

The admissibility of criminal findings in civil matters: Re-evaluating the *Hollington* judgment

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SUMMARY

In *Hollington v Hewthorn & Co Ltd* 2 1943 All ER 35 it was held that a finding of a criminal court did not have any probative value in a subsequent civil action and was inadmissible as evidence. Despite the case being one of English origin, the South African courts have largely adopted this ruling as one grounded in our common law. In this paper, the judgment in the *Hollington* case is critically analysed in order to determine its continued applicability in the face of South Africa's existing law of evidence and the Constitution of the Republic of South Africa, 1996 ("the Constitution"). It is argued that in light of the existing law, this rule no longer finds application in South Africa.

1 Introduction

In this paper the judgment of *Hollington v Hewthorn & Co Ltd*,¹ is critically analysed in order to determine its continued applicability in the face of South Africa's existing law of evidence and the Constitution. The rule formulated in the *Hollington* case ("*Hollington* rule") is grounded in our common law.² It prevents the admission of any criminal findings as evidence in a subsequent civil action, even one arising out of the same facts.³ It is argued that in light of the existing law, this rule no longer finds application in South Africa. Following this introduction, the article discusses the judgment in light of the existing common law. To this end, it explains that evidence of a previous conviction is not always irrelevant, its admissibility is dependent on whether in the particular circumstance it can resolve the issue in dispute. The article further explains how the operation of the *Hollington* rule is somewhat relaxed by legislative provisions dealing with the admissibility of evidence in civil proceedings. Lastly, the article shows how the rule potentially impacts the rights entrenched in the Constitution and therefore warrants legislative intervention.

1 *Hollington v Hewthorn & Co Ltd* 2 1943 All ER 35.

2 Schwikkard *et al*, *Principles of Evidence* (2006) 110.

3 *Hollington v Hewthorn & Co Ltd supra*.

2 The *Hollington* judgment

The rule in *Hollington* originated from English law; which forms the basis of the South African evidentiary process and is regarded as its common law.⁴ Domestic statutes regulate South Africa's procedures and where statutes are silent on certain issues, the English law of evidence which was in force on 30 May 1961 in South Africa takes precedence.⁵ This is provided for in various sections of the Criminal Procedure Act,⁶ as well as section 42 of the Civil Proceedings Evidence Act. The common law that must be followed includes English cases decided prior to 30 May 1961,⁷ and it is upon this that the rule in *Hollington* has come to bind South African courts. This is, of course, the case unless the rules are contrary to the provisions of the Constitution.⁸

The rule arose as a result of a dispute involving a motor vehicle accident, in which the plaintiff brought an action in his own capacity as owner of the car and on behalf of his son, who had suffered injuries as the driver. At the time of the action, his son was deceased and could not be called as a witness. Despite this, judgment was given in favour of the plaintiff and as a result, the defendants appealed. On appeal, the plaintiff sought to uphold the judgment and render inadmissible evidence of a previous conviction admissible. The previous conviction aimed to show negligence on the part of the defendant. On a separate occasion, the defendant was involved in an accident and was subsequently convicted of negligent driving.⁹

In delivering the judgment, Goddard LJ cited judicial precedent as a ground for exclusion, in that courts have previously ruled against the admission of such evidence. He further objected to the admissibility of the conviction as evidence, on the basis that it amounted to an irrelevant opinion of another court, and it was difficult to determine its probative value. Further, although Goddard LJ did not categorise the evidence as one affecting specific parties ("*res inter alios acta*"), he considered the possibility.¹⁰

2 1 The judgment in light of the prevailing common law

2 1 1 *Judicial precedent*

There is much to be said for the judgment, particularly in the present times. In support, Goddard LJ referred to the prevailing practice of excluding evidence of this kind. He warned that such practice should not be ignored, unless it can be proven that the decision to exclude the

