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## Editorial Note

Towards the end of 2014, Paul Babie, John Gava and Gabrielle Appleby concluded their service as Co-Editors of the *Adelaide Law Review*.

We thank our predecessors for their hard work over a considerable period in which the *Adelaide Law Review* has grown significantly in strength and reputation. Many of the articles appearing in this year's volume were initially reviewed and accepted by our predecessors, but the editing itself has been performed by those listed in the front of this volume.

The *Adelaide Law Review* also acknowledges the contributions of Anne Hewitt and Patrick Keyzer to the process of editing the three articles published in 2014 in volume 35(1) as 'Symposium: Research and Legal Education'.

We take this opportunity to thank all of our subscribers. Your subscription enables us to continue to support outstanding legal scholarship through the production of the *Adelaide Law Review*. We hope that you find our journal to be a source of interesting and relevant research.

As you may know, the Adelaide Law Review also offers outstanding students at Adelaide Law School the invaluable experience of being a Student Editor and participating in an academic course based on this role. Our Student Editors assist our authors with the editing and production of manuscripts once they have been accepted for publication.

Funds received from subscriptions have recently enabled us to purchase computers and reference materials for our Student Editors, who have a dedicated room available to them at Adelaide Law School to carry out their important work.

As Co-Editors, we are grateful for your support of the *Adelaide Law Review*, and we would welcome your feedback or suggestions regarding the content of the journal at any time.

Associate Professor Matthew Stubbs and Dr Adam Webster

Co-Editors



Mark Leeming\*

## JUDICIAL REVIEW OF VICE-REGAL DECISIONS: *SOUTH AUSTRALIA v O'SHEA*, ITS PRECURSORS AND ITS PROGENY

### I INTRODUCTION

This article is about vice-regal power, which (relevantly for present purposes) is a species of executive power, and is intended to encourage critical thinking about aspects of the relationship between it and judicial power and legislative power. The article looks to litigation from South Australia – some well-known, some perhaps less so – which provides insights into the legal analysis. Considerations of space require it to be selective, rather than comprehensive. I have tried to choose examples with a contemporary flavour: notably, a Royal Commission inquiring into a particular named union, and the exercise of vice-regal power following a closely fought Senate election marred by the fact that many ballots had been lost.

### II GOVERNOR OF SOUTH AUSTRALIA CASE

In his George Winterton Memorial Lecture,<sup>1</sup> Professor Geoffrey Lindell reminded an audience in Sydney of the important and remarkable early decision of the High Court in *The King v The Governor of the State of South Australia*.<sup>2</sup> He did so in the Banco Court of the Supreme Court of New South Wales. That decision seems an appropriate point to start a lecture in the moot court of the Law School of the University of Adelaide.

The *Governor of South Australia Case* is remarkable in a number of ways. It was heard in the original jurisdiction of the High Court over four days and decided the following day in a judgment of the Court given by Barton J. I cannot readily bring to mind another important early decision of the High Court where Griffith CJ did not write. On the other hand, the restrained decision of the Court did not end the

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\* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. I wish to acknowledge the considerable assistance provided by Ms Amy Knox in the preparation of this paper. Paper presented to the Australia Institute of Administrative Law (SA Chapter) at the University of Adelaide, 15 April 2014.

<sup>1</sup> Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?' (2014) 38 *Australian Bar Review* 118, 120.

<sup>2</sup> (1907) 4 CLR 1497 ('*Governor of South Australia Case*').

controversy; ultimately there was a second hearing and decision, later in 1907, and a further election.

Although the proceedings are briefly mentioned in *Sue v Hill*,<sup>3</sup> it is probably as well to review the facts. Mr Joseph Vardon, who had been government leader in the Legislative Council, sought a writ of mandamus directed to the Governor of South Australia requiring him to perform his duty under the *Commonwealth Constitution* after the inconclusive 1906 federal general election. The question, as Mr Vardon saw it, was whether or not s 15 of the *Constitution* applied. Section 15 in the form it took prior to the 1977 amendment provided that:

If the place of a senator *becomes vacant* before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session ... the Governor of the State, with the advice of the Executive Council ... may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever happens first.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed *shall be certified by the Governor of the State to the Governor-General*.<sup>4</sup>

It will be seen that not only does s 15 of the *Commonwealth Constitution* give an important role to the State Governor, it also uses language which reflects the imposition of a duty upon him or her.

The half Senate election of three senators for the State of South Australia in 1906 was challenged in the Court of Disputed Returns (constituted by former Prime Minister Barton J) and it was declared that the election of the third senator, Mr Vardon, who had run on an anti-socialist platform, was ‘absolutely void’. That came about in this way. The result declared by the returning officer was Josiah Symon, 33 597; William Russell, 31 796; Joseph Vardon, 31 489; Dugald Augustus Crosby, 31 455; Reginald Pole Blundell, 31 366.<sup>5</sup> Thus second, third, fourth and fifth were separated by only 430 votes. Despite his coming a very close fourth, Crosby was *not* the petitioner. He had in fact been placed third after the first count, but had died before a recount had been completed.

<sup>3</sup> (1999) 199 CLR 462, 478-479 [20]–[22].

<sup>4</sup> *Australian Constitution* s 15 (emphasis added).

<sup>5</sup> See *Blundell v Vardon* (1907) 4 CLR 1463, 1464.

Justice Barton was confronted by a series of alleged irregularities, and a large threshold problem, which is familiar to this audience in 2014.<sup>6</sup> All of the ballot-papers for the Division of Angas – over 9 000 votes – had been accidentally destroyed. Did that prevent a recount of the remainder? Barton J held that that ‘remarkable occurrence’ did not stand in the way of a statutory recount of the votes cast in the other six South Australian Divisions, with the Angas votes being accepted as they stood on the return.

His Honour then ruled progressively on a series of challenges to 828 votes of doubtful formality (some had been initialled on the front instead of on the back, some had not been initialled at all, some had not been marked in the squares on the left hand side of the paper, but on the right hand side of the paper opposite the names, or with crosses in squares, or with diagonal lines – so it is a leading case on such points). Professor Geoffrey Bolton wrote that Barton J ‘brought the commonsense of an experienced politician’ to these questions.<sup>7</sup> The result at that stage was that the third South Australian senate seat fell to be decided between Vardon with 31 640 votes and Crosby with 31 638 (Blundell had 31 560 votes).

There were 21 voting papers which had been rejected because they were initialled on their face and had not been folded. That they had been wrongly initialled was the fault of the presiding officer. Finally, there were 179 totally uninitialled papers, all of which had been excluded, also through the fault on the part of the officials administering the election. The *Commonwealth Electoral Act 1902* (Cth) in the form it then took permitted Barton J to have regard to those votes with a view to determining whether, if they had been admitted, they would have affected the result.<sup>8</sup> Had the 21 been counted, only two were for Vardon, and none were for Crosby, so that Vardon’s majority would have increased to four. However, Barton J also held that the 179 were all ‘honest attempts to vote’, and had they been counted, ‘Vardon’s majority of two over Crosby would have been converted to a minority of four’. His Honour declared on 1 June 1907 that ‘the election of Vardon to have been absolutely void’.

The South Australian Parliament was in session. It and the Governor formed the view that s 15 applied to the ‘vacancy’ caused by Barton J’s decision. The Governor thereupon forwarded a message to the Legislative Council and Legislative Assembly advising that he had been advised that there was a vacancy within the meaning of s 15 to be filled in accordance with that section. Accordingly, there was a joint sitting in Adelaide for the purposes of electing a senator. Mr Vardon wrote to the Governor

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<sup>6</sup> In the 2013 Federal Election, some 1370 WA Senate ballot papers were lost, leading to the result being declared void. See *Australian Electoral Commission v Johnston* (2014) 251 CLR 463; See also Joint Standing Committee on Electoral Matters, Commonwealth Parliament, *The 2013 Federal Election – Report on the Conduct of the 2013 Election and Matters Related Thereto* (2015).

<sup>7</sup> Geoffrey Bolton, *Edmund Barton: The One Man for the Job* (Allen & Unwin, 2000) 305.

<sup>8</sup> Cf *Commonwealth Electoral Act 1918* (Cth) s 365 and *Australian Electoral Commission v Johnston* (2014) 251 CLR 463, 475 [9] but cf 476 [12].

saying that s 15 had no operation in relation to a void election such as had been declared by Barton J. In case he was wrong about that, he also put his name forward to the chambers. Both the Governor and the chambers of Parliament rejected Mr Vardon's approaches. On 11 July 1907, the two chambers elected Mr JV O'Loghlin to fill the vacancy.

On the following day, 12 July 1907, Barton J granted, on the application of Mr Vardon, an order nisi for mandamus to the Governor to cause a writ to be issued for a new election, on the basis that s 15 did not apply. That is to say, the High Court (which had only existed for 4 years) ordered the Governor of a State to show cause why he should not be compelled to perform a duty imposed upon him under the *Constitution*. I return to this below, but this was no small step. To put it in perspective, consider three things. First, the New South Wales Premier, Joseph Carruthers (discussed below), had complained earlier that year to his Governor that it seemed that 'Federal authorities ... have no constitutional right to interfere in any way within the area of action reserved to the States under the Imperial legislation conferring their respective Constitutions.'<sup>9</sup> Secondly, it should be recalled that State Governors were, in 1907, powerful representatives of the Crown in the Australian colonies with important law-making roles, and the States were still smarting from having been excluded from the Imperial Conference (contrary to Winston Churchill's recommendation). And thirdly, recall that it is only 21 years ago that the House of Lords heard seven days of argument in *M v Home Office*<sup>10</sup> and concluded that the courts were able to grant injunctions against the Crown.

The matter came on rapidly, and was heard in Sydney, over four days in the first week of August 1907. This was decades before s 78A of the *Judiciary Act 1903* (Cth) was in force, and – remarkably to 21<sup>st</sup> century eyes – there was a serious argument whether the Commonwealth Attorney-General would be permitted to intervene. It was only a question as to the construction of the *Constitution* and its effect upon the composition of the Senate! (He was permitted to be heard.) The High Court accepted that there was a 'vacancy' within the meaning of s 21 of the *Constitution*, which required notification to the Governor of the relevant State. The High Court was prepared to *assume*, without deciding, that there was a duty imposed upon the Governor to issue a writ, deriving from ss 7, 9, 11 and 12 of the *Constitution* (as will be seen, the assumption was in fact made out). Barton J then said for the Court:

But the question remains: To whom does he owe this duty? A somewhat analogous duty is cast upon the State Governors under the Constitutions of the States, all of which provide that upon a dissolution of the Houses of Assembly the writs for a general election are to be issued by the Governor. It has never been suggested that if the Governor failed to issue the writs a mandamus would lie from a State Court to compel him to do so. There is, of course, a remedy in such a case but it

<sup>9</sup> See Anne Twomey, *The Chameleon Crown* (Federation Press, 2006) 21, where the letter is reproduced.

<sup>10</sup> [1994] AC 377.

is to be sought from the direct intervention of the Sovereign and not by recourse to a Court of law.

...

The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties – duties of imperfect obligation – are familiar to students of Constitutional Law.<sup>11</sup>

Curiously, the decision is perhaps best known for the proposition that a Governor of State is not an “officer of the Commonwealth” within the meaning of s 75(v) and the conferral of power to issue writs of mandamus by the *Judiciary Act* is controlled by the *Constitution*.<sup>12</sup> This is ironic, since seemingly nothing turned on it. It was not necessary for jurisdiction, for plainly there was a matter arising under the *Constitution* within the meaning of s 76(i), in respect of which s 30 of the *Judiciary Act* had conferred jurisdiction upon the High Court.

Justice Barton said that the duty was cast upon the Governor as Head of the State. He said that:

the same reasons which prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the Constitutional Head of a State has by his omission failed in the performance of a duty imposed on him as such Head of the State.<sup>13</sup>

The High Court refrained from expressing a view as to whether in the circumstances there was a ‘vacancy’ within the meaning of s 15.

Mr Vardon’s challenge having been dismissed, Mr O’Loughlin tried to assume his seat in the Senate. His litigation having failed, Mr Vardon petitioned the Senate for a declaration that O’Loughlin had not been duly elected. The Senate referred a question to the High Court, which on 20 December 1907 determined the question it had left unanswered in August 1907, holding that s 15 had no application where a third senator had never been elected. The purported appointment of Mr O’Loughlin by the South Australian legislature collided with the ‘dominant provision’ of s 7 of the *Constitution*, requiring senators to be directly chosen by the people of the State.<sup>14</sup> Once again, one sees the familiar process of reconciling all the provisions of a statute, so as to

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<sup>11</sup> *Governor of South Australia Case* (1907) 4 CLR 1497, 1511.

<sup>12</sup> See Leslie Zines, *Cowen and Zines’ Federal Jurisdiction in Australia* (Federation Press, 3<sup>rd</sup> ed 2002) 50.

<sup>13</sup> *Governor of South Australia Case* (1907) 4 CLR 1497, 1512-1513.

<sup>14</sup> *Vardon v O’Loughlin* (1907) 5 CLR 201.

determine which is the leading provision, and which is subordinate.<sup>15</sup> Messrs Vardon and O’Loughlin contested the new election ordered by the Governor, and Mr Vardon won and served until 1913. Shortly after the 1913 election (said to have been marred by foul play) Mr Vardon died of a cerebral haemorrhage. He was later described in the *Australian Dictionary of Biography* by an unlikely trio of adjectives: ‘plodding’, ‘broadminded’ and even ‘cosmopolitan’.<sup>16</sup>

There is a remarkable modernity about the decision. Put to one side the facts which recall those leading to the recent Western Australian Senate election. There is no suggestion that the fact that it was the *Governor* who was subject to an obligation imposed by the *Constitution* for that reason was not amenable to judicial review. The decision turned on the nature of the duty, not the identity of the repository. The High Court went straight to the particular function of relevance – a highly political one – and concluded that this was one which the Courts could not enforce.

### III SOUTH AUSTRALIA V O’ SHEA

Move forward precisely 80 years, but remain in South Australia. Both the present Chief Justice of South Australia and his immediate predecessor appeared in *South Australia v O’Shea*.<sup>17</sup> Mr O’Shea had been convicted of many indecent assaults against many young children over many years. Section 77A of the *Criminal Law Consolidation Act 1935* (SA) permitted a judge to direct that an offender serve an indeterminate sentence, rather than any fixed term of imprisonment, if declared to be incapable of controlling his sexual instincts. A direction was made. A person subject to a direction was not to be released unless (relevantly) ‘the Governor is satisfied, on the recommendation of the Parole Board, that he is fit to be at liberty and terminates his detention’. The Parole Board, after hearing from Mr O’Shea and appropriate medical practitioners, recommended his release.

The Full Court of the Supreme Court of South Australia had declared (Cox and O’Loughlin JJ, Zelling ACJ dissenting) that the refusal to follow the recommendation of the Parole Board was void for breach of natural justice, because the Governor-in-Council had failed to “hear” Mr O’Shea.<sup>18</sup>

There were two appeals heard by the High Court. That by Mr O’Shea may be put to one side: it was on a minor aspect of the legislative scheme which was unanimously dismissed without the State being called upon. The main appeal was the State’s appeal from the split decision of the Full Court which had held void the Governor’s

<sup>15</sup> See *Institute of Patent Agents v Lockwood* [1894] AC 347, 360; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [70].

<sup>16</sup> Malcolm Saunders, ‘Vardon, Joseph (1843-1913)’ in National Centre for Biography (ed), *Australian Dictionary of Biography* (Australian National University, 1990) vol 12.

<sup>17</sup> (1987) 163 CLR 378 (*O’Shea*).

<sup>18</sup> *R v Nelson; ex parte O’Shea* (1986) 44 SASR 507.

decision to take no action on the Parole Board's recommendation. The High Court allowed that appeal by majority, dividing 4:1. Each of the four judgments is distinct; it is probably uncontroversial to state that the concurring reasons of Mason CJ and the dissenting reasons of Deane J have proven to have been most influential.

The joint reasons of Wilson and Toohey JJ (which appear to have been written first) focussed upon the statutory scheme which reflected the 'duality' described by Lord Scarman in *Re Findlay*<sup>19</sup> whereby both the Parole Board and the Secretary of State need to concur. Broadly speaking, the particular facts of the case were assessed by the Parole Board, in accordance with a regime that provided for procedural fairness to the prisoner. But beyond that broader political considerations informed the decision of the Governor in Council. As they said, 'beyond that he is in the Government's hands, which must accept political responsibility for his release'.<sup>20</sup> Their Honours distinguished *FAI Insurances Ltd v Winneke* where the Cabinet was not involved and broader questions of the public interest did not arise.<sup>21</sup> Evidence was led from the Bar table of the South Australian practice for all matters tendered to the Governor by the Executive Council were first submitted to Cabinet for approval, contrary to what had been assumed by Cox J. Their Honours held that Mr O'Shea had no right to contribute to the political decision to be taken by Cabinet confirmed by the Governor-in-Council. The statute conferred an 'unfettered discretion' upon the Governor, which is to say, one to which no duty attached. Further, Mr O'Shea was found to have no interest or legitimate expectation, no more than a mere hope, so that *Kioa v West*<sup>22</sup> was inapplicable.

Mason CJ emphasised that the duty to act fairly in the making of administrative decisions was a common law duty, subject to any clearly manifested contrary statutory intention. His Honour said:

This common law duty is capable of applying to the Governor in Council, there being nothing in the relationship between the governor and the executive which inhibits the existence of such a duty: *FAI Insurances Ltd v Winneke*. That decision stands as authority for the proposition that the mere vesting of decision-making authority in the Governor in Council is not a sufficient manifestation of intention to exclude the common law duty.<sup>23</sup>

There was an echo of the argument accepted in the *Governor of South Australia Case*. Mason CJ had regard to the fact that recommendations to the Governor in Council, in South Australia, were based on a Cabinet decision, not a decision by the responsible Minister. The argument was that a court could not require Cabinet to give particulars of its possible objections so that Mr O'Shea might meet them; nor could a court

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<sup>19</sup> [1985] AC 318.

<sup>20</sup> *O'Shea* (1987) 163 CLR 378, 402.

<sup>21</sup> (1982) 151 CLR 342.

<sup>22</sup> (1985) 159 CLR 550.

<sup>23</sup> *O'Shea* (1987) 163 CLR 378, 386.

pronounce a decision invalid because Cabinet had not given such particulars. So it was said there could be no derivative enforceable obligation to accord procedural fairness at the later stage, when the Governor made his or her recommendation in accordance with Cabinet's decision.

Chief Justice Mason rejected the submission that because the public interest to which the South Australian Cabinet would have regard, involved 'some aspects of political or policy judgment, it lies outside the ambit of the doctrine of natural justice or the duty to act fairly'. His Honour considered that any submission which Mr O'Shea wished to make on a matter of public interest could have been made to the Board, and in that way forwarded to Cabinet and the Governor in Council, so as to ensure procedural fairness. His Honour held the Governor to be subject to a duty to accord procedural fairness, but treated its content as relatively low. He said that there was:

[n]o persuasive reason why the courts should not, in an appropriate case, require as an incident of natural justice or the exercise of a duty to act fairly that there be placed before Cabinet by the responsible Minister the written submissions of the individual affected by the decision to be made ...<sup>24</sup>

In effect, that makes the presence of a duty the default position. Nevertheless, Mason CJ ultimately allowed the State's appeal, but on a very narrow basis on the particular facts. Because Mr O'Shea had not claimed to have made any submission to the Parole Board on a matter of public interest, it followed that no breach of natural justice or breach of the duty to act fairly had been established.

In contrast, Brennan J sourced his analysis in statute. He said whereas here statute provides for the facts to be ascertained and evaluated by a Board, and for the Board to report and recommend to the decision-maker, 'prima facie there is no room for an implication that the power to make the decision is conditioned on the giving of an opportunity for a further hearing'. To anticipate something to which I shall return, that is styled as advancing a question of statutory construction, but it is in fact, if you think about, it a proposition about the common law – for the rules (or perhaps more accurately the process) of statutory construction are mostly common law rules, modified by statutes (notably, interpretation acts). His Honour said that:

[t]he Minister is not bound to hear an individual before formulating or applying a general policy or exercising a discretion in a particular case by reference to the interests of the general public, even when the decision affects the individual's interests. When we reach the area of Ministerial policy giving effect to the general public interest, we enter the political field.<sup>25</sup>

Therefore, like Wilson and Toohey JJ, Brennan J found there was no duty.

<sup>24</sup> Ibid 387.

<sup>25</sup> Ibid 411.

Justice Deane dissented. He too relied upon standards of procedural fairness which he described as ‘accepted as fundamental by the common law’. I want to return below to what is meant by this phrase, which reminds the reader of Sir Owen Dixon’s paper, ‘The Common Law as an Ultimate Constitutional Foundation’.<sup>26</sup> He observed that the fact that the power was vested in the Governor-in-Council no longer could be taken, of itself, to have excluded ‘both the common law requirements of procedural fairness and the possibility of effective legal challenge to the validity of the actual legal decision’. I will also return to this link between duty and remedy below; it is in stark contrast to Barton J’s ‘duties of the imperfect obligation’. He emphasised the ‘essentially formal character of the process of actual decision-making by the Governor’,<sup>27</sup> and the generality of the view expressed in *Kioa v West* that common law rules of procedural fairness extend to control any administrative decision which is made pursuant to statutory power, in the absence of a clear contrary legislative intention, which directly affects the rights, interests, status or legitimate expectations of a person. His Honour rejected the submission that the absence of an obligation on the part of Cabinet to provide reasons denied a right of hearing.

Once again, aspects of *O’Shea* are remarkably modern. Chief Justice Mason had noted that the statutory regime ‘represents a marked departure from the common law’, one of whose basic principles was that an offender should be given a sentence appropriate to his crime and no more. However, the arguments were purely administrative, and there was no anticipation of the constitutional arguments based on Chapter III of the *Commonwealth Constitution* resulting in the limitations upon State legislative power manifested in *Kable v Director of Public Prosecutions (NSW)*<sup>28</sup> and *Fardon v Attorney-General (Qld)*.<sup>29</sup> A similar issue arose last year in the Supreme Court of the United Kingdom in *Osborn v Parole Board*.<sup>30</sup> Yet, of course, *O’Shea* is in many ways properly regarded as a constitutional case – it is about the regulation of executive power, in a politically sensitive area, by the exercise of judicial power qualifying the legislation by which it is conferred. I have elsewhere referred to what I regard as the unduly narrow approach to ‘constitutional law’ within the Australian legal system, which, by focussing on the *Commonwealth Constitution*, emphasises areas which are now settled law, and detracts from some of the most important and stimulating issues presently litigated in State and federal courts.<sup>31</sup>

*O’Shea* shows administrative law in transition. It is not surprising that different judges adopted different approaches. It is conventional now to refer to the ‘apparently

<sup>26</sup> Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240.

<sup>27</sup> *O’Shea* (1987) 163 CLR 378, 416.

<sup>28</sup> (1996) 189 CLR 51 (*Kable*’).

<sup>29</sup> (2004) 223 CLR 575 (*Fardon*’).

<sup>30</sup> [2013] 3 WLR 1020, noted Philip Murray, ‘Procedural Fairness, Human Rights and the Parole Board (2014) 73 *Cambridge Law Journal* 5.

<sup>31</sup> See Mark Leeming, ‘The Federal and State Courts on Constitutional Law: The 2013 term (paper presented 14 February 2014) 3–4, available at <http://ssrn.com/abstract=2398682>.

prevailing view' that until 1981, the exercise of power by a representative of the Crown was not reviewable.<sup>32</sup> There was a distinction between an exercise of power by a Minister pursuant to a statute and an exercise of power by a Governor on the advice of a Minister, which was not. That distinction has been abandoned as a matter of law in Australia by what was decided in *R v Toohey; ex parte Northern Land Council*<sup>33</sup> and *FAI v Winneke*.<sup>34</sup> The different strands in the reasons in *O'Shea* demonstrate that the position did not seem so clear at the time. We look back on landmark decisions with the substantial advantage of hindsight. Many such decisions were not regarded as remarkable at the time.

#### IV ANALYSIS OF VICE-REGAL EXERCISES OF POWER

Those two extended South Australian examples set the scene for a recapitulation of the various obstacles which have historically been perceived to prevent judicial review of vice-regal decisions. I start from the broadest and move progressively to those that are narrower.

##### *A Jurisdiction*

The first is whether there is jurisdiction. Only if a Court has jurisdiction to decide a controversy to which the Governor is a party can his or her exercises of power be reviewed judicially. To return to Barton J's duties of imperfect obligation, the approach adopted in *Commonwealth v Mewett*<sup>35</sup> was that of Dixon J in *Werrin v Commonwealth*,<sup>36</sup> whereby the duty of imperfect obligation was made perfect by the creation of a jurisdiction in which the Commonwealth and those acting on its behalf were amenable to suit.<sup>37</sup> When there is a matter within the meaning of ss 75 and 76 of the *Constitution*, such that the court is exercising federal jurisdiction, immunity is not available to a State.<sup>38</sup> More generally, the 20<sup>th</sup> century States and 19<sup>th</sup> century colonies had largely abrogated the immunities from suit inherited from England, commencing with a South Australian Act of 1853: the *Claims Against the Local Government Act* No 6 of 1853.<sup>39</sup> Moreover, the reasoning in *Kirk v Industrial Court (NSW)*<sup>40</sup> ensures that State courts have supervisory jurisdiction to review for 'jurisdictional error' which includes cases when the duty has been breached. Questions remain about the terminology in, and the metes and bounds of, *Kirk*, but it is clear

<sup>32</sup> *Stewart v Ronalds* (2009) 76 NSWLR 99, 111 [39].

<sup>33</sup> (1981) 151 CLR 170.

<sup>34</sup> (1982) 151 CLR 342.

<sup>35</sup> (1997) 191 CLR 471.

<sup>36</sup> (1938) 59 CLR 150, 167-168.

<sup>37</sup> See Mark Leeming, *Authority to Decide* (Federation Press, 2012) 256-261.

<sup>38</sup> *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

<sup>39</sup> See Leeming, above n 37, 237-239.

<sup>40</sup> (2010) 239 CLR 531 ('*Kirk*').

that that constitutionally entrenched supervisory jurisdiction is an analogous State counterpart to ss 75(iii) and (v).<sup>41</sup>

### B Remedy

The second historically perceived obstacle, which is closely related to the first, is remedy. Traditionally, mandamus, prohibition and certiorari were unavailable against a vice-regal officer. But this question is a distraction, once it is appreciated that the availability of declaratory relief against the Attorney-General will be sufficient save in cases of reserved powers and those cases are unlikely to be apt for judicial review.<sup>42</sup> Another mechanism (which indeed reflects Barton J's reasoning in the *Governor of South Australia Case*) may be seen in *Chief Justice of the Cayman Islands v The Governor (Cayman Islands)*,<sup>43</sup> where there was a referral to the Privy Council for advice as to whether the Governor was entitled to extend the appointment of a judge of the Grand Court. It is a fortunate fact about the Australian legal system that since federation, coercive orders have tended not to have been required to be issued against the executive.

### C Identity of the donee

The third obstacle was the identity of the donee: was the fact that power had been conferred upon a *Governor* decisive? There are two distinct issues here which it is important not to conflate. The main question is one of general law. As was noted in *O'Shea, FAI v Winneke* had dispelled the idea that the fact that power was conferred on the Governor was fatal to judicial review at common law. That had been anticipated by Joseph Carruthers, here in Adelaide, in 1897:

[w]e do not want the Governor to have the power to do wrong; we want to have him limited by the terms of the Constitution Act, and kept to the straight paths by a Federal Judiciary.<sup>44</sup>

Joseph Carruthers was referring to the office now known as the Governor-General, and he was in terms dealing with the exercise of prerogative powers (following a careful account of those powers by Barton J). His point remains sound. There was a strongly held view (notably, reflected in s 75(iii) and s 75(v)) that the executive be accountable and subject to judicial review, irrespective of the source of the

<sup>41</sup> There is a large question, not addressed in this paper, as to the extent to which privative clauses in State law may be more effective than those in federal laws.

<sup>42</sup> Cf *Dyson v Attorney General* [1912] 1 Ch 158, as Gibbs CJ noted in *FAI* at 351. Again, it is a large question and outside the scope of this paper whether the more modern remedies, such as orders pursuant to ss 65 and 69 of the *Supreme Court Act 1970* (NSW), and ss 27, 29 and 31 of the *Supreme Court Act 1935* (SA) have altered the position.

<sup>43</sup> [2012] UKPC 39; [2014] AC 198.

<sup>44</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 29 March 1897, 914 (Mr Joseph Carruthers).

executive power exercised. As Owen Dixon said, ‘the thesis of *Marbury v Madison* was obvious’ to the framers of the *Australian Constitution*.<sup>45</sup> Fullagar J regarded it as axiomatic.<sup>46</sup> An immunity on the part of the Governor was *not* something relied upon in the *Governor of South Australia Case*, yet it took many decades for that idea to be dispelled. The same pattern has been charted by Justin Gleeson and Robert Yezerski, in ‘The Separation of Powers and the Unity of the Common Law’.<sup>47</sup> It is easy to under-appreciate the creativity of the early High Court – it is to be recalled that the High Court defied the Privy Council in *Baxter v Commissioners of Taxation (NSW)*,<sup>48</sup> two months prior to hearing the *Governor of South Australia Case*. However, for much of the 20<sup>th</sup> century, more traditional English ideas returned. A snapshot of the position is given by Peter Hogg:

It is clear from these cases that the attitude of the courts towards review of a decision by an official who is empowered to act ‘if he is satisfied’ or ‘if it appears to him’ that a certain state of affairs differs according to whether the official is the Crown Representative or not.<sup>49</sup>

Representative was *R v Martin*,<sup>50</sup> where reliance was placed on what Dixon J said in the *Australian Communist Party v Commonwealth*,<sup>51</sup> namely, that where statute gave a power to declare a body to be an unlawful association where ‘the Governor-General is satisfied’ then a properly framed declaration would be ‘conclusive’. Contrast *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* which, seven years before, had permitted challenges to exercises of power conditioned upon a statutory office holder holding a particular opinion.<sup>52</sup>

Although it might be thought that *FAI v Winneke* saw the end of the identity of the donee of the power being determinative, the position is complicated by some of the more recently enacted legislative regimes for judicial review. At the federal level, vice-regal decisions are excluded from the definition of ‘a decision to which this Act applies’ in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).<sup>53</sup> On the other hand, such exemptions are absent from legislation in the ACT,

<sup>45</sup> Owen Dixon, ‘Marshall and the Australian Constitution’ (1955) 29 *Australian Law Journal* 420, 425; Cf Leeming, above n 37, 247–8.

<sup>46</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263.

<sup>47</sup> See Justin Gleeson and James Watson (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), 297, 316–329.

<sup>48</sup> (1907) 4 CLR 1087.

<sup>49</sup> P W Hogg, ‘Judicial Review of Action by the Crown Representative’ (1969) 43 *Australian Law Journal* 215, 217.

<sup>50</sup> (1967) 67 SR (NSW) 404.

<sup>51</sup> (1951) 83 CLR 1, 179.

<sup>52</sup> (1944) 69 CLR 407.

<sup>53</sup> This is cognate with the exclusion of documents, other than those that relate to matters of an administrative nature, of the Governor-General from the *Freedom of Information Act 1982* (Cth), considered in *Kline v Official Secretary to the Governor General*

Queensland and Tasmania. Special provision is made in Queensland for the review of decisions of the Governor-in-Council in s 53 of the *Judicial Review Act 1991*: the respondent is to be the Minister responsible for the administration of the enactment or scheme or programme under which the decision was made or the Minister responsible for tendering advice to the Governor-in-Council. Professor Matthew Groves says that ‘it is clearly contradictory that a statute designed to provide a simpler alternative to the common law maintains an arcane exception that has disappeared from the common law itself’.<sup>54</sup>

The inter-relationship between statute and common law is complex, but there seems to be no good reason to read down the scope of judicial review available at general law by reference to statutory regimes which are narrower, at least where it is clear that those regimes do not amount to a code exhaustive of such jurisdiction as is mandated by *Kirk*.

#### D Source of power

The fourth and most interesting obstacle is also influenced by the ‘decision under an enactment’ formula in the *ADJR Act*. Is there something different about vice-regal exercises of power *pursuant to statute*, as opposed to exercises of power *unsupported by statute*?

The powers exercised by State governors have a wide range of sources:

- First, a small number of powers are conferred directly by the *Commonwealth Constitution* (such as in the *Governor of South Australia Case* itself).
- Secondly, there is the qualified investment of power by s 7 of the *Australia Act 1986* (Cth) and s 7 of the *Australia Act 1986* (UK).<sup>55</sup> That section provides that ‘all powers and functions of her Majesty in respect of a State are exercisable only by the Governor of the State’. The power to appoint and to terminate the appointment of the Governor is excluded, and if the Sovereign is personally present in the state, he or she is not precluded from exercising any of his or her powers and functions in respect of the State.<sup>56</sup>

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(2012) 88 ALJR 161.

<sup>54</sup> Matthew Groves, ‘Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?’ (2010) 34 *Melbourne University Law Review* 736, 751.

<sup>55</sup> Hereafter referred to as the ‘*Australia Acts 1986*’.

<sup>56</sup> There are large questions as to the meaning of ‘in respect of a State’: see Anne Twomey, *The Australia Acts 1986* (Federation Press, 2010) 261-263. For example, the extrinsic materials suggest that the awarding of ‘honours’ fell within the Queen’s personal prerogatives and is therefore outside of s 7(2) at the State level, and (presumably) remains with the Sovereign at the Commonwealth level.

- Thirdly, there are very important powers (including assenting to bills and proroguing Parliament) conferred by the State Constitutions.
- Fourthly, there are many powers conferred by legislation and delegated legislation, sometimes on the Governor in Council, sometimes upon the Governor acting upon the recommendation of a Minister. There are different practices in different States.<sup>57</sup> Mostly it is State legislation and delegated legislation, but some federal statutes confer powers (an example is the *Commonwealth Electoral Act*).
- Fifthly, there remain powers which lack (or appear to lack) a statutory source, commonly known as ‘prerogative’ powers. Dr Evatt divided these powers into (a) rights to do certain things without statutory authority (for example, declare war, coin money, incorporate by royal charter, pardon offenders and confer honours), (b) immunities and privileges such as priority of payment and immunity from suit (which have been very influential in this country) and (c) property rights such as the rights to escheat, to treasure trove and to precious metals confirmed by s 379 of the *Mining Act 1992* (NSW).<sup>58</sup>
- Sixthly, there are also separate delegated powers, including the delegation to State Governors of the power to approve the retention of the title ‘Honourable’ in cases falling within established criteria.<sup>59</sup>

To anticipate what follows, some of the foregoing are what Allsop J described as ‘governmental powers’, such as the powers relating to the assembling and dissolving of Parliament, assenting to statutes, to appoint and dismiss executive and judicial and military officers, and many others.<sup>60</sup>

Hence the force of Fiona Wheeler’s observation long ago that:

[t]he prerogative powers of the Crown are not a homogeneous group; ... they are both diverse in nature and exercisable in a wide variety of circumstances ... the question whether or not a particular prerogative decision is amenable to the supervisory jurisdiction of the courts (and on what grounds) should depend

<sup>57</sup> For example, in *Watson v South Australia* (2010) 278 ALR 168, 173 [23], Doyle CJ reiterated the South Australian practice relied on in *O’Shea* (which diverges from that in New South Wales) that all advice to the Governor-in-Council is based upon Cabinet recommendation, and all available ministers ordinarily attend ordinary Executive Council meetings.

<sup>58</sup> Considered in *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195.

<sup>59</sup> See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 628, referring to the letter from Sir Robin Janverin, Buckingham Palace dated 25 July 1991.

<sup>60</sup> James Allsop, ‘The Control of the Executive by the Courts’ [2002] *Federal Judicial Scholarship* 17 at [15].

upon the nature and effect of the decision itself, not upon the application of pre-determined classifications. The traditional immunity from the view of the manner of exercise of prerogative power was such a pre-determined classification writ large.<sup>61</sup>

Now, the source of a power may matter for some purposes. If the source is the *Commonwealth Constitution* or federal law, then the court whose jurisdiction is invoked by an applicant seeking judicial review will be exercising federal jurisdiction (hence, the High Court had jurisdiction to hear and determine the *Governor of South Australia Case* because the duty for which Mr Vardon contended was sourced in the Constitution). If statute provides a regime for judicial review (as in Queensland and Tasmania and the ACT and at the federal level), then again it may be important, because the statutory regime may turn upon the source of the power (famously, as in ‘decision under an enactment’ in the *ADJR Act*).<sup>62</sup>

But generally speaking, there is no sound reason for the rules within a legal system as to the amenability to judicial review in respect of such a heterogeneous group of powers to be determined by the source of the power. The heterogeneity has nothing to do with the source of the power. The right to royal metals (or for that matter to royal fish such as sturgeons and whales) and the power to dismiss a government are all ‘prerogative’ ie, sourced in common law, but vastly different considerations attend their susceptibility to judicial review. Conversely, the power to grant a licence to conduct an insurance business and to prorogue Parliament are both sourced in statute, but again very different considerations apply to their being the subject of judicial review. As much has long been recognised.

## V COMMON LAW AND STATUTE LAW

Two considerations underlie the proposition that the availability of judicial review is indifferent to the source of power.

The first is simply stated. It would be strange if a prerogative power, which is capable of being modified or supplemented or extinguished by statute, is *less* susceptible to judicial review than a power created by statute. As Heydon J wrote in *PGA v The Queen*,<sup>63</sup> ‘the courts are masters of the common law, but servants of statutes’. There would be a want of coherence for the legal system to especially immunise non-statutory powers from, say, a duty to act fairly, but to insist upon clear language before the same was true of powers sourced in statute.

<sup>61</sup> Fiona Wheeler, ‘Judicial Review of Prerogative Power in Australia: Issues and Prospects’ (1992) 14 *Sydney Law Review* 432, 473.

<sup>62</sup> See for example the jurisdictional limits identified by the High Court in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 (*ADJR Act*) and *Griffith University v Tang* (2005) 221 CLR 99 (*Judicial Review Act 1991* (Qld)).

<sup>63</sup> (2012) 245 CLR 355, 404-5 [133].

The second takes longer to expose. Particularly in this area, identifying a clear-cut distinction between common law and statute is an arid exercise. Much of our legal system is an amalgam of statute and common law, and the ‘prerogative powers’ of Governors are an excellent example.

Take for example another subject matter (also of present interest), royal commissions into the activities of nominated trade unions.<sup>64</sup> In February 1904, the New South Wales Governor, acting on the advice of the Executive Council, by letters patent appointed a royal commission for a ‘diligent and full inquiry into the formation, constitution and working of the Machine Shearers and Shed Employés Union, Industrial Union of Employés’ and, inter alia, ‘whether the registration of that union prevented the Industrial Arbitration Court from doing complete justice’. This led to a challenge by the secretary of the union, Mr Leahy, who was summoned to appear before it, but who refused to be sworn or to give evidence, for which he was prosecuted. Among other things, he challenged the validity of the exercise of prerogative power by the Governor to create the Commission. He said that the issue of letters patent was ‘an unconstitutional and illegal exercise of the prerogative of the Crown when affecting individual rights’, and indeed succeeded in the Full Court of the Supreme Court of New South Wales, which found that the Commission was ‘unlawful and illegal’.<sup>65</sup> Something of the flavour of the decision may be seen by what Darley CJ said:

Here we have a thrice defeated litigant first obtaining a select committee of the Legislative Assembly, of which committee he is the chairman, to enquire into the subject-matter of the litigation, followed by the appointment of a Royal Commission, of which at first he is made president and the members he had selected for the select committee of the House made members. Common decency at last prevailed, and led to the alteration of this, and after having been made a member of the Royal Commission, he is finally excluded, his nominees, however, remaining as members, a District Court Judge being nominated president. Is it to be wondered at that the successful litigant refused to give evidence or appear before such a tribunal with its enormous powers of discovery and encroachment upon their private offices and places of business?<sup>66</sup>

That decision was overturned by the High Court.<sup>67</sup> The litigation illuminates the relationship between prerogative powers, statute and judicial review.

First, Mr Leahy’s litigation was a *collateral* challenge to the exercise of executive power, arising out of his prosecution. He could have maintained it as a defence before the magistrate, but chose to bring separate proceedings in the Supreme Court’s supervisory jurisdiction. Notwithstanding the fragmentation of the criminal trial, such litigation is well-established in appropriate circumstances (a powerful

<sup>64</sup> Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014).

<sup>65</sup> *Ex parte Leahy* (1904) 4 SR (NSW) 402 (*Leahy*).

<sup>66</sup> *Ibid* 415.

<sup>67</sup> *Clough v Leahy* (1905) 2 CLR 139.

consideration in such cases is whether there is a question of public interest going beyond the particular circumstances of the prosecution).<sup>68</sup>

Secondly, it was not necessary to join the Governor even though it was the Governor's exercise of power which was impugned. It was sufficient to join the Attorney-General. Prohibition against the magistrate, or declaratory relief, in the case of *Sankey v Whitlam*, was sufficient.

Thirdly, neither the Supreme nor the High Court had any difficulty in asserting a jurisdiction to exercise judicial review of the Governor's decision. They differed in the outcome because, as Griffith CJ put it, it was not for the courts to rule on the propriety of executive action, but merely its lawfulness. It is a reminder of the boldness of courts in the Australian legal system in the first decade of the last century. That boldness was noted by, among others, Professor Harrison Moore in an article in the *Columbia Law Review*;<sup>69</sup> recall again that it was not until 1947 that it was possible to sue the Crown in England for tort.<sup>70</sup>

Fourthly, the prosecution was under the *Royal Commissioners Evidence Act 1901* (NSW), which created an offence for a witness to refuse to be sworn when summoned by a Royal Commissioner. However, the power to establish the commission had no statutory base. The same structure remains in New South Wales and South Australia 110 years later. Royal Commissions are established by the Governor pursuant to an exercise of a prerogative power, which is supplemented by statute. The power to inquire and investigate is 'an essential part of the equipment of all executive authority'.<sup>71</sup> However, that power to investigate did not extend to coercive powers.<sup>72</sup> Coercive powers are sourced in statute (and only apply if the commissioner is a specified person, such as a judge or former judge).<sup>73</sup> The power is sourced at common law but regulated and supplemented by statute.

<sup>68</sup> As there was in *Sankey v Whitlam* (1978) 142 CLR 1 and *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 134 [25].

<sup>69</sup> Harrison Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500. It had been anticipated, to a similar audience, by Andrew Inglis Clark, in 'The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia' (1903) 17 *Harvard Law Review* 1, although the focus of the latter was federal legislative power.

<sup>70</sup> See *Commonwealth v Mewett* (1997) 191 CLR 471, 542-545.

<sup>71</sup> *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 370.

<sup>72</sup> See *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

<sup>73</sup> NSW s 15; SA ss 10-11. Hence s 5 of the *Royal Commissions Act 1923* (NSW) provides that:

[w]henever the Governor by letters patent under the Public Seal issues a Royal Commission to any person to make any inquiry, the provisions of this Act shall apply to and with respect to the inquiry.

It would appear that the South Australian counterpart (*Royal Commissions Act 1917* (SA)) proceeds on the same basis.

The same interplay between common law and statute may be seen in an example well outside the area of judicial review. In *Stewart v Ronalds*<sup>74</sup> a Minister whose commission was withdrawn by the Lieutenant Governor (acting on the advice of the Premier) sued the State and a barrister who had conducted an investigation into the alleged misconduct.<sup>75</sup> The direct source of power to remove a Minister was unclear. Arguably it was found in s 35E of the *Constitution Act 1902 (NSW)*<sup>76</sup> although that section was not styled as a conferral of power. At best, power is conferred by implication. There was no doubt that the power existed, to be exercised by the Governor on the advice of the Premier.

The legal meaning of s 35E is informed by the context, in which two things assumed prominence. First, the section replaced s 47 of the *Constitution Act* in 1987, which had provided that appointments of officers liable to retire from office on political grounds, ‘which appointments shall be vested in the Governor alone’, a textual copy from s 35 of the *Constitution Act 1855*. Secondly, the meaning of ‘vested in the Governor alone’ meant the Governor on the advice of the Minister; the notion of responsible government is an essential backdrop to construction. In short, s 35E was held to bear a legal meaning which is very different from its literal meaning.

In summary, prerogative powers exercised by the Governor tend to be ancient; *new* prerogative powers have long since ceased being created in the Australian legal system! If there is a statutory source, statute may simply proceed on the basis that they exist and confirm their existence (s 7 of the *Australia Acts* is a good example), although quite often it may modify them.

## VI SOURCE OF OBLIGATION TO ACCORD PROCEDURAL FAIRNESS

Now if the source of the obligation to accord procedural fairness is statute, something repeatedly reaffirmed by Brennan J, then a difficulty arises in relation to judicial review of non-statutory exercises of vice-regal power.

Two things may immediately be said about Brennan J’s view on statutes as the source of the obligation. The first is that, at least from the perspective of litigation in courts other than the High Court, it must be taken to be a minority view. Intermediate appellate courts have long regarded the position as settled,<sup>77</sup> particularly by reference to what was said by a majority of the Court in *Annetts v McCann*:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate

<sup>74</sup> (2009) 76 NSWLR 99.

<sup>75</sup> Ibid.

<sup>76</sup> ‘The Premier and other Ministers of the Crown shall hold office during the Governor’s pleasure.’

<sup>77</sup> See the decisions collected in *Stewart v Ronalds* (2009) 76 NSWLR 99, 115 [68]-[69].

expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.<sup>78</sup>

The second is that this audience will be very familiar with the notion of the common law approach to statutory construction requiring words of ‘irresistible clarity’ before a duty to accord procedural fairness has been abrogated.<sup>79</sup> The position with a power sourced at common law is *a fortiori*. Once it be accepted that in cases where the legislature has spoken, it must speak clearly and unambiguously in order to detract from an enforceable duty to act fairly, then the case where the exercise of executive power has no statutory source is straightforward.

I referred earlier to the fact that propositions about statutory construction are really propositions about the common law. I have elsewhere<sup>80</sup> sought to emphasise an important passage in the reasons of four members of the High Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*:

The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as *the interaction between the three branches of government established by the Constitution*. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that ‘the common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified

<sup>78</sup> (1990) 170 CLR 596, 598.

<sup>79</sup> See *Potter v Minahan* (1908) 7 CLR 277 and its extensive progeny (as to which Professor Dennis Pearce gave a useful review ‘Principle of Legality and Human Rights: Seeking the Hymn Sheet’ at the ANU Public Law Weekend, November 2013). There are large questions, beyond the scope of this paper, as to whether those principles have changed, or may change, and if so, how: see *Gumana v Northern Territory* (2007) 158 FCR 349, 374 [96] and *R v Janceski* (2005) 64 NSWLR 10, 23 [62].

<sup>80</sup> Mark Leeming, ‘The Riddle of Jurisdictional Error’ (2014) 38 *Australian Bar Review* 139, 143–144:

[t]hat is to recognise the centrality of statutory interpretation, which is an aspect (in this country) of the common law. Because a statute must be construed in its context, which includes the common law, often little turns upon whether a restriction on the exercise of power without according procedural fairness is better viewed as a default position which the statute (having been construed) has not abrogated, or alternatively as a result of the ordinary process of giving legal meaning to the legislative text.

as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.<sup>81</sup>

The emphasised words confirm that this is ‘constitutional law’ in the (broad) sense to which I earlier referred. Similarly, Owen Dixon reminded his audience in 1957 that a very distinguished Australian had opened his treatise on *The Government of England* with the words ‘The English constitution forms a part of the Common Law’.<sup>82</sup> Ultimately, these rules are part of Australia’s ‘common law heritage’. Returning to South Australia in the 21<sup>st</sup> century, in *South Australia v Totani*, French CJ said that that heritage was antecedent to the Constitution and supplies principles for its interpretation and operation.<sup>83</sup> You will have noticed the echoing of Dixon in that passage.

A very recent example of the way in which basic aspects of that common law heritage affect 21<sup>st</sup> century litigation may be seen in *Achurch v The Queen*.<sup>84</sup> The question was whether a statute which permitted reopening of criminal proceedings in which a court had ‘imposed a penalty that is contrary to law’ applied where a decision was affected by the error identified in *Muldock v The Queen*.<sup>85</sup> The High Court said that it did not. The essential reasoning was that the principle of finality<sup>86</sup> was so deeply embedded in the legal system that it ‘should not be taken to have been qualified except by clear statutory language and only to the extent that the language clearly permits’. Another example of something ‘deeply embedded’ in our legal system is the High Court’s emphasis upon the institutional integrity of State courts.<sup>87</sup> In her new book, Sarah Murray has discussed, by reference to those decisions, the re-emergence of the ‘dominance of *institutional integrity*’.<sup>88</sup>

It is no large step to hold likewise that the principle that public power should be exercised fairly when it directly affects a person is so deeply embedded in our legal system that clear statutory language is required before the obligation to accord procedural fairness is abrogated, irrespective of the source of power. That in substance is the position which has now been reached, but perhaps you may agree that there is,

<sup>81</sup> (2012) 246 CLR 636, 666 [97] (emphasis added).

<sup>82</sup> W E Hearn, *The Government of England: Its Structure and Its Development* (Melbourne, 1867) 1, cited by Dixon, above n 25.

<sup>83</sup> (2010) 242 CLR 1, 20 [1].

<sup>84</sup> (2014) 306 ALR 566.

<sup>85</sup> (2011) 244 CLR 120 (which overturned a settled approach to sentencing in New South Wales, based on a statutory standard non-parole period).

<sup>86</sup> That same principle of finality has long been undercut by statute. Such inquiries in New South Wales dated from s 383 of the *Criminal Law Amendment Act 1883* (NSW), which ‘pre-dated by almost three decades the first general right of appeal in criminal matters in this State’: *Sinkovich v A-G (NSW)* [2013] NSWCA 383 (18 November 2013) [23].

<sup>87</sup> *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] and 161 [438]; *Hogan v Hinch* (2011) 243 CLR 506, 551 [80], 554 [91]; *Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 [169], [182].

<sup>88</sup> See Sarah Murray, *The Remaking of the Courts* (Federation Press, 2014) 75–80.

following the reconciliation effected by *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,<sup>89</sup> a more satisfying account for that result.

All of that said, one reaches the conclusion that the extent to which judicial review is available turns upon the nature of the power and the directness of its impact upon the rights of the person who claims to have been denied procedural fairness. How that assessment takes place is, perhaps the most interesting and controversial area of analysis – and one that is outside the scope of this paper. It must suffice to say that some powers are so inherently governmental (reserve powers; dismissing a Minister), or general (making a legislative instrument) that it strains notions of procedural fairness to subject their exercise to an enforceable duty. For example, *Stewart v Ronalds* characterised the advice of a Premier to the Governor that he or she had lost confidence in a Minister as a ‘quintessentially political question’.<sup>90</sup> The absence of any duty in such cases was reinforced by the constitutional term that the Minister held office ‘during the Governor’s pleasure’.<sup>91</sup> Thus it is that ‘subject matter immunities provide the core of modern understandings of justiciability’.<sup>92</sup> More generally, in *Blythe District Hospital Inc v South Australian Health Commission*,<sup>93</sup> King CJ said:

[t]here must ... be a wide range of executive government decisions based upon policy and political considerations which are not subject to judicial review and which are not subject to a duty to provide persons affected thereby an opportunity to be heard.<sup>94</sup>

As Professor Finn has said, the landmark cases of *CCSU* and *Peko-Wallsend* ‘have nonetheless offered catalogues of powers considered inherently unsuitable for judicial review’. You will have noticed that all three of the High Court decisions I have touched upon have been cases where the courts have *declined* to interfere with exercises of vice-regal executive power, which speaks eloquently of the deference attendant upon judicial review.

## VII CONCLUSION

*State of South Australia v O’Shea* may be seen as a snapshot of the Australian legal system in transition, where the reasons of Mason CJ and Deane J disclose the immediate predecessors of a modern approach to judicial review of vice-regal

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<sup>89</sup> (2012) 246 CLR 636.

<sup>90</sup> (2009) 76 NSWLR 99, 112 [45].

<sup>91</sup> *Constitution Act 1902* (NSW) s 35E.

<sup>92</sup> See Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 *Federal Law Review* 239, 252.

<sup>93</sup> (1988) 49 SASR 501, 509.

<sup>94</sup> *Ibid* 504.

exercises of executive power. The fact that the court was divided stands in contrast to the decisions at the beginning of the 20<sup>th</sup> century.

Prior to 1910, Australia was no nation. It had essentially no treaty-making power or international sovereign status. The Imperial Parliament regularly enacted legislation<sup>95</sup> and occasionally withheld, or (with equal effect) intimated that it would withhold, consent to local laws.<sup>96</sup> In a very real sense, the vice-regal representatives in Australia were local agents of an Imperial Crown with a powerful presence in the local legal system. It was a large thing for Australian courts then, unlike their English counterparts, to subject vice-regal power to judicial review.

Yet the local Australian courts adopted a modern approach to the exercise of executive power which resonates with the position 110 years later. Those decisions also raise most interesting questions about the true relationship between executive, legislative and judicial power; if this article causes its readers to think critically about that relationship, then one of its purposes will have been achieved.

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<sup>95</sup> Often with its concurrence, for example, copyright legislation: see *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, 612 but sometimes without (as in the case of the *Official Secrets Act 1911*: see Hessel Duncan Hall, *Commonwealth: A History of the British Commonwealth of Nations* (Van Nostrand Reinhold, 1971) 61).

<sup>96</sup> See Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 40.

*John V Orth\**

## THE STRANGE CAREER OF THE COMMON LAW IN NORTH CAROLINA

The common law began its career long ago and far away, in England in the 12<sup>th</sup> century. Unlike other of the world's great legal traditions, the common law did not produce an authoritative law book comparable to the *Corpus Juris Civilis* of Roman law or the *Code Napoleon* of French law. Instead, the common law generated a collection of judicial decisions, a set of institutions and a distinctive way of resolving disputes. Common law rules, derived mainly from decided cases, were multifarious and sometimes seemingly contradictory, yet susceptible to rational organisation and harmonisation. Common law institutions, principally courts, were for many years a confusing collection of ancient offices with often unclear and overlapping jurisdictions, but they benefited from a tradition of orderliness and a crude but recognisable effectiveness. The 'common law way' of reasoning from case to case within a rigid set of procedures was at bottom and necessarily practical, but it included an element of ancient anachronism that contributed an air of mystery and majesty.

After the voyages of discovery begun by Christopher Columbus in 1492, England acquired a far-flung Empire and English colonists carried the common law with them wherever they went. From its first permanent settlement in the early 1600s, the colony of North Carolina on the east coast of North America accepted as much of the common law as suited its frontier conditions.<sup>1</sup> On 4 July 1776, North Carolina joined with 12 other adjacent colonies of Great Britain to issue a unilateral declaration of independence. The American Revolution severed the colony's ties with the British Empire but not with the common law. Within months of declaring independence, the

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<sup>1</sup> For the operation of the common law in North Carolina prior to independence, see William E Nelson, 'Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775' (2010) 88 *North Carolina Law Review* 2133. See also *Act of 1715*, ch 31, 23 *The State Records of North Carolina* 38 (Walter Clark 1905) ('*State Records*'). An earlier statute from 1711 is to the same effect. See *Act of 1711* ch 1, 25 *State Records* 152.

State adopted a constitution that incorporated sections from *Magna Carta* (1215)<sup>2</sup> and the *English Declaration of Rights* (1689) in its own *Declaration of Rights*.<sup>3</sup> Soon thereafter, the State re-adopted the colonial legislation and received ‘such Parts of the Common Law, as were heretofore in Force and Use within this Territory’.<sup>4</sup>

In 1782, a courtroom drama in a backwoods county of North Carolina demonstrated that the American Revolution — unlike the French Revolution of 1789 or the Russian Revolution of 1917 — did not mark a dramatic break with the pre-revolutionary legal tradition. More than a year before a final peace treaty formally severed ties with the former colonial master, a prosecution for treason against the republican State was decided by analogy to a prosecution for treason against the Crown. As enumerated in bills of indictment, a grand jury in Rowan County charged Samuel Bryan, John Hampton and Nicholas White with:

The Taking a Commission from the King of Great Britain.  
The Levying War against this State, and the Government thereof.  
The Aiding and Assisting the Enemy, by joining their Army, and by enlisting and procuring others to enlist for that Purpose.  
The forming and being concerned in forming a Combination, Plot and Conspiracy for betraying this State into the Hands and Power of a foreign Enemy, to wit: the King of Great Britain.  
And the giving Intelligence to the Enemies of this State for that Purpose.<sup>5</sup>

In 1780, Colonel Bryan had raised a company of six or seven hundred loyalists and alongside Hampton and White served with British dragoons of the 71<sup>st</sup> regiment until the regiment was withdrawn from the State and the three were captured. The prosecution, conducted by North Carolina Attorney-General Alfred Moore (later appointed a justice of the United States Supreme Court by President George Washington), proved that Bryan had been resident in the State at the time of the passage of the State’s treason law in 1777<sup>6</sup> and had subsequently committed the overt acts charged in the indictment. A distinguished team of defence counsel, including William R Davie (a signatory of the *Declaration of Independence*), admitted that Bryan had served ‘his Britanick Majesty whom the prisoner considered as his liege sovereign’, and argued that Bryan ‘knew no protection from nor ever acknowledged

<sup>2</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 12. Cf *Magna Carta* (1215) § 39 (also referred to as the *Great Charter*).

<sup>3</sup> *North Carolina Constitution of 1776, Declaration of Rights* §§ 5, 6, 10, 17, 20. Cf 1 Wm & M sess 2, c 2, s I (preamble), cls 1, 8, 10, 13.

<sup>4</sup> *Act of 1778*, ch 5, 24 *State Records* 162. An ordinance of the 1776 Independence Convention, 23 *State Records* 992, and two earlier *Acts of 1777*, ch 25, 24 *State Records* 36 and ch 14, 24 *State Records* 113, are to the same effect.

<sup>5</sup> *State v Bryan* (Rowan County Superior Court, April 1782), quoted in David L Swain, ‘British Invasion of North Carolina in 1776’ in William D Cook (ed), *Revolutionary History of North Carolina in Three Lectures* (William D Cook, 1853) 101, 229.

<sup>6</sup> *Act of 1777*, ch 3, 24 *State Records* 9.

any allegiance to the State of North Carolina', so could not be guilty of treason against the State.<sup>7</sup>

Rather than join issue on the delicate question of when and how the North Carolinian's duty of loyalty switched from that owed the King to that owed the new Republic, the Attorney-General argued that even resident aliens could be guilty of treason. For authority, he cited the 1594 case of the Portuguese Stephano Ferrara da Gama and Emanuel Lewes Tinana, who were convicted of treason for participating in the conspiracy of Dr Roderigo Lopez to poison Queen Elizabeth I.<sup>8</sup> The defence attempted to distinguish that case by arguing that the Portuguese 'publicly claimed and enjoyed the protection of the Laws' of England and therefore owed 'a local or temporary allegiance', while Bryan, by contrast, 'maintained that Degree of Secrecy necessary to ensure the success of a Military Enterprise, was unknown to our Laws, and could not offend as a Citizen'.<sup>9</sup> Probably to no one's surprise, the argument failed to convince. The defendants were convicted and sentenced to death, but were subsequently pardoned and exchanged for American officers who had been captured by the British.

Although a State statute created the offence, its application was governed by English precedent, and the method of argument was the familiar thrust and parry of the common law. If the government's case in *State v Bryan* was like that in *Regina v Da Gama* almost 200 years earlier, then the result should be the same. *Stare decisis*. Far from being rejected by Britain's former colony, the common law was retained and domesticated — parts incorporated in a written constitution, parts superseded by statute and parts modified by judicial decision. The accommodations necessary to suit the postcolonial State, begun in 1776, continue to this day. By the early 21<sup>st</sup> century, North Carolina common law, while bearing an obvious family resemblance to its English ancestor and to common law jurisdictions throughout the English-speaking world, displays its own distinctive and remarkable characteristics.

In 1776, when the colony claimed its independence, the distinction between constitutional law and common law was not sharply drawn. Although as colonists North Carolinians had occasionally referred to the *Royal Charter* as their 'constitution'<sup>10</sup> — in

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<sup>7</sup> Swain, above n 5, 232, quoting *State v Bryan* (Rowan County Superior Court, April 1782).

<sup>8</sup> *Regina v Da Gama* (1594). The case cited is described in Sir Matthew Hale's *History of the Pleas of the Crown*, published posthumously in 1736. A 1778 edition, perhaps the very one consulted in *State v Bryan* (Rowan County Superior Court, April 1782), is in the collection of the Kathrine R Everett Law Library of the University of North Carolina.

<sup>9</sup> Swain, above n 5, 232, quoting *State v Bryan* (Rowan County Superior Court, April 1782).

<sup>10</sup> William S Powell, *North Carolina Through Four Centuries* (University of North Carolina Press, 1<sup>st</sup> ed, 1989) 88. The *Royal Charter* created the Crown Colony of North Carolina.

the Aristotelian sense of the organisation of their government<sup>11</sup> — they (like other English colonists throughout the British Empire) believed their civil rights were secured by the common law. In that very important regard, the common law *was* the constitution. The North Carolinians acted swiftly to adapt that tradition to the institutions of their new society.

The positivistic proposition that statutes trump the common law had barely been established in the Mother Country when the rebellious colonies re-complicated the issue by ‘constitutionalising’ (in the American sense of the word) parts of the common law. When the General Assembly purported to deprive expropriated Tories of the right to trial by jury,<sup>12</sup> North Carolina judges in 1787 held that ‘no act ... could by any means repeal or alter the constitution’,<sup>13</sup> which guaranteed trial by jury in all cases concerning property.<sup>14</sup> It was to be 16 years before the United States Supreme Court reached the same conclusion in the famous case of *Marbury v Madison*.<sup>15</sup>

At the centre of the new State’s *Declaration of Rights* — literally right in the middle of the text — were echoes of the famous words of *Magna Carta*: ‘No freeman ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the law of the land.’<sup>16</sup> That meant, as a North Carolina judge held in 1794, ‘according to the course of the common law’.<sup>17</sup> While an English statute of 1297 had declared that *Magna Carta* was to be received as common law,<sup>18</sup> the North Carolinians 500 years later wrote its most important section into their state

<sup>11</sup> Cf Aristotle, *Politics* (B Jowett trans, 1984) [trans of: *Politica* (first published 1885)] in Jonathon Barnes (ed), *Complete Works of Aristotle: Revised Oxford Translation* (Princeton University Press, 1984) vol 2, 1986, 2029. ‘A constitution is the arrangement of magistracies in a state, especially of the highest of all.’

<sup>12</sup> *Act of 1785*, ch 7, 24 *State Records* 730. The Act required the courts to dismiss suits challenging title acquired by purchase from a commissioner of forfeited estates.

<sup>13</sup> *Bayard v Singleton*, 1 NC (1 Mart) 5, 7 (1787).

<sup>14</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 14. ‘[I]n all Controversies at Law respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the People, and ought to remain sacred and inviolable.’

<sup>15</sup> 5 US (1 Cranch) 137 (1803).

<sup>16</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 12. Cf *Magna Carta* (1215) § 39.

<sup>17</sup> *State v Anonymous*, 2 NC (1 Hayw) 28, 29 (Williams J) (1794). Concerning the constitutionality of the specific statute at issue, Williams J’s colleagues, Ashe and Macay JJ, disagreed, although Ashe J confessed to ‘very considerable doubts’ about the judgment and admitted that ‘he did not very well like it’.

