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# A Leap In The Dark? Evaluating The Evidence for the Resurrection

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> [I]n the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society.[2]

> The Christian Church has been in existence since the Resurrection.[3]

These two quotes from relatively recent decisions of respected common law courts define the question that this paper addresses. The first expresses a deep scepticism that any "religious" proposition can ever be known to be true for the purposes of the law. The second treats the claim that Jesus Christ of Nazareth rose from the dead as a simple part of the history of the world. This paper aims to show that the first comment from Laws LJ is far too pessimistic about the possibility of coming to a decision about the issue involved on rational grounds. It is not just that we must make a "leap in the dark".

Communities often celebrate significant events from the past. In Australia some might say that the most "religious" such festival today is not Easter Sunday, but Anzac Day, April 25.

In fact, there are some interesting similarities between the two events. On both occasions we remember an event that involved a heroic sacrifice, which is said to have ongoing consequences today. Anzac Day is remembered, of course, not as a victory, but simply because so many Australians were prepared to lay down their lives for their country. Similarly, Jesus' death on the cross is seen as a sacrifice for the benefit of others.

The key similarity, however, for our purposes is this: that both Anzac Day and Easter Day are based on specific, verifiable, historical events. Of course, being "history", neither is "verifiable" in the scientific sense of being able to be repeated or directly observed. But we can ask and answer the question whether or not these things happened by well-developed and well-tested techniques used by historians and by the courts.

After all, every court case is something of an historical investigation, at least where questions of fact are important: the judge, or the jury if there is one involved, has to determine what actually happened at some point in the past.

For Anzac Day we of course still had, until fairly recently, people who were alive and who were there on the day, who could tell us what they remembered. We have access to books written by those people, books written by others who interviewed those people,

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[2] Laws LJ, in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 (29 April 2010) at [23].
[3] Young CJ in Eq, *Metropolitan Petar v Mitreski* [2009] NSWSC 106 (4 March 2009) at [149].

things dug up from Anzac Cove- a whole range of things that tell us what actually happened on April 25, 1915.

We have, as we will see, almost exactly the same material to make a decision about the events of the first Easter. Of course that happened a long time ago, probably in 33 AD, nearly 2000 years ago. But we have a plethora of reports and evidence of the same sort- works written by eyewitnesses, works written by people who interviewed eyewitnesses, things we can dig up from the same era confirming the reliability of the written accounts. And what this paper suggests is that that evidence can be assessed and weighed up, and supported as reliable, by the legal principles used in courts every day to make key decisions about people's lives.

## The Importance of this Inquiry

Before we start, though, you may be wondering why I would bother. After all, if Christianity is about moral principles that people live by, why does it really matter whether Jesus rose from the dead?

We need to be clear about this: the fact that the resurrection of Jesus actually, literally happened in the Middle East about 2000 years ago, is *vital* if Christianity is to be taken seriously. Christianity may or may not have a set of moral principles that make living in society more pleasant- but if the Bible is taken seriously, the moral principles are *not* at the centre of the Christian faith. Christianity stands or falls on a set of events said to have occurred at a specific time, in a specific place.

This is what the source documents, in the Bible, make clear. The clearest is a statement from Paul, a key leader in the early church, in a letter he wrote to some believers at Corinth. In ch 15 of the first letter to the Corinthians he sets out very clearly a summary of essential Christian belief, which seems to date back to around 2-3 years after Jesus' death (I can explain later, if you like, why this is so; but briefly, Paul had gone to Jerusalem to confer with other church leaders and this statement sounds like the agreed tradition that he received from them.)[4] He says this:

> 3 For what I received I passed on to you as of first importance: that Christ died for our sins according to the Scriptures, 4 that he was buried, that he was raised on the third day according to the Scriptures, 5 and that he appeared to Peter, and then to the Twelve. 6 After that, he appeared to more than five hundred of the brothers at the same time, most of whom are still living, though some have fallen asleep. 7 Then he appeared to James, then to all the apostles, 8 and last of all he appeared to me also, as to one abnormally born.

Having outlined this agreed statement of the central issues of the faith, he goes on to tell the people he is writing to (who seem to have suggested that it was not really necessary to believe that the dead are raised), that they are wrong. Of all that statement of belief, he says, the most unbelievable, but also the hardest to falsify, the resurrection of Jesus- turns out to be the most important!

> 13 If there is no resurrection of the dead, then not even Christ has been raised. 14 And if Christ has not been raised, our preaching is useless and so is your faith. 15 More than that, we are then found to be false witnesses about God, for we have testified about God that he raised Christ from the dead. But he did not raise him if in fact the dead are not raised. 16 For if the dead are not raised,

[4] See a brief review of the evidence in Bauckham, *Jesus and the Eyewitnesses* (2006) at 264-268.

> then Christ has not been raised either. 17 And if Christ has not been raised, your faith is futile; you are still in your sins. 18 Then those also who have fallen asleep in Christ are lost. 19 If only for this life we have hope in Christ, we are to be pitied more than all men.

In short, he points out that the Christian faith is useless if Christ has not been raised. For one thing, he says, this makes Peter and I and the other disciples liars; not just ordinary liars, but liars of the worst kind, liars who are misrepresenting God himself! Not to mention that the implications of Christ's not being raised include that Christians are not forgiven, that those who have died are already lost forever, and that the Christians who are left are just wasting their time following a useless ideal. The fact of the resurrection of Jesus is absolutely fundamental to true Christianity.

## Assessing the truth of the claim

So, can we assess the validity of the claim that Jesus rose from the dead? I think we can. I have had to learn a bit about the law of evidence in my studies in law and my time as an academic lawyer at the University of Newcastle for the last 26 years. I am not an expert on the particular subject of evidence, but I've got some material from the expert, I've checked it out, and I want to share with you what I've found about how the claim of the resurrection would be checked in a court if it came up in Australia today. In my firm view, when we apply the principles of evidence law to the evidence for the life, death and resurrection of Jesus, there is more than enough evidence to justify banking our lives on the fact that this happened.

## The Law of Evidence

Let me introduce the law of evidence very briefly. Those of you who appear in the courts won't need this, but there may be students who haven't studied this area yet, or other interested people. When a court has to decide a case, there are two sorts of issues that it has to decide: (1) the facts- what actually happened? (2) the law- what are the legal consequences of that? Where the parties do not agree with each other about what happened, the court must resolve the first question, the question "what happened"?

Actually, in real-life court cases the order in which these things are considered may be a bit different. Courts, in our legal system, are generally not asked just to investigate a set of facts. "What happened on Smith Street, Jonestown, at 10:00 last Saturday night?" is not really the sort of question you would give the court. The response would be "why do you want know?" What happens in the legal system is that one party will come to the court and ask for particular legal remedy based on some event- eg in a civil case, "I want damages because Joe Bloggs hit me in the nose on Smith Street on Saturday night". Dealing with this claim will require the court to make findings about specific facts; but knowing the nature of the legal claim means the court can focus its attention on the facts that it needs to find to deal with this specific claim. What the court tries to identify, then, are the *facts in issue*.

For our purposes today, we will take the main fact in issue to be the question: did Jesus of Nazareth rise from the dead? This may involve consideration of some subsidiary facts: was there a person called Jesus of Nazareth? Did he actually die on a cross? After death, was his body missing from where it should have been? Was he seen alive after

having been dead? But all those questions are secondary to the main one- did he rise from the dead?

## *Relevance*

The first point to note about the sort of evidence a court will admit is this: that the court will only consider evidence that is *relevant* to a fact in issue. Section 55 of the *Evidence Act* 1995 (NSW) tells us what relevance means-

> **55 Relevant evidence**
>
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

So, when you are considering this question- "did Jesus rise from the dead?"- there may be lots of things that spring to your mind. You may have an image of some sort of Jesus with blue eyes and a neatly trimmed beard from a Sunday School or Scripture class. You may have a negative feeling about Jesus because you had a bad experience with a hypocritical Christian, or a boring religion class, or because someone close to you died. But can I say as gently as possible: none of that is really *relevant* to this question we are considering today. These other things may well be very important and need to be addressed. But the principle of s 55 is that we should only be taking into account material that helps us decide in a *rational* manner whether or not it is more likely than not that Jesus of Nazareth rose from the dead.