4 Schwikkard *et al.*, 110.

5 S 42 of the Civil Proceedings Evidence Act 25 of 1965; Schwikkard *et al.*, 26.

6 Criminal Procedure Act 51 of 1977.

7 Schwikkard *et al.*, 29.

8 Schwikkard *et al.*, 27 & 31.

9 *Hollington v Hewthorn & Co Ltd supra.*

10 *Hollington v Hewthorn & Co Ltd supra.*

evidence was incorrectly arrived at. As correctly stated by Goddard LJ, and subject to certain exceptions, the ultimate enquiry is whether the evidence sought to be adduced is relevant to the fact in issue.¹¹

Although decided after, in the cases of *R v Trupedo*,¹² and *S v Shabalala*,¹³ the court was faced with an issue of whether in identifying a suspect, the evidence of a sniffer dog is admissible. Although the court in *R v Trupedo* excluded the evidence as being irrelevant, Nestadt JA in the subsequent court in *S v Shabalala* noted that the earlier court relied heavily on judicial precedent which excluded evidence of a sniffer dog, and neglected the important exercise of looking at the specific facts prevalent in the particular case before it.¹⁴ Nestadt JA in dismissing judicial precedent as binding, pointed out that if in a particular case, the facts would be such to sufficiently reduce the uncertainty that taints evidence of a sniffer dog, such evidence will carry probative value and be rendered relevant for admissibility purposes.¹⁵ Evidently, courts need to be cautious of solely relying on judicial precedent in order to determine the admissibility of a previous conviction in civil proceedings, but must decide each case on its own merits, with an essential enquiry into the relevance of the previous conviction to the facts in issue. Therefore, it is submitted that judicial precedent cannot be unduly emphasised, it can only serve as a guide because every case ought to be determined on its own facts.¹⁶

2 1 2 Res inter alios acta alteri nocere non debet

The trial judge rejected the admission of the conviction on the basis that it was *res inter alios acta*, which loosely translates to “a transaction between parties should not affect another party”.¹⁷ Zeffert opined that the maxim *res inter alios acta* could not be used as justification for the decision in *Hollington* as it was outdated and could not be regarded as a fundamental rule of evidence.¹⁸ In Goddard LJ’s own words, it was difficult to understand how one can successfully prosecute his opponent in a criminal court, and be subsequently prevented from adducing evidence of this victory in support of his claim for damages against the same party.¹⁹ It is submitted that the maxim is essentially used to guard against prejudice that may be directed to a litigant who was never party to the criminal proceedings and did not have the opportunity to challenge the evidence in those proceedings.²⁰ Consequently, it is submitted that

11 *Hollington v Hewthorn & Co Ltd supra*.

12 *R v Trupedo* 1920 AD 58.

13 *S v Shabalala* 1986 4 SA 734 (A).

14 Schwikkard *et al*, 60; *S v Shabalala supra*.

15 *S v Shabalala supra*.

16 Schwikkard *et al*, 60.

17 Collins dictionary of law https://law.academic.ru/10405/res_inter_alios_acta_nocere_non_debet (accessed 2020-01-15).

18 Zeffert “The Rule in *Hollington v Hewthorn* Revisited” 1970 SALJ 333.

19 *Hollington v Hewthorn & Co Ltd supra*.

20 Bentham *The Works of Jeremy Bentham* (1843) 275 – 276.

the question should not be whether the evidence is *res inter alios acta*, but whether any of the parties would be prejudiced by its introduction.

Goddard LJ correctly stated that at the heart of any objection relating to the admissibility of evidence, the question of relevance is emphasised.²¹ It is submitted that when considering the relevance of any evidence, it is important to look at the prejudicial effect of the evidence sought to be adduced on the parties concerned. It is further submitted that evidence which is relevant, but in the same instance prejudices the parties, may be excluded on this basis alone unless its probative value outweighs its prejudicial effect.²² Therefore, it is argued that the maxim may well be subsumed in the relevance enquiry as it also guards against prejudice.

