

ACT NO. 27 OF 2002



I assent.

J. I. ULUIVUDA
President

[24th October, 2002]

AN ACT

TO MAKE PROVISION WITH REGARD TO EVIDENCE IN CIVIL PROCEEDINGS

ENACTED by the Parliament of the Fiji Islands—

Part I—PRELIMINARY

Short title

1. This Act may be cited as the Civil Evidence Act 2002.

Interpretation

- 2.—(1) In this Act, unless the context otherwise requires—

“civil proceedings”, in addition to civil proceedings in any of the ordinary courts of law, includes —

- (a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; or
- (b) an arbitration or reference, whether or not under an enactment,

but does not include civil proceedings in relation to which the strict rules of evidence do not apply;

“copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means, whether directly or indirectly;

“court”—

- (a) includes any ordinary court of law;
- (b) in relation to an arbitration or reference, means the arbitrator or umpire;
- (c) in relation to proceedings before a tribunal (not being an ordinary court of law) means the tribunal;

“document” means anything in which information of any description is recorded;

“hearsay” means—

- (a) a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
- (b) references to hearsay include hearsay of whatever degree;

“legal proceedings” includes an arbitration or reference, whether under an enactment or not;

“oral evidence” includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs;

“original statement”, in relation to hearsay evidence, means any underlying statement by—

- (a) in the case of evidence of fact — a person having personal knowledge of that fact;
- (b) in the case of evidence of opinion — the person whose opinion it is;

“statement” means any representation of fact or opinion, however made.

(2) In this Act, references to a person’s husband or a person’s wife do not include references to a person who is no longer married to that person.

Part II—HEARSAY EVIDENCE

Admissibility of hearsay evidence

3.—(1) In civil proceedings, evidence must not be excluded on the ground that it is hearsay.

(2) Nothing in this Act affects the admissibility of evidence admissible apart from this section.

(3) Sections 4 to 8 do not apply to hearsay evidence admissible apart from this section.

Notice of proposal to adduce hearsay evidence

4.—(1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings—

- (a) a notice of that fact; and
- (b) on request, the particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay.

(2) The rules of court—

- (a) may specify classes of proceedings or evidence in relation to which subsection (1) does not apply; and
- (b) specify the manner in which (including the time within which) the duties imposed by subsection (1) are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties, and the compliance with the duty to give notice may be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1) or rules made under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court—

- (a) in considering the exercise of its powers with respect to the course of proceedings and costs; and
- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 6.

Power to call witness for cross-examination on hearsay statement

5. Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call the person as a witness, any other party to the proceedings may, with the leave of the court, call the person as a witness and cross-examine the person on the statement as if the person had been called by the first-mentioned party and as if the hearsay statement were evidence in chief.

Considerations relevant to weighing of hearsay evidence

6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following—

- (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

- (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated ;
- (c) whether the evidence involves multiple hearsay;
- (d) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Competence and credibility

7.—(1) Hearsay evidence must not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement by a person who at the time he or she made the statement was not competent as a witness.

(2) For the purpose of subsection (1), “not competent as a witness” means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings.

(3) If in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—

- (a) evidence which if the maker has been so called would be admissible for the purposes of attacking or supporting his or her credibility as a witness is admissible for that purpose in the proceedings; and
- (b) evidence tending to prove that, whether before or after the person made the statement, he or she made any other statement inconsistent with it is admissible for the purpose of showing that the person had contradicted himself or herself.

(4) Evidence may not be given under subsection (3) of any matter of which, if the person had been called as a witness and had denied the matter in cross-examination, evidence could not have been adduced by the cross-examining party.

Previous statements of witness

8.—(1) Subject as follows, the provisions of this Act as to hearsay in civil proceedings apply equally (but with any necessary modifications) in relation to a previous statement made by a person called as witness in the proceedings.

(2) A party who has called or intends to call a person as a witness in civil proceedings may not in those proceedings adduce evidence of a previous statement made by that person, except—

- (a) with the leave of the court; or

(b) for the purpose of rebutting a suggestion that the person's evidence has been fabricated.

(3) Subsection (2) does not prevent a witness statement (that is, a written statement of oral evidence which a party to the proceedings intends to lead) from being adopted by a witness in giving evidence or treated as his or her evidence.

