*. They expressed an unwillingness to support this rule. They do acknowledge that it forms part of South African law and that the courts are accordingly bound by it. They are of the view that as long as section 42 of the CPEA exist this rule will continue to bind the courts to reject the judgement evidence in later civil proceedings. The writers are of the opinion that new legislation must be enacted in order to effectively deal with the rule in *Hollington*. Furthermore, some of the writers have made mention of section 17 of the CPEA but argued that this clause must not be interpreted in a manner that prevents the application of section 42 and the rule in *Hollington*.⁴⁴



⁴⁴ Schwikkard PJ & Van der Merwe S *Principles of Evidence* 4ed (2016) 313; See also Zeffertt DT & Paizes *The South African Evidence* 2ed (2009) 341 – 343; Zeffertt DT 'The Rule in *Hollington v Hewthorn* Revisited' (1970) 87 *SALJ* 344 – 337; Davids J 'Judgment as Evidence' (1968) 85 *SALJ* 78 -79. See further the contribution of made by the scholars from other jurisdiction that were similarly bound by the rule in *Hollington*: Spencer JR 'The Ghost of The Rule In *Hollington v Hewthorn* Exorcist Required' (2014) 73 *CLJ* 477; Wright CA 'Evidence-Admissibility of Criminal Convictions in Civil Actions – Hearsay' (1943) 21 *CBR* 658.

1.7 Chapter Outline

- Chapter 2 will trace the history of the *Hollington* rule through the judicial precedent from birth to its development and abolition in the English legal system by the English legislature in terms of the Civil Evidence Act of 1968.
- Chapter 3 will focus on the reception, application, and expansion of the *Hollington* rule in the South African legal system together with the difficulties it presented.
- Chapter 4 will embark on a deep exploration of other jurisdictions; how they dealt with the judgement evidence; how they applied the rule and what were the shortcomings they had in the process and how they handled those shortcomings.
- Chapter 5 will finally shed the light on the way forward in the South African context. To that end chapter five will consider among other things, the duties of the courts, prescripts of the CPEA and other legal instruments that are worth considering in this dissertation owing to their relevance.

1.8. Methodology

This dissertation uses South African law and further includes an analysis of foreign case law. This dissertation is not a rigorous comparative study, but it explores how other jurisdictions such as Wales, Canada, United States of America, Australia, New Zealand as they have dealt with the problem investigated in this work. Scholarly writings, such as articles and books are used as well as other instruments such as law commission reports.

CHAPTER 2

THE BIRTH, DEVELOPMENT AND ABOLITION OF THE RULE IN HOLLINGTON IN ENGLAND, WHERE IT FIRST ORIGINATED

2.1 Introduction

The rule in *Hollington* has its origin in England. This chapter tracks the legal position of earlier criminal convictions in later civil suits in England before, and after the formulation of the rule in *Hollington*. This chapter will not end there but will also track the legal position subsequent to the formulation of this rule up until its abolition by the English Civil Evidence Act.⁴⁵ The lines of reasoning furnished by the English courts in respect of this rule prior to, and after, its formulation are scrutinised to assess the impact they had on the English law and litigants at large.

2.2 Admissibility of Convictions Prior to, the *Hollington* Rule

Prior to the *Hollington* case there were cases in which the admissibility of previous convictions was favoured. Such cases were few prior to 1943, but subsequent to that year cases started to emerge, one of which deserves mention, namely *Hill v Clifford*.⁴⁶ This case is said to not have been brought to the attention of the Supreme Court of England in 1943 where the *Hollington* rule was formulated, and that it has been virtually forgotten.⁴⁷ In the *Hill* case, a judicial record, far less in status than a criminal court judgement, was admitted by the English Appeal Court. The General Medical Council, acting in terms of the authority of relevant legislation, made an order striking Clifford from the dental register on the ground that he was guilty of unprofessional conduct. Prior to the order, the plaintiff had entered into a partnership agreement with Clifford, whereby it was provided that the agreement could be terminated if any of the partners were guilty of unprofessional conduct. An action was commenced to decide the validity of an attempt to determine a fine on the basis of the Council's ruling, and in this action the question of the admissibility of the Council's order in subsequent civil proceedings was raised.

⁴⁵ English Civil Evidence Act 1968.

⁴⁶ *Hill v Clifford* [1907] 2 Ch 236.

⁴⁷ Shymea E.R 'Hollington v. Hewthorn In Canada' (1955) 1 ALR 174 at page 178; Cowen & Carter 'Essays in the law of evidence' 1 ed (1956) 196.

There is one case that deserves mention, namely, *Harvey v R*,⁴⁸ which was cited in the *Hollington* case did not have any binding effect on the Court of Appeal as it was decided by the Privy Council.⁴⁹ In the *Harvey* case the matter was first adjudicated before a Master in Lunacy tribunal. The Master made an order pronouncing that the defendant was a person of unsound mind. Although the defendant was not found to be so through an inquiry, the Master authorised the defendant's wife to defend the action before him. The Master's view was later admitted by the Privy Council as evidence at face value of the actual defendant's mental incompetence. In arriving at that conclusion, the Judicial Committee of the Privy Council held that the Lunacy orders could not be rejected on the grounds that they were inadmissible. The Privy Council further held that Lunacy orders could also not be regarded as no evidence of the truthfulness of the facts reflected therein. Such orders were finally admitted as *prima facie* proof.⁵⁰

Subsequent to the *Harvey* case the Court of Appeal also upheld the Privy Council's order as *prima facie* evidence that misconduct had indeed been committed by the party that was found guilty thereof by the Privy Council.⁵¹ In *Young v Bristol Aeroplane Co. Ltd*⁵² the Court developed a 'discretion principle' according to which the Court of Appeal and the inferior courts of England were at liberty to exercise their discretion in deciding whether or not a previous conviction should be admissible in a particular case before them. In two other Court of Appeal cases, the previous convictions were admitted as proof of commission of the crime by the convicted person, and in both cases the issue of admissibility was never raised.⁵³ Furthermore, in *Estate of Crippen*⁵⁴ a murder conviction was tendered as evidence that Crippen had murdered his wife. Evans J rejected previous precedent that was established in, and followed since, the 18th century and allowed the conviction evidence as *prima facie* proof that Crippen was the murderer of his wife. In arriving at that conclusion the Court relied on

⁴⁸ *Harvey v R*. [1901] A.C. 601 (P.C.).

⁴⁹ *Willier v Joyce & Anr* 2016 UKSC 43 - in this case the court clarified the legal effect of the Privy Council on other courts. The court held that the Privy Council's decisions are not binding on the courts in England and Wales. The court further held that those decisions have a persuasive value only to the House of Lords, Supreme Court and the Court of Appeal.

⁵⁰ *Harvey v R*. [1901] A.C. 601 (P.C.) page 611.

⁵¹ *Hill v Clifford* [1907] 2 Ch 236.

⁵² *Young v Bristol Aeroplane Company Limited*, [1944] 1 KB 71.

⁵³ *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Estate of Hall, Hall v Knight and Baxter* [1941] P 1.

⁵⁴ *Estate of Crippen* [1911] P. 108.

the existing common law principle ‘*omnia praesumuntur rite et solemniter esse acta*’⁵⁵ in justifying the deviation from the long established precedent in favour of the admission of judgement evidence. The Judge concluded that the maxim *res inter alios acta*⁵⁶ had no application to the facts before him. Subsequently, *Crippen* was followed in England in other cases including, *Mash v Darly*,⁵⁷ *Partington v Partington and Atkinson*,⁵⁸ *O’Toolt v O’Toolt*,⁵⁹ and *Little v Little*.⁶⁰ Furthermore, in *Smith v Selwyn*⁶¹ the Court developed the rule according to which when the offence gave rise to both criminal and civil remedies then the civil remedies could not be pursued if the injury amounted to a felony until the criminal prosecution had been finalised.

In a further case the ruling was contemporaneous with the *Hollington* case and therefore deserves mention in this dissertation. *General Medical Council v Spackman*⁶² may, to a certain extent, be regarded as an authority initially available to contradict the *Hollington* rule. In that case, Spackman, a registered medical practitioner, was found by the Matrimonial Court to be liable for adultery in the divorce proceedings. With this court record at hand, proceedings were instituted before the General Medical Council to adjudicate on whether Spackman’s name should be struck off the medical practitioners’ register. Spackman wanted to present new evidence that had not been presented in the divorce proceedings, but the Council rejected the admission of that evidence and then ordered that the name of the errant practitioner be removed from the said register. When that matter was taken to the King’s Bench Division, the Court held that there had been no violation of natural justice. However, Singleton J dissented and the dissent hinged and relied on *Partington v Partington and Atkinson*⁶³ to assert that a previous conviction or judicial record was admissible only as *prima facie*, and not as conclusive, evidence. Accordingly, held the Court, the General Medical Council had treated the divorce decree as conclusive evidence, which consequently meant that there had been a refusal of natural justice. Subsequent to that, the English Appeal Court

⁵⁵ The *omnia praesumuntur rite et solemniter esse acta* principle translates that once it is proved that an act has occurred in reliance on that act it will automatically be presumed that such act has indeed occurred until otherwise has been proven. (Law J ‘A Dictionary of Law’ available at: www.oxfordreference.com/view/10.1093/acref/9780199664924-e-2695 [Accessed 20 November 2018]).

⁵⁶ Principle which translates that ‘a thing done between others does not harm or benefit others’. (see *Estate of Crippen* [1911] P. 108).

⁵⁷ *Mash v Darly* [1914] 1 K.B 1.

⁵⁸ *Partington v Partington and Atkinson* [1925] P. 34.

⁵⁹ *O’Toolt v O’Toolt* (1926), 42 T. L. R, 24.

⁶⁰ *Little v Little* [1927] P. 224.

⁶¹ *Smith v Selwyn* [1914] 3 K.B. 98, C.A.

⁶² *General Medical Council v Spackman* [1943] A.C. 627.

⁶³ *Partington v Partington and Atkinson* [1925] P. 34.

and the House of Lords supported the dissenting judgement by Singleton J. It has been argued by some scholars that the support of Singleton J's dissenting judgement did, or at least should, not mean that criminal court judgements could be admitted as sufficient proof in later civil law suits. The reason for that is that had that been the case the judgements would have spelled it out clearly and explicitly.⁶⁴

2.3 Admissibility of Previous Convictions Subsequent to the *Hollington* Case

For the sake of completeness and consistency I will give a short outline of the case in which the principle that a previous conviction cannot serve as proof of that fact in later civil law suits was established. In *Hollington v F Hewtorn & Co Ltd*, legal action for damages resulting from a collision of vehicles was instituted subsequent to a criminal case in which the Court declared the driver to have been negligent. The plaintiff, who was the father of the deceased who died from injuries sustained, had no direct evidence to prove negligence on the part of the driver, and he then tendered the criminal court judgement in which the driver had been convicted of negligent driving following the collision. The court of first instance rejected that evidence and then went on to regard it as opinion evidence, which enjoyed no admissibility in proving negligence in subsequent civil proceedings. For the same reasons the Appeal Court similarly rejected that evidence on the same line of reasoning.⁶⁵

Goddard J then arrived at the conclusion that the judgement of a criminal court becomes a mere opinion of that court and is irrelevant and therefore inadmissible in subsequent civil proceedings.⁶⁶ The learned Judge went on to hold that a judgement of a criminal court does not amount to an estoppel in subsequent civil proceedings.⁶⁷ The Court further held that the reason for that hinged on the fact that had the evidence of the criminal court been admitted as relevant in subsequent civil proceedings, then that could lead to a situation where the defendant challenged the propriety of that conviction. It was held further that the courts would then be faced with a duty to repeat the criminal case, which had already been decided, in order to determine the extent of the weight to be attributed to that outcome.⁶⁸

The *Hollington* case set precedent that was subsequently followed in *Hinds v Sparks*, Hinds had been prosecuted for and ultimately convicted of robbery. Hinds then appealed to the

⁶⁴ Cowen & Carter 'Essays in the law of evidence' 1 ed (1956) 196.

⁶⁵ *Hollington v F Hewtorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35 (CA).

⁶⁶ *Hollington v F Hewtorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35 (CA) at 40 A – E.

⁶⁷ *Hollington v F Hewtorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35 (CA) at 40 A – E.

⁶⁸ *Hollington v F Hewtorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35 (CA) at 40 A – E.