Bentham states that prejudice arises where evidence of a conviction in a criminal court is used against a third party not concerned with the initial proceedings, and it is unlikely to arise where the same third party uses the evidence in his favour.²³ It is submitted that in *Hollington*, the latter was the case. The plaintiff sought to adduce evidence of a verdict by a criminal court in which he was not an adversary, but which favoured him. Without any evidence of prejudice against the defendant, in that he was a party to the initial criminal proceedings and therefore had an opportunity to challenge any evidence adduced in those proceedings, it is hard to establish how the trial court reached its conclusion and classified such evidence as *res inter alios acta*.

2 1 3 The criminal finding as an irrelevant opinion

The main reason for Goddard LJ's exclusion of a previous conviction as evidence in subsequent civil suits is that it amounts to an irrelevant opinion with no greater probative value than that given by a lay person.²⁴ It is submitted that his finding of irrelevance in the mentioned circumstances, although not conclusively flawed, raises much debate, as evidence of a previous conviction may not always be excluded from admission. Goddard LJ classified the evidence as an opinion, and it is accepted that an opinion is merely conclusions or inferences drawn by a witness on certain facts, and thus a previous conviction by a criminal court can easily amount to such, based on the fact that the trial judge makes a conclusion of guilt, influenced by the facts and evidence presented before the court.²⁵

Opinion evidence is not automatically excluded from admission, and as correctly stated by Goddard LJ, admissibility is largely dependent on relevance. As such, the real question in the particular circumstance is whether introducing evidence of a negligent driving conviction, which

21 *Hollington v Hewthorn & Co Ltd supra*.

22 Schwikkard *et al*, 56.

23 Bentham 276.

24 *Hollington v Hewthorn & Co Ltd supra*.

25 Schwikkard *et al*, 89; Tapper *Cross & Tapper on Evidence* (2010) 530.

was not connected to the plaintiff's claim for damages was relevant to the issue before the court; namely whether the defendant's negligent conduct unreasonably caused the plaintiff's damages. As rightly submitted by the plaintiff's defence, unless it can be proven that the negligent driving conviction was an element of the claim for the damages suffered by the plaintiff, the evidence of the previous conviction was inadmissible.²⁶

On the facts, Goddard LJ's finding of irrelevance was warranted. It is submitted that the evidence sought to be adduced was unrelated to the claim for damages, in that the negligent driving related to a separate matter not linked to the plaintiff's case.²⁷ The evidence merely showed that the defendant was convicted of driving negligently on the same day as the plaintiff's accident.²⁸ Arguably, one cannot tender such evidence as conclusive proof for negligence on the part of the defendant in the plaintiff's civil suit for damages. In fact, it is submitted that it does not even suffice as *prima facie* proof, as this implies that any failure by the defendant to object to the evidence, may well result in a finding of negligence on his part.²⁹ Of course this cannot be the case, especially without a direct link between the defendant's negligent conduct and the harm suffered by the plaintiff.³⁰ It cannot be said however that the same is arguable where the previous conviction actually stems from the same incident.

Considering the above, the important consideration is now whether such decision to exclude evidence of a previous conviction is rightly extended to other matters. Goddard LJ did not express when an opinion would be considered relevant. However, it is noted from early writings of the law of evidence that the general rule was that opinion evidence was inadmissible.³¹ For instance, Sir James Fitzjames Stephen stated:

"The fact that any person is of the opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter."³²

It is submitted that the specified exceptions were of limited scope and included expert opinion.³³ According to Schwikkard, opinion evidence was generally irrelevant and therefore excluded on the basis that it "makes no probative contribution, creates the risk of confusion of the main issues, can lead to prolongation of trials, and can open an 'evidential pandora's box'". These being important factors when determining the relevance and admissibility of evidence.³⁴

26 *Hollington v Hewthorn & Co Ltd supra*.

27 *Hollington v Hewthorn & Co Ltd supra*.

28 *Hollington v Hewthorn & Co Ltd supra*.