(4) Without affecting any rules of court made under section 5, this Act does not authorise the adducing of evidence in civil proceedings of a previous inconsistent or contradictory statement except as follows—

- (a) a party producing a witness may not impeach the credit of the witness by general evidence of bad character, but may, if the witness in the opinion of the court proves adverse, contradict the witness by other evidence, or, by leave of the court, prove that the witness has made at other times a statement inconsistent with his or her previous testimony;
- (b) if a witness, upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding, and inconsistent with his or her present testimony, does not distinctly admit that he or she has made such statement, proof may be given that the witness did in fact make it;
- (c) before proof of a previous statement can be adduced under paragraph (a) or (b), the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he or she must be asked whether or not he or she has made such statement;
- (d) a witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the subject matter of the proceedings, without such writing being shown to him or her;
- (e) if it is intended to contradict the witness by proof of a writing under paragraph (d)—
 - (i) the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him or her; and
 - (ii) the court, at any time during the proceeding, may require the production of the writing for inspection, and may thereupon make such use of it for the purposes of the proceeding as it thinks fit.

(5) Nothing in this Act affects any rule of law as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document used by the witness to refresh his or her memory, that document may be made evidence in the proceedings.

(6) Nothing in this section prevents a statement of any description referred to in this section from being admissible by virtue of section 3 as evidence of the matters stated in it.

Evidence formerly admissible at common law

9.—(1) The common law rule whereby in any civil proceedings an admission adverse to a party to the proceedings, whether made by that party or by another person, may be given in evidence against that party for the purposes of proving any fact in the proceedings is superseded by this Act.

(2) The common law rules whereby in civil proceedings—

- (a) published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them;
 - (b) public documents (for example, public registers, and returns made under public authority with respect to matters of interest) are admissible as evidence of facts stated in them;
 - (c) records (for example, the records of certain courts, treaties, pardons and commissions) are admissible as evidence of facts stated in them,
- continue to have effect.

(3) The common law rules whereby in civil proceedings—

- (a) evidence of a person's reputation is admissible for the purpose of proving his or her good or bad character;
- (b) evidence of reputation or family tradition is admissible—
 - (i) for the purpose of proving or disproving pedigree or the existence of a marriage; or
 - (ii) for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing,
 continue to have effect in so far as they authorise the court to treat such evidence as proving or disproving that matter.

(4) Where a rule applies under subsection (3), reputation or family tradition is to be treated for the purpose of this Act as a fact and not as a statement about the matter in question.

(5) The words in which a rule of law mentioned in this section is described are intended only to identify the rule and are not to be construed as altering it in any way.

Part III—DOCUMENTARY EVIDENCE

Proof of statements contained in documents

10.—(1) If a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—

- (a) by the production of that document; or
- (b) whether or not that document is still in existence, by the production of a copy of that document or the material part of it,

authenticated in a manner the court approves.

(2) It is immaterial for the purpose of this section how many extracts there are between a copy and the original.

Proof records of business or public authority

11.—(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document is to be taken to form part of the records of a business or public authority if this is produced to the court with a certificate to that effect signed by an officer of the business or authority to which the records belong.

(3) For the purpose of subsection (2)—

- (a) a document purporting to be a certificate signed by an officer of a business or public authority is deemed to have been duly given by the officer and signed by him or her; and
- (b) a certificate is to be treated as signed by a person if it purports to bear a facsimile of the person's signature.

(4) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(5) In this section—

“records” means records in whatever form;

“business” includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

“officer” includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

“public authority” includes any public or statutory undertaking, any government department and any person holding a public office.

(6) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or class or description of documents or records.

Proof of instrument of which attestation is necessary

12.—(1) Subject to this Act, in any civil proceedings, an instrument to the validity of which attestation is needed may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive.

(2) Nothing in this section applies to the proof of wills or other testamentary documents.

Presumption as to documents 20 years old

13. In any civil proceedings, there is a rebuttable presumption that a document proved, or purporting to be not less than 20 years old, was validly executed.

Part IV – EXPERT AND OPINION EVIDENCE

Rules of court with respect to expert reports and oral expert evidence

14.—(1) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court—

- (a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class specified in the direction, that the parties or some of them must each by a specified date (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which the party proposes to adduce as part of its case at the trial; and
- (b) for prohibiting a party that fails to comply with a direction given in any such proceedings under rules of court except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report in so far as that statement deals with matters of any class specified in the direction.

(2) Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings.

(3) Without limiting subsection (2), rules of court made in pursuance of that subsection may make provision for prohibiting a party that fails to comply with a direction given as mentioned in subsection (1)(b) from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction.

(4) Rules of court made under this section may make different provisions for different classes of cases, for expert reports dealing with matters of different classes, and for other different circumstances.

(5) References in this section to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he or she is (or would if living be) qualified to give expert evidence.

