EVIDENCE ACT 1995 (NSW) – 20TH ANNIVERSARY SYMPOSIUM

RELIABILITY OF EVIDENCE – JUDGE OR JURY? – A NEW SOUTH WALES VIEW

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The title to this paper raises two matters of constitutional importance in the running of trials, particularly criminal trials, in Australia. The first, reliability of evidence, raises a question as to the respective functions of judge and jury, not only where there is a trial before a jury, but, at least in criminal jurisdiction, where the trial is by judge alone. That is because, in the interests of transparency, a judge is required to take into account any warning which the law requires to be given to a jury in such a case.[2]

The second issue concerns the relationship of courts in different states: the discussion of both Victorian and New South Wales views on questions of reliability reflect the differences in approach identified in *R v Shamouil*[3] and *R v XY*[4], in New South Wales and *Dupas v The Queen*[5] and *Velkoski v R*,[6] to which I should add *Harris*[7] and *Tuite*[8], in Victoria. In *Velkoski* the Victorian Court of Appeal noted that there are "undoubted differences between the decisions of this Court and the New South Wales Court of Criminal Appeal as to whether similarity of features need be present in order for evidence to be admissible as tendency evidence."[9] In *Saoud,*[10] I declined to express a view as to whether that was correct or not, noting that each Court had in the past referred to decisions of the other without identifying any major

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1 Judge of Appeal, Supreme Court of New South Wales. This paper was delivered at a symposium held in the Banco Court, Supreme Court of New South Wales, to mark the 20th anniversary of the *Evidence Act 1995* (NSW) on 13 June 2015. I am grateful to Agnieszka Deegan for research assistance.

2 *Criminal Procedure Act 1986* (NSW), s 133; *Fleming v The Queen* [1998] HCA 68; 197 CLR 250; *Ewen v R* [2015] NSWCCA 117.

3 [2006] NSWCCA 112; 66 NSWLR 228.

4 [2013] NSWCCA 121; 84 NSWLR 363.

5 [2012] VSCA 328; 218 A Crim R 507.

6 [2014] VSCA 121.

7 *Harris (a pseudonym) v The Queen* [2015] VSCA 112.

8 *Tuite v The Queen* [2015] VSCA 148.

9 *Velkoski* at [34].

10 [2014] NSWCCA 136; 87 NSWLR 481 at [34]-[37].

point of departure. More recently, Leeming JA has accepted, in *El-Haddad*[11] that approaches differ; indeed it is a theme of this symposium that such differences exist.

Given the importance of rulings on evidence in many criminal trials, it is perhaps unsurprising that differences may arise in the precise approach taken in different courts. Indeed, the criteria for granting special leave to appeal to the High Court expressly recognise the possibility that a decision of the High Court may be required "to resolve differences of opinion between different courts, or within the one court, as to the state of the law".[12] Nevertheless, there is an important and practical question as to how intermediate courts of appeal (and indeed trial courts) should respond to apparent disparities in approach. In order to discuss that question it is not necessary to address the merits of the positions taken in the cases referred to above.

The role of judge and jury – reliability of evidence

A court-based system for resolving disputes is governed by rules of procedure and rules of evidence. Procedural rules, both civil and criminal, are essential to establishing an orderly process resulting, in the absence of settlement, in a trial. Relevantly for present purposes, they will seek to ensure that, when the matter comes to trial, the issues between the parties have been adequately identified. The principal rule of evidence is that found in s 56 of the *Evidence Act*, namely that to be admissible evidence must be relevant, in the sense that it could rationally bear on the existence of a fact in issue. That is a necessary but not a sufficient criterion of admissibility. To adopt a colourful metaphor used by Brennan J in a different context,[13] one may talk of the ripples of affection spreading widely, but diminishing as they spread. The law of evidence draws limits as to the scope of acceptable affection. It does so in many ways, some of which depend on an *a priori* judgment about reliability. Hence the exclusion of opinion evidence in circumstances requiring a level of expertise when the proffered evidence does not come from an expert. Similarly, the law resists the expressions of lay opinion even where expertise is not required where it should be possible for the witness to recount perceptions and not

11 *El-Haddad v R* [2015] NSWCCA 10 at [35].
12 *Judiciary Act 1903* (Cth), s 35A(a)(ii).
13 *Re McHattan and Collector of Customs* (1977) 18 ALR 154 at 157.

just inferences derived from those perceptions. Similarly, the exclusion of hearsay evidence is based largely upon questions of reliability where the person who witnessed an event is not the person called to give evidence.