29 Schwikkard *et al*, 22.

30 Owen "The five elements of negligence" 2007 *Hofstra Law Review* 1683.

31 Doyle "Admissibility of opinion evidence" 1987 *Australian Law Journal* 688.

32 Stephen *A Digest of the Law of Evidence* (1914) 55.

33 Doyle 1987 *Australian Law Journal* 688.

However, in recent times the rules relating to opinion evidence do not automatically exclude it from admission. The Constitutional Court held that:

“Any opinion, whether from a lay person or expert, which is expressed on an issue the court can decide without receiving such opinion is in principle inadmissible because of its irrelevance. Only when an opinion has probative force can it be considered admissible.”³⁵

Therefore, whether an opinion carries any probative force will depend on the issues before the court. According to the Constitutional Court, any opinion, regardless of whether it is expressed by a lay person or an expert, which speaks to an issue that the court may decide without receiving it is irrelevant and inadmissible.³⁶ Consequently, the evidence is only receivable if it is capable of putting the court in a better position when deciding on the matter.

It is arguable that the previous conviction in *Hollington* was irrelevant and inadmissible, in that the court was capable of deciding on the issue of whether the defendant in the circumstances acted negligently in causing the plaintiff’s harm. It had sufficient evidence before it and could draw the necessary inferences. Further, the conviction could not assist as there was no direct link between the defendant’s negligent driving conviction and the harm suffered by the plaintiff, more especially because the conviction was based on a separate set of facts not linked to the plaintiff’s accident.³⁷

Notably, if the previous conviction had been introduced for the purposes of proving the character of the defendant, the evidence would have been treated differently. This is because similar facts are often relevant and admissible for purposes of showing that the defendant had previously behaved in a similar manner as the occasion being considered by the relevant court.³⁸ The court in *S v M* stated that:

“[S]imilar fact evidence is evidence which refers to the peculiar or immoral or illegal conduct of a party on an occasion or occasions other than the incident or occurrence in contention, but which is also of such a character that it is pertinent to or in essentials similar to the conduct on the occasion which forms the issue or subject-matter of the dispute.”³⁹

Essentially, this means that had the plaintiff in *Hollington* introduced the previous conviction in order to show that the defendant had on another occasion aside from the one in question drove negligently, such evidence, if found to be sufficiently relevant, would be admissible.

34 Schwikkard *et al*, 93.

35 *Helen Suzman Foundation v President of the Republic of South Africa* 2015 2 SA 1 (CC).

36 *Helen Suzman Foundation v President of the Republic of South Africa supra*; Schwikkard *et al*, 98.

37 *Hollington v Hewthorn & Co Ltd supra*.

38 Schwikkard *et al*, 76.

39 *S v M* 1995 1 SACR 667 (BA).

When dealing with the admission of similar fact evidence, the judgments in the cases of *Makin v Attorney-General for New South Wales*,⁴⁰ and *DPP v Boardman*,⁴¹ become particularly relevant. Although speaking to similar fact evidence in the context of criminal proceedings, Lord Herschell in his *dictum* pointed out that the evidence is not admissible where its main purpose is only to show that the defendant has a propensity to act in a certain manner.⁴² Accordingly, the evidence of the previous conviction in *Hollington* would not be admissible if the aim was simply to show that the defendant had a tendency of driving negligently, unless the degree of relevance warrants its admission.⁴³

The degree of relevance is decided on a case-by-case basis by mostly looking at the degree of similarity in the defendant's conduct.⁴⁴ Lord Wilberforce speaking to the requirement of similarity, stated that the admission of similar fact evidence is dependent on the similarity of circumstances which must be such that if compared they are likely to produce the same results. This would mean that for admission, the circumstances that led to the previous conviction sought to be adduced in *Hollington* must have been of such a nature that they are similar to the circumstances in the occasion under the scrutiny of the court, and are likely to produce the same conclusion. Of course, this requirement of similarity cannot be unduly emphasised, especially in the light of other submissions relating to alternative tests for the admission of similar fact evidence.⁴⁵

For instance, MacEwan submits that the admission of similar fact evidence does not require that the compared incidents be “uniquely strikingly similar”, but in order to establish the requisite probative value, the preferred approach is whether the evidence can be explained away as merely “coincidence”.⁴⁶ Essentially, this means that regardless of the absence of any striking similarities between the other unlawful incidents, the court may still admit the similar fact evidence. As such, even if the circumstances that gave rise to the dispute in *Hollington* were not strikingly similar to the circumstances leading to the previous conviction, the evidence would be admitted where the defendant's behaviour in the compared occasions could not be explained as a mere coincidence. It is also accepted that in some instances, where there is a lack of corroborating evidence supporting the prosecution or plaintiff's case, a higher degree of similarity is required.⁴⁷

In *DPP v Boardman*, it was said that:

40 *Makin v Attorney-General for New South Wales* 1894 AC 57 (PC).