<sup>18</sup> The 13<sup>th</sup> century statute was familiar to 18<sup>th</sup> century lawyers. See William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765–9, 1979 ed) vol 1, 124 (‘*Commentaries*’). ‘By the statute called *confirmatio cartarum* ... the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void ...’

constitution. A statute trumps the common law, but the common law, to the extent that it is incorporated into the constitution, trumps a statute.

Although the North Carolina common law reception statute, still contained within the State's *General Statutes*, expressly excepts all such parts of the common law as are 'destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established',<sup>19</sup> the successful revolutionaries recognised that legislation was required to clarify what was retained and what was discarded. To adapt the English common law to the republican social order, feudal elements accumulated over the centuries had to be purged.

Because of its association with the landed aristocracy, property law needed immediate attention. The *Declaration of Rights* singled out perpetuities and monopolies in particular as 'contrary to the genius of a free state'<sup>20</sup> and the *North Carolina Constitution of 1776* directed that the future legislature 'shall regulate entails in such a manner as to prevent perpetuities'.<sup>21</sup> In 1784 the General Assembly duly complied as part of a wide-ranging reform of land law. The fee tail was eliminated as a present estate.<sup>22</sup> 'Entails of estates', the legislators explained in the preamble to the *Act of 1784*, 'tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.'<sup>23</sup> Another section of the same statute abolished primogeniture, substituting partible inheritance among all male heirs.<sup>24</sup> The common law presumption

<sup>19</sup> NC Gen Stat § 4-1 ('*General Statutes*').

<sup>20</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 23; now *North Carolina Constitution of 1971* art I § 34.

<sup>21</sup> *North Carolina Constitution of 1776* § 43.

<sup>22</sup> *Act of 1784*, ch 22 § 5, 24 *State Records* 572, now codified at NC Gen Stat § 41-1: 'Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple.' Literally, the statute does not apply to estates in tail in remainder, so strict settlements of land which depend for their effectiveness on keeping the tenant in tail out of possession remain theoretically possible. See John V Orth, 'Does the Fee Tail Exist in North Carolina?' (1988) 23 *Wake Forest Law Review* 767.

<sup>23</sup> *Act of 1784*, ch 22 § 5, 24 *State Records* 572, 574. Ironically, in 2007 North Carolina repealed the Rule Against Perpetuities, allowing perpetual trusts, commonly known as 'dynasty trusts': NC Gen Stat §§ 41-15, 41-23. The constitutionality of the repeal was upheld in *Brown Brothers Harriman Trust Co v Benson*, 688 SE 2d 752 (NC Ct App, 2010). See John V Orth, 'Allowing Perpetuities in North Carolina' (2009) 31 *Campbell Law Review* 399. See also Steven J Horowitz and Robert H Sitkoff, 'Unconstitutional Perpetual Trusts' (2014) 67 *Vanderbilt Law Review* 1769.

<sup>24</sup> *Act of 1784*, ch 22 § 2, 24 *State Records* 572. Eleven years later, females were admitted to an equal share: *Act of 1795*, ch 435, 1 *Laws of the State of North-Carolina* (Henry Potter 1821). See John V Orth, 'After the Revolution: "Reform" of the Law of Inheritance' (1992) 10 *Law and History Review* 33.

in favour of joint tenancy, associated with settlements of property through uses or trusts, was abolished at the same time.<sup>25</sup>

North Carolina might have been a free state in one sense, but it was a slave state in another, and the integration of slavery into the common law posed special problems. While the General Assembly confessed in 1792 that the existing difference in legal treatment between the murder of a slave and the murder of a white person was ‘disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, Christian, and enlightened country’,<sup>26</sup> it was unable — despite repeated attempts — to decide what to do about it. At last, in an extraordinary piece of legislation in 1817, the legislature simply left the dirty work to the judges: ‘The offense of killing a slave shall hereafter be denominated and considered homicide and shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law.’<sup>27</sup> As Judge Leonard Henderson acknowledged in a subsequent case, the ‘law of the land’ was not the common law of England but an indigenous common law — ‘cut down’, as he put it, ‘by statute or custom so as to tolerate slavery’.<sup>28</sup> The North Carolina Supreme Court was forced to remodel the common law to suit the peculiar institution. ‘The result’, it has been observed, ‘was a peculiar common law.’<sup>29</sup>

Within a few decades of Independence, the dynamic was established that was to mark the State’s common law into the 21<sup>st</sup> century — the continuing interaction of constitution, statute and case. The post-Independence reception statute made Sir William Blackstone’s *Commentaries on the Laws of England*, fortuitously appearing in its first edition only a few years earlier, a godsend to the State’s lawyers and judges. Aspiring North Carolina lawyers into the 20<sup>th</sup> century were required to read Blackstone, and

<sup>25</sup> *Act of 1784*, ch 22 § 6, 24 *State Records* 572, now codified at NC Gen Stat § 41-2:

[I]n all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.

The effect of the 1784 statute was to eliminate the so-called right of survivorship and make the joint tenancy indistinguishable in effect from the tenancy in common. In 1991 the old joint tenancy was restored so long as the instrument creating the estate expressly provides for a right of survivorship. See John V Orth, ‘The Joint Tenancy Makes a Comeback in North Carolina’ (1990) 69 *North Carolina Law Review* 491.

<sup>26</sup> *Act of 1792*, ch 4, § 3, 1791 NC Pub Laws 8-9.

<sup>27</sup> *Act of 1817*, ch 18, § 3, 1817 NC Pub Laws 18-19.

<sup>28</sup> *State v Reed*, 9 NC (2 Hawks) 454, 457 (Henderson J) (1823).

<sup>29</sup> Joseph L Hyde, ‘The Common Law Cut Down: Homicide and Human Property in Post-Colonial North Carolina’ (2012) 36 *Australian Bar Review* 176. For a further example of just how peculiar the North Carolina common law of slavery was, see John V Orth, ‘When Analogy Fails: The Common Law & *State v Mann*’ (2009) 87 *North Carolina Law Review* 979 (comparing *State v Mann*, 13 NC (2 Dev) 263 (1829) with *Somerset v Stewart* (1772) Lofft 1; 98 ER 499).

the State's leading law professors prepared textbooks that restated Blackstone — 'from', as one subtitle advertised, 'a North Carolina standpoint'.<sup>30</sup>

As if to demonstrate the point, when in 1971 the State Supreme Court held that the reception statute 'adopted the common law as of the date of the signing of the Declaration of Independence',<sup>31</sup> it was to explain why English cases on sovereign immunity decided post-1776 were irrelevant to its decision. North Carolina courts had long since gone their own way. The process continues to this day. After piously claiming in a 1967 case that 'no state has been more faithful to *stare decisis*',<sup>32</sup> the State Supreme Court proceeded to eliminate the century-old immunity of charities to actions in tort, a reform the legislature belatedly codified.<sup>33</sup> And at the very end of the 20<sup>th</sup> century, the Court held the year-and-a-day rule in criminal law, plainly set out in Blackstone's *Commentaries*,<sup>34</sup> to be (or perhaps to have become) 'obsolete'.<sup>35</sup>

As throughout the common law world, the initiative in legal change passed from courts to legislatures. In North Carolina, the General Assembly became the principal agent of common law development. In 1987, for example, it ended the long reign of the Rule in *Shelley's Case*<sup>36</sup> with the laconic sentence: 'The rule of property known as the rule in *Shelley's Case* is abolished.'<sup>37</sup> Similarly in 2012, the legislature abolished 'the rule of property known as the Rule in *Dumpor's Case*'<sup>38</sup> — in both

<sup>30</sup> Samuel Mordecai, *Law Lectures: A Treatise, From a North Carolina Standpoint, on Those Portions of the First and Second Book of the Commentaries of Sir William Blackstone Which Have Not Become Obsolete in the United States* (Edwards & Boughton Printing, first published 1907, Commercial Printing, 2<sup>nd</sup> ed, 1916). See also John Manning, *Commentaries on the First Book of Blackstone* (University of North Carolina Press, 1899). For a general discussion of Blackstone's influence in the State, see John V Orth, 'Blackstone's Ghost: Law and Legal Education in North Carolina' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 125.

<sup>31</sup> *Steelman v City of New Bern*, 184 SE 2d 239 (NC, 1971).

<sup>32</sup> *Rabon v Rowan Memorial Hospital*, 152 SE 2d 485 (Sharp CJ) (NC, 1967).

<sup>33</sup> See Anna R Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (University of North Carolina Press, 2008) 281–7.

<sup>34</sup> Blackstone, above n 18, vol 4, 197–8.

<sup>35</sup> *State v Vance*, 403 SE 2d 495, 499 (NC, 1991).

<sup>36</sup> *Wolfe v Shelley* (1581) 1 Co Rep 93b; 76 ER 206 ('*Shelley's Case*').

<sup>37</sup> NC Gen Stat § 41-6.3. See John V Orth, 'Requiem for the Rule in *Shelley's Case*' (1989) 67 *North Carolina Law Review* 681. See also John V Orth, *Reappraisals in the Law of Property* (Ashgate Publishing, 2010) ch 2.

<sup>38</sup> NC Gen Stat § 41-6.4. See John V Orth, 'North Carolina Bids Goodbye (Again) to the Rule in *Dumpor's Case*' (2013) 35 *Campbell Law Review* 193.

cases making reference to the common law a continuing necessity in order to know what exactly was abolished.<sup>39</sup>

Not only does the General Assembly repeal old common law rules, but it also creates new causes of action, such as equitable distribution of marital property on divorce<sup>40</sup> and the ‘constitutional tort’ of state violation of individual rights.<sup>41</sup> Nonetheless, there remains a question to this day whether the legislature may constitutionally eliminate a common law cause of action. As our Supreme Court put it in 1983: ‘We refrain from holding, as our Court of Appeals did and as other courts have done, that the legislature may constitutionally abolish altogether a common law cause of action.’<sup>42</sup> ‘Neither do we mean to say’, the Court unhelpfully added, ‘that it cannot.’<sup>43</sup> Perhaps for this reason, the State still recognises the anachronistic torts of alienation of affections<sup>44</sup> and criminal conversation.<sup>45</sup>

<sup>39</sup> Cf AW Brian Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) 41: ‘When I studied property law in Oxford in 1952 we still had to know what [the Rule in *Shelley’s Case*] was, since otherwise, it was argued with perverse but yet compelling logic, we could not understand what precisely had been abolished.’ The General Assembly stumbled when it attempted a similar sweep of the Doctrine of Worthier Title. In 1974 it adopted a statute simply providing: ‘The common-law doctrine of worthier title, both the wills branch and the deeds branch, is hereby abolished’, which was codified in NC Gen Stat § 28A-1-2. Uncertainty about what exactly that meant led five years later to its repeal and the adoption of the current statute:

The law of this State does not include: (i) the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to his own heirs, or (ii) a presumption or rule of interpretation that a grantor or testator does not intend, by a grant, devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant, devise or bequest of a legal or equitable interest to a grantor’s or testator’s own heirs or next to kin, however designated, shall be determined by the general rules applicable to the interpretation of grants or wills.

NC Gen Stat § 41-6.2(a).

<sup>40</sup> NC Gen Stat §§ 50-20, 50-21.

<sup>41</sup> *Corum v University of North Carolina*, 413 SE 2d 276 (NC, 1992).

<sup>42</sup> *Lamb v Wedgwood South Corp*, 302 SE 2d 868, 882 (NC, 1983).

<sup>43</sup> *Ibid.*

<sup>44</sup> 2 Lee, *North Carolina Family Law* § 207 (1980) 553–4: ‘An action for alienation of affections is comprised of wrongful acts which are said to deprive a married person of the affections of his or her spouse, including love, society, companionship and comfort.’ According to *North Carolina Lawyers Weekly*, ‘there are more than 200 alienation of affections cases currently in the state’s Superior Courts’: Phillip Bantz, ‘One Heart-Balm Challenge Ends in N.C., Another Begins’, *North Carolina Lawyers Weekly* (Charlotte, North Carolina), 4 February 2013, 1–3.

<sup>45</sup> See Blackstone, above n 18, vol 3, 139:

Adultery, or criminal conversation with a man’s wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are properly increased or diminished by circumstances ...

The interaction between statute and common law in North Carolina is complex.<sup>46</sup> A statute may incorporate the common law by reference; the crimes of arson and burglary, for example, remain by statute ‘as defined at the common law’,<sup>47</sup> while robbery is prosecuted to this day without any statutory authorisation.<sup>48</sup> A statute may codify a judicial decision that changed the common law, such as the statute that abolished the defence of charitable immunity in tort immediately after the Supreme Court had abandoned it.<sup>49</sup> A statute may even direct the judges to develop the common law. Deposit accounts, for example, that do not conform to the statutory norm are governed ‘by other common law provisions of the General Statutes or the common law as appropriate’,<sup>50</sup> and several statutes direct the courts to be guided by ‘the principles of common law as they may be applied in the light of reason and experience’.<sup>51</sup>

Reliance on precedent continues to be the primary form of judicial reasoning. Even when deciding a case concerning a statute, North Carolina courts commonly cite a prior judicial decision rather than the statute itself. Occasionally, this leads to a line of cases that rely on a statute that has been subsequently amended or even repealed.<sup>52</sup> It would be possible to dismiss such cases as sloppy judging, but they may also be seen as examples of the persistence of the common law habit of looking for law in the prior decisions of judges, rather than in the acts of legislators.

The complex interaction between constitution, statute and case that began in North Carolina after Independence continues into the 21<sup>st</sup> century. In 2004, the State Supreme Court finally admitted that ‘North Carolina common law may be modified or repealed by the General Assembly’, but cautioned that this does not include ‘any parts of the common law which are incorporated in our Constitution’,<sup>53</sup> without

<sup>46</sup> A word search of the State’s *General Statutes* reveals that the term ‘common law’ appears in statutes over 150 times.

<sup>47</sup> NC Gen Stat §§ 14-51 (burglary), 14-58 (arson).

<sup>48</sup> *State v Black*, 209 SE 2d 458, 460 (NC, 1974), defining robbery at common law, and stating that a statute that imposes more severe punishment if firearms are used in the perpetration of the crime creates no new offense.

<sup>49</sup> NC Gen Stat § 1-539.9. ‘The common law defence of charitable immunity is abolished and shall not constitute a valid defence to any action or cause of action [arising after 1 September 1967].’ See *Rabon v Rowan Memorial Hospital*, 152 SE 2d 485 (NC, 1967).

<sup>50</sup> NC Gen Stat § 53-146.1.

<sup>51</sup> *Ibid* §§ 130A-26.1, 143-215.6B, 143-215.114B.

<sup>52</sup> See, eg, *Re Woodie*, 448 SE 2d 142, 145 (NC Ct App, 1994); *Re Lowery*, 423 SE 2d 861, 864 (NC Ct App, 1993). See *Re McCray*, 697 SE 2d 526 (NC Ct App, 2010), recognising that prior cases indirectly relied on repealed statute.

<sup>53</sup> *Rhyne v K-Mart Corp*, 594 SE 2d 1, 16 (NC, 2004) (internal quotation marks eliminated), quoting *Gwathmey v State ex rel Department of Environment, Health, and Natural Resources*, 464 SE 2d 674, 679 (NC, 1995). Cf *Pinkham v Unborn Children of Jather Pinkham*, 40 SE 2d 690, 692 (NC, 1946): ‘No person has a vested right in a continuance of the common or statute law’.

specifying what parts they are. In 2011, a statute invited — because it could not compel — the judges to revisit and overrule a prior constitutional decision.<sup>54</sup> And in 2012, the North Carolina Court of Appeals quoted Blackstone as authority for just how much (or how little) ‘entry’ was sufficient in a prosecution for breaking and entering.<sup>55</sup>

North Carolina law today is the common law — but, then again, it is not. Parts would be familiar to Blackstone. But it is not the English common law of the 18<sup>th</sup> century, let alone that of modern England. Nor is it identical to the common law of other American states. And parts would be totally unrecognisable in the common law world outside the United States. North Carolina common law today is what late 18<sup>th</sup> century English common law could have developed into — and in one corner of the old British Empire did.

<sup>54</sup> Act of 8 March 2011, ch 2011-6, 2011 NC Sess Laws, urging the State Supreme Court to revisit and overrule *State v Carter*, 370 SE 2d 553 (NC, 1988), which refused to recognise an exception to the exclusionary rule in cases in which the officer conducting the search acted in a good faith, but mistaken, belief it was lawful. The State Supreme Court sidestepped the issue in *State v Heien*, 737 SE 2d 351 (NC, 2012), affd 135 SC 530 (2014).

<sup>55</sup> *State v Watkins*, 720 SE 2d 844, 849 (NC Ct App, 2012), quoting Blackstone, above n 18, vol 4, 227.

Gary Edmond\*

## WHAT LAWYERS SHOULD KNOW ABOUT THE FORENSIC ‘SCIENCES’

### ABSTRACT

Recent and authoritative reports from the US, Canada and the United Kingdom question many types of forensic science and medicine evidence used routinely in criminal proceedings across the common law world. This article reviews recent reports produced by the National Academy of Sciences (US), the National Institute of Standards & Technology and National Institute of Justice (US), Lord Campbell in Scotland, and Justice Goudge in Ontario, in order to assess their implications for expert evidence and legal practice in Australia. The article suggests that Australian legal institutions have not performed well in response to forensic science and medicine evidence and remain largely oblivious to serious epistemic infirmities.

### I THE WORLD OF (FORENSIC SCIENCES) TURNED UPSIDE DOWN

The bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions, and the courts have been utterly ineffective in addressing this problem. For a variety of reasons — including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and the common lack of scientific expertise among judges and lawyers who

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must try to comprehend and evaluate forensic evidence — the legal system is ill-equipped to correct the problems of the forensic science community.<sup>1</sup>

Until recently, courts in most jurisdictions admitted almost all of the forensic science and medicine evidence adduced by the State. There were few challenges to this evidence and, as it turns out, remarkably few effective challenges. The liberal admission and use of incriminating ‘expert’ opinions seems to have been based on long-standing trust invested by judges (and jurors) in forensic practitioners,<sup>2</sup> a gradual weakening of exclusionary rules, and a related confidence in the accusatorial trial’s mechanisms for identifying and conveying evidentiary weakness.<sup>3</sup> However, trials and appeals have not performed well. They have not held forensic analysts to account and have not, systematically or otherwise, exposed and addressed pervasive and profound epistemic problems plaguing the contemporary forensic sciences. Trial and appellate judges, and presumably jurors, seem to have accepted that forensic analysts were generally proffering opinions derived from scientifically predicated techniques, where highly qualified analysts had rigorously followed research-based protocols. In many cases, and perhaps most, they were wrong to do so. It is significant, as this essay explains, that no court in any jurisdiction independently arrived at the conclusions produced by the Committee on Identifying the Needs of the Forensic Science Community assembled by the National Academy of Sciences (United States) reproduced above.

This essay reviews recent inquiries into the forensic sciences and medicine across the Anglophone world.<sup>4</sup> Spanning several advanced common law jurisdictions and ranging from general reviews of the forensic sciences to more focused inquiries into paediatric forensic pathology and even the controversy created by a questioned latent fingerprint attribution, the inquiries are remarkably consistent in their findings

<sup>1</sup> Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) 53 (‘NRC Report’).

<sup>2</sup> The word ‘expert’ is italicised or featured with scare quotes because in many circumstances we do not know if the relevant individuals actually possess expertise or special abilities.

<sup>3</sup> The weakening of exclusionary rules, often associated with free proof (ie the admission of all logically relevant evidence), is conventionally associated with Jeremy Bentham (1748–1832), and more recently the work of Sir Rupert Cross and Larry Laudan. See, eg, Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2005).

<sup>4</sup> While the reports are drawn exclusively from common law jurisdictions, many of the epistemic problems and issues apply in other systems, including ‘inquisitorial’ systems — where there are often few possibilities to realistically challenge the evidence produced by a court-appointed expert. See Gary Edmond and Joelle Vuille, ‘Comparing the Use of Forensic Science Evidence in Australia, Switzerland and the United States: Transcending the Adversarial/Non-Adversarial Dichotomy’ (2014) 54 *Jurimetrics Journal* 221.

and recommendations.<sup>5</sup> Each inquiry identifies serious and pervasive problems with forensic science and medicine evidence, the practices behind them, as well as organisational structures and management. Simultaneously, they explain or imply that lawyers and judges have not appreciated the magnitude or prevalence of these issues and so have been correspondingly ineffective in their practice. Having reviewed reports of inquiries from the US, Scotland and Canada, Part III of the essay turns to consider some of the unsettling implications for both accusatorial trial systems in general and Australian legal practice in particular. In doing so, the essay confronts and rejects the contention that the forensic sciences in Australia should be considered exceptional.

The title of this essay uses the term ‘forensic sciences’ rather than the singular ‘science’. The distinction is significant. It is important to recognise variation across the forensic sciences.<sup>6</sup> The many problems and issues confronting the forensic sciences and medicine are not evenly distributed. Complicating things considerably, there is no simple correlation between longevity or legal acceptance of techniques and derivative opinions and their validity and reliability. Some of the oldest techniques (eg latent fingerprint comparison) never became scientific. Some of the most recent techniques are among the most reliable and some of the concerns raised in the reports infect even techniques built on contemporary biology (eg DNA profiling), toxicology and chemistry (eg CG-MS). For even techniques that are demonstrably reliable are often applied and practiced in ways that are insufficiently attentive to the limits of validation and risks posed by human factors — particularly contextual bias and the cross-contamination of evidence. Forensic science and medicine evidence also, and inescapably, depends on collection practices and chains of custody.<sup>7</sup> Consequently, the various reports and their recommendations offer a wake-up call of general application. They raise profound questions and difficulties concerning the continuing use of forensic science and medicine evidence, as the many problems, uncertainties and threats are addressed, and in some cases the necessary research is retrospectively attempted.

What we should do now, and how we should respond to decades of convictions based on questionable techniques and exaggerated incriminating opinions (mis)portrayed as ‘expert’, ‘scientific’ and/or ‘reliable’, is far from obvious. The question of whether lawyers and judges are capable of domesticating the forensic sciences and what they should do given the inadequacies of historical performances is again, unclear. Bumbling along, as we appear to have done for more than a century, seems not merely misguided but, in the wake of the collective weight of these and other reports,

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<sup>5</sup> The ‘voice’ in Part II reflects the tone of the reports. The author’s voice appears in the residual sections.

<sup>6</sup> These are discussed in Part II and Part III, especially Part III(A).

<sup>7</sup> The meaning ascribed to artefacts (as evidence) also depends on stories and assumptions, sometimes as mundane as who owned and wore an article of clothing or the cultures of sharing clothing amongst family and friends. See, eg, Michael Lynch et al, *Truth Machine: The Contentious History of DNA Finger-Printing* (University of Chicago Press, 2008).



undesirable.<sup>8</sup> Simultaneously, it threatens the legitimacy of traditional criminal justice institutions.

For those who wonder whether these recent reports exaggerate the apparently parlous condition of many areas of forensic science and medicine, I direct their attention to the various authors and committees.<sup>9</sup> Most of these inquiries and reports had eminent lawyers and judges centrally involved (eg Judge Edwards as Co-Chair, Lord Campbell as Commissioner and Justice Goudge as Commissioner).<sup>10</sup> The reference to judicial participants is not merely an appeal to legal authority, but rather an admonition to

<sup>8</sup> See, eg, Manitoba, Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Queen’s Printer, 2007) (Chair: Patrick LeSage); Ministry of the Attorney General, Ontario, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Queen’s Printer, 1998) (Chair: Fred Kaufman). Going slightly further back we might consider: Sir John May, *Final Report: Return to an Address of the Honourable the House of Commons dated 30 June 1994 for a Report into the Circumstances Surrounding the Conviction Arising Out of the Bomb Attacks in Guildford and Woolwich in 1974* (London: HMSO 1994); Viscount Runciman, *Royal Commission on Criminal Justice*, (London: HMSO, 1993); Paul Roberts, Chirs Wilmore and Gywnn Davis, *The Role of Forensic Science Evidence in Criminal Proceedings: Royal Commission on Criminal Justice Research Study No 11* (London: HMSO, 1993); Trevor Rees Morling, *Report of the Commissioner the Hon Mr Justice TR Morling: Royal Commission of Inquiry into the Chamberlain Convictions* (Government Printer, 1987); Carl R Shannon, *Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt* (Government Printer, Adelaide, 1984). On ‘bumbling along’, Cf Charles Lindblom, ‘The Science of Muddling Through’ (1959) 19 *Public Administration Review* 79.

<sup>9</sup> The reader might also be interested in some of the preceding research and reviews see, eg, D Michael Risinger, Mark P Denbeaux and Michael J Saks, ‘Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lesson of Handwriting “Expertise”’ (1989) 137 *University of Pennsylvania Law Review* 731; Michael D Risinger et al, ‘The *Daubert/Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion’ (2002) 90 *California Law Review* 1; Michael Saks and Jonathan J Koehler, ‘The Coming Paradigm Shift in Forensic Identification Science’ (2005) 309 *Science* 892; Margaret Berger, ‘What Has a Decade of *Daubert* Wrought?’ (2005) 95 *American Journal of Public Health* S59; Margaret Berger, ‘Expert Testimony in Criminal Proceedings: Questions *Daubert* Does Not Answer’ (2003) 33 *Seton Hall Law Review* 1125; David L Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* (WH Freeman, 1999); Erica Beecher-Monas, *Evaluating Scientific Evidence: An Interdisciplinary Framework for Intellectual Due Process* (Cambridge University Press, 2007); Kelly Pyrek, *Forensic Science under Siege: The Challenges of Forensic Laboratories and the Medico-Legal Investigation System* (Academic Press, 2007).

<sup>10</sup> See also Ian Binnie, ‘Science in the Courtroom: The Mouse that Roared’ (2008) 27(2) *Advocates Society Journal* 11; Lord Leveson, ‘Expert Evidence in Criminal Courts — the Problem’ (Lecture to the Forensic Science Society, UK, November 2010); Judge Nancy Gertner, ‘The Need for a Research Culture in the Forensic Sciences’ (2011) 58 *UCLA Law Review* 789, 798; Lord Thomas, Chief Justice of England, ‘Expert Evidence and the Future of Forensic Science in Criminal Trials’ (Criminal Bar Association Kalisher Lecture, 14 October 2014).



consider the findings of senior lawyers and, very importantly, others who have devoted considerable attention to the issues. On this point, it is informative to reproduce the reflections of Judge Harry T Edwards, Senior Circuit Judge and Chief Judge Emeritus for the United States Court of Appeals for the District of Columbia Circuit. Writing about his experiences chairing the multidisciplinary committee responsible for the epigraph at the beginning of this essay, Edwards explained:

I started this project with no preconceived views about the forensic science community. Rather, I simply assumed, as I suspect many of my judicial colleagues do, that forensic science disciplines typically are well-grounded in scientific methodology and that crime laboratories and forensic science practitioners follow proven practices that ensure the validity and reliability of forensic evidence offered in court. I was surprisingly mistaken ...<sup>11</sup>

Given the breadth and depth of the reports, in combination with the range and number of eminent individuals involved in producing them, it seems just as inappropriate to adhere steadfastly to preconceived views as it is to dismiss their findings and recommendations pre-emptively.

For those who might contend that this essay exaggerates the findings and recommendations, I have intentionally included a considerable number of extracts and references, such that many of the findings, criticisms and recommendations are expressed in the words of actual commissioners and committees. I would, nevertheless, encourage any would-be sceptic to finger through the reports themselves.

#### *A Introduction to the Reports*

This essay reviews four reports focused on the forensic sciences and/or forensic medicine, namely: *Strengthening Forensic Science in the United States: A Path Forward* ('NRC Report'), *The Scottish Fingerprint Inquiry Report* ('SFI Report'), *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* ('NIST Report') and the *Inquiry into Pediatric Forensic Pathology in Ontario* ('Goudge Report').<sup>12</sup> Two of the reports emerged from the US, one from Scotland and the fourth from Canada. The essay endeavours to present the reader

<sup>11</sup> Harry T Edwards, 'Solving the Problems That Plague the Forensic Science Community' (2009) 50 *Jurimetrics Journal* 5, 7. See also Harry T Edwards, 'The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar' (2010) 51 *Jurimetrics Journal* 1.

<sup>12</sup> Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) ('NRC Report'); Lord Campbell, *The Fingerprint Inquiry Report* (APS Group Scotland, 2011) ('SFI Report'); Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (US Department of Commerce, National Institute of Standards and Technology, 2012) ('NIST Report'); Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology* (Queen's Printer, 2008) ('Goudge Report').

with an overview of the four reports in order to convey the remarkable consistency in both the depth and types of problems they describe, as well as the recommendations advanced by diffuse committees and commissioners from quite different common law jurisdictions. What follows focuses primarily on the findings and recommendations pertaining to scientific and medical evidence.

The inquiries and reports are all recent, published between 2008 and 2012 respectively. They arose from a range of mistakes, published scholarly concerns and from the impact of new technologies. The emergence of DNA profiling, with its rigorous mainstream scientific foundation and serendipitous value for criminal justice systems, threw an unexpected and, as it turns out, somewhat unwelcome light on many aspects of practice in the forensic sciences and medicine. In combination with the work of Innocence Projects, and in particular, the refinement of DNA profiling (through reforms to the collection, handling, processing, and the application of population genetics and statistics), these developments produced greater awareness of the frailties of many forms of forensic science. Simultaneously, they illuminated the performance of expert witnesses and prosecutors — and indirectly juries and judges — as convictions predicated upon speculative, exaggerated and mistaken forensic science and medicine evidence were painstakingly overturned.<sup>13</sup> Most of the reports discussed in this essay emerged in response to problems (or mistakes) associated with latent fingerprint evidence.<sup>14</sup> The NRC and NIST Reports were, in part, responses to the FBI’s mistaken attribution of a latent print recovered from a fragment of a train bomb in Madrid to Brandon Mayfield.<sup>15</sup> Lord Campbell’s inquiry into fingerprint evidence in the McKie case followed protracted controversy surrounding an attribution by a Scottish fingerprint bureau. The fourth, the Goudge Inquiry, flowed from a series of mistakes and wrongful convictions associated with flawed forensic pathology evidence in Ontario.

This essay is written for a legal audience, primarily lawyers and judges exposed to forensic science and medicine evidence in the course of their practice. It aims to encourage prosecutors to reconsider their professional obligations and performances as ‘ministers of justice’, to embolden defence lawyers to challenge techniques and opinions that have not been evaluated (even if they have been uncritically accepted for decades) and to pay close attention to analytical processes and reports, and for

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<sup>13</sup> Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence* (New American Library, 2003); Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2011).

<sup>14</sup> The focus on fingerprints is revealing because fingerprint comparison is one of the oldest of the institutionalised forensic sciences, remains in widespread use, has an iconic status, and is still presented (and understood) as basically infallible evidence of identity. See Federal Bureau of Investigation, *The Science of Fingerprints: Classification and Uses* (Department Of Justice, 1984). Three of the reports directly challenge this status. See generally Simon A Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard University Press, 2001).

<sup>15</sup> See generally Office of the Inspector General, US Department of Justice, *A Review of the FBI’s Handling of the Brandon Mayfield Case* (2006).

judges to begin to refine their admissibility jurisprudence and temper their, apparently misguided, confidence in the protections afforded by trial safeguards.<sup>16</sup> For regardless of what the institutionalised forensic sciences and medicine do in response to these reviews and recommendations, lawyers and judges would seem to be *on notice*.<sup>17</sup>

## II INSIGHTS FROM THE UNITED STATES, SCOTLAND AND CANADA

### *A Strengthening Forensic Science in the United States (2009)*

The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country. This can only be done with effective leadership at the highest levels of both federal and state governments, pursuant to national standards, and with a significant infusion of federal funds.<sup>18</sup>

The most important, most authoritative and most disruptive of the recent inquiries and reports is a broad ranging independent review undertaken in the United States.<sup>19</sup> In 2006, Congress authorised the National Academy of Sciences ('NAS') to undertake a review of the forensic sciences.<sup>20</sup> The NAS assembled a multidisciplinary committee from its National Research Council ('NRC') — the Committee on Identifying the Needs of the Forensic Science Community ('the NRC Committee') — composed of statisticians, a judge (Edwards), law professors, a chemist, forensic scientists, an engineer, biologists, computer scientists and a medical examiner.<sup>21</sup> The Committee's report, *Strengthening Forensic Science in the United States: A Path*

<sup>16</sup> It provides something of an evidentiary background to the arguments advanced in Gary Edmond, 'Specialised Knowledge, the Exclusionary Discretions and Reliability: Reassessing Incriminating Expert Opinion Evidence' (2008) 31 *University of New South Wales Law Journal* 1; Gary Edmond, 'The Admissibility of Forensic Science and Medicine Evidence under the Uniform Evidence Law' (2014) 38(3) *Criminal Law Journal* 136; Gary Edmond, '(Ad)Ministering Justice: Expert Opinion Evidence and the Professional Responsibilities of Prosecutors' (2013) 36 *University of New South Wales Law Journal* 921.

<sup>17</sup> In some ways the situation is reminiscent of the constructive knowledge (and responsibility) imputed in tobacco litigation. For an overview, see Robert N Proctor, *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (University of California Press, 2012).

<sup>18</sup> NRC Report, above n 12, xx.

<sup>19</sup> Interestingly, the National Institute of Justice ('NIJ') undertook an inquiry a decade before the NRC review. See NIJ, US Department of Justice, *Forensic Sciences: Review of Status and Needs* (Gaithersburg, Maryland, February 1999). The earlier report acknowledges some of the limitations but represents insiders' perspectives and is far less critical.

<sup>20</sup> *Science, State, Justice, Commerce and Related Agencies Appropriations Act of 2006*, Pub Law No 109-108, 119 Stat 2290 (2005).

<sup>21</sup> NRC Report, above n 12, v.

*Forward* (known variously as the NAS or NRC Report) followed a multi-year inquiry involving consultations and submissions.<sup>22</sup>

The report begins by introducing the reader to the fact that that ‘[t]he term “forensic science” encompasses a broad range of disciplines’ exhibiting ‘wide variability with regard to techniques, methodologies, reliability, level of error, research, general acceptability, and published material’.<sup>23</sup> They range from laboratory-based disciplines to those based on the interpretation of patterns. Consequently, the term applies to ‘a broad array of activities, with the recognition that some of these activities might not have a well-developed research base, are not informed by scientific knowledge, or are not developed within the culture of science.’<sup>24</sup>

The NRC Committee found the existing system of forensic sciences to be fragmented and inconsistent. Having acknowledged variation, along with the fact that many large state and federal laboratories were better resourced and staffed than the myriad of smaller laboratories and police departments, the NRC Committee found the general absence of ‘meaningful’ standards to be disconcerting:

Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place (eg SWG standards), they often are vague and not enforced in any meaningful way. In short, the quality of forensic practice in most disciplines varies greatly because of the absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight. These shortcomings obviously pose a continuing and serious threat to the quality and credibility of forensic science practice.<sup>25</sup>

The problems, however, ran deeper. The absence of standards and, in many cases, constraints on practice followed the widespread paucity of research and a research culture:

<sup>22</sup> Ibid 37, 40–3, 44–8. According to the NRC Report, the inquiry was commissioned in the aftermath of the FBI’s mistaken attribution of a fingerprint on a bomb in Madrid, coincident with ‘the growing number of exonerations resulting from DNA analysis’, the ‘greater expectations for precise forensic science evidence raised by DNA testing [forcing] new scrutiny on other forensic techniques’, chronic underfunding and case backlogs, emerging criticisms from beyond the forensic science communities, disquieting episodes of hubris and fraud and even the impact of media and CSI.

<sup>23</sup> Ibid 38.

<sup>24</sup> Ibid 39, 182, 188. On this last point see Jennifer L Mnookin et al, ‘The Need for a Research Culture in the Forensic Sciences’ (2011) 58 *UCLA Law Review* 725; David A Harris, *Failed Evidence: Why Law Enforcement Resists Science* (New York University Press, 2012).

<sup>25</sup> NRC Report, above n 12, 6 (citations omitted). ‘SWG’ is the acronym for Scientific Working Group.

Little rigorous systematic research has been done to validate the basic premises and techniques in a number of forensic science disciplines. The committee sees no evident reason why conducting such research is not feasible ...<sup>26</sup>

The lack of systematic research was, and remains, a serious problem. It is problematic because many of the forensic science disciplines proffer interpretations that are not supported by research. Prominent examples are comparison and pattern recognition techniques, often associated with identification. Many types of ‘identification’ evidence (eg those relying on images, voices, hair and fibres, tool and bite marks, ballistics, documents, foot, shoe and tyre marks, fingerprints and so on) purport to ‘match’ a trace with a specific source.<sup>27</sup> The NRC Committee was sceptical about such claims:

Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about ‘individualization’ (sometimes referred to as ‘matching’ a specimen to a particular individual or other source) or about classification of the source of the specimen into one of several categories. *With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.* In terms of scientific basis, the analytically based disciplines generally hold a notable edge over disciplines based on expert interpretation. But there are important variations among the disciplines relying on expert interpretation. For example, there are more established protocols and available research for fingerprint analysis than for the analysis of bite marks. ... *The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem.* Although research has been done in some disciplines, *there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.*<sup>28</sup>

The NRC Committee found the institutionalised forensic sciences to be under-resourced and to maintain ‘thin ties to an academic research base that could support the forensic science disciplines and fill knowledge gaps.’<sup>29</sup> Though, of ‘the various facets of under resourcing, the committee [was] most concerned about the knowledge base’:<sup>30</sup>

A body of research is required to establish the limits and measures of performance and to address the impact of sources of variability and potential bias.

<sup>26</sup> Ibid 189.

<sup>27</sup> Ibid 183.

<sup>28</sup> Ibid 7–8, 87, 100, 128 (emphasis added). See also 42: ‘The fact is that many forensic tests — such as those used to infer the source of toolmarks or bite marks — have never been exposed to stringent scientific scrutiny.’

<sup>29</sup> Ibid 15.

<sup>30</sup> Ibid. On the need for collaboration with ‘broader science and engineering communities’, see 189.



Such research is sorely needed, but it seems to be lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics.<sup>31</sup>

When it came to legal reliance on forensic science evidence, the NRC Committee’s assessment was stark:

The law’s greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether — and to what extent — there is *science* in any given forensic science discipline.

Two very important questions should underlie the law’s admission of and reliance upon forensic evidence in criminal trials: (1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings and (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards. These questions are significant. *Thus, it matters a great deal whether an expert is qualified to testify about forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder’s reliance on the truth that it purports to support. Unfortunately, these important questions do not always produce satisfactory answers in judicial decisions pertaining to the admissibility of forensic science evidence proffered in criminal trials.*<sup>32</sup>

During the course of its deliberations the NRC Committee came to the conclusion that ‘truly meaningful advances will not come without significant concomitant leadership from the federal government.’<sup>33</sup> Recognising that the ‘forensic science enterprise lacks the necessary governance structure to pull itself up from its current weaknesses’ it recommended establishing a new national institute to begin the ‘substantial improvement’ required to place forensic science and medicine on a firm scientific foundation.<sup>34</sup> The NRC Committee advocated strong and independent leadership and governance, closely connected with the ‘Nation’s scientific research base’.<sup>35</sup> For the Committee it was vital that any ‘entity that is established to govern the forensic science community cannot be principally beholden to law enforcement’, rather ‘it must be equally available to law enforcement officers, prosecutors, *and* defendants in the criminal justice system.’<sup>36</sup> This led to the first of the NRC Committee’s 13 recommendations:

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<sup>31</sup> Ibid 8.

<sup>32</sup> Ibid 9, 43, 87, 111 (emphasis added).

<sup>33</sup> Ibid 16.

<sup>34</sup> Ibid 16, 37.

<sup>35</sup> Ibid 16.

<sup>36</sup> Ibid 17.



To promote the development of forensic science into a mature field of multidisciplinary research and practice, founded on the systematic collection and analysis of relevant data, Congress should establish and appropriate funds for an independent federal entity, the National Institute of Forensic Science (NIFS).<sup>37</sup>

The NRC Committee proposed the following as ‘minimum criteria’ for the national institute:

- It must have a culture that is strongly rooted in science, with strong ties to the national research and teaching communities, including federal laboratories.
- It must have strong ties to state and local forensic entities as well as to the professional organizations within the forensic science community.
- It must not be in any way committed to the existing system, but should be informed by its experiences.
- It must not be part of a law enforcement agency.
- It must have the funding, independence, and sufficient prominence to raise the profile of the forensic science disciplines and push effectively for improvements.
- It must be led by persons who are skilled and experienced in developing and executing national strategies and plans for standard setting; managing accreditation and testing processes; and developing and implementing rulemaking, oversight, and sanctioning processes.<sup>38</sup>

Accordingly, NIFS would be obliged to address deficiencies and ‘focus on’:

- a) establishing and enforcing best practices for forensic science professionals and laboratories;
- b) establishing standards for the mandatory accreditation of forensic science laboratories and the mandatory certification of forensic scientists and medical examiners/forensic pathologists — and identifying the entity/entities that will develop and implement accreditation and certification;
- c) promoting scholarly, competitive peer-reviewed research and technical development in the forensic science disciplines and forensic medicine;
- d) developing a strategy to improve forensic science research and educational programs, including forensic pathology;
- e) establishing a strategy, based on accurate data on the forensic science community, for the efficient allocation of available funds to give strong support to forensic methodologies and practices in addition to DNA analysis;
- f) funding state and local forensic science agencies, independent research projects, and educational programs as recommended in this report, with conditions that aim to advance the credibility and reliability of the forensic science disciplines;

<sup>37</sup> Ibid 19, 78 [Recommendation 1].

<sup>38</sup> Ibid 18–19.

- g) overseeing education standards and the accreditation of forensic science programs in colleges and universities;
- h) developing programs to improve understanding of the forensic science disciplines and their limitations within legal systems; and
- i) assessing the development and introduction of new technologies in forensic investigations, including a comparison of new technologies with former ones.<sup>39</sup>

NIFS would provide an important ‘interface between the forensic science and medical examiner communities and basic sciences’.<sup>40</sup>

In advocating a national institute the NRC Committee was conscious of the historical proximity of forensic science and medicine to law enforcement. It insists on distance and autonomy because the ‘best science is conducted in a scientific setting as opposed to a law enforcement setting.’<sup>41</sup> Recommendation 4 places firm and conspicuous emphasis on independence:

To improve the scientific bases of forensic science examinations and to maximize independence from or autonomy within the law enforcement community, Congress should authorize and appropriate incentive funds to the National Institute of Forensic Science (NIFS) for allocation to state and local jurisdictions for the purpose of removing all public forensic laboratories and facilities from the administrative control of law enforcement agencies or prosecutors’ offices.<sup>42</sup>

The NRC Committee characterises the identification of errors, their elimination and the estimation of remaining errors as ‘a key task’ for those designing validation studies ‘as well as for the analyst applying a scientific method to conduct a particular analysis’.<sup>43</sup>

All results for every forensic science method should indicate the uncertainty in the measurements that are made, and studies must be conducted that enable the estimation of those values. ... the accuracy of forensic methods resulting in classification or individualization conclusions needs to be evaluated in well-designed and rigorously conducted studies. The level of accuracy of an analysis is likely to be a key determinant of its ultimate probative value.<sup>44</sup>

The ‘existence of several types of potential error makes it absolutely critical ... to be explicit and precise in the particular rate or rates referenced in a specific setting.’<sup>45</sup>

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<sup>39</sup> Ibid 19–20.

<sup>40</sup> Ibid 189.

<sup>41</sup> Ibid 23.

<sup>42</sup> Ibid 24 [Recommendation 4].

<sup>43</sup> Ibid 116.

<sup>44</sup> Ibid 184, 122.

<sup>45</sup> Ibid 122.

Identifying and understanding error were linked to the ‘self-correcting nature of science’; particularly the need to be ‘as cautious as possible before asserting a new “truth”’ and advocating its adoption among the forensic sciences.<sup>46</sup>

The NRC Committee was also concerned about the variation and inconsistency of ‘terminology used in reporting and testifying about the results of forensic science investigations’, insisting that it ‘must be standardized’.<sup>47</sup>

[M]any terms are used by forensic examiners in reports and in court testimony to describe findings, conclusions, and the degrees of association between evidentiary material (eg hairs, fingerprints, fibers) and particular people or objects. Such terms include but are not limited to ‘match,’ ‘consistent with,’ ‘identical,’ ‘similar in all respects tested,’ and ‘cannot be excluded as the source of.’ The use of such terms can have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates evidence. Yet the forensic science disciplines have not reached agreement or consensus on the precise meaning of any of these terms. ... This imprecision in vocabulary stems in part from the paucity of research in forensic science and the corresponding limitations in interpreting the results of forensic analyses.<sup>48</sup>

Problems with terminology were linked to the lack of research, vague standards and deficient reporting. In response the NRC Committee recommended:

The National Institute of Forensic Science (NIFS), after reviewing established standards such as ISO 17025, and in consultation with its advisory board, should establish standard terminology to be used in reporting on and testifying about the results of forensic science investigations. Similarly, it should establish model laboratory reports for different forensic science disciplines and specify the minimum information that should be included. As part of the accreditation and certification processes, laboratories and forensic scientists should be required to utilize model laboratory reports when summarizing the results of their analyses.<sup>49</sup>

Because limitations with techniques and opinions were rarely disclosed and generally inconspicuous in reports and testimony, the NRC Committee insists that expert reports must be ‘complete and thorough’, containing ‘at minimum, “methods and materials,” “procedures,” “results,” “conclusions,” and, as appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (eg levels of confidence).’<sup>50</sup> Reports should provide sufficient detail ‘to enable a peer or other courtroom participant to understand and, if needed, question the sampling scheme, process(es) of analysis,

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<sup>46</sup> Ibid 125.

<sup>47</sup> Ibid 21.

<sup>48</sup> Ibid 185–6.

<sup>49</sup> Ibid 22 [Recommendation 2]. ISO 17025 is a generic standard for the testing and calibration of laboratories.

<sup>50</sup> Ibid 21, 186.

or interpretation.’<sup>51</sup> Reports and ‘courtroom testimony stemming from them, must include clear characterizations of the limitations of the analyses, including associated probabilities where possible.’<sup>52</sup>

The NRC Report draws conspicuous and unprecedented attention to the need for research into different types of bias and the potential for bias to affect the work of forensic scientists (and others in the criminal justice system).<sup>53</sup> Noting that in other areas of scientific and medical research and practice — such as biomedical clinical trials of treatment protocols and drugs — elaborate procedures are employed to minimise the threats posed by conscious and unconscious biases. The NRC Report refers to a number of sources of bias threatening the forensic sciences, including: the discounting of base rates; framing and suggestion; institutional pressures and urgency; seeing ‘patterns that do not actually exist’, and anchoring.<sup>54</sup> In implicit juxtaposition to practice across the forensic sciences, the NRC Report notes that ‘these sources of bias are well known in science, and a large amount of effort has been devoted to understanding and mitigating them.’<sup>55</sup> The NRC Report dismisses the contention that such biases can be overcome through character or experience. ‘Such biases are not’, as the NRC Committee explained, ‘the result of character flaws; instead they are common features of decision-making, and they cannot be willed away.’<sup>56</sup>

The NRC Committee observed that the forensic sciences could benefit from the large body of research on human performance (and human factors) in diagnostic medicine and cognitive science.<sup>57</sup> It simultaneously insisted on the need for forensic science disciplines ‘to develop rigorous protocols for performing subjective interpretations, and ... equally rigorous research and evaluation programs.’<sup>58</sup> Recommendation 5 embodies the NRC Committee’s response to the threats posed by bias:

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<sup>51</sup> Ibid 135.

<sup>52</sup> Ibid 186, 21–2. In contrast, they noted that:

Failure to acknowledge uncertainty in findings is common: Many examiners claim in testimony that others in their field would come to the exact same conclusions about the evidence they have analyzed. Assertions of a ‘100 percent match’ contradict the findings of proficiency tests that find substantial rates of erroneous results in some disciplines (ie voice identification, bite mark analysis)

at 47.

<sup>53</sup> See Gary Edmond et al, ‘Contextual Bias and Cross-Contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals’ (2015) 14 *Law, Probability and Risk* 1.

<sup>54</sup> NRC Report, above n 12, 122–4.

<sup>55</sup> Ibid 124.

<sup>56</sup> Ibid 122. See also Risinger et al, ‘The *Daubert/Kumho* Implications of Observer Effects in Forensic Science’, above n 9.

<sup>57</sup> NRC Report, above n 12, 8.

<sup>58</sup> Ibid 188.

The National Institute of Forensic Science (NIFS) should encourage research programs on human observer bias and sources of human error in forensic examinations. Such programs might include studies to determine the effects of contextual bias in forensic practice (eg studies to determine whether and to what extent the results of forensic analyses are influenced by knowledge regarding the background of the suspect and the investigator's theory of the case). In addition, research on sources of human error should be closely linked with research conducted to quantify and characterize the amount of error. Based on the results of these studies, and in consultation with its advisory board, NIFS should develop standard operating procedures (that will lay the foundation for model protocols) to minimize, to the greatest extent reasonably possible, potential bias and sources of human error in forensic practice. *These standard operating procedures should apply to all forensic analyses that may be used in litigation.*<sup>59</sup>

Validation studies, in conjunction with attention to error, uncertainty and threats from bias, would enable multidisciplinary groups to develop standards and protocols derived from relevant research. These are embodied in Recommendation 6:

To facilitate the work of the National Institute of Forensic Science (NIFS), Congress should authorize and appropriate funds to NIFS to work with the National Institute of Standards and Technology (NIST), in conjunction with government laboratories, universities, and private laboratories, and in consultation with Scientific Working Groups, to develop tools for advancing measurement, validation, reliability, information sharing, and proficiency testing in forensic science and to establish protocols for forensic examinations, methods, and practices. Standards should reflect best practices and serve as accreditation tools for laboratories and as guides for the education, training, and certification of professionals.<sup>60</sup>

Using examples from medical research and practice, the NRC Committee drew attention to the need for 'quality control, assurance, and improvement'.<sup>61</sup> The NRC Report explains the need for 'systematic and routine feedback' to facilitate 'continuous improvement'.<sup>62</sup> These needs are encapsulated in Recommendation 8:

Forensic laboratories should establish routine quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners. Quality control procedures should be designed to identify mistakes, fraud, and bias; confirm the continued validity and reliability of standard operating procedures and protocols; ensure that best practices

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<sup>59</sup> Ibid 24 (emphasis added).

<sup>60</sup> Ibid 24–5. On the value of standards, see 194, 201–6; on proficiency testing and certification, see 206–10.

<sup>61</sup> Ibid 25.

<sup>62</sup> Ibid.



are being followed; and correct procedures and protocols that are found to need improvement.<sup>63</sup>

According to the NRC Committee, the quality assurance regime should apply to both laboratories (accreditation) and individuals (certification):

Laboratory accreditation and individual certification of forensic science professionals should be mandatory, and all forensic science professionals should have access to a certification process. ... No person (public or private) should be allowed to practice in a forensic science discipline or testify as a forensic science professional without certification. Certification requirements should include, at a minimum, written examinations, supervised practice, proficiency testing, continuing education, recertification procedures, adherence to a code of ethics, and effective disciplinary procedures. All laboratories and facilities (public or private) should be accredited, and all forensic science professionals should be certified, when eligible, within a time period established by NIFS.<sup>64</sup>

Having criticised the guild-like systems operating in many areas of forensic science, the NRC Committee explained that ‘training should move beyond apprentice-like transmittal of practices to education based on scientifically valid principles.’<sup>65</sup> The NRC Committee was convinced that these are ‘best learned through formal education. Apprenticeship has a secondary role; under no circumstances can it supplant the need for the scientific basis of education and of the practice of forensic science.’<sup>66</sup> The NRC Committee was also concerned about the absence of ‘formal and systematically applied standards or standardization requirements for forensic science education programs, making the quality and relevance of existing programs uncertain.’<sup>67</sup> In response, Recommendation 10 places emphasis on attracting and funding graduate students in fields critical to the forensic sciences and to design programs that ‘cut across organizational, programmatic and disciplinary boundaries.’<sup>68</sup> Undertaking ‘research and exposure to research’ are characterised as ‘a critical component of an appropriate forensic science education.’<sup>69</sup> The need for formal education was explicitly extended to other legal actors, through support for ‘legal education programs for law students, practitioners, and judges.’<sup>70</sup> For

<sup>63</sup> Ibid 26.

<sup>64</sup> Ibid 25, 195–200. On ethics, see 212–4.

<sup>65</sup> Ibid 26–7, 217.

<sup>66</sup> Ibid 238. See also Michael J Saks and David L Faigman, ‘Failed Forensics: How Forensic Science Lost Its Way and How It Might Yet Find It’ (2008) 4 *Annual Review of Law & Social Science* 149.

<sup>67</sup> NRC Report, above n 12, 237.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid 230.

<sup>70</sup> Ibid 28, 234–7.



lawyers and judges often have insufficient training and background in scientific methodology, and they often fail to fully comprehend the approaches employed by different forensic science disciplines and the degree of reliability of forensic science evidence that is offered in trial.<sup>71</sup>

Moving from the general to the particular, the Report reviews a range of specific forensic science disciplines and practices. These include those dealing with biological evidence, controlled substances, friction ridge analysis, shoeprints and tyre tracks, tool mark and firearm identification, hair and fibre evidence, document examination, paint and coatings evidence, explosives evidence and fire debris, odontology, blood pattern analysis, digital and multimedia analysis. As we have seen, the Committee was generally critical of pattern recognition and comparison techniques, finding they frequently lack appropriate research, do not employ validated techniques or meaningful standards, do not provide any indication of limitations and errors, expose the analysts to information that has the potential to bias them, and that results tend to be expressed in forms that are often experientially-based or intuitive rather than from the statistical analysis of relevant data.<sup>72</sup>

The NRC Committee's reaction to friction ridge analysis (ie fingerprints, palm prints and sole prints) conspicuously influenced two of the reports considered below — the NIST and SFI Reports. In order to provide the reader with a flavour of the tone of the more narrowly focused sections, the following extract outlines the NRC Committee's primary concerns with friction ridge comparisons, particularly latent fingerprints.<sup>73</sup> As the 'Summary Assessment' explains, current practices tend to elide limitations and overstate the value of the evidence:

Historically, friction ridge analysis has served as a valuable tool, both to identify the guilty and to exclude the innocent. Because of the amount of detail available in friction ridges, it seems plausible that a careful comparison of two impressions can accurately discern whether or not they had a common source. *Although there is limited information about the accuracy and reliability of friction ridge analyses, claims that these analyses have zero error rates are not scientifically plausible.*

ACE-V provides a broadly stated framework for conducting friction ridge analyses.<sup>74</sup> However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the

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<sup>71</sup> Ibid 238.

<sup>72</sup> Ibid ch 5.

<sup>73</sup> Although 'latent' means invisible, it is ordinarily used to refer to chance or accidental impressions (often left at a crime scene or on an object). 'Patent' prints are those that are obvious to the human eye, and it is often used to refer to reference prints.

<sup>74</sup> ACE-V is the dominant friction ridge 'method'. The acronym stands for Analysis, Comparison, Evaluation, and Verification. See the discussion in Part II(B).

steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper by Haber and Haber presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: ‘We have reviewed available scientific evidence of the validity of the ACE-V method and found none.’

...

Error rate is a much more difficult challenge. Errors can occur with any judgment-based method, especially when the factors that lead to the ultimate judgment are not documented. Some in the latent print community argue that the method itself, if followed correctly (ie by well-trained examiners properly using the method), has a zero error rate. Clearly, this assertion is unrealistic, and, moreover, it does not lead to a process of method improvement. The method, and the performance of those who use it, are inextricably linked, and both involve multiple sources of error (eg errors in executing the process steps, as well as errors in human judgment).

Some scientific evidence supports the presumption that friction ridge patterns are unique to each person and persist unchanged throughout a lifetime. Uniqueness and persistence are necessary conditions for friction ridge identification to be feasible, but those conditions do not imply that anyone can reliably discern whether or not two friction ridge impressions were made by the same person. Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source. The impression left by a given finger will differ every time, because of inevitable variations in pressure, which change the degree of contact between each part of the ridge structure and the impression medium. None of these variabilities — of features across a population of fingers or of repeated impressions left by the same finger — has been characterized, quantified, or compared.<sup>75</sup>

The NRC Committee approvingly quoted a prominent legal scholar:

At present, fingerprint examiners typically testify in the language of absolute certainty. ... Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model

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<sup>75</sup> NRC Report, above n 12, 142–5 (emphasis added) (citations omitted), citing Lyn Haber and Ralph N Haber, ‘Scientific Validation of Fingerprint Evidence under *Daubert*’ (2008) 7 *Law, Probability and Risk* 87. On the issue of uniqueness, see NRC Report, above n 12, 188–9. See also Michael Saks and Jonathan J Koehler, ‘The Individualization Fallacy in Forensic Science’ (2008) 61 *Vanderbilt Law Review* 199; Simon A Cole, ‘Forensics without Uniqueness, Conclusions without Individualization: The New Epistemology of Forensic Identification’ (2009) 8 *Law, Probability and Risk* 233; Jonathan J Koehler and Michael J Saks, ‘Individualization Claims in Forensic Science: Still Unwarranted’ (2010) 75 *Brooklyn Law Review* 1187.

of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified ... Therefore ... fingerprint identification experts should exhibit a greater degree of epistemological humility. Claims of 'absolute' and 'positive' identification should be replaced by more modest claims about the meaning and significance of a 'match.'<sup>76</sup>

During the course of the inquiry the Committee recognised that many of the problems confronting the forensic sciences also applied to the 'medicolegal death investigation system'.<sup>77</sup> The NRC Committee was, once again, confronted and concerned by tremendous variation in qualifications, standards, and practices as well as the limited funding available to the medical examiner community and its counterparts.<sup>78</sup> There were, for example, 'no mandated national qualifications or certifications for death investigators.'<sup>79</sup> In addition to the need for more resources, through Recommendation 11, the NRC Committee advocated: converting the remaining coroners to medical examiner systems (dominated by qualified physicians, preferably pathologists); making 'death investigation ... clearly independent of law enforcement';<sup>80</sup> establishing a scientific working group ('SWG') for forensic pathology and medicolegal death investigation to 'develop and promote standards for "best practices, administration, staffing, education, training, and continuing education"'; the accreditation of medical examiner offices 'pursuant to NIFS-endorsed standards'; and all autopsies performed by 'board certified forensic pathologist[s]'.<sup>81</sup> The Report identified a conspicuous need for basic and translational pathology research.<sup>82</sup> Anticipating resistance, the Committee indicated that 'federal incentives' will be required to implement changes in each state.<sup>83</sup>

Overall, the NRC Report identifies and explains the pressing need for reform. The proposed national institute was a response to the poor performance and 'modest leadership' provided by the National Institute of Justice and the FBI Laboratory.<sup>84</sup>

<sup>76</sup> NRC Report, above n 12, 142, 184, quoting Jennifer Mnookin, 'The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate' (2008) 7 *Law, Probability and Risk* 127. More generally, see Cole, *Suspect Identities*, above n 14.

<sup>77</sup> NRC Report, above n 12, 265. The Report also recognises the important roles played by the forensic sciences in 'natural and human-made mass disasters' and in 'the gathering of effective and timely intelligence and investigative information on terrorists and terrorist groups.' See 33, 265, 279–85: Recommendation 13.

<sup>78</sup> *Ibid* 29–30.

<sup>79</sup> *Ibid* 264.

<sup>80</sup> *Ibid* 252.

<sup>81</sup> *Ibid* 29–30, 251–2. These structural recommendations are perhaps the least applicable of the various recommendations to Australia, and exemplify some important differences in medico-legal death investigation between the jurisdictions.

<sup>82</sup> *Ibid* 265.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* 78–9.



Neither ‘entity has recognized, let alone articulated, a need for change or a vision for achieving it.’<sup>85</sup> In addition, the NRC Report suggests that laboratories and their budgets should be ‘independent of or autonomous within law enforcement agencies’:<sup>86</sup>

The forensic science community needs strong governance to adopt and promote an aggressive, long-term agenda to help strengthen forensic science. Governance must be strong enough — and independent enough — to identify the limitations of forensic science methodologies and must be well connected with the Nation’s scientific research base in order to affect meaningful advances in forensic science practices. The governance structure must be able to create appropriate incentives for jurisdictions to adopt and adhere to best practices and promulgate the necessary sanctions to discourage bad practices. It must have influence with educators in order to effect improvements to forensic science education. It must be able to identify standards and enforce them.<sup>87</sup>

The NRC Report was not only concerned about the forensic sciences and the institutions responsible for their administration. The NRC Committee recommended a new national institute because lawyers and judges were considered incapable of providing the necessary supervision. In contrast to the usual legal valorisation of adversarial mechanisms and trial safeguards, the NRC Committee drew attention to the poor performance of courts and expressed doubts about the ability of legal institutions to substantially reform practice:

The report finds that the existing legal regime — including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence — is inadequate to the task of curing the documented ills of the forensic science disciplines. This matters a great deal, because ‘forensic science is but the handmaiden of the legal system.’ ... there are serious issues regarding the capacity and quality of the current forensic science system; yet, the courts continue to rely on forensic evidence without fully understanding and addressing the limitations of different forensic science disciplines.<sup>88</sup>

Interestingly, the proposed NIFS has yet to be established and the NRC Report has not exerted a great deal of direct influence in US courts.<sup>89</sup> It has, however, been influential on forensic science and medicine communities, their conferences, their publications and their attempts to begin to modify practices, at least behind the scenes. One of the

<sup>85</sup> Ibid 16, 184.

<sup>86</sup> Ibid 184.

<sup>87</sup> Ibid 79.

<sup>88</sup> Ibid 85, 12, 53, 96, 109, 110.

<sup>89</sup> While there have been quite a few references, including US Supreme Court decisions such as *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009), as yet there is little evidence of more stringency in admissibility decision-making. In February 2013, the US Government announced that it was establishing a Commission, under the auspices



challenges with such a critical report is how investigators, analysts and courts should respond as practices, techniques and expressions need to be studied and repaired, and in some cases jettisoned, ‘on the run’.

*B The Report of The Expert Working Group on Human Factors in  
Latent Print Analysis (2012)*

*Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (‘NIST Report’)<sup>90</sup> seems to have been a response to both the NRC inquiry (and Mayfield), background issues pertaining to fingerprints following experimental research led by Itiel Dror and Brad Ulery, and continuing critical commentary by scholars such as Simon Cole, Jennifer Mnookin and Ralph and Lyn Haber.<sup>91</sup> As the title suggests, this report is focused on the role of ‘human factors’ in latent fingerprint comparison.<sup>92</sup> It was prepared by a large multidisciplinary committee — the Expert Working Group on Human Factors (the Expert Working Group or (‘Working Group’)) — where latent print specialists were well represented. The two and a half year review and report were jointly sponsored by two US federal entities, the National Institute of Standards and Technology (‘NIST’) and the National Institute of Justice (‘NIJ’).

‘Human factors’ concern ‘the interaction between humans and products, decisions, procedures, workspaces, and the overall environment encountered as work and in daily living’.<sup>93</sup> They are present ‘in any experience- and judgment-based analytical process such as latent print examination.’<sup>94</sup> Attention to human factors research is intended ‘to enhance quality and productivity in friction ridge examinations and to reduce the likelihood and consequences of human error at various stages in the

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of the NIST to begin the arduous work of developing standards and reforming the forensic sciences. Some committees have now been established and held preliminary meetings.

<sup>90</sup> NIST Report, above n 12.