Court of Criminal Appeal with no success. Subsequent to that, Sparks, a journalist, published a statement stating that Hinds had previously committed a robbery. Hinds then sued Sparks for defamation. Sparks had no proof to tender before the court to show that Hinds had indeed committed the robbery other than the robbery conviction itself. The *Hollington* rule then militated against the admissibility of the conviction evidence and in the light of that, Hinds won his claim.⁶⁹

In *Goody v Odhams Press Ltd* proceedings were instituted by the plaintiff for defamation against the newspaper which had published an article conveying his involvement in a notorious train robbery. When the action was instituted the plaintiff was already serving a sentence of 30 years imprisonment after having been convicted of participating in the robbery in question. The Court held that a conviction does not amount to evidence of guilt, so much so that it does not even at least amount to *prima facie* evidence.⁷⁰

Last but not least, in *Rondel v. Worsley*⁷¹ the issue, among others, was whether counsel could be sued for professional negligence. Rondel, who had been charged with, and convicted of, assault with grievous bodily harm (GBH) and believed that he would have been acquitted if counsel had conducted defence well, brought this action. The Court of Appeal ruled that a barrister could not be proceeded against. Similarly to Hinds and Goody, Rondel was also canvassing his guilt or innocence in the civil court which, in the light of the *Hollington* rule, was not admissible.

2.4 Abolition of the Hollington Rule

The previous conviction evidence, as has been expounded on above, remained an unresolved issue insofar as its admissibility as proof in subsequent civil suits was concerned. The courts were not united in a single view as some were for and others against its admissibility. The uncertainty in question was finally settled in the *Hollington* case where it was held that conviction evidence should be treated as irrelevant and therefore inadmissible. This precedent was followed in subsequent cases and was adopted even in foreign jurisdictions. After a series of criticisms, the *Hollington* rule was finally laid to rest in England.⁷²

⁶⁹ *Hinds v Sparks* [1964] Crim LR 717.

⁷⁰ *Goody v Odhams Press Ltd* [1967] 1 QB 333 (CA) at page 339, [1966] 3 All E.R. 369 page 371.

⁷¹ *Rondel v. Worsley* [1966] 3 W.L.R. 950; [1966] 3 All E.R. 657.

⁷² Cowen & Carter 'Essays in the law of evidence' 1 ed (1956) 196; 15th Report (The Rule in *Hollington v F Hewthorn & Co Ltd*) (1967) Cmnd 3391, para 4.

2.4.1 Law Reform Commission

In *Barclays Bank, Ltd. v. Cole*⁷³ the *Hollington* rule was criticised and the Master of the Rolls was of the view that it should be changed in the light its repercussions in England, namely, the reliance thereon by criminals in subsequent civil proceedings.⁷⁴ Consequent to that line of criticism, Lord Gardiner L.C. referred the implications of the rule in *Hollington* to the distinguished Law Reform Committee (LRC) tasked with scrutinising it with a view to improving the law of evidence in civil law suits.⁷⁵ The LRC was of the view that the *Hollington* rule militated against the sense of justice.⁷⁶ It further remarked that a finding by a court on culpability was an expression of opinion that was different from that of a mere passer-by who witnessed an accident. Those opinions, it was stated in the Report, are formulated by persons (judges and magistrates among others) having a legal duty to formulate them and to determine legal issues. It was also stated that when these persons formulate those opinions they do so within the confines of the law of evidence. It was further stated that those opinions have serious consequences as they pronounce serious findings in criminal and civil matters which findings are enforced by the executive branch of government.⁷⁷

The LRC also expressed the common sense perspective that the criminal law standard of proof was superior to that of the civil law. It entails that a guilty finding in an opposed criminal trial has considerable probative value compared to that of civil proceedings riling. Even a layman would perceive that the fact of such a conviction was a strong basis upon which to believe that an accused had in fact behaved in a blameworthy manner, and that if the conduct also amounted to a civil wrong, then that civil wrong will, by the same token, be deemed to have been committed.⁷⁸

The LRC was of the view that people who plead guilty usually do so when they are actually guilty. The LRC suggested that there could be no reason in logic or in common sense why a consequential conviction should not have probative value in establishing that an accused was in fact guilty of the conduct for which he had been convicted.⁷⁹ The LRC suggested further that where the party has been convicted by a competent UK court that conviction must be

⁷³ *Barclays Bank, Ltd. v. Cole* [1967] 2 Q.B. 738 (C.A.).

⁷⁴ *Barclays Bank, Ltd. v. Cole* [1967] 2 Q.B. 738 (C.A.) at 743; See also Osew E.A 'The Criminal in the Civil Court' (1970) 2 RGL 84 page 85.

⁷⁵ Zeffert D 'The Rule in *Hollington v. Hewthorn* Revisited' (1970) 87 SALJ 325 page 325

⁷⁶ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 3

⁷⁷ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 4

⁷⁸ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 3-6

⁷⁹ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 12; see also Zeffert D 'The Rule in *Hollington v. Hewthorn* Revisited' (1970) 87 SALJ 325 page 326.

accepted in any successive civil suits as sufficient proof of liability unless it is proved that the conviction was incorrect.⁸⁰

One could ask: how did the LRC deal with cases of defamation such as in cases such as *Hinds v Sparks*⁸¹ and *Goody v Odhams Press Ltd*⁸² where it was held that the criminal convictions did not serve as proof that the accused had indeed committed the offences of which they were convicted? The LRC accordingly recommended that where an action for defamation was instituted in the light of a judgement which reflected that a party is guilty of conduct which constitutes a criminal offence, then a finding made by a competent court in the UK should be conclusive proof that a person stands convicted or acquitted as the case may be.⁸³ The LRC then made the following recommendations. First, it was suggested that whether passed by a magistrate or on indictment a conviction should be admitted as relevant in later civil proceedings even if a convicted person is not involved in those subsequent civil proceedings. Such a conviction must suffice as proof that the convicted person was guilty. Secondly, the conviction must not serve as conclusive evidence, however the duty to prove that such conviction was erroneous ought to rest on the party that so alleges. Thirdly, the position with acquittals should be different. Acquittals should be treated as inadmissible evidence when they are tendered to prove that the acquitted party is indeed innocent. Fourthly, proof of previous acquittal and conviction will serve as conclusive evidence of the facts in defamation cases as to the guilt or innocence of parties. Fifthly and lastly, civil judgements should be inadmissible. However, the paternity findings arrived at in the affiliation proceedings and the adultery findings arrived at in the matrimonial proceedings before the County or High Court⁸⁴ ought to be accepted as *prima facie* proof in later civil litigation.⁸⁵

The foregoing criticisms and recommendations paved the way for new legislation that was enacted to shed light on and address, among other things, the issue of admission as evidence

⁸⁰ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 13

⁸¹ *Hinds v Sparks* [1964] Crim LR 717

⁸² *Goody v Odhams Press Ltd* [1967] 1 QB 333 (CA) at page 339, [1966] 3 All E.R. 369 at 371

⁸³ 15th Report ('The Rule in *Hollington v. Hewthorn*') (1967), Cmnd. 3391 para 26 - 31

⁸⁴ But not in a magistrates' court as the alleged adulterer has no legal right to appear and defend the allegation if not the respondent to the summons. See also Dean M 'Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn*' (1968) 31 *TMLR* 58 footnote 6.

⁸⁵ Dean M 'Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn*' (1968) 31 *TMLR* 58 page 58-59. Similar recommendations were made in the Denning Report on Matrimonial Causes (1947) Cmd. 7024; and the Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678. See also Dean M 'Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn*' (1968) 31 *TMLR* 58 footnote 7.

the convictions of the criminal court in subsequent civil proceedings as was found in the *Hollington* rule.

2.4.2 Civil Evidence Act 1968

The Civil Evidence Act⁸⁶ was enacted following the LRC recommendations mentioned above. Section 11 of the Act specifically reflects the recommendations of the LRC Report, and thus altered the position as found in the Court of Appeal decision in *Hollington*. According to this section, in any civil proceedings, with only the exception of an action for defamation, the fact that a person has, by any competent court in the UK, been found guilty of any offence is admissible in proving that she had truly committed the said offence should that fact be relevant. That remains the case whether or not she later becomes a party to the subsequent civil proceedings.⁸⁷

Having given an outline of section 11 it is important to examine section 13 of the Act. Section 13 stipulates that in any defamation or slander (false/unsupported statement) action in which it is relevant whether or not a person did commit an offence, the conviction evidence will be conclusive proof of guilt.⁸⁸ The position is not the same where a defamation that is anticipated in section 13 is not involved. Section 11(2) provides that where it has been proved that a party has been found guilty of a criminal offence, there will be a rebuttable presumption that she had actually committed it until the presumption has been successfully rebutted.⁸⁹

Before one becomes over-optimistic about the abolition of the *Hollington* rule by the Civil Evidence Act, it must be noted that this Act brought along with it other questions to be

⁸⁶ Civil Evidence Act 1968

⁸⁷ Civil Evidence Act 1968 s 11. – ‘(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section[...]

⁸⁸ Civil Evidence Act 1968 s13. – ‘(1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly [...]

⁸⁹ Civil Evidence Act 1968, s 11 (2); See also Zeffert D ‘The Rule in *Hollington v. Hewthorn* Revisited’ (1970) 87 *SALJ* 325 page 328.

answered and other implications relating to the very same problem it sought to settle and clarify. This issue is discussed next.

2.4.3 Repercussions of the Civil Evidence Act 1968

Although the CEA was enacted to deal with the *Hollington* rule together with its repercussions, it actually came into play with a degree of uncertainty. The ball was back on the judiciary's court to decide the extent of the application of its relevant sections. *J.W Stupple v. Royal Insurance Co. Ltd*⁹⁰ was the first case to be heard under the relevant provisions of the Act. This case dealt with the meaning and extent of the application of section 11 (2) which provides that a previous conviction will, if relevance to the matter, be admissible evidence that the convicted has indeed committed an offence unless and until the 'contrary is proven'.⁹¹

In the light of section 11, the question was whether it had to mean that one must, as Goddard J. put it in the *Hollington* case, 'retry the criminal case when the accuracy of the previous conviction is challenged in the subsequent civil proceedings?'⁹² Again, if only the conviction is to be considered then how does a subsequent civil court determine its weight? It was argued that courts must consider what evidence was given and whether the jury did believe it before a proper determination of the previous conviction's weight may be made. An assessment may have to be made a long time after the conviction, and Paull J had to, and in fact did evaluate the evidence of witnesses that were uncertain at the subsequent civil trial when they had been certain at the first trial. According to Zeffert, with those views I agree, this was nowhere near extinguishing the flames of difficulty on that issue.⁹³

Paull J rejected the argument that he was entitled to consider the way in which the original trial was conducted in deciding the correctness of the conviction that was challenged before him.⁹⁴ In *Wauchope v. Mordecai* the Court of Appeal left open the question whether section 11 imposed an extremely heavy standard of proof.⁹⁵ Needless to say, the findings of the LRC as reflected in section 11 of the CEA are also subject to criticism, and in the light of the

⁹⁰ *J.W Stupple v. Royal Insurance Co. Ltd* [1970] 1 All E.R. 390 (Q.B.), [1970] 2 W.L.R. 124 S M

⁹¹ Civil Evidence Act s 11 (2) (a)

⁹² *J.W Stupple v. Royal Insurance Co. Ltd* [1970] 1 All E.R. 390 (Q.B.) at 395

⁹³ Zeffert D 'The Rule in *Hollington v. Hewthorn* Revisited' (1970) 87 SALJ 325 page 330

⁹⁴ *J.W Stupple v. Royal Insurance Co. Ltd* [1970] 1 All E.R. 390 (Q.B.) page 395 See also Zeffert D 'The Rule in *Hollington v. Hewthorn* Revisited' (1970) 87 SALJ 325 page 330

⁹⁵ *Wauchope v. Mordecai* [1970] 1 All E.R. 417 (C.A.), [1970] 1 W.L.R. 317

circumstances outlined above, a stronger case may be presented in favour of the retention of the Hollington rule.⁹⁶

In 1981 in an attempt to deal with the foregoing state of affairs, the House of Lords in *Hunter v Chief Constable of the West Midlands*,⁹⁷ held that the use of a civil action to initiate a rebuttal of the criminal court's final decision amounted to an abuse of the civil court process when there existed no new proof which completely altered the aspect of the case. In *CXX v DXX*, the defendant, a consultant physician, initiated a challenge of a previous conviction. He had had an intimate affair with the applicant who had worked as a medical secretary. The latter later became pregnant and refused the former's suggestion of pregnancy termination. With the intention to terminate her pregnancy he contaminated her drinks (tea, coffee, and orange juice) with an abortifacient agent, a conduct for which he was tried and convicted in the Crown Court. Leave to appeal against the convictions was denied. The victim then instituted a delictual claim against the defendant for damages and in doing so she relied on his conviction in terms of section 11 of the English CEA. The defendant contended that his conviction was erroneous mainly in the light of the serious inconsistencies in the victim's evidence at trial. That defence was rejected on the basis that it amounted to an abuse of process. The Court then went on to enter summary judgement in the applicant's (victim) favour.