You may be surprised to hear me use the word "rational" in the same sentence as Christianity. But that is indeed my conviction- that being a follower of Jesus is not just a "blind leap of faith", but is the most rational and reasonable decision that someone can make. The Bible never calls on people to make a "blind leap" with no evidence. Instead, we see the presentation of facts that have a firm foundation in evidence- and then a call for a response to those facts. But the response is never called for in the absence of the evidence.The early preachers were not just automatically accepted by their hearers- they all knew that dead men don't usually rise! The preachers went about producing *evidence* that Jesus had been raised from the dead.[5] The proponents of Christianity engaged with others in an attempt to "persuade" and "reason" with them.[6]

Of course, I suppose for some people the suggestion that talk about someone rising from the dead can be rational is a contradiction in terms. Can it be rational to suggest that something supernatural has happened? In a very real sense that is precisely the issue here: for a conviction that "the dead can never rise" is not a proposition of logic, it can only ever be a presumption of fact based on past experience.[7] And what we are talking about today

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[5] See *Acts* 2:22-36, 13:23-41, 17:30-31.

[6] *Acts* 9:20-22, 17:2-4 ("reasoned", "explaining and proving"), and many other examples in the book of Acts.

[7] The philosopher David Hume is best known for an attempt to convert the rarity of miracles into a philosophical argument that one should never believe in their occurrence: see eg David Hume, "Of Miracles," in *An Inquiry Concerning Human Understanding*, ed. Charles W. Hendel (Indianapolis: Bobbs-Merrill, 1955), 122. For one of many scathing reviews and responses to Hume's work, see John Earman, *Hume's Abject Failure: The Argument against Miracles* (Oxford: Oxford University Press, 2000).

is whether or not, in this special set of circumstances, taking into account the evidence, we ought not to accept that this event, unlikely as it seems, did in fact happen.

## *Truth*

Justice Simpson, from the NSW Supreme Court, has said:

> The laws of evidence have always had the noble aim of enabling the judicial decision-maker to reach the correct decision, to make a decision on an accurate version of the facts - to arrive at that most elusive of results, the truth.[8]

This is our task today- putting aside other issues, to arrive at the truth. And, as Jesus said in another context, "the truth will set you free"![9]

## *Types of Evidence*

In seeking the truth, the courts have traditionally recognised a number of valid sources of evidence. These are the sort of things that are potentially relevant to deciding factual questions. I want to base the rest of what I say today on the list from one of Australia's leading textbooks, *Cross on Evidence*. *Cross* sets out these 5 major categories of valid evidence:

1. Testimony
2. Hearsay
3. Documents
4. Things
5. Related Facts (also called "circumstantial evidence").[10]

### 1. Testimony (Eye-Witness evidence)

The first type of evidence is generally regarded as the strongest- testimonial evidence given by an eye-witness of something they have seen themselves or otherwise perceived with their 5 senses.

There is an immediate problem for me here, of course. All the relevant eye-witnesses (with the sole exception of one, of course, if the question is answered affirmatively!) are long dead. But a court resolving this sort of question about the past would generally refer to the work of historians, and those historians would consider the testimony of eye-witnesses. Courts are not often called on to resolve issues as to what happened many years ago, but it is not unknown. Where limitation periods have been extended, a court may have to come to a decision about facts which were some time in the past. One situation where such fact-finding has been necessary is in the case of claims for compensation by the "stolen generation" of indigenous children removed from their parents in childhood. In each case the courts apply the usual rules of evidence, even to events many years in the past.[11] Ken Handley, former Justice of the NSW Court of Appeal who has written an article

[8] Foreword to P Bayne, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 2003) at v.
[9] John 8:31.
[10] See the 7th ed, para [1075] at p 13 for this list.
[11] For examples of fact-finding that had to extent back some time, see *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000). In native title cases involving the need to demonstrate a long-term

I recommend on the handout for today, notes that "in 1973 our High Court had to decide what happened at Port Moresby in 1886", citing *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.

In *Trevorrow v State of South Australia (No 5)* [2007] SASC 285 (1August 2007), for example, Gray J noted:

> [14] The present proceedings, as earlier noted, relate to events that commenced some 50 years ago. However, extensive contemporaneous documentation relevant to the events was tendered in evidence. This documentation, largely departmental, most prepared with apparent care and in accordance with established practices and procedures, allows a relatively clear understanding of the events, attitudes and policies of the time. From time to time witnesses were able to speak to documents and the procedures and practices that led to their creation. In many instances, this has assisted the process of the court being satisfied that documents were reliable records of events that occurred and of attitudes and policies of the time.

Of course, resolution of issues about event 2000 years ago are much more difficult even than those of 50 years ago. But I propose that is worthwhile to conduct something of a "thought experiment". Let us assume for the purposes of this discussion that the documents from the 1st and 2nd centuries are people in front of us. We will hear these documents as they testify to us.

### *The reliability of the documents as evidence of the originals*

But of course we can only do this with integrity if we do indeed have access to documents from the 1st and 2nd centuries. So I need to briefly address this issue. After all, for some people today I have a feeling that they may believe that the documents about Jesus were made up by monks sitting around in the Middle Ages with nothing else to do!

But this is not true, of course. It is important to realise, first, that what we have in the book that we call the Bible is not one book but 66 different documents, all from different places and different times, with some from the same authors but mostly by different authors. In particular, the bit we call the New Testament contains 27 different documents. These documents were all originally written in Greek in the 1st century. Greek was, at the time, the shared language of the Mediterranean, mostly due to the long-lasting impact of Greek culture and learning over many centuries. Almost all moderately educated people in Palestine would have spoken and written in Greek as well in their local language, Aramaic. Those who had official positions also doubtless knew and used Latin. But all the New Testament documents are written in a popular form of Greek called Koine, or "Common", Greek.

What I have just told you would not be controversial in any scholarly circles with an interest in the first and second centuries AD and the Mediterranean, although some might date the documents later into the 2nd century. But whatever the view of the evidence, we do not have late medieval fantasies! As I will mention in a little while, we have a number of pieces of external testimony from non-Christian sources, Roman and Jewish historians,

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connection with land, fact-finding in relation to events that occurred on the original settlement of Australia by Europeans at the end of the 18th century may be necessary. In *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (5 February 2007), for example, Lindgren J observed in his preliminary summary of the case that "the claimants must prove what indigenous laws and customs were being acknowledged and observed in the Goldfields at the date of sovereignty – 1829."

to the major outlines of Jesus' life, and the existence of a body of his followers in key parts of the Roman Empire very early in the 2nd century.

In relation to the documents of the New Testament, we have a large and absolutely convincing body of evidence that shows that we have access to the text of what was originally written, through the large numbers of copies of the documents that are available. We don't have the "autographs", the original pieces of paper; but then again no historical document from this era has survived intact. But we have enough copies, and enough copies from clearly different sources and places, to have confidence that we can read today what was written in the 1st century.[12]

### *Bias of Witnesses*

Of course, there seems to be one major objection to relying on the evidence of the New Testament documents: that the writers were biased. But on what grounds do we want to reject a witness's testimony as biased? Not simply because they believe in the truth of what they are saying! After all, if a witness sees a car accident, gives a statement to the police about it, and later repeats that statement in court, we don't say the witness is biased- we simply say that the witness is telling the truth!

The former President of the NSW Court of Appeal noted that the standard means of testing the credibility of witnesses include asking the questions:

> Did the witnesses have sufficient opportunity to observe? Do their actions conform to their words? Is there independent support for their account, and how weighty is it? What motive did they have to lie or to tell the truth?[13]

The NSW Court of Appeal noted some important general principles about assessing the credibility of witnesses in *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 Feb 2013), where Allsop P noted at [65]:

> Mr Morris referred to the helpful discussion of "credibility" by Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at 431 as follows:
> ""Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a **truthful or untruthful person**? Secondly, is he, though a truthful person, **telling something less than the truth on this issue**, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, **did he register the intentions of the conversation correctly** and, if so, has his memory correctly retained them? Also, has his recollection been **subsequently altered by unconscious bias** or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, **contemporary documents** are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, **is it so improbable** that it is on balance more likely that

[12] For an overview of the evidence for reliable transmission of the text of the New Testament documents, see P Barnett, *Is the New Testament History?* (rev'd ed, Sydney South, Aquila, 2003) ch 5 "Is the transmission trustworthy?", pp 40-45.
[13] The Hon K Mason, AC QC, Foreword to P Barnett, *The Truth about Jesus: The challenge of the evidence* (2nd ed; Aquila Press, 2004) at vii.

> he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And **motive** is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." (Emphasis added)

We might summarise the issues at stake as those of the general reliability of the witness; whether or not there was some reason for him or her not to have properly observed the event; whether or not time has intervened to change the recollection; whether or not the events recounted are inherently improbable; and whether or not there is a motive to tell other than the truth.

Possible bias, then, may arise where a witness has a reason other than truth-telling to tell a story. If he or she had been offered money by one side or the other, or stood to gain a promotion from one of the parties, or was related to one of the parties- we would say there was a danger of bias.