<sup>91</sup> Cole, *Suspect Identities*, above n 14; Itiel Dror, David Charlton and Alisa E Peron, ‘Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications’ (2006) 156 *Forensic Science International* 74; Jennifer Mnookin, ‘The Courts, the NAS, and the Future of Forensic Science’ (2010) 75 *Brooklyn Law Review* 1209; Lyn Haber and Ralph N Haber, ‘Scientific Validation of Fingerprint Evidence under *Daubert*’, above n 75; Brad Ulery et al, ‘Accuracy and Reliability of Forensic Latent Fingerprint Decisions’ (2011) 108 *Proceedings of the National Academy of Sciences of the United States of America* 7733. See also Jason Tangen, Matthew Thompson and Duncan McCarthy, ‘Identifying Fingerprint Expertise’ (2011) 22 *Psychological Science* 995.

<sup>92</sup> NIST Report, above n 12, vii, viii. The Working Group was composed of experts from ‘forensic disciplines, statisticians, psychologists, engineers, other scientific experts, legal scholars, and representatives of professional organizations.’ The group reached substantial agreement on most, though not all, issues.

<sup>93</sup> NIST Report, above n 12, vi.

<sup>94</sup> *Ibid.*



interpretation of evidence.<sup>95</sup> That is, to establish strategies and a culture capable of recognising and responding to human factors and the risks they pose to latent print evidence.<sup>96</sup>

The NIST Report begins with a critical review of the dominant approach to latent print comparison known by the four phases of Analysis, Comparison, Evaluation, and Verification or ACE-V:<sup>97</sup>

Although ACE-V is a systematic process, meaning that the examination proceeds in an orderly and logical fashion, this does not, by itself, demonstrate that the results are accurate and reproducible. In 2009, a committee of the National Research Council (NRC) stated that ACE-V is ‘a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ... Merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.’ Additional study is required to ascertain precisely how well examiners using the process perform under either controlled conditions or in casework ...

Although many in the latent print community describe the ACE-V process as a scientific method, the issue is not the label that can or should be attached to the process with respect to human factors. ACE-V is a systematic, skill-based, and widely used process for determining whether two impressions have a common origin. ACE-V designates a logical sequence for a complex process of judgment, but ACE-V itself does not provide substantive guidance about standards to be applied within this sequence. Therefore, even though two examiners might both assert (correctly) that they are using ACE-V, they may be employing different cognitive processes. Those differences create opportunities for human factors to come into play.<sup>98</sup>

<sup>95</sup> Ibid vi–vii.

<sup>96</sup> Ibid 172. Human factors are prominent in other areas of human endeavour, such as in medical treatment, the operation of nuclear facilities and air traffic control. Attention to them is intended to improve decision-making and system performance especially where mistakes are potentially catastrophic. See Mark Sanders and Ernest McCormick, *Human Factors in Engineering and Design* (McGraw-Hill Companies, 7<sup>th</sup> ed, 1993).

<sup>97</sup> NIST Report, above n 12, 1. On ‘ACE-V’, see above n 74.

<sup>98</sup> NIST Report, above n 12, 9, 123–4 (citations omitted).

The focus on ACE-V is not intended as an endorsement of ACE-V as a ‘methodology.’ As explained in Chapter 1, ACE-V maps the steps of a process, but it does not provide specific functional guidance on how to implement that process, nor does it detail the substantive content of the various steps. Although ACE-V provides a useful framework for describing the steps taken for interpreting prints, it does not offer specific criteria to guide those interpretations

at 39.



Of particular concern, given the dearth of detailed standards, was the manner in which fingerprint examiners report and testify about their conclusions, especially the identification of a putative source to the exclusion of all others. According to the Working Group ‘this claim is needlessly strong’:

a fingerprint identification was traditionally considered an ‘individualization,’ meaning that the latent print was considered identified to one finger of a specific individual as opposed to every other potential source in the universe. However, the recent attention focused on this issue reveals that this definition needlessly claims too much, is not adequately established by fundamental research, and is impossible to validate solely on the basis of experience. Nor does fingerprint evidence have objective standards or a well-validated statistical model that can provide an objective measure of the strength of the fingerprint evidence in a given instance. Therefore, examiners should not claim to be able to exclude every other finger in the world as a potential source. Rather, an identification decision suggests a substantial enough similarity that the examiner believes that the two impressions originated from a common source. But whether any other finger in the world might also be able to leave an impression with a comparable amount of similarity is not fully known, and the examiner’s testimony should not suggest otherwise. Regardless of the specific words used to describe an identification, examiners should refrain from claiming that an identification means that they have excluded all other individuals in the world.<sup>99</sup>

In the absence of statistical data on the prevalence of print features, the move between declaring a match and equating that with positive identification becomes, in effect, ‘a leap of faith’:

Because not enough is known about rarity, and even that which is known is not necessarily part of an examiner’s formal training, this aspect of interpretation is often an implicit judgment based on the examiner’s experience.<sup>100</sup>

Concerns about ‘over-expressing the evidence’ led to Recommendation 3.7 — the first in the ‘Summary of Recommendations’:<sup>101</sup>

Because empirical evidence and statistical reasoning do not support a source attribution to the exclusion of all other individuals in the world, latent print examiners should not report or testify, directly or by implication, to a source attribution to the exclusion of all others in the world.<sup>102</sup>

<sup>99</sup> Ibid 72, 197. Interestingly, even some of the technical advisory groups have begun to respond to this criticism: at 72. See also Simon A Cole, ‘Individualization is Dead, Long Live Individualization! Reforms of Reporting Practices for Fingerprint Analysis in the United States’ (2014) 13 *Law, Probability and Risk* 117.

<sup>100</sup> NIST Report, above n 12, 48, 63.

<sup>101</sup> Ibid 72.

<sup>102</sup> Ibid 72. See also NIST Report at 77: ‘examiners should qualify their conclusions instead of stating an exclusion of identification in absolute terms.’

This bears re-reading, as the Working Group recommended against the use of latent fingerprint evidence to positively identify or individualise.<sup>103</sup> Notwithstanding this disruptive recommendation, the Working Group was agnostic about the form in which conclusions should be expressed and the circumstances in which ‘a qualified rather than an absolute conclusion is warranted’ (Recommendation 3.8).<sup>104</sup> Aware of ongoing statistical investigation, the Working Group suggested that probabilities and likelihood ratios will eventually provide more appropriate means of expressing results — that is, more empirically robust and qualified conclusions. Moreover, recourse to data sets was perceived as likely to provide examiners with more options than the traditional, and rather clunky, categories of ‘identification, exclusion, or inconclusive’.<sup>105</sup>

Notwithstanding the ‘increasing number of research projects’ the Working Group insisted that ‘additional research should be undertaken’.<sup>106</sup> There are, as the Working Group noted, ‘many questions ... that presently lack definitive answers.’<sup>107</sup> They identified ‘a critical need for a focused program of research into the interpretive process that is at the heart of ACE-V.’<sup>108</sup> This would involve ‘standardized methods for feature selection’ and a better understanding of ‘the link between variations in feature selection and the ultimate decision’.<sup>109</sup> Significantly:

The Working Group found no research that explicitly addresses utility or sufficiency in the context of latent print analysis. This is unsurprising, for a critical piece for any such research — the definition and validation of a metric for assessing utility — is missing. ... Opening the box to study the process of judgment in every phase of ACE-V would provide the empirical foundation from which to develop best practices for each part of the process. As a result, the Working Group recommends:

The federal government should support a research program that aims to:

- a. Develop measures and metrics relevant to the analysis of latent prints;
- b. Use such metrics to assess the reproducibility, reliability, and validity of various interpretive stages of latent print analysis; and

<sup>103</sup> In addition, the existence of large national databases led the Working Group to recommend that examiners should always consider ‘the possibility and dangers of incidental similarity’ between prints: Ibid 199 [Recommendation 3.6].

<sup>104</sup> Ibid 198. Recommendation 3.8 recognises that in some circumstances a positive identification could be made, but such a finding is not appropriate in the vast majority of circumstances.

<sup>105</sup> Ibid 198, 86, 96.

<sup>106</sup> Ibid 203.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid. Findings have shown wide variation in feature selection.

<sup>109</sup> Ibid 204.

- c. Identify key factors related to variations in performance of latent print examiners during the interpretation process.<sup>110</sup>

The current use of ‘subjective, experienced-based judgments of the probability’ to weigh the significance of individual features, along with research suggesting inconsistency between examiners, led the Working Group to advocate the assembly of data sets (Recommendation 4.2), statistical research and algorithms for some parts of the process (Recommendation 3.9).<sup>111</sup> The move to statistically-based forms of interpretation would also require pedagogical reform:

Because statistical information plays a fundamental role in weighting latent print feature evidence, training should include the best available empirical information and should educate examiners about probabilistic reasoning in using that information. (Recommendation 3.5)<sup>112</sup>

The latent print examiner community should expand the training of examiners in elementary probability theory to enable examiners to properly utilize the output of probabilistic models. (Recommendation 4.3)<sup>113</sup>

Having recommended against source attributions ‘to the exclusion of all others’, the Working Group endorsed the NRC Report’s concern about the lack of ‘agreement ... on the precise meaning’ of terms such as “‘match,” “consistent with,” “identical,” “similar in all respects tested,” and “cannot be excluded as the source of””, describing it as a “‘critical” problem’.<sup>114</sup> Rather than insist ‘on the use of any single set of terms’, the Working Group sought to consider a range of opinions including probabilistic approaches (eg random match probabilities and likelihood ratios), and different kinds of individualisation — ie global and specific.<sup>115</sup> Statistical analysis of data could support probabilistic models ‘of various kinds’ and provide ‘a firmer foundation for and opportunities to improve the judgments of examiners’ and ‘supply objective probabilities that would be useful to judges and juries’.<sup>116</sup> Without directly advocating a particular approach (because of the inability to achieve consensus within the Working Group), the NIST Report appears most sympathetic to the likelihood ratio approach, where the evidence is presented in terms favouring ‘one

<sup>110</sup> Ibid [Recommendation 3.9].

<sup>111</sup> Ibid. Automated fingerprint identification system (AFIS) technologies could be enhanced, particularly through greater interoperability and compatibility with tools and software programs (Recommendation 4.1). These are systems used by fingerprint examiners to assist with the location of potentially matching prints. See also NRC Report, above n 12, 276 and Recommendation 12.

<sup>112</sup> NIST Report, above n 12, 202.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 128; NRC Report, above n 12, 185.

<sup>115</sup> NIST Report, above n 12, 128–9.

<sup>116</sup> Ibid 205.

proposition (identity of sources) versus another (non-identity of sources).<sup>117</sup> For the Working Group, this approach presents ‘a more modest claim than an absolute source attribution ... Furthermore, it would be far less vulnerable to the charge of over-claiming.’<sup>118</sup> This assumes, of course, that underlying models are ‘adequately validated and accepted in the scientific community, and the courts must be persuaded that expressing the strength of evidence in the form of a likelihood ratio is not too confusing for juries.’<sup>119</sup>

The need for qualification in the way conclusions are expressed in reports and courtroom testimony followed from limitations with current practice and their subjective dimensions:

Current methods for making these interpretations are based on professional knowledge and experience rather than on formal decision thresholds or statistical models. The process known as ACE-V organizes the interpretations and decisions of an examiner into a useful and logical sequence, but descriptions of this process do not detail the substantive content of the various steps. Examining latent prints and exemplars necessitates judgment and expertise, which inevitably makes the interpretive process partly subjective. With this subjectivity of interpretation comes the possibility of reduced performance due to a wide range of human factors issues.<sup>120</sup>

The NIST Report devoted considerable attention to issues related to determining whether prints were ‘sufficient’ for analysis and comparison and the kinds of tolerances that the analyst should accept. The Working Group was concerned that these issues had not been subjected to clear and consistent guidelines. Many ‘[d]ecision making processes’, it explained, ‘are neither clearly defined a priori nor made using an objective, validated metric.’<sup>121</sup> Some examiners may be willing to analyse and declare a match while others might deem the same latent print insufficient for analysis. As the Working Group noted: ‘[t]here are no formal thresholds for any sufficiency determinations, and feature selection and weighting are matters of personal judgment’, and ‘none of [the] variabilities — of features across a population of fingers or of repeated impressions left by the same finger — has been

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<sup>117</sup> Ibid 134, quoting Christophe Champod, ‘Interpretation of Friction Ridge Examinations (Fingerprints)’ in Andre Moenssens and Allan Jamieson (eds), *Wiley Encyclopedia of Forensic Science* (Wiley and Sons, 2009) Vol 3, 1508–11.

<sup>118</sup> NIST Report, above n 12, 134, 138.

<sup>119</sup> Ibid 135. This approach sits awkwardly with jury capacity, see Kristy Martire et al, ‘The Psychology of Interpreting Expert Evaluative Opinions’ (2013) 45 *Australian Journal of Forensic Sciences* 305; Andrew Ligertwood and Gary Edmond, ‘Expressing Evaluative Forensic Science Opinions in a Court of Law’ (2012) 11 *Law, Probability and Risk* 289.

<sup>120</sup> NIST Report, above n 12, 198.

<sup>121</sup> Ibid 45.

characterized, quantified, or compared.’<sup>122</sup> They also drew attention to the problem of distortion in prints along with the lack of information about ‘an examiner’s ability to identify types of distortion’.<sup>123</sup> The Working Group recommends that:

‘Each agency or forensic service provider should define ‘suitable’ or ‘sufficient’ in its standard operations procedures. Guidelines should be as explicit as possible about what is expected for sufficiency determinations at different stages of the latent print examination process (Recommendation 3.4).’<sup>124</sup>

Subjective assessments, especially in the absence of detailed standards, introduce a range of dangers. Given its orientation, the NIST Report is conspicuously attentive to threats from cognitive bias. For

Observers’ expectations have been shown to influence judgment in a broad range of tasks. Especially when confronted with ambiguous stimuli, people tend to see what they hope or expect to see. ... some information about the origin of a latent print can facilitate accurate results, but other contextual information can produce confirmation bias. Extraneous information can influence people acting in good faith and attempting to be fair interpreters of the evidence.<sup>125</sup>

The NIST Report is not critical, or disparaging, of ‘subjective elements in human interpretation’.<sup>126</sup> These dimensions, as the Working Group recognises, constitute an essential component of judgment and expertise.<sup>127</sup>

To recognize that latent print examiners are potentially subject to bias is not to single them out but rather to suggest that they are not exempt from those cognitive biases that all interpreters of data and information face.<sup>128</sup>

<sup>122</sup> Ibid 16, quoting NRC Report, above n 12, 144. The Working Group continued at 69: ‘This is not to suggest that experts are poor at any of these tasks. Rather, it is simply to note the absence of objective criteria.’ There were also questions, as in the SFI Report, about how to handle the re-assessment of parts of a latent print after looking at the exemplar. This is described as ‘recursive practice.’ See NIST Report, above n 12, 42–3, especially 51.

<sup>123</sup> NIST Report, above n 12, 66, 50. There is ongoing controversy around what constitutes a complex latent print. Studies by Dror et al found inconsistency between analysts, and even with the same analyst analysing the same print at different times. See Itiel Dror et al, ‘Cognitive Issues in Fingerprint Analysis: Inter- and Intra-Expert Consistency and the Effect of a “Target” Comparison’ (2011) 208 *Forensic Science International* 10.

<sup>124</sup> NIST Report, above n 12, 199.

<sup>125</sup> Ibid 10 (citations omitted).

<sup>126</sup> Ibid 39.

<sup>127</sup> On expertise generally, see Itiel Dror, ‘The Paradox of Human Expertise: Why Experts Get it Wrong’ in Narinder Kapur (ed) *The Paradoxical Brain* (Cambridge University Press, 2011) 177.

<sup>128</sup> NIST Report, above n 12, 40.

Introducing human factors into the mix acknowledges the ‘possibility of reduced performance because of human factors issues’<sup>129</sup> and is intended to remove the culture of blame by ‘systematically design[ing] safety into the process’.<sup>130</sup> Rather than simply blame individuals for errors and mistakes, a human factors approach is more holistic — extending attention to ‘the design, working conditions, or management culture of the total system’.<sup>131</sup> The Working Group was desirous that the forensic sciences should emulate other scientific and medical practices involving the identification, reduction and quantification of error:<sup>132</sup>

A basic tenet of experimental science is that ‘errors and uncertainties exist that must be reduced by improved experimental techniques and repeated measurements, and those errors remaining must always be estimated to establish the validity of our results.’ What applies to physics and chemistry applies to all of forensic science: ‘A key task ... for the analyst applying a scientific method is to conduct a particular analysis to identify as many sources of error as possible, to control or eliminate as many as possible, and to estimate the magnitude of remaining errors so that the conclusions drawn from the study are valid.’ In other words, errors should, to the extent possible, be identified and quantified.<sup>133</sup>

There is, in consequence, a need to define error precisely, collect data about performance and error, use well-defined proficiency tests to provide feedback and exclude unnecessary contextual information.<sup>134</sup> That is, to generate ‘system-wide’ reform (Recommendation 7.1).<sup>135</sup>

The Working Group placed conspicuous emphasis upon the importance of learning from mistakes: ‘Numerous studies have found that without quick and accurate feedback on correct and incorrect judgments, experience does not enhance expertise and that experts routinely overestimate their skills.’<sup>136</sup> They also noted that forensic analysts ‘do not routinely receive ... prompt and frequent feedback.’<sup>137</sup>

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<sup>129</sup> Ibid 39.

<sup>130</sup> Ibid 21, 39.

<sup>131</sup> Ibid 140.

<sup>132</sup> Drawing on the National Academy of Sciences, Institute of Medicine, Committee on Quality of Health Care in America report: *To Err Is Human: Building A Safer Health System* (National Academies Press, 1999).

<sup>133</sup> NIST Report, above n 12, 21, quoting NRC Report, above n 12, 111.

<sup>134</sup> NIST Report, above n 12, 24. The Working Group seem relieved that the latent print community had, in recent years, begun to ‘acknowledge that errors do occur and furthermore that claims of zero error rate in the discipline are not *scientifically* plausible’ at 32 (emphasis in original).

<sup>135</sup> Ibid 203.

<sup>136</sup> Ibid 23 (citations omitted).

<sup>137</sup> Ibid (citations omitted).

Conceptual limitations and threats from subjectivity, led the Working Group to attempt to increase the ‘transparency of the process and to insulate the examiner from extraneous influences.’<sup>138</sup> Research drawn from psychological studies led to proposals for blinding examiners to information and offering multiple exemplars for comparison:

Procedures should be implemented to protect examiners from exposure to extraneous (domain-irrelevant) information in a case. (Recommendation 3.3).<sup>139</sup>

For cognitive biases can be subtle and are ‘usually unknown to the observer.’<sup>140</sup> Vulnerability and transparency could be better managed through enhanced documentation:

A report and contemporaneous supporting notes or materials should document the examination to make the interpretive process as transparent as possible. Although the degree of detail may vary depending on the perceived complexity of the comparison, documentation should, at a minimum, be sufficient to permit another examiner to assess the accuracy and validity of the initial examiner’s assessment of the evidence. (Recommendation 3.1).

Modifications to the results of any stage of latent print analysis (eg feature selection, utility assessment, discrepancy interpretation) after seeing a known exemplar should be viewed with caution. Such modifications should be specifically documented as having occurred after comparison has begun. (Recommendation 3.2).<sup>141</sup>

The Report was also concerned with the communication of results to ‘lay consumers’:

Developing and implementing procedures and practices that encourage experts to communicate their findings accurately and fairly to lawyers, judges, and juries and to detect and correct errors in this process is a crucial component of a system that reduces the opportunities for errors in the production and presentation of courtroom fingerprint evidence.<sup>142</sup>

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<sup>138</sup> Ibid 198.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid 12. On sequential unmasking, see NIST Report at 52 and see also Dan Krane et al, ‘Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation’ (2008) 53 *Journal of Forensic Science* 1006.

<sup>141</sup> NIST Report, above n 12, 198. The FBI has recently adopted a process described as linear ACE-V. This involves using the steps associated with ACE-V, though in a way where exposure to information and documentation of impressions guide progression through the process. This is a generally positive development but does not address validation and reliability directly.

<sup>142</sup> Ibid 113, 199, see also [Recommendation 5.1] at 94.

According to Recommendation 6.1:

The trial preparation process should address the presentation of technical information in lay terms, the organization of the direct examination, possible cross-examination, and the possible use of visual aids.<sup>143</sup>

To increase the likelihood that the evidence ‘will be used properly, fully, and fairly’ by ‘lay consumers’, Recommendation 5.2 lists ‘the minimum information that should appear in the summary report’:<sup>144</sup>

A report should:

- a) Identify the latent print examiner(s);
- b) Describe the items submitted to the examiner(s);
- c) List the procedures used by the examiner to develop, visualize, or enhance the friction ridge impressions;
- d) List all comparisons conducted;
- e) State all conclusions with the method used to reach them;
- f) Note any important limitations to the conclusions;
- g) Indicate whether a verification was made and whether there was any conflict of opinion among examiners prior to the reported conclusions;
- h) Note (or refer to external documentation of) any information about the case that the examiner(s) received;<sup>145</sup>
- i) Note the existence of additional documentation; and
- j) Define important technical terms, either explicitly or by reference to an authoritative, readily available source.<sup>146</sup>

The report should provide sufficient information to enable a reviewing expert to verify the examiner’s assessment.<sup>147</sup> The ‘level of detail is sufficient to inform investigators, prosecutors, defense counsel, other experts, and judges or juries as to how the analysis was conducted and what conclusions were reached.’<sup>148</sup>

Enhanced transparency and tempering the expression of conclusions are characterised as consistent with the obligations of latent print examiners ‘to their profession and to the court ... complying [with] legal demands such as disclosure, and being truthful.’<sup>149</sup> To assist in these ends:

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<sup>143</sup> Ibid 115.

<sup>144</sup> Ibid 90, 95.

<sup>145</sup> Ibid 100.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid 90.

<sup>148</sup> Ibid 101.

<sup>149</sup> Ibid 117, quoting Bruce Budowle et al, ‘A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement’ (2009) 54 *Journal of Forensic Sciences* 795, 803. On disclosure, see also NIST Report, above n 12, 91.

Forensic service providers should adopt codes of ethics that require testifying in a nonpartisan manner; answering questions from both the prosecution and the defense directly, accurately, and fully; and providing appropriate scientific information before, during, and after trial.<sup>150</sup>

The Working Group explains ‘the importance of “staying within the bounds or limits of what the science can provide” and providing appropriate scientific information’.<sup>151</sup> This, again, is indexed to Recommendation 3.7, above.<sup>152</sup> One of the implications, following from ‘absolute certainty [being] unattainable in science’ is that ‘the witness must be prepared to acknowledge and discuss the possibility that an opinion is not correct.’<sup>153</sup>

Recognising that it will be difficult to estimate errors, both false positives and false negatives, the NIST Report discusses the virtues of using: non-blind proficiency tests; realistic, blind proficiency tests; verifications; random audits of case reports; and controlled experiments. All have limitations, but all have the potential to inform our understanding and improve the performance of latent print examiners and the use of their interpretations.<sup>154</sup>

A testifying expert should be familiar with the literature related to error rates. A testifying expert should be prepared to describe the steps taken in the examination process to reduce the risk of observational and judgmental error. The expert should not state that errors are inherently impossible or that a method inherently has a zero error rate. (Recommendation 6.3).<sup>155</sup>

The point is to refine practices and develop means of expressing fingerprint evidence in ways that reflect limitations and the real possibility of error.<sup>156</sup>

<sup>150</sup> NIST Report, above n 12, 200 [Recommendation 6.2].

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid 201. Cf Simon A Cole, ‘Who Speaks for Science? A Response to the National Academy of Sciences Report on Forensic Science’ (2010) 9 *Law, Probability and Risk* 25.

<sup>154</sup> NIST Report, above n 12, 33.

<sup>155</sup> Ibid 201, 74. It is unlikely that there will be a single error rate. See Jonathan Koehler, ‘Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter’ (2008) 59 *Hastings Law Journal* 1077; Jonathan Koehler, ‘Proficiency Tests to Estimate Error Rates in the Forensic Sciences’ (2013) 12 *Law, Probability and Risk* 89 and Gary Edmond, Jason M Tangen and Matthew B Thompson, ‘A Guide to Interpreting Forensic Testimony: Scientific Approaches to Fingerprint Evidence’ (2014) 13 *Law, Probability and Risk* 1.

<sup>156</sup> See Tangen, Thompson and McCarthy, ‘Identifying Fingerprint Expertise’, above n 91; Brad Ulery et al, ‘Accuracy and Reliability of Forensic Latent Fingerprint Decisions’, above n 91.

The NIST Report also advocated the need for quality assurance mechanisms, including: ‘requirements and guidelines for reporting, documentation, and testimony’ and sampling for compliance (Recommendation 6.4).<sup>157</sup> Enhanced supervision and management were characterised as ‘essential to risk reduction and quality assurance and control. Effective management requires good information about the incidence and sources of errors.’<sup>158</sup> Collecting this information would require developing a culture where ‘openness about errors’ is ‘not necessarily a path to punitive sanctions but rather is part of an effective system to detect deviations from desired practices and incorrect judgments’ (Recommendation 9.1).<sup>159</sup> This means that errors should be identified and tracked (Recommendation 9.2) and procedures should be implemented for prevention and resolution of disputes (Recommendation 9.4).<sup>160</sup> In addition, there is a need for forensic science providers to be accredited, and for the latent print community to ‘develop and implement a comprehensive testing program that includes competency testing, certification testing and proficiency testing’ (Recommendations 9.3 and 9.4) and for the certification and continuing education of analysts (Recommendation 8.7).<sup>161</sup>

The NIST Report decries the existing ‘heterogeneity in curricula, instructors, pedagogy, documentation, and mentorships’, and laments the ‘few enforceable standards’.<sup>162</sup> In addition to improved training, the Working Group recommended continuing education and research into the education and aptitudes suited to training a latent examiner (Recommendation 8.1).<sup>163</sup> The Working Group also recommended mentor programs and accreditation of institutional training programs (Recommendation 8.8).<sup>164</sup> Training should be supported by a multidisciplinary expert group responsible for developing ‘a latent print educational textbook, practical exercises, and assessment tests’ (Recommendation 8.4), a clearinghouse of materials and publications (Recommendation 8.6), and funding to support training programs (Recommendation 8.2).<sup>165</sup>

The Working Group’s recommendations are consistent with the thrust of the NRC Report. Nevertheless, when it came to detailed recommendations the Working Group

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<sup>157</sup> NIST Report, above n 12, 138–9, 201.

<sup>158</sup> Ibid 201.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> All this should be supplemented with ‘medical surveillance’, such as annual vision testing (Recommendation 7.2). Performance would also be improved by directing more attention to the physical environment, particularly the hardware and software, routinely used by examiners (Recommendation 7.1).

<sup>162</sup> NIST Report, above n 12, 165.

<sup>163</sup> Ibid 209.

<sup>164</sup> Ibid 210.

<sup>165</sup> Ibid 203. Notably, authors of the textbook, ‘should not be confined to experts in latent print examination, but should include experts on cognitive issues, statistics, and forensic science’: at 167–8.

was undecided on a range of issues (notably the expression of opinions, above). The lack of relevant research meant that for some members of the Working Group specific recommendations were considered inappropriate at this stage.<sup>166</sup> They were conscious of the difficulty of proposing ‘modifications to an interpretive system that is largely non-formalized.’<sup>167</sup>

Given the insufficient research base, the Working Group placed emphasis on the need for transparency through documentation:

Documentation serves to maximize the transparency of the interpretative process and to provide a record that can be useful for many purposes, including reports and testimony, future research and evaluation, and quality assurance.<sup>168</sup>

Documentation should strive to capture dimensions of practice such as the enhancement of images of prints, the examiner’s impressions at particular stages of analysis, processing and disagreement between examiners.<sup>169</sup>

Similarly, the lack of research on the precise effects of bias led the Working Group to adopt a precautionary approach:

given the decades-long research into the significant effects of cognitive bias in other domains, it seems wise to minimize the potential for such biases in latent print interpretation, even in the absence of definitive research results for latent print analysis.<sup>170</sup>

Any exposure to domain irrelevant information should be minimized and documented because:

the possibility of biases influencing the decision making process of examiners cannot be dismissed, a report should reveal the context of the examination by describing or referring the reader to the information about the case that an examiner received.<sup>171</sup>

Overall, the Working Group endorsed the conclusion of the NRC Report, insisting that: ‘fingerprint experts should exhibit a greater degree of epistemological humility.

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<sup>166</sup> Ibid 49, 53, 74, 78.

<sup>167</sup> Ibid 63, 8, 19.

<sup>168</sup> Ibid 41, 49, 53, 66, 90, 94. See also Recommendation 3.1 at 42.

<sup>169</sup> Ibid 81–2, 185. See also SWGIT (Scientific Working Group for Imaging Technology) and the need to validate enhancement technologies.

<sup>170</sup> Ibid 43, 44.

<sup>171</sup> Ibid 97 quoting SWGFAST 2009. ‘SWGFAST’ is the Scientific Working Group for Friction Ridge Analysis, Study and Technology.

Claims of “absolute” and “positive” identification should be replaced by more modest claims about the meaning and significance of a “match.”<sup>172</sup>

Notwithstanding its focus on fingerprints, there are few doubts about the general application of the NIST Report, its findings and recommendations to many other forensic science disciplines and techniques:

Although this report explicitly addresses only the procedures for performing a latent fingerprint examination and communicating the results, much of the analysis and many of the recommendations are applicable to other forensic science disciplines. Issues of cognitive bias, standardization of procedures, documentation of examinations, working conditions, error detection and correction, and accuracy in testimony — among many others — cut across the forensic sciences.<sup>173</sup>

### *C The Scottish Fingerprint Inquiry (2011)*

The Scottish Fingerprint Inquiry and Report (‘SFI Report’) represent the culmination of more than a decade of controversy surrounding the (mis)attribution of a latent print in a murder investigation. In 1997, as part of the routine examination of a murder scene in Kilmarnock, latent prints were collected and checked against those of investigating police officers.<sup>174</sup> One of the latent fingerprints recovered from an internal doorframe, adjacent to the body of Marion Ross, was attributed by examiners at the Scottish Criminal Records Office (SCRO) to Detective Shirley McKie. McKie had been involved in the investigation but insisted that she had never entered the property and could not, therefore, have been responsible for the print.<sup>175</sup> The eventual prosecution of David Asbury for the murder of Ross relied upon incriminating fingerprint evidence. McKie’s insistence that she had not entered the building introduced complications with the fingerprint evidence. McKie was called as a witness and denied that she had entered the premises. Her unwillingness to accept that it was her print and that she must, therefore, have improperly entered a crime scene, created difficulties for prosecutors and led to McKie’s subsequent prosecution for perjury. With the aid of foreign fingerprint experts testifying on her behalf, McKie successfully resisted that prosecution. The controversy arising from the ‘identification’ and McKie’s unsuccessful prosecution led to several internal and public reviews.<sup>176</sup> The Scottish Fingerprint Inquiry was the most recent and comprehensive.

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<sup>172</sup> NIST Report, above n 12, 130.

<sup>173</sup> *Ibid* ix.

<sup>174</sup> This was part of a routine process to exclude any marks left inadvertently by investigators thereby enabling the focus to be placed on prints that might be relevant to the investigation of the crime.

<sup>175</sup> There was some initial consideration of transfer but this possibility was eventually rejected.

<sup>176</sup> Technically, according to prevailing bureau practice, this was an elimination rather than an identification. Different levels of confidence and review were applied to identifications as opposed to eliminations.

The Commissioner, Sir Anthony (now Lord) Campbell, concluded that a mistake had been made in the attribution of the print to McKie.<sup>177</sup> Through the course of his review Campbell identified many problems and made numerous recommendations to reform the organisation, practice and presentation of fingerprint evidence in Scotland. The final report of the Scottish Fingerprint Inquiry runs to almost 800 pages. Like the Goudge Inquiry — Part II(D), below — it was a full-time public inquiry. Rather than attempt to reproduce the case-specific issues and the intricacies of Scottish practice, in this context it seems appropriate to focus on the major recommendations pertaining to latent fingerprint evidence. To a considerable degree, these reinforce points advanced in the NRC and NIST Reports and, once again, are directly relevant to other forensic sciences, particularly those involving interpretation and comparison.

The SFI Report concluded that there were many problems with the organisation of the Scottish Fingerprint bureau as well as the practices of examiners.<sup>178</sup> Despite these problems and routine overreaching in expert reports, the inquiry heard testimony about how it was relatively rare for a fingerprint examiner to appear in court and almost unheard of for there to be any kind of challenge to identifications.<sup>179</sup> By an Act of Parliament, fingerprint examiners with sufficient experience were effectively ‘authorised’ and excused from having to appear where their evidence was uncontested.<sup>180</sup> This expedient mechanism merely reinforces unquestioned faith in the reliability (or infallibility) of fingerprint comparison and individualisations.<sup>181</sup> Confidence can also be observed in the willingness to prosecute McKie for perjury on the basis of a recovered latent fingerprint even though she was a serving police officer, denied entering the premises, and the police officers accompanying McKie at the scene corroborated her version of events.<sup>182</sup>

Of the 86 recommendations made in the SFI Report the following were listed as the ten ‘key recommendations’:

1. Fingerprint evidence should be recognised as opinion evidence, not fact, and those involved in the criminal justice system need to assess it as such on its merits. [Recommendation 1]

<sup>177</sup> Interestingly, at some level the controversy continues, even though those alleging a misattribution seem to have prevailed. This is interesting because it demonstrates that in the absence of knowledge of the correct answer (ground truth) it can be difficult to know who is right. This is, in part, why less categorical forms of practice and expression have been recommended.

<sup>178</sup> For a short summary, see Simon A Cole and Andrew Roberts, ‘Certainty, Individualisation, and the Subjective Nature of Expert Fingerprint Evidence’ [2012] *Criminal Law Review* 824.

<sup>179</sup> SFI Report, above n 12, 193–4, 237.

<sup>180</sup> *Criminal Procedure (Scotland) Act 1995* (Scot) ss 280, 281.

<sup>181</sup> SFI Report, above n 12, 559.

<sup>182</sup> Compare Frank Vincent, *Report: Inquiry Into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama* (Victorian Government Printer, May 2010).

2. Examiners should discontinue reporting conclusions on identification or exclusion with a claim to 100% certainty or on any other basis suggesting that fingerprint evidence is infallible. [Recommendation 3]
3. Examiners should receive training which emphasises that their findings are based on personal opinion; and that this opinion is influenced by the quality of the materials that are examined, their ability to observe detail in mark and print reliably, the subjective interpretation of observed characteristics, the cogency of explanations for any differences and the subjective view of ‘sufficiency’. [Recommendation 2]
4. Differences of opinion between examiners should not be referred to as ‘disputes’. [Recommendation 4]
5. The SPSA’s Standard Operating Procedures should set out in detail the ACE-V process that is to be followed. [Recommendation 20]<sup>183</sup>
6. Features on which examiners rely should be demonstrable to a lay person with normal eyesight as observable in the mark. [Recommendation 9]
7. Explanations for any differences between a mark and a print require to be cogent if a finding of identification is to be made. [Recommendation 11]
8. A finding of identification should not be made if there is an unexplained difference between a mark and a print. [Recommendation 12]
9. The SPSA should develop a process to ensure that complex marks are treated differently. The examination should be undertaken by three suitably qualified examiners who reach their conclusions independently and make notes at each stage of their examination. The substantive basis for the examiners’ conclusions should be reviewed. The reasons why they have reached their respective conclusions should be explored and recorded, even where they agree that an identification can be made. [Recommendation 42]
10. An emphasis needs to be placed on the importance not only of learning and practising the methodology of fingerprint work, but also of engaging with members of the academic community working in the field. [Recommendation 16]<sup>184</sup>

The Commissioner, like the Expert Working Group, recommended that fingerprint examiners should not purport to possess an infallible method and should generally not make positive identifications without some qualification (Recommendations 1 and 3, above).

Like the NRC and NIST Reports, the SFI Report documents inadequacies in the research base. Specific areas warranting attention include:

- (i) the frequency of particular characteristics or combinations of characteristics in fingerprints;
- (ii) the use of data as to the frequency of particular characteristics or combinations of characteristics as a means of assisting examiners in their work;
- (iii) the weight to be given to third level detail, and as to its reliability;

<sup>183</sup> ‘SPSA’ is the acronym for the Scottish Police Services Authority.

<sup>184</sup> SFI Report, above n 12, 740 (citations omitted).

- (iv) distortion and the effect of movement;
- (v) which marks ought to be assessed as complex;
- (vi) the specific factors that may cause variations among examiners; and
- (vii) contextual bias.<sup>185</sup>

Recommendation 83 extends this to include ‘probabilistic analysis’.<sup>186</sup> As part of the need to develop the research base, there was a conspicuous need for fingerprint examiners to engage with mainstream research scientists:

#### **Engaging with the academic community**

**Recommendation 16 (Para 35.135)** [Number 10, above]

...

**Recommendation 18 (Para 35.142)** The SPSA, in conjunction with members of the academic community as appropriate, should design a practical system for examiners to assess and evaluate (a) tolerances and (b) any reverse reasoning.<sup>187</sup>

The Report also draws explicit attention to the serious threat posed by human factors, in the guise of contextual bias:

#### **Fingerprint methodology**

**Recommendation 6 (Para 35.137)** The SPSA should review its procedures to reduce the risk of contextual bias.

**Recommendation 7 (Para 35.138)** The SPSA should ensure that examiners are trained to be conscious of the risk of contextual bias.

**Recommendation 8 (Para 35.139)** The SPSA should consider what limited information is required from the police or other sources for fingerprint examiners to carry out their work, only such information should be provided to examiners, and the information provided should be recorded.<sup>188</sup>

The SFI Report makes many recommendations to improve practice, including: the need to ‘set out in detail the ACE-V process to be followed’ (Recommendation 20);<sup>189</sup> documenting and attaching less weight to ‘characteristics first found at the comparison stage’ (Recommendation 26);<sup>190</sup> emphasising the need to focus on

<sup>185</sup> Ibid 752 [Recommendation 82]. See also SFI Report at 432, 702, 734.

<sup>186</sup> Ibid 752.

<sup>187</sup> Ibid 742 (emphasis in original).

<sup>188</sup> Ibid 741. See also SFI Report at 743 [Recommendation 24].

<sup>189</sup> Ibid 743.

<sup>190</sup> Ibid. That is, once they have had an opportunity to look at both prints side-by-side.

‘tolerances, the quality of similarities, the nature of differences, any explanations for differences, the extent to which reverse reasoning may have been employed and the sufficiency of matching characteristics’ during ‘the evaluation stage’; and blinding reviewers to the reasoning during the verification stage.<sup>191</sup> Attention was also directed to improving the quality of images, particularly digital images and documenting changes to digital images (Recommendations 37–40).<sup>192</sup>

The Report placed conspicuous emphasis on the subjective (ie non-certain and interpretive) nature of fingerprint comparison (Recommendation 1).<sup>193</sup> In addition to the need for procedures to manage disagreement between examiners (Recommendations 34 and 36), it stressed the need for practitioners to:

conduct their individual ACE comparisons conscious of the fact that they are working in a field where there is no certainty and where there is scope for differences of opinion. When it comes to verification, examiners should be encouraged to be open and to adopt a challenging attitude to the opinions of other examiners, irrespective of seniority. Standard Operating Procedures should emphasise that the fact that one examiner reaches the opposite conclusion from another, or entertains any doubt, does not necessarily cast any aspersion on the competence of either examiner.<sup>194</sup>

The SFI Report placed emphasis on the need for improved ‘record-keeping and note-taking’ (Recommendations 44–52).<sup>195</sup> Recommendations 54–6 address the need to provide information to prosecutors, and Recommendations 60–3 address disclosure and the provision of access to the defence.<sup>196</sup> Sensitive to the circumstances of its origin, the Report was concerned that those ‘identified’ (and their legal representatives) should have access to all images of prints, not only those relied upon by the state’s examiners.

The SFI Report also insisted on the need for training, improved performance management (Recommendations 70–4) and the certification and authorisation of examiners (Recommendations 76–80).<sup>197</sup> Notwithstanding the need for examiners to be authorised to prepare reports and testify, the Report was open to the possibility of allowing those who were not authorised under Scottish legislation to act as expert

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<sup>191</sup> Ibid 654–5 [36.113].

<sup>192</sup> Ibid 745.

<sup>193</sup> Ibid 741.

<sup>194</sup> Ibid 655 [36.118], 744 [Recommendation 33].

<sup>195</sup> Ibid 746–7.

<sup>196</sup> Ibid 747–9.

<sup>197</sup> Ibid 750–1.

witnesses (under common law principles), so that the defence, in particular, might have access to potentially critical perspectives and insights.<sup>198</sup>

In terms of the provision of evidence, Recommendation 59 lists the factors that should be included in an examiner's report.<sup>199</sup> Recommendations 64 and 65 insist on the need to 'pay particular attention to ensuring that fingerprint evidence is presented to the court in such manner as to be readily understood by the judge and jury' and 'exploring' the use of technology to assist with the presentation.<sup>200</sup>

In addition, there was a perceived need for both examiners and prosecutors to maintain 'up-to-date knowledge' of cases and developments in Anglophone jurisdictions, particularly where 'courts, inquiries or other investigating bodies have made significant criticism of existing fingerprint practice' (Recommendation 85).<sup>201</sup>

#### D *The Inquiry Into Pediatric Forensic Pathology In Ontario (2008)*

The Goudge Report followed a public inquiry into forensic medicine, specifically forensic pathology, in the wake of a series of wrongful convictions in Ontario based on mistaken or misleading expert evidence.<sup>202</sup> Conducted by Justice Stephen Goudge, a judge of the Court of Appeal for Ontario, the Inquiry was wide-ranging

<sup>198</sup> See the discussion in Michael Lynch and Simon Cole, 'Science and Technology Studies on Trial: Dilemmas of Expertise' (2005) 35 *Social Studies of Science* 269; Simon A Cole, 'A Cautionary Tale about Cautionary Tales about Intervention' (2009) 16 *Organization* 121.

<sup>199</sup> SFI Report, above n 12, 679–80, 748, Recommendation 59:

Each examiner's separate opinion should cover: (i) the images of the mark and also the specific print used in the comparison; (ii) the examiner's opinion about the quality of the mark; (iii) if the examiner considers the mark to be complex; (iv) whether third level detail is relied upon and the fact that such detail still requires to be supported by further research that has been validated; (v) identifying any differences between mark and print; (vi) a summary of the reasons why any differences between mark and print have been discounted and whether the examiner relies on objective studies and evidence to account for such differences or on common sense and experience; (vii) the characteristics relied on in making the identification, the number of such characteristics, and the classification of such characteristics, (e.g. ridge ending, bifurcation); (viii) a marked up image of the mark and print with a legend specifying the type of the ridge detail (including any third level detail) relied upon and the associated ridge counts; (ix) the opinion of the examiner; (x) any consultation with another examiner during the ACE-V process, including any facilitated discussion or panel review; and (xi) the fact that any novel method such as probabilistic analysis has been used or relied on.

<sup>200</sup> *Ibid* 680, 749.

<sup>201</sup> *Ibid* 734, 752. This is a thinly-veiled reference to the NRC Report.

<sup>202</sup> The Goudge Inquiry was one of a series of inquiries following wrongful convictions in Canada. See *Re Truscott 2007 ONCA 575* and the reports discussed above at n 8.

in its review of forensic pathology.<sup>203</sup> Goudge, as Commissioner of the Inquiry, made 169 recommendations pertaining to the organisation, practice and presentation of forensic pathology evidence in Ontario. This brief review focuses primarily on findings and recommendations directed to the practice of forensic pathology and the presentation of medical evidence in inquiries and legal proceedings.

The Goudge Inquiry was established in response to a number of wrongful convictions based on flawed paediatric forensic pathology evidence. Although one pathologist (Dr Charles Smith) was responsible for the Inquiry, having testified beyond his abilities and exaggerated his evidence — in service to the prosecution — leading to several wrongful convictions, Goudge found that many of the problems with forensic pathology were systemic.<sup>204</sup> The major thrust behind Goudge’s recommendations is the need to professionalise, or for greater professionalisation of, forensic pathology. In terms of the practice of forensic pathologists and their production of expert opinions about cause of death there was a conspicuous need for more attention to scientific research, enhanced communications, greater transparency and improved documentation.

Central to Goudge’s recommendations for improvements in practice was the need for better training, certification and accreditation (Recommendations 2, 3, 7).<sup>205</sup> This would involve both quality assurance and control (Recommendation 51) and improved recruitment and continuing education for pathologists (Recommendation 60).<sup>206</sup> Goudge suggested that there was a need for improved standards and an institutional culture where pathologists were open to constructive criticism. The need for improvement ranges from dramatic structural reform to the organisation and governance of forensic pathology in Ontario (eg Recommendations 101–28) to the practice of forensic pathologists.<sup>207</sup> In addition to accreditation and certification, reforms would involve a greater emphasis on teamwork (Recommendation 82) and developing guidelines ‘to assist forensic pathologists in adhering to best practice at or surrounding the autopsy’ (Recommendation 83).<sup>208</sup>

<sup>203</sup> The author was an adviser and appeared before the Inquiry. See Gary Edmond, ‘Pathological Science? Demonstrable Reliability and Expert Pathology Evidence’ in Kent Roach (ed), *Pediatric Forensic Pathology and the Justice System* (Queen’s Printer for Ontario, 2008) 96. On the Canadian position, more generally, see Gary Edmond and Kent Roach, ‘A Contextual Approach to the Admissibility of the State’s Forensic Science and Medical Evidence’ (2011) 61 *University of Toronto Law Journal* 343. The Commission also consulted the Director of the Victorian Institute of Forensic Medicine, Professor Stephen Cordner.

<sup>204</sup> See also William C Thompson, ‘Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions’ (2008) 37 *Southwestern Law Review* 1027.

<sup>205</sup> Goudge Report, above n 12, 295–6, 301–2.

<sup>206</sup> *Ibid* 353–4, 361–2.

<sup>207</sup> *Ibid* 436–69.

<sup>208</sup> *Ibid* 402–5.

On the subject of bias, the main issues for forensic pathologists are characterised as whether they should attend the death scene and whether details of investigations (eg social-psychological information) should be disclosed to them, whether by investigating police or others.<sup>209</sup> In response, Goudge tends to defer to the anticipated professionalism of forensic pathologists and comes out against withholding information.<sup>210</sup> Recognising differences of opinion over the value of blinding pathologists to information, and noting that Dr Smith had often relied heavily on social-psychological factors in drawing unfounded conclusions, Goudge nevertheless concluded that it would be inappropriate to blind investigating pathologists to relevant information, and indeed recommended that they should in many cases attend scenes.<sup>211</sup> Recommendation 73(e) does, however, advocate developing protocols explaining ‘the types of information that should and should not be provided to the forensic pathologist.’<sup>212</sup> These were consolidated in Recommendation 75, which stresses the need for forensic pathologists to ‘remain vigilant against confirmation bias or being affected by extraneous considerations.’<sup>213</sup> In terms of reaching a conclusion, ‘circumstantial evidence or non-pathology information’ ‘should never’ bear ‘the entire burden of support for an opinion’ (Recommendation 93).<sup>214</sup> Similarly, if a pathologist relies ‘in whole or part, on consultation with other experts’ that information should be documented and disclosed (Recommendation 94).<sup>215</sup>

Generally, there was a need to disclose and explain the basis for opinions and their underlying facts:

#### **Recommendation 95**

- a) The articulation of the basis for the forensic pathologist’s opinion in a completely transparent way is at the cornerstone of evidence-based pathology.
- b) Forensic pathology opinions, whether given in writing or in oral communication, should articulate both the pathology facts found and the reasoning process followed, leading to the opinions expressed.<sup>216</sup>

<sup>209</sup> Where, for example, a child dies and the parents are on welfare and had a history of mistreatment and/or neglect.

<sup>210</sup> This may be a necessary consequence of the manner in which medico-legal death investigation is undertaken, but Goudge does not exhibit the same degree of concern about bias as the subsequent inquiries and reports. A reader might obtain the impression that the Commissioner thought that bias and other human factors could be overcome by being aware of dangers.

<sup>211</sup> Goudge Report, above n 12, 377. Compare S Betts, *A Critical Analysis of Medical Opinion Evidence in Child Homicide Cases* (PhD Thesis, The University of New South Wales, 2013).

<sup>212</sup> Goudge Report, above n 12, 384.

<sup>213</sup> Ibid 390.

<sup>214</sup> Ibid 422.

<sup>215</sup> Ibid 423.

<sup>216</sup> Ibid 427.

This becomes even more conspicuous in Recommendation 97, describing a code of practice for forensic pathologists that would include ‘principles that should guide them as they write their reports and the information that should be contained in them.’<sup>217</sup> This ‘should include at least the following’:

- a) the principles set out in Recommendation 84 [discussed below];
- b) guidance on the content of their autopsy and consultation reports (particularly where they may be used by the justice system), including
  - i) the subjects mandated by the *Code of Practice and Performance Standards for Forensic Pathologists* in England and Wales;
  - ii) details of each expert’s academic and professional qualifications, experience, and accreditation relevant to the opinions expressed in the report, as well as the range and extent of this expertise and any limitations on it;
  - iii) the levels of confidence or certainty with which the opinions are expressed;
  - iv) any alternative explanations that are raised by the pathology or by the reported history associated with the deceased’s death, with an analysis of why these alternative explanations can or cannot be ruled out;
  - v) what the pathologist has to say that is relevant to the live or pertinent issues in the case and why;
  - vi) any area of controversy that may be relevant to their opinions, placing their opinions in that context;
  - vii) any limits of the science relevant to the particular opinions;
  - viii) the extent to which circumstantial or non-pathology information has been used or relied on, and its impact on the reasoning and opinions;
  - ix) any other expert opinions relied upon;
  - x) the pathology facts found and the reasoning process that was followed, leading to the opinions expressed; and
  - xi) a glossary of medical terms, if helpful, to assist in communicating opinions in plain language to lay readers.
- c) guidance on
  - i) language to be used or avoided, and the dangers associated with the use of particular terms;
  - ii) how best to think about and articulate levels of confidence or certainty;
  - iii) the need to avoid the formulation or articulation of opinions in terms of proof beyond a reasonable doubt;
  - iv) the need to avoid default diagnoses;
  - v) the importance of recognizing and identifying for others the limits of their own expertise and of avoiding the expression of opinions that fall outside that expertise; and

<sup>217</sup> Ibid 429.

- vi) the cautions that should surround the use of circumstantial evidence or non-pathology evidence.<sup>218</sup>

As this and other recommendations make clear, Goudge placed particular emphasis on the need for improved communication, transparency and documentation. As part of the general need for transparency, there is an explicit preference for the dissemination of information to be by way of writing and, if verbal, to be documented (Recommendations 74 and 76).<sup>219</sup> The need for documentation also applies to the record of analysis and autopsies along with appropriate retention of organs, samples and exhibits (Recommendation 77).<sup>220</sup> There was also a perceived need for more timeliness in the provision of forensic pathology reports (Recommendation 80), for pathologists to exercise caution in the provision of preliminary opinions (Recommendation 78) and to reduce preliminary opinions to writing to avoid their potential to be misunderstood and to mislead (Recommendation 79).<sup>221</sup>

The Goudge Report dedicated considerable attention to problems in the interaction between forensic pathology and the criminal justice system. Because many aspects of ‘a pathologist’s opinion may cause misunderstanding’, Recommendation 84 describes ‘general principles’ informing ‘the way pathology opinions are communicated’:

To reduce the risk of their being misunderstood, the most important parts of a forensic pathologist’s opinion should be expressed in writing at the earliest opportunity.

The ability of the various consumers of a forensic pathologist’s opinion — including peer reviewers, coroners, and stakeholders in the criminal justice system or child protection proceedings — to understand, evaluate, and potentially challenge the opinion requires that it be fully transparent. It should clearly state not just the opinion but the facts on which the opinion is based, the reasoning used to reach it, the limitations of the opinion, and the strength or degree of confidence the pathologist has in the opinion expressed.

Although some of the consumers of a forensic pathologist’s opinion are experts, such as peer reviewers, many are lay persons who have little or no understanding of technical language. It is essential that the pathologist’s opinion be understood by all the users. It must therefore be communicated in language that is not only accurate but also clear, plain, and unambiguous.

In expressing their opinions, forensic pathologists should adopt an evidence-based approach. Such an approach requires that the emphasis be placed on empirical evidence, and its scope and limits, as established in large measure by

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<sup>218</sup> Ibid 429–30.

<sup>219</sup> Ibid 386–90, 391.

<sup>220</sup> Ibid 392.

<sup>221</sup> Ibid 392–401.

the peer-reviewed medical literature and other reliable sources. This approach places less emphasis on authoritative claims based on personal experience, which can seldom be quantified or independently validated.<sup>222</sup>

During the course of the Inquiry:

it became apparent that there is no common understanding of how forensic pathologists think about their level of confidence or certainty in their opinions; how they articulate this level, if at all, when communicating their opinions; and how they might strive to sharpen their perception and articulation of the level of certainty in their views. Misunderstanding can arise in a number of ways. Of greatest concern is the possibility that the criminal justice system, in its search for certainty, will interpret a pathology opinion as reflecting a higher level of confidence than the expert intended.<sup>223</sup>

This led to Recommendation 86 (and 99), where it is suggested that forensic pathologists should report as accurately as possible pending the results of multidisciplinary work on a ‘common language to describe what forensic pathologists have to say’.<sup>224</sup> It is also recommended (87 and 88) that forensic pathologists ‘should not formulate or articulate their opinions’ in terms of ‘proof beyond a reasonable doubt’ and should not change their level of confidence ‘depending on the forum in which the opinions are expressed’.<sup>225</sup>

Goudge emphasised the importance of disclosing the limits of opinions and the existence of differences of opinion and controversy. Recommendation 91 states:

- a) Forensic pathologists should clearly communicate, where applicable, areas of controversy that may be relevant to their opinions and place their opinions in that context.
- b) They should also clearly communicate, where applicable, the limits of the science relevant to the particular opinions they express.
- c) They should remain mindful of both the limits and the controversies surrounding forensic pathology as they form their opinions and as they analyze the level of confidence they have in those opinions.
- d) These obligations extend to the content of post-mortem or consultation reports, to verbal communications, and to testimony.<sup>226</sup>

The need for positive disclosure extends to ‘a positive obligation to recognize and identify for others the limits of their expertise. Forensic pathologists should avoid expressing opinions that fall outside that expertise. When invited to provide such opinions, they should make the limits of their expertise clear and decline to do so’

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<sup>222</sup> Ibid 408.

<sup>223</sup> Ibid 410–11.

<sup>224</sup> Ibid 413, 435.

<sup>225</sup> Ibid 414.

<sup>226</sup> Ibid 419.

(Recommendation 92).<sup>227</sup> Furthermore, forensic pathologists should not engage in ‘default diagnoses’ (Recommendation 89) and should outline, in reports, ‘the alternative or potential diagnoses that may arise in a case’ (Recommendation 90).<sup>228</sup>

Because the Inquiry emerged out of wrongful convictions, the Commissioner devoted time and resources to the ‘Role of the Court’ in an attempt to ‘assist in making the courts less vulnerable to unreliable expert evidence’.<sup>229</sup> In this vein, Goudge explains that:

The justice system should place a premium on the reliability of expert evidence if it is to maximize the contribution of that evidence to the truth-seeking function and be faithful to the fundamental fairness required of the criminal process.<sup>230</sup>

The Commissioner stressed that the ‘judge must bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence.’<sup>231</sup> Among the main recommendations is the need for the court to ‘clearly define the subject area of the witness’s expertise and vigorously confine the witness’s testimony to it’ (Recommendation 129), and for judges to be vigilant ‘gatekeepers’ attentive to the reliability of expert evidence regardless of whether techniques are classified as novel (Recommendations 130, 131 and 133).<sup>232</sup> To assist in this capacity, the National Judicial Institute (of Canada) ‘should consider programs for judges on threshold reliability and the scientific method in the context of determining the admissibility of expert scientific evidence’ (Recommendation 134).<sup>233</sup>

Goudge also recommends both a Code of Practice for pathologists (Recommendation 98) and a Code of Conduct for Expert Witnesses providing:

that experts have a duty to assist the court ... and that this duty overrides any obligation to the person from who they received instruction or payment [Recommendation 136].<sup>234</sup>

The Recommendations for the trial, particularly the need for better funding for the defence follow recognition that trials and appeals had not uncovered systemic problems with the delivery of pathology evidence in prosecutions arising from paediatric injury and death.

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<sup>227</sup> Ibid 420.

<sup>228</sup> Ibid 417.

<sup>229</sup> Ibid 470, 471.

<sup>230</sup> Ibid 484. See especially Recommendations 130 and 131, at 487, 496.

<sup>231</sup> Ibid 470.

<sup>232</sup> Ibid 487.

<sup>233</sup> Ibid 502.

<sup>234</sup> Ibid 505. These are consistent with codes already in place in England and Wales and many Australian jurisdictions.

*E Thematic Summary of Recommendations*

The table below provides a useful review of recommendations on some of the key issues. The table reinforces how many of the findings and recommendations are shared across the reports and would seem to be widely applicable to many types of forensic science and medicine in use across common law jurisdictions.

RECOMMENDATIONS	NRC REPORT	NIST REPORT	SFI REPORT	GOUDGE REPORT
Need for research, validity and reliability	Rec. 1(c), 1(i), 3	Rec. 3.7, 3.9, 4.1, 4.2	Rec. 81–4	Rec. 4, 69
Identification and reduction of error	5	3.6, 6.3, 9.1, 9.2	67, 69	
Identification and reduction of bias	5	3.3, 7.1	6–8, 18, 21, 22, 24, 29–32, 42	70, 75, 110
Current expression problematic	2	3.7	1, 2, 3	84, 89
Develop probabilistic approach	3	3.5, 4.2, 4.3	83	
Documentation, transparency and disclosure		3.1, 3.2, 6.2, 6.4	5, 17, 26, 39, 40, 44–53, 56–9	74–6, 79, 93–5
More training, formal qualifications and continuing education	1(d), 1(g)	4.3, 8.3, 8.4, 8.5, 8.7	17, 70–2, 85, 86	6, 7, 60, 88, 135
Comprehensible to end users	1(h)	5.1, 6.1	9, 64, 65	84–7, 90, 91, 96, 99, 100
Code of ethics/impartiality	9	6.2		97, 98, 136
Research on expression	3	3.8	82	84
More detailed reports	2	5.2	57, 59	
Accreditation, certification and proficiency	1(g), 6, 7, 8	6.4, 8.7, 8.8, 9.3, 9.4, 9.5	76–80	2, 32, 42–6, 50–3, 57, 59
More funding required	1, 10, 11, 12, 13	4.4, 8.2		8–11
Need to engage with scholars	6	8.4	16–18	3, 5, 33
Detailed standards and protocols	1(a), 1(b), 1, 6	3.4	10–12, 19, 20, 23, 25, 33–6	34, 52, 54, 68, 69
Legal responses	1(h)	6.1	60–3	101–28, 129–40
Need for independence	4			
Reliability for admissibility	Yes	Yes		Yes — ‘threshold reliability’
Total recommendations	13	34	86	169

**Table 1: A Summary of The Main Findings and Recommendations**

### III IMPLICATIONS FOR AUSTRALIA (AND BEYOND)

The third part of this essay is a commentary. Before embarking on this analysis I want to make or reiterate four important points. First, many forensic science and medical techniques are insufficiently reliable. That is, we do not know if they work, how well or in what conditions. They are insufficiently reliable because appropriate scientific research has not been performed.<sup>235</sup> Consequently, the validity and reliability of many techniques in routine use is simply unknown and standards and accreditation are not predicated upon the results of research.<sup>236</sup> Secondly, the reports stress the importance of transparency. They place considerable emphasis on the need for enhanced documentation and disclosure to lawyers, courts and other experts. Transparency is important generally, though especially important where there are serious limitations, such as little underlying research or analysts being exposed to threats from cognitive bias. Thirdly, longstanding (and continuing) use, previous legal recognition, and the experience of examiners and judges, are not presented in the reports as grounds for maintaining confidence in particular techniques, interpretations or practices. The fourth point is that the kinds of issues raised in these reports emerge relatively rarely in trials and appeals in Australia and do not feature prominently in the relevant jurisprudence.<sup>237</sup>

In the remainder of this essay, it is my intention to briefly review some of the findings, recommendations and insights with an eye to their implications for forensic science and medicine evidence and criminal proceedings in Australia. Many raise unsettling questions about the performance of lawyers and judges interpreting and applying rules as well as the effectiveness of adversarial mechanisms.

#### *A Australian Exceptionalism?*

Critically important to this discussion is the relevance of these findings and recommendations to forensic science and medicine in Australia. To the question ‘Do they apply to Australia?’, the answer is an almost unqualified ‘Yes’. Australia is not exceptional in its production, presentation and treatment of forensic science and medicine evidence.

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<sup>235</sup> Appellate courts in England and Wales have merely required that, if requested, analysts should disclose the fact that there has been no validation study and there is no database behind claims about frequency. Even though the seriousness, and implications, of these oversights are rarely developed. See, for example, *R v Atkins* [2009] EWCA Crim 1876 (30 July 2009); discussed in Gary Edmond et al, ‘*Atkins v The Emperor: The “Cautious” Use of Unreliable “Expert” Opinion*’ (2010) 14 *The International Journal of Evidence & Proof* 146.

<sup>236</sup> NRC Report, above n 12, 135. This extends to techniques that are otherwise reliable, see William C Thompson, ‘Painting the Target around the Matching Profile: The Texas Sharpshooter Fallacy in Forensic DNA Interpretation’ (2009) 8 *Law, Probability and Risk* 257.

<sup>237</sup> Andrew Ligertwood and Gary Edmond, *Australian Evidence* (LexisNexis, 5<sup>th</sup> ed, 2010).

While there are significant differences, particularly around admissibility jurisprudence, rules and procedures, traditions of practice and even levels of accreditation and certification, most of the problems with forensic sciences in North America and the United Kingdom have direct implications for Australia.<sup>238</sup> This is readily discernible in relation to the inadequate research base, the forms of expression (used in reports and testimony), the failure to disclose error rates, the reluctance (or inability) to introduce probabilistic forms of expression (whether frequentist or likelihood ratios) based on data, and the unwillingness to shield analysts from domain irrelevant information. Two examples are illuminating. Taking the research base, as an obvious and decisive example (that trumps accreditation and standards), the NRC Report explained that many of the techniques, especially those that were not derived from developments in mainstream biology and chemistry, do not have an adequate research base.<sup>239</sup> For, where there is no research base in the United States (or England or Canada or Germany or Japan) we can confidently assume that none exists. The globalised nature of the modern sciences and international collaboration in law enforcement and counter-terrorism efforts means that missing research is missing everywhere. Australia is not in possession of a clandestine research repository. The fact that Australian laboratories might be better accredited, to varying degrees have standards and protocols, and better-trained personnel, cannot overcome the failure to have undertaken validation studies, confirm that techniques and practices are efficacious, or the need to attend to uncertainty and error.<sup>240</sup>

A second, more specific example concerns latent fingerprint evidence. Australian fingerprint examiners continue to rely on ACE-V as a comprehensive and adequate description of their scientific credentials and continue to express the results of their comparisons in positive terms — equating a match with the identification of an individual to the exclusion of all other persons. While latent fingerprint evidence will usually have considerable probative value, Australian examiners, like their British and North American counterparts, tend to be indifferent or unresponsive to what have become notorious issues in the practice and reporting of latent fingerprint evidence. Australian examiners are not shielded from gratuitous (ie domain irrelevant) information and routinely provide positive identification evidence.<sup>241</sup> These practices are inconsistent with the recommendations of the three reports that considered latent fingerprint evidence.