On appeal, Spencer J disagreed with the court *a quo* on the finding of abuse of process and noted that in the light of section 11, challenging a previous conviction does not automatically result in an abuse of process because the CEA permits such a challenge. However, the learned Judge dismissed the appeal against the summary judgement on evidential grounds rather than on anything else, noting that the defendant fell short of having any real prospects of success in his defence.⁹⁸

Furthermore, in *McCauley v Vine*, the defendant had a summary conviction for a small traffic offence. Consequent to that conviction, in a civil claim instituted for shockingly high damages, the plaintiff relied on the conviction for that small traffic offence. The Court set the evidential standard to be used in combatting an action for a summary judgement and held that the standard is lower than 'evidence that completely alters the aspect of the case'.⁹⁹ Dyson

⁹⁶ Zeffert D 'The Rule in *Hollington v. Hewthorn* Revisited' (1970) 87 *SALJ* 325 page 330

⁹⁷ *Hunter v Chief Constable of the West Midlands* [1982] A.C. 529

⁹⁸ *CXX v DXX* [2012] EWHC 1535 (QB) para 34 - 35

⁹⁹ *McCauley v Vine* [1999] 1 *W.L.R.* 1977.

and Randall correctly opine that contesting a civil claim was not an abuse per se as doing so was permitted by section 11 of the CEA.¹⁰⁰

2.5 Impact of other Relevant Legislation

Subsequent to the CEA, further legislation were enacted on the same subject relating to the effects of criminal convictions on subsequent civil proceedings. This section will expand on those pieces legislation and reflect on their relevant provisions that have a bearing on the admissibility of criminal court judgements in civil proceedings. These pieces of legislation include the Police and Criminal Evidence Act¹⁰¹ and the Criminal Justice Act.¹⁰²

2.5.1 Impact of the Police and Criminal Evidence Act 1984 (PCEA)

The PCEA provides that in any proceedings the fact that a person other than the accused has been convicted will be admissible if relevant to the matter at hand if such person was convicted by UK court or by a Service Court outside the UK whether or not any other evidence has been tendered to prove the commission of the offence for which she had been convicted by such courts.¹⁰³ The Act further states that once such conviction is shown, the

¹⁰⁰ Dyson M. *et* Randall J ‘Criminal Convictions and The Civil Courts’ (2015) 71(1) *CLJ* 78 page 81.

¹⁰¹ Police and Criminal Evidence Act 1984.

¹⁰² Criminal Justice Act 2003.

¹⁰³ Police and Criminal Evidence Act 1984 s 74. – ‘(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service Court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed the offence, whether or not any other evidence of his having committed that offence is given.

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or by a Service Court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.

(3) In any proceedings where evidence is admissible of the fact that the accused has committed an offence, in so far as that evidence is relevant to any matter in issue in the proceedings for a reason other than a tendency to show in the accused a disposition to commit the kind of offence with which he is charged, if the accused is proved to have been convicted of the offence –

(a) by or before any court in the United Kingdom; or

(b) by a Service Court outside the United Kingdom,

He shall be taken to have committed that offence unless contrary is proved.

(4) Nothing in this section shall prejudice –

(a) the admissibility in evidence of any conviction which would be admissible apart from this section;

or

person that was so convicted will be deemed to have actually committed that offence unless the contrary is proved.¹⁰⁴

The wording of these provisions is akin to that of section 11 of the CEA in that it allows for the admissibility of conviction evidence and, by the same token, provides leeway for contesting that conviction.¹⁰⁵ Section 74 also finds application in criminal proceedings in that it allows for the admissibility in subsequent criminal proceedings of the conviction evidence tendered with the sole purpose to prove that the accused had actually committed that offence.¹⁰⁶ However, as indicated above, this dissertation is not a rigorous exploration of conviction evidence in relation to on subsequent criminal proceedings, but civil proceeding.

2.5.2 Criminal Justice Act 2003 (CJA)

The CJA¹⁰⁷ defines bad character evidence as evidence that shows misconduct or a disposition towards misconduct except the one that directly relates to the investigation or facts of the offence.¹⁰⁸ It, as Tandy correctly pointed out, follows that conviction evidence that is directly related in such a way will fall under this definition and will therefore be admissible.¹⁰⁹ The CJA is concerned about, and applies to, the admissibility of conviction and acquittal evidence in subsequent criminal, and not civil, proceedings and will not be expounded on any further due to its falling beyond the scope of this dissertation.

Having highlighted the legal developments in England, particularly in the context of the *Hollington* rule, necessity begs the same outline in the South African context. However, this chapter was meant to investigate the English law only and has in its scope no discussion of the South African law. The extent and complexities of the South African jurisprudence on this

(b) the operation of any enactment whereby a conviction or a finding in any proceedings is for the purpose of any

other proceedings made conclusive evidence of any fact.’

¹⁰⁴ Police and Criminal Evidence Act 1984 s 74 (2).

¹⁰⁵ Police and Criminal Evidence Act 1984 s 74; see also Civil Evidence Act 1968 s11-13.

¹⁰⁶ Police and Criminal Evidence Act 1984 s 74 (3).

¹⁰⁷ Criminal Justice Act 2003.

¹⁰⁸ Criminal Justice Act 2003 s 98. – ‘References in this Chapter to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.’

¹⁰⁹ Tandy R ‘The Admissibility of a Defendant’s Previous Criminal Record: A Critical Analysis of the Criminal Justice Act 2003’ (2009) 30(3) *SLR* 203 page 204.

topic demand a separate chapter and the following one, that is a third chapter, will consist of a deep exploration of that.

2.6 Conclusion

The rule in *Hollington* originated in England. It was established in 1943 by the Appeal Court in the case of *Hollington v Hewthorn*. The position before this case was unclear in England as the courts were not united on whether a criminal court judgement should be admissible as evidence in civil proceedings. The *Hollington* rule was finally abolished by the Civil Evidence Act of 1968. This Act was followed by other legislation such as the CJA and the PCEA, containing provisions that are akin to those of the Civil Evidence Act.



CHAPTER 3

THE RECEPTION, APPLICATION AND EXPANSION OF THE RULE *HOLLINGTON* IN SOUTH AFRICA

3.1 Introduction

This chapter explores the South African law relating to the admissibility of conviction evidence in subsequent civil proceedings. I will deal with the legal position as it was prior to the coming into existence of the relevant pieces of legislation such as the SuCA¹¹⁰ as repealed by the SupCA of 2013¹¹¹ and the CPEA.¹¹² This chapter chronologically traces the legal developments in South Africa in relation to the admissibility of conviction evidence in civil proceedings. South Africa, being a former colony (a so-called commonwealth country) of England received some of its law from the English legal system and that is evident in the residuary rule in the CPEA.¹¹³ This chapter also highlights the reception of the *Hollington* rule into South African law, and its application and expansion by the courts. This Chapter highlights the negative effects that the *Hollington* rule yielded and still continues to yield in South Africa. To that end, this chapter refers to the relevant statutory provisions, namely, but not limited to, the SupCA and the CPEA and the relevant case law.

3.2 The *Hollington* Rule in South Africa

This section discusses when and how the rule in *Hollington* was received into South African law. Case law is discussed as the inception of the *Hollington* rule was through case law and not legislation. This section further highlights how the courts grappled with the issue of criminal court judgement's admissibility as evidence in later civil proceedings.

3.2.1 The Inception of the Rule in *Hollington* in South Africa

Before the coming into existence of the rule in *Hollington* the South African courts were consistent in accepting conviction evidence in undefended civil proceedings.¹¹⁴ However, in defended civil proceedings different considerations applied: the courts consistently rejected

¹¹⁰ Supreme Court Act 59 of 1959.

¹¹¹ Superior Courts Act 10 of 2013.

¹¹² Civil Proceedings Evidence Act 65 of 1965.

¹¹³ Civil Proceedings Evidence Act 25 of 1965 s 42. – 'The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.'

¹¹⁴ *Botha v Van Rensburg* 1908 E.D.C 339; *Ruxton v Ruxton* 1925 W.L.D 234; *Nicholson v Nicholson* 1927 E.D.L 164; *Ex parte Snitcher* 1938 E.D.L 202; *Cassell v Cassell* 1941 E.D.L 123.

conviction evidence.¹¹⁵ It is unclear in which specific South African case the rule in *Hollington* was borrowed from England. The courts have since the formulation of the rule in *Hollington* held themselves bound to exclude the conviction evidence in civil proceedings. The position after the *Hollington* case will be discussed next.

3.2.2 The Position After the birth of the *Hollington* Rule

In *Postmaster General v. Stadlander*¹¹⁶ there was an application for a restraint order to prevent a convicted thief from disposing of the stolen money. The Court admitted the conviction in the light of the urgent nature of the application and the fact that interim relief was being asked for. In *R v Xaki*¹¹⁷ the Court held that the fact that a defendant was convicted of theft by a criminal court was irrelevant, and inadmissible evidence in subsequent civil proceedings in proving, that such defendant did in fact commit the theft for which he had been convicted in the criminal court. Furthermore, in *Du Toit v Grobler*¹¹⁸ the Court convicted the accused (now the defendant) of stealing a sum of money from the plaintiff. The plaintiff then instituted civil proceedings in an attempt to recover the money as a civil debt and presented the conviction by the criminal court of the defendant, but the civil court was of the view that such evidence was irrelevant and inadmissible in proving that the defendant had indeed stolen the money from the plaintiff. This was the position in South Africa after the birth of the *Hollington* rule, but in 1959 the legislature passed legislation whose provisions had, and still have, a bearing on this subject.

3.2.3 Superior Courts Act 10 of 2013 (SupCA)

The SuCA was passed in 1959 and the commencement date was January 1960.¹¹⁹ This Act was intended, as per the preamble, to consolidate and amend the laws relating to the Supreme Court of South Africa and to make provision for related matters. The relevant provision of this Act was section 18 which provided that a copy of a judgement or order of the court would serve as *prima facie* evidence. Section 18 was to the effect that when referred to in any manner a certified copy of the court record, such as, a judgement, verdict, order or other record, that was so certified by the registrar of a relevant division would serve as *prima facie*

¹¹⁵ Zeffer DT 'The Rule in *Hollington v Hewthorn* Revisited' (1970) 87 *SALJ* 335; see also the case discussion by Davids J 'Judgment as Evidence' (1968) 85 *SALJ* 76 - 77.

¹¹⁶ *Postmaster General v. Stadlander* 1949 (2) S.A. 315 (T).

¹¹⁷ *R v Xaki* 1950 (4) SA 332 (E); *R v Lee* 1952 (2) SA 67 (T); See also *R v Markins Motors(pty) Ltd* 1959 (3) SA 508

¹¹⁸ *Du Toit v Grobler* 1947 (3) SA 588 (SWA).

¹¹⁹ Supreme Court Act 59 of 1959.

evidence.¹²⁰ That provision made it clear that a copy of the court judgement would be *prima facie* evidence when it is referred to in any manner. In 2013 the legislature enacted the SupCA,¹²¹ thereby repealing the SuCA. However, the legislature carried the provisions of section 18 of the SuCA over to the SupCA *verbatim* as reflected in section 34.¹²²

There does not appear to be any reason in logic why the expression ‘referred in any manner’ should not include the reference to the previous convictions in subsequent civil proceedings. The title of section 34 of the SupCA reads ‘certified copies of court records admissible as evidence’ which explicitly suggests that this section was meant for no any other purpose than the admissibility of court records including judgements as evidence. It can be argued further that the very reason why the legislature carried the provisions of the repealed Act over to the new Act was to ensure that judgement evidence still becomes admissible evidence. It can be argued further that the legislature had no intention to succumb to the *Hollington*.