Justice Windeyer in the High Court of Australia referred to this in *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 221, noting:

> In assessing the testimony of any witness in any case it is relevant to know whether he has any interest or concern in the outcome of the case which might not make him impartial… When his testimony is being weighed, it is relevant to know the nature and extent of his interest, how the result of the case will affect him, what for him is at stake.[14]

Do we find this sort of bias in the New Testament? Oddly enough, I don't think so. True, the authors of the New Testament were followers of Jesus. But what motive did they have for telling the story of the resurrection other than that they believed in the truth of it? Starting in the 1st century, and extending well into the 2nd and 3rd centuries, Christians were despised and persecuted and killed for their faith. In the New Testament itself, in the book called "Acts of the Apostles" which relates what happened after Jesus' death and resurrection, there is an account of two of Jesus' followers, Peter and John, being arrested by the authorities and specifically told *not* to talk to others about Jesus' resurrection (*Acts* 4:1-22). Later Peter and others, when they disobeyed the order, were arrested again, and beaten, and only just escaped being killed (*Acts* 5:33-41). Later still there is a clear account of another one of the church leaders being beheaded for continuing to preach about Jesus (*Acts* 12:2).

Yet the followers of Jesus continued to proclaim the fact that Jesus had risen! Somehow this group of people had come to the unshakeable belief that Jesus had risen from the dead, and that other people needed to hear about this- because his resurrection showed that he was the coming Judge of the world, and also the only way that people could escape judgment (see *Acts* 17:31). In the end they stood nothing to gain from this story, and everything to lose, except that they hoped that they could persuade others that it was true and these others could escape God's judgment. If the story was a lie or a hoax, of course, it was a futile exercise (as Paul said in that passage I read before.)

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[14] Noted in Anderson, J & Bayne, P *Uniform Evidence Law: Text and Essential Cases* (2nd ed; 2009) at **[12.340]** p 502.

In the end, I guess a witness may be biased for reasons that we can't guess, so we need to treat people's testimony with some suspicion. But that is why we look for corroboration- other witnesses who are independent, documents, circumstances that crosscheck. When we put all these things together, I think we will see they make an impressive case. I would urge you strongly, if you haven't done so already, to read the four different accounts of Jesus' life in the New Testament (or to do so again if you haven't done so for a few years.) While they tell the same story, I think you will see that they don't look like documents concocted in collusion with each other. While there is some overlap of material, each has a slightly different purpose, and tells the story slightly differently. Nor do the accounts read as if they were "sanitized" to just present a positive picture of the people writing them. What we find is a "warts and all" picture, to use the phrase coined by Oliver Cromwell when telling his portrait painter to paint exactly what he saw, not what he thought Cromwell would want people to see! The accounts record events that cast the disciples of Jesus in a poor light, they record moments when they did not understand what was going on, when Jesus had to rebuke them for their slowness. In short, they read like a truthful account of real events.

So, who do we have then, who would count as an eye-witness to this story of the resurrection?

### *The First Witness: John*

The first witness I want to call to the stand is the apostle John. There are a couple of people called John in the New Testament- this one is the one who wrote the account of Jesus' life that is called the Gospel of John.

There is an excellent short account of the background to John's Gospel in a book on the bibliography on the back of the handout, in a book by Paul Barnett called *Is the New Testament History?* Barnett describes how, over the course of the 20th century, more and more archaeological evidence has emerged confirming the accuracy of John's account in incidental details- and where the details are right, this provides a good clue to the accuracy of the main points. It seems clear that John writes just as you would expect someone to write who was familiar with 1st century Jerusalem. (It is John, for example, who records an incident which took place at a pool in Jerusalem which is described as having five "porticos" or porches (*Jn* 5:2). No such structure was known for many years. But in the course of the 20th century archaeologists unearthed the remains of just such a structure: two very deep pools with 4 porches around the side and 1 running across the middle.)

So who was John? There seems no doubt that he was one of Jesus' closest disciples. This is so despite the fact that he is not named in the book he has written. But what we find is that, apparently in accordance with a literary convention, he talks of himself in the 3rd person, as "the disciple whom Jesus loved".

The writer of this book makes the claim to have been an eye-witness of the events recorded. He is a part of the broader group of disciples who, we are told in *Jn* 1:14, "have seen his glory" (referring to Jesus). At a crucial point in the account of Jesus' death, we read that, in reference to himself, John writes in *Jn* 19:35

> He who saw it has borne witness- his testimony is true, and he knows that he is telling the truth- that you also may believe.

And then at the conclusion of the book we see something like a legal "attestation clause" perhaps provided by other Christian leaders- after an incident involving the "disciple Jesus loved", we read in *Jn* 21:24

> This is the disciple who is bearing witness about these things, and who has written these things, and we know that his testimony is true.

### *The Concept of "Witness"*

What seem clear from these passages is that it is regarded as important by John that the readers of his account know that these matters are presented by someone who was himself a witness to them, and who writes with the aim of conveying that truth. He is not writing a "religious fable"; he is claiming to present actually what happened.

Without going into the details, the idea of "witnesses" who could testify to the events of Jesus' life, death and resurrection is also to be found all through the book of Acts. The replacement for Judas who betrayed Jesus, who was to be appointed by the remaining eleven disciples, had to be an eye-witness (*Acts* 1:21-22). Peter and the others repeat on a number of occasions that they were eye-witnesses to Jesus' resurrection (*Acts* 2:32, 3:15, 4:20, 5:32, 10:39, 10:41). When Paul preaches later in Acts he is careful to distinguish his role, which is mainly to pass on what he has heard from the original disciples, from their role, which was to testify to what they had seen (*Acts* 13:31).

### *John chapter 20*

So let us look at an example of this eye-witness testimony to the resurrection of Jesus. Here is the text of the chapter.

**John 20 (English Standard Version)**

1 Now on the first day of the week Mary Magdalene came to the tomb early, while it was still dark, and saw that the stone had been taken away from the tomb. 2 So she ran and went to Simon Peter and the other disciple, the one whom Jesus loved, and said to them, "They have taken the Lord out of the tomb, and we do not know where they have laid him." 3 So Peter went out with the other disciple, and they were going toward the tomb. 4 Both of them were running together, but the other disciple outran Peter and reached the tomb first. 5 And stooping to look in, he saw the linen cloths lying there, but he did not go in. 6 Then Simon Peter came, following him, and went into the tomb. He saw the linen cloths lying there, 7 and the face cloth, which had been on Jesus'[a] head, not lying with the linen cloths but folded up in a place by itself. 8 Then the other disciple, who had reached the tomb first, also went in, and he saw and believed; 9 for as yet they did not understand the Scripture, that he must rise from the dead. 10 Then the disciples went back to their homes.

11 But Mary stood weeping outside the tomb, and as she wept she stooped to look into the tomb. 12 And she saw two angels in white, sitting where the body of Jesus had lain, one at the head and one at the feet. 13 They said to her, "Woman, why are you weeping?" She said to them, "They have taken away my Lord, and I do not know where they have laid him." 14 Having said this, she turned around and saw Jesus standing, but she did not know that it was Jesus. 15 Jesus said to her, "Woman, why are you weeping? Whom are you seeking?" Supposing him to be the gardener, she said to him, "Sir, if you have carried him away, tell me where you have laid him, and I will take him away." 16 Jesus said to her, "Mary." She turned and said to him in Aramaic,[b] "Rabboni!" (which means Teacher). 17 Jesus said to her, "Do not cling to me, for I have not yet ascended to the Father; but go to my brothers and say to them, 'I am ascending to my Father and your Father, to my God and your God.'" 18 Mary Magdalene went and announced to the disciples, "I have seen the Lord"--and that he had said these things to her.

19 On the evening of that day, the first day of the week, the doors being locked where the disciples were for fear of the Jews, Jesus came and stood among them and said to them, "Peace be with

you." 20 When he had said this, he showed them his hands and his side. Then the disciples were glad when they saw the Lord. 21 Jesus said to them again, "Peace be with you. As the Father has sent me, even so I am sending you." 22 And when he had said this, he breathed on them and said to them, "Receive the Holy Spirit. 23 If you forgive the sins of anyone, they are forgiven; if you withhold forgiveness from anyone, it is withheld."

24 Now Thomas, one of the Twelve, called the Twin,[c] was not with them when Jesus came. 25 So the other disciples told him, "We have seen the Lord." But he said to them, "Unless I see in his hands the mark of the nails, and place my finger into the mark of the nails, and place my hand into his side, I will never believe."

26 Eight days later, his disciples were inside again, and Thomas was with them. Although the doors were locked, Jesus came and stood among them and said, "Peace be with you." 27 Then he said to Thomas, "Put your finger here, and see my hands; and put out your hand, and place it in my side. Do not disbelieve, but believe." 28 Thomas answered him, "My Lord and my God!" 29 Jesus said to him, "Have you believed because you have seen me? Blessed are those who have not seen and yet have believed."