<sup>238</sup> Australia has been a leader in the accreditation of laboratories. However, accreditation depends on the validation of techniques. Having accredited laboratories using techniques that have not been validated and with unknown levels of error is likely to disguise real risks and limitations as analysts appeal to formal processes that may be devoid of content. Accreditation without validation is a triumph of form over substance.

<sup>239</sup> It trumps accreditation and standards because these should be predicated upon research and validation studies for particular practices.

<sup>240</sup> Accreditation and standards mean that a process is in place and that analysts are doing the same things, not that the processes or practices actually work.

<sup>241</sup> See Edmond, Tangen and Thompson, ‘A Guide to Interpreting Forensic Testimony’, above n 155.

While the reports have undoubted relevance and, in many cases, application to Australia, it is also appropriate to recognise the variegated nature of the forensic sciences and their institutions both within and across Australian jurisdictions.<sup>242</sup> Unremarkably, there are anomalies and counter examples. The Victorian Institute of Forensic Medicine, for example, has been a leader in the development of standards and the provision of qualified evidence in reports and testimony. Several of the Institute's most senior forensic pathologists have, in the face of controversy and/or inadequate research foundations, been willing to acknowledge uncertainty and have manifested a creditable reluctance to express strong opinions under pressure from police and prosecutors.<sup>243</sup> Similarly, document examiners in the Victoria Police Forensic Services Department have endeavoured to respond to perceived weaknesses and threats from bias by restricting access to domain irrelevant information and developing probabilistic approaches to their analyses.<sup>244</sup> Australia's version of a NIFS is simultaneously endeavouring to improve the standard and performance of the forensic sciences, but in terms of resourcing, independence from law enforcement, scientific leadership and authority to impose standards, is but a pale shadow of the institute proposed in the NRC Report.<sup>245</sup> The basic need for more research, for techniques, processes and the expression of opinions to be derived from research (and data), for attention to human factors, and for greater transparency about processes and limitations, seems — notwithstanding a few conspicuous exceptions — to be as applicable to Australia as elsewhere.

Those who would contend that the convergent findings and recommendations from other advanced common law jurisdictions do not apply to Australia have responsibility for making that case persuasively.<sup>246</sup> In anticipation, it is important to emphasise that accreditation, a process to develop generic standards for the forensic sciences and Australia already having a National Institute of Forensic Sciences<sup>247</sup> are not credible responses to the lack of research, a history of non-disclosure (see Part III(B))

<sup>242</sup> See Andrew Ligertwood, 'Forensic Science Expressions and Legal Proof' (2013) 45 *Australian Journal of Forensic Sciences* 263.

<sup>243</sup> See *R v Matthey* (2007) 177 A Crim R 470; *Gilham v The Queen* [2012] NSWCCA 131 (25 June 2012). Professor Cordner's 'modest' approach to the interpretation of the injuries in *Gilham* led two senior prosecutors to characterise him as an unreliable witness. See Justice McClellan's criticisms of these characterisations in *Gilham* at [351]ff, [383]ff and [396]–[412].

<sup>244</sup> Interestingly, Victoria seems to be a something of an Australian leader in these areas.

<sup>245</sup> See, for example, Frank Vincent, *Independent Review of the National Institute of Forensic Science* (July 2014).

<sup>246</sup> These issues are so serious that the burden cannot rest with critics.

<sup>247</sup> Australia's NIFS is not the kind of independent, science-driven institution recommended in the NRC Report. Although it was originally more independent, NIFS is effectively captured by law enforcement: funded by state and federal police and dominated by individuals who are or were police and/or forensic scientists. The Australian NIFS reports to the Australia New Zealand Policing Advisory Agency (ANZPAA) board. See Alastair Ross, 'Forensic Science in Australia — Can We Learn from International Reports?' (2011) 43 *Australian Journal of Forensic Sciences* 135.



below) and continuing indifference to notorious threats from contextual and other forms of bias.<sup>248</sup> Similarly, the fact that we have been doing things for a long time and have not (yet) exposed as many wrongful convictions as any other jurisdiction is no answer to substantial criticisms — see Part III(J) below.<sup>249</sup>

The findings and recommendations in the reports make clear that many of our trials and appeals have been substantially unfair. Forensic science and medicine evidence has been routinely misrepresented in reports and testimony (regardless of whether the analysts and lawyers knew) and there have been relatively few substantial challenges to forensic science evidence that was insufficiently reliable. Fingerprint evidence continues to be opaque; expressed in absolute terms — linking a latent print to the accused as opposed to every other person who has ever lived. Incriminating opinions derived from images, voices, bite marks, tools and firearms, documents, fires and explosives, shoe and tire marks, injuries to children (and so on) are routinely expressed in terms that are not consistent with available research (ie *what is known*). Even DNA evidence, the poster-child for reliable forensic science techniques, has very real risks of error.<sup>250</sup> We have already encountered mistakes in the collection and continuity of DNA evidence, and increasing sensitivity, mixed samples, along with new techniques and applications, create difficult interpretive issues that are yet to be studied or credibly addressed.<sup>251</sup> Moreover, Australia has few coherent

<sup>248</sup> The author is the only active member of the Standards Australia committee on the reference for the forensic sciences who is not a current or former member of a police force or forensic science institution. Revealingly, there are no independent scientists, no cognitive scientists, and no other lawyers involved in the drafting and revision processes.

<sup>249</sup> We do not have independent mechanisms such as Criminal Cases Review Commissions or well-functioning innocence projects in Australia.

<sup>250</sup> NRC Report, above n 12, 101, 106. ‘The goal is not to hold other disciplines to DNA’s high standards in all respects; after all, it is unlikely that most other current forensic methods will ever produce evidence as discriminating as DNA. However ... the least that the courts should insist upon from any forensic discipline is certainty that practitioners in the field adhere to enforceable standards, ensuring that any and all scientific testimony or evidence admitted is not only relevant, but reliable.’ See also David H Kaye, *The Double Helix and the Law of Evidence* (Harvard University Press, 2010) and Lynch et al, *Truth Machine*, above n 7. Interestingly, the NIST Report cites studies that suggest error rates for DNA testing in European laboratories have ‘stabilized in the range of 0.4% to 0.7%.’ S Rand et al, ‘The GEDNAP (German DNA Profiling Group) Blind Trial Concept Part II: Trends and Developments’ (2004) 118 *International Journal of Legal Medicine* 83.

<sup>251</sup> See, for example, Vincent, *Report: Inquiry Into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama*, above n 182. More generally, there are dangers where DNA analysts interpret results, especially mixed samples and LCN profiles after they have been exposed to the profile of the suspect. Analysts should be required to *identify and document* what are peaks, stutters and other anomalies before being exposed to the profile of the suspect. There are, with almost all techniques, problems in moving from the data to the interpretation and in conveying the opinion/conclusion to the decision-maker in ways that are simultaneously consistent with what is known, comprehensible and meaningful in terms of criminal proof. See William C



review mechanisms beyond appeals. Unlike England, Wales and Scotland and many jurisdictions in the United States, our post-conviction review processes are generally narrow and incumbents incredulous in disposition.<sup>252</sup>

### B *When are the Forensic Analysts Planning to Come Clean?*

While the various findings and recommendations may come as something of a surprise to many legal practitioners and judges, they are by now familiar to forensic analysts. Most forensic analysts have some familiarity with these reports and recommendations. All Australian fingerprint examiners, by way of example, are aware of the controversy surrounding Mayfield and McKie and the subsequent reports.<sup>253</sup> Conferences and working groups have devoted time and discussion to their implications. Indeed, the initial shock and denial has largely passed, as many analysts and institutions are now struggling to come to terms with the need for research and reform. However, as the reports explain, many analysts do not have the time, the necessary skills and/or resources to address fundamental epistemic problems. Most forensic analysts, including latent fingerprint analysts, are not trained in research methods, statistics or cognitive science. Consequently, they are not in a good position to respond to the various recommendations unilaterally.<sup>254</sup>

In general, we are yet to see responses to the criticisms of current practices, particularly in relation to research, revised terminologies and disclosure. Thus far, and notwithstanding the chorus of criticisms that both pre-date and post-date the reports, forensic analysts relying upon techniques that have never been validated, are yet to disclose these oversights and the corrosive implications for their ‘evidence’. They have not volunteered that extant processes do not shield against notorious cognitive biases, they have not explained that many opinions are little more than speculation and that many traditional practices are without empirical foundation. They have not conceded that in many areas they have no idea about their ability or error rate.<sup>255</sup> As a

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Thompson, ‘What Role Should Investigative Facts Play in the Evaluation of Scientific Evidence?’ (2011) 43 *Australian Journal of Forensic Sciences* 123 and *Tuite v The Queen* [2015] VSCA 148 (12 June 2015).

<sup>252</sup> David Hamer, ‘Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission’ (2014) 37 *University of New South Wales Law Journal* 270.

<sup>253</sup> They are also aware of the work of critics such as Professor Simon Cole, Professor Jennifer Mnookin and others. However, they do not refer to notorious criticisms in reports or testimony.

<sup>254</sup> Research scientists have begun to develop statistical models and undertake appropriate validation studies so that we have a clearer idea about abilities, errors and the value of matches. Ironically, some of the pioneers of fingerprint comparison, such as Sir Francis Galton (1822–1911) and Henry Faulds (1843–1930), were sophisticated mathematicians aware of many statistical and practical-epistemic problems.

<sup>255</sup> It may be that many techniques will turn out to be quite reliable. The point is that we should not take this on trust when ability and accuracy can be measured and techniques can be improved.

community, forensic scientists have been recalcitrant, sometimes duplicitous, in their failure to proactively concede notorious epistemic constraints and bring them to the attention of users, whether lawyers, judges or jurors.

The continuing silence, especially from leaders and managers, along with conscious omissions from expert reports and trial testimony, is nothing short of scandalous. Forensic scientists have a duty to the court and a commitment to truth. They must respond to the criticisms and professional obligations and disclose epistemic limitations.

### C ‘Reliability’ in Admissibility and Discretionary Decision-Making

The widespread failure of forensic scientists to unilaterally disclose limitations — notwithstanding the ‘oath’, admissibility standards, procedural rules, codes of conduct and practice directions (see Part III(G), below) — means that the burden falls on the lawyers and the trial. In practice the burden tends to fall almost entirely on the defence. This sits awkwardly with the presumption of innocence (and the burden of proof) and, as we have seen, is a responsibility that the system is not, at present, capable of bearing.<sup>256</sup> Nevertheless, the findings and recommendations in these reports reinforce the need for attention to the value of forensic science and medicine evidence and active judicial gatekeeping at the admissibility stage. Admissibility is important because the trial has not proven to be consistently effective in exposing or addressing weaknesses — see Part III(D) below. Incriminating expert opinion evidence should be demonstrably reliable. Unreliable and insufficiently reliable techniques and opinions should be excluded.

It is essential for lawyers and judges to direct their attention to the reliability of incriminating expert evidence.<sup>257</sup> This applies across the board and is not restricted to novel techniques.<sup>258</sup> Expert opinions derived through techniques that have not been evaluated, or were derived through processes where the analyst was unnecessarily exposed to gratuitous information, or are not expressed in terms that have an appropriate foundation in research, have no place in a rational system of justice. They are not susceptible to rational evaluation by laypersons either individually or as part of a case.<sup>259</sup> In their admissibility jurisprudence around both the exception for opinions

<sup>256</sup> Inattention to the reliability of incriminating expert opinion evidence, and presenting incriminating opinions without appropriate qualifications and caution threatens to subvert criminal proof.

<sup>257</sup> This can be quite a complicated undertaking and it may be that models of reliability must respond, to some extent, to the particular type of expertise. See Edmond, ‘Pathological Science?’, above n 203.

<sup>258</sup> See *R v Trochym* [2007] 1 SCR 239. The recent decision of the Supreme Court of Victoria Court of Appeal in *Dupas v The Queen* (2012) 218 A Crim R 507 represents a positive development, but there needs to be a positive obligation on the state rather than an enhanced opportunity for the defence to challenge.

<sup>259</sup> Recall, NRC Report, above n 12, 184: ‘The level of accuracy of an analysis is likely to be a key determinant of its ultimate probative value.’ See also Gary Edmond, ‘Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation’ (2015) 39 *Melbourne University Law Review* (forthcoming).

based on ‘specialised knowledge’ and (mandatory and) discretionary exclusions, trial and appellate judges should direct their attention to the reliability of techniques and derivative opinions and the very real dangers that follow from unreliability and inattention to appropriate practices.

While reliability ought to be a prerequisite for admissibility, it is not my intention to suggest that a formal reliability threshold will operate as some kind of panacea.<sup>260</sup> After all, many jurisdictions with an explicit reliability standard admitted, and continue to admit, incriminating opinions that are insufficiently reliable — either unreliable or of unknown reliability. Nevertheless, apprised of some of the problems and recommendations, lawyers and judges are now in a better position *and obliged* to respond to the reliability of expert evidence. Lawyers and trial judges should be willing and able to ask to see research and to ask about procedures, standards, rates of error and limitations. They should expect to see reference to relevant published studies. In many cases, inattention to these sorts of issues threatens both the fairness of the trial and the safety of any conviction. Actual reliability would seem to be a condition precedent to admission. Inattention or insufficient attention to reliability has led to the current state of affairs where unreliable and speculative opinions are sometimes treated as scientifically predicated and reliable, occasionally infallible, evidence of guilt.

Courts have been too accommodating in their responses to the state’s incriminating expert evidence. They have ‘certified’ techniques and experts prematurely; thereby allowing untested and therefore speculative forms of evidence into trials, and required the defence to somehow identify, explain and successfully convey limitations at the accused’s peril. Symbolically, as well as practically, it seems that requiring ‘experts’ called by the state to demonstrate actual abilities and readily concede limitations and uncertainties is consistent with the basic goals of the accusatorial trial and criminal proof. Inattention to reliability places decision-makers in an impossible position and subverts the goal of doing justice in the pursuit of truth.<sup>261</sup>

#### *D Trial Safeguards are Weak and Have Been Ineffective Against Expert Evidence*

Attention to reliability, along with the willingness to exclude relevant though insufficiently reliable incriminating expert evidence, is vitally important because adversarial mechanisms and trial safeguards have not proven effective.<sup>262</sup> Individually

<sup>260</sup> See Gary Edmond et al, ‘Admissibility Compared: The Reception of Incriminating Expert Opinion (ie Forensic Science) Evidence in Four Adversarial Jurisdictions’ (2013) 3 *University of Denver Criminal Law Review* 31.

<sup>261</sup> H L Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008).

<sup>262</sup> Here it is important to acknowledge that serious (albeit usually unsuccessful) challenges occasionally occur in the US where coordinated innocence projects and attentive scholars often cooperate in an attempt to expose problems and limitations through strategic litigation. Challenges that extend beyond the superficial are highly irregular in the US and Australia, but they occur more regularly in the US just because of the sheer volume of cases and levels of specialisation.

and in combination, prosecutorial restraint (as a ‘minister of justice’), admissibility standards and judicial discretions, cross-examination, defence (ie rebuttal) experts, restrictions on expression (eg similarity evidence rather than positive identifications), directions and warnings, the onerous burden of proof, and even appeals, have not afforded credible protection to those confronted with unreliable opinions or expert evidence that was not appropriately constrained.<sup>263</sup> Significantly, they did not expose the problems identified in the various reports nor reveal their prevalence across the forensic sciences. Standard judicial directions and warnings, in particular, do not refer to, nor have they substantially engaged with, the many issues raised in the reports. It is perhaps illuminating that, years after the publication of highly critical reports, legal safeguards are yet to expose serious (and now notorious) epistemic frailties.

Traditional legal practices and protections did not persuade judges to alter their historically accommodating response to incriminating expert evidence. They did not effectively convey the range and depth of problems, nor the inability of many disciplines and practitioners to fully gauge their significance, let alone address them. The focus on the individual case and the rather myopic manner in which cases are tried and appealed, seem to have made it difficult for trial and appellate judges to appreciate (or respond to) some of the systemic dimensions at play across a wide range of techniques and practices. There has, for example, been no systematic attempt to consider the way human factor issues might impact across all interpretive processes, or the way that different types of identification and comparison evidence might be expressed in court. In consequence, legal responses to different types of expert evidence tend to be largely oblivious to structural similarities (and dangers) and the responses to different techniques (eg using DNA profiling, bite marks, CCTV images and voice recordings to assist with identification) tend to be not merely unprincipled, but epistemologically incoherent.<sup>264</sup>

Trial safeguards and protections (and human rights instruments) can, in some circumstances, afford very effective means of identifying and presenting evidentiary weaknesses to the tribunal of fact. On most occasions they do not. In practice, trial safeguards and commitment to a fair trial often have more of a discursive or rhetorical flavour than a substantial one. Historically, trial and appellate judges have placed great store in the effectiveness of admissibility rules, the power of cross-examination, their own directions and instructions to the jury, along with the jury’s ‘common sense’. Notwithstanding this seemingly inexhaustible faith, none of these and other protections consistently, nor effectively, exposed the profound problems with many types of forensic science and medicine.

In a recent review of expert opinion evidence in criminal proceedings in England and Wales, the Law Commission expressed doubts about widespread legal confidence in traditional trial safeguards:

<sup>263</sup> Gary Edmond and Mehera San Roque, ‘The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial’ (2012) 24 *Current Issues in Criminal Justice* 51.

<sup>264</sup> See Edmond et al, ‘Admissibility Compared’, above n 260.

Cross-examination, the adduction of contrary expert evidence and judicial guidance at the end of the trial are currently assumed to provide sufficient safeguards in relation to expert evidence ... However, ... it is doubtful whether these are valid assumptions.<sup>265</sup>

Similar concerns were expressed, more starkly, by Judge Edwards in the aftermath of the NRC Report:

*Unfortunately*, the adversarial approach to the submission of evidence in court is not well suited to the task of finding ‘scientific truth.’ The judicial system is encumbered by, among other things, judges, lawyers, and jurors who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner; defense attorneys who often do not have the resources to challenge prosecutors’ forensic experts; trial judges (sitting alone) who must decide evidentiary issues without the benefit of judicial colleagues and often with little time for extensive research and reflection; and very limited appellate review of trial court rulings admitting disputed forensic evidence. Furthermore, the judicial system embodies a case-by-case adjudicatory approach that is not well suited to address the systematic problems in many of the various forensic science disciplines.<sup>266</sup>

Trials and appeals have not identified profound and widespread problems with the forensic sciences and medicine. Trial and appellate judges have not provided relevant or practical leadership and guidance in response to systemic problems with forensic science and medicine evidence. They have preferred to admit expert evidence and, when challenged, exhibited a tendency to valorise longstanding legal techniques, such as cross-examination and judicial directions, and privilege the experience of state-employed analysts — see Part III(I), below.

<sup>265</sup> Law Commission of England and Wales, *Expert Evidence in Criminal Proceedings in England and Wales*, 34 Law Commission Report No 325 (HMSO, 2011) 1.20, 1.24. Compare the US Supreme Court majority’s confidence in these mechanism in *Daubert v Merrell Dow Pharmaceuticals Inc* 113 S Ct 2786, 2798 (1993) (*‘Daubert’*) (italics added): ‘Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky* but admissible evidence’. Simultaneously, the Supreme Court dismissed concerns about ‘the capabilities of the jury and of the adversary system generally’ as ‘overly pessimistic’.

<sup>266</sup> Edwards, ‘Solving the Problems’, above n 11, 19 (emphasis added). Testifying before the Goudge Inquiry, Justice LeSage stated (at 501):

I must say it came as somewhat a shock to me, having spent 40 years in the justice system, to hear some of the scientific experts speak of the uncertainty and lack of clarity in areas of science that I had always thought of as much more certain than they really are. And I felt very guilty that I had not better educated myself on these areas long before.

*E Bias and Cross-Contamination*

One of the central and recurring themes in all of the reviews was the issue of bias. This is revealing because the danger posed by contextual bias has played almost no role in the discussion of forensic science and medicine evidence in trials and appeals. Significantly, the inquiries and reports were not especially interested in bias in the sense of overt partisanship (of the kind that tends to animate judges and law reform).<sup>267</sup> Rather, they focused attention on cognitive influences that tend to operate below the threshold of consciousness and are, therefore, difficult and sometimes impossible for analysts to overcome.

All of the reports recognise that exposure to gratuitous information — along with other influences and environmental factors — has a well-established tendency to subtly contaminate human cognition. The NRC Report, the NIST Report and the SFI Report each insist on the need for further research in this area and, in the absence of research, precautionary steps to prevent cognitive processes and institutional pressures improperly contaminating the interpretation and evaluation of evidence. In practice, this requires managing access to information about a case or investigation and may require shielding analysts from some kinds of information (blinding), and/or gradually exposing them to information as they document their initial impressions (sequential unmasking). It may also require the redesign of processes and computer programs (eg AFIS) that currently provide analysts with access to more information than is necessary.

Remarkably, these sorts of issues have rarely surfaced in trials and appeals.<sup>268</sup> This is remarkable because threats to cognitive processes have a demonstrated tendency to change how humans interpret evidence. Experiments have demonstrated that analysts may change their opinions when exposed to information that is not relevant to their analysis. In one series of studies fingerprint examiners (and DNA analysts), who did not know they were part of an experiment, were exposed to case information unrelated to their analyses. They were asked to re-assess samples they had previously matched (several years earlier) while under the impression that they had not seen the particular latent prints before. As part of the study the analysts were provided with information about the investigation, which implied that the prints did not match. The results indicate that a large proportion (up to 80 per cent in one study) produced interpretations, on the central issue of whether two prints or profiles matched, that

<sup>267</sup> English and Australian judges, in contrast, have been concerned with adversarial partisanship, especially in civil proceedings. See Lord Woolf, *Access to Justice* (HMSO, London, 1996); see also Ian Freckelton, Prasuna Reddy and Hugh Selby, *Australian Judicial Perspectives: An Empirical Study* (Melbourne, Australian Institute of Judicial Administration, 1999); New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005). See also Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books, 1991).

<sup>268</sup> Contrast Shannon, *Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt*, above n 8.

were inconsistent with previous interpretations of the same material by the same examiner.<sup>269</sup>

Threats from bias are real and, significantly, cannot be easily compensated for in the course of accusatorial proceedings. Once analysts are exposed to (cognitive) contamination, the threat cannot be corrected by informing the jury about potential dangers. What, after all, should a judge tell a jury? That the results of the fingerprint comparison are probably correct, but the analyst was unnecessarily exposed to the kind of information that has been shown to make them produce mistakes. How does a jury make sense of such evidence in the particular case? Obviously, the appropriate course of action is to shield analysts from domain-irrelevant information unless there is experimental evidence that exposure is unlikely to influence the analysis.

At this point it is worth stating emphatically that long experience and familiarity with the dangers of cognitive bias do not enable analysts to resist its pernicious effects. This is not an issue of morality or character but rather the manner in which humans process information. The only effective means of avoiding the danger of contamination is through shielding.

Another troubling issue arising out of inattention to bias concerns the way in which expert opinions are presented at trial and the danger of double counting when it comes to evaluating the evidence. At present, in almost all cases, forensic analysts are exposed to a great deal of (no doubt titillating) information that is not relevant to their practice.<sup>270</sup> Nevertheless, at trial, forensic science and medicine evidence is routinely presented as *independent* support (or corroboration) for the case against the accused. In reality, because of the danger posed by contamination, we do not know if such interpretive evidence is actually independent. If an interpretation (ie opinion) was shaped or strengthened, for example, by other information (such as knowledge that the suspect had made certain admissions, or the detectives indicated that the suspect had antecedents) then claims about the independence of the expert evidence are misleading. The forensic science evidence is no longer independent of other strands of information — regardless of whether that information is reliable or admissible.<sup>271</sup> While the evidence may still have probative value it has less probative value than opinions that were derived in ignorance of such information.<sup>272</sup> Once

<sup>269</sup> Dror, Charlton and Peron, 'Contextual Information' above n 91; Itiel E Dror and Greg Hampikian, 'Subjectivity and Bias in Forensic DNA Mixture Interpretation' (2011) 51 *Science and Justice* 204.

<sup>270</sup> One of the difficulties is sometimes determining what is relevant. This, as Goudge's recommendations imply, is usually more of an issue for forensic pathologists than fingerprint analysts. See also Emma Cunliffe, 'Judging Fast and Slow: Using Decision-making Theory to Explore Judicial Fact Determination' (2014) 18 *The International Journal of Evidence & Proof* 139.

<sup>271</sup> It is not only reliable knowledge that has the power to influence. Innuendo, unfounded beliefs and commitments, institutional pressures and expectations, can all unwittingly shape cognitive processing.

<sup>272</sup> See Edmond et al, 'Contextual Bias and Cross-Contamination in the Forensic Sciences', above n 53.

contaminated the probative value is unknown (reliability is compromised), but the danger of unfair prejudice to the accused through misrepresentation, over-valuation, the danger of mistakes and the impossibility of exploring the issue in relation to any specific analysis and opinion will often be extreme.<sup>273</sup>

Where, as in most cases, there is no need to expose the analyst to background information, this information should not be conveyed and should not be accessible to the analyst.<sup>274</sup> Shielding the analyst has the benefit of avoiding threats to cognition, strengthening their evidence (by making it genuinely independent), and enabling analysts to provide independent feedback on, rather than endorsement of, investigative suspicions and leads. Warning fact-finders about forensic science evidence represented as independent corroboration not actually being independent is, in contrast, not an effective means of addressing very serious dangers that could, in the vast majority of cases, be avoided relatively easily. In practice it places an obligation on the trial judge and the defence lawyer to explain the dangers from bias — even though lawyers and judges had not previously appreciated their significance, and there will be little chance of identifying any effects from bias in the specific case (regardless of whether they were present). It also imposes the dangers created by insensitivity to bias on the accused even though investigators could have employed procedures that avoided the risk.

Moreover, the trial is not necessarily stuck with the contaminated evidence. In many cases the actual interpretation could be re-conducted by a separate analyst (preferably from a different laboratory) shielded from gratuitous information. In the absence of evidence demonstrating that bias is not an issue, trial and appellate judges should be very cautious about admitting contaminated evidence. The issue of bias and the cross-contamination of evidence are difficult to manage at trial. In particular, subtle exposure and contamination are often difficult to trace retrospectively. Because effects tend to operate below the threshold of consciousness they are difficult to explore through cross-examination. Of significance, the passing of gratuitous information is seldom documented, often informal and may even be forgotten. Actual exposure — rather than a witness’s recollection or demonstrable impact on their practice or evidence — ought to guide decisions about admissibility and reliance.<sup>275</sup> Responsibility for demonstrating that exposure to domain irrelevant information does not bias practice, or the conditions in which analysts are capable of resisting some kinds of unnecessary contamination, properly resides with the State and its analysts.

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<sup>273</sup> Here the only way the issue can be explored by the defence is by introducing general theories of cognitive problems. There is very little chance of identifying contamination and its specific effect(s) post factum.

<sup>274</sup> Sometimes the process itself can be suggestive, such as where the analyst is only presented with one comparator. So, for example, where police present images of only one suspect, along with CCTV images of an armed robbery, the process conveys their belief that the suspect is the offender. This is standard practice in forensic image comparison in Australia, England and Wales.

<sup>275</sup> Failure to address the issue in reports and documents should be viewed very critically.

*F Jury Not Properly Positioned to Evaluate the Evidence*

Regardless of one's position on the continuing use of jurors, it follows from the failure of forensic scientists to appreciate and disclose limitations, and the failure of lawyers and judges to independently identify and adequately convey (or respond to) them, that juries have not been placed in conditions that are conducive to the rational evaluation of incriminating opinion evidence and proof of guilt more generally.<sup>276</sup> When it comes to jury evaluation of expert evidence, and the combination of expert evidence with other forms of evidence, trial and appellate court confidence and deference would seem to be misplaced.<sup>277</sup>

*G Court-Appointed Experts, Concurrent Evidence and Codes Of Conduct*

Of all the inquiries only Goudge and, to a more limited degree, Campbell devote attention to legal — as opposed to scientific — practice. Revealingly, there is little support for importing putative solutions from non-adversarial systems.<sup>278</sup> Indeed, Goudge considered but explicitly rejected them: 'Court-appointed or joint experts are not recommended for cases involving paediatric forensic pathology.'<sup>279</sup> Whereas judges frequently express concerns about the partiality or partisanship of expert witnesses, especially expert witnesses called by plaintiffs in civil suits and defendants in criminal proceedings, the discussion in the reports is instead focused on problems — flowing from the lack of research, weak standards and inattention to human factors — *impacting on state-employed forensic analysts*. The emphasis on reliability, research, standards, and transparency is intended to make the occasional incidence of fraud more difficult as well as address systemic problems and risks created by human factors. Significantly, risks are not removed and may not even be addressed through recourse to different, apparently more neutral or independent, experts. For, even genuinely independent experts must employ valid techniques and can have their opinions unwittingly contaminated through exposure to gratuitous information. In the Mayfield case, an independent expert confirmed the mistaken attribution made by three FBI fingerprint examiners.<sup>280</sup> All persons, including court-appointed experts (and jurors and judges), are vulnerable to cognitive bias and error.

<sup>276</sup> For an orthodox expression, see Ronald Allen and Joe Miller, 'The Common Law Theory of Experts: Deference or Education' (1993) 87 *Northwestern University Law Review* 1131. See also Edmond, 'Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation', above n 259.

<sup>277</sup> Here, claims about judge and jury agreement might be rendered problematic to the extent that both groups have relied on quite simplistic impressions of expertise and expert evidence.

<sup>278</sup> Edmond and Vuille, 'Comparing the Use of Forensic Science Evidence in Australia, Switzerland and the United States', above n 4.

<sup>279</sup> Goudge Report, above n 12, 506–7 [Recommendation 137]. Goudge accepted that 'people such as Professor Sir Roy Meadow, whose testimony was later discredited in England, or Dr Smith might have been precisely the type of well-known "experts" appointed by the court or chosen by the parties as joint experts.'

<sup>280</sup> The independent reviewer was not blinded to the conclusions of the other examiners.

Only the Goudge Inquiry considered receiving evidence concurrently. Goudge recommended more pre-trial meetings between experts, and between experts and lawyers. He also proposed trialling concurrent evidence procedures. Accepting that pre-trial meetings and concurrent evidence procedures may have some potential to enhance efficiency and improve communication and comprehension, it is important to recognise that achieving consensus among experts brought together (by the parties) on a concurrent panel is not a substitute for evidence of validity and reliability.<sup>281</sup> Three fingerprint examiners agreeing in a concurrent session does not somehow overcome the failure to validate techniques or determine the level of error. We should not forget that several examiners agreed with the result in each of the McKie and Mayfield misattributions.

Codes of conduct and professional ethics (and concurrent evidence) have some obvious value and potential, but they have not made a conspicuous difference to the performance of expert witnesses in criminal proceedings. Breaches are rarely disciplined and do not necessarily lead to the exclusion of evidence.<sup>282</sup> As with rules of admissibility, codes have been interpreted and applied loosely. They provide a basic normative framework where breaches are unlikely to lead to the exclusion of opinion evidence or even sanctions. This includes flagrant breaches by expert witnesses called by the prosecutor in criminal proceedings.<sup>283</sup>

#### *H Trials (and Appeals) Are Not a Credible Test of Forensic Science Techniques*

Given the preceding discussion, particularly express concerns about the historical weakness of legal proceedings; it probably goes without saying that the trial does not constitute a credible assessment of a technique.<sup>284</sup> Accepting that occasionally a well-resourced defendant might be able to use safeguards to challenge evidence and generate doubts, in the vast majority of cases (ie quotidian trials) weaknesses and limitations are not identified or explored in detail during the course of proceedings.<sup>285</sup> The fact that an expert or a particular technique has been previously admitted does not tell us anything about validity or reliability. Earlier decisions, sometimes

<sup>281</sup> In practice the defence may not have access to an expert and in many areas the state has an effective monopoly on current practitioners.

<sup>282</sup> This is also true for breaches of prosecutorial duties, they are hardly ever pursued. See Edmond, ‘(Ad)Ministering Justice’, above n 16.

<sup>283</sup> See discussion in *Wood v The Queen* (2012) 84 NSWLR 581, 618 [723]ff.

<sup>284</sup> NRC Report, above n 12, 42. There is a common belief among those in the forensic science and law enforcement communities that: ‘ability to withstand cross-examination in court when giving testimony related to these tests was sufficient to demonstrate the tests’ reliability’. For a notorious US example, see *United States v Haavard* 117 F Supp 2d 848 (SD Ind 2000).

<sup>285</sup> Compare Sheila Jasanoff, *Science at the Bar: Law, Science and Technology* (Harvard University Press, 1995) and Gary Edmond, ‘Science in Court: Negotiating the Meaning of a “Scientific” Experiment During a Murder Trial and Some Limits to Legal Deconstruction for the Public Understanding of Law and Science’ (1998) 20 *Sydney Law Review* 361.

used as ‘precedent’, may have been decided under different admissibility rules and almost never involve serious review of the technique(s). In consequence, earlier jurisprudence and previous admissibility decisions might not be particularly useful guides for contemporary practice.<sup>286</sup> Moreover, using prior decisions and convictions as admissibility heuristics is unlikely to prevent evidence ‘creep’ as experts extend the scope of claims derived from untested techniques once admitted; constrained only by the incredulity of technically-limited lawyers, judges and jurors.

The evaluation of techniques and proficiency of individuals should be carefully undertaken separate from legal proceedings; preferably independently and in circumstances where the correct answer (ie ‘ground truth’) is known.<sup>287</sup> Formal evaluation should produce an indication of validity and reliability. Such studies help us to understand the scope of application, the limits and errors, as well as the kinds of things that are legitimate to say when reporting the results from a particular technique.<sup>288</sup> Notably, trials and appeals provide none of these.<sup>289</sup> Similarly, trials and appeals cannot sensibly address threats from human factors, other than to bluntly recognise their possibility though without providing a mechanism to gauge their impact (or substantially address the risks created) in the instant case.

#### *I Experience and Peer Review: Necessary but Seldom Sufficient*

The various reports recognise, both implicitly and explicitly, that the experience of an analyst is not capable of validating a technique. Experience alone does not provide a safeguard in relation to forensic science and medicine.<sup>290</sup> Experience is necessary though almost never sufficient to ground admissibility.<sup>291</sup> Experience comes into its own through the application of validated techniques and methods.<sup>292</sup>

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<sup>286</sup> See, eg, Simon Cole, ‘Grandfathering Evidence: Fingerprint Admissibility Rulings from *Jennings* to *Llera Plaza* and Back Again’ (2004) 41 *American Criminal Law Review* 1189.

<sup>287</sup> Although, studies that simply compare whether analysts use similar practices or produce similar results (technically reliability, but without validation) can be informative in identifying potential problems.

<sup>288</sup> Interestingly, in *Daubert* the US Supreme Court indicated that these could be useful factors to consider; but they have not been taken seriously and applied by lower courts, especially in criminal proceedings.

<sup>289</sup> We may be confident about convictions, but they very rarely afford certain evidence of guilt or a particular state of affairs. To the extent that lawyers and judges negotiate expressions of opinions, these tend to be speculative.

<sup>290</sup> The reports were concerned about analysts expressing opinions about the significance of matches — particularly derived from latent fingerprints — on the basis of experience as opposed to probabilities derived from statistical analysis of data.

<sup>291</sup> Particularly where the techniques are, or it is envisaged that they will be, used routinely. Such techniques should be properly evaluated.

<sup>292</sup> Cf *R v Weller* [2010] EWCA Crim 1085 (4 March 2010).

Relying on experience tends to lead to bare assertions (so-called *ipse dixit*) that are difficult to challenge and seemingly persuasive. It tends to limit the potential for challenges to methods, ability and accuracy — and in a way that converts them to attacks on morality, character and credibility.<sup>293</sup> Moreover, because courts have often admitted forensic science and medicine evidence that is basically experiential, they are not usually receptive to subsequent admissibility challenges where it is suggested that the same (or similar) techniques may be speculative or misguided.

Unwittingly, experience has become a problem for courts because of their inclination to use the long experience of forensic analysts as grounds for admission (and reliance). Experience is a convenient (and simple) heuristic that enables judges to defer to the accommodating decisions of earlier courts or the length of time a person (or institution) has been doing something, without ever having to consider validation studies, reliability and limitations. Many rules and statutes (eg Federal Rules of Evidence, r 702,<sup>294</sup> Uniform Evidence Law, s 79) include ‘experience’ as a term that facilitates the admission of otherwise inadmissible opinions.<sup>295</sup> Recourse to ‘experience’ could be limited, however, by attending to the need for ‘knowledge’ — and in Australia reading ‘reliability’ into ‘specialised knowledge’. Such an approach would require even those presenting opinions derived from their experience to present ‘good grounds’ — that is, demonstrative evidence — for believing that techniques and opinions are sufficiently reliable.<sup>296</sup>

Perhaps the take away message is to recognise that when it comes to forensic science and medicine — especially in response to forensic science techniques that are, or are likely to be, in routine use — experience (and long use) cannot support the weight of admissibility. Prosecutors and trial judges, as well as defence lawyers, are obliged to direct attention to formal evidence of reliability. A witness should not be able to vouch for her performance on the basis of long experience, previous admission or prior convictions. None of these provide meaningful evidence of ability or accuracy.

None of the reports proposed long experience as a viable exception to the formal evaluation of techniques. The limits of experience reinforce the primacy of reliability as a prerequisite for admissibility.

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<sup>293</sup> And, employment history rather than validation studies, error rates and proficiency.

<sup>294</sup> *Federal Rules of Evidence* 28 USC r 702 (1975).

<sup>295</sup> *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

<sup>296</sup> In *Daubert*, the US Supreme Court explained that “‘knowledge’ connotes more than subjective belief or unsupported speculation’. The term ‘applies to any body of known facts or to any body of ideas inferred from such facts on good grounds’. Cf *Tuite v The Queen* [2015] VSCA 148 (12 June 2015).

Just as experience has serious limitations, so too peer review does not serve to validate a technique or result and is often quite a weak form of quality assurance.<sup>297</sup> Weakness is accentuated where techniques have not been evaluated and where those undertaking review are not blinded to contextual information and the workings and conclusions before undertaking their review. In the circumstances leading to the Scottish Fingerprint Inquiry, quite elaborate processes of review did not identify or address problems and even discrepancies. Similarly, review did not prevent the mistaken identification of Mayfield by the FBI. Indeed, in the Scottish case the fingerprint bureau was organised in such a way that disagreement could be effectively circumvented, and subsequently concealed, by obtaining alternative reviewers and not disclosing discordant opinions.

### *J Wrongful Convictions and Substantially Unfair Proceedings*

On the basis of the reports, it is my contention that a great deal of evidence has been misleadingly presented in investigations, plea negotiations, trials and appeals as reliable forensic science or expressed in terms that do not reflect the actual limitations of the underlying techniques.<sup>298</sup> Many trials will have been rendered substantially unfair on that basis, and in some proportion of trials the defendant will have lost the benefit of reasonable doubt because mistakes, techniques not being reliable, exaggeration and misrepresentation, technical limitations, and inattention to cognitive contamination, were not identified or explained. In some trials the incriminating forensic science and medical evidence — derived from techniques that are yet to be evaluated, using processes that were inattentive to cognitive risks — will have simply been wrong.

In making this claim about the near universal misuse of forensic science and medicine evidence, it is not my intention to suggest that all or even most of these convictions are mistaken. In the vast majority of cases we do not know for certain that a particular person is guilty. Even so, many past convictions were compelling without forensic science and medicine evidence, and sometimes weak forensic science and medicine evidence may have contributed to compelling cases. The concern is that people have been convicted in circumstances where real limitations with evidence were not disclosed and where there were real dangers that evidence was cross-contaminated and trial judges, appellate judges and jurors were not genuinely alive to these significant threats to proof.

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<sup>297</sup> Goudge Report, above n 12, 334. Second opinions are often presented as ‘peer review’. See also SFI Report above n 12; and Gary Edmond, ‘Judging the Scientific and Medical Literature: Some Legal Implications of Changes to Biomedical Research and Publication’ (2008) 28 *Oxford Journal of Legal Studies* 523.

<sup>298</sup> See for example, National Research Council, *Forensic Analysis Weighing Bullet Lead Evidence* (National Academies Press, 2004) and National Research Council, *On the Theory and Practice of Voice Identification* (National Academies Press, 1979). Interestingly, the FBI reviewed all the cases where there had been misrepresentations of bullet lead evidence. Contrast the (non)responses to the use of bullet lead, voice spectroscopy, microscopic hair comparison and other problematic forensic science evidence in Australia.

Those who insist on being shown wrongful convictions are, to some extent, asking the wrong question. The more appropriate and fundamental question for a criminal justice system that takes itself and its central precepts seriously is to ask: ‘Has incriminating expert opinion evidence been presented accurately and transparently (and in a manner that is comprehensible to the fact-finder)?’ In a large proportion of cases, both past and present, the answer must be ‘No’. Incriminating expert evidence continues to be presented without conveying *known* limitations, uncertainties and risks.

The fact that we have not uncovered many wrongful convictions, in systems that sometimes maintain strong, if seemingly irrational, commitments to their performance and the effectiveness of protections, might not be considered particularly surprising. Alternatively, it might be that Australian criminal justice systems are better than those in the United States, the United Kingdom and Canada at not convicting the innocent. That, however, needs to be demonstrated rather than asserted. Recent successful appeals in *Morgan*, *Gilham*, *Wood*, *Honeysett*, *Eastman* and *Keogh* all raise damaging questions about forensic science and medicine evidence as well as the ability of trials, and criminal justice personnel, to identify weak performances and suspect expert evidence.<sup>299</sup>

On the subject of uncovering wrongful convictions, involving the misuse or misrepresentation of forensic science evidence, it is interesting to consider the Expert Working Group’s response:

the chances of uncovering an erroneous identification are remote. Most fingerprint identifications are not challenged in court either because the defendant pled to some other charge or because the defense did not obtain a second opinion. Further, after conviction, the opportunities for innocent persons to obtain new evidence and have their convictions reviewed and overturned are still extremely rare.<sup>300</sup>

Undoubtedly influenced by the difficulties encountered by US-based innocence projects overturning convictions through exonerating DNA, the Working Group recognized just how difficult it is to excavate mistakes and address errors retrospectively. Such insights have an obvious salience to both the McKie and Mayfield cases, because the controversy that emerged from each of these incidents was highly unusual. It seems very likely that it was the unusual case circumstances, rather than the presence of exceptional errors, that led to exposure and notoriety.

<sup>299</sup> *Morgan v The Queen* (2011) 215 A Crim R 33; *Gilham v The Queen* (2012) 224 A Crim R 22; *Wood v The Queen* (2012) 84 NSWLR 581; B Martin, Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester, *Report of the Board of Inquiry* (2014); *Eastman v DPP (ACT) [No 2]* [2014] ACTSCFC 2 (22 August 2014); *Honeysett v The Queen* (2014) 253 CLR 122; *R v Keogh [No 2]* (2014) 121 SASR 307. See also the review of Kathleen Folbigg’s conviction by Emma Cunliffe in *Murder, Medicine and Motherhood* (Hart Publishing, 2011).

<sup>300</sup> NIST Report, above n 12, 33.

Unlike the vast majority of individuals who are charged and convicted in criminal justice systems, McKie and Mayfield had resources, supporters and the benefit of external intervention. As a policewoman and lawyer, respectively, they began with levels of social capital and resources that are atypical. Moreover, McKie's father was a senior police officer and the family eventually obtained the assistance of a non-aligned fingerprint examiner from the US who disagreed with the report from the Scottish bureau. In Mayfield's case, Spanish investigators formally rejected the FBI's attribution. They preferred the 'match' with a known terrorist produced by the Spanish National Police. It was in these circumstances that two positive identifications were contested and eventually rejected. In most criminal investigations there is no alternative authority and no *correct* answer. So, unless the suspect is well resourced or problems that occur 'backstage' are disclosed (or emerge), it can be very difficult to effectively challenge incriminating forensic science evidence — particularly the opinions of very experienced (and ostensibly impartial) analysts from prestigious institutions even when they are exaggerated or mistaken.

*K. Judicial Notice, Exogenous Knowledge and Engagement (After Aytugrul)*

One of the implications flowing from the non-disclosure by forensic analysts — and the incredibly circuitous and capricious manner in which research and knowledge gets before our courts — is that senior Australian judges have not been systematically exposed and are not, therefore, in a position to respond to the issues raised in the various reports. The upshot is that traditional — that is, deferential and accommodating — approaches toward the institutionalised forensic sciences and medicine have been perpetuated by judges, prosecutors and even defence lawyers notwithstanding unprecedented and unanswered criticism and recommendations for reform. Very few Australian courts have made references to the kinds of issues that need to be addressed. Australian courts are yet to reference any of the reports, despite daily reliance on DNA, latent fingerprint, voice, image, ballistic, tool and bite marks, blood spatter, shoe, foot and tire, and many other forms of incriminating evidence. This suggests that existing legal rules and safeguards might be quite limited in their ability to identify and facilitate systematic responses to serious and pervasive problems.

The conspicuous failure to recognise the deep organisational and epistemic problems with many areas of forensic science and medicine would seem to suggest that lawyers and legal institutions need to develop new means of accessing advice on what is known beyond the courts — particularly what is known about the forensic sciences. The fact that lawyers and, in consequence, judges in Australia seem to be largely oblivious to the issues raised in the reports and have yet to engage with the implications in their jurisprudence, means that there are disconcerting discontinuities and ruptures between legal knowledge and practice and *what is known*.

Common law courts have traditionally celebrated their focus on the individual case and ability to adapt, but confronted with systemic problems and issues beyond the experience of judges this orientation may actually be disabling. Insensitive to problems in a core area of proof, appellate courts and trial judges have tended to rehearse longstanding confidence in trial safeguards and legal platitudes while,

perhaps unknowingly, discounting the ever-growing body of critical evidence.<sup>301</sup> In relation to forensic science and medicine, there is a conspicuous need to develop better-informed processes and systems that help lawyers, judges and experts respond to the range of issues affecting their ability to understand and regulate expert evidence.

The recent High Court decision in *Aytugrul v The Queen*<sup>302</sup> reinforces the orthodox expectation that issues such as juror comprehension and reliability (and even legislative facts) should be raised at trial. It reinforces the reluctance of appellate judges to take judicial notice of, or to even consider, issues not raised at trial.<sup>303</sup> This is unfortunate because defence lawyers are not generally resourced or particularly well positioned to raise complex methodological (or policy) issues at trial. Many defence lawyers seem reluctant to insist on reliability before trial judges operating in interpretive traditions that have been insensitive to the actual abilities and accuracy of *experts*. Whatever the precise reasons, defence lawyers (and prosecutorial obligations) have not exposed fundamental and pervasive problems across the forensic sciences and medicine. It seems that we need to consider reform, such as lower thresholds for judicial notice (though retaining scope for the parties to respond), broader scope for the intervention of *amicus curiae*, and perhaps independent advisory panels able to synthesise relevant research in order to provide authoritative, independent advice to lawyers and judges in areas of controversy.<sup>304</sup>

Regardless of the precise mechanism(s), lawyers and judges must be more attentive to external developments and much more attentive to the performance of their own institutions. There is conspicuous need for more evidence-based practice rather than adherence to tradition in the face of historical failure. Collective legal experience and institutional myths (however sincerely held), should be tempered with independent evidence.<sup>305</sup>

<sup>301</sup> Consider the response by J D Heydon, ‘Evidence of Forensic Scientific Opinion and the Rules for Admissibility’ (2015) 36 *Adelaide Law Review* 101.

<sup>302</sup> (2012) 247 CLR 170 (*Aytugrul*).

<sup>303</sup> The recent decision in *Aytugrul* is emblematic in this respect. See also Gary Edmond, ‘Bacon’s Chickens? Re-thinking Law and Science (and Incriminating Expert Opinion Evidence) in Response to Empirical Evidence and Legal Principle’ in Justin T Gleeson and Ruth C A Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 137.

<sup>304</sup> See Gary Edmond, ‘Advice for the Courts? Sufficiently Reliable Assistance with Forensic Science and Medicine (Part 2)’ (2012) 16 *The International Journal of Evidence & Proof* 263.

<sup>305</sup> It is no coincidence that in failing to attend to the performance of forensic sciences, legal institutions have not generally been particularly interested in their own performances, other than by the crude metrics of disposition under the guise of efficiency.

#### IV CONCLUSION: WHERE IGNORANCE ISN'T BLISS, 'TIS FOLLY TO BE UNWISE

On the whole the reports find that many forensic science and medicine techniques are not based on independent scientific research. Many techniques and assumptions have never been evaluated and many practitioners have never had their abilities credibly assessed. Surprisingly few forensic analysts know about, or are trained to deal with, issues and factors that may dramatically influence their performances and the reliability of results. They have been especially inattentive to threats to interpretation and the expression of results.<sup>306</sup> Many practices and techniques are not standardised, and/or described in sufficient detail, to produce consistent results between analysts. Standards are often imprecise and not based on research. This has meant that — where they exist — accreditation, certification and regulation are generally weaker than they ought to be. The reports are, in addition, generally critical of the proximity, sometimes dependence, of forensic science and medicine on law enforcement.<sup>307</sup> One of the main reasons for this state of affairs is the limited funding available for research. Other problems include the lack of formal qualifications among forensic analysts, inadequate scientific leadership and very limited historical contact between forensic analysts and relevant scholarly communities. A very significant factor is the limited scrutiny provided in legal settings. Accommodating legal institutions have effectively circumvented the need for research and attention to reliability while simultaneously providing access and prematurely (or improperly) conferring socio-epistemic legitimacy.

Australian forensic science and medicine and Australian legal institutions need to respond to the serious problems infecting forensic science and medicine evidence, regardless of what comparator countries do. This will require additional funds and new forms of independent leadership for the forensic sciences, preferably at a national level. Simultaneously, there are serious implications for law and legal practice. It requires senior judges (and possibly legislatures) to modify rules, practices, assumptions and interpretations. For, too much insufficiently reliable forensic science and medicine evidence is relied upon in charge and plea negotiations and admitted in Australian criminal proceedings.

Australian trials and appeals have not identified the profound weaknesses in many forms of forensic science and medicine. The vast majority of cases do not provide an adequate assessment of incriminating opinion evidence. They do not place decision makers in an appropriate position to rule on admissibility or rationally determine weight. As this essay has explained, there are very serious challenges confronting

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<sup>306</sup> See Dawn McQuiston-Surrett and Michael J Saks, 'The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear' (2009) 33 *Law and Human Behavior* 436; Martire et al, 'The Psychology of Interpreting Expert Evaluative Opinions', above n 119.

<sup>307</sup> The reports do not attempt to demonise individual failings and performances. Several make it clear that problems tend to be systemic — generally not caused by 'bad apples'.



not only the forensic sciences in Australia, but also legal practitioners (particularly prosecutors) and judges. While there have been some early efforts in relation to accreditation, the development of standards and the fostering of research in Australia, these are modest and in many cases accreditation and standards do not have the necessary underlying research to instill confidence.

What should lawyers and judges do in response to continuing proffers of incriminating expert opinion evidence? First, they should be willing to ask questions and exclude evidence. More broadly, in consultation with independent multidisciplinary advisory groups, they should begin to experiment with new procedures that are more conducive to the longstanding goals of doing justice in the pursuit of truth. Whatever happens, it is unlikely that this will be a simple or short-lived process. For, we need to develop legal institutions and identify personnel capable of informing legal practice with the knowledge and skills available in other domains. Consequently, there is a need for ongoing review and empirical assessment of legal practice and processes. There are, as the reports all imply, dangers — both epistemic and socio-political — in allowing courts and their ‘handmaidens’ to continue to operate in ways that are detached from what is known — or understood about knowing — in mainstream scientific communities.<sup>308</sup>

With limited historical interest in the reliability of forensic science and medicine evidence, Australian courts have gradually and unwittingly placed themselves in a state of epistemic bliss. Perhaps a distant prospect, our hope is that ‘Thought would destroy their paradise.’<sup>309</sup>

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<sup>308</sup> NRC Report, above n 12, 52: ‘many forensic fields (eg firearms analysis, latent fingerprint identification) are but handmaidens of the legal system, and they have no significant uses beyond law enforcement.’ The relationship might actually be uxorious.

<sup>309</sup> Thomas Gray, *An Ode on a Distant Prospect of Eton College* (London 1747).



*J D Heydon\**

## EVIDENCE OF FORENSIC SCIENTIFIC OPINION AND THE RULES FOR ADMISSIBILITY

### ABSTRACT

This article describes some possible methods by which unreliable forensic scientific evidence might be excluded. Is it irrelevant? Does its probative value exceed its prejudicial effect? Are there categories of it which should be automatically inadmissible? Are the existing rules for exclusion too loose, or too loosely applied? What is the correct balance between the roles of judge and jury?

The major theme of Professor Edmond's article – 'What Lawyers Should Know About the Forensic "Sciences"'<sup>1</sup> – is that the training of forensic scientists must be improved so that they, and others, understand the weaknesses and risks in forensic scientific reasoning better. In a similar vein, the article alerts lawyers to reasons for suspecting particular expert evidence and to methods of attacking it. But it also sounds a minor theme – the approaches to admissibility which might control weaknesses in the evidence of forensic scientists. Thus Professor Edmond reads the Goudge report<sup>2</sup> as calling on judges to be vigilant gatekeepers, attentive to the potential unreliability of expert evidence. He advocates the recognition of reliability as a prerequisite to admissibility. In that regard, he says: 'Lawyers and trial judges should be willing and able to ask to see research and to ask about procedures, standards, rates of error and limitations. They should expect to see reference to relevant published studies.'<sup>3</sup>

The purpose of this article is to raise some general questions about difficulties in using admissibility criteria to control the weaknesses which Professor Edmond has identified.

What are the evidentiary rules to be considered in relation to that enterprise? The first material rule relates to relevance. But 'relevance' does not necessarily imply any inquiry into the weight or correctness of expert opinion evidence. In Australia,

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\* QC.

<sup>1</sup> Gary Edmond, 'What Lawyers Should Know About the Forensic "Sciences"' (2015) 36 *Adelaide Law Review* 33.

<sup>2</sup> Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Queen's Printer, 2008).

<sup>3</sup> Edmond, above n 1, 85.

in those jurisdictions which have legislation similar to the *Evidence Act 1995* (Cth),<sup>4</sup> relevance is defined by s 55(1) of the Act. It provides that the evidence that is relevant in a proceeding is evidence that, *if it were accepted* (and it may not be), *could* (not would) rationally *affect* (not determine) directly or *indirectly* the assessment of the probability of a fact in issue.<sup>5</sup> The threshold of admissibility is thus not high. In other Australian jurisdictions a common test for relevance is that which James Fitzjames Stephen employed. He said that the word ‘relevant’ means that:

any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.<sup>6</sup>

But Stephen, in using the word ‘fact’, was proceeding in similar fashion to s 55(1). His test enabled one to assess whether one ‘fact’ was relevant to another. It assumed that the evidence tending to prove a fact, if it were admitted, would be accepted. It did not require that evidence be credible before it could be admitted.

A second group of material evidentiary rules are those permitting or compelling the exclusion of evidence the probative value of which was exceeded by its prejudicial effect, or which operated unfairly against the accused in a criminal case. Those common law rules are similar to, but may not be identical with, some provisions in the *Evidence Act 1995* (Cth) and its equivalents. Thus s 135(a) of the Act provides:

‘The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party ... ’

And s 137 provides:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Here too the rules probably do not contemplate an inquiry into the *actual* credibility or reliability of evidence. The assessment of probative value for the purposes of these rules rests on an assumption that the evidence is accepted, and proceeds to inquire

<sup>4</sup> *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). This legislation, alongside the *Evidence Act 1995* (Cth), will be referred to collectively, though misleadingly, as the Uniform Evidence Law, for the Acts are not uniform and do not deal with the whole of evidence law.

<sup>5</sup> *Evidence Act 1995* (Cth) s 55(1).

<sup>6</sup> Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (Macmillan, 12<sup>th</sup> ed, 1936) 4, art I.

whether, on that assumption, the prejudicial effect of the evidence outweighs the assumed value.<sup>7</sup> And often the inquiry into prejudicial effect, too, assumes an effect or likely effect.<sup>8</sup> In *R v BD*,<sup>9</sup> Hunt CJ at CL said that the ‘prejudice’ to which the relevant sections referred was prejudice ‘which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way’. And the Australian Law Reform Commission, which was the progenitor of the Uniform Evidence Law, said that ‘unfair prejudice’ referred to the danger that the fact-finder might use the evidence

to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder’s sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.<sup>10</sup>

Thus there is a difficulty underlying attempts to control unsatisfactory expert evidence either by holding it irrelevant or by holding its use to be excessively prejudicial or unfair. It is true that parts of the law of evidence which deal with admissibility do exclude certain categories of evidence which may be unreliable (eg involuntary confessions, or hearsay not falling within accepted categories). But outside those areas, the *reliability of particular items of evidence* is treated as a matter entirely for the trier of fact. The judge does not second-guess (or first-guess) the role of the trier of fact.

A third line of attack would be to seek to assess whether particular classes of expert evidence were routinely so unreliable, or carried an unacceptable risk of reliability, that the law should respond in a particular way. One way might be to exclude the evidence completely (like that of some very young or mentally infirm witnesses). Another way might be to exclude the evidence unless there were actual corroboration of it (as with the issue of whether a statement alleged to be perjured was false). Another way might be to create a duty to give a warning that caution should be exercised in using the evidence unless there were actual corroboration of it (as with accomplice evidence at common law). Another way might be to confer on the trial judge a power (not a duty) to warn that caution should be exercised in using the evidence unless there were actual corroboration of it.

<sup>7</sup> That, at least, is the New South Wales position: *R v XY* (2013) 84 NSWLR 363. For Victoria, see *Dupas v The Queen* (2012) 40 VR 182. See generally, J D Heydon, ‘Is the Weight of Evidence Material to its Admissibility?’ (2014) 26 *Current Issues in Criminal Justice* 219.

<sup>8</sup> Cf *R v Mundine* (2008) 182 A Crim R 302, 310 [44].

<sup>9</sup> (1997) 94 A Crim R 131, 139. See also *R v Suteski* (2002) 56 NSWLR 182, 199 [116].

<sup>10</sup> Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) vol I, [644].

Whatever the substantive merits of these approaches, the tide of history, as reflected both in legislation and in judicial approaches, is flowing against them. That tide may turn. But at the moment its flow is strong. The law tends to favour the reception of evidence, untrammelled by restrictive rules of admissibility. It does not favour the selection of particular categories of information and the branding of them as always inadmissible. Nor does it favour compulsory corroboration warnings. Another difficulty is that some of the troubles caused by expert evidence arise not because of the type of evidence involved, but because of the slack way in which that type of evidence is sometimes presented. Legislative provisions prohibiting the use of expert evidence of any kind, or of specified kinds, might reduce the incidence of erroneous convictions, but it would also reduce the flow to courts of rigorously prepared, accurately presented and convincing information. It would make it much harder to convict accused persons who are guilty or to make just findings adverse to civil defendants. It could also make it harder for an accused person to raise a reasonable doubt.

A fourth line of control for expert evidence would be to concentrate on the particular evidentiary rules governing it. There is a notorious division within the judiciary about how restrictive those rules are or should be. Of course, the views of judges on what the rules should be have an important influence on what the rules identified by the judges are. That is so whether the judges are considering common law rules or the statutory provisions which now apply in several Australian jurisdictions. There is a similar division within the judiciary about how rigorously the rules, whatever they are, should be applied. There has been some, but diminishing, division on the question of whether it is a precondition to the admissibility of expert evidence that the witness identify the assumptions (or evidence) of primary fact on which the opinion is offered. The view that it is a precondition is now universal. The main proponents of the contrary view were judges of the Federal Court of Australia. However, they have fallen silent in the face of a practice note in that Court, issued with the authority of its judges, which now requires the factual assumptions to be stated.<sup>11</sup> There does remain quite a sharp division on the question of whether it is a precondition to the admissibility of expert evidence that there be evidence capable of supporting the assumptions of primary fact – evidence from either the expert or other sources, which either has been tendered or will be before the close of the tendering party's case. Decisions in State courts favour the strict view. Decisions of the Federal Court of Australia favour the laxer view.

Professor Edmond does not identify this particular controversy as one which affects his criticisms of the present position regarding the admissibility of forensic scientific evidence. To adopt the laxer approach to admissibility would not assist in solving the problems with which he is concerned. But some of the recommendations of reforming bodies which Professor Edmond quotes are worth comparing with the Australian law on expert evidence. Thus Professor Edmond, after complaining of a

<sup>11</sup> Federal Court of Australia, *Practice Note CM 7 – Expert witnesses in proceedings in the Federal Court of Australia*, 4 June 2013.

lack of ‘stringency in admissibility decision-making’,<sup>12</sup> quotes Recommendations 95 and 97 of the Goudge Report.<sup>13</sup> Recommendations 95 and 97(b)(ix) in particular correspond with what the High Court construed s 79 of the *Evidence Act 1995* (NSW) as requiring.<sup>14</sup> Thus Recommendation 95(a) requires articulation of the basis for a forensic pathologist’s opinion in a completely transparent way by stating the reasoning process followed, which leads to the opinion expressed.<sup>15</sup> The majority in *Dasreef’s Case* required the opinion to be ‘wholly or substantially based’ on the witness’s expert knowledge.<sup>16</sup> That requires a disclosure of how the expert reasoned from the expert knowledge to the opinion.

Further, Recommendation 95(b) requires forensic pathology opinions to articulate the ‘pathology facts found’,<sup>17</sup> which, when the expert’s reasoning process is applied to them, lead to the opinions expressed. As indicated earlier, the Australian position is that the assumptions (or evidence) of primary fact on which the opinion is offered must be identified. Recommendation 84(c) of the Goudge Report requires a forensic pathologist’s opinion to be ‘communicated in language that is not only accurate but also clear, plain, and unambiguous’.<sup>18</sup> Similar thinking underlies Lindgren J’s hints to experts in *Harrington-Smith v Western Australia [No 7]*.<sup>19</sup> Recommendation 129 of the Goudge Report requires the court clearly to ‘define the subject area of the witness’s expertise and vigorously confine the witness’s testimony to it’.<sup>20</sup> This rather basic proposition already corresponds with Australian law. It therefore seems fairly arguable that a strict formulation and application of the particular rules that apply to the reception of evidence would alleviate some of the problems Professor Edmond discusses.

Professor Edmond makes one suggestion which may be questioned. He states that ‘defence lawyers (and prosecutorial obligations) have not exposed fundamental and pervasive problems across the forensic sciences and medicine’.<sup>21</sup> He begins a list of suggestions by saying that: ‘It seems that we need to consider reform, such as lower thresholds for judicial notice’.<sup>22</sup> How would this help? In one sense, ‘judicial notice’ refers to the capacity of a trier of fact to find a fact even though there is no evidence

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<sup>12</sup> Edmond, above n 1, 52, n 89.

<sup>13</sup> Goudge, above n 2, 427, 429–30.

<sup>14</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 602–3 [32], 604–5 [39]–[40], 605 [42] (*‘Dasreef’s Case’*).

<sup>15</sup> Goudge, above n 2, 427.

<sup>16</sup> *Dasreef’s Case* (2011) 243 CLR 588, 603 [32].

<sup>17</sup> Goudge, above n 2, 427.

<sup>18</sup> *Ibid* 408.

<sup>19</sup> (2003) 130 FCR 424, 429–30 [28]–[31].

<sup>20</sup> Goudge, above n 2, 475.