Notwithstanding the existence of section 18 of the SuCA before it was repealed by the SupCA, the courts continued to disregard it and further rejected the evidence of previous convictions as irrelevant in subsequent civil proceedings. That state of affairs is evident in the judgements that were handed down subsequent to the commencement of the SuCA. In *Yusuf v Baily* the facts are similar to those in *Goody v Odhams*.¹²³ The plaintiff was convicted of; fraud, following that conviction a certain press company released a publication to the effect that the plaintiff was a fraudster. It was on that basis that the plaintiff sued the press company for defamation. The Court held that the plaintiff who had been convicted of fraud was not a fraudster by virtue of a fraud conviction.¹²⁴

Furthermore, the Court in *Birkett v Accident Fund*,¹²⁵ a case with facts that are mostly analogous and akin to those of *Hollington v Hewthorn*,¹²⁶ also followed the *Yusuf* case and

¹²⁰ Supreme Court Act 59 of 1959 s 18. – ‘Whenever a judgment, decree, order or other record of the court of a division is required to be proved or inspected or referred to in any manner, a copy of such judgement, decree, order or other record duly certified as such by the registrar of that division under its seal shall be *prima facie* evidence thereof without proof of the authenticity of such registrar’s signature.’

¹²¹ Supreme Court Act 10 of 2013.

¹²² SupCA, s 34.

¹²³ *Goody v Odhams Press Ltd* [1967] 1 QB 333 (CA). – In this case proceedings were instituted by the plaintiff for defamation against the newspaper which had released an article conveying his involvement in a notorious train robbery. When the action was instituted the plaintiff was already serving a sentence of 30 years of imprisonment after having been convicted of partaking in the robbery in question. The court held that a conviction does not amount to evidence of guilt so much so that it does not even at least amount to a *prima facie* evidence.

¹²⁴ *Yusuf v Baily* (1964) SA 117 (W).

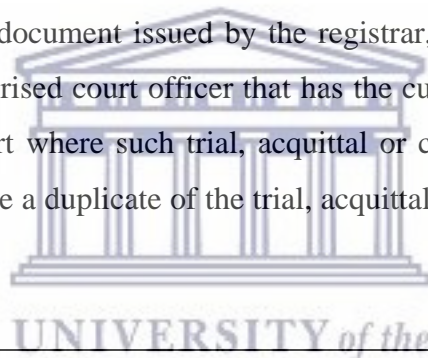
¹²⁵ *Birkett v Accident Fund* 1964 (1) S.A. 561 (T).

expressly stated that the Court was bound by the *Hollington* case and consequently by the *Hollington* rule as well. Not long after the enactment of the SuCA another statute, the CPEA, was enacted. The CPEA was intended to do away specifically with the *Hollington* rule in South Africa. This piece of legislation will be expounded on below.

3.2.4 Civil Proceedings Evidence Act 25 of 1965 (CPEA)

The CPEA was passed and commenced in 1965. The purpose for which it was passed was that it was intended to update the law of evidence with regard to civil proceedings.¹²⁷ The relevant provisions are sections 17 and 42 insofar as they address the issue of the admissibility of previous convictions in civil proceedings. These provisions will be quoted somewhat extensively for their significance not only with regard to this dissertation' but generally on this subject.

Section 17 of the CPEA provides that a trial, acquittal or conviction of any party can be proved merely by a certified document issued by the registrar, deputy registrar, clerk of the court or any other dully authorised court officer that has the custody of such document. That person must be from the court where such trial, acquittal or conviction took place and that document will be deemed to be a duplicate of the trial, acquittal or conviction as the case may



¹²⁶ *Hollington v Hewthorn 2* [1943] All ER 35. – ‘This case arose out of collision between two cars on a highway in which the plaintiff's car was damaged. The driver of the defendant's car was convicted in the magistrates' court of careless driving. His conduct amounted to the tort of actionable negligence at the suit the other user of the highway who had sustained damage as a result of the careless driving. The plaintiff sued the driver and his employer for damages caused by this tort, but before the hearing the driver of the plaintiff's car died, depriving the plaintiff of his only witness. He sought to put in evidence the conviction of the driver to establish a prima facie case of negligence against him. The Court of Appeal held this evidence to be inadmissible and the plaintiff's action failed.’

¹²⁷ Civil Proceedings Evidence Act 25 of 1965 Preamble. – ‘To state the law of evidence in regard to civil proceedings, to repeal the Ordinance for altering, amending, and declaring in certain respect the Law of Evidence within this Colony, 1830 (Cape), the Ordinance for improving the Law of Evidence, 1846 (Cape), the Bankers' Books Evidence Act, 1877 (Cape), the Oaths and Declarations Act, 1891 (Cape), the Law to regulate the Law of Evidence In the Colony Of Natal, 1859 (Natal), the Law to amend the Law of Evidence, 1870 (Natal), the Law to provide for the production in evidence of Copies, instead of Originals, of Public Documents, 1884 (Natal) and the Presumption of Death of Soldiers Act, 1952, to amend the Law of Evidence Amendment Act, 1861 (Cape), the Law to make further provision in respect of the substitution, in certain cases, of Declarations for Oaths, 1862 (Natal), the Law of Evidence Ordinance, 1902 (Orange Free. State), the Law of Evidence Proclamation, 1902 (Transvaal), the Administration of Justice Proclamation, 1919 (South-West Africa), the Further Administration of Justice Proclamation, 1920 (South-West Africa), the Procedure and Evidence Proclamation, 1938 (South-West Africa), the General Law Amendment Act, 1935, the General Law Amendment Act, 1952, the Criminal Procedure Act 1955, and the Evidence Act, 1962, and to provide for other incidental matters.’

be.¹²⁸ This section ought to be read together with the residuary clause, section 42 of the CPEA.

Section 42 of the CPEA provides that the law relating to the compellability, examination and cross-examination, and competency of witnesses which was, on 30 May 1961, applicable to civil proceedings will also apply in any circumstances for which provision is not by the CPEA or any other law.¹²⁹

Section 17 provides that the production of a certified court judgement may be admissible proof in civil proceedings. On the other hand, section 42 provides that when the CPEA is silent on any matter, then that matter upon which it is silent will be dealt with in terms of the law which was applicable on 30 May 1961. This therefore means that a judge in a civil suit cannot apply section 42 when section 17 or any other provision of the CPEA applies. This chapter holds the view that the birth of section 18 of the SuCA and section 34 of the SupCA and section 17 of the CPEA brought an end to the *Hollington* rule. However, case law shows that the courts have not only ignored section 17 of the CPEA and section 18 of the SuCA but have also extended the ambit of the *Hollington* rule. The next section analyses this issue in detail.

3.2.5 Application & expansion of the *Hollington* Rule Subsequent to the Civil Proceedings Evidence Act

In *S v Mavuso*¹³⁰ Hefer JA, by way of an obiter dictum, stated that it was an open question whether the relevant conviction evidence would not be inadmissible in a subsequent criminal matter because of the *Hollington* rule. This view can be argued to have been oblivious to the prescripts of section 197 of the Criminal Procedure Act which marks, as a general rule, the previous convictions as irrelevant and therefore inadmissible in criminal matters unless the exceptions listed there therein are met.¹³¹ However, this dissertation is primarily on conviction

¹²⁸ Civil Proceedings Evidence Act 25 of 1965 s 17. – ‘The trial and conviction or acquittal of any person may be proved by the production of a document certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such registrar, clerk or other officer, to be a copy of the record of the charge and of the trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof.’

¹²⁹ Civil Proceedings Evidence Act 25 of 1965 s 42. – ‘The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.’

¹³⁰ *S v Mavuso* 1987 (3) SA 499 (A) at 505F

¹³¹ Criminal Procedure Act 51 of 1977 s 197. – ‘An accused who gives evidence at criminal proceedings shall not be asked or

evidence in subsequent civil proceedings, and subsequent criminal matters fall beyond its scope.

In 1979 the Appellate Division in *S v Khanyapa*¹³² held that the *Hollington* rule found no application in proceedings to strike an attorney off the roll on the basis that those proceedings were not civil proceedings as anticipated in the CPEA. In *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg*¹³³ the Bar Council applied to court to have a certain advocate struck off the roll. The Council wanted to adduce its own prior finding that the advocate was no longer fit and proper for practice. The Court held that the *Hollington* rule did find application to the findings of the Bar Council (that an advocate was unfit for practice). The Court reasoned and stated that admitting the Council's finding as evidence would allow it to constitute presumptive evidence in a matter to which the Council was a party. Although the Court had extended the ambit of the *Hollington* rule from criminal court judgements to a findings of a Bar Council, in this context admitting the Council's evidence would have led to a situation where a party produced self-manufactured evidence.

The absurdity of the *Hollington* rule, as Paizes and Zeffert¹³⁴ put it, is well demonstrated by *Leeb and another v Leeb and another*.¹³⁵ In that case the first respondent had been convicted of murdering her spouse and the matter was, on application, heard by Thirion J. The question before the honourable Judge was whether the errant spouse could benefit from her marriage to the deceased that was in community of property since she would inherit with bloody hands. Thirion J. remarked that the *Hollington* rule had been criticised as being controversial in *Cape*

required to answer any question tending to show that he has committed or has been convicted of or has been charged with any offence other than the offence with which he is charged, or that he is of bad character, unless-

- (a) he or his legal representative asks any question of any witness with a view to establishing his own good character or he himself gives evidence of his own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution;
- (b) he gives evidence against any other person charged with the same offence or an offence in respect of the same facts;
- (c) the proceedings against him are such as are described in section 240 or 241 and the notice under those sections has been given to him; or
- (d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged.'

¹³² *S v Khanyapa* 1979 (1) SA 824 (A) para 8.

¹³³ *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 (4) SA 35 (T) discussed in Zeffertt DT & Paizes *The South African Evidence* 2 ed (2009) 343.

¹³⁴ *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 (4) SA 35 (T) discussed in Zeffertt DT & Paizes *The South African Evidence* 2 ed (2009) 342.

¹³⁵ *Leeb and another v Leeb and another* [1999] 2 All SA 588 (N).

Pacific Ltd v Lubner Controlling Investments,¹³⁶ but that rule had not been abolished and that it continued to be part of South African law. The learned Judge went on to remark that he was bound thereby and he likewise concluded that the conviction of the first respondent for murdering the deceased was therefore not evidence that she had indeed murdered her husband, and it ultimately was to be treated as inadmissible.

In *Groenewald N.O and Another v Swanepoel*, the Court held that it was bound by the *Hollington* rule on the basis of the residuary section. It held that the South African courts are constrained by section 42 of the CPEA to always revert back to and apply the law of evidence as it was on 30 May 1961 to civil matters before them.¹³⁷ The Court went on to hold that the *Hollington* rule should therefore apply. The Court stated, most importantly, that a judgement handed down by a competent criminal court will nonetheless be inadmissible evidence in later civil litigation in a bid to prove that a convicted party is actually liable as per that conviction.¹³⁸

At its first opportunity several years subsequent to the *Groenewald* case, the Constitutional Court, despite the provisions of section 17 of the CPEA, decided to refer, without any criticism, to the *Hollington* rule. In its 2007 judgement in *Prophet v NDPP*, Nkabinde J., writing for the court, relied on the *Hollington case*, to hold that the Magistrate's judgement relating to a criminal trial was irrelevant and superfluous evidence as it amounted to an opinion on a matter on which a Judge might have to decide anyway.¹³⁹

It is regretful that the highest court of the land, the Constitutional Court, came to that conclusion despite the existence of section 18 of the SuCA and section 17 of the CPEA. The Constitutional Court, it can be rightfully argued, ought to have taken upon itself to bring the law of evidence up to date in accordance with the provisions of the foregoing statutes. The Court merely accepted and reinforced the *Hollington* rule, especially in the light of the fact that this rule has been treated with scepticism by the inferior courts, such as the Appellate Division in the case of *Cape Pacific v Lubner*.¹⁴⁰

Subsequent to that Constitutional Court judgement, a long line of High Court cases emerged that also relied on that principle and cited the *Hollington* rule in denying the admissibility as

¹³⁶ *Cape Pacific Ltd v Lubner Controlling investments* 1995 (4) SA 790 (A).

¹³⁷ *Groenewald N.O and Another v Swanepoel* 2002 (6) SA 724 (E) page 727E.

¹³⁸ *Groenewald N.O and Another case*, page 727E.

¹³⁹ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at footnote 26 & para 42.