(6) Nothing in the foregoing provisions of this section limits section 25 of the High Court Act (Cap. 13), section 68 of the Magistrates' Courts Act (Cap. 14) or any other enactment conferring power to make rules of court.

(7) Nothing in any enactment restricting the matters with respect to which rules of court may be made limits the making of rules of court in pursuance of this section or the operation of any rules of court so made.

Admissibility of expert opinion and certain expressions of non-expert opinion

15.—(1) Subject to any rules of court under this Act, if a person is called as a witness in any civil proceedings, the person's opinion on any relevant matter on which he or she is qualified to give expert evidence is admissible in evidence.

(2) Where a person is called as a witness in any civil proceedings, a statement of opinion by the person on any relevant matter on which he or she is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by the person, is admissible as evidence of what he or she perceived.

(3) In this section "relevant matter" includes an issue in the proceedings in question.

Evidence of foreign law

16.—(1) In civil proceedings a person who is suitably qualified to do so on account of his or her knowledge or experience is competent to give expert evidence as to the law of any place outside the Fiji Islands, irrespective of whether the person has acted or is entitled to act as a legal practitioner in that place.

(2) If any question as to the law of any place outside the Fiji Islands with respect to any matter has been determined (whether before or after the passing of this Act) in any civil proceedings in any place (not being proceedings before a court which can take judicial notice of the law of that place with respect to that matter)—

- (a) any finding made or decision given on that question in those proceedings is, if reported or recorded in citable form, admissible in evidence for the purpose of proving the law of that place with respect to that matter; and
- (b) if that finding or decision, as so reported or recorded, is adduced in any subsequent civil proceedings pursuant to paragraph (a), the law of that place with respect to that matter is taken to be in accordance with that finding or decision unless the contrary is proved.

(3) Paragraph (b) of subsection (2) does not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced pursuant to of this subsection in the same proceedings.

(4) Except with the leave of the court, a party to any civil proceedings may not adduce any such finding or decision as is mentioned in subsection (2) above unless the party has in accordance with rules of court given to every other party to the proceedings notice of intention to do so.

(5) The proceedings first referred to in subsection (2) are taken to be reported or recorded in citable form if, but only if, they are reported or recorded in writing in a report, transcript or other document which, if that question were a question as to the law of the Fiji Islands, could be cited as an authority in legal proceedings in the Fiji Islands.

Part V – CONVICTIONS, ETC. AS EVIDENCE IN CIVIL PROCEEDINGS

Convictions as evidence in civil proceedings

17.—(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the Fiji Islands or elsewhere is, subject to subsection (3), admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the person committed the offence, whether the person was so convicted upon a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.

(2) No conviction other than a subsisting one is admissible in evidence by virtue of this section.

(3) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the Fiji Islands—

- (a) the person is taken to have committed that offence unless the contrary is proved; and
- (b) without affecting the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person was convicted, are admissible in evidence for that purpose.

(4) Nothing in this section affects the operation of section 19 of this Act or any other written law whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(5) If in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (3), a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document, is admissible in evidence and must be taken to be a true copy of that document or part unless the contrary is shown.

Findings of adultery and paternity as evidence in civil proceedings

18.—(1) In any civil proceedings the fact that a male person—

- (a) has been found guilty of adultery in any matrimonial proceedings; or
- (b) has been adjudged to be the father of a child in affiliation to proceedings before any court in the Fiji Islands,

is subject to subsection (2) admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings.

(2) No finding or adjudication other than a subsisting one is admissible in evidence by virtue of this section.

(3) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in subsection (1)(a), or to have been found or adjudged to be the father of a child as mentioned in subsection (1)(b)—

- (a) the person is taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved; and
- (b) without affecting the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the other proceedings in question is admissible in evidence for that purpose.

(4) Nothing in this section affects the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(5) Section 17(5) applies for the purpose of this section as if the reference to subsection (3) were a reference to subsection (3) of this section.

(6) In this section—

“affiliation proceedings” means proceedings under the Maintenance and Affiliation Act (Cap. 52);

“matrimonial proceedings” means proceedings under the Matrimonial Causes Act (Cap. 51).

Conclusiveness of convictions for purposes of defamation actions

19.—(1) In an action for defamation in which the question whether a person did or did not commit a criminal offence is relevant to an issue in the action, proof that, at the time

when that issue falls to be determined, the person has been convicted of the offence is conclusive evidence that the person committed that offence and the conviction is admissible in evidence accordingly.