<sup>21</sup> Edmond, above n 1, 98.

<sup>22</sup> *Ibid*.

of it, where it is notorious.<sup>23</sup> In another sense, the expression ‘judicial notice’ can be used to refer to the capacity of a trier of fact to take into account matters suggested by the ordinary experience of life, whether or not they are notorious or even uncontroversial.<sup>24</sup> How would loosening the tests for taking either type of ‘judicial notice’ help protect litigants, particularly accused persons, against unsound expert evidence? The protection would come either at the stage when the judge is considering admissibility or at the stage when the jury is considering weight. Creating lower thresholds for judicial notice of either kind would not assist either judge or trier of fact to appreciate that superficially impressive expert evidence was in fact flawed. The passages in which Professor Edmond makes these suggestions include a protest against the view that ‘issues such as juror comprehension and reliability (and even legislative facts) should be raised at trial’.<sup>25</sup> The suggestion that trials be run on one basis, and appeals on another, is unattractive. Even a successful reversal of a conviction on appeal is a harrowing experience for the victor. Expert evidence goes to fact-finding, and fact-finding is pre-eminently something to be engaged in as part of a trial.

Professor Edmond’s final suggestion in relation to the admissibility of expert evidence is that judges should be much more robust in excluding evidence. He seems to advocate judges testing expert evidence for themselves if it has not been properly attacked by defence counsel. Proper testing of evidence on the initiative of the judge would require a radical alteration in the judicial role from umpire to player. It would require the holding of a *voir dire*. If defence counsel is not equipped or not inclined to attack the reliability of the evidence, how is the judge better equipped? Like the trier of fact, the judge has lay skills only, not expert skills. Further, the suggestion assumes that unreliability is a valid ground for exclusion. If that assumption were sound, the law would be radically different from what it is.

Professor Edmond’s suggestion raises various questions. What test would the judge apply? Would it suffice for the judge to conclude that the jury could believe the expert? Or would it be necessary for the judge to experience a personal belief, whether on the balance of probabilities or beyond reasonable doubt, in the reliability of the evidence? Is that belief to be judged only in light of the evidence of each expert considered alone? Or would the judge have to hear all the experts on a point before deciding that the evidence of any of them was admissible? If the process were conducted before there were evidence of the primary facts, it might prove otiose if the primary evidence fell short of the tendering party’s expectations. If the process were conducted in the light of the primary facts, can the legal system cope with a regime involving not a mini trial by judge followed by a main trial by jury, but two separate and substantial trials in any proceeding where the judge found an expert’s evidence to be admissible? Could the legal system – ultimately the state – absorb the cost of this?

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<sup>23</sup> See LexisNexis, *Cross on Evidence* (at Service 182) [3015]–[3160].

<sup>24</sup> *Ibid* [3200]–[3305].

<sup>25</sup> Edmond, above n 1, 98.

What would be the effect on the judge's capacity to sum up dispassionately to the jury on an issue the judge had already reached a personal view on? And what would be the effect on jury autonomy and diligence if the jurors knew, as some of them would know, that the case only comes to them because the trial judge has believed a key witness? The last two difficulties will remain even though the standard of proof before the judge is less than the standard of proof before the triers of fact (as s 142 of the *Evidence Act 1995* (Cth) provides). In short, all the difficulties will arise that arise when a judge has to decide on an issue which is also an issue for the triers of fact. That is because the judge cannot hold that the evidence is admissible unless it is reliable, and the jury must hold that the evidence lacks sufficient weight to support a finding for the tendering party unless it is reliable.



*Keelah E G Williams\* and Michael J Saks\*\**

## WHY DON'T THE GATEKEEPERS GUARD THE GATES? COMMENTS PROMPTED BY EDMOND

### ABSTRACT

Despite clear rules and procedures directing judges to critically scrutinise proffers of expert testimony – and giving them the tools to do so – judges continue to allow unreliable expert evidence into the courtroom. What accounts for the gatekeepers' failure to guard the gates? Drawing from psychological literature, we offer possible explanations for neglectful judicial gatekeeping, and discuss potential solutions for the path forward.

### I INTRODUCTION

At bottom, the touchstone of admission of expert evidence has always been the soundness of the expertise upon which proffered expert testimony claims to stand. In past centuries, courts looked for such assurance in the credentials of the proffered witness, then to the commercial success of that witness in his or her field, then to the general acceptance of the claimed knowledge and techniques in the eyes of the relevant fields themselves. Most recently, in the federal and many state courts of the United States, the test has become – for asserted scientific expert testimony – an assessment of the validity of the expert's field's claims based on empirical testing. In the case of *Daubert v Merrell Dow Pharmaceuticals Inc*,<sup>1</sup> the US Supreme Court stated: '[t]he overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie the proposed submission.'<sup>2</sup> That is, the law in many US jurisdictions has directed judges to stop looking at indirect, superficial indicia of soundness, and instead evaluate more directly the actual (empirical, scientific) evidence upon which the (trial) expert evidence stands.

Despite such clear commands from on high, trial judges (the principal gatekeepers of expert evidence) have, for the most part, been nothing less than inspired in evading the task of applying the law's filters to so-called forensic science in criminal cases. When presented with support for the claims of forensic science expert testimony

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<sup>1</sup> 509 US 579 (1993) (*'Daubert'*).

<sup>2</sup> Ibid 594–95.

that was far too weak (and for some fields, non-existent) to cross the legal threshold, the courts engaged in remarkable judicial gymnastics: relegate all criticisms to weight, not admissibility; lower the standard to ensure that the proffer can pass over it; emphasise flexibility of criteria (without stating what criteria were being used); look to a past century of admission (under different or no admissibility rules); appeal to the seemingly intuitively obvious; deny hearings so that the proponent's expert evidence will not have to be put to the test; shift the burden of persuasion from the proponent to the opponent; and, if necessary, extract support from thin air.

Upon analysing a large number of modern cases in which the admissibility of fingerprint expert testimony had been challenged and (almost always) admitted, a major treatise on scientific evidence in American courts described what was found:

Ironically, the failure of judges to write a coherent defense of asserted fingerprint expertise under *Daubert*, but only to seek ways to shelter it from serious scrutiny, suggests that fingerprint expert evidence actually does not meet the requirements of *Daubert*.

If the claims and assumptions of fingerprint identification expertise had been empirically tested, if these empirical tests were sufficiently well designed so as to survive peer review leading to publication in scientifically respectable journals and had [fared well] in the intellectual marketplace following publication, and the data convincingly showed low error rates for the relevant task-at-hand, and if these findings had come to be generally accepted among relevant scientific and professional communities beyond the circle of police technicians who practice the art – then the proponents no doubt would have eagerly offered such information to the courts and the judges would have had ample material with which to write cogent opinions. That such material appears in none of the opinions suggests that it does not exist. If the grounds for admitting fingerprint examiners' testimony were as strong and as sound as the judges assert that it is, then it should not be so difficult to write an opinion actually presenting those grounds.<sup>3</sup>

The question we tackle in this response to the Edmond essay is why courts behave in this manner. Why do they not simply follow the law, rule as required by the law when applied to the facts, trust the legal process, and embrace their role within that process?

Gary Edmond, in his essay 'What Lawyers Should Know About the Forensic "Sciences"',<sup>4</sup> provides a review of inquiries into the forensic sciences across the globe, and identifies extensive and persistent problems with forensic science evidence.<sup>5</sup> Edmond is careful to refer to the forensic sciences in plural, emphasising

<sup>3</sup> David L Faigman et al, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (Thomson Reuters, first published 1997, 2010 ed) vol 4, 381-382 § 33:17.

<sup>4</sup> Gary Edmond, 'What Lawyers Should Know About the Forensic "Sciences"' (2015) 36 *Adelaide Law Review* 33.

<sup>5</sup> *Ibid.*

the variability in history, reliability, methodology and scope of the many techniques included under the forensic science umbrella.<sup>6</sup>

Ultimately, Edmond concludes that many forensic techniques are insufficiently reliable, due largely to a lack of necessary scientific foundations and having no scientific infrastructure to carry out the research needed to fill the gap.<sup>7</sup> After a thorough examination of the flaws highlighted by various independent reports, Edmond considers the question of where to go from here. Edmond suggests that continuing on with the now century-old practice of inaction ‘threatens the legitimacy of traditional criminal justice institutions.’<sup>8</sup> However, Edmond acknowledges that the path forward is unclear. As noted by a comprehensive report on the state of forensic science reviewed in Edmond’s essay, the legal system has shown itself to be ‘ill-equipped to correct the problems of the forensic science community.’<sup>9</sup> Edmond implicates forensic scientists for their failure to bring the inadequacies of their endeavours to the attention of forensic science consumers – lawyers, judges, and jurors.<sup>10</sup> Such silence in the face of valid criticism is, Edmond suggests, ‘nothing short of scandalous.’<sup>11</sup>

Although Edmond’s concerns are centred around the shortcomings of the forensic sciences, they imply complementary deficiencies in our courts. Were courts capably performing the job of evidence filtering that the law has entrusted to them, much of the flawed, unvalidated, exaggerated, and speculative expert opinion that has come to be routinely admitted would long ago have been cabined in appropriate ways, and some of it excluded altogether. Instead, those scientifically questionable types of expert opinion have been barely scrutinised and carelessly welcomed into the courthouse. Why do the gatekeepers fail to guard the gates?

That the gatekeepers fail where the forensic ‘sciences’ are concerned is made clear by the comments of a gatekeeper himself: Judge Harry T Edwards, Senior Circuit Judge and Chief Judge Emeritus of the United States Court of Appeals for the DC Circuit. Judge Edwards acted as Co-Chair of a committee tasked by the US Congress in 2006 with reviewing the forensic sciences.<sup>12</sup> Judge Edwards notes that he began the project

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<sup>6</sup> Ibid 34. See also National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (Washington, DC: National Academies Press, 2009) 38 (*‘NRC Report’*).

<sup>7</sup> Edmond, above n 4, 81. This centrally important conclusion is shared by the National Research Council. See *NRC Report*, above n 6. It might be more precise to say: Proffered forensic science expert evidence is not known to be sound, valid, or dependable. In the larger world as well as in court, the burden is properly on the proponent to establish that it is sound. Some of it doubtless will be confirmed to be sound, while some of it will be found to be prone to error or be misleading.

<sup>8</sup> Edmond, above n 4, 35.

<sup>9</sup> *NRC Report*, above n 6, 53.

<sup>10</sup> Edmond, above n 4, 69.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 37.

'with no preconceived views about the forensic science community,' assuming that 'forensic science disciplines ... are well-grounded in scientific methodology.'<sup>13</sup> Judge Edwards was forced, however, to conclude that

[t]he bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions, and the courts have been utterly ineffective in addressing this problem.<sup>14</sup>

In this Comment we focus our attention on the indirect light that Edmond's essay casts upon the courts. Despite rules and procedures designed to filter expert evidence with greater care than any other kind of proffered evidence, it is clear that courts nevertheless continue to promiscuously admit unreliable forensic science expert evidence. What accounts for the failings of courts in their evaluations of crime laboratory offerings?

Part II of this Comment briefly addresses the appropriate metric for evaluating forensic expert evidence in the United States court system,<sup>15</sup> and provides support for the claim that the courts are failing their assigned role as gatekeeper. Part III addresses possible explanations for neglectful judicial gatekeeping. Potential solutions are discussed in Part IV, with attention paid to the successful exclusion of inadequate forensic expert evidence in a recent court opinion. We then offer general conclusions and comments on the path forward.

## II *DAUBERT*: THE PINHOLE THAT BECAME A FLOODGATE

To understand how the courts are failing, we first briefly review the appropriate legal standard for admissibility of forensic expert evidence. We then examine the courts' persistently poor performance in meeting this standard when forensic science has been proffered (typically by the government).

### *A The Admissibility of Scientific Evidence Under Daubert*

The US Supreme Court, for the first time in its history, considered the standard for evaluating the admissibility of scientific expert testimony in *Daubert*.<sup>16</sup> Prior to *Daubert*, American courts had applied several tests, the most prominent of which

<sup>13</sup> Harry T Edwards, 'Solving the Problems That Plague the Forensic Science Community' (2009) 50 *Jurimetrics Journal* 5, 8.

<sup>14</sup> *NRC Report*, above n 6, 53; Edmond, above n 4, 33 (emphasis added).

<sup>15</sup> The system with which the authors of this Comment are most conversant.

<sup>16</sup> For the purposes of this article, only a concise summary is provided here. Please see David L Faigman et al, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (Thomson Reuters, first published 1997, 2008 ed) vol 1, ch 1, 1-120, ('*Modern Scientific Evidence*') for a thorough review of scientific evidence admissibility in the United States.

(and the greatest contrast to *Daubert*) was the ‘general acceptance’ test<sup>17</sup> announced in *Frye v United States*.<sup>18</sup> In such a test, judges need not make independent assessments of validity, but can defer to what asserted scientists say about their respective fields’ views of their techniques and theories.<sup>19</sup>

In *Daubert*, however, the Court unanimously held that trial court judges must embrace their role as ‘gatekeepers’ by evaluating the validity of the basis for proffered scientific expertise before permitting the expert to testify.<sup>20</sup> No longer passive bystanders watching expert evidence flow to fact-finders, *Daubert* requires judges to actively assess the purported science underlying the asserted expert testimony. The Court concluded that the evidentiary relevance and reliability of such testimony could be determined only by an evaluation of scientific validity.<sup>21</sup> Thus, under *Daubert* and the Federal Rules of Evidence, trial court judges are responsible for determining the admissibility of forensic expert evidence,<sup>22</sup> and must do so by evaluating the soundness of the science supporting the proffered testimony.

Application of the *Daubert* standard to forensic science requires an understanding of scientific research. This presents judges with a challenge: as non-experts themselves, how can judges evaluate the scientific validity of forensic expert evidence?<sup>23</sup> Chief Justice Rhenquist anticipated the difficulty judges would have in assuming the role of ‘amateur scientists.’<sup>24</sup> To assist trial court judges with this demanding task, the Court in *Daubert* articulated several factors for consideration when determining the validity

<sup>17</sup> Roselle L Wissler, Keelah E G Williams and Michael J Saks, ‘Dual-Processing Models of Admissibility: How Legal Tests for the Admissibility of Scientific Evidence Resemble Cognitive Science’s System 1 and System 2’ (2013) 17 *Virginia Journal of Law & Technology* 356, 363.

<sup>18</sup> 293 F 1013 (DC Cir, 1923) (*Frye*). For a discussion of *Frye*’s predecessor, a ‘market-place’ test in which experts were judged by their success in the commercial market, see Faigman et al, above n 16, vi.

<sup>19</sup> Faigman et al, above n 16, 15.

<sup>20</sup> 509 US 579, 597 (1993).

<sup>21</sup> *Ibid* 594–95 (the ‘overarching subject [of Rule 702] is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie the proposed submission.’).

<sup>22</sup> Federal Rules of Evidence, Rule 702, is the rule that governs admissibility, and it states:

a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is a product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

<sup>23</sup> Roselle L Wissler, Keelah E G Williams and Michael J Saks, above n 17, 357.

<sup>24</sup> *Daubert* 509 US 579, 601 (1993).

of scientific expert opinion: testability ('falsifiability'),<sup>25</sup> quality of research design and methods ('peer review and publication'),<sup>26</sup> findings of the research ('error rates'),<sup>27</sup> 'maintenance of standards'<sup>28</sup> in the application of the research knowledge to the trial issue, and, in a greatly reduced role, 'general acceptance.'<sup>29</sup> The Court emphasised that these factors are not exclusive,<sup>30</sup> and each need not be met in all cases.<sup>31</sup> Some scholars, however, have neatly summarised the task into a single directive: *Daubert* obliges judges to ask, 'Where are the data?'<sup>32</sup>

As conceptually straightforward as the US Supreme Court's directive might seem to a conventional scientist, carrying it out requires sufficient scientific proficiency to not only inspect the scientific principles and findings underlying experts' opinions, but also to understand and evaluate the methodologies behind particular results. 'Data' are produced by both rigorous research and parodies of science. In order to evaluate the validity of scientific evidence, judges must be able to distinguish one from the other.<sup>33</sup> What two decades of cases and research have made clear, however, is that judges have not successfully embraced the *Daubert* directive where forensic science has been concerned.

### B *How Are Judges Failing?*

The failure of judges to subject scientific expert evidence to the level of scrutiny required by *Daubert* is systemic. It is not the occasional judge who errs, but the great majority erring the great majority of the time when called upon to evaluate proffers of forensic science. Continued admission of unvalidated scientific evidence into the courtroom suggests that judges have a quasi-religious faith in the validity of the non-science forensic sciences, the soundness of their techniques, and the accuracy of resulting expert opinions.<sup>34</sup> These erroneous beliefs persist notwithstanding the

<sup>25</sup> Ibid 593.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 594.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid. See also Faigman et al, above n 16, 30.

<sup>30</sup> See Mark McCormick, 'Scientific Evidence: Defining a New Approach to Admissibility' (1982) 67 *Iowa Law Review* 879, 911–12, for a former state supreme court justice's suggested list of additional factors for determining admissibility (including, for example, the care with which the technique was employed in the case).

<sup>31</sup> 509 US 579, 593 (1993) (factors not 'a definitive checklist or test').

<sup>32</sup> Faigman et al, above n 16, 47.

<sup>33</sup> Ibid 37.

<sup>34</sup> See the observations of Judge Thorne, concurring in *State v Quintana*, 103 P 3d 168, 170, 171 (Utah Ct App, 2004): 'fingerprint [identification] evidence has never truly been put to the test in either the courtroom or the scientific community,' that '[i]n essence, we have adopted a cultural assumption that a government representative's assertion that a defendant's fingerprint was found at a crime scene is an infallible

inadequate research base,<sup>35</sup> the failure to develop and disclose meaningful error rates,<sup>36</sup> the failure to develop and employ assessments of random match probabilities (or similar probabilistic methods) based on data,<sup>37</sup> exaggerated claims that exceed what is known or can be known,<sup>38</sup> and the unwillingness to shield analysts from domain-irrelevant information.<sup>39</sup>

If, at the very least, *Daubert* requires that testable evidence be tested (and to require that the proponent of the expert opinion make the case for admission with those data), it is clear that several forensic sciences fail to meet this basic threshold.<sup>40</sup> For example, researchers have noted that handwriting identification, bite marks, and hair comparisons lack sufficient empirical evidence for admission under a serious application of *Daubert*.<sup>41</sup> Those forensic sciences that have disappeared from the courts owing to findings of their lack of validity (eg, voiceprints, numerous arson indicators, comparative bullet lead analysis) were not generally (or at all) perceived as flawed by the courts, and their departure was not hastened by any judicial push out the door.

The National Research Council Report details many of the systemic problems with forensic evidence.<sup>42</sup> The report's concluding call for the creation of a National Institute of Forensic Science was an acknowledgement of the failure of all relevant extant institutions to have built a sound and scientific forensic science and to keep pseudo-science from entering the courts. Those institutions that failed in this regard

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fact, and not merely the examiner's opinion', and therefore courts should take steps to 'remove the near mystical awe that fingerprints evoke, and replace it with a more cautious regard for forensic evidence and its overall lack of certainty.'

<sup>35</sup> Faigman et al, above n 16, 63; *NRC Report*, above n 6, 189; Edmond, above n 4, 38–9.

<sup>36</sup> *NRC Report*, above n 6, 122.

<sup>37</sup> See, eg, Michael J Saks and Jonathan J Koehler, 'The Individualization Fallacy in Forensic Science Evidence' (2008) 61 *Vanderbilt Law Review* 199 (2008) ('*Individualization Fallacy*'); Michael J Saks and Jonathan J Koehler, 'The Coming Paradigm Shift in Forensic Identification Science' (2005) 309 *Science* 892 ('*Paradigm Shift*').

<sup>38</sup> See, eg, Mark Page, Jane Taylor and Matt Blenkin, 'Uniqueness in the forensic identification sciences – Fact or fiction?' (2011) 206 *Forensic Science International* 12; Edmond, above n 4, 46; Saks and Koehler, *Individualization Fallacy*, above n 37.

<sup>39</sup> Edmond, above n 4, 53. See also D Michael Risinger et al, 'The *Daubert/Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion' (2002) 90 *California Law Review* 1.

<sup>40</sup> Faigman et al, above n 16, 63.

<sup>41</sup> *Ibid.* See also Michael J Saks, 'Implications of the *Daubert* Test for Forensic Identification Science' (1994) 1 *Shepard's Expert & Scientific Evidence Quarterly* 427; D Michael Risinger and Michael J Saks, 'Science and Nonscience in the Courts: *Daubert* Meets Handwriting Identification Expertise' (1996) 82 *Iowa Law Review* 21; Randolph N Jonakait, 'Real Science and Forensic Science' (1994) 1 *Shepard's Expert & Scientific Evidence Quarterly* 435, 441; Saks and Koehler, *Paradigm Shift*, above n 37.

<sup>42</sup> *NRC Report*, above n 6.

include the courts. When it comes to forensic evidence, what might account for the courts' persistently neglectful gatekeeping?

### III POSSIBLE JUDICIAL WORLD VIEW THAT MIGHT EXPLAIN POROUS GATEKEEPING

Courts routinely admit forensic science expert testimony that has not been validated using any sort of conventional empirical testing. Why? A multitude of explanations have been offered for this uncritical admission of unvalidated techniques into the courtroom, so long as the proffers are flying under the banner of forensic science.<sup>43</sup> Although – as suggested by the *NRC Report*<sup>44</sup> – the loci of this failure are numerous, the final institutional quality control is the judicial admissibility decision. If courts screened conscientiously and competently, excluding that which had not been validated, they would create a powerful incentive for governments to invest in validity testing.<sup>45</sup> Were judges to demand the data, the forensic science community would be obliged to begin producing the data. Thereafter, courts would be in a better position to admit or exclude based on the results of such testing. At present, however, a variety of impediments keep the courts from embracing the role required of them by their rules of evidence, the common law, and certainly by *Daubert*.

#### *A Conventionality*

In an attempt to maintain the authority of their decisions and to shelter them from criticism, trial judges are likely to look to prevailing sentiment in their jurisdictions – not only formal precedent but popular beliefs, held by other judges and by the general public.<sup>46</sup> Judges feel they are on safe ground as long as they adhere to conventional beliefs.<sup>47</sup> This might be thought of as a companion – and sometimes a competitor – to precedent: a tendency to follow convention rather than deference to controlling law in accord with *stare decisis*. Consistency with law might require doing exactly what most judges are disinclined to do: evaluate old forensic techniques under unfamiliar

<sup>43</sup> See, eg, Edmond, above n 4, 81.

<sup>44</sup> *NRC Report*, above n 6, 85.

<sup>45</sup> Though sound research is necessary and welcome, at the same time the findings need to be absorbed by the law with a cautious and sophisticated appreciation that research can be designed – intentionally or inadvertently – in ways that produce illusory support as well as illusory disconfirmation. See, eg, D Michael Risinger and Michael J Saks, 'A House with No Foundation: Forensic science needs to build a base of rigorous research to establish its reliability' (2003) 20 *Issues In Science And Technology* 35.

<sup>46</sup> Faigman et al, above n 16, 51.

<sup>47</sup> One of the authors was present in a California courtroom when a judge stated during an evidentiary hearing: I don't want to be the first judge in a hundred years to conclude that [a particular forensic science] does not meet the test for admission. That judge was under no legal obligation to admit the proffered expert testimony without limitation or, indeed, to admit it at all, yet felt a compulsion not to depart from conventional practice regardless of what the applicable legal rules might say.

'new' standards.<sup>48</sup> What we have described in this subsection is an illustration of the psychological phenomenon of 'social proof.'<sup>49</sup> Social proof leads individuals to conform to actions or ideas perceived as normative, predominantly when the 'correct' behaviour is ambiguous. Particularly in the case of forensic sciences with a long history of courtroom presence, it might be difficult for judges to question what has for so long been accepted without question. Deference to convention inevitably preserves the so-called forensic sciences in whatever state they have been operating.

### B *Inertia*

A related notion is that of inertia. But whereas conventionality implies following popular beliefs set by current members of the bar, the bench, and the public, inertia implies continuing to do whatever one (or one's peers) have done before. Despite numerous high level reports exposing serious shortcomings in forensic expert evidence, courts proceed as if nothing has changed in the understanding of the attainments and limits of forensic science knowledge.

Perhaps much of this judicial inertia can be explained by a wayward reliance on history. Courts have relied on certain techniques for so long that they are reluctant to rethink the role of those techniques in the trial process. Similar to the concept of 'grandfathering', courts continue to admit familiar species of evidence, regardless of new rules that impose new tests, or old rules that courts are urged to start applying properly. Thus, the sheer fact of a long history of admission carries enormous weight. However much sense this makes for dealing with normative principles in law, it is precisely backwards when dealing with science. Past generations of judges had less data available to them than today's judges do. Judges today are in a far better position to assess the ability of forensic science expert testimony to do what its practitioners claim or to meet the law's standards for admission. And tomorrow's judges will be in a better position than today's. But the judicial preference for repeating whatever helps to lock forensic science in place. The forensic scientists, too, know that if they keep doing what they have been doing they are likely to remain safe in the courts' eyes.

### C *Error Management in Admission of Expert Evidence*

The purpose of evidence screening by judges is to assist fact-finders in reaching correct conclusions by providing more probative evidence and screening out

<sup>48</sup> As one judge put it: under the *Daubert* line of cases, '[e]verything old is new again.' (*United States v Horn*, 185 F Supp 2d 530, 554 (D Md, 2002)). Many other judges, of course, refused to read *Daubert* as commanding them to 'depart from the well-traveled path,' despite their inability to find justification for admission under the criteria provided by the *Daubert* trilogy. *US v Cline*, 188 F Supp 2d 1287 (D Kan, 2002), affd 349 F 3d 1276 (10<sup>th</sup> Cir, 2003). Such recalcitrance would be viewed, at least by Supreme Court Justice Antonin Scalia, as reversible error. See *Kumho Tire Co Ltd v Carmichael*, 526 US 137 (Scalia J concurring) (1999).

<sup>49</sup> Robert B Cialdini, *Influence: The Psychology of Persuasion* (Harper Business, revised ed, 2006) 114.

misleading evidence. As in many other settings, courtroom verdicts can produce one of two errors: a false negative (in the trial context, a guilty individual pronounced not guilty), or a false positive (the alternative error, in which an innocent individual is found guilty). Because errors are unavoidable, procedures must be calibrated to balance the risk of false positives and false negatives. Once that threshold is set – in criminal cases, it is the familiar ‘proof beyond a reasonable doubt’ – judges might implicitly adjust their evidence screening thresholds to help or hinder the government’s efforts to carry a case over the threshold.

The US Supreme Court in *Daubert* recognised that ‘a gatekeeping role ... inevitably on occasion will prevent the jury from learning of authentic insights’.<sup>50</sup> Excluding forensic expert evidence might thus increase the risk of a false negative, and so it is not surprising that judges who believe a conviction is the preferred outcome in a particular criminal case – or in criminal cases generally – might exhibit trepidation about ‘defanging prosecutors.’<sup>51</sup> The result would be that, when evaluating expert evidence in a criminal case, anything that tends to inculcate a defendant tends to be admissible.

As a consequence, tacit trial verdict error management practices might be affecting the evaluation of forensic science in a way that unintentionally increases the risk of admitting misleading evidence. Some indication that this is occurring comes from studies of DNA exoneration cases, which have found erroneous and misleading forensic science testimony to be a leading cause of erroneous convictions, second only to eyewitness errors.<sup>52</sup>

#### *D Failure to Recognise Pseudo-Science*

When testifying before the Goudge Inquiry, LeSage J stated:

I must say it came as somewhat of a shock to me, having spent forty (40) years plus in the justice system, to hear some of the scientific experts speaking about the uncertainty and the lack of clarity in areas of science which I had always thought were far more certain than they really are. And I felt very guilty that I had not better educated myself on these areas long before.<sup>53</sup>

Justice LeSage is surely in crowded company. Few judges or lawyers understand how science comprehends empirical reality and, as a result, few are able to recognise the pre-science nature of certain forensic ‘sciences’. Judges’ most typical evidentiary experience involves individual, narrative storytelling by ordinary fact witnesses,

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<sup>50</sup> 509 US 579, 597 (1993).

<sup>51</sup> Faigman et al, above n 16, 64.

<sup>52</sup> Saks and Koehler, *Paradigm Shift*, above n 37, 892. See also Brandon L Garrett and Peter J Neufeld, ‘Invalid Forensic Science Testimony and Wrongful Convictions’ (2009) 95 *Virginia Law Review* 1.

<sup>53</sup> Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Queen’s Printer, 2008) 501.

rather than an assessment of the scientific validity underlying empirical data. Not only are judges untrained in evaluating scientific, empirical issues, they tend to be unaware of the extent of their limitations.<sup>54</sup>

Because few judges understand how science builds knowledge, they appear to assume that once scientific expert evidence has been admitted as valid, it cannot become invalid. In consequence, what has been admissible cannot become inadmissible. But it is not a rare experience in any scientific field to see scientific phenomena – be they empirical relationships or theoretical understandings – that have had to be revised or revoked as new and better studies exposed flaws in the prior studies.<sup>55</sup>

Ironically, progress in science that contradicts old science is the unrecognised enemy of past judicial action. Judges, like almost everyone in Western society, glibly declare that they welcome scientific progress. But scientific progress is not welcome when it advances by subtraction – that is, by finding that something once believed to be true is instead false. One of the authors observed an exchange that ensued following a continuing education program presented by university scientists to the state's judges. A medical school gynaecology professor had explained to the judicial audience how she and her colleagues once believed that certain markings on a child's vagina signified abuse, but more recent and better research revealed that entirely innocent and common causes for those markings existed. Following her talk, a judge approached and with apparent annoyance made essentially the following statement: 'Do you remember testifying in my courtroom five years ago, and saying that marks such as those did indicate sexual abuse? That child's father is now in prison because of your testimony.' Even more interesting was the doctor's reply: 'What would you have us do, remain ignorant forever?'

This anecdote illustrates the tension between judges and scientific experts when science marches onward by replacing earlier erroneous beliefs with updated findings. The law is not prepared to handle such tensions. It has unrealistic expectations of what scientific knowledge should do for trials. And, much like forensic scientists themselves, judges prefer to protect old beliefs they and their brethren have acted upon from refutation.

<sup>54</sup> See, eg, Sophia Gatowski et al, 'Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World' (2001) 25 *Law and Human Behavior* 433; Margaret Bull Kovera et al, 'Assessment of the Commonsense Psychology Underlying *Daubert*: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases' (2002) 8 *Psychology, Public Policy, and Law* 180. This is not surprising; it is difficult to know what one does not know and easy to think a matter simpler than it actually is. To turn the microscope around, think of the numerous mistaken things that doctors and scientists and other legally untrained persons think they understand about the law.

<sup>55</sup> See, eg, Mario Livio, *Brilliant Blunders* (Simon & Schuster, 2013).

*E Over-Reliance on the Adversarial Process*

Judges and scientists do not share the same concept of 'reliability,' and thus possess a different metric for achieving it. As demonstrated by Blackmun J in the US Supreme Court's opinion in *Daubert*, many judges seem to believe that 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'<sup>56</sup> Put more simply, this signifies a belief that trial procedure is capable of separating good scientific evidence from bad scientific evidence. 'Shaky' forensic science evidence will be exposed during trial through the safeguards of the adversarial process. Thus, judges may safely play a passive role in the filtering of evidence, trusting that the 'truth will out'.

Such confidence is misplaced for several reasons. Defence attorneys often do not have the resources to challenge prosecutors' forensic experts. Even with adequate resources, a defence attorney's best challenge against forensic science testimony would be empirical data indicating the science is flawed – and yet, as we know, empirical inquiry into many forensic science techniques remains limited, methodologically inadequate, or non-existent. Finally, forensic science evidence can be overly persuasive to juries, regardless of the shaky scientific basis for such belief – and cross-examination itself is an ineffective neutraliser of unreliable expert testimony.<sup>57</sup>

Before the trial begins, trial judges (sitting alone) must decide evidentiary issues with few resources and little time for extensive research and reflection. After conclusion of the trial, there exists very limited appellate review of trial court rulings admitting disputed evidence. Moreover, because those are evidentiary rulings, appellate courts traditionally review them deferentially.<sup>58</sup> Thus, from before the trial begins to well after the trial concludes, admission of weak forensic evidence eludes the ability of the adversarial system to effectively evaluate the proffered (or admitted) evidence. When faced with the unpleasant consequences produced by poor quality forensic science – notably, wrongful convictions – courts have a tendency to blame individual experts rather than recognise systemic issues. By doing so, courts 'sidestep engaging with the possibility that legal processes might create systematic vulnerabilities to unreliable and speculative forms of expert opinion evidence.'<sup>59</sup>

<sup>56</sup> 509 US 579, 596 (1993).

<sup>57</sup> See, eg, Joseph Sanders, 'The Merits of the Paternalistic Justification for Restrictions' (2003) 33 *Seton Hall Law Review* 881, 931–935. See also Shari Seidman Diamond et al, 'Juror Reactions to Attorneys at Trial' (1996) 87 *Journal of Criminal Law & Criminology* 17, 41 (results indicating that once a forensic psychiatrist has made a prediction of dangerousness, no amount of high quality challenge can undo the damage).

<sup>58</sup> See, eg, *General Electric Co v Joiner*, 522 US 136 (1997).

<sup>59</sup> Gary Edmond et al, 'Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) in Four Adversarial Jurisdictions' (2013) 3 *University of Denver Criminal Law Review* 31, 93.

We have suggested a number of cognitive habits of Anglo-American judges that together, or separately, might explain the continuing admission by courts of expert testimony from witnesses representing subfields of the non-science forensic sciences – fields that have yet to conduct rigorous research to evaluate the validity of their techniques, despite calls from several high-level commissions of inquiry that have looked into these fields and found them to be surprisingly short on science.<sup>60</sup> Can the future be expected to offer much improvement over the past?

#### IV LOOKING TO THE FUTURE

Numerous voices have detailed serious deficiencies of forensic science expert testimony, yet the courts' response thus far has been, shall we say, unresponsive. However, significant improvements are within reach. In Part IV we briefly mention potential solutions, and call attention to a recent court opinion excluding inadequate forensic expert evidence as an indication that judicial progress is attainable, even while scientific progress is slow.

##### *A Helpful Half-Measures*

As scholars such as Edmond have indicated,<sup>61</sup> the forensic science community has much to answer for in their failure to improve the science behind forensic expert evidence. Peter Neufeld has argued that the courts are not the place where improvements will be made, and that the focus of attention must be on other institutions that can compel or encourage improvements in the forensic science fields.<sup>62</sup> Certainly, courts cannot conduct the scientific experimentation required to validate forensic science techniques. However, courts have great power to catalyse the necessary changes. By not holding forensic scientists accountable, the courts allow these troubles to continue. And by contrast, if the gatekeepers were to more assiduously 'guard the gates,' that would force the forensic sciences (or others) to do the science and produce the evidence needed to permit the gatekeepers to conduct serious substantive evaluations. Thus, courts could rapidly improve the quality of forensic science by refusing to admit poorly scientifically supported, highly exaggerated testimony. The courts cannot be responsible for improving the science, per se, but they can, and should, be responsible for following the requirements of the law. This

<sup>60</sup> Edmond, above n 4, 34. See also Paul C Giannelli, 'Forensic Science: Why No Research?' (2010) 38(2) *Fordham Urban Law Journal* 503, 517 ('the reason for the lack of empirical research [in the past decade] was simply a stubborn refusal to reconsider beliefs in light of credible challenges. This is the antithesis of the scientific method.') Lack of research is only one of the major criticisms from the various commissions. But, validation research is the indispensable starting point – without it, little else can improve.

<sup>61</sup> Edmond, above n 4, 69.

<sup>62</sup> See, eg, Peter Neufeld and Barry Scheck, 'Making Forensic Science More Scientific' (2010) 464 *Nature* 351.

in turn would impel improvements by those whose interest it is to keep forensic science expert evidence flowing into the courts.

Beyond more careful scrutiny of proffered forensic science expert evidence – or instead of more careful scrutiny – courts could take other steps to rein in unvalidated forensic science. In this Comment, we merely list them, but further explication can be found in the margin.<sup>63</sup> None of these is a substitute for sound validation, rigorous quality control oversight, and more innovative institutional fixes,<sup>64</sup> but for courts and justice systems that for whatever reason can do no more, here are some possible courses of action:

- As a condition of admission, require examiners to be certified and their laboratories to be accredited.
- As a condition of admission, require examiners to have participated in regular proficiency testing, and review their performance results (aware that sometimes the tests are so easy that it would be hard not to do well).
- As a condition of admission, require labs to have submitted to routine scientific audits.
- Make use of court appointed experts as one route for reducing biased or weak forensic evidence in the courtroom.<sup>65</sup>
- Require blind examinations, evidence lineups, sequential unmasking, or other recognised procedures to minimise unintended bias in examinations.<sup>66</sup>
- Employ partial admission – allowing pattern comparison examiners to describe similarities and differences between questioned and known samples, but not to opine on ultimate conclusions of identity.<sup>67</sup>
- Require experts to stay well within the bounds of their asserted expertise. That is, to not go beyond what their field claims to be able to do.<sup>68</sup>
- Prohibit assertions of unique individualisation (for fields that perform pattern comparison) or assertions of perfect or near-perfect accuracy (for all fields). Prohibit use of unreasonably overpowering terminology generally, such as ‘indeed and without doubt’, ‘match’, ‘share a common source’, ‘identification to the exclusion of all others in the world’.

<sup>63</sup> See, eg, Michael J Saks, ‘Protecting Factfinders from Being Overly Misled, While Still Admitting Weakly Supported Forensic Science into Evidence’ (2008) 43 *Tulsa Law Review* 609.

<sup>64</sup> See Roger Koppl, *CSI For Real: How to Improve Forensics Science* (1 December 2007) Reason Foundation <<http://reason.org/files/d834fab5860d5cf4b3949fecf86d3328.pdf>> 19–30.

<sup>65</sup> *General Electric Co v Joiner*, 522 US 136, 147 (Breyer J concurring) (1997).

<sup>66</sup> Risinger et al, above n 39; Dan E Krane et al, ‘Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation’ (2008) 53 *Journal of Forensic Sciences* 1006.

<sup>67</sup> See, eg, *United States v Hines*, 55 F Supp 2d 62 (D Mass, 1999).

<sup>68</sup> Even when the field’s claims have not been validated, one can insist that the expert not become a field unto himself of unvalidated claims of ability.

- Instruct the jury on the limitations of accuracy of particular types of expertise, even though the court has chosen to admit such testimony.<sup>69</sup>

### B *An Exception to the Rule*

A recent court opinion demonstrates that it is possible for judges to undertake more searching evaluations of proffered forensic science, and might serve as a model, or at least inspiration, for proper consideration of scientific evidence.<sup>70</sup> The trial judge in *United States v Johnsted* evaluated a motion to exclude the expert testimony of a forensic document examiner on handwriting identification, ultimately concluding that ‘the science or art underlying handwriting analysis falls well short of a reliability threshold when applied to hand printing analysis,’<sup>71</sup> having found that the government had not sufficiently demonstrated that the expert’s analysis was ‘supported by principles and methodology that are scientifically valid.’<sup>72</sup>

The Court noted several troubling aspects of the proffered testimony. First, little research existed ‘demonstrating the ability of certified experts to distinguish between [an] individual’s handwriting or identity forgeries to any reliable degree of certainty.’<sup>73</sup> Of the limited research available, results indicated that forensic experts ‘made correct identifications less frequently than laypersons in hand printing analyses.’<sup>74</sup>

Second, the court commented on the discretionary nature of the expert’s analysis. The expert conceded that, in contrast to objective criteria, ‘analysts must rely entirely on their experiences and individual training to determine when a case warrants a particular conclusion.’<sup>75</sup>

Third, the judge was unimpressed by the proffered published peer reviewed studies, stating, ‘a mere list of journals does not convince the court that the specific techniques at issue in this case have been peer reviewed.’<sup>76</sup> A consistency-based argument was equally unpersuasive, representing a rare and thoughtful departure from customary judicial treatment of handwriting evidence.<sup>77</sup>

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<sup>69</sup> See, eg, *United States v Starzeczyzel*, 880 F Supp 1027 (SD NY, 1995).

<sup>70</sup> *United States v Johnsted*, 30 F Supp 3d 814 (WD Wis, 2013) (*Johnsted*) (order excluding expert testimony).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* 818.

<sup>74</sup> *Ibid* 819.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* 820.

<sup>77</sup> The full opinion is well worth reading for the thoroughness and acuity of its consideration of the factual issues and its analysis.

The conclusions of the *Johnsted* opinion indicate that change is possible in how judges screen proffers of expert evidence for validity. However, such change requires judges to exert effort, exercise independence, and perhaps summon courage as well.

## V CONCLUSIONS

Evaluating scientific and pseudo-scientific evidence is a challenging task for the courts, and perhaps one for which they are ill-suited. Although we may acknowledge the difficulty of the task, the ‘appropriate response to complexity should not be to call in the witch doctor for a magic spell, but rather to demand the best science available and remain aware of its limitations.’<sup>78</sup> In *General Electric Co v Joiner*,<sup>79</sup> Breyer J anticipated the trouble judges would face, noting that the gatekeeping requirement ‘will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer.’<sup>80</sup> Acknowledging that ‘judges are not scientists,’ he nevertheless counseled that ‘neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the “gatekeeper” duties that the Federal Rules impose.’<sup>81</sup> Justice Breyer’s sentiments were echoed by Scalia J’s concurrence in *Kumho Co Tire Ltd. v Carmichael*,<sup>82</sup> in which he concluded that a failure to apply the *Daubert* factors where they are applicable would constitute an abuse of discretion and therefore be a reversible error.<sup>83</sup>

Perhaps the duty to evaluate forensic science evidence confronts courts with a perfect storm, encompassing judicial incapacity (ignorance of how science builds knowledge), lack of will (bias), and pressure to move cases expeditiously (managerial judging). The situation likely is not solvable from within the judicial process. As Peter Neufeld has argued,<sup>84</sup> much of the change will have to come from outside: by testing and improving the forensic sciences, by engaging with mainstream research scientists, and by legislative and administrative processes. The US National Research Council’s suggestion to create a National Institute of Forensic Science reflects this realisation.

Yet, as the US Supreme Court has observed, judges are not to be absolved of responsibility. And when judges embrace the role required of them by the law, the gates can be better guarded against invasion by the non-science forensic ‘sciences’.

<sup>78</sup> Faigman et al, above n 16, 62.

<sup>79</sup> 522 US 136 (1997).

<sup>80</sup> *General Electric Co v Joiner*, 522 US 136, 146 (Breyer J) (1997).

<sup>81</sup> *Ibid.*

<sup>82</sup> 526 US 137 (Scalia J) (1999).

<sup>83</sup> *Ibid.* 159.

<sup>84</sup> Neufeld and Scheck, above n 62, 351.

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## THE PERILS OF LAW OFFICE SCIENCE: A PARTIAL RESPONSE TO PROFESSOR GARY EDMOND

### ABSTRACT

Professor Gary Edmond's article, 'What Lawyers Should Know About the Forensic "Sciences"' calls attention to some important failings in the judicial treatment of scientific evidence. But the issues he describes are not limited to the forensic sphere, and are endemic in civil litigation generally.

In this paper, we continue Professor Edmond's discussion and explore examples from the US, Canada, Australia, England and New Zealand in the fields of product liability, intellectual property and other types of commercial disputes. We explore the unsettling unwillingness on the part of the bar, the bench and the government to actively engage with the 'scientific verities' of a case, and to go against prior rulings when current scientific developments have overtaken the legal reasoning in earlier cases. Finally, we look at the impact this judicial unwillingness has on the legal system.

It is clear that legal rulings must be, and must seem to be, well-grounded both as a matter of law and science. With the growth of alternate dispute resolution, the continued functioning of the civil litigation system depends on it.

### I INTRODUCTION

It seems possible, on reading Professor Gary Edmond's article, 'What Lawyers Should Know About the Forensic "Sciences"', that his analysis suffers from (to borrow a term from his own article) 'epistemological humility'.<sup>1</sup> We agree with him that

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<sup>1</sup> Gary Edmond, 'What Lawyers Should Know About the Forensic "Sciences"' (2015) 36 *Adelaide Law Review* 33, 65.

[i]n relation to forensic science and medicine, there is a conspicuous need to develop better-informed processes and systems that help lawyers, judges and experts respond to the range of issues affecting their ability to understand and regulate expert evidence.<sup>2</sup>

The question is why he limits this criticism ‘to *forensic* science and medicine’,<sup>3</sup> when the problems that concern Professor Edmond are largely generic to the ability of the courts to deal with scientific evidence generally. His analysis is deserving of wider application. There exists a growing controversy over the legitimacy of judicial decision-making in matters of science and sophisticated technology, whether encountered in the area of product liability, intellectual property or many different types of commercial disputes.

In this paper, we expand upon Professor Edmond’s thesis and examine the ways in which the scientific realities are often obscured, avoided or even ignored in both commercial and forensic contexts. Litigants reasonably expect a decision that is both scientifically and legally accurate. The legitimacy of court decisions in civil litigation, given the proliferating mechanisms for alternate dispute resolution, depends on it.

## II ‘BUMBLING ALONG’

In the first part of his article, Professor Edmond refers approvingly to two reports from the United States calling attention to problems with forensic experts.<sup>4</sup> But the systemic difficulties are equally on display in purely commercial contexts, such as in the recent breast cancer gene litigation in the United States and Australia. The issue in *Association for Molecular Pathology v Myriad Genetics Inc*<sup>5</sup> was whether DNA is to be considered a ‘composition of matter’, as the patentees argued, or simply a set of unpatentable genetic instructions, as Dr James Watson, co-discoverer of DNA’s double helix and Nobel Laureate, contended. This legal debate, in turn, brought into question the courts’ understanding of the nature and function of DNA itself.

At this point of intersection of *non*-forensic science and law, in litigation that is said to be of crucial importance to the financial health of the biotech industry, the United States Supreme Court and the Full Federal Court of Australia have (so far) reached diametrically opposite conclusions based, at least in part, on differing conceptions

<sup>2</sup> Ibid 98.

<sup>3</sup> Ibid (emphasis added).

<sup>4</sup> Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) (*‘NRC Report’*); Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (US Department of Commerce, National Institute of Standards and Technology, 2012) (*‘NIST Report’*).

<sup>5</sup> 133 S Ct 2107 (2013) (*‘Myriad Genetics’*).

of the relevant science and public policy. The Federal Court of Australia upheld the validity of Myriad's patent on the 'isolated and purified' genes.<sup>6</sup> The US Supreme Court invalidated key elements of it.<sup>7</sup> In both jurisdictions, the judges obviously felt somewhat out of their depth in coming to terms with the underlying science.

Product liability litigation has also experienced its share of what Professor Edmond refers to as 'bumbling along'.<sup>8</sup> An English judge was widely portrayed as a scientific 'bumbler' when he dismissed the claim of a woman who had attributed her stroke to taking a third generation oral contraceptive.<sup>9</sup> The judge had in evidence before him six studies on the alleged relationship or 'association' between strokes and 'the pill'. Three of these studies, all published in peer reviewed medical journals, said that there was an approximate doubling of the risk of stroke to a woman who was taking the third generation of the pill. On the other side, there were three industry-sponsored reports that said that there was no discernible increase in the risk. The unfortunate trial judge accepted as persuasive the industry-sponsored reports, dismissed the action, and was then roundly chastised by the medical establishment.<sup>10</sup> An editorial in *The Lancet* decried, 'trying science in a court of law is doomed to failure.'<sup>11</sup> And an article in the *British Medical Journal* stated, '[d]espite millions of pounds spent and numerous intelligent minds locked in combat, the judge failed to get to the heart of the matter.'<sup>12</sup> Yikes!

In an earlier product liability case, a US trial judge was pilloried for allowing a woman's claim that serious birth defects had been caused by a spermicide used to prevent conception.<sup>13</sup> There was a general consensus in the scientific community that because of its chemical properties, the spermicide was simply incapable of producing the effects claimed. Nevertheless, this same causal relationship was established to the satisfaction of the trial judge, sitting without a jury, who awarded the woman \$5.1 million in damages. The figure was reduced on appeal to \$4.7 million.

<sup>6</sup> *D'Arcy v Myriad Genetics Inc* (2014) 224 FCR 479 ('*Myriad Australia*').

<sup>7</sup> *Myriad Genetics*, 133 S Ct 2107 (2013).

<sup>8</sup> Edmond, above n 1, 35.

<sup>9</sup> *X v Schering Health Care Ltd* [2002] EWHC 1420 QB (29 July 2002), discussed in Justice Ian Binnie, 'Science in the Courtroom: The Mouse that Roared' (2007) 56 *University of New Brunswick Law Journal* 307 ('*The Mouse that Roared*').

<sup>10</sup> See Binnie, 'The Mouse that Roared', above n 9, 312.

<sup>11</sup> Editorial, 'Epidemiology on Trial' (2002) 360 *The Lancet* 421. See also News, 'Third Generation Pill Not More Risky' (2002) 269 *The Pharmaceutical Journal* 149; Haroon Ashraf, 'UK High Court Dismisses Risk of VTE in "Pill" Test Case' (2002) 360 *The Lancet* 391.

<sup>12</sup> David C G Skegg, 'Oral Contraceptives, Venous Thromboembolism, and the Courts' (2002) 325 *British Medical Journal* 504.

<sup>13</sup> *Wells v Ortho Pharmaceutical Corp*, 788 F 2d 741 (11<sup>th</sup> Cir, 1986), discussed in Justice Ian Binnie, 'Wrongful Convictions and the Magical Aura of Science in the Courtroom' (2011) 10 *Judicial Review* 141 ('*Wrongful Convictions*').

According to a study of the case by Professor Samuel Gross,<sup>14</sup> the outcome was entirely at odds with a broad scientific consensus. An editorial in the *New York Times* described the judge's reasons as 'an intellectual embarrassment'.<sup>15</sup>

Professor Edmond notes the possibility of 'Australian exceptionalism' to the judicial bumbling on display elsewhere.<sup>16</sup> Canadian courts do not claim any such exceptionalism, and on occasion seem to relish in declaring their own bafflement. A notorious example occurred in patent litigation involving Procter & Gamble's dryer added fabric conditioner BOUNCE.<sup>17</sup> Although Unilever ultimately managed to persuade the trial judge that its patent was both valid and infringed, the scientific evidence elicited the following outburst from the bench:

A judge unschooled in the arcane subject is at difficulty to know which of the disparate, solemnly mouthed and hotly contended 'scientific verities' is, or are, plausible. Is the eminent scientific expert with the shifty eyes and poor demeanour the one whose 'scientific verities' are not credible? Cross-examination is said to be the great engine for getting at the truth, but when the unschooled judge cannot perceive the truth, if he or she ever hears it, among all the chemical or other scientific baffle-gab, is it not a solemn exercise in silliness?<sup>18</sup>

In *Myriad Genetics*, the breast cancer gene case, Scalia J of the US Supreme Court was uncharacteristically modest about his grip on the 'scientific verities'. He concurred with the majority's opinion, except with respect to its appreciation of the underlying science. His opinion was brief and to the point:

I join the judgment of the Court, and all of its opinion except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge *or even my own belief*.<sup>19</sup>

In short, it is not only in the realm of criminal law that the courts need, in Professor Edmond's words, '[to] respond to the range of issues affecting their ability to understand and regulate expert evidence.'<sup>20</sup> In the *BOUNCE* case, the claim was valued at the equivalent (at the time) of over \$100 million. In the breast cancer gene litigation, a good chunk of the global biotech industry was said (controversially) to hang in the balance. Litigants in such disputes have an understandable anxiety for some assurance that the judges who are to decide their respective destinies understand the issues of scientific controversy as well as the relevant law.

<sup>14</sup> Samuel R Gross, 'Expert Evidence' (1991) *Wisconsin Law Review* 1113, 1121.

<sup>15</sup> Editorial, 'Federal Judges vs Science', *The New York Times* (New York), 27 December 1986, A22. See Binnie, 'Wrongful Convictions', above n 13, 145–6.

<sup>16</sup> Edmond, above n 1, 81.

<sup>17</sup> *Unilever PLC v Procter & Gamble Inc* (1993) 47 CPR (3d) 479 ('*BOUNCE*').

<sup>18</sup> *Ibid* 488–9.

<sup>19</sup> *Myriad Genetics*, 133 S Ct 2107, 2120 (2013) (emphasis added).

<sup>20</sup> Edmond, above n 1, 98.

### III WHAT SCIENTISTS UNDERSTAND ABOUT LAWYERS AND JUDGES

The title of Professor Edmond's article could, as in the above heading, be switched around. He commences his article with a quotation from an American judge bemoaning the common lack of scientific familiarity among judges and lawyers. But many scientists are equally baffled by the ways of the law. Some scientists who have experienced the adversarial trial system have been brave enough to complain about it. The following is a representative sample:

the expert witness is almost entirely at the mercy of counsel on both sides. The [expert] must depend on counsel to present his or her views fairly and forcefully ... [experts] do not get an opportunity to defend themselves against misquotation or selective quotation by opposing counsel.

...

There is no opportunity to explain evidence or interpretation oneself, no assurance that counsel will explain it clearly or in a sophisticated fashion, and no opportunity to correct errors or crudities which creep in.

There is no guarantee . . . that counsel will even understand the arguments the [expert] has made, and consequently no guarantee that questions which may be posed by the judges will be correctly or clearly answered.<sup>21</sup>

Legal academics, too, sometimes offer observations surprising enough to make scientists rub their eyes.<sup>22</sup> Professors Stéphane Beaulac and Pierre-André Côté of the Université de Montréal apparently took their instruction from a Montreal management consultant in their display of a rather shaky grip of the law of gravity: 'Consider a flight from Montreal to London. The pilot must plan such a flight based on a conception of the earth that is round, otherwise the aircraft would end up in outer space.'<sup>23</sup>

Product liability cases, intellectual property disputes and other science-related matters lack some of the glamour of the forensic sciences. Still, the outcomes are important in the eyes of the public, especially the business community, as a test of the ability of the courts to get to a satisfactory result.

<sup>21</sup> G M Dickason and R D Gidney, 'History and Advocacy: Some Reflections on the Historian's Role in Litigation' (1987) 68 *Canadian Historical Review* 576, 579. See generally Binnie, 'The Mouse that Roared', above n 9; J Morgan Kousser, 'Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing' (1984) 6 *The Public Historian* 5.

<sup>22</sup> See also Binnie, 'The Mouse that Roared', above n 9.

<sup>23</sup> Stéphane Beaulac and Pierre-André Côté, 'Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 *Revue Juridique Themis* 131, 168.

## IV THE BREAST CANCER GENE AND THE COURTS

In the 1980s, it had been discovered that some women inherited a predisposition to breast and ovarian cancers.<sup>24</sup> A researcher by the name of Mary-Claire King led a team that identified the BRCA1 gene on chromosome 17 as a major source of concern. In 1995, a second culprit, the BRCA2 gene, was identified on chromosome 13. The presence of certain genetic mutations at these sites increases a woman's risk of developing breast cancer from 12 to 13 per cent in the average population to up to 80 per cent. (Some measure of this scientific achievement is the fact the researchers were able to isolate as relevant two genes amongst the roughly 24 000 genes spread over 23 chromosomes in the human genome.)

The Myriad Genetics laboratory in Utah had the advantage of access to the colossal genealogical database created by the Mormon Church. The results of its research into the health outcomes of generations of Mormon women persuaded the US Patent and Trademark Office to issue extensive patent rights to the 'isolated and purified' BRCA1 and BRCA2 gene sequences. Myriad went on to develop diagnostic tests that identify mutations in the BRCA1 and BRCA2 genes, and help women to determine whether to undertake preventative options, including prophylactic surgery, and to otherwise structure an appropriate course of treatment. A famous beneficiary of the diagnostic tool is the actress Angelina Jolie.

In addition to the BRCA gene sequences, Myriad's patent also covered laboratory modifications of the genes, such as the cDNA Myriad 'created' in the lab by excising the introns (DNA segments not involved in protein generation) from the native gene. The US Court of Appeals for the Federal Circuit unanimously upheld Myriad's claims to cDNA, but divided on whether the 'isolated and purified' BRCA genes themselves were patentable inventions.<sup>25</sup> The plaintiffs said the 'inventors' had made no 'invention', but mere unpatentable 'discoveries'.

At this point, inevitably, lawyers and judges reach for the familiar toolbox of analogies and metaphors instead of 'drilling down' (to use another overworked metaphor) into the science itself. The Australian Full Federal Court denounced this judicial proclivity at the start of its judgment:

it is worth stating that care should be taken in resort to metaphor in analysis in this field. Metaphor can assist thought, in particular, by the evocation of structure and form by imagination; but it can also blind the eye of the mind by

<sup>24</sup> For further discussion of this case, see Ian Binnie and Vanessa Park-Thompson, "Keep Your Greedy Hands Off My Genes!" The US Supreme Court's Invalidation of Gene Patents is a Victory for Basic Principles of Patent Law, but Public Policy Concerns Remain Unresolved' (2014) 26 *Intellectual Property Journal* 249.

<sup>25</sup> *Association for Molecular Pathology v US Patent and Trademark Office*, 689 F 3d 1303, 1329 (Lourie J), 1340–1 (Moore J), 1355–6 (Bryson J) (Fed Cir, 2012) ('*Myriad CAFC*'). Justice Lourie wrote the majority decision, with Moore J in the minority and Bryson J dissenting.

oversimplification. It may risk blinding real illumination that is achieved through analysis of the facts, including the scientific principles involved, by the utilisation of a striking evocation of a simplified structure of analysis that is derived from the metaphor chosen, rather than from the facts as existing.<sup>26</sup>

This may indeed be an assertion of ‘Australian exceptionalism’. In other jurisdictions, the lawyers are typically focused on soft peddling the science to the judges. In the companion US case, the government conjured up images of Superman’s famous x-ray vision to dispute the validity of key claims of Myriad’s patents. It advanced a simplistic ‘magic microscopic’ test: if an instrument could be built to penetrate the human body at the molecular level, would a researcher be able to ‘see’ the claimed gene fragment? If so, the genetic material, isolated and purified or not, was *not* patentable subject matter.

The majority of the US Court of Appeals rejected the ‘magic microscope’ analogy:

The government’s microscope could focus in on a claimed portion of any complex molecule, rendering that claimed portion patent ineligible, even though that portion never exists as a separate molecule in the body or anywhere else in nature, and may have an entirely different utility. That would discourage innovation.<sup>27</sup>

This same analogy crashed and burned in the Australian litigation, the Full Federal Court generally approving of the American appellate court’s analysis.<sup>28</sup>

On the hunt for a better analogy, both the US minority and the dissent went on to compare isolated DNA to a baseball bat, with differing conclusions about whether a baseball bat could be considered patent-eligible subject matter (a rather different argument, it would seem, than one about isolated and purified gene sequences). As to baseball bats, the minority refined the analogy as follows: ‘man has defined the parts [of the tree] that are to be retained and the parts that are to be discarded, and he has molded [sic] the retained portion into a product that bears little resemblance to that which occurs naturally.’<sup>29</sup>

However, the dissenter fixed on the analogy (not the science). He floated the idea that if isolation and purification is sufficient, what about a kidney surgically removed from a patient’s body? Why would not the ‘isolated’ and cleaned up kidney be as patentable as an ‘isolated and purified’ gene? Pursuing yet another analogy, Bryson J went on to suggest that ‘extracting a gene is akin to snapping a leaf from a tree’:

Like a gene, a leaf has a natural starting and stopping point. It buds during spring from the same place that it breaks off and falls during autumn. Yet prematurely

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<sup>26</sup> *Myriad Australia* (2014) 224 FCR 479, 482 [4].

<sup>27</sup> *Myriad CAFC*, 689 F 3d 1303, 1331 (Fed Cir, 2012).

<sup>28</sup> *Myriad Australia* (2014) 224 FCR 479, 482 [5]–[7], 517 [212].

<sup>29</sup> *Myriad CAFC*, 689 F 3d 1303, 1342 (Fed Cir, 2012).

plucking the leaf would not turn it into a human-made invention. That would remain true if there were minor differences between the plucked leaf and the fallen autumn leaf, unless those differences imparted ‘markedly different characteristics’ to the plucked leaf.<sup>30</sup>

No, no, no replied the majority, ‘[s]napping a leaf from a tree is a physical separation, easily done by anyone. Creating a new chemical entity is the work of human transformation, requiring skill, knowledge, and effort.’<sup>31</sup>

Even the Australian Full Federal Court, though purporting to eschew metaphors as an ‘oversimplified analysis’,<sup>32</sup> could not help but add its voice to the chorus:

[The tree branch analogy] is inapposite. The branch has not changed — it is simply divorced from the tree, whereas the chemical and physical makeup of the isolated nucleic acid renders it not only artificial but also different from its natural counterpart.<sup>33</sup>

Justice Moore, the concurring judge in the US Court of Appeals decision, concluded that the genetic subject matter was probably *not* patentable as a matter of patent law.<sup>34</sup> However, given that the US Patent and Trademark Office ‘has allowed patents on isolated DNA sequences for decades ... we must be particularly wary of expanding the judicial exception to patentable subject matter where both settled expectations and extensive property rights are involved.’<sup>35</sup> In effect, in her Honour’s view, the biotech industry had more or less earned squatters’ rights to its intellectual property.

A similarly pragmatic argument, based on patent office experience, had earlier been endorsed by the Australian Law Reform Commission (‘ALRC’) in its 2004 report on gene patenting:

6.51 there are attractive arguments for the view that such materials should not have been treated as patentable subject matter.

6.52 *However, the time for taking this approach to the patenting of products and materials has long since passed.* For decades, naturally occurring chemicals have been regarded by patent offices in many jurisdictions as patentable subject matter, when they are isolated and purified. This principle has been applied by analogy to biological materials, including genetic sequences, on the basis that they are ‘merely’ complex organic compounds. This development was certainly

<sup>30</sup> Ibid 1352 (Bryson J) (citations omitted).

<sup>31</sup> Ibid 1332.

<sup>32</sup> *Myriad Australia* (2014) 224 FCR 479, 482 [7].

<sup>33</sup> Ibid 517 [211].

<sup>34</sup> *Myriad CAFC*, 689 F 3d 1303, 1343 (Fed Cir, 2012).

<sup>35</sup> Ibid.

not foreseen when the modern patent system was established, and a different approach might have been available when the issue first arose for consideration.

6.53 Nonetheless, the ALRC considers that a new approach to the patentability of genetic materials is not warranted at this stage in the development of the patent system, for the following reasons ...<sup>36</sup>

But when the *Myriad Genetics* case reached the US Supreme Court (which eventually invalidated the patent claims to the ‘isolated and purified’ gene sequences), Roberts CJ was drawn moth-like back to the baseball bat analogy. His Honour suggested the bat could be seen as a true invention, because ‘[y]ou don’t look at a tree and say, well, I’ve cut the branch here and cut it here and all of a sudden I’ve got a baseball bat.’<sup>37</sup> Human innovation was required. Conversely, the BRCA genes did *not* require invention, because ‘[you] snip off the top and you snip off the bottom and there you’ve got it.’<sup>38</sup>

Justice Sotomayor preferred a sweeter metaphor: if the chromosome were a chocolate chip cookie, were not the claimed BRCA1 and BRCA2 genes no more patentable than the salt, flour, eggs and butter used to make that cookie?<sup>39</sup>

Then the Court made a hypothetical trip to Amazonia, comparing the BRCA1 and BRCA2 genes in a human chromosome to a plant in the Amazon forest: if ‘Captain Ferno’ ventures into the jungle, uproots an indigenous plant and carries it back to the United States, does he or she have something patentable, or just a discovery?<sup>40</sup>

In the end, the chocolate chip cookie school of thought prevailed and the US Supreme Court reversed the Court of Appeals’ decision, striking down Myriad’s claims to the isolated and purified gene sequences.