30 Now Jesus did many other signs in the presence of the disciples, which are not written in this book; 31 but these are written so that you may believe that Jesus is the Christ, the Son of God, and that by believing you may have life in his name.

I have given you a large chunk of text there, and we won't be able to go through it detail. But this is one the key pieces of direct, eye-witness testimony to the events of the resurrection.

Did you notice how the author John records events as they unfolded? He and Peter hear from one of the other disciples, Mary Magdalene, that the tomb is empty. At this point they obviously fear grave robbery by Jesus' enemies, or something of the sort. They run together to the tomb. John recalls how he got there first and stooped to look in (maybe panting from the effort of the run) - all he can see is the cloths that Jesus had been wrapped in, but nothing else. Peter then catches up, and barges in, and at the point notices something else- not only the cloths, but a face cloth, that had been around the head, folded up and off to one side. Finally, John plucks up the courage and looks in.

At this stage it is apparent to them that this is not an ordinary grave robbery. The cloths, which were valuable, were left there. It was at this point, the writer records, that he "believed"- I think the meaning is probably, at this point that he believed that Jesus had risen from the dead. Verse 9 I think perhaps has the sense "for it was not until then" that he understood the scripture. Again, we see the mark of the witness- he can speak for himself, but he can't speak for Peter.

Of course, the mystery is then resolved when Mary actually sees Jesus, goes back and tells the others, and then later when Jesus himself appears to them.

To my mind there is a lot about this passage that speaks as if it was someone who was there. It would have been easy, if John was making this up, to have made himself look good by being the first one who entered the tomb- but instead John recreates for us, almost in slow motion, the haste and confusion and finally the dawning realization that he experienced. Again, if the disciples were making this up they would not have chosen to have Jesus' first appearance to one of the women! Women were not, in the 1st century, accepted as reliable witnesses in court. But they are telling it as it happened, and so they give us this account.

This is strong eye-witness testimony. John had seen Jesus do amazing miracles; he was standing there looking on when Jesus was on the cross and was killed. *Jn* 19:26-27 tells us that. He watched as the expert Roman guards checked to see if Jesus was dead (who no doubt knew all about crucifixion, the Romans having executed hundreds of

criminals in this way in various rebellions). Pilate, the Roman governor, to make sure those being crucified were dead, gave these guards a direct order. Three people were crucified that day, two "rebels" and Jesus. Two of them had their legs broken to ensure that they died quickly- people who were being crucified could only prolong their lives by bracing themselves using their legs. But when these masters of the death penalty came to Jesus, he was dead already.

Just to make sure (or maybe just for fun, we don't know!) one of the soldiers then took a spear and plunged it into Jesus' side. John stresses the fact that he saw blood and water pour out. It seems fairly clear from the medical experts that this was a clear sign that death had already occurred. Certainly there was no further reaction from Jesus.

So this John- the John who knows who Jesus is, who saw him die, is the one who saw the empty tomb and later saw him alive again.

### *A Second Witness- Matthew*

It is also quite likely that we have eye-witness testimony from the author Matthew, since early tradition links the gospel bearing that name to the disciple of Jesus who had that name, a former tax-collector. But the evidence for Matthew's direct authorship of his gospel is a little less clear, and there are complications, which arise from the fact that it seems Matthew used other, pre-existing sources in putting his book together. Not that I'm saying he got it wrong- I think his other sources can be shown to be reliable (for example, the gospel we call Mark.) But I won't put him forward so strongly as an eye-witness.

### *A Third Witness- Peter*

Since I am covering authors of New Testament documents who themselves had seen Jesus, we can't ignore Peter, who, while he didn't directly write a gospel (though it seems that Mark probably represents Peter's preaching), wrote two letters. In both those letters Peter claims to be an eye-witness. In *1 Peter* 5:1 he reminds his readers that he was "a witness of the sufferings of Christ", and he refers in his letter elsewhere to the fact that Jesus was raised from the dead (*1 Pet* 1:21). In *2 Peter* 1:16 he says that he and the others were "eyewitnesses of his majesty", in referring to an incident where Jesus appeared transfigured on a mountain.

### *A Fourth Witness- Paul*

Finally, I must note that Paul claimed to have seen Jesus, after he had risen. But Paul never put his experience forward as clear evidence, because his experience of Jesus was in a vision, and those around him did not see and hear it clearly (see *Gal* 1:16 and the accounts in *Acts* 9:3-7, where those around him heard a voice but saw no-one; *Acts* 22:6-11, where they saw a light but did not hear the voice; *Acts* 26:12-18).

## 2. Hearsay (Indirect) Testimony

So we have seen that there are at least four eye-witnesses who can tell us something of the resurrection, one very strong. This seems like a good time, then, to mention the second type of evidence referred to by *Cross on Evidence*. Technically this is what is called "hearsay" evidence, because it is not the direct testimony of eye-witnesses, but it is someone else's account of what an eye-witness said.

The formal definition of "hearsay evidence" in s 59(1) of the *Evidence Act* 1995 is evidence of a previous representation made by a person, which usually is inadmissible to prove the existence of a fact that the person intended to assert by the representation.

The classic example would be where the fact in issue was whether A had stabbed B, and witness W got into the box and said that he had heard X say that he saw A stab B. The court would usually exclude that evidence because it wants to get the best evidence into court, and test it; so it would say that X himself should come into court so his testimony can be tested.

But there are a number of situations, under common law and more recently under statute, where W's evidence, even though hearsay, could be admitted. One of the most obvious examples where it should be admitted is where X is now dead and cannot be called! If there is no other evidence about the stabbing, then it makes sense to allow W's evidence, which can at least be taken into account, and may well be accepted if it is concluded that X had no reason to lie, was otherwise reliable, etc.

In fact, you may have noticed before, when I quoted *Cross on Evidence*, that one of the five categories of available evidence the author refers to is indeed "hearsay", where it falls into one of the categories of hearsay accepted by the law. As he says later in that book:

> Sometimes the best that can be done is to tender the evidence of what someone else was heard to say or wrote on the subject. (at para [1260])

The purpose of the usual exclusion of hearsay evidence is to require the *best* testimony available to be present in court and to be tested as rigorously as possible. If W says that X told him something happened, then it would be *best* if we could X into court to give his own evidence. But the exceptions to the hearsay rule recognize that in some circumstances this is not possible, and so we accept hearsay evidence as the *best available*.

What sort of hearsay evidence do we see in the New Testament? A good example is the gospel of *Mark*, which from reliable church tradition seems to be based on material told to Mark by the apostle Peter- probably material that Mark had heard Peter give in many sermons, since when you analyse the sermons of Peter recorded in the book of Acts, they reflect the structure of the gospel of *Mark*. Mark very clearly records the empty tomb at the end of his gospel.[15]

Another example of technical hearsay is the gospel of *Luke*, which the author himself tells us at the beginning he has compiled from eyewitness testimony of those who saw the events. He says (*Luke* 1:1-4)

> 1 Inasmuch as many have undertaken to compile a narrative of the things that have been accomplished among us, 2 just as those who from the beginning were **eyewitnesses** and ministers of the word have delivered them to us, 3 it seemed good to me also, having followed all things closely for some time past, to write an orderly account for you, most excellent Theophilus, 4 that you may have certainty concerning the things you have been taught. (ESV)

Matthew's gospel seems also to be partly based on other sources, and partly based on some unique material that either represents what Matthew saw, or some other documents.

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[15] We can see Mark's connection with Peter hinted at in the New Testament, where we are told in *Acts* 12:12 that Peter, after being miraculously released from prison, "went to the house of Mary, the mother of John whose other name was Mark, where many were gathered together and were praying." This John Mark seems to be the Mark who authored the gospel.

### *Exceptions to the Hearsay Rule*

So, are there recognized exceptions to the normal exclusion of hearsay evidence that will allow us to regard these documents as good evidence of the facts that they assert?

## Common Law Exceptions

There are in fact a number of exceptions developed by the *common law courts* that apply when the maker of the original statement is now dead, and which could be said to apply to the New Testament.

(1) There is an exception to the hearsay rule where the statement made was "against the interest" of the person who made it. For example, a dying murderer who chokes out "I done it!" In the New Testament context it could be said, for reasons that I've mentioned already, that to proclaim the resurrection of Jesus in the 1st century Roman Empire was against one's interest, as likely to lead to persecution and imprisonment and sometimes death.

(2) There is another exception where the statement was made "in pursuance of a duty to record or report the acts" of the person who made the statement. It could be argued that Luke, for example, who sets himself up as an historian in the way he writes, had a duty to accurately record the statements of the disciples. This is not a very strong argument, however, as Luke didn't hold an official position. I am going to mention in a moment testimony we have from a Roman writer in an official position that can be accepted for this sort of reason, however.