(2) In any action as mentioned in subsection (1) in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person was convicted, are, without affecting the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, admissible in evidence for the purpose of identifying those facts.

(3) For the purposes of this section a person is taken to have been convicted of an offence if, but only if, there subsists against the person a conviction for that offence by or before a court in the Fiji Islands.

(4) Section 17(5) applies for the purpose of this section as if the reference to subsection (3) were a reference to subsection (2) of this section.

(5) Subsections (1) to (4) apply for the purpose of any action begun after the commencement of this Act, whenever the cause of action arose, but do not apply for the purposes of any action begun before the commencement of this Act or of any appeal or other proceeding arising out of any such action.

Part VI—PRIVILEGE

Privilege against incrimination of self or spouse

20.—(1) The right of a person in any civil proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of penalty—

- (a) applies only as regards criminal offences under the law of the Fiji Islands and the penalties provided for by such law; and
- (b) includes a like right to refuse to answer any question to produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

(2) If a written law which confers (in whatever words) powers of inspection or investigation also confers on a person (in whatever words) the right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, subsection (1) applies to that right as it applies to the right described in that subsection and every such written law is to be construed accordingly.

(3) If a written law provides (in whatever words) that in any proceedings other than criminal proceedings a person is not excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that written law is to be

construed as providing also that in such proceedings a person is not excused from answering any question or giving any evidence on the ground that to do so may incriminate the husband or wife of that person.

(4) If any written law (whatever words)—

(a) confers powers of inspection or investigation; or

(b) provides as mentioned in subsection (3),

and further provides (in whatever words) that any answer or evidence given by a person is not admissible in evidence against that person in any proceedings (however described, and whether criminal or not), that written law is to be construed as providing also that any answer or evidence given by that person is not admissible in evidence against the husband or wife of that person in the proceedings or class of proceedings in question.

(5) In this section references to giving evidence are references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

Abolition of certain privileges

21.—(1) The following rules of law are abrogated except in relation to criminal proceedings—

(a) the rule whereby, in any legal proceedings, a person cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose the person to a forfeiture;

(b) the rule whereby, in any legal proceedings, a person other than a party to the proceedings cannot be compelled to produce any deed or other document relating to the person's title to any land.

(2) The rule of law whereby, in any civil proceedings, a party to the proceedings cannot be compelled to produce any document relating solely to the person's own case and in no way tending to impeach that case or support the case of any opposing party is abrogated.

(3) Section 94(2) of the Matrimonial Causes Act (Cap. 51), which provides that a husband or wife cannot be compelled to disclose any communication made to him or her by his or her spouse during the marriage, is abrogated except in relation to criminal proceedings.

(4) A witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, is not excused from answering any question by reason that it tends to show that the witness has been guilty of adultery.

Privilege before any tribunal, inquest, inquiry or investigation

22.—(1) A witness before any tribunal, inquest, inquiry or investigation (however defined) is entitled to the same privileges as if he or she were a witness in any civil proceedings before a court.

(2) No person may be compelled for the purpose of any tribunal, inquest, inquiry or investigation to give any evidence or produce any document which the person could not be compelled to give or produce in civil proceedings before the High Court.

Part VII – MISCELLANEOUS

Rules of court

23.—(1) A power conferred by a written law to make rules of court regulating the practice or procedure of the court in relation to civil proceedings includes power to include any provision necessary or expedient for carrying into effect the provisions of this Act.

(2) Rules of court made for the purposes of this Act as it applies in relation to proceedings in the High Court apply, except in so far as their operation is excluded by agreement, to arbitration or reference proceedings to which this Act applies, subject to appropriate modifications.

(3) A question arising pursuant to subsection (2) as to what modifications are appropriate must be determined, in default of agreement, by the arbitrator or umpire, as the case may be.

Savings

24.—(1) This Act does not affect the operation of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances is not admissible in evidence against that or some other person in any proceedings or class of proceedings (however described).

(2) In subsection (1) the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(3) This Act does not affect—

- (a) the power of a court, in any legal proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or
- (b) the operation of any agreement (whenever made) between the parties to any legal proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings.

(4) This Act applies to any cause of action pending at the date of commencement of this Act.

Repeal

25.—(1) The Evidence Act (Cap 41) is repealed in respect of civil proceedings.

(2) Sections 2,4,7 and 8 of the Evidence Act continue to apply in respect of criminal proceedings.

(3) The Evidence (Fiji) Order 1961 (U.K.) is repealed.

Passed by the House of Representatives this 30th day of September 2002.

Passed by the Senate this 17th day of October 2002.