The lack of any real scientific analysis was baffling to the scientific community. The amicus brief submitted by Dr James Watson was scornful of the US Court of Appeals’ judgment upholding the validity of the patent claims:

what the Court misses, I fear, is the fundamentally unique nature of the human gene. Simply put, no other molecule can store the information necessary to create and propagate life the way DNA does. It is a chemical entity, but DNA’s

<sup>36</sup> ALRC, *Genes and Ingenuity: Gene Patenting and Human Health*, Report No 99 (2004) 130 (emphasis added), referred to in *Myriad Australia* (2014) 224 FCR 479, 508–9 [158].

<sup>37</sup> Transcript of Proceedings, *Myriad Genetics* (United States Supreme Court, Roberts CJ, Kennedy, Ginsburg, Scalia, Alito, Kennedy, Sotomayor, Kagan and Breyer JJ, 15 April 2013) 41.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 35–6.

<sup>40</sup> Ibid 7–8, 30, 32–3, 43–5, 64–5.

importance flows from its ability to encode and transmit the instructions for creating humans.<sup>41</sup>

In other words, DNA fragments are important not as compositions of matter, but because of the information they carry.<sup>42</sup> The attempt to patent ‘the messenger’ as just another ‘composition of matter’ is like (if we may dare to impose yet another metaphor on Dr Watson) conceptualising the importance of Mozart in terms of his body parts. It creates, in Dr Watson’s view, an unacceptable ‘ownership’ of our common genetic inheritance.<sup>43</sup> Importantly, moving subject matter from ‘the commons’ into the realm of private property may complicate rather than facilitate future scientific discovery. In this way, Dr Watson’s objection combined both scientific and public policy concerns.

The Australian Full Federal Court in effect concluded that the US Supreme Court, Dr James Watson and other scientists who argue that DNA sequences are (from a scientific perspective) essentially carriers of information, may know science but simply do not understand patent law.<sup>44</sup> According to the Full Federal Court,

[t]here is a distinction between a claim to an isolated nucleic acid comprised in part of a sequence of nucleotide bases and a claim to a written sequence of nucleotides which may be identical to the corresponding sequence in the natural cell. The claim is to be construed according to the normal principles of claim construction. To identify the invention as lying in the concept of information said to be embodied in a sequence of nucleotides ignores the language of the claim.<sup>45</sup>

In its view, Myriad’s patent claimed a tangible compound — a nucleic acid — with valuable economic utility.<sup>46</sup> Focusing on the ‘unnatural’ properties of isolated and purified genetic sequences, the Federal Court of Australia concluded:

What is being claimed is not the nucleic acid as it exists in the human body, but the nucleic acid as isolated from the cell. The claimed product is not the same as the naturally occurring product. There are structural differences but, more importantly, there are functional differences because of isolation. As Lourie J [of the US Court of Appeals] explains, ‘*the ability to visualise a DNA molecule through a microscope, or by any other means, when it is bonded to other genetic material [and in a particular regulatory environment] is worlds apart from processing an isolated DNA molecule that is in hand and useable*’.<sup>47</sup>

<sup>41</sup> ‘Brief for James D Watson, PhD as Amicus Curiae in Support of Neither Party’, Submission in *Myriad Genetics*, 133 S Ct 2107 (2013), 2 (‘Watson Brief’).

<sup>42</sup> See Binnie and Park-Thompson, above n 24, 251.

<sup>43</sup> ‘Watson Brief’, Submission in *Myriad Genetics*, 133 S Ct 2107 (2013), 2.

<sup>44</sup> *Myriad Australia* (2014) 224 FCR 479, 518 [216].

<sup>45</sup> *Ibid* 514 [194].

<sup>46</sup> *Ibid* 516–7 [210].

<sup>47</sup> *Ibid* 517–8 [212], [216]–[217] (emphasis added).

Of course, if the genius of the ‘inventors’ lay in the methods of extraction and purification, why were they not limited to method claims on their extractive processes?

The case is currently under appeal to the High Court of Australia.

## V OTHER HORROR STORIES FROM CANADA

Professor Edmond rightly calls to attention two excellent reports on wrongful convictions in Canada. The first in time was a meticulous judicial inquiry into the wrongful conviction of Guy Paul Morin for the murder of a child who lived next door. The Commissioner, a retired judge of the Quebec Court of Appeal, Fred Kaufman, concluded that the research used by the Crown expert for purposes of identification of the accused as the killer had been ‘seriously misused’ and would ‘likely mislead the jury’.<sup>48</sup> The testimony ‘proved nothing’, Commissioner Kaufman wrote: ‘There is no doubt that the hair and fibre evidence was crucial to the decision to arrest Guy Paul Morin; its presentation to the jury at the second trial undoubtedly contributed to Mr Morin’s wrongful conviction.’<sup>49</sup>

The second, more broadly based judicial inquiry, extensively described by Professor Edmond in his article, concerned a crusading Ontario forensic pathologist by the name of Dr Charles Smith.<sup>50</sup> Problems with Dr Smith’s testimony in a variety of cases eventually became so notorious that a Commission of the Inquiry (the ‘Goudge Inquiry’) was established.<sup>51</sup> Justice Stephen Goudge, an Ontario Court of Appeal judge, found that Dr Smith was poorly trained, chronically disorganised, arrogant and incompetent.<sup>52</sup> In the result, he recommended that 142 of the cases in which Dr Smith testified should be reviewed to investigate potential errors and miscarriages of justice. One agonising issue raised by the Goudge Inquiry was why the prosecution continued to recommend Dr Smith’s opinions to judges and juries, long after serious doubts and alarms had been raised about his competence. In many of these cases of wrongful conviction, based on a misuse of forensic science, the prosecution’s ethics are very much in question.

## VI PUBLIC POLICY TRUMPS SCIENCE IN THE COURTROOM

Much of Professor Edmond’s commentary suggests a judicial preference for pragmatic results over scientific doubts and quibbles about reliability. We agree with him that

<sup>48</sup> Fred Kaufman, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Queen’s Printer, 1998) 119.

<sup>49</sup> *Ibid.* 83.

<sup>50</sup> See also Binnie, ‘Wrongful Convictions’, above n 13.

<sup>51</sup> Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Queen’s Printer, 2008).

<sup>52</sup> *Ibid.*

[c]ourts have been too accommodating in their responses to the state's incriminating expert evidence. They have 'certified' techniques and experts prematurely; thereby allowing untested and therefore speculative forms of evidence into trials, and required the defence to somehow identify, explain and successfully convey limitations at the accused's peril.<sup>53</sup>

As a case in point, Professor Edmond refers<sup>54</sup> to his earlier and very timely commentary<sup>55</sup> on the decision of the English Court of Criminal Appeal in *R v Atkins*.<sup>56</sup> In light of the vast network of closed-circuit television cameras ('CCTV') currently operating in Britain, it would take an uncommonly sturdy judiciary to rule that evidence of 'facial morphology' is inadmissible for identification purposes on the grounds of the lack of a proper database, subjectivity on the part of the expert, confirmation bias, and so on. As in the case of the ALRC's support of gene patents, there seems to emerge from time to time a critical mass of acceptance of even weak science at which point further critical debate is put aside. (An exception, in Canada, was the Supreme Court of Canada's willingness to review and discredit prevailing views of the value of evidence given under hypnosis.)<sup>57</sup>

In the Myriad Genetics litigation, the American and Australian courts of appeal were clearly of the view that the long-established patent office and parliamentary practice was determinative.<sup>58</sup> Both the minority of the US Court of Appeals and the unanimous Australian Full Federal Court deferred to the wisdom of the government, who, when faced with the question of whether to exclude purified and isolated gene sequences from patentability, had specifically declined to do so. The Australian Federal Court stated:

The isolation of the nucleic acid also leads to an economically useful result — in this case, the treatment of breast and ovarian cancers. This is surely what was contemplated by a manner of new manufacture in the *Statute of Monopolies*. As Moore J explained in the Federal Circuit, '*it is not the chemical change alone, but that change combined with the different and beneficial utility which leads me to conclude that small isolated DNA fragments are patentable subject matter*'.<sup>59</sup>

Despite Myriad's success in Australia, we are of the opinion that the Supreme Court of Canada, if invited to do so, would likely *strike down* the contested gene claims on unabashed grounds of public policy (and likely without much discussion of the underlying science). There is, in fact, no pending patent litigation in Canada about

<sup>53</sup> Edmond, above n 1, 85.

<sup>54</sup> Ibid 79 n 235.

<sup>55</sup> See Gary Edmond et al, '*Atkins v The Emperor: the "Cautious" Use of Unreliable "Expert" Opinion*' (2010) 14 *The International Journal of Evidence & Proof* 146.

<sup>56</sup> [2009] EWCA Crim 1876 (2 October 2009), cited in Edmond, above n 1, 79 n 235.

<sup>57</sup> *R v Trochym* [2007] 1 SCR 239.

<sup>58</sup> *Myriad Australia* (2014) 224 FCR 479, 482 [3].

<sup>59</sup> Ibid 517 [214] (emphasis added).

the BRCA genes; the public health authorities in the provinces decided simply to appropriate the teaching of the Myriad patents and diagnostic tools, while ignoring Myriad's strident claims for compensation. For reasons unknown, while Myriad kicked up a fuss, it ultimately chose not to sue for patent infringement in Canada. However, had such a suit been initiated, we doubt that the ruling would have been based on whether to conceptualise DNA as a 'composition of matter' or 'genetic instructions'. The Supreme Court of Canada, after all, was in a distinct minority among national courts in denying the validity of Harvard University's 'oncomouse' patent by 'reading into' the *Patent Act*, RSC 1985 c P-4 a prohibition against patenting 'higher life forms'.<sup>60</sup>

In *Harvard Mouse*, the majority in a 5:4 decision concluded that the adult mouse was unpatentable because it developed through the 'natural process of gestation'<sup>61</sup> and Parliament could not have intended the pedestrian phrase 'composition of matter' to include conscious, sentient living creatures such as rodents (as opposed to bacteria and other 'lower life forms') within its scope:

The fact that animal life forms have numerous unique qualities that transcend the particular [genetic material] of which they are composed makes it difficult to conceptualize higher life forms as mere 'composition[s] of matter'. It is a phrase that seems inadequate as a description of a higher life form.

...

*The distinction between lower and higher life forms, though not explicit in the Act, is nonetheless defensible on the basis of common sense differences between the two.*<sup>62</sup>

Oddly enough, there is some echo here of Dr Watson's argument that the extraordinary nature of DNA 'transcend[s] the particular [genetic material] of which they are composed.'<sup>63</sup> In the majority's view, the phrase 'composition of matter' just 'seems inadequate as a description' of nature's messenger molecule.

The four dissenting judges on the Supreme Court of Canada criticised the majority's failure to define what it had in mind as the critical dividing line between lower and higher forms of life.<sup>64</sup> Apparently, the line falls somewhere along a spectrum between a bacterium and a mouse. For the dissent, what was significant was not the 'natural process of gestation' but the very unnatural product of a mouse whose every cell had been modified by human intervention to achieve a novel and medically

<sup>60</sup> *Harvard College v Canada (Commissioner of Patents)* [2002] 4 SCR 45 ('*Harvard Mouse*').

<sup>61</sup> *Ibid* 93 [85], 126–7 [162] (Bastarache J for L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache and LeBel JJ).

<sup>62</sup> *Ibid* 122 [155], 127 [163], 147 [199] (emphasis added).

<sup>63</sup> *Ibid* 127 [163].

<sup>64</sup> *Ibid* 78–82 [46]–[56].

useful purpose.<sup>65</sup> The minority's view was that '[t]he extraordinary scientific achievement of altering every single cell in the body of an animal which does not in this altered form exist in nature, by human modification of "the genetic material of which it is composed"' deserved patent protection,<sup>66</sup> unless and until the *Patent Act* was amended to attenuate the scope of patentable subject matter. As in the case of the forensic sciences examined in Professor Edmond's article, the admissibility and weight of scientific evidence seemed to be judicially viewed through the lens (another overworked metaphor!) of public policy, rather than from the perspective of the scientists. The excessively 'accommodating' judicial attitude to dubious science noted by Professor Edmond may indicate more than a simple misunderstanding or lack of interest. Science may become subservient to a different agenda. In the Ontario cases mishandled by Dr Smith, Commissioner Goudge describes a simple desire on the part of the prosecution to obtain a conviction, and its willingness to hold its nose while calling the incompetent pathologist.

#### VII ARE JURIES LESS PERCEPTIVE THAN JUDGES IN SPOTTING UNRELIABLE SCIENTIFIC EVIDENCE?

Professor Edmond expresses special concern about the ability of jurors to see through unreliable 'science'. We agree with Professor Edmond that, 'juries have not been placed in conditions that are conducive to the rational evaluation of incriminating opinion evidence and proof of guilt more generally.'<sup>67</sup>

However, we suggest that the conclusion Professor Edmond draws is excessively pessimistic. He concludes that: 'When it comes to jury evaluation of expert evidence, and the combination of expert evidence with other forms of evidence, trial and appellate court confidence and deference would seem to be misplaced.'<sup>68</sup>

We think Australians can draw particular comfort from the work of the New South Wales jury in *R v Tang*.<sup>69</sup> The jurors in that case, on their own initiative, raised many of the concerns that trouble Professor Edmond about the reliability of experts' methodology. They were asked by the prosecutor to convict on the basis of 'expert' identification by 'facial mapping' and 'body movements'. The expert, Dr Sutisno, purported to compare the facial features of the accused with those of the perpetrator of a crime captured on CCTV.<sup>70</sup> (*Tang* is therefore a companion case in some respects to the English case of *R v Atkins*, mentioned earlier.)

<sup>65</sup> Ibid 62 [8], 69–71 [27]–[30].

<sup>66</sup> Ibid 62 [8] (Binnie J for McLachlin CJ, Major, Binnie and Arbour JJ).

<sup>67</sup> Edmond, above n 1, 91.

<sup>68</sup> Ibid.

<sup>69</sup> (2006) 65 NSWLR 681 ('*Tang*'). See also Binnie, 'Wrongful Convictions', above n 13.

<sup>70</sup> *Tang* (2006) 65 NSWLR 681, 684–5 [9]–[11], 687 [22].

The expert, Dr Sutisno, holds a doctorate in anatomy. Initially she gave a qualified opinion that in the *Tang* case ‘facial mapping’ from a CCTV-type camera could only be of limited assistance to the prosecution.<sup>71</sup> However, upon reflection and extending her analysis to a visual examination of the body movements of the person on the video and comparing them with the known body movements of the accused, she upgraded her opinion considerably. By the time of trial she was prepared to tell the jury that the person shown in the video was indeed the accused.<sup>72</sup> This evidence was a critical part of the Crown’s case.<sup>73</sup>

The New South Wales Court of Criminal Appeal overturned Tang’s conviction on the basis that whatever level of (doubtful) confidence could be placed in ‘facial mapping’, there was no scientific foundation at all to qualify ‘body mapping’ as a field of ‘specialised knowledge’ within the meaning of s 79 of the *Uniform Evidence Law* (*UEL*).<sup>74</sup> The Court concluded that Dr Sutisno’s identification evidence amounted to nothing more than inadmissible subjective opinion.<sup>75</sup>

However, the jury got there first. After Dr Sutisno had explained facial features and body posture to them, and pointed out a number of areas where she said the video image matched the accused, the jury sought a clarification: ‘Accepting Dr Sutisno’s qualifications should we therefore accept her methodology?’<sup>76</sup> The jurors, it seems, shared Professor Edmond’s concern about the need to establish the reliability of the method quite apart from the credentials of the expert.

Following a luncheon adjournment, the jury came back with a series of additional questions that demonstrated beyond any doubt their insight into the weaknesses of Dr Sutisno’s methodology, as follows:

How accurate is morphology analysis as a technique? What percentage of cases are correct matches of persons versus incorrect matches? Could we please ask Dr Sutisno how many matching morphological features she needs to form the opinion that two photos are the same person, what would be the minimum?<sup>77</sup>

The New South Wales Court of Criminal Appeal was clearly impressed with the jury’s ‘pertinent, indeed perspicacious, questions’,<sup>78</sup> even though Spigelman CJ noted the fact that nothing in s 79 of the *UEL* refers explicitly to reliability and

<sup>71</sup> Ibid 689 [32]–[33].

<sup>72</sup> Ibid 689 [33].

<sup>73</sup> Ibid 683 [7], 706 [99].

<sup>74</sup> The *UEL* are *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

<sup>75</sup> *Tang* (2006) 65 NSWLR 681, 715 [154]–[155].

<sup>76</sup> Ibid 695 [50].

<sup>77</sup> Ibid 701 [74].

<sup>78</sup> Ibid.

therefore ‘[t]he focus of attention must be on the words “specialised knowledge”, not on the introduction of an extraneous idea such as “reliability”.’<sup>79</sup> Having said that, Spigelman CJ gave practical effect to his reliability concerns by holding that Dr Sutisno could only describe to the jury such dissimilarities and similarities as she had observed. She could not go further and testify as to the likelihood that the man in the photo was in fact the accused because there existed no comprehensive database (about which the jury had inquired) to inform an expert such as Dr Sutisno as to how common the particular facial traits or body movements she referred to were, or how frequently in the general population people exist with particular combinations of hooked noses, protruding ears, and so on.<sup>80</sup>

Professor Edmond sets out the heart of his concern as follows:

Expert opinions derived through techniques that have not been evaluated, or were derived through processes where the analyst was unnecessarily exposed to gratuitous information, or are not expressed in terms that have an appropriate foundation in research, have no place in a rational system of justice. They are not susceptible to rational evaluation by laypersons either individually or as part of a case.<sup>81</sup>

On this point, the doubters in the *Tang* jury were punching well above their weight.<sup>82</sup> On occasion, judges seem less perceptive than the *Tang* jury, or perhaps they are just working from a different conception of public policy.

### VIII A HEAVY ONUS ON THE ‘GATEKEEPER’

Professor Edmond writes about the bench’s ‘unquestioned faith in the reliability (or infallibility)’ of various scientific measurements that purport to verify the identity of an accused.<sup>83</sup> His well-founded concerns about the lack of attention to a reliability analysis in Australia seem to be illustrated in spades by the decision of the South

<sup>79</sup> Ibid 712 [137].

<sup>80</sup> Ibid 715 [155], 716 [157].

<sup>81</sup> Edmond, above n 1, 84.

<sup>82</sup> As stated earlier, the misgivings of the lay persons on the *Tang* jury seem not to have been sufficiently shared by the professional judges on the English Court of Criminal Appeal in *R v Atkins* [2009] EWCA Crim 1876 (2 October 2009) [31], where similar evidence of ‘facial mapping’ (though not ‘body mapping’) had been adduced. Citing *Tang*, but waiving aside many of its caveats, the English Court reasoned that: ‘the expert is not disabled either by authority or principle from expressing his conclusion as to the significance of his findings, and ... he may do so by use of conventional expressions, arranged in a hierarchy’. The English appellate judges, unlike the *Tang* jurors, seem to have fallen into the precise errors Professor Edmond warns against.

<sup>83</sup> Edmond, above n 1, 67.

Australian Court of Criminal Appeal in *R v Rose*,<sup>84</sup> a ‘barefoot morphology’ case with close parallels to the Ontario case of *R v Dimitrov*.<sup>85</sup>

In *Rose*, two Australian podiatrists took a pair of the shoes of the accused and plaster casts of his feet to analyse a possible connection between the footprints of the accused *inside* the shoes and a set of unknown barefoot imprints on shoes that someone, allegedly the perpetrator, had left near the crime scene.<sup>86</sup> The podiatrists purported to be able to link the known footprints to the incriminating shoes, and thereby establish identification (even though the evidence was officially considered on a different point, it effectively cooked the accused’s goose). The appellate court upheld the trial judge’s decision to admit the evidence, and neither court made any attempt to evaluate the alleged ‘body of knowledge’ on which the testimony was allegedly based. Instead, the courts relied on the credentials of the podiatrists and the fact that podiatry itself is an established field of expertise. This was enough, the Court of Criminal Appeal indicated, without addressing the reliability or even general acceptance of stretching the study of podiatry to the murkiness of ‘barefoot morphology’.

Similarly unreliable evidence of ‘barefoot morphology’ was held admissible by an Ontario trial judge in *Dimitrov*.<sup>87</sup> But the Ontario Court of Appeal ordered a new trial, on the basis that this sort of quack evidence should have been stopped at the gateway and ruled inadmissible.<sup>88</sup> The prosecution’s evidence of ‘barefoot morphology’ failed to meet any of the established criteria for admissibility. There was no serious test of the methodology, and as such, there was no opportunity for peer review and no error rate had ever been established. The Court of Appeal asked itself the right questions and it came up with the right answer. The deficiencies in the so-called ‘science’ went beyond questions of weight. It was simply inadmissible.

Of course, sometimes these bizarre technologies come to the aid of the defence. In the US case of *Harrington v State*,<sup>89</sup> the trial judge admitted novel scientific evidence of alleged brain fingerprinting submitted by the defence to overturn a 25-year-old conviction. According to the *Toronto Globe and Mail*:

For two decades, Terry Harrington protested his innocence from his Iowa prison cell, insisting that he had not shot and killed a retired police officer when he was 17 years old.

<sup>84</sup> (1993) 69 A Crim R 1 (*‘Rose’*).

<sup>85</sup> (2003) 68 OR (3d) 641 (Ontario Court of Appeal) (*‘Dimitrov’*).

<sup>86</sup> See also Binnie, ‘Wrongful Convictions’, above n 13.

<sup>87</sup> (2003) 68 OR (3d) 641 (Ontario Court of Appeal).

<sup>88</sup> *Ibid* 654–8 [37]–[56].

<sup>89</sup> 659 NW 2d 509 (Iowa, 2003), discussed in Binnie, ‘The Mouse that Roared’, above n 9, 319.

Then he decided to try brain fingerprinting. It's a computerized mind-reading technique developed by Jerry Farwell, an American researcher and entrepreneur who says he can tell if the details of a crime scene are stored in a suspect's brain. If Mr Harrington were innocent, the test would show that his brain did not recognize details about the murder, details the killer would know.

'The brain never lies,' Dr Farwell says.

...

The judge accepted the results of the brain-fingerprinting test, the new testimony from Mr Hughes and the suppressed police reports ... [I]n February, 2003, the Iowa Supreme Court overturned his conviction, and ordered a new trial.

By then, he had been in prison for 25 years ... In October, 2003, the charges were officially dropped.

Mr Harrington ... is suing the police ...<sup>90</sup>

The idea of brain fingerprinting may have superficial attraction as a technique to signal an involuntary response, much as a lie detector is supposed to do. But there is considerable doubt as to whether, at this stage of its development, the technique achieves what it is claimed to do, and whether its results are reproducible, or whether it meets any of the other requirements of the scientific method.<sup>91</sup>

However, dubious science seems more often to be enlisted by the prosecution. As mentioned, in Ontario, the Goudge Inquiry found that the prosecutorial authorities clung disgracefully to the flawed 'expertise' of Dr Charles Smith long after it was evident that his evidence was, more often than not, wholly unreliable.

In the Lindy Chamberlain case,<sup>92</sup> for so long considered a poster child for prosecutorial wilful blindness, the Australian authorities eventually faced up to the reality of

<sup>90</sup> Anne McIlroy, 'Not Guilty: "The Brain Never Lies"', *The Globe and Mail* (Toronto), 5 November 2005, F6.

<sup>91</sup> See Binnie, 'The Mouse that Roared', above n 9, 320.

<sup>92</sup> As is known around the world, Lindy Chamberlain's daughter, as Lindy said from the outset, had been abducted from their camping tent by a wild dingo. The experts, however, thought otherwise and she was eventually convicted in part on the basis of expert testimony as to the alleged presence of baby blood in her car. A Commission of Inquiry later concluded that in reality much of the substance found could not be conclusively identified as blood at all (it was likely paint) let alone her baby's blood. In upholding the Commissioner's findings and quashing the convictions, the appeal court found that some experts had overstepped the proper boundaries of their expertise and overstated the reliability of their opinions. *Reference under 433A of the Criminal Code by the Attorney-General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain* [1988] NTSC 64 (15 September 1988). See also *Re Ross* (2007) 19 VR 272.

a wrongful conviction for murder based in large part, as the defence had contended, on flawed expert testimony.

But in the *Bain* case, even after two decades, the New Zealand government continues to simply ignore the flaws in the forensic evidence that led to a conviction eventually overturned by the Judicial Committee of the Privy Council in 2007.<sup>93</sup>

The *Bain* case involved domestic violence on a grand scale. In 1994, 19-year-old David Bain, was convicted in Dunedin of murdering his parents and siblings in the family home with his .22 calibre hunting rifle.<sup>94</sup> It was common ground that the killer was either David Bain or his father, Robin (in which case it was a murder-suicide). There was some evidence of the father's mental instability. Contested evidence was led at the retrial of an alleged incestuous relationship between Robin and his youngest daughter, and that prior to the weekend of the killings, she had voiced to a friend her intention to go home to expose the incest and her part-time work as a prostitute to the rest of the family. No plausible motive was ever suggested for David Bain (although the Crown pointed out, as if it were significant, that on occasion David Bain had experienced episodes of déjà vu!).

Eventually, after several unsuccessful attempts to obtain relief from the New Zealand courts,<sup>95</sup> David Bain's lawyers were able to get his case to the Privy Council, which quashed the convictions. One of the controversial points of evidence concerned the nature and origin of stains on the murder weapon, which the prosecution maintained were made in the blood of one of the victims. The Privy Council held:

The trial proceeded on the assumption that David's fingerprints on the forearm of the rifle were in human blood. It is now known that although blood from other parts of the rifle had been tested before trial and found to be human blood, the fingerprint material had not been tested. When it was tested after the trial it gave no positive reading for human DNA. Thus the blood analysis evidence was consistent with the blood being mammalian in origin, the possible result of possum or rabbit shooting some months before. If Dr Geursen's evidence is accepted, the blood was positively identified as mammalian in origin.<sup>96</sup>

By the time of the Privy Council decision, David Bain had spent 13 years in prison. In 2009, following a 12-week retrial, he was promptly acquitted by a jury after a half day of deliberation.

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<sup>93</sup> See generally Ian Binnie, *Report for the Minister of Justice on Compensation Claim by David Cullen Bain* (30 August 2012) ('*Report for the Minister of Justice*').

<sup>94</sup> *Bain v The Queen* (2007) 23 CRNZ 71.

<sup>95</sup> With the distinguished exception of the judgment of Sir Kenneth Keith, then of the New Zealand Court of Appeal, now of the International Court of Justice, who recommended further appellate consideration of the Bain convictions. On reassessment the Court, differently constituted, dismissed the Bain application, and it was this dismissal that opened the door to seek leave from the Privy Council.

<sup>96</sup> *Bain v The Queen* (2007) 23 CRNZ 71, 100–1 [112].

Of interest for present purposes, is the dismissive attitude exhibited in the earlier decision of the New Zealand Court of Appeal (in upholding the conviction) towards the DNA and other scientific evidence later relied upon by the Privy Council:

In these circumstances we are of the view that nothing of moment has been raised to cast doubt on our earlier discussion of this topic which demonstrated, for the reasons there set out, *that from a practical rather than a scientific point of view*, David's fingerprints were almost certainly deposited on the fore-end of the rifle contemporaneously with the murders.<sup>97</sup>

Similarly, the New Zealand authorities put forward (and for the most part still rely upon to deny David Bain's claim for compensation) some curious 'forensic science' including:<sup>98</sup>

- a) The testimony of an expert who examined some bloodied sock prints in the area of the family home where the killings occurred. He pronounced the prints to be David Bain's and not those of his father, based in part on the relative size of socks belonging to Robin and David, a position he admitted at the 2009 retrial was of no 'scientific benefit'<sup>99</sup> and was 'not useful for comparative purposes'.<sup>100</sup> Most people recognise that socks stretch and can accommodate a range of foot sizes;
- b) Experts who were eventually retained by the defence could not do their own analysis of the bloodied prints as, contrary to the New Zealand *Police Manual*, the critical evidence of the carpet stained with bloody footprints had not been preserved. The family home, including the vital areas of carpet, was deliberately burned down three weeks after the murders, with police permission;
- c) Robin Bain was killed by a bullet from the same .22 rifle that killed the other family members. There was an issue at both trials about whether Robin *could* have extended his reach to pull the trigger given the length of his arm. The Police armourer testified that the rifle was 20 cm longer than it was. The error favoured the prosecution. If the police witness had been correct, the trigger would likely have been beyond Robin's reach. The error was caught by the defence in cross-examination;
- d) The prosecution witness called to identify fingerprints on the murder weapon testified that David Bain's fingerprints on the forestock were 'positive prints', by which he meant that blood was already on the fingers when pressure was applied to create the print (rather than a 'negative' print which would result if the fingers were applied to blood already smeared on the gun). The expert testified

<sup>97</sup> Ibid 96 [95] (emphasis added).

<sup>98</sup> See generally *Report for the Minister of Justice*, above n 93, 74, 84, 88, 91, 94.

<sup>99</sup> Ibid 74.

<sup>100</sup> Ibid.

that the fingerprints ‘appeared to be’ blood<sup>101</sup> when ‘visually enhanced’ under the polilight (a type of laser). He explained to the 1995 jury that when blood is illuminated under a polilight it luminesced. At the 2009 retrial, the expert admitted that this was wrong. Blood does not luminesce under a polilight; blood absorbs light and shows up as dark. It is the background that luminesces. When the defence pointed this out, the witness said his misstatement to the 1995 jury had been deliberate. He said he intended to convey the picture ‘in layman terms to the jury so that they would understand’.<sup>102</sup> He could not explain why he thought ‘luminesced’ was an easier concept for the jury to grasp than ‘dark’; and

- e) Eventually, the prosecution provided a defence expert with an alleged blood sample. His analysis concluded that, ‘the only reasonable explanation is that the DNA extracted from the fingerprint by the prosecution on the rifle is *not* of human origin.’<sup>103</sup> The Crown responded that the defence expert was inadvertently provided with contaminated material and therefore his tests were not valid. How exactly the prosecution came to supply the defence expert with a contaminated sample that rendered the defence work useless was not explained.

Unlike many of the other jurisdictions referred to in Professor Edmond’s article, the New Zealand government has not accepted any responsibility to David Bain for what the Privy Council condemned as a true miscarriage of justice. Nor had the Minister of Justice, an Auckland tax lawyer, indicated any interest in persuading the police to learn from the mistakes that were made, or to come to terms with the demonstrated deficiencies of some of the Crown’s forensic scientists. As Jonathan Swift wrote in 1738, ‘there is none so blind as they that won’t see.’<sup>104</sup>

## IX CONCLUSION

Professor Edmond has for some years been turning over the fertile ground of the deficiencies in the state of the forensic sciences. He has rightly called attention to the indulgent attitude of many judges and prosecutors towards these deficiencies, and the failure of some governments to exercise leadership in setting things right.

There is much to be said for ratcheting up the standards of scientific experts, improving the education of judges and lawyers, and reinforcing the focus on reliability rather than on credentials. Better outcomes also likely require a change in judicial attitudes towards science. Professor Edmond has amply illustrated an unsettling unwillingness on the part of both the bar and the bench to actively engage with the ‘scientific verities’ of a case, to ask probing questions and have the gumption to go

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<sup>101</sup> Ibid 88.

<sup>102</sup> Ibid 91.

<sup>103</sup> Ibid 94.

<sup>104</sup> G Saintsbury, *Polite Conversation in Three Dialogues by Jonathan Swift with Introduction and Notes by George Saintsbury* (Chiswick Press, 1892) Dialogue III.

against historical rulings of admissibility when the rulings have been overtaken by current scientific developments.

Even in litigation of crucial importance to patients, scientific researchers and multi-billion dollar biotech businesses, the Australian Full Federal Court copied and pasted the entire scientific explanation of the case (over 10 pages) from the lower court's decision.<sup>105</sup> Justice Scalia was at least candid in simply throwing his hands up in despair.

In many ways, courts are already empowered to re-orient themselves. For example, in response to concerns with the way the adversarial system handles expert evidence, the Federal Court of Canada recently implemented amendments to the rules of court procedure,<sup>106</sup> with the stated goal of giving courts the proper tools to effectively manage such evidence.<sup>107</sup> Pre-trial 'seminars' on the uncontested aspects of the evidence have been introduced. Judges can require the parties' experts to confer together pre-trial to narrow the issues in dispute, or 'hot-tub' at trial. Judges can order an expert to testify (as opposed to reading his or her report into evidence) where the Court deems this procedure to be more helpful in facilitating serious engagement with the experts. Similar provisions are finding their way into the rules of courts elsewhere.<sup>108</sup>

Unless the courts can do a better job of persuading litigants of the judicial capacity and willingness to tackle scientific issues in a credible way, dissatisfaction will continue to grow. Unlike parties to criminal proceedings, civil litigants usually have alternate dispute mechanisms available to them. Those who can afford to do so are already voting with their feet to go more readily to arbitration. The absence of an appellate hierarchy within the arbitral community, and the confidentiality of arbitral decisions, is already leading to an impoverishment of the jurisprudence.

Whether the case involves an accused's liberty or a biotech firm's multibillion dollar enterprise, the affected parties expect better. And they deserve better.

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<sup>105</sup> *Myriad Australia* (2014) 224 FCR 479, 483–90 [16]–[63].

<sup>106</sup> See, eg, *Rules Amending the Federal Courts Rules (Expert Witnesses)*, SOR/98-106, rr 52.1–52.6.

<sup>107</sup> 'Regulatory Impact Analysis Statement' in Canada, Canada Gazette, No 17, 21 May 2010, 1552.

<sup>108</sup> See, eg, *Federal Court Rules 2011* (Cth) r 23.15; *Uniform Civil Procedure Rules 2005* (NSW) r 31.35; *Civil Procedure Rules 1998* (UK) pt 35.

*Stephen Odgers SC\**

## WHAT LAWYERS SHOULD *DO* ABOUT FORENSIC SCIENCE EVIDENCE

### ABSTRACT

This article examines what lawyers – and particularly defence lawyers – must do in challenging forensic science evidence. This article argues that for this to occur there must be a significant increase in legal aid funding.

Professor Edmond, in his article ‘What Lawyers Should Know About Forensic “Science”’,<sup>1</sup> has clearly demonstrated that there are reasons to doubt the reliability of evidence derived from a number of forensic sciences, with issues of inadequate research validation, lack of transparency, lack of appropriate protocols, risks of bias (conscious and unconscious) and inadequate disclosure of limitations and risk of error.

Professor Edmond has also made a persuasive case that the Australian legal system has failed to deal effectively with forensic science evidence. Overseas inquiries have highlighted the problems in comparable legal systems and, as Professor Edmond observes, there is no reason to believe that Australia is immune from those problems.

However, in asking *why* the legal system has not been effective in dealing with the challenge of forensic science evidence – and what reforms are needed – Professor Edmond has asked questions for which the answers are perhaps less clear.

In my opinion, the problem does not derive to any significant extent from the current law relating to the admissibility of forensic science evidence. The common law in this area, which still applies in Queensland, South Australia, and Western Australia, provides generally adequate safeguards against unreliable forensic science evidence, at least if that law is properly enforced. For such ‘expert opinion’ evidence to be admissible, the court must be satisfied that:

- the ‘field of expertise’ in question is a ‘reliable’ body of knowledge or experience;<sup>2</sup>

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<sup>1</sup> Gary Edmond, ‘What Lawyers Should Know About the Forensic “Sciences”’ (2015) 36 *Adelaide Law Review* 33.

<sup>2</sup> See *R v Bonython* (1984) 38 SASR 45, 47; *Osland v The Queen* (1998) 197 CLR 316, 336; *R v T* [2010] EWCA Crim 2439 (26 October 2010).

- the witness has expertise in that field;
- the particular opinion is based on that expertise (rather than being a mere ‘*ipse dixit*’);<sup>3</sup> and
- the opinion will assist the tribunal of fact.<sup>4</sup>

As regard the position under the Uniform Evidence Law,<sup>5</sup> applying in the other Australian jurisdictions, it is true that the law has been somewhat unsettled but current authority indicates that there are similar safeguards to those applicable under the common law. It is reasonably clear that a court must be satisfied that:

- the field of ‘specialised knowledge’ requires more than ‘belief’ – ‘knowledge’ refers to ‘any body of known facts or to any body of ideas inferred from such facts or accepted as truths *on good grounds*’;<sup>6</sup>
- the witness actually has specialised knowledge regarding the subject matter of the opinion;<sup>7</sup>
- the particular opinion is ‘substantially based’ (s 79) on that specialised knowledge (with the consequence that the reasoning of the witness must be exposed<sup>8</sup> and it must be established that the opinion is not simply a ‘subjective’<sup>9</sup> opinion or mere ‘speculation’<sup>10</sup>); and
- the opinion will assist the tribunal of fact (in that it will simply not be relevant where the witness is not in a ‘better position’ than the tribunal of fact to determine the matter about which the opinion is expressed).<sup>11</sup>

<sup>3</sup> See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743–4 [85].

<sup>4</sup> *Murphy v The Queen* (1989) 167 CLR 94, 110.

<sup>5</sup> *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). This legislation, alongside the *Evidence Act 1995* (Cth), will be referred to collectively as the Uniform Evidence Law.

<sup>6</sup> *Honeysett v The Queen* (2014) 253 CLR 122, 131–2 [23] (emphasis added).

<sup>7</sup> See *Campbell v The Queen* (2014) 312 ALR 129, 166 [229]–[234].

<sup>8</sup> See *HG v The Queen* (1999) 197 CLR 414, 428 [41]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 605 [42].

<sup>9</sup> *Honeysett v The Queen* (2014) 253 CLR 122, 137 [43]. See also *R v Tang* (2006) 65 NSWLR 681, 715 [155], where Spigelman CJ endorsed the view of the Court of Appeal in England that an opinion must have been ‘only the subjective opinion’ of the witness because of the absence of ‘any national database ... or any accepted mathematical formula’ from which ‘conclusions could *safely* be drawn’ (emphasis added): see *R v Gray* [2003] EWCA Crim 1001 (27 March 2003) [16].

<sup>10</sup> *HG v The Queen* (1999) 197 CLR 414, 428 [41].

<sup>11</sup> *Smith v The Queen* (2001) 206 CLR 650, 654–5 [9].

It may be accepted that some ambiguity remains as to what ‘good grounds’ requires to establish ‘knowledge’, but it is likely that the High Court will (when called upon to decide the question) import considerations of ‘validity’ (or even ‘reliability’), as has the United States Supreme Court in respect of a similar provision in the US Federal Rules of Evidence.

Three recent examples may be given of cases where appellate courts have applied these rules to hold that forensic science evidence should have been ruled inadmissible at trial:

- *Campbell v The Queen*: the evidence of an Associate Professor was held to be entirely inadmissible because neither his formal qualifications nor his course of study established that he had acquired specialised knowledge regarding the mechanics of the human body in terms of movement and reactions.<sup>12</sup>
- *Honeysett v The Queen*: the opinion of an expert in anatomy that an offender and the defendant both had certain anatomical characteristics (such as ‘oval shaped heads’) was not based on his knowledge of anatomy but ‘his subjective impression of what he saw when he looked at the images’ of the offender and the defendant – the evidence ‘gave the unwarranted appearance of science to the prosecution case that the [defendant and the offender] share a number of physical characteristics.’<sup>13</sup>
- *Gilham v The Queen*: an opinion from forensic pathologists that stab wounds in three different victims were ‘similar’ (and thus showed a pattern) was inadmissible because it was not shown to be substantially based on the experts’ experience in stab wounds.<sup>14</sup>

Further, under both the common law and the Uniform Evidence Law, the courts have a ‘discretion’ to exclude otherwise admissible forensic science evidence where its ‘probative value’ is outweighed by a ‘danger of unfair prejudice’. That allows the court to exclude the evidence when persuaded that there is a real risk that the tribunal of fact will give the evidence significantly more weight than it really deserves.

Even if forensic science evidence is admitted, the right of the defence to cross-examine fully the forensic scientist means that issues relating to the reliability of the field of expertise, the level of expertise of the witness, the reasoning of the expert and whether a particular opinion is substantially based on that expertise *can* all be revealed. Indeed, if such a process is properly engaged in, it would not usually matter much whether the evidence is ruled admissible or inadmissible.

<sup>12</sup> *Campbell v The Queen* (2014) 312 ALR 129, 166 [229]–[234] (Bathurst CJ). See also *Wood v The Queen* [2012] NSWCCA 21 (24 February 2012) [467].

<sup>13</sup> *Honeysett v The Queen* (2014) 253 CLR 122, 138 [45].

<sup>14</sup> *Gilham v The Queen* [2012] NSWCCA 131 (25 June 2012) [345].

The real problem, then, is not the current legal framework but the fact that, in many cases, the defence trial lawyer lacks the knowledge or resources to engage in a thorough testing of the evidence of the forensic scientist so as to point out its flaws or weaknesses – with the consequence that the evidence is both ruled admissible and is inadequately challenged in cross-examination. In the cases of *Campbell*, *Honeysett* and *Gilham*, the evidence was admitted at the trial and its weaknesses were not properly exposed before the jury – leaving it to an appeal court to correct the consequent miscarriage of justice.

It is true that some criminal defendants are well-resourced and they can fund effective challenges to forensic evidence. But the vast majority are not, and depend on legal aid. Legal aid commissions around the country have been experiencing reduced budgets for some years, largely as a result of significant reductions in Commonwealth funding. They can only pay lawyers a very low rate compared with private work, with the consequence that the quality of representation tends to decline and there is a limited incentive for the lawyers who do take the work to engage in the time-consuming task of thoroughly preparing an effective challenge to forensic evidence. They will not be paid for it. While the commissions will usually fund obtaining a report from another expert, the limited available funds mean that the lawyer may well not be given the ammunition necessary to effectively challenge the prosecution expert.

The lack of defence resources is particularly significant where there are epistemic problems with the particular forensic science, rather than concerns with the individual scientist giving evidence for the prosecution. Notwithstanding the fact that the onus is on the prosecution to satisfy the court that the field of expertise or ‘specialised knowledge’ meets standards of reliability or validity (‘good grounds’), past acceptance of evidence derived from that field will put a practical burden on the defence to show that there is a real issue whether those standards can be met. That will require serious resources, investigation and preparation. It is not something that your average legal aid defence lawyer could realistically contemplate.

Professor Edmond’s suggestion that prosecutors take more responsibility in ensuring the quality of forensic science evidence has merit but cannot be carried too far. It may be accepted that some prosecutors have gone too far in pursuit of a conviction by relying on demonstratively unreliable forensic science evidence<sup>15</sup> and failing to comply with established duties of fairness, to ‘fairly’ assist the court to arrive at the truth. Ensuring a culture of compliance with those duties is essential. However, it is not, and realistically cannot be, the role of the prosecutor to engage in a thorough review of a forensic science prior to adducing evidence derived from it. While the prosecutor must not adduce evidence the prosecutor believes, or even suspects, to be unreliable, the prosecutor cannot be expected to investigate whether a particular recognised expert in an accepted field of forensic science is able to express reliable opinions.

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<sup>15</sup> See, eg, *Wood v The Queen* [2012] NSWCCA 21 (24 February 2012).

Nor can the judges fill the gap left by under-resourced defendants. In our adversarial system of criminal justice, the judges must remain above the fray. The judge's role is to ensure procedural fairness for the parties and rule on questions of law, not to determine the scope of the evidence put before the court or to insist that challenges are brought with respect to certain categories of evidence. Of course, it is vital that judges are willing to apply the law when such challenges are brought and willing to insist that legal safeguards are complied with, but they cannot be expected to initiate the challenges or adduce the evidence needed to show that there is a real issue to be determined.

I appreciate that some have suggested that the adversarial system is unsuited to the task of finding 'scientific truth' and have, at least by implication, supported replacement of that system with a more inquisitorial model. My view is that any such change would be most unlikely to provide a solution. The fundamental benefit of an adversarial model is that a party in the legal proceedings has the opportunity to challenge and test evidence adduced by the opposing party. Properly resourced, such testing can illuminate the weaknesses in such evidence and thereby facilitate just outcomes. Reliance on an investigative judge, linked to prosecution authorities, is most unlikely to provide an adequate safeguard against questionable forensic science evidence coming from people closely connected to law enforcement. Equally, as Professor Edmond has said, such procedural solutions as court-appointed experts or concurrent expert evidence will not address the problems raised in his article.

While a number of appeals have in recent years exposed miscarriages of justice arising from forensic science evidence, that is also plainly not an adequate safeguard. Resources for appeals, like trials, are limited. Rules preclude the adducing of new evidence that was reasonably available at the time of the trial. There are significant limitations on the taking of 'judicial notice'. It can be difficult to expose problems retrospectively. In any event, it is far preferable to prevent the miscarriage of justice in the first place rather than try to remedy it at some later time.

My conclusion is that trial defence lawyers must do more to challenge forensic science evidence but this can only happen if they are given the resources to do that. One possibility is the establishment of an adequately funded independent body given the task of evaluating forensic science evidence and providing appropriate assistance to defence lawyers. Another is a *significant* increase in legal aid funding to allow effective challenges to forensic science evidence. Until such steps are taken, the risk of miscarriages of justice arising from unreliable forensic science evidence will inevitably remain.



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## WHAT LAWYERS SHOULD AND CAN DO NOW THAT THEY KNOW ABOUT THE FORENSIC SCIENCES: A RESPONSE TO EDMOND'S 'WHAT LAWYERS SHOULD KNOW ABOUT THE FORENSIC "SCIENCES"'

### ABSTRACT

Accepting the fragility of forensic evidence exposed in recent reports and the risk of courts acting upon that evidence without a full appreciation of its limitations, this response focuses upon what lawyers and judges, in the light of this knowledge, can do to alleviate this problem, arguing that current evidential rules and processes, if approached with the rigour that the principles behind them demand, can go a considerable way to ensuring that the accused in a criminal trial is protected from forensic evidence being overvalued. Particular focus is given to evidential rules controlling the reception of forensic evidence – rules of relevance, rules controlling the admissibility of expert opinion evidence and the courts' residual discretion – and to the appropriate expression of forensic evidence if rigorous application of the common law criminal standard of proof is to be ensured. The prosecution's duties of disclosure, the adversarial nature of common law trial process, and the processes for appeal are also briefly considered as available to protect accused against unreliable forensic evidence. It is concluded that as a first response lawyers and judges are duty bound to invoke these protections to mitigate the risk of forensic evidence being overvalued.

### I INTRODUCTION: FROM KNOWLEDGE TO ACTION

At the very commencement of his article Edmond<sup>1</sup> quotes from an important report commissioned by the United States ('US') National Academy of Science (the '*NRC Report*'<sup>2</sup>) into forensic evidence and its use in US courts. The quote makes two points. First, it emphasises that the reliability of almost all forensic evidence has neither robust theoretical nor empirical justification and

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<sup>1</sup> Gary Edmond, 'What Lawyers Should Know About the Forensic "Sciences"' (2015) 36 *Adelaide Law Review* 33.

<sup>2</sup> Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) 53.

secondly, it asserts that courts are ill-equipped to expose this problem. In making this latter assertion four hurdles are referred to: (1) rules governing the admissibility of forensic evidence; (2) standards governing appellate review; (3) the limitations of the adversary process; and (4) the common lack of scientific expertise among the judges and lawyers who must try to comprehend and evaluate forensic evidence.

The principal recommendations in the report are directed at forensic scientists, seeking to ensure that they lift their game in justifying forensic evidence and be entirely frank about its limitations.<sup>3</sup> But it also directs attention to the courts' role and it is this role that is the subject of this response. The question is, now that lawyers and courts are aware of the fragility and limitations of forensic evidence, what steps can they take to ensure that forensic evidence is not overvalued, most particularly in the criminal trial. Can the hurdles mentioned above be negotiated to achieve this result?

In this response it is accepted that the fragility of forensic evidence exposed in the *NRC Report*, and others,<sup>4</sup> must be accepted by Australian courts.<sup>5</sup> It is also accepted that, like their US counterparts, Australian courts and lawyers have generally been too ready to receive forensic evidence,<sup>6</sup> and while there is no clear evidence of consequent systemic wrongful conviction in Australia,<sup>7</sup> individual examples can be found<sup>8</sup> and the precautionary principle alone demands closer

<sup>3</sup> Edmond reserves some of his most vehement criticism for the failure of forensic scientist to be entirely honest and transparent about their evidence in Part III(B) *When are the Forensic Analysts Planning to Come Clean?*, particularly at 83–4:

As a community, forensic scientists have been recalcitrant, sometimes duplicitous, in their failure to proactively concede notorious epistemic constraints and bring them to the attention of users, whether lawyers, judges or jurors ... The continuing silence, especially from leaders and managers, along with conscious omissions from expert reports and trial testimony, is nothing short of scandalous.

<sup>4</sup> Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (US Department of Commerce, National Institute of Standards and Technology, 2012); Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Queens Printer, 2008); Lord Campbell, *The Fingerprint Inquiry Report* (APS Group Scotland, 2011).

<sup>5</sup> Edmond, above n 1, 79 Part III(A) *Australian Exceptionalism?*

<sup>6</sup> Ibid. At 79 Edmond remarks that 'the kinds of issues raised in these reports emerge relatively rarely in trials and appeals in Australia and do not feature in the relevant jurisprudence.'

<sup>7</sup> Cf US. See, eg, Brandon L Garrett and Peter J Neufeld, 'Invalid Forensic Science Testimony and Wrongful Convictions' (2009) 95 *Virginia Law Review* 1.

<sup>8</sup> Recent cases where trial judges have admitted forensic evidence without adequate scrutiny include *Honeysett v The Queen* (2014) 253 CLR 122, *Fitzgerald v The Queen* (2014) 311 ALR 158, *Morgan v The Queen*, (2011) 215 A Crim R 33, *Gilham v The Queen* (2012) 224 A Crim R 22, *Wood v The Queen* (2012) 84 NSWLR 581.

scrutiny. In these circumstances, and as Edmond emphasises,<sup>9</sup> it is ultimately the professional responsibility of lawyers and judges to ensure so far as they can within their adversarial roles that forensic evidence is not given more evidential weight than it deserves.

The argument in this response is that current evidential rules and processes, if approached with the rigour that the principles behind them demand, can go a considerable way to ensuring that forensic evidence is not overvalued. Particular focus is given to admissibility rules and to the appropriate expression of forensic evidence if rigorous application of the common law standard of proof is to be achieved.

Edmond recognises that current rules and processes are available, and says that his paper:

aims to encourage prosecutors to reconsider their professional obligations and performances as ‘ministers of justice’, to embolden defence lawyers to challenge techniques and opinions that have not been evaluated (even if they have been uncritically accepted for decades) and to pay close attention to analytical processes and reports ...<sup>10</sup>

But he remains extremely sceptical of their ability to do this effectively. Resources (time and money) are recognised as a principal problem but he goes further and is critical of the very safeguards inherent in the common law accusatory adversarial trial and the ‘inexhaustible faith’ that judges have in them:

Trial safeguards and protections (and human rights instruments) can, in some circumstances, afford very effective means of identifying and presenting evidentiary weaknesses to the tribunal of fact. On most occasions they do not. In practice, trial safeguards and commitment to a fair trial often have more of a discursive or rhetorical flavour than a substantial one. Historically, trial and appellate judges have placed great store in the effectiveness of admissibility rules, the power of cross-examination, their own directions and instructions to the jury, along with the jury’s ‘common sense’. Notwithstanding this seemingly inexhaustible faith, none of these and other protections consistently nor effectively exposed the profound problems with many types of forensic science and medicine.<sup>11</sup>

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<sup>9</sup> Edmond, above n 1, 85: ‘apprised of some of the problems and recommendations, lawyers and judges are now in a better position *and obliged* to respond to the reliability of expert evidence’.

<sup>10</sup> Ibid 38–9.

<sup>11</sup> Ibid 86.

The only hope that he sees is for ‘judges to begin to refine their admissibility jurisprudence and temper their, apparently misguided, confidence in the protections afforded by trial safeguards.’<sup>12</sup>

Strong words indeed. Is Edmond advocating the end of the common law adversarial criminal trial as we know it?<sup>13</sup> Or are his remarks directed only to the failure of the trial safeguards to reveal the infirmities of forensic science evidence? Even if forensic scientists lift their game, justify their analysis with strong theoretical and empirical support and present their conclusions with complete transparency, the evidence in the individual case will always require the scrutiny of trial safeguards. As with other evidence, error rates will always exist in forensic evidence and their effect must be assessed in the context of all the evidence in the particular case. To temper the protections afforded by trial safeguards is to lose confidence in the very fundamentals of the common law criminal trial whereby counsel for the accused is able to scrutinise fully the evidence put before the court.

It may be that ultimately (and then one suspects principally on grounds of efficiency and resources) we do have to rethink our system of trial, but first, in the light of the knowledge that they now have, lawyers and judges need to look more closely at the safeguards that are already available and see whether they can be more effectively used to protect against the frailties of forensic evidence.<sup>14</sup>

Edmond agrees that ‘apprised of some of the problems and recommendations, lawyers and judges are now in a better position *and obliged* to respond to the reliability of expert evidence’, but he does not explain whether and if so how current

<sup>12</sup> Ibid 39. His scepticism continues to his very final sentence where he says at 100:

With limited historical interest in the reliability of forensic science and medicine evidence, Australian courts have gradually and unwittingly placed themselves in a state of epistemic bliss. Perhaps a distant prospect, our hope is that ‘Thought would destroy their paradise.’

<sup>13</sup> It seems that Edmond thinks that it is when he concludes at 100 that:

What should lawyers and judges do in response to continuing proffers of incriminating expert opinion evidence? First, they should be willing to ask questions and exclude evidence. More broadly, in consultation with independent multidisciplinary advisory groups, they should begin to experiment with new procedures that are more conducive to the longstanding goals of doing justice in the pursuit of truth.

<sup>14</sup> Edmond does not appear to rule out this more conservative approach, despite his scepticism, commenting at 95:

In making this claim about the near universal misuse of forensic science and medicine evidence, it is not my intention to suggest that all or even most of these convictions are mistaken. In the vast majority of cases we do not know for certain that a particular person is guilty. Even so, many past convictions were compelling without forensic science and medicine evidence, and sometimes weak forensic science and medicine evidence may have contributed to compelling cases. The concern is that people have been convicted in circumstances where real limitations with evidence were not disclosed and where there were real dangers that evidence was cross-contaminated and trial judges, appellate judges and jurors were not genuinely alive to these significant threats to proof.

evidential rules and processes can function to permit such a response.<sup>15</sup> He asserts that '[a]ctual reliability would seem to be a condition precedent to admission' without explaining what he means by 'actual reliability' nor whether 'actual reliability' is already demanded by admissibility rules.<sup>16</sup> One cannot but accept his conclusion that 'inattention to reliability places decision-makers in an impossible position and subverts the goal of doing justice in the pursuit of truth', but this proposition applies to all evidence. And it would be surprising if the common law trial encouraged this inattention.<sup>17</sup>

## II ADMISSIBILITY RULES ENABLING THE CLOSE SCRUTINY OF POSSIBLY UNRELIABLE FORENSIC EVIDENCE: RELEVANCE, OPINION AND DISCRETION

### *A Relevance*

Courts are no strangers to the tender of possibly unreliable evidence. But the common law's approach has been to leave, so far as is possible, determinations of probative weight to the trier of fact (whether judge sitting alone or jury). If evidence is relevant, that is, capable of rationally affecting the probability of a fact in issue in the case, then it is presumptively admissible and can be put before the trier of fact.<sup>18</sup> Relevance is a role-defining concept, but can it provide a vehicle for the careful scrutiny of forensic evidence and perhaps lead to its exclusion?

Forensic evidence is commonly regarded as evidence of opinion but this is not necessarily the case. The very basis of forensic testimony is often observations made by the forensic witness. The fingerprint examiner testifies to similarities observed between a latent print of the accused and a latent fingerprint found at the scene of the crime; the DNA expert testifies to bands observed following spectrographic analysis of a forensic sample containing DNA and compares the location of these with bands in a sample from the accused. While the fingerprint examiner can make her observations with the naked eye enhanced only by magnification, the DNA analyst makes observations on the basis of a process that requires a much more sophisticated scientific justification.

Where the ability to make significant observations depends upon a special skill then it would seem logical that evidence of the witness's ability to make those observations be before the court if the observations are to be relevant. For this to be the case there must be evidence of the knowledge enabling the observations before the court,

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<sup>15</sup> Ibid 85.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> See ss 55–6 of the Uniform Evidence Acts: *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic), hereafter referred to as the 'Uniform Evidence Law.'

and evidence that the particular witness has that knowledge, before the fact-finder is in a position to rationally decide whether to accept the witness's observational testimony. Without such evidence the observational testimony cannot be capable of rational acceptance by the fact-finder.<sup>19</sup> In this sense the evidence of the knowledge and experience *authenticates*, that is makes *relevant*, the testimony of the matters observed.

Having made these observations the witness will then generally be asked to testify whether the forensic sample can be said to 'match' a sample from the suspect and, it is to be hoped, to explain exactly what the witness means by a 'match'. In the case of fingerprint evidence, up until now, courts seem to have accepted that a declaration of a 'match' is just that, an all or nothing match. What the recent reports show, and Edmond emphasises, is that this cannot be so, that there must always be a degree of error, that this should be based upon empirical evidence relating to the accuracy of that particular examiner, and that the degree of error should be clearly put before and explained to the trier of fact. In the case of DNA evidence, as a consequence of the rigour of the science involved, courts require experts to explain a 'match' in terms not only of the simple observations of the witness but also by reference to population genetics and the probability of finding DNA of the profile observed in a randomly chosen member of a suspect population. For the nature and extent of the match to be put before the trier of fact again it must be *authenticated* by evidence capable of rationally supporting the existence of the knowledge upon which the examiner relies to make the observations in question as well as the justification for any population analysis which seeks to explain the nature of the match and its consequent probative value. Without evidence of appropriate authentication again the jury will have no rational basis upon which to determine the relevance of the evidence being given by the examiner.<sup>20</sup> Of course, as forensic knowledge gains empirical and theoretical justification there may be no practical reason for disputing relevance on this basis, but where forensic knowledge remains dubious the point is that the concept of relevance provides counsel with a vehicle to argue that the evidence be excluded as irrelevant.

Other forensic evidence might illustrate how this vehicle could be used. For example, in the case of suspects depicted on video surveillance it is often impossible to make any definitive comparison with the accused, due to disguises worn by the suspect or simply due to the poor quality of the video images. In these circumstances prosecutors may call forensic 'experts' who claim, on the basis of simple experience, to be able to map bodily and facial features and observe whether the features and their

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<sup>19</sup> Some may be sceptical of this quest for rationality because they doubt the rational capabilities of juries. But, as the reasons required of judges sitting alone and of judges sitting on appeal show, rationality remains the basis of our justice system and judges and lawyers should not seek to persuade on grounds of mere emotion.

<sup>20</sup> As a practical matter as forensic knowledge gains empirical and theoretical justification it will not be disputed, but where this is not the case the point is that the concept of relevance does provide counsel with a vehicle to have the evidence excluded.

positioning on the images ‘match’ those of the accused. Furthermore, such ‘experts’ are prepared, and have been permitted, to ‘identify’ the accused from these features.

The problem with this forensic evidence is determining whether any of it can be authenticated as relevant. As evidence of simple observation it might be argued that experience and rigorous examination itself authenticates its relevance. But only as evidence of the simple observations. To seek to use these observations to draw a conclusion of identity involves a further step in the chain of relevance and requires separate authentication to satisfy the test of relevance. The difficulty here is that there is no theoretical or empirical basis for the separate authentication of this identification evidence. All that can be rationally said is that particular observations have been carefully made, that these cannot exclude the accused’s involvement, that in this sense the features in the image might be said to ‘match’ those of the accused, but the expert has no idea how many other possible suspects might also be matched by these features. To say anything further is to provide irrelevant evidence, evidence that cannot be rationally used to establish the accused’s connection with the crime.

While some might regard my assertions about the nature of relevance as being controversial, it cannot be denied that the nature of relevance is far from definitive, both at common law and under the Uniform Evidence Law. At common law, relevance is often described in terms of ‘sufficient relevance’ or evidence ‘worth considering’, perhaps confusing notions of relevance and sufficiency, but emphasising that relevance does embrace a degree of sufficiency wide enough to embrace the approach here advocated. Under the Uniform Evidence Law relevance is defined in s 55 as ‘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.’ The principle behind this definition is that the evidence be capable of rationally affecting the probability of the existence of a fact in issue in the proceeding. The principle of rationality is expressly endorsed.<sup>21</sup> Furthermore, in this context it makes no sense to say the phrase ‘if it were accepted’ means it could be accepted unless ‘it’ is similarly capable of rational acceptance. Thus relevance depends on capability of rational acceptance and evidence based on knowledge or skill is not capable of rational acceptance unless there is evidence from which that knowledge and skill may be established. The evidence requires authentication before it can be relevant.

I suspect that some readers may think the distinction drawn above between the relevance of evidence of observations and the relevance of evidence of identification made upon the basis of those observations as being unrealistic, and that, even with directions from the trial judge, no trier of fact will fail to understand that observational evidence has been tendered to identify the accused. If the risk of it being used as identification evidence where there is no rational evidential basis for it being so

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<sup>21</sup> Of course, while law-makers might demand triers of fact to act rationally whether or not they (particularly juries) so do in practice is another matter. But while the idea of reason is a complicated concept its assumption remains fundamental.

used is too great, of course the residual ‘discretion’<sup>22</sup> might be invoked to exclude the evidence altogether as being more prejudicial than probative.

But it is important that the first protection against unreliable forensic evidence be the hurdle of relevance, some probative value that can be *rationally* assessed, and that the party tendering forensic evidence based upon expert knowledge must satisfy the court that there is evidence before the court capable of rationally supporting the existence of this knowledge. While the discretion provides further protection it is less definitive to invoke and the burden lies upon the party seeking exclusion to justify its exercise. It is more effective for lawyers and courts to scrutinise the reception of forensic evidence using a rigorous concept of relevance rather to rely upon a more uncertain residual balancing process.

### B *Opinion*

But there remains another avenue for the exclusion of forensic science evidence: that evidentiary rule which excludes evidence of opinion, of inferences drawn from observational evidence. It can be readily seen that the evidence of a forensic witness that samples or images contain relevant similarities and that these ‘match’ those from the accused is evidence of inferences drawn from observations, that the observations are of similarities able to identify and that the sum of the similarities is sufficient to identify the accused. At common law, evidence of opinions of this sort are generally excluded unless the witness is qualified through experience or training to draw such inferences and can thereby assist the trier of fact in reaching a more accurate and reliable decision (although interestingly an exception is made both at common law and under s 78 in the case of eyewitnesses where inferences – not reliant upon expert knowledge – are necessary for the witness to testify to the matters observed, for example eyewitness testimony of identification). Regrettably s 79 of the Uniform Evidence Law, which also exceptionally permits opinions from experts, does not specifically provide that the ‘specialised knowledge’ required to justify expert opinions must assist the quest for accuracy. And courts continue to refuse to read this quest into the requirement of ‘specialised knowledge’ by regarding a notion of reliability as inherent in the very idea of knowledge.<sup>23</sup>

But reliability does not mean that the knowledge is reliable in the sense that it can produce a definitive conclusion in every individual case. As the reports discussed by Edmond recognise, forensic knowledge<sup>24</sup> is at best probabilistic (even DNA evidence). Reliability means there must be good theoretical or empirical reasons for

<sup>22</sup> At common law exclusion is regarded as a matter of ‘discretion’ but under the Uniform Evidence Law the s 137 exclusion is mandatory once the probative value is ‘outweighed’ by prejudicial effect.