(3) We could, thirdly, note that courts are allowed to consult historical works to ascertain ancient facts of a public nature (see *Cross on Evidence* at [33845] n 872, referring to *Read v Bishop of Lincoln* [1892] AC 644, 646; *R v Zindel* (1987) 35 DLR (4th) 338 at 385).

## Statutory Exceptions to the Hearsay Rule

But in fact, I think, rather than referring to the common law exceptions, which were recognized over the years as far too narrow, and often excluding valuable evidence, we should refer to the current situation in NSW and exceptions available under the *Evidence Act* 1995 (NSW).

Section 63(2)(b) of the Act allows the reception of "first-hand hearsay" (that is, evidence of a statement made by a person who themselves had personal knowledge of a fact) in certain cases. The cases where this evidence is allowed under s 63 are where the original maker of the statement is unavailable, and where the proceedings involved are a civil trial, rather than a criminal.

I did wrestle a bit with this issue of civil *versus* criminal trial, and what sort of inquiry we should characterize our current "thought experiment" as. In fact, we base major decisions of our lives quite commonly on whether something is "more likely than not", and so it does not seem unreasonable to ask whether the resurrection of Jesus is true "on the balance of probabilities", which is the standard of proof in civil trials.

But I thought, the fair thing is probably to make it harder for myself by asking the question, as would be asked in a criminal trial, can the resurrection be shown to be true "beyond reasonable doubt"? Always keeping in mind that this is not an impossible standard- one of the best discussions of it I have seen, to which I regularly refer my students, is that of the famous Lord Denning when he was a mere trial judge in 1947. In *Miller v Minister of Pensions* [1947] 2 All ER 372 he said:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.

So, let's come back to this question of hearsay. If I make it harder for myself and assume we are testing this issue in something resembling a criminal trial, the relevant exception under the *Evidence Act* is to be found in s 65(2). That is as follows-

> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
> (a) made under a duty to make that representation or to make representations of that kind, or
> (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or
> (c) made in circumstances that make it highly probable that the representation is reliable, or
> (d) against the interests of the person who made it at the time it was made.

Notice that the section picks up some of the common law exceptions. Notice also that each one of these is an independent ground for being able to receive evidence (since the word "or" is used after each); so that if any one of them is satisfied, the evidence can be used in a criminal trial.

The one that I think is highly relevant is para (b), where the representation concerned was made "when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication".

We have a perfect example of this sort of thing in John 20, on your handout. Apart from John recording the things he saw himself, which is eyewitness testimony, we have John recording things he heard other people say, which under this rule can be used for evidence of the facts asserted by those others. So, in v 2 John records that Mary Magdalene came in and said "they have taken the Lord out of the tomb". Now, I don't think we can regard this as evidence that Mary saw someone remove the body of Jesus. But it is clearly evidence that when Mary went to the tomb, it was empty. And hence, even before John himself goes to see it, we can accept this as evidence that the tomb was empty. The statement was made very shortly after she had seen it; the circumstances make it highly unlikely that it was a fabrication, if only for the simple reason that Peter and John could easily check.

It seems pretty clear that the more extensive passage in vv 11-18 is another example of firsthand hearsay that would be acceptable. Here we have Mary's meeting with the risen Jesus. John did not see this himself, but he heard about it from Mary and the circumstances make it unlikely that it was fabricated. (For a start, she reports the unusual fact that she didn't recognise him at first!)

Another reason that supports the evidence here is this- that it is clear that the disciples were not expecting Jesus to rise from the dead! It seems that they had really sunk into despair, gloom and fear. You can see in *Jn* 20:19 that they had locked the doors "for fear of the Jews". They knew that they had all run away when Jesus was arrested; Peter knew he had denied he even knew Jesus three times! Indeed, *Luke* 24:11 tells us that when they heard the women report that they had seen Jesus "these words seemed to them an idle tale, and they did not believe them". Despite this, they were finally forced to believe by the evidence of their eyes- especially when Jesus later appeared to them in the room where they were hiding!

There is other material in the New Testament that is reporting of what the person concerned actually saw. We can accept, I think, most of Mark's gospel, on the basis that it seems to be a report of what Peter actually told him. Matthew also seems to be either an eye-witness account or a compilation of eye-witness accounts from others. So by extending the range of admissible evidence to the reception of "first-hand hearsay" we bring in a bit more of the material.

Another important exception to the hearsay rule is to be found in what is called the **"business records"** exception in s 69 of the *Evidence Act*. Section 69 allows for evidence to be received, to summarise broadly, where someone whose business it was to make accurate records, at a time when no legal dispute was in mind, wrote it down.[16]

Specifically, s 69 provides as follows:

> **69 Exception: business records**
> (1) This section applies to a document that:
> (a) either:
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or
> (ii) at any time was or formed part of such a record, and
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

So, what I am suggesting here is that a court can receive evidence of the facts asserted in the New Testament documents because they are equivalent to the sort of "business records" dealt with under s 69.

In order to make a case here, I need to deal with a couple of important issues. One is whether the early church, the source of these documents, could be regarded as a relevant "business"; another is whether the statements concerned were made for the purposes of the business. Finally, I need to address the question as to whether the documents were prepared in relation to pending court proceedings.

[16] For a case involving a native title claim where the court had to make rulings on various types of hearsay evidence and refer to the "business records" exception, see *Daniels v State Of Western Australia* (Includes Corrigenda 6 March 2001) [2000] FCA 413 (4 April 2000).

**Do the documents come from a relevant "business"?**

The first question is not quite so tricky as you might think. The issue is whether the NT documents are part of records "belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business". But the definition of "business" is quite broad. The term is defined in the Dictionary to the *Evidence Act* at the end, Part 2, clause 1, where we read that

> (1) A reference in this Act to a business includes a reference to the following:
> (a) a profession, calling, occupation, trade or undertaking,

We also see that clause 1(2)(a) says that a "reference in this Act to a business also includes a reference to (a) a business that is not engaged in or carried on for profit". So the business concerned does not need to be profit-making and can include a "calling" or an "undertaking".

It seems fairly clear that the early church, the custodian of the New Testament documents, was an organization that was "undertaking" the mission that had been entrusted to them by Jesus- or, to put it another way, had a "calling" from God to proclaim the message of Jesus. We are told in the early part of the book of Acts that Jesus "gave commands" to his apostles (*Acts* 1:2) and called them to be his witnesses starting in Jerusalem, then going out into Judea, Samaria and the "end of the earth" (*Acts* 1:8). (See also the commands given in *Luke* 24:48, *Matthew* 28:18-20).

This was not just a "one-off" event, but an ongoing task. What the original apostles had learned was passed on to others, such as Paul (see *Acts* 13:31, 32). The author of the later letter to the Hebrews says, in *Hebrews* 2:3, that

> This salvation, which was first announced by the Lord, was confirmed to us by those who heard him.

So, there is a chain of testimony, from "the Lord" (Jesus), to "those who heard him", to "us". We see a similar chain referred to by Paul in *2 Timothy* 2:2 where he says to his "trainee", Timothy:

> And the things you have heard me say in the presence of many witnesses entrust to reliable men who will also be qualified to teach others.

There is a chain that stretches here from Paul (who himself had a direct revelation from Jesus- see *2 Tim* 1:11 referring to his own "appointment" as an apostle, mentioned in many other passages such as *Galatians* 1:16), to Timothy (who heard the message along with "many witnesses"), to the "reliable men" to whom Timothy will entrust the message, who will in their turn teach "others"! So, there is a very clear sense that this is an ongoing "organisation" engaged in the tasks that have been given by Jesus.[17]

[17] See the comments on the "chain of transmission" of tradition in the New Testament in ch 11, "Transmitting the Jesus Tradition" of R Bauckham, *Jesus and the Eyewitnesses: The Gospels as Eyewitness Testimony* (Eerdmans, 2006), at p 265. This whole work is an excellent account of the evidence for the eyewitness origin of the gospel accounts of Jesus' life, death and resurrection.

In *Valoutin Pty Ltd v Furst* (1998) 154 ALR 119 at 129 Finkelstein J in the Federal Court of Australia, dealing with this question of what amounts to a "business" for the purposes of s 69, said:

> The definition appears to be wide enough to cover any systematic information gathering activity.[18]

The compiling of the gospel account of Jesus' life must have involved such a process- see in particular *Luke* 1:3

> Therefore, since I myself have carefully investigated everything from the beginning, it seemed good also to me to write an orderly account for you, most excellent Theophilus…

It is also worth noting s 152 *Evidence Act* 1995 (NSW):

**152 Documents produced from proper custody**

If a document that is or purports to be more than 20 years old is produced from proper custody, it is presumed, unless the contrary is proved, that:

(a) the document is the document that it purports to be, and

(b) if it purports to have been executed or attested by a person-it was duly executed or attested by that person.