Even relevance and reliability are not sufficient criteria for evidence to be adduced. Of particular relevance in jury trials is the possibility of prejudice contaminating the fact finding process. Prejudicial effect is, in one sense, the opposite of probative value: it refers to the risk that the evidence will be assessed by irrational or non-rational processes. A jury of lay persons is widely assumed to be more susceptible to such processes than a legally trained judge. The rules of evidence reflect that assumption.

The development of the law of evidence has occurred over centuries (JD Heydon describes the development of "modern rules of evidence" as beginning in the 17th and 18th centuries in the United Kingdom[14]). Over that time, whilst the primary institution of a judge and jury in serious criminal trials has remained largely intact, legal and social change has resulted in an accretion of reforms, both judicial and statutory, which has now largely (though not entirely) yielded to the reorganised form of the *Uniform Evidence Acts*.

There is little doubt that the *Uniform Evidence Acts* are a major achievement in the modernisation of the law of evidence. However, almost any statement about them must be qualified. Thus, they are not entirely uniform, they are not limited to the law of evidence and they do not contain all of the law of evidence; they are not even the only statutes which deal with evidence.

There are two respects in which those comments are relevant to the present inquiry. First, to the extent that the Acts deal with admissibility, they say little about the reliability of the evidence. For the most part (using a modern analogy), reliability is a feature of the underlying operating system, rather than that which appears on the screen. When it does appear, it is often in a muted form. Thus, the heading to s 85 refers to "reliability of admissions by defendants". Admissions to an investigating

[14] JD Heydon, *Cross on Evidence* (LexisNexis, 10th Ed, 2015) at [1005].

official are not admissible, the section states, unless made in circumstances rendering it "unlikely that the truth of the admission was adversely affected." By contrast, unreliability is a focus, not in the context of admissibility, but in the context of warnings and information to be given to the jury about evidence that has been adduced. With respect to specified categories of evidence, s 165 states that the judge may need to warn the jury that the evidence "may be unreliable" and must tell them of matters that may cause it to be unreliable.[15] Significantly, the section makes no attempt to deal separately with different basis of unreliability. Needless to say, evidence may be unreliable because of a misperception of the original event (it occurred at night in a badly lit street); error in recollection (delay or overlay by subsequent events, including retelling); veracity (the evidence was induced by the promise of a benefit) or unconscious processes (suggestion or contamination).

In most areas involving exclusionary rules, modern reforms have involved a retreat from inadmissibility and from overly strong warnings. However, in one area the law has been tightened, namely with respect to identification evidence. That is because there is a growing understanding of the inherent unreliability of such evidence, especially evidence which merely describes elements of resemblance or identification of a stranger, with the result that, where practicable, visual identification evidence is inadmissible unless an identification parade has been held.[16] Where identification evidence is adduced, the judge is required to inform the jury of "a special need for caution" before accepting the evidence, and of the reasons for that need.[17]

There is no doubt that reliability in all its many forms is a matter for the jury, once evidence is admitted. The question about which views can differ is the extent to which reliability is properly assessed by the judge when considering admissibility. The question arises whenever the judge is required to consider the probative value of particular evidence. In the case of tendency or coincidence evidence, the judge is required to decide whether "the probative value of the evidence substantially

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15 *Evidence Act*, s 165(2).
16 *Evidence Act*, s 114.
17 *Evidence Act*, s 116; at least where identification is disputed – *Dhanhoa v The Queen* [2003] HCA 40; 217 CLR 1 at [19] (Gleeson CJ and Hayne J), [53] (McHugh and Gummow JJ) and [92] (Callinan J, dissenting as to the outcome).

outweighs any prejudicial effect it may have".[18] When dealing with the exclusion of prejudicial evidence, a similar test is to be applied for the purposes of s 137. When the jury comes to consider the evidence it will ask itself whether or not that evidence helps it to be satisfied that some event occurred or conduct took place, or that the accused had a particular state of mind. When the judge assesses probative value, the judge asks whether the evidence "*could* rationally affect" an assessment as to the existence of a fact.[19]

The New South Wales case law accepts that the question for the judge concerns the capacity of the evidence, a question which does not depend upon whether the judge considers that the evidence should be believed or not. On the other hand, New South Wales law also accepts that the judge may need to consider the weight to be given to particular evidence, again a question which can be determined by asking what weight the evidence *could reasonably bear* and, in some cases what construction the jury *could reasonably adopt* as the meaning of the evidence, where it is vague or uncertain.