<sup>23</sup> See most recently *Tuite v The Queen* [2015] VSCA 148 (12 June 2015).

<sup>24</sup> Indeed all knowledge!

accepting something as known – ‘good grounds’<sup>25</sup> or ‘demonstrable evidence’ as Edmond puts it.<sup>26</sup> Additionally, in the context of a criminal trial, the risks of error must be articulated so far as is reasonably possible so that the knowledge can be integrated into the criminal standard of proof.<sup>27</sup> Without valid reasons being given for accepting something as known, there is no rational way of assessing what probative value to give it in relation to the issues to which it is allegedly relevant. In the light of the knowledge we now have, and that Edmond endorses, about the limits of forensic evidence, one would hope that in the near future the High Court demands that ‘knowledge’ be based upon ‘good grounds’ so that some degree of reliability can be rationalised. While a requirement that can never be definitive, it does at least give trial judges the opportunity to scrutinise the basis of forensic evidence rigorously and rationally on a case by case basis. And it ensures that it is not simply enough that a witness has ‘knowledge’ beyond the trier of fact but that this ‘knowledge’ has a rational basis that enables the probative value of the forensic evidence to be rigorously assessed.<sup>28</sup> Only in this way can expert evidence assist the trier of fact to reach a more accurate decision. This must be the very reason for receiving expert evidence at trial.

How far we take this requirement is another matter. It is not clear whether Edmond would take it further in the case of forensic evidence and demand its empirical validation prior to tender; that is, require the justification of likelihood ratios and error rates through formal studies and experiments. Although he is scathing about accepting mere experience as a sufficient basis for the admissibility of forensic science evidence,<sup>29</sup> he asks only that ‘good grounds’ be put forward for accepting that experience. This step would appear to be consistent with the notion of ‘good

<sup>25</sup> In *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579, 590 (1993), the US Supreme Court explained that “‘knowledge’ connotes more than subjective belief or unsupported speculation. The term “‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’” See also *R v Tang* (2006) 65 NSWLR 681, 712–3 [138]–[139] (Spigelman CJ), 716 [159] (Simpson J), 716 [160] (Adams J).

<sup>26</sup> Edmond, above n 1, 84: ‘incriminating expert opinion evidence should be demonstrably reliable. Unreliable and insufficiently reliable techniques and opinions should be excluded.’ And at 94: ‘those presenting opinions derived from their experience [should] present “good grounds” – that is, demonstrative evidence – for believing that techniques and opinions are sufficiently reliable.’

<sup>27</sup> Discussed below at Part V Forensic Evidence and Proof Beyond Reasonable Doubt.

<sup>28</sup> Support for this quest for rigor in approaching expert evidence is found in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 and in Heydon JA’s judgment in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

<sup>29</sup> Edmond, above n 1, 94 where the author explains:

Experience is a convenient (and simple) heuristic that enables judges to defer to the accommodating decisions of earlier courts or the length of time a person (or institution) has been doing something, without ever having to consider validation studies, reliability and limitations. ... when it comes to forensic science and medicine – especially in response to forensic science techniques that are, or are likely to be, in routine use – experience (and long use) cannot support the weight of admissibility.

grounds' put forward here and leave the decision about the probative value of forensic evidence with the trier of fact. But at other points he goes further, saying the '[a]ctual reliability would seem to be a condition precedent to admission',<sup>30</sup> and (more ambiguously) that '[i]nattention to reliability places decision-makers in an impossible position and subverts the goal of doing justice in the pursuit of truth'<sup>31</sup> and (again more ambiguously) '[p]rosecutors and trial judges, as well as defence lawyers, are obliged to direct attention to formal evidence of reliability. A witness should not be able to vouch for her performance on the basis of long experience'.<sup>32</sup>

It is doubtful that experience should be rejected out of hand as an irrational basis for observations or inferences because it has not been subjected to empirical measurement. Ultimately experience is the touchstone for the assessment of the probative value of all evidence. Courts reject expression of proof as an enumerative concept.<sup>33</sup> Whether the criminal standard<sup>34</sup> is ultimately satisfied is left to the life experiences of the trier of fact as considered in relation to all the evidence before the court. Forensic evidence must not be overvalued, and enumerated likelihood ratios and error rates based on empirical evidence are always preferred, but if, in the absence of such empirical enumeration, the court is presented with forensic evidence based only upon experience, and 'good grounds' for that evidence are put before the court, then the trier of fact should not be prevented from considering it. It may be that such evidence cannot at its highest be decisive and juries should be directed about this, that there is an error rate leaving room for innocent explanations; but to exclude evidence for which good reasons can be given would involve a fundamental change to our current system of trial which leaves it to the trier of fact to assess the probative effect of 'good reasons'.<sup>35</sup>

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<sup>30</sup> Ibid 85.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 94.

<sup>33</sup> See Andrew Ligertwood and Gary Edmond, 'Expressing Evaluative Forensic Science Opinions in a Court of Law' (2012) 11 *Law, Probability and Risk* 289 and Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2010) 110 [2.69]. For a more conceptual consideration of taking a mathematical approach to legal proof see Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2010) ch 1.

<sup>34</sup> Discussed further below at Part V Forensic Evidence and Proof Beyond Reasonable Doubt.

<sup>35</sup> Edmond is of course a supporter of such fundamental changes as he is sceptical of the ability of our current system of trial to rationally assess forensic evidence: see Edmond, above n 1, 92–3. But he has no objection to judges and lawyers seeking to improve the way the current system treats forensic evidence: see, eg, Edmond et al, 'How to Cross-Examine Forensic Scientists: A Guide for Lawyers' (2014) 39 *Australian Bar Review* 174.

This approach does leave trial judges to assess good reasons from case to case. Edmond is critical of this ‘myopic’ approach.<sup>36</sup> But courts are concerned ultimately with the individual case. Their focus is neither the systemic analysis of forensic evidence, nor simply the question of its accuracy in the individual case. The focus is upon whether, having regard to all the evidence in the case, the accused can be found guilty beyond all reasonable doubt. Of course, the exclusion by courts of forensic evidence without empirical justification would prompt further research and experimentation to provide clearer evidence of its accuracy. But in the meantime an individual case would be deprived of evidence supported by good, if not decisive, reasons to consider when applying the criminal standard of proof. On this basis, fingerprint evidence might still be excluded as its formal empirical justification remains incomplete. But experience shows it is generally strong evidence, though not free from error, which the jury must then consider with other evidence to exclude this possibility of error before convicting an accused.<sup>37</sup>

It is clear that much empirical research remains to be done into the nature and reliability of evidence regularly put before the courts, in particular human testimony. It may be that one day this research will produce more definitive guidelines for determining credibility. But in the meantime trials must continue and decisions about guilt and innocence made on the basis of evidence for which there appear to be ‘good reasons’ for considering. As research reveals that there are ‘good reasons’ for particular types of forensic evidence, these reasons can be incorporated into the reception of that evidence through the current rules relating to relevance and opinion. And, consequent upon the reports discussed by Edmond, no doubt that research will accelerate and further empirical justification will be incorporated into the ‘good reasons’ for admitting that evidence.<sup>38</sup>

### C ‘Discretion’

At both common law and under the Uniform Evidence Law, evidence can be excluded if it is decided that its effect on the trier will be more prejudicial than probative. This residual rule is regarded as a ‘discretion’ at common law but s 137 provides that a judge ‘must’ exclude prosecution evidence where they so decide. While these semantic differences may produce different appellate consequences these rules have the same basis: to exclude evidence where the judge is of the view that, because of its prejudicial nature, there is an unacceptable risk that the trier of fact will, even with

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<sup>36</sup> Edmond, above n 1, 86:

The focus on the individual case and the rather myopic manner in which cases are tried and appealed, seem to have made it difficult for trial and appellate judges to appreciate (or respond to) some of the systemic dimensions at play across a wide range of techniques and practices.

<sup>37</sup> See below Part V Forensic Evidence and Proof Beyond Reasonable Doubt.

<sup>38</sup> Edmond, above n 1, 93, remains pessimistic: ‘Trials and appeals cannot sensibly address threats from human factors, other than to bluntly recognise their possibility though without a mechanism to gauge their impact (or substantially address the risks created) in the instant case.’

appropriate instructions, give the evidence more probative value than it deserves.<sup>39</sup> As explained above, it may be invoked to exclude forensic evidence where the trier of fact is likely to give the evidence excessive probative weight on the basis of the status of the witness rather than the capacity of the evidence. This approach necessarily requires judges to consider the rational probative capacity of the evidence and in this sense involves a determination of the reliability of the evidence and its limits.<sup>40</sup> It also requires the judge to ensure that the evidence is presented in such a way that the jury is able to understand any disputed basis of the evidence and its probative limits. It may be that judges remain too willing to accept the capacity of jurors to understand technical forensic evidence and its limits.<sup>41</sup>

### III OTHER PROCESSES AND SAFEGUARDS

In the above ways, admissibility of unreliable forensic evidence can be excluded under current rules. But the protections against the probative risks with forensic evidence do not manifest themselves at the admissibility stage alone. Rules already demand that prior to trial the parties, most significantly the prosecutor,<sup>42</sup> disclose in a timely fashion the forensic evidence they propose to tender. In this way an opponent is placed in a position to contest the evidence, either through seeking its exclusion or through informed cross-examination and the tender of countervailing evidence should the evidence be admitted. Where forensic evidence is admitted, the prosecution's duty of fairness demands that it be presented in a form that can be understood by the trier of fact. This requires forensic witnesses to clearly explain their expert knowledge and how it relates to their testimony of observations and admissible opinions. It is important that their testimony is transparent and that triers are not forced to determine the reliability of their testimony simply by reference to the apparent status of the forensic expert. This transparent approach can be reinforced by the trial judge, through demanding clarity of testimony and through final directions and comments to the jury.

As mentioned above, Edmond seems to have no faith in these further processes, although, perhaps in optimistic resort, he has recently been instrumental in the

<sup>39</sup> See further Gary Edmond et al, 'Christie, Section 137 and Forensic Science Evidence (After *Dupas v The Queen* and *R v XY*)' (2014) 40 *Monash University Law Review* 389.

<sup>40</sup> See also J D Heydon, LexisNexis, *Cross on Evidence* (at 31 May 2015) [2000] interpreting the apparently different approaches of the New South Wales (*R v XY* (2013) 84 NSWLR 363) and Victorian (*Tuite v The Queen* [2015] VSCA 148 (12 June 2015)) Courts of Criminal Appeal.

<sup>41</sup> Cf the upholding of the trial judge's ruling on the discretion in *Tuite v The Queen* [2015] VSCA 148 (12 June 2015).

<sup>42</sup> Edmond has elsewhere argued that prosecutors have responsibilities of fairness extending beyond mere disclosure and should abstain from tendering forensic evidence of dubious probative value: see Gary Edmond, '(Ad)Ministering Justice: Expert Evidence and the Professional Responsibilities of Prosecutors', (2013) 36 *University of New South Wales Law Journal* 921.

publication of a guide to the cross-examination of forensic experts.<sup>43</sup> It may just be, now that they are on notice, lawyers will use trial safeguards to at least ensure the disclosure of the fragility of forensic evidence to the trier of fact. Indeed, given the devastating criticism of forensic evidence in the *NRC Report*, one wonders how any prosecution forensic evidence will ever be regarded as decisive, as adequate cross-examination should now always disclose the existence of significant error rates. In the case of DNA, while the chances of a random match can be precisely calculated, human errors in the processes of investigation and analysis of DNA will reveal risks of error of more uncertain degree. With most other forensic evidence, error rates of uncertain degree will also remain, but while most may not be precisely calculated, the revelation of their very existence will compel triers of fact to seek evidence to exclude the reasonable possibility of error.

It is difficult to see the problems of contextual bias discussed by Edmond being eliminated.<sup>44</sup> At one level they are inherent in a system of trial dependent upon human testimony. It is difficult not to agree with his conclusion that

the issue of bias and the cross-contamination of evidence are difficult to manage at trial. In particular, subtle exposure and contamination are often difficult to trace retrospectively. Because effects tend to operate below the threshold of consciousness they are difficult to explore through cross-examination.<sup>45</sup>

Courts must rely upon forensic processes being conducted in environments as free as possible from bias and cross-contamination. Then it remains the role of the trier of fact to determine the effect of bias and cross-contamination upon the credibility of a forensic witness having regard to all the evidence in deciding whether the accused can be found guilty beyond reasonable doubt. Some might argue that this provides sufficient safeguards for an innocent accused.

#### IV THE PROBATIVE LIMITS OF A ‘MATCH’: ENSURING THAT TRIER OF FACT UNDERSTAND THE LIMITS OF ADMISSIBLE FORENSIC EVIDENCE

Of crucial importance is that triers of fact understand the significance of evidence of a ‘match’. As explained above in the context of discussion of the concept of relevance, a ‘match’ can never be definitive identification; even DNA evidence, the most empirically and theoretically justified evidence of identification, remains subject to generally unquantified human error in the collection and analysis of the forensic samples. Where no theoretical or empirical basis is provided for forensic identification evidence and the evidence has been admitted, the trial judge can and should ensure that the testimony is confined to mere observations and, even if the

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<sup>43</sup> Edmond et al, ‘How to Cross-Examine Forensic Scientists: A Guide for Lawyers’ (2014) 39 *Australian Bar Review* 174.

<sup>44</sup> Edmond, above n 1, 88 Part III (E) Bias and Cross-Contamination.

<sup>45</sup> *Ibid* 90.

defence concedes that none of these exclude involvement of the accused, emphasise that observed similarities are no more than evidence leaving open the possibility of the accused's involvement, and cannot alone implicate the accused in full satisfaction of the criminal standard.

As explained above, forensic evidence based upon knowledge and skill should not be admitted at all unless there is evidence of that knowledge enabling the probative value of the evidence to be rationally assessed. Thus, in the absence of evidence of a theoretical or empirical basis, the only relevant evidence a forensic expert can give is of observations requiring no such basis. Of course, if this is the situation it is likely that the trier of fact will be in a position to make the observations itself, for example to view video images and compare them with the accused. In these circumstances there is no reason to call a third party to testify to observations. Counsel can draw the trier's attention to the possible observations and inference to be drawn. The risk of calling a third party is that she will be seen as an expert or some other person of apparent influence whose evidence should be accorded evidential weight for that reason alone. While it might be argued that the witness in these circumstances is able to give relevant evidence, the risk of the evidence being given undue weight, coupled with it being unnecessary and a waste of time, are extremely strong reasons for exclusion (discretionary at common law and demanded under s 137 of the uniform legislation).

## V FORENSIC EVIDENCE AND PROOF BEYOND REASONABLE DOUBT

Ultimately, of most importance in a criminal case is how the trier of fact uses forensic evidence in determining whether to convict. The standard is beyond reasonable doubt and guilt must be determined upon the basis of all the evidence before the court.

It is up to the trier of fact to determine the probative value to be given to the evidence, both individually and collectively. The rationality of this process is assumed but never clearly articulated in Australian courts. The standard of criminal proof is formulaically declared but explanation is generally forbidden, it being regarded as the sole prerogative of the trier, conceived as a jury, to apply this formula.<sup>46</sup>

However, in cases turning upon competing explanations of circumstantial evidence juries can be directed that the criminal standard requires that they exclude reasonable hypotheses consistent with innocence before an accused can be convicted beyond reasonable doubt (the so-called *Hodge* direction).<sup>47</sup> But further explanation of the notion of 'beyond reasonable doubt' is disapproved and juries are not required to explain their decisions. Yet when judges sit alone and when courts sit on appeal,

<sup>46</sup> See generally Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2010) 111–4 [2.70]–[2.72].

<sup>47</sup> *Hodge's Case* (1838) 2 Lewin 227; 168 ER 1136; *Shepherd v The Queen* (1990) 170 CLR 573, 579–80, 586 (Dawson J).

judges explain their decisions with as much rigour as they can muster as they seek to justify their decisions of both law and fact on rigorous rational grounds. When one looks at these explanations of the application of the criminal standard the process of proof is laid bare.<sup>48</sup> It is a process of hypothesis testing against the available evidence, and conviction cannot be justified until every reasonable hypothesis consistent with innocence has been excluded. This exclusionary approach is the touchstone of the criminal standard and there is no reason why it cannot receive emphasis when trial judges are explaining to juries how they should approach their task.

Furthermore, there are good reasons for trial judges to point out where evidence leaves room for innocent hypotheses, to direct juries to consider any reasonable hypotheses that consequently arise and to exclude them before they convict. This explanation is straight-forward and does nothing to undermine the criminal standard. On the contrary, it ensures that the criminal standard is rigorously applied.

Consequently when it comes to forensic evidence trial judges can and should explain to juries its non-definitive nature, that it necessarily leaves open the possibility of innocent explanations, that the jury must consider whether reasonably possible innocent explanations arise and exclude them before convicting the accused. The jury remains the arbiter of when an explanation is possible and reasonable, and whether it can be excluded so as to produce proof beyond reasonable doubt.

If the issue is identity, the trier can and should be told that forensic evidence, from fingerprint to DNA evidence, can never be 100 per cent definitive, that there is always a possibility of human error in any collection and analysis of the forensic samples and furthermore always a statistical probability, however slight, as in the case of DNA evidence, that the evidence could produce a match with another person who had an opportunity to commit the crime alleged. The task of the trier is to consider all the evidence to ask whether there is a reasonable explanation consistent with innocence and exclude it before conviction. A direction in these terms assumes that the processes for the tender of forensic evidence explained above have been followed.

Forensic scientists prefer to express evidential weight in terms of a likelihood ratio.<sup>49</sup> Using Bayesian analysis this ratio can then be used to calculate the effect of forensic evidence upon the prior probability of an event. But courts do not, as discussed above, determine criminal proof in some mathematical way.<sup>50</sup> Rather, hypotheses are compared, with the standard of criminal proof demanding that an accused cannot be convicted if a reasonable hypothesis consistent with innocence has not been

<sup>48</sup> For an excellent recent example see the trial judgment of Martin J in *Western Australia v Rayney [No 3]* [2012] WASC 404 (1 November 2012), affirmed *Rayney v Western Australia* (2013) 46 WAR 1.

<sup>49</sup> See Guest Editorial, 'Expressing Evaluative Opinions: A Position Statement' (2011) 51 *Science and Justice* 1, 1–2.

<sup>50</sup> See, eg, Andrew Ligertwood, 'Forensic Science Expressions and Legal Proof' (2013) 45 *Australian Journal of Forensic Sciences* 263 <<http://www.tandfonline.com/doi/abs/10.1080/00450618.2013.782341>>.

excluded by evidence before the court. What courts are interested in are the opportunity for innocent hypotheses rather than the mere likelihood of a guilty hypothesis. On the other hand the forensic scientist is more interested in the evidential support for the guilty hypothesis. This may lead to detection of an alleged offender, and that offender may subsequently plead guilty, but if the offender pleads not guilty and demands proof the prosecutor must persuade the trier of fact that no reasonable hypothesis consistent with innocence remains. Scientists may be unhappy with this approach but it remains the touchstone for criminal conviction, recognising that the probabilistic calculation of guilt in a criminal case can never have a definitive empirical basis.

Even in the case of DNA evidence where the identity of the DNA sample is the determinative issue, courts cannot accept the proof of a match calculated mathematically, for this would be to accept that proof leaves open the chance, however small, that an innocent person has been convicted. However, where the statistical chances of a match with another person are extremely low, other evidence, including the failure of the accused to put up a credible innocent hypothesis, can be taken into account in deciding that the common law criminal standard has been satisfied.<sup>51</sup>

## VI APPELLATE SUPERVISION IN AUSTRALIA

In all Australian jurisdictions, appeal against conviction by an accused following trial by jury can be made on one of three grounds: that the verdict is unreasonable or cannot be supported by the evidence, that there has been a wrong decision on any question of law, or if on any ground there has been a miscarriage of justice.<sup>52</sup> By way of proviso even if any of these grounds are established the court may dismiss the appeal if satisfied that there has been no substantial miscarriage of justice.<sup>53</sup>

The first ground focuses on the factual question of whether the evidence is able to support conviction beyond reasonable doubt. The other grounds concern errors of law or other wrongful decisions made during the trial that have caused a miscarriage of justice. The proviso applies if the court is satisfied that despite an error or other wrongful decision during trial, having regard to the strength of the evidence in the case the jury would inevitably have convicted, that is, would not have entertained

<sup>51</sup> See further Andrew Ligertwood, 'Can DNA Evidence Alone Convict an Accused?' (2013) 33 *Sydney Law Review* 487.

<sup>52</sup> On grounds for appeal generally see Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5<sup>th</sup> ed, 2010) 58–61 [214]–[2.15].

<sup>53</sup> *Criminal Appeal Act 1912* (NSW) s 6; *Criminal Code Act* (NT) sch 1 ('*Criminal Code* (NT)') s 411; *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 668E; *Criminal Law Consolidation Act 1935* (SA) s 353; *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') s 404(1); *Criminal Procedure Act 2009* (Vic) s 276 (this provision incorporates the proviso within the latter two grounds of appeal); *Criminal Code Act Compilation Act 1913* (WA) sch 1 ('*Criminal Code* (WA)') s 689.

any reasonable doubt as to the accused's guilt. Thus it also focuses on the factual question but asks not whether the jury could have convicted but whether it would have convicted. Whether there is any difference in these tests is doubtful as in both situations the appellate court will ask whether a reasonable doubt remains open on the evidence, and will answer that question on its own assessment of the evidence on the record.<sup>54</sup> Thus the proviso effectively has no application if the first ground is made out. Nor will the proviso be considered in cases where there has been an error regarded as fundamental to the fairness of the trial.<sup>55</sup>

An error of law occurs where evidence is wrongfully admitted so that if admissibility rules are approached to demand more rigour in the reception of forensic evidence then failure to ensure that rigour may oblige an appellate court to find that evidence received by the trial court was wrongly admitted, either generally or for a specific purpose.<sup>56</sup> However, given the proviso, the appeal may not ultimately succeed where the overall evidence is strong. It is unlikely that an error in admitting forensic evidence will be regarded as so fundamental to the fairness of the trial that the proviso should not apply. In deciding whether the accused would inevitably have been convicted without the inadmissible forensic evidence the appellate court will look closely at all the evidence in the case and make a decision on the basis of its understanding of this evidence.<sup>57</sup> In this way the appellate court can directly and rigorously supervise the jury's verdict.

The court can also rigorously supervise the verdict when it is claimed that the evidence cannot justify conviction. In reaching this decision the High Court of Australia has now made it clear that the appellate court must carefully analyse the record of all the evidence in the case and decide for itself whether it was open for a reasonable jury to be satisfied beyond reasonable doubt. The appellate court is not asked to put itself in the place of the jury but to make its decision upon its own analysis of the evidence. Thus 'a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.'<sup>58</sup> In this way again the appellate court can directly supervise the jury's verdict.

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<sup>54</sup> But see further the more detailed discussion by David Hamer, 'Wrongful Convictions, Appeals and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37 *University of New South Wales Law Review* 270, 282–4.

<sup>55</sup> Cf Bibi Sangha and Robert Moles, 'MacCormick's Theory of Law, Miscarriages of Justice and the Statutory Basis of Appeals in Australian Criminal Cases' (2014) 37 *University of New South Wales Law Review* 243 who complain that the Australian rules are too liberal in allowing trial errors creating unfairness to be trumped by applying the proviso.

<sup>56</sup> For a recent High Court example see *Honeysett v Queen* (2014) 253 CLR 122 (facial mapper unqualified). The Court adopted a similarly rigorous approach to expert evidence in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (medical expertise exceeded).

<sup>57</sup> *Weiss v The Queen* (2005) 224 CLR 300, 316 [41].

<sup>58</sup> *M v The Queen* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

These grounds give appellate courts considerable scope in supervising the admissibility and use of forensic evidence; although the decisions to be made are difficult. It is also interesting to note that while the High Court has in the past been reluctant to uphold appeals in cases involving forensic evidence, for example *Chamberlain v The Queen*,<sup>59</sup> in recent years a number of appeals (both in the High Court and in State Supreme Courts) concerning forensic evidence have been upheld despite the proviso.<sup>60</sup> It seems that the fragility of forensic evidence is already being taken more seriously.

The limitation of appellate process is that, once exhausted, there is no further recourse to the court for challenge by a convicted accused, even if evidence comes to light suggesting the accused's innocence. The common law doctrine of double jeopardy protects the acquitted accused and the convicted accused has no further recourse except to seek executive intervention. Traditionally this was by way of exercise of the common law prerogative to pardon. In all Australian jurisdictions executive intervention is permitted by statute, but in the majority of jurisdictions the decision to intervene remains with the executive alone.<sup>61</sup> In these jurisdictions the executive may exercise the prerogative to pardon, or invoke the assistance of the court through seeking its opinion on any question of law or fact, or remit the matter back to the court for its decision in application of the normal appellate processes. But with executive intervention affected by political considerations, in New South Wales the Supreme Court is empowered to order an enquiry or remit for appeal.<sup>62</sup> In South Australia, legislation now simply allows a convicted accused to apply to the court for leave to bring a further appeal on the ground that there is fresh and compelling evidence suggesting the jury's verdict should be overturned.<sup>63</sup> This provides an important and direct avenue for the court to supervise the admissibility and use of forensic, and other, evidence.<sup>64</sup>

<sup>59</sup> *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

<sup>60</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, *Honeysett Queen v The Queen* (2014) 253 CLR 122, *Fitzgerald v The Queen* (2014) 311 ALR 158, *Morgan v The Queen* (2011) 215 A Crim R 33, *Gilham v The Queen* (2012) 224 A Crim R 22, *Wood v The Queen* (2012) 84 NSWLR 581.

<sup>61</sup> *Crimes Act 1900* (ACT) pt 20; *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–7; *Criminal Code* (NT) ss 431, 433A; *Criminal Code* (Qld) ss 18, 672A, 675; *Criminal Code Act 1924* (Tas) s 13 and *Criminal Code* (Tas) ss 398, 419; *Criminal Procedure Act 2009* (Vic) s 327 and *Sentencing Act 1991* (Vic) s 106; *Sentencing Act 1995* (WA) ss 137, 140.

<sup>62</sup> *Crimes (Appeal and Review) Act 2001* (NSW) ss 78–9.

<sup>63</sup> *Criminal Law Consolidation Act 1935* (SA) s 353A; *Magistrates Court Act 1991* (SA) s 43A.

<sup>64</sup> For a critical discussion of these various post-conviction avenues see Hamer, above n 54, 286–98.

## VII CONCLUSION

It is far from clear that Australian courts are ill-equipped to deal with the frailties of forensic evidence. First, the admissibility rules relating to relevance, opinion and discretion are open to interpretations permitting the rigorous consideration of forensic evidence, to ensure that it is based on theoretical and/or empirical grounds and that it is expressed transparently in a way that enables the trier of fact, with appropriate directions from the trial judge, to take it rationally into account when considering the criminal standard of proof. Secondly, standards governing appellate review (including post-conviction review) are open to interpretations that could ensure that forensic evidence is carefully scrutinised on appeal, not only to determine its admissibility and use but also in determining whether the criminal standard of proof has been satisfied. Thirdly, the adversary process may be limited by time and resources but it undoubtedly has the potential to provide a powerful scrutiny of forensic evidence. And finally, as far as the common lack of scientific expertise among the judges and lawyers who must try to comprehend and evaluate forensic evidence is concerned, one might argue that in many cases it is not necessary for laypersons (judges and juries) to follow all the technicalities of a forensic process and it is enough to appreciate the possibilities of error in determining admissibility and proof. It is only where the very basis of scientific evidence is being disputed that persons with a background in that area of science may be required to adjudicate the dispute.

While arguments continue about resources, and more fundamental changes may be advocated, the point is that it is time for lawyers and judges to bite the bullet. Given what we now know about the frailties of forensic evidence, all involved in the administration of justice have a role to play within their current capabilities. Forensic scientists need to ensure their evidence has strong theoretical and empirical justification, investigators that their processes for the collection of forensic samples are fool-proof, and forensic analysts that their processes are as free as possible from human error. But most crucially, prosecutors, defence counsel and judges need to use existing processes and admissibility rules to ensure that the worst unreliabilities of forensic evidence are avoided and that remaining risks of error are fully exposed so that the evidence can be as rationally and accurately integrated into the criminal standard of proof as possible. For prosecutors, defence counsel and judges this is their ethical duty towards the administration of justice. There is much to achieve.



Gary Edmond\*

## AGAINST ORACULAR PRONOUNCEMENT: A REPLY TO HEYDON

Of the respondents to ‘What Lawyers Should Know About the Forensic “Sciences”’<sup>1</sup> only the Honourable John Dyson Heydon is disengaged from the central issue of endemic problems across the forensic science and their implications for criminal justice practice.<sup>2</sup> His response undertakes to succinctly restate ‘*the* rules for admissibility’ for expert opinions with no role for reliability. This restatement of what purports to be common law orthodoxy operates as though merely rehearsing commitments precludes alternatives, including alternative interpretations that are not only more consistent with relevant statutory provisions, but also more likely to advance overarching institutional objectives.

Explaining his understanding of reliability (and probative value) under ss 55, 79 and 137 of the Uniform Evidence Law (‘UEL’),<sup>3</sup> Heydon’s response suggests that judicial consideration of reliability is inconsistent with the common law and the UEL. There is, however, no attempt to explore the meaning of ‘specialised knowledge’ from s 79(1) or its implications. As for my contention that judges should, when forensic science evidence is challenged, expect to see demonstrable evidence of reliability — usually in the guise of validation studies, indicative error rates, uncertainties and limitations, and empirically-warranted forms of expression — Heydon insists that such expectations are against the ‘tide of history’.<sup>4</sup>

This response explains how Heydon’s account is insensitive to contemporary developments across the common law world and, more importantly, likely to frustrate legal engagement with forensic science and medicine evidence and scientific knowledge more generally. To begin, it is illuminating to consider contemporary judicial engagement with the reliability of forensic science evidence. The United States Supreme Court read the need for reliability into the term ‘scientific, technical

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<sup>1</sup> Gary Edmond, ‘What Lawyers Should Know About the Forensic “Sciences”’ (2015) 36 *Adelaide Law Review* 33.

<sup>2</sup> J D Heydon, ‘Evidence of Forensic Scientific Opinion and the Rules for Admissibility’ (2015) 36 *Adelaide Law Review* 101.

<sup>3</sup> *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

<sup>4</sup> Heydon, above n 2, 101, 104.

and other specialized *knowledge*’ from rule 702 of the *Federal Rules of Evidence* (1975) in *Daubert v Merrell Dow Pharmaceuticals Inc*<sup>5</sup> and *Kumho Tire Co v Carmichael*.<sup>6</sup> In *Daubert* the Court imposed a reliability standard and directed trial judges to consider the validity of scientific knowledge.<sup>7</sup> The Court proposed criteria such as testing, publication and peer review, the provision of error rates, the application of standards, and even general acceptance to assist trial judges with their ‘gatekeeping’. In *Kumho* the Supreme Court confirmed that it was the word ‘knowledge’ from rule 702 of the *Federal Rules of Evidence* ‘that “establishes a standard of evidentiary reliability.”’<sup>8</sup> The need for reliability was subsequently entrenched in the text of rule 702. The rules and/or jurisprudence of more than half of the US state courts now require that trial judges consider the reliability of expert opinion evidence when admissibility is contested.<sup>9</sup>

In 2000 the Supreme Court of Canada imposed gatekeeping duties on trial judges with respect to expert opinion evidence, referring explicitly to the need for reliability and endorsing the *Daubert* criteria. These apply not only to scientific evidence but technical and other specialised knowledge and are not restricted to challenges to the admissibility of novel techniques.<sup>10</sup> The Canadian example is of particular interest because Justice Goudge’s *Inquiry into Pediatric Forensic Pathology* in Ontario is the only report that is referenced in Heydon’s response.<sup>11</sup> Heydon reproduces several recommendations from the Goudge Inquiry (eg 84, 95 and 97) but makes no reference to recommendations of more direct application to the admissibility of forensic science and medicine evidence. Recommendation 130, for example, states:

A concern about the reliability of evidence is a fundamental component of the law of evidence. ... Reliability can be an important consideration in determining whether the proposed expert evidence is relevant and necessary; whether it is excluded under any exclusionary rule, including the rule that requires evidence to be excluded if its prejudicial effect exceeds its probative value; and whether the expert is properly qualified.<sup>12</sup>

<sup>5</sup> 509 US 579 (1993) (*Daubert*).

<sup>6</sup> 526 US 137 (1999) (*Kumho*).

<sup>7</sup> *Daubert*, 509 US 579 (1993).

<sup>8</sup> *Kumho*, 526 US 137, 147 (1999).

<sup>9</sup> It is not my intention to suggest that engagement with reliability has been effective, sophisticated or consistent. Nevertheless, it seems to be a necessary step. See Gary Edmond et al, ‘Admissibility Compared: The Reception of Incriminating Expert Evidence (ie, Forensic Science) in Four Adversarial Jurisdictions’ (2013) 3 *University of Denver Criminal Law Review* 31.

<sup>10</sup> See *R v DD* [2000] 2 SCR 275; *R v J-LJ* [2000] 2 SCR 600; *R v Trochym* [2007] 1 SCR 239.

<sup>11</sup> Stephen T Goudge, *Inquiry into Pediatric Forensic Pathology* (Queen’s Printer, 2008) (‘Goudge Report’).

<sup>12</sup> *Ibid* 487 [Recommendation 130]. See also Recommendation 131 at 496.

In 2011, the Law Commission of England and Wales recommended a statute-based reliability standard because of anxieties about the quality of some forensic science and medicine evidence and the prevalence of a ‘laissez-faire approach to admissibility.’<sup>13</sup> The Conservative Government did not adopt those recommendations, though the Lord Chief Justice recently published practice directions that incorporate the Law Commission’s proposals into English criminal procedure.<sup>14</sup> The *Criminal Procedure Rules* make it clear that:

Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.<sup>15</sup>

In his recent *Review of Efficiency in Criminal Proceedings* Sir Brian Leveson confirmed that English ‘court[s] must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted.’<sup>16</sup>

Closer to home, the Victorian Court of Appeal now requires the trial judge to consider the reliability (and validity) of forensic science and medicine evidence adduced by the state when the defence raises an objection under s 137 of the *Evidence Act 2008* (Vic). This arose in relation to expert evidence, albeit as obiter, in *Dupas v The Queen*<sup>17</sup> and was recently confirmed in *Tuite v The Queen*.<sup>18</sup> In *Tuite*, a unanimous Court concluded that ‘the question of the reliability of opinion evidence falls to be determined as part of the assessment of probative value undertaken by the Court for the purposes of s 137’.<sup>19</sup> The Court continued:

the touchstone of reliability for scientific evidence must be trustworthiness, and trustworthiness depends on validation. ... It follows, in our view, that the focus of attention for the purposes of assessing the reliability of scientific evidence should be on proof of validation.<sup>20</sup>

Recent criticisms of the forensic sciences provided the Court with ‘a stark reminder that unvalidated scientific evidence can lead to grave injustices.’<sup>21</sup>

<sup>13</sup> Law Commission of England and Wales, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) 4 [1.17] (emphasis removed).

<sup>14</sup> *Criminal Procedural Rules 2014* (UK) SI 2014/1610 (‘CPR’).

<sup>15</sup> CPR, r 33, especially r 33A.4.

<sup>16</sup> Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (HMSO, London, 2015) 60 [223]. See also 62 [228].

<sup>17</sup> (2012) 218 A Crim R 507.

<sup>18</sup> [2015] VSCA 148 (12 June 2015) (‘*Tuite*’).

<sup>19</sup> *Ibid* [10].

<sup>20</sup> *Ibid* [101]–[102].

<sup>21</sup> *Ibid* [108].

To suggest that judicial consideration of the reliability of forensic science evidence is inconsistent or incompatible with common law practice (or tradition) in Australia or elsewhere is controvertible, at the very least.<sup>22</sup>

A vitally important, though under developed implication flowing from the failure to evaluate (or attend to) the validity and reliability of techniques, is that the absence of this information — really *knowledge* — threatens the rationality of criminal proceedings. The need to be able to *rationaly* evaluate expert opinion evidence was advanced in the Scottish case of *Davie v Magistrates of Edinburgh*<sup>23</sup> where Lord President Cooper said that:

the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.<sup>24</sup>

The same need was recognised in *Makita (Australia) Pty Ltd v Sprowles*<sup>25</sup> and in *Dasreef Pty Ltd v Hawchar*.<sup>26</sup> In *Makita* Heydon JA emphasised the ‘prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert’s conclusions’.<sup>27</sup>

Perhaps ironically, given Heydon’s role in promoting this idea in *Makita* and *Dasreef*, the failure to attend to the reliability (or probative value) of forensic science evidence threatens the propriety of legal proceedings because of the difficulty of rationally evaluating the analyst’s opinion.<sup>28</sup> This danger arises conspicuously in relation to the pattern recognition techniques (eg comparisons involving handwriting and documents, tool marks and ballistics, latent fingerprints, bite marks, shoe and tyre marks, images, voices and gait and so on), where both the techniques and proficiency of analysts can be, and should have been, formally evaluated.

Heydon does not address, or even refer to the substantive criticisms of forensic science and medicine evidence raised in the reports or any potential implications for *orthodox* Australian legal practice.<sup>29</sup> Rather than quibble over controvertible readings

<sup>22</sup> See Gary Edmond, ‘The Admissibility of Forensic Science and Medicine Evidence under the Uniform Evidence Law’ (2014) 38 *Criminal Law Journal* 136.

<sup>23</sup> 1953 SC 34 (*Davie*).

<sup>24</sup> *Ibid* 40.

<sup>25</sup> (2001) 52 NSWLR 705 (*Makita*).

<sup>26</sup> *Davie* [1953] SC 34, 40; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 624 [93]–[94].

<sup>27</sup> *Makita* (2001) 52 NSWLR 705, 729–30 [59]–[60], 743–4 [85]. See *Hillstead v The Queen* [2005] WASCA 116 (23 June 2005).

<sup>28</sup> Gary Edmond, ‘The Conditions for Rational (Jury) Evaluation of Forensic Science Evidence’ (2015) 39 *Melbourne University Law Review* (forthcoming).

<sup>29</sup> Cf *Dasreef* (2011) 243 CLR 588, 607 [47].

of Australian evidence jurisprudence, it is more productive to illuminate the difficulties that adherence to the commitments outlined by Heydon, particularly judicial insensitivity to reliability and probative value, create in practice. New South Wales provides a fertile example because its Court of Criminal Appeal ('CCA') basically follows the approach endorsed in Heydon's essay. The upshot is that at no stage in a contest around the admissibility of forensic science evidence can a trial judge in NSW use the reliability or actual probative value of an expert opinion or the underlying technique(s) to exclude the evidence. According to the decision in *R v Tang*,<sup>30</sup> the word 'knowledge' in s 79(1) does not require (or enable) the trial judge to consider reliability (and validity). In the words of Spigelman CJ, 'the focus of attention must be on the words "specialised knowledge", not on the introduction of an extraneous idea such as "reliability".'<sup>31</sup> This means that 'specialised knowledge', for the purpose of s 79(1), does not require the judge to consider whether the opinions of forensic scientists are linked to a body of scientific research or known to be superior to those of ordinary persons. Questions about whether the technique works and how well are usually left for the trial and the jury.

Equally unhelpful, the NSWCCA has insisted that only exceptionally can a trial judge consider the probative value of evidence when asked to exclude it on the basis of s 137 of the UEL. (Like the 'orthodox' interpretation of s 79, this approach is difficult to reconcile with the text of s 137). Rather than obtain information, such as the results of validation studies, that would enable a trial judge to determine the conditions in which a technique is known to work, as well as provide an indication of its accuracy and the analyst's proficiency, the judge is obliged to take the probative value of the opinion 'at its highest' and to undertake the mandated balancing exercise on that basis.<sup>32</sup> This approach renders s 137 largely moribund.<sup>33</sup> There are several reasons for this.

First, for most forensic science and medicine evidence only formal scientific evaluation enables a person to ascertain the validity and reliability of the technique and derivative opinion. This means that in order to determine the potential value, insight into validation, reliability and limitations is required. Where the technique has not been formally validated, claims about *the highest value* are nothing but a (judicial) guess. Secondly, many of the dangers associated with forensic science and medicine evidence flow from the tribunal of fact overvaluing or misunderstanding the value of the evidence or deferring to highly credentialed witnesses. Yet, it is only when the value (or more realistically, an indicative probative value) is known that the admittedly fraught balancing exercise around probative value and the dangers

<sup>30</sup> (2006) 65 NSWLR 681 ('*Tang*').

<sup>31</sup> Ibid 712 [137]. After *Tuite*, the Victorian Court of Appeal requires trial judges to consider the reliability (and validity) of expert opinion evidence when challenged under s 137. *Tang* and *Honeysett v The Queen* (2014) 253 CLR 122, however, effectively prevented the Court from concluding that 'knowledge' in s 79(1) requires attention to reliability.

<sup>32</sup> See, eg, *R v Shamouil* (2006) 66 NSWLR 228 and *R v XY* (2013) 84 NSWLR 363.

<sup>33</sup> See Gary Edmond et al, '*Christie*, Section 137 and Forensic Science Evidence (After *Dupas v The Queen* and *R v XY*)' (2014) 40 *Monash University Law Review* 389.

of unfair prejudice to the accused can be undertaken. By not requiring evidence of validity and reliability, to the extent that judges actually purport to enact s 137, they are engaged in a speculative (ie a largely imaginary) exercise. Trial judges guess at the probative value and their speculative impressions inform how they treat potential dangers. Where judges *deem* the probative value to be high they are unlikely to treat the dangers as significant. Revealingly, judicial deeming is not necessarily correlated with actual probative value or known dangers. Thirdly, complicating the balancing exercise, there is a tendency among lawyers and judges to believe that those with formal qualifications and experience are highly proficient even though the National Academy of Sciences' report expressed grave concerns about such assumptions.<sup>34</sup>

The upshot of all this is that when the admissibility of apparently relevant forensic science or medicine evidence is contested in NSW (as opposed to Victoria) there are few opportunities for the trial (or appellate) judge to engage with the probative value or reliability of the evidence. Unreliability and unknown probative value do not provide grounds for exclusion. Furthermore, judges are not generally provided with information that would enable them to be ascertained. In consequence, apart from rehearsing their commitment to fairness and the effectiveness of trial safeguards (eg admissibility standards, cross-examination, mandatory and discretionary exclusions and directions), all the trial judges of NSW can do is invoke some issue that *they believe* should influence the admission (and perhaps presentation) of the forensic science evidence.<sup>35</sup> Such concerns will ordinarily be raised and discussed in the absence of empirical evidence; for studies and empirical insights are rarely provided and may not be available.<sup>36</sup>

The Court of Criminal Appeal has painted the judges of NSW into a tight and debilitating corner. At no stage following a defence challenge to the admissibility of the state's forensic science evidence (and this includes challenges to techniques that are not known to work) can a trial judge use 'reliability' to exclude the opinion evidence. All an adventurous trial judge can do is identify some issue that they believe (but usually will not know) might impact upon the value of the evidence; warranting qualification and in extreme cases exclusion. In effect, our trial judges are required to speculate about what might or might not matter in relation to the probative value of forensic science techniques and opinions — including some in routine use — rather than require the proponent to provide evidence that the techniques actually work so that 'knowledge', 'probative value' and 'unfair prejudice' can be assessed according to the textual requirements of ss 55, 56, 79 and 137 of the UEL. It makes no sense, in a purportedly rational system of justice, to require judges and juries to guess and speculate about the probative value and limitations of scientific and technical evidence when that 'knowledge' is required by the UEL and should be available.

<sup>34</sup> Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009).

<sup>35</sup> Consider *Morgan v The Queen* (2011) 215 A Crim R 33 and *Honeysett v The Queen* (2013) 233 A Crim R 152.

<sup>36</sup> DNA profiling and some techniques developed by chemists are (partial) exceptions.

*G E Dal Pont\**

**1984–2014  
THE LIFE OF THE (NON-CONSTRUCTIVE)  
TRUST IN THE HIGH COURT**

ABSTRACT

The High Court of Australia has handed down at least 30 judgments on the law of trusts in the period 1984–2014. This presents as an opportune time to consider what the timeframe of a generation has contributed to trusts law at the highest judicial level in Australia. Leaving aside the constructive trust, which is jurisprudentially distinct and well served by academic literature, this paper focuses on the High Court developments in the law of trusts within this era. It concludes that, while not revolutionary, the case law has revealed incursions into what may previously have been assumed to be accepted principle and a consequent fluidity in the concept of the trust and its incidents.

I INTRODUCTION

This paper pursues a broad overview of Australian High Court case authority on the general law of trusts, with the exception of constructive trusts, in the 30 year period between 1984 and 2014. There is an obvious reason for targeting High Court decisions. After all, as the Court sits at the apex of the Australian court hierarchy, its statements on (trusts) law are the only truly authoritative (non-statutory) statements of what is Australian (trusts) law. And while it may be accepted that state and territory appellate courts, and decisions of the Full Court of the Federal Court of Australia, merit considerable weight in approaching the general law of trusts, they must yield to the ratio decidendi of the High Court. Indeed, there is an indication that courts lower in the hierarchy should follow even the ‘considered dicta’ of the High Court rather than pursue a new avenue of judicial analysis. Arguably the sternest rebuke, at least in recent times, by the High Court in this regard derived from a trusts case.<sup>1</sup> In that instance, it chastised the New South Wales Court of Appeal for propounding an unjust enrichment analysis of recipient liability in place of the traditional approach grounded in inquiry into knowledge.<sup>2</sup> In so doing, the High Court

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<sup>1</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 148–58 [130]–[158].

<sup>2</sup> *Ibid.*

made clear that it expected other than incremental steps in the development of the general law to remain its sole domain.

There is more than mere expediency driving the focus on the last 30 years of High Court decisions. It aligns with the introduction in 1984 of s 35A of the *Judiciary Act 1903* (Cth), which prescribed criteria for the grant of special leave to appeal to the High Court. Since this time, the only (trusts) cases heard by the High Court are those that, in the language of s 35A, involve a question of law that is either of ‘public importance’ or in respect of which there is a need to resolve differences of opinion between lower courts or the judges therein and the ‘interests of the administration of justice’ require consideration by the High Court. In other words, the appeal must warrant the leadership of the highest court of the land to give direction so far as the law is concerned. In turn, the trusts case law in the last 30 years should, at least in theory, represent areas calling most for this leadership.

A second reason for the selection of the 30 year time frame is that it largely aligns with the time span of a single generation. To this end, one may expect it to reflect a sufficient breadth of generational thinking. When speaking of generations, it also equates to approximately twice the average tenure of a High Court judge since the Court was constituted,<sup>3</sup> and three times the average tenure of its Chief Justice.<sup>4</sup> A sufficient breadth of judicial opinion can thus be anticipated, in a time frame within which on average the Court has twice altered its constitution and been under the leadership or stewardship of three Chief Justices.

Aside from the temporal restriction, a further qualification in this excursus is its focus on cases directed to matters of broad trusts principle as opposed to those where trusts law has had either a peripheral application or otherwise an application against a backdrop of a specific (non-trusts) statute. Accordingly, for instance, even though the concept of ‘charity’ at law translates to the law of charitable trusts, the High Court ‘charity’ authorities in the last 30 years have chiefly targeted the meaning of ‘charity’ for the purposes of taxing statutes.<sup>5</sup> They have not been cases directed to the charitable trust as such. There have also been various High Court decisions involving the taxation of trust income,<sup>6</sup> and while no doubt informed by general trusts principle to the extent that it aligns with the terms of the statute, their focus is one that rests on

<sup>3</sup> Calculated in 2014 on the basis of non-currently sitting High Court judges (including those subsequently appointed Chief Justice) since the institution of the Court, namely 38 judges, equating to approximately 15.2 years average tenure.

<sup>4</sup> Calculated in 2014 on the basis of non-currently sitting High Court Chief Justices since the institution of the Court, namely 11 judges, equating to approximately 10.5 years average tenure.

<sup>5</sup> See, eg, *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539.

<sup>6</sup> See, eg, *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264; *Bamford v Federal Commissioner of Taxation* (2010) 240 CLR 481.

the meaning of the statutory wording. Similar remarks may be made vis-a-vis case law on managed investment schemes.<sup>7</sup>

But as foreshadowed at the outset, the most substantial qualification to the coverage of this paper is that it omits analysis of the cases targeting constructive trusts. Aside from making it more manageable in size, and not seeking to add to the already substantial academic literature on the Australian law of constructive trusts (which mostly developed in the last 30 years),<sup>8</sup> there are reasons in principle for this omission. The most substantive is that the constructive trust is largely jurisprudentially distinct from other trusts. Express trusts and resulting trusts, aside from being grounded in intention (whether actual, inferred or presumed), ordinarily target the holding of property for another person. The constructive trust – with one arguably anomalous exception that has in any case not been the subject of clear High Court endorsement –<sup>9</sup> does not rest upon any inquiry into intention, but against the main backdrop of either a breach of an existing (usually fiduciary) duty (often termed an ‘institutional constructive trust’) or an unconscionable denial of a beneficial interest in property (a ‘remedial constructive trust’). In each case, the Court’s imposition of the trust remains discretionary, and in the case of the institutional constructive trust may involve no interest in property whatsoever. In the fiduciary context, the ‘trust’ language here may be utilised as a means of expressing personal accountability rather than any interest in property. Indeed, this has led some, including within the judiciary, to suggest that the language of ‘trust’ is inappropriate and misleading in this context.<sup>10</sup>

<sup>7</sup> See, eg, *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129.

<sup>8</sup> See, eg, Pamela O’Connor, ‘Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust’ (1996) 20(3) *Melbourne University Law Review* 735; Gino E Dal Pont, ‘Equity’s Chameleon – Unmasking the Constructive Trust’ (1997) 16 *Australian Bar Review* 46; David Wright, *The Remedial Constructive Trust* (Butterworths, Sydney, 1998); Tom Besanko, ‘Refining the Constructive Trust’ (2011) 5 *Journal of Equity* 108; Elise Bant and Michael Bryan, ‘Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials’ (2011) 5 *Journal of Equity* 171; William M C Gummow, ‘Knowing Assistance’ (2013) 87 *Australian Law Journal* 311.

<sup>9</sup> Namely what is termed the ‘common intention constructive trust’, in Australian law largely emanating from the New South Wales Court of Appeal’s decision in *Allen v Snyder* (1977) 2 NSWLR 685, a prototypical case of adjusting property interests in a failed de facto relationship. Cf Darryn Jensen, ‘Rehabilitating the Common Intention Trust’ (2004) 23(1) *University of Queensland Law Journal* 54; Mark Pawlowski and Nicola Grout, ‘Common Intention and Unconscionability: A Comparative Study of English and Australian Constructive Trusts’ (2012) 2 *Family Law Review* 164.

<sup>10</sup> See, eg, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [142] (Lord Millett) (who suggested that the words ‘accountable as constructive trustee’ in the case of accessory liability should be discarded in favour of ‘accountable in equity’); Malcolm Cope, ‘A Comparative Evaluation of Developments in Equitable Relief for Breach of

In the past 30 years there can be numbered at least 30 cases indexed in the Commonwealth Law Reports under the ‘Trusts’ title, or that otherwise exhibited sufficient trusts content as to merit this indexation. This, it should be noted, approximates to one decision for each year in that period. Some 20 of those decisions targeted, respectively, what goes to constituting express trusts (five decisions),<sup>11</sup> resulting trusts (five decisions, one overlapping with constructive trusts)<sup>12</sup> and constructive trusts (10 decisions, one overlapping with express trusts).<sup>13</sup> Of the remaining cases, most focused on either the nature of interests under a particular form of express trust (namely the unit trust and the discretionary trust)<sup>14</sup> or aspects relating to the management of trusts.<sup>15</sup> In this paper it is these remaining cases that are first addressed, followed by a review of the case law on express trusts and resulting trusts.

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Fiduciary Duty and Breach of Trust’ (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 118, 157; Darryn Jensen, ‘Reining in the Constructive Trust’ (2010) 32 *Sydney Law Review* 87, 112.

- <sup>11</sup> Namely, in chronological order, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 (Mason CJ and Dawson J); *Corin v Patton* (1990) 169 CLR 540; *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation* (1993) 178 CLR 145 (‘*Accident Compensation Tribunal*’); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 (‘*Associated Alloys*’); *Byrnes v Kendle* (2011) 243 CLR 253.
- <sup>12</sup> Namely, in chronological order, *Calverley v Green* (1984) 155 CLR 242; *Muschinski v Dodds* (1985) 160 CLR 583; *Delehunt v Carmody* (1986) 161 CLR 464; *Nelson v Nelson* (1995) 184 CLR 538; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 (‘*Cummins*’).
- <sup>13</sup> Namely, in chronological order, *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (Mason J); *Muschinski v Dodds* (1985) 160 CLR 583; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 (Wilson, Toohey and Brennan JJ); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; *Giumelli v Giumelli* (1999) 196 CLR 101; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.
- <sup>14</sup> Namely, in chronological order, *Read v Commonwealth of Australia* (1988) 167 CLR 57; *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1; *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 (‘*CPT*’); *Kennon v Spry* (2008) 238 CLR 366.
- <sup>15</sup> Namely, in chronological order, *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 (‘*Youyang*’); *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 (‘*Macedonian*’); *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 (‘*Finch*’); *Byrnes v Kendle* (2011) 243 CLR 253.

Four cases are omitted from discussion, as three of these involve trusts law peripheral to the main subject matter of the case<sup>16</sup> and the fourth raises no more than a question of construction of the relevant trust deed.<sup>17</sup>

## II COMPARING FIXED AND DISCRETIONARY TRUSTS

The ‘interest’ of a beneficiary under a trust has arisen in at least five High Court cases in the last 30 years. These highlight, more so than its High Court precursors, that the traditional division between a fixed (unit) trust and a discretionary trust – whereby beneficiaries of the former necessarily have a fixed equitable (ownership) interest in the trust property, whereas beneficiaries of the latter do not – cannot be applied categorically, at least where the language of ‘trust’, ‘interest’ and ‘ownership’ under statute is concerned.

Four out of those five cases involved a unit trust.<sup>18</sup> The Court’s 1989 decision in *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd*<sup>19</sup> can be put to one side at the outset. Against a backdrop of a purchase of shares by a trustee of a unit trust, under an agreement containing a covenant by a nominee to hold on trust for the purchaser, the case raised a question of whether the shares were, under the agreement, to be held in trust for the trustee or instead for the unit holders. The decision turned on the terms of the agreement as against those of the relevant stamp duties legislation, and discussed few matters of principle. Similarly, the Court’s decision of *Read v Commonwealth of Australia*<sup>20</sup> in the year prior – involving an issue concerning the ‘income’, for the purposes of social security legislation, of a pensioner who received

<sup>16</sup> Namely *Orr v Ford* (1989) 167 CLR 316 (a case involving alleged statutory illegality of a trust, and broader judicial remarks as to the equitable defences of laches and acquiescence, mostly in the dissenting judgment of Deane J; it should be noted that the Court’s subsequent decision in *Byrnes v Kendle* (2011) 243 CLR 253, discussed later in this paper by reference to trustees’ duties and intention to create a trust, also contains multiple judicial remarks directed to acquiescence (albeit adding little to the existing legal landscape); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 (involving the incidence of stamp duty on a supplemental deed to a discretionary trust altering the destination of the trust property in default of appointment; although the case does contain useful statements directed to the nature of the trustee’s right to indemnity, these largely reflect existing High Court authority); *Clay v Clay* (2001) 202 CLR 410 (a case involving limitation of actions, which stands chiefly for the proposition that, for the purposes of limitations legislation, the relationship between guardian and ward was not one between trustee and beneficiary).

<sup>17</sup> Namely *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325 (dealing with the interpretation of a clause providing for the appointment of a trustee).

<sup>18</sup> Namely, in chronological order: *Read v Commonwealth of Australia* (1988) 167 CLR 57; *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1; *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494; *CPT* (2005) 224 CLR 98.

<sup>19</sup> (1989) 167 CLR 1.

<sup>20</sup> (1988) 167 CLR 57.

additional units under a commercial unit trust scheme – added little to matters of principle except to describe a unit holder’s position in the following terms:

A unit holder thus has a beneficial interest in the assets of the Trust, a right to have the trusts executed in accordance with the Deed, and a right to proportionate distribution of the proceeds representing the assets of the trust fund upon termination of the Trust. The extent of a unit holder’s beneficial interest at any given time is that proportion which his or her units bear to the total number of units issued.<sup>21</sup>

But the apparent breadth of these remarks must be seen in the context of the terms of the unit trust before the Court. The point was made explicit in 2005 in *CPT Custodian Pty Ltd v Commissioner of State Revenue*,<sup>22</sup> where the Full Court remarked that the descriptor ‘unit trust’, in the absence of an applicable statutory definition, has no constant, fixed normative meaning. It prefaced these remarks with the observation that ‘a priori assumptions as to the nature of unit trusts under the general law and principles of equity would not assist and would be apt to mislead’.<sup>23</sup> On the facts, what this meant was that it could not be assumed that unit holders were the ‘owners’<sup>24</sup> of an equitable estate or interest in land, or persons entitled to ‘any estate of freehold in possession’,<sup>25</sup> for the purposes of the relevant land tax statute.

Their Honours further stressed that the belief, commonly held, that unit holders have a proprietary interest in all of the property that is for the time being subject to the trust deed – often seen as the upshot of the remarks of Dixon CJ, Kitto and Taylor JJ in *Charles v Federal Commissioner of Taxation*<sup>26</sup> – should be placed in the context of the terms of the deed in *Charles*. Indeed, the judges in *Charles* had prefaced their remarks with the words ‘under the trust deed before us’. What the reasons in *CPT* moreover suggest is that there is no standard form unit trust that per se generates standard outcomes for the purposes of varying statutory expressions.

In any case, decisions of this kind in effect target the meaning of words used in a statute (usually a taxing statute), against the backdrop of words chosen by parties to a trust deed. The focus on statutory language, in tandem with recognition that beneficiaries’ ‘interests’ under a trust must be conceived by reference to the entitlements and restrictions imposed by the trust deed, indicate that each case must rest on its own facts rather than being amenable to rules other than at a high level of generality. For instance, the Court in *CPT* did not accept the proposition that unit

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<sup>21</sup> Ibid, 61–2 (Mason CJ, Deane and Gaudron JJ).

<sup>22</sup> (2005) 224 CLR 98, 109 [15].

<sup>23</sup> Ibid.

<sup>24</sup> *Land Tax Act 1958* (Vic) s 13AA.

<sup>25</sup> Ibid.

<sup>26</sup> (1954) 90 CLR 598, 609 (*‘Charles’*).

holders necessarily have a sufficient (equitable) interest in the trust property to lodge a caveat on it.<sup>27</sup>

And, as their Honours remarked in *CPT*,<sup>28</sup> nor does the term ‘discretionary trust’, in the absence of an applicable statutory definition, have a constant, fixed normative meaning.<sup>29</sup> While, in its earlier decision in *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)*<sup>30</sup> (another case involving revenue law consequences of dealings with interests under a unit trust), the Court had noted that the use of terms such as ‘beneficial interest’ is ‘apt to mislead when applied to beneficiaries’ interests in a discretionary trust’, and it cannot be assumed that discretionary trusts, like unit trusts, fit standard moulds. In line with the above prescient remarks in *CPT*, in 2008 in *Kennon v Spry*<sup>31</sup> the Court ruled that the wife’s right, as a discretionary beneficiary of a family trust, to secure its due administration, when coupled with her husband’s discretionary power (as trustee) to appoint the entirety of the trust assets to the wife, constituted ‘property of the parties to the marriage’ for the purposes of allocating property interests under s 79 of the *Family Law Act 1975* (Cth). In so concluding, French CJ reasoned as follows:

The word ‘property’ in s 79 is to be read as part of the collocation ‘property of the parties to the marriage’. It is to be read widely and conformably with the purposes of the *Family Law Act*. In the case of a non-exhaustive discretionary trust with an open class of beneficiaries, there is no obligation to apply the assets or income of the trust to anyone. Their application may serve a wide range of purposes ... Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as ‘property of the parties to the marriage’ because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.<sup>32</sup>

In the circumstances, his Honour added that the characterisation of the assets of the trust as ‘property’ of the parties to the marriage was supported by the husband’s legal title to the assets, the origins of their greater part as property acquired during the marriage, the absence of an equitable interest in them in any other party, the absence of any obligation on the husband’s part to apply all or any of the assets to any beneficiary and the contingent character of the interests of those who might be

<sup>27</sup> *CPT* (2005) 224 CLR 98, 113–4 [29]–[32], querying the general applicability of *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90 to this effect.

<sup>28</sup> *Ibid* 110 [15].

<sup>29</sup> *Ibid*.

<sup>30</sup> (1999) 198 CLR 494, 509 [34].

<sup>31</sup> (2008) 238 CLR 366.

<sup>32</sup> *Ibid*, 390–1 [64]–[65]. *Contra* 425 [175] (Heydon J).

entitled to take upon a default distribution at the distribution date.<sup>33</sup> In reaching the same conclusion, Gummow and Hayne JJ emphasised that the term ‘property’ is not a term with a specific and precise meaning, it being necessary to pay regard to any statutory context in which the term is used, specifically its subject matter, scope and purpose.<sup>34</sup> What the decision indicates, it has been suggested, is that:

where the trust, as established or as operated, constitutes a vehicle for the accumulation of assets of the marriage which, in other circumstances, might simply be held in joint names, then, upon the breakdown of the marriage the ample powers of the Family Court under the Act allow it effectively to deal with those assets in the altered circumstances which have eventuated.<sup>35</sup>

The focus of the majority in *Kennon v Spry* on the statutory context, against the backdrop of a lengthy marriage, is arguably an indicator against the unthinking application of the same approach outside the familial environment.<sup>36</sup> But while the majority was careful to confine its remarks to the statutory context underscoring the *Family Law Act*, the case does reveal that the long held notions that place discretionary beneficiaries’ interests invariably outside the proprietary sphere are no longer gospel.<sup>37</sup>

In this context, therefore, the elapsing of 30 years has witnessed a breaking down of the assumption that the unit trust and the discretionary trust are polar opposites so far as beneficiaries’ ‘interests’ are concerned. The historical dichotomy has, at least in its application in the statutory environment, yielded to a more contextual inquiry, where fixed rules have less to play than the language adopted by legislators and trust deed drafters.

### III INQUIRING INTO TRUSTEE DUTIES OF MANAGEMENT

Four trusts cases decided by the High Court of Australia within the last three decades can, in particular, be grouped by reference to trustees’ management of a trust. In *Finch v Telstra Super Pty Ltd*<sup>38</sup> the Court was requested to address the duties of a trustee

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<sup>33</sup> Ibid 392 [70].

<sup>34</sup> Ibid 396–7 [89].

<sup>35</sup> Justin Gleeson, ‘Spry’s Case: Exploring the Limits of Discretionary Trusts’ (2010) 84 *Australian Law Journal* 177, 184.

<sup>36</sup> One commentator has suggested that the decision ‘could be read down as an eccentric view on the width of “property” as a term under the *Family Law Act*’: Lee Aitken, ‘Muddying the Waters Further – *Kennon v Spry*: ‘Ownership’, ‘Control’ and the Discretionary Trust’ (2009) 32 *Australian Bar Review* 173, 181.