This would allow a presumption that the gospel records, if found in "proper custody" (ie circulated within the early church) are what they claim to be and were written by who they claim to be written by. The title on all the documents[19] goes back to the earliest copies we have. The section of course allows proof to the contrary but casts the onus on the person who claims they are not authentic.

**In the course of, or for the purposes of, the business**

The "business" that the early church was engaged in, then, involved putting together the accounts of Jesus' life, death and resurrection, and carrying out his orders to be a witness to his resurrection and to continue his teaching. To do, while oral preaching was the first stage, it became increasingly important that documents be drawn up to record the relevant events. This must have increasingly been the case as the first generation of Christian leaders passed away and the message needed to be transmitted accurately. In his account of Jesus' life, the writer John spells out why he has put his book together:

> **John 20:30-31** Jesus did many other miraculous signs in the presence of his disciples, which are not recorded in this book. But these are written that you may believe that Jesus is the Christ, the Son of God, and that by believing you may have life in his name.

[18] Noted in Anderson & Bayne, *Uniform Evidence Law: Text and Essential Cases* (2nd ed; Federation Press, 2009) at **[8.1080]**, p 366.
[19] Eg "*kata Ioannen*", "according to John"- the same form of words appears at the top of each of the four gospels.

Similarly, Luke, the author of the 2-volume work *Luke/Acts*, says why he put his book together:

> **Luke 1:1-4** Many have undertaken to draw up an account of the things that have been fulfilled among us, just as they were handed down to us by those who from the first were eyewitnesses and servants of the word. Therefore, since I myself have carefully investigated everything from the beginning, it seemed good also to me to write an orderly account for you, most excellent Theophilus, so that you may know the certainty of the things you have been taught.

This collection of documents may have started with some of the letters that had been written by the apostles to their young churches being collected, and then passed around from church to church.[20] But by the middle of the 2nd century it became a collection that included not only these letters, but also the "gospels", the four biographies of Jesus, the history of the first spread of the gospel message in the book of Acts, and a prophetic revelation from John the Elder.

**Representations made in the documents**

For our purposes we do not need to explore all the assertions made in this collection of documents. We are interested in the statements made about the resurrection of Jesus. Do these documents contain "a previous representation made or recorded in the document in the course of, or for the purposes of, the business" – s 69(1)(b)?

Clearly a number of the documents do contain representations about the fact of Jesus' resurrection. All of the four gospels contain a direct account, the speeches in the book of Acts refer to it, and there are many passing references in the letters and the book of Revelation. These accounts were "recorded" in the documents "in the course of" the business of proclaiming the good news of Jesus in Palestine and around the Mediterranean in the 1st century, which was the purpose of the "business" of the church.

**Effect of the gospels etc being "business records"**

If we can deal with the gospels and other documents as business records, then there are two cases in which the usual rule excluding hearsay evidence will not be applicable.

Under s 69(2)(a),

> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or…

This allows us to clearly admit directly into our notional court proceedings all the evidence of eye-witnesses that we have mentioned previously. To take one example, the author of John's gospel tells us very clearly that he was present at the cross to see the spear thrust into Jesus' side (*Jn* 19:35). More importantly, he is attested to be a reliable witness in *Jn* 21:24. In particular all the evidence points to the author of the gospel being

[20] In his letter to the Colossians, at *Col 4:16*, Paul urges them to pass the letter on to the church in the neighbouring city of Laodicea, and in turn to read the one he has sent to the Laodiceans.

the "beloved disciple" in *John* 20 who was one of the first two people to see the empty tomb, and then later spoke face to face with the risen Jesus.

Section 69(2)(b) then opens up an even wider scope for reception of hearsay evidence, by providing that the hearsay exclusion does not apply to a representation made

> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

This then allows us to accept as evidence of the resurrection, a record in the New Testament that is based "directly or indirectly" on the testimony of a person who was an eyewitness. Hence, we are authorised to accept Luke's account of events, because he tells us that he obtained it by interviewing eye-witnesses. Similarly, if we can be satisfied (which I think we can) that Mark's gospel contains material supplied by the eye-witness Peter, we can accept that.

This is more than enough to provide admissible evidence of the resurrection. But we could go even further in reliance on the "indirect" supply of data, to say that we could accept information that had come through one or more hands before being committed to writing, so long as the ultimate source was an eyewitness. In their book on Evidence, Anderson & Bayne note that in reliance on this provision, in a dispute over the chassis number of a vehicle, it will be admissible for C to say that B told him that X told B the number. "In theory, there is no limit to the length of a chain of indirect suppliers of the relevant information."[21]

One could then take, for example, Luke's report in *Acts* 2:32 of Peter's assertion that he (Peter) had witnessed the resurrected Jesus. Even if this account has come indirectly (in that Luke wrote down what someone else told him that Peter said), if the issue is whether or not Jesus rose from the dead, this seems to be "information… indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact".

In short, the provisions of s 69(2) seem to make admissible a large number of statements made in the "business records" of the New Testament. Of course, that does not mean that they are necessarily true- evaluation of the *weight* of the evidence is always a matter for the ultimate fact-finder, either judge or jury. But the material can be put into the basket of evidence to be weighed; and in my view it is very powerful, coming from a range of different sources and people who had no motive to fabricate the story.

**The pending court proceedings exception**

Before leaving s 69, however, it should be noted that there is an exception to the admissibility of business records under s 69(3).

> (3) Subsection (2) does not apply if the representation:
> (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or
> (b) was made in connection with an investigation relating or leading to a criminal proceeding.

[21] Anderson & Bayne, above n 18, at 365.

The reason for the exception seems to be- it is all very well to regard business records produced for the ordinary purposes of a business to be admissible, but the records would be suspect if at the time they were produced it was known that court proceedings were under way in which the records would be produced! There is then a danger, of course, that the records would be "self-serving" and possibly unreliable.

Could it be said the accounts of Jesus' resurrection in the New Testament were produced "for the purpose of" court proceedings? In the past some academic commentators have said that some parts of the book of *Acts*, for example, would have been useful if Christians were facing criminal charges under Roman law. There are clearly references made in *Acts* to proceedings where Christians were brought before the local authorities, and in most such cases charges against them stirred up by religious agitators are actually dismissed. But it seems a big jump from that to say that the book of *Acts* was actually prepared for the *purpose* of such possible proceedings.

Even if it were possible to characterise one purpose of *Acts* as to enable Christians to respond to charges, no one could seriously suggest that this was the purpose of the four gospels, which are clearly presented as biographies of Jesus with the straightforward aim of presenting the challenge to follow Jesus as the chosen Saviour and Messiah.

In the end, then, the "business records" exception to the exclusion of hearsay evidence provides substantial ground for reception of the evidence of the gospels, and the other statements in the New Testament records, affirming the truth of the resurrection of Jesus. These documents were kept and used by the early church, the organisation established and called by Jesus to bear witness to the events of his death, resurrection and rule over the world. They contain clear assertions about the event made for the purposes of these tasks.

Let's turn to the next category of evidence referred to by *Cross*, documents.

## 3. Documents

Courts have long been in the habit of accepting documents for various purposes. There is a general rule that the original of a document must be produced where possible, but of course this is not possible in the case of the New Testament documents, or other documents from the 1st century.

While all the material we have so far been considering is documentary, under this heading I particularly want to outline some of the documents that are available as corroborative evidence from *outside* the pages of the New Testament. Of their nature, the events of Jesus' life, death and resurrection, occurring in a fairly isolated backwater of the Roman Empire, did not initially attract much attention from the official record-keepers and historians. But in fact, we do have a number of documents from some of these sources that, while not going into great detail, do provide evidence that the broad outlines of the New Testament are credible. These are documents from impeccable historical sources, none of whom could be said to be Christians. They may be said to be "public documents", as to which there is an evidentiary rule that they may be proved by the production of copies.

A good analysis of these is to be found in an excellent little book by John Dickson called *The Christ Files* (and in another book called *Investigating Jesus*). I will just summarise some of what he notes.