¹⁴⁰ *Cape Pacific Ltd v Lubner Controlling investments* 1995 (4) SA 790 (A).

evidence of the convictions of the criminal courts in subsequent civil law suits. The logic behind the rejection of the conviction evidence was no more than the fact that it constituted opinion evidence which had no relevance, and those cases include, but are not limited to, *Nel v Law Society, Cape of Good Hope*¹⁴¹ and *Lagoon Beach Hotel v Lehane*.¹⁴²

The courts further went on to extend the application of the *Hollington* rule to include the awards of the CCMA commissioners as opinion evidence of such commissioners, which therefore ought not to be admissible evidence in proving any relevant issue or fact before a presiding officer in subsequent civil proceedings for lack of relevance in cases such *Graham v Park Mews Body Corporate and Another*,¹⁴³ just to mention one.

3.3 *De bloedige hand en neemt geen erf Enis Principle*

The doctrine of *de bloedige hand neemt geen erf* (*bloedige hand*) has been part of our common law since Roman times and was derived from the Roma-Dutch law and not from the English law. It dictates that murder makes the murderer unworthy to inherit from the deceased based on the logic that bloody hands cannot inherit.¹⁴⁴ One could ask, what happens if a criminal court finds X guilty of murdering her husband and then later on the errant party wants to inherit from the deceased as a surviving spouse? Will the conviction of the criminal court be disregarded as opinion evidence and the *bloedige hand* doctrine be rendered useless or at least extremely difficult to prove? These are relevant questions and this dissertation will investigate and critically present the current and answers to them.

The relevant case on this issue is that of *Danielz NO v De Wet and another*.¹⁴⁵ In this case, the applicant (executor of the deceased's estate) sought an order declaring that the respondent had no entitlement to the proceeds of certain life insurance policies that were taken out on the life of the deceased. The first respondent was married to the deceased and was the sole nominated beneficiary of those life insurance policies. However, the first respondent had hired a person to assault the deceased, and the deceased had died as a result of that attack. The criminal court

¹⁴¹ *Nel v Law Society, Cape of Good Hope* 2010 (6) SA 263 [ECG] para 16

¹⁴² *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 520 (SCA) para 40; *Lagoon Beach Hotel v Lehane* [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 12.

¹⁴³ *Graham v Park Mews Body Corporate and Another*; 2012 (1) SA 355 (WCC); [2012] 1 All SA 167 (WCC) para 60; *De Sousa and Another v Technology Corporate Management (Proprietary) Limited and Others* [2017] 3 All SA 47 (GJ) para 107.

¹⁴⁴ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C) para 37; see also Ex parte Steenkamp and Steenkamp 1952 (1) SA 744 (T) at 752GH for more grounds upon which a person will be deemed unworthy to inherit.

¹⁴⁵ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C)

found both parties, the direct and indirect perpetrators, guilty of murder, among other offences. In a subsequent civil court case, it was argued on behalf of the errant spouse that a criminal court conviction is, in terms of the *Hollington* rule, irrelevant opinion evidence which should likewise be inadmissible in subsequent civil proceedings.¹⁴⁶

The Court had to decide on the tension between the *bloedige hand* doctrine and the *Hollington* rule. Traverso AJP stated that the facts of the case before her could not apply. She reaffirmed that the *Hollington* rule is indeed part of South African law but in the case before her, the convicted party (Mrs De Wet), admitted to having committed the offence and it was on that basis that she admitted a previous conviction as admissible.¹⁴⁷

That conclusion by Traverso AJP is debatable. This chapter holds the view that it is an insufficient reasoning upon which the *bloedig hand* principle was preferred over the *Hollington* rule. The judge is cognisant of the *Hollington* rule, on the one hand, and is reluctant to use it, on the other. The fact that Mrs De Wet was convicted in a previous criminal court hearing for murder has no relevance according to the *Hollington* rule. The fact that Mrs De Wet admitted in a subsequent civil matter arising from that initial conviction before Traverso AJP of having conspired to murder her husband should have no relevance in that it does not conform to the prescripts of a guilty plea as anticipated in section 112 of the Criminal Procedure Act.¹⁴⁸ Even if it did conform to section 112 it would still be irrelevant

¹⁴⁶ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C) para 17

¹⁴⁷ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C) para 18

¹⁴⁸ Criminal Procedure Act 51 of 1977 s112. – '(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

before Traverso AJP because of the *Hollington* rule. Traverso AJP just circumvented the *Hollington* rule in that matter.

A specific argument along the lines of public policy would have been more convincing had Traverso AJP held that the *Hollington* rule was indeed applicable in the matter before her and that public policy in the circumstances demanded that the *bloedige hand* principle take preference over the *Hollington* rule. Such argument would have aligned with the spirit of the South African legal reasoning, and would have connoted that the *Hollington* principle is not absolute and that it could be limited when demanding considerations, such as public policy, necessitated. It can be argued that the courts are at liberty to borrow legal principles from foreign jurisdictions which are not reconcilable with the existing South African law.¹⁴⁹ It can be argued further with respect that the courts, as things stand in South Africa, are at liberty to abuse their discretionary powers. They do so by circumventing the very principles they borrowed when they cannot reconcile them with the existing legal principles.

Having deliberated on the inception and application of the *Hollington* rule in South Africa, this dissertation will engage with a comparative analysis, to establish the lessons that South Africa can learn from other jurisdictions on this subject.

3.4 Conclusion

The South African courts borrowed the rule in *Hollington* from English law but it is not clear in which specific case. Before this rule the South African courts consistently admitted conviction evidence in undefended civil proceedings but consistently rejected it in defended proceedings. After the establishment of the *Hollington* rule, courts consistently held themselves bound by it. This rule is irreconcilable with certain legal principles, such as, *de bloedige hand* principle, section 17 of the CPEA, and sections 18 of the SuCA now section 34

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.⁷

¹⁴⁹ Such as the *Hollington* principle which is not in conformity with sections 17 and 42 of the Civil Proceedings Evidence Act 25 of 1965 and arguably section 18 of Supreme Courts Act 59 of 1959.

of the SupCA. The courts have not tried to promote a satisfactory solution to the tension between these principles.



CHAPTER 4

A COMPARATIVE STUDY OF THE RULE IN HOLLINGTON

4.1 Introduction

This chapter investigates and critically analyses how other jurisdictions have dealt with the issue of the rule in *Hollington*. It also investigates the shortcomings that this rule brought about in those jurisdictions, and the mechanisms developed in dealing with those shortcomings. To that end, the English jurisdiction will not be considered because it has been considered extensively already in the second chapter. This chapter particularly targets the laws of jurisdictions such as Canada, New Zealand, the United States of America, and Australia. That is so because these jurisdictions had taken positive action and responded by legislative and other means to the rule in *Hollington*. From that analysis recommendations will be made on how South Africa may deal with the *Hollington* rule in the light of the methods adopted by the abovementioned jurisdictions.

4.2 Foreign Jurisdictions

This section rigorously expound on the legal developments in Canada, New Zealand, Australia and the United States of America. Those developments include the abolition of the rule in *Hollington*. The abolishing legislation and court judgements of each of these jurisdictions will be discussed as well.

4.2.1 Canada

The Canadian legal system also was influenced by the *Hollington* case on the admissibility of criminal convictions in civil proceedings. The rule in *Hollington* was adopted by the Canadian Supreme Court in *La Fonciere Compagnie d'Assurance de France v Perras and others*¹⁵⁰ which case was decided the same year in which the *Hollington* rule was laid down by the English court. In the *La Fonciere* case, the plaintiff demanded payment from the insurer (defendant) for damage to property. The insurer contended that the car accident which led to the damage followed as a result of the commission of a criminal offence by the plaintiff. On the other hand, the plaintiff contended that the accident resulted from negligence which was covered by the insurer. The Court then held that criminal convictions did not

¹⁵⁰ *La Fonciere Compagnie d'Assurance de France v. Perras and others* [1943] S.C.R. 165.

amount to *res judicata*¹⁵¹ and the initial criminal conviction was rejected based on the same logic of inadmissibility.¹⁵²

On the reception of the *Hollington* rule in Canada, Mandel argued that although the *La Fonciere* case was cited in later cases as establishing the rule in *Hollington*, it is, based on its facts, mere authority that criminal court judgements do not lead to *res judicata* in civil proceedings. This learned author relied on the fact that the Supreme Court in *La Fonciere* did not explicitly state that the criminal convictions were inadmissible in later civil proceedings. It is, according to Mandel, authority that a criminal court decision does not constitute a *res judicata* in civil proceedings.¹⁵³

The Canadian law makers finally shed light on the issue in 1985 and took it upon themselves to enact the Evidence Act.¹⁵⁴ This Act, as it stands with its amendments, today provides in section 12 that a certified judgement signed by the court clerk or other duly authorised court officers which judgement reflects the conviction or its reversal may be used as admissible evidence.¹⁵⁵ The Canadian leading case on this legal development is *Del Core v. College of Pharmacists*.¹⁵⁶ In the *Del Core* case, a pharmacist had a criminal conviction following the procurement of pharmaceuticals by illegal means and the admissibility of that conviction as evidence was subsequently challenged. The Court held that the previous convictions were indeed admissible as evidence in subsequent civil proceedings, but that the weight and extent of its probative value were to be determined on a case by case basis owing to the fact that the circumstances of each case differ.¹⁵⁷

The Court went on to pronounce on the finality of a conviction and held that it would only serve as *prima facie*, as opposed to conclusive, evidence. Blair JA stated that in the light of this the conviction may be objected to in various ways. His Lordship provided a way forward and stated that a conviction may be challenged or lessened but declined to give an exhaustive list as to the circumstances under which to do so. The Court further provided that the entitlement to challenge the conviction evidence is subject to limitations. The Court stated

¹⁵¹ *Res judicata* can be defined as a principle that the matter between the same parties relating to the same cause of action will not be entertained again once it has been decided on by a court of competent jurisdiction unless it is brought on review or appeal.

¹⁵² *La Fonciere Compagnie d'Assurance de France* case.

¹⁵³ Mandel WM 'Admissibility of Criminal Convictions in Civil Trials' (2010) *ARCL* 5 – 6.

¹⁵⁴ Canada Evidence Act RSC, c. C-5.

¹⁵⁵ Canada Evidence Act RSC, c. C-5 s12.

¹⁵⁶ *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.).

¹⁵⁷ *Del Core* case para [60].

that attacking the conviction merely as wrong would amount to an abuse of process. The court further clarified this position and stated that the principle of ‘abuse of process’ would be invoked voluntarily by the courts in certain cases in order offset the attack on the conviction.¹⁵⁸ The principles laid down were subsequently followed in cases such as *Franco and others v. White*.¹⁵⁹

In *Toronto (City) v CUPE, Local 79*¹⁶⁰ the Supreme Court had to determine whether a judgement of a criminal court should be conclusive or rebuttable evidence in civil court, and whether it could be reopened and litigated. The Court embarked on what Blair JA refused to do in the *Del Core* case, and provided a list of examples of the circumstances in which criminal convictions as evidence may be rebuttable in the civil court. The Court took the view that the justice system’s integrity is more likely to be enhanced and not impeached when the civil courts re-open and re-litigate the criminal matter. The Court cautioned that the reopening of a criminal court case relied on as evidence in the civil proceedings will only be done under the following circumstances. First, when it transpires that the initial criminal proceedings were affected by dishonesty or fraud. Secondly, when new evidence is available but was not in the initial criminal proceedings and its probative value changes the original outcome. Thirdly, the Court laid down a very wide and flexible condition to the effect that when the dictates of fairness demand that the courts should forego the original outcome and re-litigate the matter.¹⁶¹

In *Danyluk v Ainsworth Technologies Inc*¹⁶² Binnie J expounded on the issue of estoppel (res judicata) and held that for it to be invoked with success in the admission of judgement evidence and the refusal to re-litigate the same matter three safeguards ought to be met. According to Binnie J, those precautions entail, first, that the issue before the civil court now must be the same as the one that has initially been pronounced on by the criminal court; Secondly, the criminal court judgement that is now tendered before a civil court must have been final, and lastly, the parties to the civil proceedings must be the same parties to the initial criminal proceedings or their representatives.¹⁶³

¹⁵⁸ *Del Core* case para [61] - [62].

¹⁵⁹ *Franco et al. v. White*, (2001) 53 O.R. (3d) 391 (Ont. C.A.).

¹⁶⁰ *Toronto (CITY) v. CUPE* [2003] 3 S.C.R. 77.

¹⁶¹ *Toronto (CITY)* case para [52].

¹⁶² *Danyluk v Ainsworth Technologies Inc*. [2001] 2 S.C.R. 460.

¹⁶³ *Danyluk v Ainsworth Technologies Inc*. [2001] 2 S.C.R. 460, para [25].