Whether one adopts that approach or an approach which requires the judge to form a view about the reliability of the evidence depends on whether the judge is to play a constrained role, leaving questions of reliability to the jury, or whether the judge is to play a more controlling role, thus being more likely to remove evidence from the jury. As noted by Heydon in *Cross on Evidence,*[20] *Doney v The Queen*[21] denied that a trial judge had power to direct a jury to enter a verdict of not guilty on the ground that, in the view of the judge, a verdict of guilty would be unsafe or unsatisfactory, holding that a directed verdict of not guilty is only available "if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."[22]

Heydon also cites with approval the remarks of Glass JA, writing extra judicially, to the following effect:[23]

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18 *Evidence Act*, s 101.
19 *Evidence Act*, Dictionary, **probative value**.
20 *Cross* at [11100].
21 (1990) 171 CLR 207
22 *Doney* at 215.
23 HH Glass, "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 ALJ 842 at 845.

> "The usurpation of the jury's function of weighing evidence is contrary to accepted principle governing jury trials. Although that proposition has been eroded to the extent that three judges on appeal may now say that a conviction though open on the evidence would be unsafe, it would not be warranted to confide that power to a single judge guided only by his own unaided and uncorrected assessment of the testimonial weight."

Interstate differences

In summarising the position with respect to assessment of reliability, I referred to "the law in New South Wales". It is then necessary to ask whether the law in New South Wales can be different from that in Victoria, in the application of uniform state legislation, or, whether if there be differences, one (if not both) of the state courts must be in error.

This question has a number of dimensions, none of which can be fully explored here. Nor would a full explanation result in a single unqualified proposition.

In one sense the question can be addressed in the abstract, without necessarily finding that there is a difference in the approach in the two jurisdictions. That would be unsatisfactory, although I have doubts as to whether the degree and nature of any difference can readily be identified. It may be summarised (at the risk of over-simplification) in the following terms: while in NSW a trial judge should, in considering the exercise of the power to exclude evidence, assume that the proposed evidence is true, in Victoria the trial judge is to assume the credibility or sincerity of the witness, but not the reliability of the evidence.[24] In *Dupas*, the Victorian Court of Appeal held that the NSW approach was manifestly wrong and should not be followed. In other words, in NSW we adopt a more constrained approach to the judge's function than they do in Victoria. Heydon pointed out in his 2014 Paul Byrne SC Memorial Lecture that because the Victorian Court in *Dupas* upheld the decision of the trial judge refusing to exclude the evidence, the

[24] *Dupas v R* [2012] VSCA 328; 218 A Crim R 507 at [184].

statements were obiter.[25] Nevertheless, its reasoning is now firmly entrenched by later cases in Victoria.

There are a number of reasons for being relaxed about the differences in approach. First, while it is true that the provisions relevant for present purposes are in identical terms, the full legislative schemes governing the law of evidence in NSW and Victoria (and indeed other jurisdictions) are not identical. It therefore follows that the principle stated in *Farah v Say-Dee,*[26] that intermediate appellate courts should not depart from the decisions of other intermediate appellate courts in construing "uniform national legislation",[27] does not apply in its full force. Nor is that a contrived excuse. What underlies the differences in approach is the difference with respect to the constitutional relationship between judge and jury in a criminal trial. That will depend to a significant extent upon the statutory schemes with respect to admissibility of evidence, but it will also depend upon other aspects of the criminal trial process. For example, the timing and circumstances for *voir dires* may differ across jurisdictions. There are strong practical reasons to limit the holding of *voir dires* in the course of a trial where it becomes necessary to interrupt the trial and require the jury to sit in splendid isolation for a significant period. These factors have been identified in more detail by Heydon in a paper delivered in England on a similar topic.[28] Such factors will operate differently if there are pre-trial arrangements permitting or requiring the holding of a *voir dire* before the jury is empanelled.