### *Greek and Roman Authors*

1) We have corroboration of the events recorded in the New Testament from a couple of Greek and Roman authors.
   a. An historian called Thallos (whose works are recorded in later sources but seems to have been writing about AD 55) records a darkening of the sun when Jesus was crucified (as noted in three of the four gospels, *Mk* 15:33/*Lk* 23:44-45/*Matt* 27:45). He explained it away as an eclipse rather than as a supernatural event (but of course it could have been both!)
   b. The famous Roman historian Tacitus, in his *Annals* 15.44, writing sometime in the second half of the 1st century, notes in passing that there was a group of people called "Christians" in Rome, that they took their name from one "Christ" who was executed under Tiberius by Pontius Pilate, and that what Tacitus called their "superstition", briefly checked, "broke out afresh" in Judea and then in Rome. (You can read the whole chapter, and cross-check the Latin if you like, at http://www.sacred-texts.com/cla/tac/a15040.htm .)
   c. Pliny the Younger (whose father, Pliny the Elder, had died in the eruption of Vesuvius at Pompeii in 79AD) was an official in what is now northern Turkey (then Bithynia). In AD 110 he wrote to the emperor (Book 10, Letter 96) to ask if he should keep on executing Christians! He describes them as meeting weekly, singing a hymn to "Christ as to a god", and otherwise taking vows to do good. In other words, pretty harmless. But he shows that even at this fairly early stage Jesus' followers thought he was something special!
   d. Seutonius, who wrote in AD 120, reports that the Emperor Claudius had expelled all Jews from Rome in AD49 because of ongoing disputes over someone called "Chrestus" (which seems pretty clearly to be reference to Christ.) This precise event is referred to in the book of *Acts*, 18:2, where two disciples had come from Italy because Claudius had expelled the Jews from Rome (and at this stage Christians would mostly have been regarded as part of the Jewish community).

### *Jewish authors*

We also have some early, mostly hostile, references to Jesus in Jewish writings of the time.

1) One in particular comes from a Jewish historian called Josephus, who wrote before the end of the 1st century. One of the key passages which specifically refers to Jesus, however, has been previously thought by many historians to have had bits added to it by a later Christian writer, so could not be completely relied on. However, more recently some more historical work has been done on the passage, which suggests that the text has not been tampered with as had been previously thought.
2) What I have put on the handout are three versions of the passage, with the words that most scholars thought had been added later, highlighted in the second version. The third version is one that many scholars are

prepared to accept. We are left with a text where Josephus, while not himself being convinced that Jesus was the Christ, still confirms a number of features of the NT account of Jesus.

3) Secondly, Josephus has another passage, *Jewish Antiquities* 20.200, which is less controversial but still very helpful. In that passage he confirms the NT evidence that Jesus had a brother called James, and in the passage he refers to Jesus as "the so-called Messiah-Christ". Josephus tells us something that the NT does not record, but that fits in with what we might expect, which is that James, Jesus' brother, was put to death by the Sanhedrin, the Jewish council (in AD 62, as it turns out.)

4) Thirdly, there are hostile references to Jesus in the *Talmud*, an early Jewish exposition of the law from the first part of the 2nd century. There we find it recorded that Jesus was "hanged" on the Passover (hanged could, of course, refer to crucifixion), and that he "practiced sorcery and led Israel astray". In another passage, dating probably from the early 3rd century, *Talmud* records the rumour that Jesus was the illegitimate son of Mary and a Roman soldier called "Pantera". Even at that stage it was obvious that the Jewish sources remembered that there was something odd about Jesus' birth.

So- we have some *documentary* evidence from outside the NT confirming a number of key facts about the existence of Jesus, and the early existence of a group of followers of Jesus.

## 4. Things

Fourthly, what I want to look at next is the category of evidence that *Cross* refers to as "things", or sometimes "real" evidence. In a trial these are objects that have relevance to what is being proved- a blood-stained jacket, some fibres found at the scene, etc.

### *Archaeology*

As far as the NT goes, we don't have extensive "real" evidence in this sense. But we do have some. The discipline of archaeology digs up what we can find from earlier years, and archaeologists have dug up a large amount of material that corroborates NT data. This is particularly so with the story of the early church in the book of *Acts*, written by Luke, where in a number of cases Luke's account of the 1st century Roman Empire has been shown to be accurate. For example, in referring to the Roman government officials in the city of Thessalonica Luke calls them "politarchs". For many years there was no evidence outside Luke's account that such officers existed. But in the middle of the 19th century a huge gateway was unearthed which referred on its inscription to "the time of the Politarchs". Since then many other inscriptions mentioning politarchs have been found. There are many other examples of Luke's accuracy as a historian.

Incidental archaeology regularly confirms the fact that Jerusalem in the 1st century was just as we see it described in the eye-witness accounts of the gospels.

## 5. Circumstantial Evidence

Finally, though, let me conclude by briefly referring to the fifth type of evidence referred to by *Cross*, 'related facts', or what is sometimes called "circumstantial evidence". Circumstantial evidence, like hearsay, has a bad name; but it can be very useful. All it means is:

> Any fact, from the existence of which the judge or jury may infer the existence of a fact in issue.[22]

In many, we may even say most, criminal cases there is no eyewitness (crimes often being committed, for some reason, where no-one else can see them!) So, it is often necessary to refer to other facts, which human experience or logic tell us tend to lead to an inference of the fact we are interested in. If the accused is seen carrying a blood-stained knife near a murder scene where the deceased was killed with a knife, and if we know the accused had a motive, then those are pieces of evidence against the accused.

What sort of circumstantial evidence do we have for the fact of Jesus' resurrection? Quite a lot but let me just mention three categories. *Cross* uses three different categories to describe circumstantial evidence: "prospectant" (facts occurring before the event which point forward); "concomitant" (facts occurring about the same time); and "retrospectant" (facts occurring afterwards which speak of what happened before).

1) **Prospectant**- facts before the event. In this category I want to put two very powerful types of evidence.
    a. First, prophecies of the Old Testament. You see, I concede that the resurrection of someone is inherently unlikely. If you told me today of the resurrection of your cousin Horatio from Toowoomba, I would be extremely skeptical. But the event is made more likely if the resurrection occurs in a situation where for many years other spectacular things have been known to occur, and the resurrection has been predicted.
        i. That is what we find in the case of Jesus. It is not as if he is a random first-century inhabitant of the Mediterranean. For thousands of years the God of the Jews had been doing spectacular things for his people, and the book which records those events looked forward to a future coming of someone called a Messiah- an anointed King- who would fulfill the promises previously made. It also spoke of a future judgment day where a mysterious but powerful human being called the "Son of Man" would play a role in the resurrection of all people at the end of time.
        ii. Indeed, in these predictions of the Messiah or the Son of Man it becomes clear that this person will not be like all the other human kings- he will actually live forever! To take just a couple of examples from the Old Testament
            1. In Isaiah there is a prophecy of someone called the "Servant of God" who is clearly the promised Messiah of

[22] *Cross on Evidence*, [1100], p 16.

the family of David. In amazing detail (amazing when you compare it to what actually happened to Jesus) *Isaiah* ch 53 speaks of this one as a "Suffering Servant". And yet, after recording his death as a sacrifice, we read in *Is* 53:10

When his soul makes an offering for sin, he shall see his offspring; he shall prolong his days… Out of the anguish of his soul he shall see the light and be satisfied. (Using the DSS manuscript)

2. Secondly, in a broader context, there are many passages that speak of the Messiah or Son of Man as ruling forever (cf *Dan* 7; *2 Sam* 7:12-16.) If that is so, and if he also must die for his people, then obviously he will have to rise to life again! We see this especially in *Psalm* 16, which Peter quotes in his first sermon in *Acts* 2. In the Psalm David, speaking as the ancestor of the Messiah, expresses his confidence that when the Messiah comes, death will not be able to conquer him!

My heart is glad, and my whole being rejoices; my flesh also dwells secure. For you will not abandon my soul to Sheol, or let your Holy One see corruption. (Ps 16:9-10)

iii. Reference to the circumstantial evidence of the predictions of the Old Testament was a key part of the proof offered by the first witnesses- see *Acts* 2:31, 13:32-33, 17:31, 26:22-23. Indeed, you may recall that in *1 Corinthians* 15 when Paul sums up the message in an early creed, which many scholars think is likely to originate only 2-3 years after Jesus' death and resurrection, he stresses this very thing:

That Christ died for our sins in accordance with the Scriptures;
that he was buried;
that he was raised on the third day in accordance with the Scriptures.

b. The second type of prospectant evidence is this: that while he was still alive, Jesus, knowing the Old Testament, told his disciples that this was exactly what was going to happen- that he would die, and rise again (see eg *Mk* 8:31 and others.) Interestingly it is clear from the reactions of the disciples on Easter Sunday that while they may have heard this, it was so incredible that they didn't really believe it!