41 *DPP v Boardman* (1975) AC 421.

42 *Makin v Attorney-General for New South Wales supra*; Schwikkard *et al*, 79.

43 *DPP v Boardman supra*.

44 *S v M supra*.

45 *DPP v Boardman supra*.

46 MacEwan *Evidence and the Adversarial Process: The Modern Law* (1998) 58 – 59.

47 Schwikkard *et al*, 60.

“The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury would acquit in the face of it.”⁴⁸

Accordingly, the relevance of the similar fact evidence will be tested against the issues to be decided by the court and any other available evidence. This would mean that the defendant’s culpability in *Hollington* would not only depend on the previous conviction, but also on other evidence tendered by the plaintiff and the issues before the court.

3 Previous convictions and the Civil Proceedings Evidence Act 25 of 1965 and the Superior Courts Act 10 of 2013

For purposes of both civil and criminal matters, any evidence which does not serve to make plausible or implausible a fact in issue before the court will be inadmissible as a result of its irrelevance.⁴⁹ The idea of irrelevance has been largely considered in relation to opinion and similar fact evidence above and is regarded as evidence that is unlikely to assist the court in deciding on the matter before it. The prescripts of the Civil Proceedings Evidence Act and the Superior Courts Act relating to the admissibility of evidence, become particularly important when speaking to the admissibility of previous convictions, and the rule in *Hollington* ought to be discussed in relation to the relevant provisions.

Owing to the fact that the *Hollington* rule is largely applied in civil matters, the Civil Proceedings Evidence Act becomes particularly relevant and section 17 and section 42 of the Act are a point of reference in so far as they relate to the admission of evidence in civil matters. The Civil Proceedings Evidence Act contains a residuary provision which prompts the application of the law of evidence applicable to civil proceedings on 30 May 1961, unless the contrary is rendered possible by the Act or any other relevant law.⁵⁰ Accordingly, where the Civil Proceedings Evidence Act is silent on certain issues, such as the admissibility of a previous conviction, the matter will be dealt with in terms of the law applicable on 30 May 1961. With that said, and in light of section 17 of the Civil Proceedings Evidence Act, read together with section 42 above, there is inconsistency in applying the *Hollington* rule.⁵¹

48 *DPP v Boardman supra*.

49 S 210 of the Criminal Procedure Act 51 of 1977; S 2 of the Civil Proceedings Evidence Act 25 of 1965.

50 S 42 of the Civil Proceedings Evidence Act 25 of 1965.

51 See judgments of *Cape Pacific Ltd v Lubner Controlling Investments* 1995 4 SA 790 (A); *Groenewald v Swanepoel* 2002 6 SA 724 (E); *Lagoon Beach Hotel v Lehane* 2016 1 All SA 660 (SCA); *Leeb v Leeb* 1999 2 All SA 588 (N); *Prophet v National Director of Public Prosecutions* 2007 6 SA 169 (CC).

Although section 17 of the Civil Proceedings Evidence Act does not speak to the relevance and admissibility of previous convictions in civil matters per se, it does make the production of such evidence possible by way of certified documentary evidence.⁵² Despite the section not providing clarity as to the purpose of admitting the certified document as proof of a previous conviction, it is arguable that the inclusion of this section in the Civil Proceedings Evidence Act means that in some instances, and depending on the circumstances before the court, the evidence of a previous conviction may be relevant in deciding the issues before the court and as such, be admissible for purposes of proof. Interestingly, it is submitted that evidence of a previous conviction is not only adducible through section 17 of the Civil Proceedings Evidence Act, as the use of “any other law” under section 42 of the Civil Proceedings Evidence Act may include the prescripts of the Criminal Procedure Act or the rules of admissibility relating to perhaps similar fact evidence.