Considering the admissibility of a 'guilty plea' in a civil court as evidence to prove the liability of the defendant, the Canadian Supreme Court in *English v Richmond*¹⁶⁴ grappled with this issue. The majority judgement ruled that a guilty plea was admissible in later civil proceedings because of its relevance.¹⁶⁵ In the 2011 case of *British Columbia v. Malik*,¹⁶⁶ the Court stated that the admission of the initial criminal court judgement in later civil proceedings will be determined by the purpose for which that previous criminal court judgement is tendered. The Court went on to express its support for the existing precedent and held that the *Hollington* rule was rigid and arbitrary, and refused to replace it with rules that were similarly inflexible.¹⁶⁷ The Court then shed more light. It stated that once the criminal court judgement is admitted as evidence in civil proceedings, the circumstances of the individual cases, the issue of similarities, the nature of the initial law suit and the identity of the parties concerned is an open list that will help in the determination of the weight that ought to be attached to such evidence.

Furthermore, the Court went another step ahead to consider the position of a disciplinary committee's findings in later civil suits. The Court was of the view that it was indeed admissible, and refused to pronounce on the weight to be attached to such evidence. The defendant, further held the Court, should be entitled to argue, in reliance on evidence, that such evidence must be given less weight in the successive civil suits. It was noted by the Court that more often than not the findings of the disciplinary body were opinions of persons who were not experts. The Court stated that that will be taken into account when the weight of the disciplinary committee findings becomes an issue in the civil suits. The Court further stated that the fact that a disciplinary body did not operate within the confines of the law of evidence rules was also going to be considered in the determination of its weight.¹⁶⁸

In conclusion, the legal position of criminal court judgements in subsequent civil suits is summed up by Carson. The quasi-criminal and criminal judgements are accepted as *prima facie* proof in Canada until compelling evidence is presented in rebuttal or sufficient clarification is provided to show its irrelevance in the present matter.¹⁶⁹

¹⁶⁴ *English and Laing v. Richmond et al* [1956] S.C.R. 383.

¹⁶⁵ *English and Laing* case, page 384.

¹⁶⁶ *British Columbia (Attorney General) v. Malik*, 2011 SCC 18.

¹⁶⁷ *British Columbia* case, para 46.

¹⁶⁸ *British Columbia* case, para 32- 48.

¹⁶⁹ Carson P.A 'Triple Jeopardy: Civil, Disciplinary, and Regulatory Proceedings against Professionals' available at:

4.2.2 New Zealand

4.2.2.1 Prior to the enactment of the Evidence Act 2006

Before the enactment of the Evidence Act,¹⁷⁰ which explicitly abolished the *Hollington* rule in New Zealand, reliance was placed on judicial precedent and the land-mark case on this issue was *Jorgensen v News Media (Auckland)*.¹⁷¹ It was established in this case that a conviction sufficed as proof in successive civil law suits to show that the party against whom such evidence was tendered was in fact guilty of the offence in question. The precedent established by that case was, later in 1980, codified and reflected in the Evidence Amendment Act.¹⁷²

Following that, courts in New Zealand were of the view that that the evidence of conviction as shown in the criminal court judgement was indeed admissible in subsequent civil proceedings. Because the extent of this position was unknown in the context of subsequent criminal proceedings courts extended the admissibility to successive criminal proceedings. Courts were of the view that such evidence was, by the same token, relevant and admissible in proving the commission of the offence.¹⁷³

4.2.2.2 Subsequent to the Enactment of the Civil Evidence Act 2006

The New Zealand Law Reform Commission produced a Law of Evidence Report in 1999.¹⁷⁴ The Report recommended that the rule in *Hollington* be abolished in New Zealand. The reasons for the Report's recommendations were, according to the LRC, pillared by three policy considerations which will follow. First, the admission of criminal court judgements in successive civil suits will be convenient and cost effective in that the parties would not need to relitigate the matter that had already been decided. Secondly, the criminal court judgement was arrived at using the stronger standard proof and that becomes relevant and probative evidence available to prove that a party had indeed committed the offence in issue. The third reason was that the rejection of the criminal court judgement evidence will go against the

<http://www.millerthomson.com/en/publications/communiqués-and-updates/lloyds-brief-canadian-legal-perspectives/september-2015/triple-jeopardy-civil-disciplinary-and/> (Accessed 18 July 2018).

¹⁷⁰ Evidence Act 2006.

¹⁷¹ *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (CA).

¹⁷² Evidence Amendment Act 2 of 1980, s 23.

¹⁷³ *R v Vinette* [1975] 2 SCR 222; *R v Davis* [1980] 1 NZLR 257 (CA) at 262; *R v Kirkby* [2000] 2 QR 57 (QCA).

¹⁷⁴ Law Commission *Evidence: Reform of the Law* (NZLC R55 Volume 1, 1999) 234 & 235.

criminal justice system policy, namely, that a criminal court is the arena for the imposition of serious punishments.¹⁷⁵

The LRC went on to propose solutions and stipulated that the criminal court judgement evidence reflecting a conviction should be accepted in successive criminal proceedings as well.¹⁷⁶ The LRC further stipulated that the party that intends to adduce such evidence will have to show beforehand the relevance of such evidence in the present matter.¹⁷⁷

4.2.2.3 Section 49 of the Evidence Act 2006

The Evidence Act came into force in 2006 and finally settled the uncertainties in accordance with the recommendations of the LRC. This Act introduced section 49 which is to date still applicable in New Zealand. This section provides that a conviction as reflected in a criminal court judgement will suffice as conclusive proof that a party concerned has committed the said crime. This section further stipulates that in certain compelling circumstances the presiding officer may permit the party against whom such evidence is produced to adduce evidence to disprove such conviction.¹⁷⁸

In conclusion, the judgement evidence is admissible in later civil proceedings in terms of section 23 of the Evidence Amendment Act and this followed the abolition of the *Hollington* rule by the courts on their own. The courts did not end there but took it upon themselves to further extend that application to criminal proceedings and the legislature caught up and enacted section 49 of the Evidence Act to give effect to the courts' approach.

4.2.3 Australia

The legal position before the legislative enactment against the rule in *Hollington* in Australia is reflected in *Mickelberg v Director of Perth Mint*.¹⁷⁹ The Court dealt with the position of criminal court judgements as evidence in later civil suits in Australia. The Court held that such evidence was admissible as *prima facie* proof. This means that a party intending to rebut that judgement evidence will only be allowed to do so upon tendering fresh evidence that altered the aspect of the case completely.¹⁸⁰

¹⁷⁵ Law Commission *Evidence* report, para 233.

¹⁷⁶ Law Commission *Evidence* report, para 234.

¹⁷⁷ Law Commission *Evidence* report, para 235.

¹⁷⁸ Evidence Act 2006, s 49.

¹⁷⁹ *Mickelberg v Director of Perth Mint* [1986] WAR 365.

¹⁸⁰ *Mickelberg* case, at 372.

4.2.3.1 Evidence Act 1995

The Evidence Act¹⁸¹ was enacted to, among other things, abolish the *Hollington* rule in Australia. Specifically, part 3.5 of that Act introduced sections 91-93 which provisions abolish the *Hollington* rule. Section 91 at face value retains the *Hollington* rule and provides that the judgement evidence or a fact finding reflected in that judgement evidence as per the conclusions of the previous court will be inadmissible in successive proceedings.¹⁸² The operation of section 91 is qualified by section 92(2) which provides that the conviction may be used as evidence in successive proceedings despite the prescripts of section 91.¹⁸³ Section 92(2) further permits the admissibility of the evidence of convictions despite the prescripts of section 59¹⁸⁴, which deny the admissibility of hearsay evidence, and of section 76¹⁸⁵ which deny the admissibility of opinion evidence.¹⁸⁶

¹⁸¹ Evidence Act 1995.

¹⁸² Evidence Act 1995, s91. –

‘(1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note: Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

¹⁸³ Evidence Act 1995, s 92. –

‘(1) Subsection 91(1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove:

(a) the death, or date of death, of a person; or

(b) the due execution of a testamentary document.

(2) In a civil proceeding, subsection 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction:

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or

(b) that has been quashed or set aside; or

(c) in respect of which a pardon has been given.

(3) The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this Section.’

¹⁸⁴ Evidence Act 1995, s 59. –

‘(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an *asserted fact*.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R. v Hannes* (2000) 158 FLR 359.

(1) Subsection (1) does not apply to evidence of a representation contained in a

The Court in *Gonzales v Claridades*¹⁸⁷ stated that the *Hollington* rule was originally formulated based on the understanding that the judgement evidence was either hearsay or opinion evidence and therefore inadmissible in successive proceedings. The Court went on to state that that conclusion was based on the logic that the accused's guilty verdict was a representation made elsewhere and not in the course of the later civil law suit in which such evidence was intended to be adduced. Most importantly, the Court also stated that had it not been for the existence of section 92 of the Evidence Act in New South Wales, the judgement evidence would be excluded as hearsay or opinion evidence. The Court confirmed that section 92 indeed abolished the *Hollington* rule in civil suits and that the burden was on the party who challenged the correctness of the conviction tendered as evidence to prove that it was indeed incorrect. It was also stated that once conviction evidence was admitted in terms of section 92, it was not conclusive as regards the effect of estoppel since the party against whom it was adduced would be allowed to contest it.¹⁸⁸

In a further extension of the scope of section 92, the Court in *National Mutual Life Association of Australasia Ltd v Grosvenor Hill*¹⁸⁹ ruled that the judgements of the superior courts can be adduced as evidence in proving the parties' identity in later civil law suits. The court also stated that such evidence can also be used in proving the issue that was raised in those initial proceedings as reflected in the judgement.¹⁹⁰

The courts further shed light on section 92. In *Prothonotary of the Supreme Court of New South Wales v Sukkar*¹⁹¹ the Court held that a certificate obtained in terms of the relevant provisions of the Evidence Act that furnishes proof of the truthfulness of the facts the conviction was based on could be admissible. The Court stated that that statement was

certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.'

¹⁸⁵ Evidence Act 1995, s 76. – '(1) Evidence of an opinion is not admissible to prove the existence of a fact about the

existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.'

¹⁸⁶ Evidence Act 1995, ss 59, 76 & 92.

¹⁸⁷ *Gonzales v Claridades* (2003) 58 NSWLR 188.

¹⁸⁸ *Gonzales v Claridades* case, para 66.

¹⁸⁹ *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* (2001) 183 ALR 700

¹⁹⁰ *National Mutual Life Association of Australasia Ltd* case, para 46 – 51.

¹⁹¹ *Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341.

unfortunately inadmissible insofar as it purported to show the truthfulness of the facts because section 91 militates against such evidence.¹⁹²

The Court in *Ainsworth v Burden*¹⁹³ clarified the position in *Prothonotary of the Supreme Court*, and stated that when the content of the previous judgement has relevance in successive proceedings in which it is adduced, it will be admissible as long as it does not purport to prove the truthfulness of that material. The Court stated that an example of an instance in which the content of the judgement may be admissible is when the content is adduced to prove that the party that has read the findings therein has knowledge of that content. The Court cited section 91 as an impediment to the admission of the statement that seeks to prove the truthfulness of the content of the judgement evidence.¹⁹⁴

In *Ainsworth Game Technology Ltd v Michkoroudny*¹⁹⁵ the defendant was initially convicted of having wrongfully used the information he obtained during his employment by the applicant. The Court held that that conviction was admissible as evidence that proves that the defendant had indeed committed that wrong.¹⁹⁶ In defamation proceedings, the Court of Appeal in *Bass v TCN Channel Nine*¹⁹⁷ admitted a finding previously arrived at by the jury, namely that the plaintiff had acted fraudulently. The Court stated that such a finding was relevant to the plaintiff's credibility in a subsequent civil law suit. The Court relied on section 93 which provides the principle of estoppel and halts the application of the *res judicata* principle¹⁹⁸

4.2.3.2 Acquittals

In *Permanent Trustee Co Ltd v Gillett*¹⁹⁹ the Court held that the acquittal of a mentally ill defendant on the basis of limited legal capacity was not admissible to found an estoppel pertaining to that party's mental illness.²⁰⁰ In the context of acquittals the application of the *Hollington* rule is still intact and has not been changed by the Evidence Act. In *Helton v*

¹⁹² *Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341, para 9; see also an unreported case of *Antoniadis v TCN Channel Nine Pty Ltd* (12/3/97, NSWSC) para 2–4.