Secondly, the *Farah* principle is subject to the usual exception, namely whether the other court is persuaded that its sibling is "plainly wrong", or in the preferable formulation promoted by Nettle J, there is "compelling reason" not to follow it. The exception tends to cast doubt upon any constitutional basis for the principle.

Thirdly, to demand uniformity of approach may be to impose a rigid scheme which is inappropriate given the historical development of the uniform legislation. In short, the legislation had been in force in NSW for more than a decade before it was

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25 JD Heydon, "Is the Weight of Evidence Material to its Admissibility?" at (2014) 26 *Current Issues in Criminal Justice* 219 at 232.

26 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89.

27 *Farah* at [153].

28 JD Heydon, "Is the weight of evidence material to its admissibility?" (Oxford University, February 2015).

adopted in Victoria (and for more than 15 years before it was adopted in the Territories). It was not imposed upon a pre-existing common law regime (which is curiously believed to be uniform throughout Australia), but on an admixture of the general law and statute. The uniform legislation is not a code: on any view it will require consideration in some respects of pre-existing laws, in order to determine consistency or otherwise. There is no necessary reason why the results will be the same in each jurisdiction.

Fourthly, although it may seem a somewhat amorphous consideration, there is no doubt that legal culture and practices differ between jurisdictions around Australia. The High Court may assume otherwise, but the reaction to *Barbaro* and *Zirilli*[29] (dealing with prosecutors' submissions on sentence) differed quite significantly across jurisdictions, because of differences in local practices.

In any event, the short answer to the concern of inconsistency in interpretation is that there may be some degree of accommodation over time, or the High Court may intervene to impose consistency (or the High Court may decline to do so, there being no necessary imperative to impose uniformity).

Conclusions

As to the future, any predictions with respect to the operation of the Evidence Acts is fraught with uncertainty. One interesting development which appears to accompany statutory reform of a comprehensive and intrusive kind (in which I include the Evidence Acts), is that the legal mind tends to focus on issues which otherwise lie dormant. The common law involves the incremental development of principle from case to case, each development being made with careful regard to the circumstances of the particular case, a factor which will immediately constrain any inclination to generalise more broadly. By contrast, statutes set rules and principles at a high level of generality and without specific reference to particular circumstances. The exercise of statutory construction in a particular situation is therefore quite a different exercise from the application of earlier case law. One

[29] *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 88 ALJR 372.

result is, apparently, to see complexity and uncertainty where that did not exist (or was not perceived) under the general law. A second result is that courts interpreting a provision may seek to understand the generality of the language against a context requiring articulation of previously assumed institutional and even constitutional conditions. It is for this reason that I think it is legitimate to see the differences of opinion revealed in the NSW and Victorian courts in terms of different approaches to the constitutional roles of the judge and jury, even though the reasoning may not be expressed in those terms. That may be no bad thing, but the cost, at least for a time, may be increased appellate litigation, increased complexity of legal principles, and an accompanying increase in uncertainty of application of such principles.

Will this get worse before it gets better? Questions of the reliability of evidence are not limited to tendency and coincidence evidence: as we know, s 137 extends generally to evidence having a potential prejudicial effect. That regime can readily engage with any evidence which may reveal bad character or uncharged misconduct on the part of the accused, including what is imprecisely described as "relationship evidence". That concept covers evidence which is adduced, not to establish a tendency on the part of the accused, but to explain the complainant's conduct.

The discussion in cases such as *Dupas* and *Shamouil* (and their progeny) has tended to focus on the assessment of probative value. A similar set of questions arises with respect to prejudicial effect. What precisely is the exercise in which the judge must engage to identify the nature of the prejudicial effect and the likelihood of a jury succumbing to inappropriate reasoning? How is it best to consider the possibility that prejudicial effects will be mitigated by careful directions at a time when it is unlikely that considered attention has been given (or could be given) to the formulation of appropriate directions?

Clear, coherent and readily applicable laws of evidence, adapted to current conditions, are an essential goal for the administration of justice in the courts. Whether we are moving closer to that goal or away from it remains to be seen: we are probably moving closer in some respects, but not in others.