It is also worth noting that the Superior Courts Act also provides for the submission of documentary evidence in order to prove one’s criminal history.⁵³ Again, it is submitted that this indicates that previous judgments may serve as admissible evidence in subsequent court proceedings. Similar to section 17 of the Civil Proceedings Evidence Act, the section does not explicitly render judgments of previous courts relevant in subsequent proceedings as this is decided depending on the prevailing circumstances. The ultimate question being whether receiving the evidence will provide reasonable assistance to the court in deciding on the facts in issue.⁵⁴

Although in the case of *S v Mavuso*,⁵⁵ the Supreme Court of Appeal by way of an *obiter* left open the question as to whether the judgment in *Hollington* extends to criminal matters, it is submitted that in light of the Criminal Procedure Act, to extend the rule to criminal matters will result in an erroneous application of our existing law as the Criminal Procedure Act provides for the admission of previous convictions in specified instances.

Section 197 of the Criminal Procedure Act allows for an accused to be questioned on their previous convictions where their conduct falls within the provisions contained therein. Importantly, section 197 of the Criminal Procedure Act provides that the accused’s previous conviction will be put to him or her where s(he) led evidence of good character or where its introduction is admissible for purposes of proving guilt.⁵⁶ Accordingly, and contrary to the judgment in *Hollington*; it is submitted that this section may well be indicative of the fact that in certain circumstances, one’s previous conviction may be such that it is capable of assisting the court in resolving the issue of guilt or witness credibility.

52 S 17 of the Civil Proceedings Evidence Act 25 of 1965.

53 S 34 of the Superior Courts Act 10 of 2003.

54 Schwikkard *et al*, 53.

55 *S v Mavuso* 1987 3 SA 499 (A).

56 S 197(a) & (b) of the Criminal Procedure Act 51 of 1977.

Arguably, a civil court may accept evidence of previous convictions where the defendant has portrayed himself as a person of good character, this is considered relevant for purposes of proving credibility, which is particularly important for purposes of assessing the final weight of all evidence.⁵⁷

Further, the Criminal Procedure Act provides that evidence of a previous conviction will be admissible where the previous conviction is an element of the offence the accused is charged with.⁵⁸ It is submitted that although it is not clear when a previous conviction will be an element of another offence, arguably, it would seem to mean that the previous conviction must also relate to the unlawful causing of the prohibited consequences which form the subject of the court's enquiry. Criminal liability only attaches where it can be proven beyond a reasonable doubt that all elements of a crime exist, specifically those relating to the conduct and the mental state of the accused.⁵⁹ Thus, a previous conviction will have to serve this purpose.

Similarly, in *Hollington* it was accepted by the plaintiff that the previous conviction will only become relevant and admissible as *prima facie* evidence, if it can be proven that the negligence leading to the conviction also resulted in the accident which was the subject of dispute in the case. Goddard LJ did not dispute this argument, although he advanced that to identify the conviction with the matter before him may well result in the retry of the criminal case.⁶⁰ Accordingly, in a civil matter, and in a case of fraud for instance, it would seem that the previous conviction will be sufficiently linked where the intention to defraud is also the intention to cause pure economic loss.

In light of this, the judgment may not pose problems in criminal matters, considering the provisions of the Criminal Procedure Act that readily provide for the admission of previous convictions in those proceedings. It is also worth noting that previous convictions in criminal matters also play a rather important role in determining the appropriate sentence pursuant to a conviction.⁶¹

4 The constitutionality of the *Hollington* rule

The Constitution being the supreme law of the land demands that all law is consistent with it, with the result of a declaration of invalidity on any

57 Schwikkard *et al.*, 566.

58 S 211 of the Criminal Procedure Act 51 of 1977.

59 Grant *The Responsible mind in South African Criminal Law* (PhD thesis 2011 WITS) 23; Snyman *Criminal Law* (2016) 29 – 31.