¹⁹³ *Ainsworth v Burden* [2005] NSWCA 174

¹⁹⁴ *Ainsworth v Burden* case, para 109.

¹⁹⁵ *Ainsworth Game Technology Ltd v Michkoroudny* [2006] NSWSC 280.

¹⁹⁶ *Ainsworth Game Technology Ltd* case, para 4.

¹⁹⁷ *Bass v TCN Channel Nine Pty Ltd* [2006] NSWCA 343.

¹⁹⁸ *Bass v TCN Channel Nine Pty Ltd* [2006] NSWCA 343, para 21 – 24.

¹⁹⁹ *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220.

²⁰⁰ *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, para 38–41; *Batey v Potts* (2004) 61 NSWLR 274 para 8–13.

*Allen*²⁰¹ it was concluded that acquittals are not admissible in successive civil suits.²⁰² The Court of Appeal in *Pringle v Everingham*²⁰³ stated that the Evidence Act did not change the common law position that was originally formulated in the *Hollington* case in the context of acquittals.²⁰⁴

4.2.4 The United States of America (USA)

In the USA the admissibility of judgement evidence is governed by Rules of evidence. These Rules are referred to as Federal Evidence Rules.²⁰⁵ These rules were originally enacted in 1975 by the US Congress following numerous years of drafting by the US highest court, the Supreme Court.²⁰⁶ The most relevant of these Federal Evidence Rules in the context of this chapter is Rule 609. This Rule deals with the use of convictions of the criminal courts as evidence for impeachment in later civil proceedings. It is at the disposal of the parties that seek to attack the character of the witnesses for truthfulness.²⁰⁷

²⁰¹ *Helton v Allen* (1940) 63 CLR 691.

²⁰² *Helton* case, para 710.

²⁰³ *Pringle v Everingham* [2006] NSWCA 195.

²⁰⁴ *Pringle* case, para 34.

²⁰⁵ US Federal Rules of Evidence, 1975.

²⁰⁶ The National Court Rules Committee 'Federal Rules of Evidence' available at: <https://www.rulesofevidence.org/> (Accessed 10 October 2018); see also Spirn A.R 'Prior Conviction Evidence' (1986) 86 CLR 1269.

²⁰⁷ Federal Rules of Evidence, Rule 609. – "(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years.

This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.

This Rule provides that a criminal offence that is punishable by more than one year of imprisonment or by death in the jurisdiction where it was imposed will constitute a criminal conviction which is admissible in later civil or criminal litigation for purposes of Rule 609. The court must, upon admission of that evidence, be satisfied that its probative value exceeds the prejudicial effects it may have on the party against whom it has been adduced. It is also stated that notwithstanding the extent of the punishment, the evidence of conviction will be admissible if the court is able to determine that such evidence is establishing the elements of crime needed to prove dishonesty.²⁰⁸

The Supreme Court, in *Green v. Bock Laundry*,²⁰⁹ stated that Rule 609 obliges a presiding officer to allow a witness's impeachment in later civil suits with evidence of a criminal court judgement. The Court explained that such evidence will be tendered despite any unfair prejudices that may possibly ensue from it.²¹⁰

4.3 Conclusion

The foregoing jurisdictions have long abolished the application of the *Hollington* rule. Why is South African jurisprudence showing a firm trend of hesitation to do the same? South Africa jurisdiction may draw from the methods used by the foregoing jurisdictions in order to allow the litigants to freely rely on the judicial precedent established in earlier cases. The *Hollington* rule is an impediment to the principle of *stare decisis* and judicial precedent, in

Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible."

²⁰⁸ Federal Rules of Evidence, Rule 609.

²⁰⁹ *Green v. Bock Laundry Machine. Co.*, 490 U.S. 504, 528 (1989).

²¹⁰ *Green v. Bock Laundry Machine. Co.*, 490 U.S. 504, 528 (1989) pp 509 – 527.

that, as has been shown above, it denies reliance by the parties on court judgements that have been decided already.²¹¹ Chapter 5 will suggest how the rule in *Hollington* can be abolished, which body has the authority to do so, and on what basis to abolish it.



²¹¹ *Graham v Park Mews Body Corporate and Another* [2012] 1 All SA 167 (WCC) para 60; *De Sousa and Another v Technology Corporate Management (Proprietary) Limited and Others* [2017] 3 All SA 47 (GJ) para 107.

CHAPTER 5

OPINION AND CONCLUSION

5.1 Introduction

This chapter critically outlines the rule in *Hollington* as permitted by section 42 of the CPEA. This rule is analysed in the light of section 17 of the CPEA, section 3 of the LEAA,²¹² and finally sections 39 (2) and 173 of the South African Constitution.²¹³ Finally, light will be shed on how the issue of criminal court judgement admissibility as evidence in civil proceedings should be dealt with in South Africa. To that end this chapter considers, among other things, the courts' constitutional duties. Further duties imposed on courts by other legislation are also outlined owing to their relevance.

5.2 Proposed Solutions on the rule in *Hollington*

In this section this dissertation will contribute viable and legally founded solutions to abolish or circumvent the rule in *Hollington* in South Africa. This circumvention will be proposed in terms of the CPEA, LEAA and Constitution respectively.

5.2.1 Admission of Judgement Evidence by Way of an Application of Section 17 of the CPEA

Scholars²¹⁴ and the courts, as has been shown in earlier chapters, are united in the view that it is section 42 of the CPEA that instructs the courts to incorporate into South African law the English law, particularly the rule in *Hollington*.²¹⁵ The courts seem to uphold this view and have consistently held themselves bound by this rule based on the contention that they are forced to apply it by section 42.²¹⁶ Those views now necessitate scrutiny of section 42. This section provides that the law of evidence that applied on 30 May 1961 will apply in any case

²¹² Law of Evidence Amendment Act 45 of 1988.

²¹³ Constitution of the Republic of South Africa, 1996 ss 39(2) & 173.

²¹⁴ Schwikkard PJ & Van der Merwe S *Principles of Evidence* 4ed (2016) 313; See also Zeffertt DT & Paizes *The South African Evidence* 2ed (2009) 341 – 343; Zeffertt DT 'The Rule in *Hollington v Hewthorn* Revisited' (1970) 87 *SALJ* 344 – 337; Davids J 'Judgment as Evidence' (1968) 85 *SALJ* 78 -79. See further the contribution of made by the scholars from other jurisdiction that were similarly bound by the rule in *Hollington*: Spencer JR 'The Ghost of The Rule In *Hollington v Hewthorn* Exorcist Required' (2014) 73 *CLJ* 477; Wright CA 'Evidence-Admissibility of Criminal Convictions in Civil Actions – Hearsay' (1943) 21 *CBR* 658.

²¹⁵ See for example Schwikkard PJ & Van der Merwe S *Principles of Evidence* 4ed (2016) 110 – 111; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at footnote 26 & para 42.

²¹⁶ *Groenewald N.O and Another v Swanepoel* 2002 (6) SA 724 (E) At 727E see also *S v Khanyapa* 1979 (1) SA 824 (A); *S v Mavuso* 1987 (3) SA 499 (A); *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 (4) SA 35 (T) where the courts confirmed that the *Hollington* case and the precedent laid down in it is binding on the South African courts.

that is not covered by the CPEA or any other law. It is important to note that with this clause the legislature specifically anticipated those cases not provided for by the South African law not just any cases. As has been shown in chapter 2, the law relating to the admissibility of conviction evidence in civil suits was the one found in the 1943 judgement, the *Hollington* case, according to which the conviction evidence was inadmissible in later civil proceedings.

Section 17 of the CPEA provides that a conviction or an acquittal may be proved by the production of a document duly certified by the relevant court that acquitted or convicted the person in question. This provision permits, or at least should be read and understood as permitting, the use of criminal convictions and acquittals as conclusive evidence in civil proceedings. Section 42 of the CPEA provides that when the CPEA is silent on a specific issue the courts are required to find answers in the English law that was applicable on 30 May 1960.²¹⁷ Section 17 of the CPEA provides that the judgement evidence is admissible in civil proceedings.²¹⁸ Sections 42 read with, and in the light of, section 17 leaves no room for the application of the English law that was in force on 30 May 1961 because the CPEA is not silent on the admissibility of a criminal judgement in civil proceedings.

The law as it stands in South Africa reflects the courts' disregard of section 17. Alternatively, the South African law as it stands is reflective of a misinterpretation of section 42. This possible misinterpretation is based on the reason that section 42 grants the courts a discretion to choose between the South African law and the English law of evidence when deciding certain matters. After rigorous research I have not been able to find any judgement in which section 17 was quoted, interpreted and whose relevance was examined and decided. This dissertation contends that the courts have erroneously integrated the ancient English law into the South African law against the precepts of the South African law itself. There is therefore no need for the enactment of new legislation to abolish the rule in *Hollington* in South Africa because section 17 of the CPEA is readily available.

²¹⁷ CPEA, s 42. – ‘The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.’

²¹⁸ CPEA, s 17. – ‘The trial and conviction or acquittal of any person may be proved by the production of a document certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such registrar, clerk or other officer, to be a copy of the record of the charge and of the trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof.’

5.2.2 Admission of Judgement Evidence by Way of Statutory Exceptions to the Hearsay Rule

It has been submitted that a criminal court judgement tendered as evidence in later civil proceedings becomes hearsay evidence although that was not explicitly stated in the *Hollington* case.²¹⁹ It has been further contended that based on the wording of the *Hollington* judgement the hearsay rule is what the Court had in mind when it refused the admission of judgement evidence.²²⁰ The South African law as it stands defines hearsay as evidence whether in oral or written form whose probative value depends on the credibility of a person other than the one adducing it.²²¹ By the same definition a judgement is in writing and its probative value depends on the credibility of the presiding officer that delivered it and not the plaintiff who is now adducing it in the civil court. Before 1988, it has been submitted, there were no clear exceptions in terms of which to admit hearsay evidence save for undefended cases.²²² This could be the reason why the courts were reluctant to admit the judgement evidence.

In 1988, the legislature enacted the LEAA, including section 3 which introduced the exceptions to hearsay rule.²²³ The general rule is that hearsay is not admissible evidence both in criminal and civil proceedings.²²⁴ Section 3 provides three exceptions in terms of which hearsay evidence may be admitted contrary to the general rule. This provision provides that

²¹⁹ Zeffer DT 'The Rule in *Hollington v Hewthorn* Revisited' (1970) 87 SALJ 332

²²⁰ Thomas H & Davis IV 'Criminal Judgments as Evidence in Civil Cases' (1957) 11 SwLJ 231; see further Wright CA 'Evidence-Admissibility of Criminal Convictions In Civil Actions – Hearsay' (1943) 21 CBR 657.

²²¹ Law of Evidence Amendment Act 45 of 1988 s 3(4). – 'For the purposes of this section "hearsay evidence" means evidence: whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.'

²²² Zeffer DT 'The Rule in *Hollington v Hewthorn* Revisited' (1970) 87 SALJ 335.

²²³ LEAA, s 3. – '(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;. . .
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

²²⁴ LEAA, s 3 (1).

hearsay evidence may be admissible by consent between the litigants²²⁵ and the courts have held that consent will be inferred from the opponent party's failure to object to its admissibility.²²⁶ It was also provided that consent will be inferred in instances where a litigant purposefully provokes hearsay evidence from their opponents during cross-examination.²²⁷

The second instance according to which hearsay evidence may be admissible occurs when it may be admitted provisionally when the court has been informed that the party on whose credibility the probative value of such evidence depends will be available to testify at some later stage.²²⁸ Thirdly and most importantly, section 3 (1) (c) grants upon the courts a judicial discretion to admit hearsay evidence when they are satisfied that doing so is in the interest of justice. This provision assists the courts with six specific considerations and an additional one that is wider than the rest that the courts may consider when they are exercising their discretion in admitting hearsay evidence. The courts are, in terms of subparagraph (i), to consider the nature of the proceedings, and in terms of subparagraph (ii) to consider the nature of the evidence. Having indicated that section 3 applies to both criminal and civil matters, it cannot be over-emphasised that civil courts also have it at their disposal.²²⁹ As has been shown in chapter 1 of this dissertation, the criminal law standard of proof is heavier than in civil proceedings. In the application of subparagraph (i) the nature of litigation is civil proceedings where the standard of proof is less than that employed in criminal proceedings. In the application of subparagraph (ii) the nature of the evidence is a criminal court conviction that was arrived at using a standard of proof that is more onerous than that which would otherwise be used in the civil court if the matter was to be re-litigated.