2) What about "**concomitant**" circumstantial evidence, stuff happening at the same time? Here we could put a lot of the evidence I've already mentioned. The empty tomb itself is a massive piece of circumstantial evidence. Indeed, I don't know if you've noticed, but in fact we don't have in the New Testament a single piece of eye-witness testimony of the *actual event* of Jesus rising. It would be nice if we did, in a way; someone who saw him open his eyes, take off the bandages, perhaps a

spooky bright light. If I was making the story up I might have put that scene in! Hollywood could do it! (And indeed, we have a couple of spurious so-called "gospels" from later centuries that try to plug this gap and give us the moment.) But what we do have is what people saw- Jesus actually dead, wrapped in a heavy linen cloth and put into a rock tomb with a heavy rock in front of it, guarded by soldiers. And then on Sunday morning, the tomb empty, the rock rolled away. But after that, of course, we move from circumstantial evidence to eye-witness testimony when people meet the risen Jesus.

a. Perhaps a good example of concomitant circumstantial evidence for the resurrection is this- the failure of the Jewish or Roman authorities to provide an adequate explanation for the events of Easter. It is a well-established principle of evidence that if there is a fact as to which one party in a dispute should be able to call evidence, and yet they fail to do so, then the court may legitimately infer that the uncalled witness, or the unproduced evidence, would not have assisted that party's case. A common version of the rule is known in Australia as the rule in *Jones v Dunkel* (1959) 101 CLR 298.
b. So, consider the question of the missing body. What are the other explanations if the resurrection is not the right one?
    i. One is that the disciples stole the body. Indeed, in Matthew's gospel we see that this is what the Jewish authorities feared would happen (*Matt* 27:62-66), so they persuaded the Roman governor Pilate to allow a guard of soldiers to be set. After the resurrection *Matthew* 28:11-15 tells us that the guards told the chief priests what had actually happened, that they had fallen down in fear of an angel who had rolled the stone away. But the chief priests, we are told, gave the guards money to spread the story that the body had been taken while they were asleep!
    ii. Yet in all the very public proclamation of the message of Jesus' resurrection we never hear about this story again. If indeed the guards could testify that the body was stolen while they were asleep (and how could they have seen it if they were asleep?)- then as soon as Peter and the others started preaching the guards should have been called up to tell their story. Nothing of the sort ever happened.
    iii. And the same thing applies to most other theories about where the body went. If the *authorities* removed the body, clearly they could have produced it when the preaching began. If, as some have speculated, the weeping women went to the wrong tomb, again, the body could easily have been produced from the right tomb. The tomb belonged to Joseph of Arimathea, a respected member of the Council, who would have known precisely where it was!
c. Dr John Anderson, who lectures at Newcastle in criminal law and evidence, gave me some notes he has used in criminal law class. There he points out that "one of the best ways of persuading a court to draw a chain

of inference, is to lead evidence to eliminate the possible alternative explanations which exist at every step of the chain" (p 8).

i. In the case of the empty tomb, it seems to me that all the competing inferences can be eliminated. The suggestion, for example, that Jesus just fainted and later revived and walked or was carried out of the tomb is ridiculous. He was killed and declared dead by experts. Even if he had somehow just survived, he would have been a total physical wreck, not at all likely to inspire his disciples to the view that he was God's risen King.

ii. Nor does it seem plausible that the disciples staged the whole event. A fraud of that sort, which had to then be concealed by dozens of people over the next decades, is just not plausible! In any event, it is not just that the tomb was empty. It is the appearances of the risen Jesus, to different groups of people, at different times, in different contexts, which make the case. It seems impossible to ignore the change that took place, from a defeated, despairing group huddled behind closed doors for fear they would be next (see *Jn* 20:19, again)- to the confident and articulate group who proclaim the resurrection in front of the whole of Jerusalem in *Acts*, and ignore threats and beatings to do so.

3) Finally on circumstantial evidence, the **retrospectant** evidence, the evidence of what happened later- confirms the resurrection. I have just mentioned the main effect- the change in the disciples. But if you read on in the book of *Acts* you will see the continuing impact of the resurrected Jesus on the 1st-century world. The New Testament explains it in theological terms by the presence of the Holy Spirit, who ensured Jesus' ongoing presence with his followers. But the outward effect of that is observed in transformed lives, people willing to risk their income and their possessions to spread the news of Jesus' resurrection and to care for other members of this new community; people willing to burn their old books of pagan magic; Jews willing to eat with Gentiles and call them brothers. If I had time, but I don't, we could look at the letters in the later part of the New Testament, which confirm again and again that the resurrection of Jesus was a given for the life of the early church.

a. One writer, C F D Moule, puts it this way:

> The coming into existence of the Nazarenes (his term for the followers of Jesus) rips a great hole into history, a hole the size and shape of the Resurrection {quoted in Strobel, p 344).

John Anderson notes in relation to good circumstantial evidence that one characteristic that it has is "the fact that there are numerous separate and independent strands of evidence, all pointing towards the same conclusion" (p. 8). You may still be skeptical about one or two of these individual points; but I would argue that when you combine all these different strands you come up with a closely entwined cable which is

more than adequate for you to entrust your life to. Baron Pollock, a highly respected common law judge, put it this way in *R v Exall* (1866) 4 F&F 922 at 929; 176 ER 850 at 853, speaking of circumstantial evidence-

> It is more like the case of a rope comprised of several cords… there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt… with as much certainty as human affairs can require or admit of.

## Conclusion

What I've tried to do here is just to give you a taste of the wide range of evidence that is available to establish that Jesus of Nazareth did indeed live, and die, and rise again to life. The sort of evidence we have considered- eye-witness testimony, first-hand hearsay, business records, documents, things, circumstantial evidence- covers the whole range of evidence that courts use every day to decide issues of fundamental importance in people's lives.

For the writers of the New Testament, this evidence was clear and uncomplicated- many of them had seen and met Jesus, before and after his death; or else they had heard and trusted the evidence of the eye-witnesses. As the writer of the letter to the *Hebrews* puts it: this salvation "was declared at first by the Lord, and it was attested to us by those who heard, while God also bore witness by signs and wonders and various miracles." (Heb 2:3-4)

But all I have been able to do is to give you a brief overview. There are a number of very helpful books that go into this material in much more detail, listed on the bibliography.

But probably the most important thing you could do if you are still unsure about the truth of these things, would be to take one of the accounts of Jesus' life and read it, or read it again, for yourself, noting the sort of material that is used and just getting a feel for yourself about how reliable these authors sound. In the end a judge in a trial has to take all the various bits of evidence, consider the impact they have on each other, and finally come to an honest and careful decision based on all the available material. Read the source documents of the New Testament for yourself. Weigh up the way the writers present the picture in a very straightforward way, giving details that ring true because they were there on the spot. They don't gloss over stuff, they tell of their own failures and misunderstandings. But in the end they present a compelling case for the fact that this man Jesus rose from the dead, and he is the One that God has chosen to preside over the resurrection at the end of time.

If that is true, then your decision about the resurrection of Jesus is indeed the most important decision you will ever make. I hope that I have shown you that in my view, it is a decision you can make on good evidence.

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## Josephus, *Jewish Antiquities* 18.63-64

Now there was about this time Jesus, a wise man, *if it be lawful to call him a man*; for he was a doer of wonderful works, a teacher of such men as receive the truth with pleasure. He drew over to him both many of the Jews and many of the Gentiles. *He was [the] Christ*. And when Pilate, at the suggestion of the principal men amongst us, had condemned him to the cross, those that loved him at the first did not forsake him; *for he appeared to them alive again the third day; as the divine prophets had foretold these and ten thousand other wonderful things concerning him*. And the tribe of Christians, so named from him, are not extinct at this day.

### Possible reconstruction of original

Now there was about this time Jesus, a wise man; for he was a doer of wonderful works, a teacher of such men as receive the truth with pleasure. He drew over to him both many of the Jews and many of the Gentiles. And when Pilate, at the suggestion of the principal men amongst us, had condemned him to the cross, those that loved him at the first did not forsake him. And the tribe of Christians, so named from him, are not extinct at this day.

### More recent scholarship

(See *Josephus and Jesus: New Evidence for the One Called Christ* by T C Schmidt, OUP, 2025)

See https://www.thegospelcoalition.org/reviews/josephus-jesus-new-evidence/

Schmidt's own rendition of the full (and perhaps authentic) *Testimonium Flavianum* is this:

And in this time, there was a certain Jesus, a wise man, if indeed one ought to call him a man, for he was a **doer of incredible deeds**, a teacher of men who receive truisms with pleasure. And he brought over many from amongst the Jews and many from amongst the Greeks. He was **thought to be** the Christ. And, when Pilate had condemned him to the cross at the accusation of the first men amongst us, those who at first were devoted to him did not cease to be so, for on the third day it **seemed to them** that he was alive again given that the divine prophets had spoken such things and thousands of other wonderful things about him. And up till now the tribe of the Christians, who were named from him, has not disappeared. (204)