60 *Hollington v Hewthorn & Co Ltd supra.*

61 *S v Scheepers* 2006 1 SACR 72 (SCA); Page 37 of the Discussion Paper 91 (Project 82): Sentencing (A New Sentencing Framework) 2000.

law if the contrary exists.⁶² Accordingly, in the case of *De Lange v Smuts NO*,⁶³ the Constitutional Court recognised that it is everyone's fundamental right to challenge the legality of any law in the Republic.⁶⁴ It is upon this basis that this paper examines how the *Hollington* rule may negatively impact the principles of the Constitution.

Section 34 of the Constitution grants access to courts to all people in the Republic who seek civil action refuge. Amongst other things, the provision guarantees the resolution of legal disputes by way of fair proceedings.⁶⁵ The Constitutional Court pronounced on the fair hearing component and said:

"This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it reasonably possible to do so, in a way that would render the proceedings fair."⁶⁶

Accordingly, section 34 requires that civil proceedings be conducted fairly,⁶⁷ and where the proceedings conflict with the Constitution, the relevant legislation and rules should be interpreted accordingly to bring the proceedings in line with the prescripts of the Constitution.

It has been submitted that section 34, although applicable to civil matters is contextually similar to section 35 of the Constitution which deals with arrested, detained and accused persons for purposes of criminal proceedings.⁶⁸ As such, it has been argued that in so far as section 35 refers to the right to a fair trial in the form of certain sub-rights, these should also be recognised as forming part and parcel of section 34 of the Constitution.⁶⁹ This is of course with the exception of certain sub-rights, which may not explicitly apply in civil proceedings – i.e. the right to be presumed innocent, the right to silence and the right speaking to state appointed legal representation.

62 S 8 & S 39 of the Constitution of the Republic of South Africa, 1996.

63 *De Lange v Smuts* 1998 3 SA 785 (CC).

64 *De Lange v Smuts supra*.

65 Currie & De Waal *The Bill of Rights Handbook* (2015) 740.

66 *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC).

67 *Barkhuizen v Napier* CCT72/05 2007 ZACC 5; *De Beer v North-Central Local Council and South-Central Local Council supra*; *De Lange v Smuts supra*; *Mohlomi v Minister of Defence* CCT41/95 1996 ZACC 20; *Van Huysteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (CPD).

68 Brickhill & Friedman *Access to Courts in Constitutional Law of South Africa* (2006) 5.

69 Brickhill & Friedman 6.

The Constitutional Court has indicated that an important aspect of this fair hearing component is the ability of all parties to reasonably present their case. This translates to an adequate opportunity to prepare one's defence and to also present or challenge any evidence put before the court.⁷⁰ The Constitutional Court further states that this is essential, as it ensures that the presiding officer reaches an objective conclusion in relation to the existence or non-existence of facts.⁷¹

It is submitted that the rule in *Hollington* which relates to the withholding or exclusion of evidence, does not accord with this fundamental aspect of fairness in civil proceedings as it limits the right of litigants to present and possibly challenge evidence. It is apparent that courts are required to enquire into the relevance of every piece of evidence received,⁷² and a cautionary approach is necessary before invoking any rule, especially one based on judicial precedent.⁷³ Facts of cases differ and therefore the enquiry needs to be reflective of this, in that it is possible that evidence may be considered irrelevant in one matter, only to be admitted in another. It is submitted that the relevance of evidence must be tested against the prevailing facts and issues before the court, and to neglect this may well amount to a limitation of a litigant's right to adduce and challenge evidence.

In *Hollington*, Goddard LJ had no objections to the fact that if a sufficient link is established it is possible to find such evidence relevant and admissible. This suggests that had the previous conviction been one that stems from the same facts or incident, a substantial link would exist, as the plaintiff would be able to bring evidence to show that the defendant by his careless driving, caused the damages suffered by the plaintiff. Accordingly, to simply rely on this judgment without any assessment of the conviction in relation to the issues may prevent a litigant from adducing evidence potentially relevant. Resultantly, to neglect to assess the evidence, prevents the admission of a previous conviction in this regard and limits a litigant's right to adduce relevant evidence.