Proceeding with the considerations in section 3 (1) (c), subparagraph (iii) requires the courts to consider the purpose for which the evidence is tendered, and subparagraph (iv) draws the courts' attention to consider the probative value of such evidence.²³⁰ The courts have also pronounced on section 3 of the LEAA. In *Vimbela v S* the court relied on section 3 of the LEAA to allow the admissibility of hearsay evidence.²³¹ In *May v Multilateral Motor Vehicle Accident Fund* the Court cited the hearsay definition found in section 3 of the LEAA.²³² The

²²⁵ LEAA, s 3 (1) (a).

²²⁶ *S v Aspeling* 1998 (1) SACR 561 (C); *Thoroughbred Breeders Association of South Africa v Price Waterhouse* 1999 (4) SA 968 (W).

²²⁷ See for example the case of *Mahomed v Attorney-General of Natal & others* 1996 (1) SACR 139 (N).

²²⁸ LEAA s 3 (1) (b).

²²⁹ LEAA s 3 (1) (c) (i) – (ii).

²³⁰ LEAA s 3 (1) (c) (iii) – (iv).

²³¹ *Vimbela v S* [2015] JOL 31805 (GP), page 3.

²³² *May v Multilateral Motor Vehicle Accident Fund* [2008] JOL 22337 (Ck), page 5.

Court further stated that a statement made by someone other than the one giving it in court did not automatically become hearsay evidence.²³³ The Court stated that it is when that statement is adduced as evidence that it becomes hearsay evidence.²³⁴

Applying the former subparagraph, the purpose of tendering the judgement evidence is to avoid unnecessary litigation costs and endless re-litigation of the same matter in different courts. Furthermore, the purpose of tendering judgement evidence is based on the reliance on the judicial precedent and the doctrine of finality of litigation as the matter has already been pronounced on. Applying the latter subparagraph, the judgement of the criminal court is anticipated to have a sufficiently persuasive value to that of the civil court when the criminal court has a similar or inferior status. However, the judgement evidence is anticipated in this dissertation to be conclusive when the criminal court whose judgement is tendered in the civil court has a status superior to that of the civil court. This view is correctly in conformity with the doctrine of *stare decisis* and judicial precedent.²³⁵ Based on this line of reasoning, by eliminating this mere technicality of the *Hollington* rule, it would be unacceptable to hold that a criminal court judgement lacks all probative value in a civil court.

According to subparagraph (v) courts are expected to consider the reason why the party on whose credibility the probative value of the hearsay evidence depends is not available to testify in the proceedings. Moreover, subparagraph (vi) requires of the courts to consider any prejudice associated with the admission of such hearsay evidence.²³⁶ Applying the former provision, the judges' complaint is one of overwork and backlogs, meaning that judges are State employees whose responsibilities are demanding.²³⁷ It is therefore impracticable for them to appear as witnesses with regard to their own judgements in later civil suits. It is not desirable for a judge to appear before a civil court bench to testify about her judgement, because the courts are special public bodies tasked with the duty of decision-making.²³⁸ The foregoing are sound reasons why, upon the production of judgement evidence before a civil court, the judges cannot be readily available to testify about their judgements. Applying the

²³³ May v Multilateral Motor Vehicle Accident Fund case, page 5.

²³⁴ May v Multilateral Motor Vehicle Accident Fund case, page 5.

²³⁵ Ex Parte Minister of Safety and Security and Others: *In Re: S v Walters and Another* 2002 (7) BCLR 663 (C) at 693; Barratt A & Snyman P 'Researching South African Law' Available at http://www.nyulawglobal.org/globalex/South_Africa1.html#_edn14 (Accessed 23 February 2018).

²³⁶ LEAA s 3 (1) (c) (v)-(vi).

²³⁷ News24 'Western Cape High Court backlog getting worse' Available at: <https://www.news24.com/SouthAfrica/News/western-cape-high-court-backlog-getting-worse-20180903> (Accessed 13 November 2018).

²³⁸ Spencer JR 'The Ghost of the Rule in *Hollington v Hewthorn* Exorcist Required' (2014) 73 *CLJ* 477.

latter subparagraph, when the judgement evidence is dismissed, as is presently the case in South Africa, the party who relies on that evidence will suffer the cost related to the litigation, including possible legal costs.²³⁹ Finding the initial witnesses for the second time long after the incident might be difficult or impossible due to their death or incapacity. The reliance on judicial precedent will fail the litigants and benefit the wrongdoers for their misdeeds.²⁴⁰ The foregoing are inevitable prejudices ensuing from the rejection of the judgement evidence.

The last provision of section 3 (1) (c) contains a very wide, yet flexible, consideration which the courts may employ in deciding whether or not to admit hearsay evidence. That consideration is to be found in subparagraph (vii), and provides that the courts may, in addition to the other considerations, take into account any other factor that they deem necessary. All these considerations must guide the courts towards the admission of hearsay evidence on the grounds that such admission is in the interest of justice. This is a guideline offered by this dissertation as a means to circumvent of the rule in *Hollington* in South Africa by reliance on the LEAA.



²³⁹ Shymka ER 'Hollington v Hewthorn in Canada' (1955) 174 ALR 183- 184.

²⁴⁰ Osew EA 'The Criminal in the Civil Court' (1970) 2 RGL 94-97.

5.2.3 Circumvention of the Rule in *Hollington* through the Development of the Common Law in Terms of the Constitution

The enactment of new legislation as a means to finally lay the rule in *Hollington* to rest is unnecessary. The judiciary has, to my knowledge and as has been submitted by Schwikkard,²⁴¹ not yet pronounced on the relevance and the effects of section 17 of the CPEA on the rule in *Hollington*. Should courts adopt the interpretation that is offered by Schwikkard in relation to section 17, and should the exceptions to the hearsay rule as shown above fail, the Constitution may still be opted for as a final resort.²⁴² South African courts may make use of the Constitution and develop the common law in terms of the prescripts of section 173 read with section 39(2) thereof.²⁴³ Section 39(2) bestows on the courts the power to develop the common law while on the other hand section 173 explains the nature of that power the courts are anticipated to exercise. Section 173 provides that it is the power inherent in the superior courts namely the High Court, the SCA and the Constitutional Court.²⁴⁴ The superior courts may, as expected of them, accept the duty to develop the common law using sections 173 and 39(2) of the Constitution by finally putting an end to the rule in *Hollington*.

Courts have pronounced on the development of the common law and laid down guidelines that courts ought to be followed in this regard. The Constitutional Court in *Paulsen and Another v Slip Knot Investments* ruled that when policy does not permit the development of the common law the courts must likewise refrain from doing so.²⁴⁵ The Court took the view that if the courts ignore the public policy consideration test and readily leap to develop the common law, they will run the risk of usurping the function of the legislative authority, thereby breaching the doctrine of separation of powers.²⁴⁶ In *Carmichele v Minister of Safety and Security* the Constitutional Court held that the judiciary, when it is exercising the power bestowed on it by the Constitution to develop the common law, must remain cognisant of the fact that legislative authority rests primarily with the legislature.²⁴⁷ The highest court in South Africa, the Constitutional Court, again in the case of *Masiya v Director of Public Prosecutions, Pretoria and Another* stated that courts are mandated by section 39(2) of the

²⁴¹ Schwikkard PJ & Van der Merwe S *Principles of Evidence* 4ed (2016) 313.

²⁴² Constitution of the Republic of South Africa, 1996.

²⁴³ Constitution of the Republic of South Africa, 1996, ss 39 (2) & 173.

²⁴⁴ Constitution of the Republic of South Africa, 1996, s 173. - 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

²⁴⁵ *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5 para 57.

²⁴⁶ *Paulsen and Another v Slip Knot Investments* case at para 57.

²⁴⁷ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 36.

Constitution to develop the common law. However, courts must exercise their power sparingly in those cases that demand the development of the common law because law reform falls within the terrain of the legislature.²⁴⁸ The Constitutional Court, after ruling that public policy must be determinative in the development of the common law, went on to hold that public policy considerations are infused in the constitutional values. Those considerations may, according to the Court, compete so much that it becomes difficult to make a choice but it is erroneous of the court to opt for its preferred choice that is arrived at without weighing those considerations.²⁴⁹

The rule in *Hollington* as it has been demonstrated in chapter 3 of this dissertation offends and stands out to compete and conflict with the common law doctrine of *de bloedige hand neemt geen erf* which doctrine serves to advance the legitimate demands of public policy. The *Hollington* rule defeats the *bloedige hand* rule and renders it useless in that it makes it difficult for it to achieve the very purpose for which it was intended to prevent wrongdoers from benefitting from their transgressions.²⁵⁰ In a further assessment of why the common law should be developed, the rule in *Hollington* unjustly obstructs and militates against the long established principles that create the necessary order in a legal system. Those principles are *stare decisis* and judicial precedent.²⁵¹ The *Hollington* rule unreasonably puts these principles in abeyance. The rule in *Hollington* translates to: that when a superior court hands down a judgement in terms of which an accused person is found guilty as charged and then convicted, such conviction will not bind on the inferior courts such as a Magistrate's Court.

In criminal matters the State is required to prove the guilt of the accused beyond a reasonable doubt,²⁵² while, on the other hand, in civil proceedings the litigants are only required to establish a *prima facie* case against each other.²⁵³ The rule in *Hollington* requires the matter to be started afresh in the civil proceedings, and to be proved on a balance of probabilities, a standard which is lighter than the one used when the matter was first proved in the criminal court. This state of affairs militates against logic and common sense, and it is irreconcilable for trading a stronger standard of proof for the lighter one. The *Hollington* rule can hardly be said to align with the public policy that is reflected in the spirit of the Constitution, taking

²⁴⁸ *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) para 31.

²⁴⁹ *Paulsen and another case* para 38.

²⁵⁰ *Danielz NO v De Wet and another, De Wet v Danielz NO and another* [2008] 4 All SA 549 (C) para 17 -18.

²⁵¹ Barratt A & Snyman P 'Researching South African Law' Available at http://www.nyulawglobal.org/globalex/South_Africa1.html#_edn14 (Accessed 23 February 2018).

²⁵² *S v Mlambo* 1957 (4) SA 727 (A) at 337.

²⁵³ *Pillay v Krishna* 1946 AD 946 at 952.

into account the prejudices and disadvantages it comes with as outlined in this dissertation. It is of necessity, and the public policy of today demands, that the rule in *Hollington* be abolished.²⁵⁴

The superior courts can now develop the common law, and doing so will not amount to an encroachment upon the domain of the legislature as the latter has long ago resolved this issue by the enactment of section 17 of the CPEA in 1965. The *Hollington* rule is further in conflict with and disturbing the doctrine of finality in proceedings;²⁵⁵ and abolishing it cannot be said to be unnecessary in the circumstance because it is a liability in our law in that it has more prejudices and disadvantages than benefits. This rule does not only hamstring the litigants with litigation costs but also obstructs other essential legal principles thereby causing chaos and uncertainty in our legal system. In the light of these considerations, the light is green for the South African courts to employ sections 39 (2) and 173 of the Constitution and develop the common law with regard to the rule in *Hollington*. This will certainly restore legal certainty and resolve the undesirable conflicts and competition among South African legal principles.

5.3 Conclusion

The rule in *Hollington* originated in England in 1943 in *Hollington v Hewthorn* and it dictates that a criminal court judgement is inadmissible as evidence in later civil proceedings because it is an opinion of a criminal court judge. This rule was incorporated into South African law by reference in terms of section 42 of the CPEA. In England the rule was abolished with the enactment of the Civil Evidence Act in 1968. Be that as it may, to date it remains part of South African law. It has been criticised by legal scholars at both the local and international levels. In other jurisdictions steps have been taken to finally lay it to rest. This dissertation has argued that it can be abolished in one of the three ways namely: the interpretation of section 17 of the CPEA in a manner that abolishes the *Hollington* rule; secondly, the LEAA should be used as a means to admit the judgement evidence as an exception to the hearsay rule; and thirdly, courts can make use of the Constitution, particularly section 39(2) and section 173, and embark on the development of the common law. It is only when one of these avenues is employed that legal certainty will be restored and the conflict of legal principles will be resolved in the South African legal system.

²⁵⁴ Shymka ER ‘*Hollington v Hewthorn* in Canada’ (1955) 174 ALR 183- 184.

²⁵⁵ Jordaan DW ‘Taking a Second Bite at the Appeal Cherry: *Molaudzi v S*’ (2016) 19 PER/PELJ 2.

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