Goddard LJ also states that one of the reasons for exclusion relates to the fact that the defendant is entitled to challenge this evidence and resultantly, admission would result in a retry of the criminal matter.⁷⁴ Although this is true, particularly in the light of our Constitution which recognises the right to challenge evidence by way of cross-examination,⁷⁵ it is submitted that this right will not be limited in civil proceedings where the courts prevent the challenge of such evidence. This is because section 35 of the Constitution already provides an accused person with the right to review any criminal proceedings or

70 *De Lange v Smuts supra*.

71 *De Lange v Smuts supra*.

72 *S v Shabalala supra*.

73 *S v Shabalala supra*.

74 *Hollington v Hewthorn & Co Ltd supra*.

75 *Jongilanga v S* 2016 2 SACR 404 (ECB).

appeal any criminal decision.⁷⁶ In the circumstances, it is argued that the litigant against whom such conviction is to be adduced already has a right to review or appeal, and any failure to use this opportunity in criminal proceedings can be construed as a waiver of such right and as such, the litigant is not expected to challenge the conviction in civil proceedings. Perhaps the challenge must only extend to the admissibility of such evidence against the said litigant and not whether the conviction was correctly arrived at. It is argued that section 35 of the Constitution already serves as a safeguard against any injustice in relation to the conviction.

As correctly observed, the fundamental principle of the law of evidence is that evidence is only admissible where it is relevant in proving a fact in issue,⁷⁷ and this is the case where it assists the court in deciding on the issues before it.⁷⁸ The court in this instance does not decide on the final weight, it only makes a potential assessment of the evidence in order to determine whether its probable contribution is substantial to justify admission. Evidence may be such that its potential contribution is easily assessed, whereas other evidence may have a probative value dependent on the existence of other facts.⁷⁹ The latter case is applicable to previous convictions.

Accordingly, the court is under an obligation to assess any evidence presented and received by it. A failure to do so may result in neglecting one's right to adduce evidence. It is submitted that this process of assessment is essential in every individual case, and evidently, the Superior Courts Act provides under section 22 that issues relating to admissibility of evidence warrant a review of proceedings.⁸⁰ It is submitted that an omission of this kind may amount to a gross irregularity reviewable in terms of the mentioned Act,⁸¹ provided the affected litigant may show materiality in the form of prejudice.⁸²

5 Conclusion

The rule in *Hollington* originates from English law and finds its dominance in South African law by virtue of Section 42 of the Civil Proceedings Evidence Act. It renders a criminal conviction inadmissible as evidence in a subsequent civil action, regardless of whether such conviction stems from the same facts. However, it is submitted that the

76 S 35 (3) (o) of the Constitution of the Republic of South Africa, 1996.

77 *R v Trupedo supra*; Schwikkard et al, 4.

78 Murphy *A Practical Approach to Evidence* (2008) 25.

79 Zuckerman *The Principles of Criminal Evidence* (1989) 51.

80 S 22(1)(d) of the Superior Courts Act 10 of 2003.

81 S 22(1)(c) of the Superior Courts Act 10 of 2003.

82 In *ABSA Bank Limited v De Villiers* 2010 All SA (SCA), Navsa JA stated that a "gross irregularity in civil proceedings in an inferior court means an irregular act or omission by the presiding judicial officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant".

rule no longer finds application in light of the developments found in existing legislation, particularly section 17 of the Civil Proceedings Evidence Act and section 34 of the Superior Courts Act. Further, section 34 of the Constitution grants every civil litigant a right to a fair trial, and the application of the rule proves to be unconstitutional if viewed against such right. This is problematic as it is likely to result in reviewable decisions. It is therefore necessary for the legislature to intervene and reform the position in law regarding the rule established in *Hollington* in order to ensure certainty in the treatment of previous convictions in civil matters.