<sup>37</sup> It should be noted, as an aside, that the majority did not seek to address the (traditional) distinction adopted in Heydon J’s dissent (*Kennon v Spry* (2008) 238 CLR 366 425–6 [175]), namely that between the wife’s ‘interest’ in being considered as a beneficiary of the discretionary trust and the actual trust property itself.

<sup>38</sup> (2010) 242 CLR 254.

of a superannuation fund. In particular, at issue was the trustee's compliance, or otherwise, with its obligations under the trust deed to determine 'total and permanent invalidity' in the appellant. The trust deed defined that phrase to mean, inter alia, a disablement as a result of which:

in the opinion of the Trustee after consideration of any information, evidence and advice provided to the Trustee by the Employer and any other information, evidence and advice the Trustee may consider relevant, the Member has ceased to be an Employee and is unlikely ever to engage in any gainful Work for which the Member is for the time being reasonably qualified by education, training or experience.<sup>39</sup>

The appellant's claim for a 'total and permanent invalidity' benefit rested on the trustee forming an opinion about the likelihood that the appellant would ever again engage in 'gainful Work'. Under the above clause, the Court noted, 'that was not a mere discretionary decision'.<sup>40</sup> Rather, it imposed upon the trustee a duty to seek relevant information, and make sufficient inquiries, in order to make an informed decision as to the appellant's claim. Their Honours made the following remarks in this regard:

In the Deed there was a power to take into account 'information, evidence and advice the Trustee may consider relevant', and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty.<sup>41</sup>

As a matter of construction of the trust deed, there is little to dispute in the Court's remarks. In this sense, the decision is one on its own facts and thus of little greater moment. But their Honours stepped beyond the process of construction of a particular trust deed to make an observation with a broader principle-based resonance. They noted that what have been described as the '*Karger v Paul*'<sup>42</sup> principles – wherein the court may review the exercise of a trustee's discretion upon proof of, inter alia, a want of 'properly informed consideration' – applied in the superannuation environment *but with greater accentuation*. In particular, 'the duty of trustees properly to inform themselves is more intense in superannuation trusts', as it is 'extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid'.<sup>43</sup>

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<sup>39</sup> Ibid 262–3 [66].

<sup>40</sup> *Finch* (2010) 242 CLR 254, 280–1 [66].

<sup>41</sup> Ibid.

<sup>42</sup> Named after the principles identified in *Karger v Paul* [1984] VR 161.

<sup>43</sup> *Finch* (2010) 242 CLR 254, 280 [66].

In drawing this conclusion the underlying context and factual matrix proved especially persuasive. In that employees' superannuation is a valuable asset (and, moreover, is the subject of management by a professional trustee, to whom higher standards of trusteeship can be expected), different criteria may be seen to apply to the operation of a superannuation trust from those that apply in respect of discretionary decisions made by a trustee holding a power of appointment under a non-superannuation trust. As superannuation is earned and in the nature of deferred pay, the legitimate expectation that decisions over benefits will be sound is high. As the Court said, the attendant public significance of superannuation and close regulatory attention given to it supported the conclusion that decisions of superannuation trustees are unlikely to be immunised from judicial control without clearly contrary language.<sup>44</sup>

*Finch* is instructive because it highlights that the same principles, even at general law, do not necessarily apply vis-a-vis all trusts. There are considerations, it seems, that may be unique to one or more types of express trust. Indeed, the very breadth of uses of the trust, in a variety of distinct contexts, may well justify some rethinking of what should remain as general trusts law 'principle' – a core, as it were – and what may instead be malleable in the circumstances.

Ultimately, *Finch* may suggest that there is no 'one size fits all' approach to characterising trustee duties. The law, it seems, must be more nuanced in its statements of principle. If so, it reveals some confluence, at a higher level of generality, with the case law on unit and discretionary trusts mentioned earlier. Although the subject matter of the respective cases, aside from coming under the broad umbrella of trusts law, is quite discrete, the trend away from 'one size fits all' approaches is extant. To brand a trust a 'discretionary trust', or a 'unit trust', may not be determinative of respective rights and obligations thereunder. Similarly, to speak in terms of a trustee's obligation to give real and genuine consideration to the exercise of discretion as to appointment may, as a result of *Finch*, be a more fluid and contextual exercise than may previously have been imagined.

Neither *Finch*, nor the High Court case law on unit and discretionary trusts should be seen however, as suggesting that other aspects of trust principle, especially directed at attempts to dilute the strictness of trustee duties, justify a corresponding fluidity. In *Byrnes v Kendle*<sup>45</sup> – a case more significant in the context of the creation of an express trust, and thus accordingly chiefly addressed below under that heading – the respondent signed an Acknowledgment of Trust declaring that he held one undivided half-interest in the matrimonial home as tenant in common upon trust for his wife. Upon the breakdown of the matrimonial relationship, the respondent leased the property to his son from a previous marriage but took few steps to collect rent, which remained largely unpaid. In an attempt to withstand claims by the wife's family to recover, inter alia, the unpaid rent, the respondent argued that, in the circumstances, he was not obliged to collect rent from the property. The High Court rejected this argument, and with it any claim that the respondent was no more than a bare trustee.

<sup>44</sup> Ibid 270–2 [32]–[37].

<sup>45</sup> (2011) 243 CLR 253.

It instead trod the orthodox path in espousing that a trustee is obliged to render the trust property productive.<sup>46</sup>

Implicit in the reasons of French CJ was that even if the respondent could have been characterised as a bare trustee (which on the facts was not so), this was not conclusive against a duty to generate income, for the benefit of the beneficiary, from the trust property.<sup>47</sup> Accordingly, any suggestion that a trustee's duty to render the trust property productive should be diluted, qualified or even ousted by the trust being characterised as a bare trust, or otherwise arising in a familial or matrimonial context, was not an outcome their Honours appeared willing to countenance. Justices Heydon and Crennan addressed the point as follows:

Even if there is no direction in the trust instrument that the trust property be invested, it is the duty of the trustee to invest the trust property subject to the limits permitted by the legislation in force under the proper law of the trust and subject to any limits stated in the trust document. If there are no limits of that kind, a trustee who receives a trust asset, like an executor of a deceased estate, must 'lay it out for the benefit of the estate'. That is, it is the duty of a trustee to obtain income from the trust property if it is capable of yielding an income. If the property is money, it should be invested at interest or used to purchase income-yielding assets like shares. If the property consists of business assets, it should be employed in a business. If the property is lettable land, it should be let for rent. And if the intended means of gaining an income turn out to be unsatisfactory, those means must be abandoned and others found.<sup>48</sup>

Aside from alternative provision in the trust instrument, the upshot of *Byrnes v Kendle* in this regard is essentially an overarching approach when it comes to a duty to invest trust property. That the above remarks of Heydon and Crennan JJ were categorical, and expressed without qualification, is suggestive of a principle capable of application across the breadth of trusts and trusteeship. It highlights the core function of a trustee to pursue the financial interests of the beneficiary and is therefore not variable by reference to the type of trust involved or the nature of the relevant trustee.

A number of the Court's obiter remarks in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*<sup>49</sup> reflect a corresponding disinclination to compartmentalise the law of trusts, albeit here by reference to the common law. Their Honours cautioned that the nature of a monetary remedy for breach of trust 'may vary to reflect the terms of the trust, and the breach of which complaint is made', such that '[g]eneralisations may mislead'.<sup>50</sup> But this did not preclude the Court from querying the trend in England and New Zealand courts to distinguish trustees' breaches of duties of skill

<sup>46</sup> Ibid 264–5 [19]–[23] (French CJ), 277–8 [67]–[73] (Gummow and Hayne JJ), 291–2 [119]–[124] (Heydon and Crennan JJ).

<sup>47</sup> Ibid 264–5 [19]–[22].

<sup>48</sup> Ibid 291–2 [119] (citations omitted).

<sup>49</sup> (2003) 212 CLR 484.

<sup>50</sup> Ibid 499 [36].

and care from fiduciary breaches for the purposes of quantifying monetary relief for breaches of trust. In those jurisdictions the courts have revealed a willingness to assimilate trustees' breaches of duties of skill and care to tortious (or contractual) breaches. They accordingly have voiced a justification to approach monetary relief for these breaches by trustees in a manner equivalent to that applicable to common law damages, with its particular constraints of causation, foreseeability and remoteness. In response, the High Court in *Youyang* made the following remarks:

there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.<sup>51</sup>

The upshot of the foregoing is an indication, perhaps not conclusive but at least weighty, that core principles of trusts law are not to be diluted by concepts traditionally seen as foreign to the trust or fiduciary concept. This aligns, in a broad sense, with the Court's strict conception of the trustee's duty to benefit the beneficiaries evident in *Byrnes v Kendle*. After all, the above obiter remarks in *Youyang* are, in the context of the law's remedial response, evidently directed at fostering a higher standard of conduct on trustees than would be expected by the common law.

There is necessarily a flipside to the strictness with which the Court has conceived of trustee obligations and, with this, the strict liability that stems from a breach of trust. It is evident, at least from one perspective, in the Court's 2008 judgment in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*.<sup>52</sup> Its essence is to dismantle the impediments that lower courts had, over time, imposed on the curial jurisdiction to give a trustee advice and directions. That the advice sought could determine substantive rights, or could otherwise involve proceedings that evinced an adversarial tinge, had been proffered as effectively jurisdictional limitations on the court's power to give the said opinion, advice or directions.

What the High Court made clear in its reasons is that these matters present no bar to jurisdiction, although they may assume relevance to the discretion as to whether and what advice is given. In one sense, the Court's reasons do no more than reflect the statutory language in which the jurisdiction is framed, and dissuade the introduction of non-statutory fetters. But its remarks must also be viewed within a broader framework. If Australian trusts law is to maintain its strictness vis-a-vis trustee duties and liability, there is sense in encouraging trustees who are legitimately unsure about the appropriateness of a certain course of action to approach the court for advice and directions. After all, a trustee who acts in accordance with the advice or directions, where all relevant evidence was placed before the court and the facts are substantially

<sup>51</sup> Ibid 500 [39].

<sup>52</sup> (2008) 237 CLR 66.

as submitted in the application, is deemed to have discharged his or her duty as trustee in the subject matter of the application.

Indeed, in the context of trustees defending proceedings the plurality went so far as to declare that ‘a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings’.<sup>53</sup> A failure to seek this advice may, in addition, adversely impact upon the trustees’ ability to seek an indemnity for costs in the litigation, which may have particular impact upon corporate trustees as a result of s 197 of the *Corporations Act 2001* (Cth).<sup>54</sup>

#### IV TARGETING INTENTION UNDERSCORING EXPRESS TRUSTS

It is accepted that the creation of an express trust requires, inter alia, the satisfaction of ‘three certainties’: certainty of intention, certainty of subject matter and certainty of object. Should High Court endorsement of this classic catalogue of requirements, emanating from the remarks of Lord Langdale MR in *Knight v Knight*,<sup>55</sup> be needed, it can be found in its 2001 decision in *Clay v Clay*.<sup>56</sup>

In the last 30 years, any substantive analysis of the second and third of these certainties has, with one exception,<sup>57</sup> been largely absent from High Court pronouncements. The assumption, it seems, is that the law pertaining to these certainties is sufficiently clear not to justify High Court exposition. This is no foregone conclusion, however, as case law from lower courts and other jurisdictions reveals that both certainty of subject matter and certainty of object are not without their challenges. For instance, the extent to which Australian law should countenance a valid trust over part of the

<sup>53</sup> *Macedonian* (2008) 237 CLR 66, 94 [74] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

<sup>54</sup> The section dictates that where a company incurs a liability as a trustee, a director is liable to discharge all or part of the liability if the company has not discharged, and cannot discharge, the liability or that part of it, and the company is not entitled to be fully indemnified against the liability out of trust assets solely because of: (a) a breach of trust by the company; (b) the company acted outside the scope of its powers as trustee; and/or (c) a term of the trust denies, or limits, the company’s right to be so indemnified.

<sup>55</sup> (1840) 3 Beav 148, 172–3; 49 ER 58, 68.

<sup>56</sup> (2001) 202 CLR 410, 431 [42]. See also *Kauter v Hilton* (1953) 90 CLR 86, 97 (Dixon CJ, Williams and Fullagar JJ) (‘the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries’).

<sup>57</sup> Namely the remarks by Gaudron, McHugh, Gummow and Hayne JJ in *Associated Alloys* (2000) 202 CLR 588, 604 [30] (finding no objection to the effective creation of a trust that the trust property is identified as a proportion of the proceeds received by a purchaser referable to moneys from time to time due and owing but unpaid by the buyer to the seller).



bulk of identical or similar items awaits High Court authority.<sup>58</sup> Similarly, the binary approach to certainty of object – applying the list certainty test to fixed trusts and the criterion certainty test to discretionary trusts – has produced difficulties for judges in lower courts.<sup>59</sup> This binary approach, moreover, may now face challenge from the High Court’s tendency, noted earlier, to adopt a more individualised approach to the incidents of fixed (unit) trusts and discretionary trusts. In any case, although it may seem a given, the High Court has yet to explicitly pronounce on the legitimacy of the criterion certainty test.<sup>60</sup>

By contrast, five High Court trusts cases in the 1984–2014 time span have trodden a path pertaining to certainty of intention. In four of those – chronologically, *Bahr v Nicolay [No 2]*,<sup>61</sup> *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation*,<sup>62</sup> *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)*<sup>63</sup> and *Byrnes v Kendle*<sup>64</sup> – intention formed a core issue before the Court. In the remaining case, *Corin v Patton*,<sup>65</sup> which was essentially about the requirements for effecting a transfer or assignment of property, intention can be seen to form part of the calculus surrounding complete constitution.

Though first and second chronologically, a discussion of *Bahr v Nicolay [No 2]* and *Accident Compensation Tribunal* is reserved for later because the cases involve inferring an intention to create a trust. The other three cases, conversely, involve the use of explicit trust language and the issue before the Court (except perhaps in *Corin v Patton*) was whether the language sufficed to evince an intention to create a trust.

#### *A Express Intention*

In *Associated Alloys* the trust language was located in a contractual retention of title clause, which read as follows:

In the event that the purchaser uses the goods/product in some manufacturing or construction process of its own or some third party, then the purchaser shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the vendor. Such part shall be deemed to

<sup>58</sup> See the extensive analysis at first instance by Campbell J in *White v Shortall* (2006) 68 NSWLR 650 (affirmed albeit not on this specific point: *Shortall v White* [2007] NSWCA 372 (19 December 2007)).

<sup>59</sup> See, eg, *West v Weston* (1998) 44 NSWLR 657 (in the context of an ostensibly fixed trust); *Lempens v Reid* (2009) 2 ASTLR 373 (in the context of a discretionary trust).

<sup>60</sup> Cf *Accident Compensation Tribunal* (1993) 178 CLR 145, 183 (Brennan, Dawson and McHugh JJ, dissenting).

<sup>61</sup> (1988) 164 CLR 604.

<sup>62</sup> (1993) 178 CLR 145.

<sup>63</sup> (2000) 202 CLR 588.

<sup>64</sup> (2011) 243 CLR 253.

<sup>65</sup> (1990) 169 CLR 540.



equal in dollar terms the amount owing by the purchaser to the vendor at the time of the receipt of such proceeds.

The relevant wording aimed to overcome one of the main difficulties surrounding retention of title clauses at general law. Namely, that the mixing of the property which forms the subject of the clause with other property may deny the product any independent identity to which the clause may apply. The wording of the clause in *Associated Alloys* sought to address this difficulty by declaring a property interest over a proportion of the proceeds of the mixed goods. It therefore purported to translate a contractual proprietary interest, preceding any mixing, to an equitable proprietary interest thereafter.

Justices Gaudron, McHugh, Gummow and Hayne found that the words chosen by the parties, via their agreement, were consistent with an intention to create a trust. The facts revealed nothing to suggest that the parties did not mean what they said in their written instrument, or did not say what they meant.<sup>66</sup> That an incident of trusteeship would normally be that the trust property is retained separately rather than mixed with other property – and the Court accepted that an express obligation upon the purchaser to keep the ‘proceeds’ separate would have pointed to the existence of a trust even if none had been explicit<sup>67</sup> – did not alter this view. The fact that the parties had used the language of trust meant that mixing did not threaten the existence of a trust or any intention supporting it.<sup>68</sup> As a result, their Honours construed the above clause as an agreement to constitute a trust of future-acquired property, not as a registrable charge, meaning that it was not void as against the administrators or liquidator of the purchaser.

The decision in *Associated Alloys* therefore reveals the pre-eminence the court will accord to the explicit use of ‘trust’ language, to which effect will be given unless there is compelling evidence of an intention to the contrary. It stands to reason, therefore, that where parties who are commercially experienced, and/or document their dealings pursuant to legal advice, choose the language of trust to express those dealings (or a part thereof), there is likely to be little scope to contend that no trust was intended. That the High Court in *Associated Alloys* was willing to so conclude, whilst conceding the ‘practical difficulties’ it may cause to third parties seeking to assess a purchaser’s credit-worthiness,<sup>69</sup> highlights the primacy given to explicit expressions of intention.

<sup>66</sup> *Associated Alloys* (2000) 202 CLR 588, 606 [35] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>67</sup> *Ibid* 606 [34], citing *Cohen v Cohen* (1929) 42 CLR 91, 100–1.

<sup>68</sup> Although only mentioned in passing in the judgment, by way of footnote, this holding was entirely consistent with that of the New South Wales Court of Appeal in *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331, 348–9 (Hope JA), 334 (Kirby P), 367 (Priestley JA).

<sup>69</sup> *Associated Alloys* (2000) 202 CLR 588, 61 [49] (Gaudron, McHugh, Gummow and Hayne JJ). Their Honours considered that these difficulties could be remedied by legislation. Yet when the opportunity to address these difficulties presented itself with

This primacy, even outside of the commercial arena, was reiterated a decade or so later in *Byrnes v Kendle*. As mentioned earlier, the respondent in that case signed an Acknowledgment of Trust declaring that he held one undivided half-interest in the matrimonial home as tenant in common upon trust for his wife. Upon the breakdown of the relationship, the home was sold. The respondent sought to withstand claims by the wife's family to recover one-half of the proceeds of sale by arguing that he had not intended to create a trust.

The Court unanimously rejected the respondent's argument. Importantly, this was largely independent of whether or not the respondent actually had a subjective ('real') intention to create a trust. Rather, the case concerned the admissibility of evidence of that intention. The Court found that where there is executed a document that explicitly countenances the creation of a trust, aside from evidence of vitiating factors, evidence cannot be admitted to contradict the intention manifested by that document. Accordingly, extrinsic evidence of the respondent's intentions underscoring the negotiations leading to the trust was inadmissible to prove that he did not intend to create a trust.

The assumption is that persons who use the unambiguous language of trust intend to create a trust. Language of this kind is decisive, and serves to preclude the admission of evidence inconsistent with it. The relevant intention is, in the words of Heydon and Crennan JJ, 'an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words'.<sup>70</sup> The focus on the intention as evinced on the face of the document – an 'objective' intention – aligns with the prevailing approach to contractual interpretation, and with the policy underscoring the parole evidence rule.<sup>71</sup> In so ruling, the Court overruled its decision some 90 years earlier in *Commissioner of Stamp Duties (Qld) v Jolliffe*,<sup>72</sup>

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the advent of personal property securities legislation, it was not taken. The *Personal Property Securities Act 2009* (Cth) treats a retention of title agreement essentially as a secured loan, and prescribes its own procedures for the seller to enforce its security – thereby rewriting the principles that underpin retention of title clauses – but is expressed not to apply to 'a transfer of the beneficial interest in a monetary obligation where, after the transfer, the transferee holds the monetary obligation on trust for the transferor' (s 8(1)(f)(x)). Accordingly, it dictates that the trust retains its utility as a vehicle to secure priority in this context, given that property held on trust is not available to satisfy the claims of creditors of an insolvent trustee, coupled with the fact that trust interests require no form of registration and take effect at the time the settlor specifies. See further Jamie Glister, 'The Role of Trusts in the PPSA' (2011) 34(2) *University of New South Wales Law Journal* 628.

<sup>70</sup> *Byrnes v Kendle* (2011) 243 CLR 253, 290 [114]. See also 277 [17] (French CJ), 290 [65] (Gummow and Hayne JJ).

<sup>71</sup> A point, however, queried by some commentators: see, eg, Corey Karaka, 'Secret Intentions and Slippery Words: *Byrnes v Kendle*' (2012) 34(3) *Sydney Law Review* 599; Jessica Palmer, 'Equity and Trusts' [2012] *New Zealand Law Review* 141, 142–7.

<sup>72</sup> (1920) 28 CLR 178, 181 (Knox CJ and Gavan Duffy J); *contra* 190–3 (Isaacs J) whose reasoning the Court in *Byrnes v Kendle* unanimously endorsed.

where a majority of the Court was willing to admit evidence to determine the ‘real intention’ of the purported settlor, in opening a bank account as ‘trustee’.

By rendering inadmissible extrinsic evidence to deny an intention to create a trust, the Court in *Byrnes v Kendle* (and implicitly also in *Associated Alloys*) made its task (and that of later courts) easier – essentially avoiding the responsibility of balancing and deciding as between competing evidential presentations – and attendant to this reduced the scope for litigation. Inquiry into subjective (or ‘real’) intention is, moreover, prone to difficulties. It relies solely on the evidence adduced by the person whose state of mind is in issue, and is accordingly likely to be inherently biased, even assuming it is accurate in view of, inter alia, the elapsing of time.

By denying the admissibility of evidence of subjective intention – ‘both to the question of whether a trust exists and to the question of what its terms are’<sup>73</sup> – the Court was not, however, suggesting that subjective intention has no relevance vis-a-vis the law of trusts. As Heydon and Crennan JJ made explicit:

As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification – an equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity, a challenge based on the non est factum or duress defences, an application for modification by reason of some estoppel, an allegation of illegality, an allegation of ‘sham’, a claim that some condition has not been satisfied, or a claim for rectification.<sup>74</sup>

It follows, it may be reasoned, that there is unlikely to be any injustice done to a settlor by denying the opportunity to adduce evidence of his or her actual (subjective) intention. Scenarios where the settlor could be the victim of some injustice are, it seems, adequately addressed by existing vitiating doctrines.

Although not reasoned explicitly by reference to objective intention of a settlor, but rather by reference to whether or not a trust had been completely constituted, the High Court’s decision over 20 years earlier in *Corin v Patton*<sup>75</sup> is amenable to being viewed through the prism of objective intention. In addressing the complete constitution point, the Court needed to resolve a point punctuated by conflicting authority simmering in Australian law since its early decision in *Anning v Anning*.<sup>76</sup> The latter produced three divergent interpretations of Turner LJ’s classic remarks in *Milroy v Lord*<sup>77</sup> that ‘in order to render a [trust] valid and effectual, the settlor must have done everything which ... was necessary to be done in order to transfer the property and render the settlement binding upon him’. The Court in *Corin* favoured the view that

<sup>73</sup> *Byrnes v Kendle* (2011) 243 CLR 253, 290 [115] (Heydon and Crennan JJ).

<sup>74</sup> *Ibid* (citations omitted). See also 262–3 [15]–[17] (French CJ).

<sup>75</sup> (1990) 169 CLR 540.

<sup>76</sup> (1907) 4 CLR 1049.

<sup>77</sup> (1862) 4 De GF & J 264, 274; 45 ER 1185, 1189.



a settlor (or donor or transferor) must do *only* those acts that are *obligatory for him or her to do and no-one else*.<sup>78</sup> As explained by Mason CJ and McHugh J:

if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. ‘Necessary’ used in this sense means necessary to effect a transfer. From the view point of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part ... [so] the donee acquires an equitable estate or interest in the subject matter of the gift once the transaction is complete so far as the donor is concerned.<sup>79</sup>

This approach has the merit of giving effect to the settlor’s intention, objectively determined. After all, if the settlor has done everything necessary to be done by him or her to effect the transfer, to refuse to enforce a trust would be to frustrate what is objectively the settlor’s intention. But where some act remains to be done that is the sole province of the settlor, the trust will be incompletely constituted until that act is done; here it cannot be inferred as a matter of course that the settlor intended to create a trust because he or she has failed to fulfil the acts required of him or her. Importantly, whether or not the putative settlor *subjectively* intended to create a trust is practically irrelevant in this context, because he or she has not manifested this intention objectively by doing what was necessary for him or her to do so as to render the trust completely constituted. It stands to reason that the decision in *Byrnes v Kendle* could hardly be seen as unheralded, but as representing somewhat of a culmination of a flow of High Court jurisprudence directed to this end.

### B Inferred Intention

In each of the above cases the putative settlor used the language of trust. It was no great step, therefore, for the Court to attribute to the settlor an intention to create a trust. But, as noted by the High Court in *Accident Compensation Tribunal*:

A trust may be created without use of the word ‘trust’. And, unless there is something in the circumstances of the case to indicate otherwise, a person who has ‘the custody and administration of property on behalf of others’ or who ‘has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit’ is a trustee in the ordinary sense.<sup>80</sup>

<sup>78</sup> Namely the view espoused by Griffith CJ in *Anning v Anning* (1907) 4 CLR 1049, 1057. Higgins J (at 1081–2) had taken the view that the transferor must do those acts it is *possible* for him or her to do. Isaacs J (at 1069) had held that the transferor must ensure that *all* necessary acts are done, irrespective of who can do them.

<sup>79</sup> *Corin v Patton* (1990) 169 CLR 540, 559. See also 582 (Deane J).

<sup>80</sup> (1993) 178 CLR 145, 165–6 (Mason CJ, Deane, Toohey and Gaudron JJ) (citations omitted).



*Accident Compensation Tribunal* was unusual because the alleged intention to create a trust derived from statute rather than a private settlor, and the arguments circled around whether public officers or entities should come within the private law trusts mantle.<sup>81</sup> A majority of the Court held that a statutory provision under which ‘any amount of money administered by the Registrar under this Act may be invested, applied or otherwise dealt with in any manner that the Registrar thinks fit for the benefit of the person entitled to that money’ sufficed to constitute the Registrar a trustee, in the ordinary sense, of compensation moneys paid to the Registrar pursuant to the relevant workers compensation legislation. These words sufficed, reasoned their Honours, ‘because they indicate that he has or holds that money for the benefit of the person or persons entitled to the compensation involved’.<sup>82</sup>

The case reveals that, by requiring a public official to hold funds on behalf of persons entitled, there may be grounds to conclude that the funds are to be held on trust. But much no doubt depends on the terms of the relevant statute, and the context within which the collection and dispersal of the funds operates.<sup>83</sup> Accordingly, beyond an acceptance that a trust may be inferred in circumstances where no explicit trust language is used, the decision may be seen as one on its own facts. Nonetheless, what appears is that the focus on objective intention redolent in *Byrnes v Kendle* is not confined to scenarios where the language of trust appears on the face of the relevant instrument. It has force, and arguably even greater value, where a court is asked to *infer* an intention to create a trust, often from what is ostensibly no more than a contractual relationship. Gummow and Hayne JJ in *Byrnes v Kendle*<sup>84</sup> endorsed the following comment of Lord Millett in *Twinsectra Ltd v Yardley*:

A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them.<sup>85</sup>

The reason why objectively discerned intention assumes especial significance where there has been no use of trust language in the relevant dealings is that matters of inference are most unlikely to be grounded in subjective intention. Had a person subjectively intended to create a trust, a court could legitimately reason that he or she would have used language sufficiently explicit to this effect. The absence of this kind

<sup>81</sup> On this latter point the majority found ‘no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown’, adding that ‘[t]he mere fact that the person on whom the obligation is cast is a statutory office holder cannot, of itself, require the question whether he or she is a trustee in the ordinary sense to be approached on the basis of a presumption to the contrary’: *Accident Compensation Tribunal* (1993) 178 CLR 145, 163, 164 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>82</sup> Ibid 166 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>83</sup> Cf *Victoria v Sutton* (1998) 195 CLR 291.

<sup>84</sup> 243 CLR 253, 274 [55].

<sup>85</sup> [2002] 2 AC 164, 185 [71] (*‘Twinsectra’*).

of language dictates a need to pursue what the person, objectively speaking, is likely to have intended via the dealing.

A typical scenario triggering attempts to infer a trust relationship is, as in *Twinsectra*, where moneys advanced, ostensibly as a loan, may prove (partially) irrecoverable in the event of the borrower's insolvency. If the lender can establish that the moneys were advanced on trust, whether or not also as a loan, and that the object of the advance remains to be fulfilled, the lender may prove able to reclaim those moneys in the capacity as a beneficiary of a trust. Moneys held on trust, after all, are not available to satisfy the claims of the trustee's (here the borrower's) own creditors. The core determinants of whether moneys so advanced are brought within the (proprietary) umbrella of trust, as opposed to (or in addition to) the (contractual) umbrella of debt, were elicited in a 1913 statement by Channell J in *Henry v Hammond*,<sup>86</sup> that the High Court cited with approval, albeit in 1929,<sup>87</sup> which reads as follows:

It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then ... he is not a trustee ... but a mere debtor.<sup>88</sup>

Logic of this kind has given force, in English law, to what is known as the 'Quistclose trust' – named after the House of Lords' decision in *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>89</sup> – which the High Court has recently described as 'helpful as a reminder that legal and equitable remedies may co-exist'.<sup>90</sup> Importantly, in line with the remarks in the above quote, what animates an inference of an intention to create a trust is the conduct of the lender, or that of lender and borrower together, in crafting the advance of moneys for a specific object, to be treated discretely rather than to form part of the borrower's general funds. In other words, that conduct evinces an intention, objectively, to retain (beneficial) ownership of the moneys in question, at least until they are applied for the object of the advance.

Implicit in the Court's decision in *Associated Alloys*, discussed earlier, that explicit trust language can overcome a failure to prescribe the discrete treatment of money or property advanced is that, absent such language, a failure to prescribe for that discrete treatment will in all probability be fatal to any claim of trusteeship. In this

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<sup>86</sup> [1913] 2 KB 515.

<sup>87</sup> *Cohen v Cohen* (1929) 42 CLR 91, 101 (Dixon J).

<sup>88</sup> *Henry v Hammond* [1913] 2 KB 515, 521.

<sup>89</sup> [1970] AC 567 ('Quistclose').

<sup>90</sup> *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 523 [112] (Bell, Gageler and Keane JJ).

latter scenario, there is likely to be very little from which to make the inference, objectively, of an intention to create a trust.

At least in the last 30 years, though, there is little in the way of High Court authority directed to a *Quistclose*-type scenario. To find the most significant (and essentially the only dedicated) High Court statement directed to this end, it is necessary to go back to 1978, where Gibbs ACJ, with whom Jacobs and Murphy JJ agreed, cited *Quistclose* as authority for the proposition that:

where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.<sup>91</sup>

In any case, Gibbs ACJ found no trust on the facts. Beyond an indication from the above quote that the trust in question is one grounded in intention (though misleadingly termed ‘implied’ rather than ‘inferred’),<sup>92</sup> the High Court’s only other remark in this context is one unrelated to intention, namely that the terminology of a ‘*Quistclose* trust’ is ‘not helpful if taken to suggest the possibility apart from statute of a non-express trust for non-charitable purposes’.<sup>93</sup>

Even without compelling recent High Court authority in this regard, what can be said is that the application of the express trust in the (ostensible) debtor-creditor scenario is grounded in an inquiry into intention, objectively determined by reference to the language and conduct of the relevant person. Although the trust is usually raised ex post facto in an attempt to secure an outcome not available in contract, its existence, in line with Channell J’s observations in *Henry v Hammond*, is premised upon evidence upon which an inference of intention to create a trust can be made.

Yet in another context, which has witnessed greater exposition in High Court authority within the last 30 years, the evidence of intention proffered as sufficient to create a trust has appeared less compelling. Again, the scenario is one whereby the (express) trust is utilised ex post facto to circumvent what would otherwise be an insurmountable hurdle imposed by contract law. Commonly termed the ‘trust of a contractual promise’, directed chiefly at overcoming a potential injustice emanating

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<sup>91</sup> *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335, 353.

<sup>92</sup> Which Lord Millett later incidentally explained by a reference to an ‘orthodox’ resulting trust in *Twinsectra* [2002] 2 AC 164, 192–3 [100].

<sup>93</sup> *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 523 [112] (Bell, Gageler and Keane JJ).

from the doctrine of privity of contract, it is a decidedly abstract use of the trust vehicle,<sup>94</sup> albeit one seemingly well established in English case law.

The joint judgment of Mason CJ and Dawson J, in the High Court's 1988 decision in *Bahr v Nicolay [No 2]*,<sup>95</sup> appears to countenance a 'weak' concept of objectively derived intention in this context. The appellants had sold land to the first respondent with a lease back for three years. The contract of sale gave the appellants a right of re-purchase at a specified price once those three years had expired. During that time, the land was sold to the second respondents, who in the sale agreement acknowledged the buyback provision. At the expiration of the lease, the second respondents refused to sell the land back to the appellants. As the appellants had no contractual relationship with the second respondents, they lacked standing in contract to enforce any claim against the second respondents.

Chief Justice Mason and Justice Dawson reasoned that '[c]ontract scarcely seems to give sufficient effect to what the parties had in mind'; instead '[a] trust relationship is a more accurate and appropriate reflection of the parties' intention'.<sup>96</sup> Their Honours expressed their concurrence with the remarks of Fullagar J some 30 years earlier in *Wilson v Darling Island Stevedoring & Lighterage Co Ltd*,<sup>97</sup> who had found it 'difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases'. This prompted their Honours to frame the relevant principle in the following terms:

If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred.<sup>98</sup>

The present was, according to Mason CJ and Dawson J, 'just such a case'.<sup>99</sup> The effect of the trust, accordingly, obliged the second respondents hold the land subject to such rights as were created in favour of the appellants by the original contract between the appellants and the first respondent. The outcome is abstract because it did not make the second respondents the trustees of the land itself, but rather the trustees of the promise contained in the original agreement.

<sup>94</sup> Some have, to this end, suggested that a supposed intention to create a trust in this context 'appears to be a particularly artificial construct' (Joseph Jaconelli, 'Privity: The Trust Exception Examined' [1998] *Conveyancer and Property Lawyer* 88, 93) and represents a 'fictional process' (Ian B Stewart, 'Why Place Trust in a Promise? Privity of Contract and Enforcement of Contracts by Third Party Beneficiaries' (1999) 73 *Australian Law Journal* 354, 361).

<sup>95</sup> (1988) 164 CLR 604.

<sup>96</sup> *Ibid* 618.

<sup>97</sup> (1956) 95 CLR 43, 67.

<sup>98</sup> *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 618–19.

<sup>99</sup> *Ibid* 619.

Importantly, their Honours emphasised that the trust in question was an express, not a constructive, trust.<sup>100</sup> Yet there seemed scant evidence before the Court of the parties' intentions, whether objective or subjective, that could have supported the inference of an intention to create a trust. In a sense, Mason CJ and Dawson J implicitly accepted this in their formulation of principle above, which is suggestive of an inquiry grounded in what the parties might have thought, *after the event*, as reflective of the structure of the dealing in question. It seems difficult to conclude that, had the parties been asked, at the time of the relevant transaction, whether they intended to create a trust, they would have answered unswervingly in the affirmative.

Their Honours' approach, underscoring their insistence on the trust being express in nature, nonetheless (indirectly) feeds into the Court's later focus on objective intention as the core determinant of an express trust. Indeed, over 20 years before *Byrnes v Kendle*, it ostensibly took objectivity to a new level, in the sense that their Honours inferred an intention that the parties *may have shared, had they turned their minds to the question, with the benefit of hindsight*. On this reasoning, there may be little distinction between inferring and imputing intention, even though courts have traditionally eschewed the latter in trusts law.<sup>101</sup>

Yet, no less than three months later, Deane J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*<sup>102</sup> was likewise willing, in very similar language, to countenance the relevant inference of intention in the trust of a contractual promise scenario. It is accordingly curious in that case that Mason CJ, on this occasion joined by Wilson J, saw it as 'incongruous that we should be compelled to import the mechanism of a trust to ensure that a third party can enforce the contract if the intention of the contracting parties is that he should benefit from performance of the contract'.<sup>103</sup> Their Honours accordingly proposed an exception to the doctrine of privity on the facts before them,<sup>104</sup> though it is arguable that the language in which the aforesaid remarks is couched could have been transmissible to the *Bahr v Nicolay [No 2]* scenario.

The approach of Mason CJ and Dawson J in *Bahr v Nicolay [No 2]* has prompted one commentator to suggest that there is now no necessity to intend to create a

<sup>100</sup> *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 619.

<sup>101</sup> For instance, in the case law on the so-called 'common intention constructive trust', judges have explicitly refused to countenance imputing an intention: see, eg, *Allen v Snyder* [1977] 2 NSWLR 685, 690–4 (Glass JA), 704 (Mahoney JA).

<sup>102</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 147 ('the requisite intention should be inferred if it clearly appears that...the third party should himself be entitled to insist upon performance of the promise and receipt of the benefit and if trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention').

<sup>103</sup> *Ibid* 121.

<sup>104</sup> Which involved a claim by the respondent sub-contractor to secure the benefit of insurance under an insurance contract between the appellant insurer and the owner of the relevant facility, which was expressed to cover sub-contractors.

trust, but merely an intention simply to benefit another pursuant to which the court decides whether the trust is the appropriate legal mechanism to execute this intention to benefit.<sup>105</sup> Not only does this approach strain the notion of an express trust, it runs contrary to the usual intentions of contracting parties that the promisor will, in exchange for the consideration furnished by the promisee, do the act or thing intended in favour of the third party.<sup>106</sup> This may, inter alia, explain why the other judges in *Bahr v Nicolay [No 2]* were unwilling to infer an intention to create a trust, but reached the same ultimate outcome on the facts through the vehicle of the (imposed) constructive trust.<sup>107</sup>

Be that as it may, a general dearth of High Court remarks on inferring an intention to create a trust in the subsequent 25 years or so has hardly served to deny the potential applicability of the approach to ‘inference’ espoused by Mason CJ, Dawson and Deane JJ. Notwithstanding potential misgivings, it remains within Australian law’s arsenal under the guise of an express trust.

## V THE DIRECTION OF THE PRESUMED RESULTING TRUST

Resulting trusts are traditionally subdivided, especially by English judges, between ‘presumed resulting trusts’ and ‘automatic resulting trusts’.<sup>108</sup> The latter operate, by implication of law, to fill a gap in beneficial ownership where the settlor fails to dispose of the entire beneficial interest in the relevant property. For instance, where an express trust that fails for lack of certainty of subject matter or object, the intended property of the trust is held by the intended trustee on automatic resulting trust for the settlor.

The following discussion, however, targets the so-called ‘presumed resulting trust’. There are several reasons for this. First, of the five decisions of the High Court of Australia within the last 30 years that have directly addressed the resulting trust,<sup>109</sup> the focus has been squarely on the presumed resulting trust. Second, there is no High Court authority, even going back to the inception of the Court, that adopts the ‘automatic resulting trust’ terminology (although the broader concept is hardly

<sup>105</sup> David Wright, ‘Trusts Involving Enforceable Promises’ (1996) 70 *Australian Law Journal* 911, 917 and 919.

<sup>106</sup> Ian B Stewart, ‘Why Place Trust in a Promise? Privity of Contract and Enforcement of Contracts by Third Party Beneficiaries’ (1999) 73 *Australian Law Journal* 354, 361.

<sup>107</sup> *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 638 (Wilson and Toohey JJ), 654 (Brennan J).

<sup>108</sup> See, eg, *White v Vandervell Trustees Ltd (No 2)* [1974] 1 Ch 269, 289 (Megarry J).

<sup>109</sup> Namely, in chronological order, *Calverley v Green* (1984) 155 CLR 242; *Muschinski v Dodds* (1985) 160 CLR 583 (which is mentioned only in passing because its main focus was on the remedial constructive trust); *Delehunt v Carmody* (1986) 161 CLR 464 (which contains relatively little by way of principle beyond the judgments in *Calverley v Green*, and so does not require further analysis for this purpose); *Nelson v Nelson* (1995) 184 CLR 538; *Cummins* (2006) 227 CLR 278.

foreign to (older) High Court authority).<sup>110</sup> Third, the assumption that an ostensible gap in beneficial ownership must necessarily be filled, whether or not through the vehicle of the resulting trust, was challenged by the High Court in *CPT*, noted earlier, in its rejection of the ‘dogma’ that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else.<sup>111</sup> Fourth, it is the presumed resulting trust – in particular, the presumption of resulting trust underscoring it – more so than the scenarios that have traditionally triggered the automatic resulting trust, that have been challenged in the case law, including by some Australian High Court judges, as noted below.<sup>112</sup>

Within the 30 year time frame targeted in this paper, the core principles pertaining to the presumed resulting trust, which ostensibly remain extant in Australian law, were catalogued by the High Court in the leading case of *Calverley v Green*.<sup>113</sup> The following remarks of Gibbs CJ encapsulate these principles:

Where a person purchases property in the name of another, or in the name of himself and another jointly, the question whether the other person, who provided none of the purchase money, acquires a beneficial interest in the property depends on the intention of the purchaser. However, in such a case, unless there is such a relationship between the purchaser and the other person as gives rise to a presumption of advancement, ie, a presumption that the purchaser intended to give the other a beneficial interest, it is presumed that the purchaser did not intend the other person to take beneficially. In the absence of evidence to rebut that presumption, there arises a resulting trust in favour of the purchaser. Similarly, if the purchase money is provided by two or more persons jointly, and the property is put into the name of one only, there is, in the absence of any such relationship, presumed to be a resulting trust in favour of the other or others. For the presumption to apply the money must have been provided by the purchaser in his character as such – not, eg, as a loan. Consistently with these principles it has been held that if two persons have contributed the purchase money in unequal shares, and the property is purchased in their joint names, there is, again in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase money.<sup>114</sup>

<sup>110</sup> See, eg, *Black v S Freedman & Co* (1910) 12 CLR 105; *Duncan v Cathels* (1956) 98 CLR 625.

<sup>111</sup> *CPT* (2005) 224 CLR 98, 112 [25].

<sup>112</sup> This is not to say that the automatic resulting trust is, by its nature, entirely devoid of any aspect of presumption: see Charles E F Rickett, ‘The Classification of Trusts’ (1999) 18 *New Zealand Universities Law Review* 305 at 316 (who suggests that it may be more accurate to simply replace the phrase ‘resulting trust’ with the phrase ‘presumed trust’).

<sup>113</sup> (1984) 155 CLR 242.

<sup>114</sup> *Ibid*, 246–7. See also 255–6, 258 (Mason and Brennan JJ), 266–7 (Deane J) (citations omitted); *Delehunt v Carmody* (1986) 161 CLR 464, 472–3 (Gibbs CJ). See also 473 (Wilson J), 473 (Brennan), 473 (Deane J), 473 (Dawson J).



Several observations necessarily stem from his Honour's remarks. First, it is evident that the (presumed) resulting trust – whether stemming from property voluntarily transferred to another (the 'voluntary transfer scenario') or purchase money supplied for the purchase in the (joint) name of another (the 'purchase money scenario') – is grounded in a presumed intention that the law attributes to the 'settlor'.

Second, presumed intention must give way to evidence of actual intention and so it is said that the presumption of resulting trust can be rebutted by evidence of intention inconsistent with it. For example, this may be evidence of an intention that legal ownership is to align with equitable ownership, as was found in *Muschinski v Dodds*.<sup>115</sup> This necessarily raises the question of what evidence should be admissible for this purpose. Justices Mason and Brennan in *Calverley v Green*, citing from earlier High Court authority,<sup>116</sup> addressed the point as follows:

The evidentiary material from which the court might have drawn an inference as to the intention of the parties included their acts and declarations before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction. Evidence of those acts and declarations were admissible either for or against the party who did the act or made the declaration, but any subsequent declarations would have been admissible only as admissions against interest<sup>117</sup>

Third, stemming from the foregoing is the need to draw a temporal line when it comes to admissible evidence, although the High Court has not been explicit as to the specific reason for adopting this restriction. It may be that, as the resulting trust is presumed to arise as a result of a particular type of transaction, to allow post-transaction conduct to impact upon the beneficial interests under that trust would undermine the certainty of beneficial interest at the time of its creation. If so, the resulting trust sets in stone the relevant beneficial interests as at (or around) the date of the transaction.

Fourth, and flowing from the above, the ostensible need to draw a temporal line may inter alia dictate that financial contributions post-purchase are not probative of the relevant beneficial interests under the resulting trust. Indeed, in *Calverley v Green* Mason and Brennan JJ explicitly rejected the proposition that contributions to the repayment of a mortgage over the relevant property could be taken into account in determining beneficial interests under the trust. Their Honours reasoned, to this end, that '[t]he purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed'.<sup>118</sup> This required Mason and Brennan JJ to distinguish the Court's decision, only three years earlier (and barely outside the 30 year time

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<sup>115</sup> (1985) 160 CLR 583.

<sup>116</sup> Namely *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 365.

<sup>117</sup> *Calverley v Green* (1984) 155 CLR 242, 262 (citations omitted). See also 269 (Deane J).

<sup>118</sup> *Ibid* 257.



frame), in *Bloch v Bloch*,<sup>119</sup> where every member of the Court was willing to count mortgage contributions for the purposes of determining beneficial interests under a (presumed) resulting trust, reasoning that the parties' objective was to purchase what would be ultimately unencumbered title.<sup>120</sup> Yet this begs the question, in any case, of how many contributors to property funded by a mortgage do *not* intend to ultimately own the property outright.

Fifth, Gibbs CJ in the seminal quote extracted above noted that the presumption of resulting trust does not operate in scenarios where the 'counter-presumption'<sup>121</sup> of 'advancement' arises on the facts. Hence, the recognition of one presumption (that of resulting trust) must be counterbalanced by another presumption (of advancement) in circumstances where the law would naturally presume an intention to gift. This in turn requires the law to distinguish relationships in which advancement is presumed from those where it is not, and a resulting trust is instead presumed. This has not always proven straightforward, and certainly there seems no entirely definitive legal foundation upon which such a distinction can confidently be made.<sup>122</sup> For instance, against a backdrop whereby the law had long accepted that a transfer from husband to wife operated by way of advancement,<sup>123</sup> in *Calverley v Green* Gibbs CJ envisaged a presumption of advancement as between a man and his de facto spouse,<sup>124</sup> whereas Mason, Brennan and Deane JJ did not.<sup>125</sup> And it was not until 1995, in *Nelson v Nelson*,<sup>126</sup> that the High Court extended the presumption of advancement as between parent (of either gender) and child; previously it was confined, in this regard, to relationships between father and child. Moreover, by recognising another presumption in this context the law must necessarily supply rules as to admissibility of evidence directed to its rebuttal. Parallel challenges accordingly arise in this context as per the admissibility of evidence to rebut the presumption of the resulting trust.

Each of these issues stems, at least partly, from the law's adoption of a presumption. The law could undoubtedly be simplified were it to eschew presumptions here and instead proceed on the basis of legal title-holding to property. In any case, the notion that either of the aforesaid presumptions necessarily reflects the likely intention of parties to property dealings may well be queried. Most in society would hardly appreciate, for instance, that placing title in the name of another may reserve an equitable interest that essentially prevails over legal title. Informed by considerations

<sup>119</sup> (1981) 180 CLR 390, 397–8 (Wilson J). See also 392 (Gibbs CJ), 392 (Murphy J), 392 (Aickin J), 402 (Brennan J).

<sup>120</sup> See *Calverley v Green* (1984) 155 CLR 242, 262–3.

<sup>121</sup> In the words of Mason and Brennan JJ in *ibid* 258.

<sup>122</sup> See, eg, *ibid* 247–50 (Gibbs CJ).

<sup>123</sup> *Wirth v Wirth* (1956) 98 CLR 228, 232 (Dixon CJ); *Hepworth v Hepworth* (1963) 110 CLR 309, 318 (Windeyer J).

<sup>124</sup> *Calverley v Green* (1984) 155 CLR 242, 250–1.

<sup>125</sup> *Ibid* 259–60 (Mason and Brennan JJ), 268–9 (Deane J).

<sup>126</sup> (1995) 184 CLR 538, 548 (Deane and Gummow JJ), 575–6 (Dawson J), 583–6 (Toohey J), 601–2 (McHugh J).

of this kind, Murphy J in *Calverley v Green*,<sup>127</sup> in a typically liberal judgment, advocated the discarding of both presumptions as ‘inappropriate to our times’ and ‘opposed to a rational evaluation of property cases arising out of personal relationships’. In the absence of those presumptions, said his Honour, the legal title should reflect the interests of the parties ‘unless there are circumstances (not those false presumptions) which displace it in equity’.<sup>128</sup>

Even Deane J, a judge less liberal than Murphy J, in briefly cataloguing the historical background to the presumptions, saw their worth even in earlier times as ‘at best debatable’, before adding that in present times ‘their propriety is open to serious doubt’.<sup>129</sup> His Honour was, however, unwilling to take the step for which Murphy J contended, seeing the presumptions as ‘too well entrenched ... to be simply discarded by judicial decision’.<sup>130</sup> His Honour’s preference for the issue to be addressed by statute has, at least in the de facto relationship scenarios presented in cases such as *Calverley v Green* and *Muschinski v Dodds*, come to fruition via a statutory jurisdiction to alter property interests upon the breakdown of those relationships,<sup>131</sup> mirroring an existing jurisdiction as between spouses under the *Family Law Act 1975* (Cth).<sup>132</sup>

While statute has largely obviated the need to rely on the presumption of resulting trust or the presumption of advancement in allocating property interests upon the breakdown of spousal and de facto relationships, there remain scenarios outside this statutory domain where the presumptions retain operation. For instance, the presumptions may be probative in allocating property interests in relationships outside the legislation, or in dealing with events not governed by the legislation, such as in the context of succession, concerning matters of illegality, to confer priority (whether or not for the purposes of insolvency), or for standing to sue or to lodge a caveat. Yet it should not be assumed that Australian law has been uniformly welcoming to the full implications of the presumptions in these contexts, at least if the High Court’s two subsequent decisions in *Nelson v Nelson*<sup>133</sup> and *Trustees of the Property of Cummins v Cummins*<sup>134</sup> provide any guide.

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<sup>127</sup> (1984) 155 CLR 242, 264.

<sup>128</sup> Ibid 265.

<sup>129</sup> Ibid 266.

<sup>130</sup> Ibid.

<sup>131</sup> *Domestic Relationship Act 1994* (ACT) s 15; *Property (Relationships) Act 1984* (NSW) s 20; *De Facto Relationships Act 1991* (NT) s 18; *Property Law Act 1974* (Qld) s 286; *Domestic Partners Property Act 1996* (SA) s 9; *Relationships Act 2003* (Tas) s 40; *Relationships Act 2008* (Vic) s 45; *Family Court Act 1997* (WA) s 205ZG. Since 1 March 2009 this power has largely been brought within the Commonwealth Act as a result of a referral of powers (other than by Western Australia) vis-a-vis property allocation in de facto relationships: *Family Law Act 1975* (Cth) s 90SM (pursuant to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)).

<sup>132</sup> *Family Law Act 1975* (Cth) s 79.

<sup>133</sup> (1995) 184 CLR 538.

<sup>134</sup> (2006) 227 CLR 278.

In the former of these cases, decided in 1995, the opportunity to consider the interaction of the presumptions with the principles of (statutory) illegality presented itself. Reflecting the classic statement of principle that '[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act',<sup>135</sup> the Court accepted the general rule that a court may assist a party to a transfer of property for an illegal purpose to recover that property only if he or she can establish legal or equitable title without the need to adduce evidence as to his or her own illegality. So far as the presumptions were concerned, this 'rule' suggests that a party cannot rely upon evidence of his or her own illegality to rebut either presumption. If money or property has been transferred for an illegal purpose in circumstances giving rise to a presumption of advancement, it follows that the transferor cannot rebut the presumption as this would involve leading evidence of the illegality. A claim grounded in the presumption of resulting trust, on the other hand, need not disclose an illegality as the law presumes that a retention of an (equitable) interest in the relevant property.

In this context the question of admissibility is not merely one subject to temporal constraints. It is one that, unless mollified, may deny the admissibility of relevant evidence of (contrary) intention entirely. In *Nelson v Nelson* a mother provided funds for the purchase of a house, the title to which was put into the names of her son and daughter. This transaction was designed to enable the mother to access subsidised finance under a statutory scheme on the purchase of a residence for herself. The mother, (falsely) declaring that she had no interest in a house other than the one for which the subsidy was sought, obtained that finance. On the later sale of the first house, the mother claimed the proceeds, which the son conceded, but the daughter withstood on the basis that the original purchase moneys were provided by way of advancement. As the Court accepted that the mother-child relationship gave rise to the presumption of advancement, the issue was whether the mother should be precluded from adducing evidence rebutting that presumption on the basis that this evidence disclosed an illegality.

That each member of the Court allowed the mother to adduce evidence surrounding the original transaction, even though it was tainted by illegality and in the face of the presumption of advancement, suggests an approach that is hardly inflexible when it comes to that presumption (or to the presumptions generally). It is true that their Honours specifically targeted statutory illegality in this context and that there was no unanimity as to the appropriate approach to ultimately addressing the mother's illegality. But a unanimous desire to ensure that the mother was not deprived of an equitable interest in property, which the evidence supported, led their Honours to downplay the strictness with which the presumptions, interacting with the principles of illegality, should be applied.

In turn this can be interpreted as a potential dissatisfaction with the presumptions, or at least with their mechanical application independent of the justice of the instant case. Only McHugh J, however, was willing to voice that concern explicitly. After noting that the presumption of advancement derives its force from the existence of

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<sup>135</sup> *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121 (Lord Mansfield).

the presumption of resulting trust, his Honour opined that ‘it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee’.<sup>136</sup> In line with remarks of Murphy J in *Calverley v Green*, noted earlier, he then warned that ‘[i]f the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them’.<sup>137</sup>

Though it may be accepted that *Nelson v Nelson* cannot stand as authority denying the applicability of the presumptions in Australian law – indeed, the Court proceeded on the assumption that the presumption of advancement applied as between mother and daughter – nor can it stand as an uncritical and unwavering endorsement of their application in every instance. If this is a trend to be discerned, it is one that derives support from the Court’s decision, some eleven years later, in *Cummins*.<sup>138</sup>

The case involved, inter alia, a 1987 transfer, by a husband to wife, of his legal and beneficial interest as joint tenant in the matrimonial home. The evidence revealed that the husband had, when the home was originally purchased many years earlier, contributed approximately one-quarter of the purchase price and the wife the remainder. The husband became bankrupt in 2000. Before the High Court (and also at first instance) his trustees in bankruptcy succeeded in establishing that the 1987 transfer was void because, in the language of s 121(1)(b) of the *Bankruptcy Act 1966* (Cth), ‘the [husband’s] main purpose in making the transfer was ... to prevent the transferred property from becoming divisible among the [husband’s] creditors’. The question then centred on whether the trustees in bankruptcy could recover the husband’s (former) one-half share in law, or were confined to his alleged share in equity, under a resulting trust, commensurate with his (lesser) original contribution to the purchase price.

At first instance Sackville J accepted, as a starting point, ‘the equitable presumption which arises where unequal contributions are made to the acquisition of an asset by parties to a marriage (or other relationship)’,<sup>139</sup> namely the presumption of resulting trust. However, according to his Honour the presumption was rebutted in the circumstances by evidence that the parties’ common intention, at the time of purchasing the home, was that they should hold as joint beneficial owners. In this sense, the reasoning in question follows nothing beyond an orthodox approach.

Though reversed on appeal,<sup>140</sup> the High Court reinstated Sackville J’s orders.<sup>141</sup> But their Honours’ approach in reaching this outcome, at least so far as the operation of the presumption of resulting trust is concerned, was more veiled. Rather than

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<sup>136</sup> *Nelson v Nelson* (1995) 184 CLR 538, 602.

<sup>137</sup> *Ibid.*

<sup>138</sup> (2006) 227 CLR 278.

<sup>139</sup> *Prentice v Cummins* (2003) 134 FCR 449, 463 [53].

<sup>140</sup> *Cummins v Trustees of the Property of Cummins* [2004] FCAFC 191 (30 July 2004).

<sup>141</sup> *Cummins* (2006) 227 CLR 278, 304 [76].

approach the question by reference to an original presumption, and then evidence of intention capable of ousting that presumption, the Court appeared to go directly to evidence of inferred intention. What drove this ostensible short-circuiting of principle, it appears, was that, unlike a case such as *Calverley v Green*, the facts in *Cummins* involved a longstanding ‘traditional matrimonial relationship’.<sup>142</sup> In such a relationship, their Honours accepted the reasoning espoused by the leading American trusts work, which in two discrete extracts adopted by the Court reads as follows:

Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them.

It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.<sup>143</sup>

The above, said the Court, ‘applies with added force in the present case where the title was taken in the joint names of the spouses’.<sup>144</sup> If so, it appears that, notwithstanding manifold broad statements of legal principle in the case law (including in the High Court) directed to circumstances in which the presumption of resulting trust is triggered, there may be less room for the resulting trust to operate vis-a-vis property in a marriage relationship. It almost seems, at least in the insolvency context of *Cummins*, that any supposed resulting trust could not survive against a counter-presumption of intention arising as a result of the purchase of property as a matrimonial home. The ambit of the resulting trust is thus correspondingly reduced. Taken together with High Court judicial remarks, catalogued earlier, which can be interpreted as challenging the presumption’s validity or at least scope for operation, subtle moves appear afoot against the presumption of resulting trust (and with this, the presumption of advancement).

## VI CONCLUSION

Even without engaging in a review of the most frequent contributor to High Court trusts jurisprudence in the last 30 years – the constructive trust – there stems from the trusts case law sufficient indication that trusts law is capable of evolution within the space of a generation.

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<sup>142</sup> Ibid 302 [71].

<sup>143</sup> Austin W Scott and William F Fratcher, *The Law of Trusts* (4th ed, Aspen Law & Business, New York, 1989), vol 5, §§443 (citations omitted), 454.

<sup>144</sup> *Cummins* (2006) 227 CLR 278, 303 [72].



The categories of fixed and discretionary trusts can no longer be accurately understood as watertight. The law of trusts, in this regard, is more nuanced, especially when measured against concepts found in revenue law statutes. There is also evident a more nuanced, and contextual, approach to trustee duties, albeit concurrent with a reinforcement of certain core trustee obligations that transcend context.

So far as the express trust is concerned, the last 30 years has witnessed, and culminated, in a focus on intention that is objectively determined. Trusts law has in this vein followed contract law, but has in other instances, chiefly where intention is sought to be inferred, been utilised as a vehicle to overcome contractual constraints. Yet in this latter scenario too, questions of subjective intention have not infrequently been put to one side, mainly to justify a finding of trusteeship rather than to deny it.

And in the context of resulting trusts, while the High Court has revealed no explicit inclination (with the exception of *Murphy J*) to judicially discard the presumption of resulting trust (and the attendant presumption of advancement), nor has it revealed a willingness to uncritically endorse and apply the presumptions in every instance.

Overall, what the foregoing review suggests is that trust principles should not be perceived as being set in stone. With the exception of its development of the remedial constructive trust,<sup>145</sup> which fell outside the scope of this paper, while the High Court in the past 30 years has on the whole not shown itself willing to pursue revolutionary change in trusts law, it has shown itself willing, by way of incremental steps, to reshape certain of its parameters. So far as the evolution of trusts law is concerned, this willingness may be welcomed, especially in view of the High Court's inclination, noted at the outset of the paper, to reserve the reshaping of legal doctrine to itself. The inherent historical fluidity of equity would, it may be surmised, expect no less.

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<sup>145</sup> Through the seminal case of *Baumgartner v Baumgartner* (1987) 164 CLR 137.



*Sue Milne\**

## THE SECOND OR SUBSEQUENT CRIMINAL APPEAL, THE PREROGATIVE OF MERCY AND THE JUDICIAL INQUIRY: THE CONTINUING ADVANCE OF POST-CONVICTION REVIEW

### ABSTRACT

When all rights of judicial appeal are exhausted, post-appeal review of a criminal conviction is commonly removed into the executive sphere by way of the prerogative of mercy, or judicial inquiry. As a particular class of administrative decision, these forms of post-conviction review are substantially immune from judicial review, and notably with respect to the mercy prerogative, invoke discretionary powers and lack transparency. In order to provide a public and more transparent approach to post-conviction review, the South Australian Parliament has created a judicial pathway for criminal review, post-conviction. The *Statutes Amendment (Appeals) Act 2013* (SA) is the first enactment in Australia to create a second or subsequent right of criminal appeal where an appeal court is satisfied that there is fresh and compelling evidence which should, in the interests of justice, be considered on an appeal. Appeals may be allowed if the court considers there was a substantial miscarriage of justice. This paper examines the likely efficacy of these reforms and argues that the creation of a right to a second or subsequent appeal provides a public and pragmatic solution, by way of a judicial approach to revisiting a conviction, outside the executive or political sphere. This ultimately provides a simpler, direct and more transparent process than the mercy prerogative and judicial inquiry.

### I INTRODUCTION

The review of a criminal conviction post the exercise of the usual single right of appeal in Australia is an administrative act, where the executive considers a petition for the prerogative of mercy or initiates a judicial inquiry, and is a topic of much interest today. Grounds for review of a conviction usually concern evidence raising doubt as to guilt upon the consideration of material not available at trial or on appeal. Yet the discretionary nature of the mercy prerogative, absent

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statutory direction, means that the rationale for the application of mercy is not necessarily limited to evidential matters and is circumscribed only by convention. Uniquely, post-conviction review, which is available only where all rights of appeal have been exhausted, juxtaposes the finality of judicial appeals with the engagement of the executive, or the judiciary in an administrative role, with wider considerations unconstrained by rules of court procedure, in order to ensure that no miscarriage of justice has been done. As a ‘constitutional safeguard against mistakes’,<sup>1</sup> the mercy prerogative in particular, has for centuries occupied a distinctive role in the administration of criminal justice.

In South Australia, legislation has recently been enacted to provide a purely judicial approach to post-conviction review through application to the courts for a second or subsequent appeal upon consideration of fresh and compelling evidence.<sup>2</sup> The reforms seek to ‘de-politicise’ post-conviction review by removing the process into a public forum, the courts, where, as was colourfully argued by the Attorney-General when introducing the associated Bill into Parliament, the convicted person may benefit from ‘that marvellous disinfectant of sunshine just covering the whole circumstance’.<sup>3</sup>

Inherent in the Attorney-General’s claim is an invocation of the rule of law as it manifests in the courts, to principles of fairness, impartiality and open justice. In contrast, the operation of the prerogative of mercy, as an executive power removed from public oversight, is open to criticism for lack of transparency and accountability, and, not least, enjoys immunity from curial review.<sup>4</sup> The judicial inquiry similarly holds a unique place in the administration of criminal justice which lends it some immunity from appeal or review, but is saved from accusations of a lack of transparency or accountability due the comparatively open nature of the inquiry process itself.<sup>5</sup>

<sup>1</sup> *Burt v Governor-General* [1992] 3 NZLR 672, 678, 681 (*‘Burt’*), cited with approval in *R v Home Secretary; Ex parte Bentley* [1994] QB 349, 365 (*‘Bentley’*).

<sup>2</sup> *Statutes Amendment (Appeals) Act 2013* (SA) received assent on 28 March 2013 and pt 2 & sch 1 commenced on 5 May 2013. The new amendments apply to appeals instituted after commencement of the Act, regardless of the date of the offence: *Statutes Amendment (Appeals) Act 2013* (SA) sch 1.

<sup>3</sup> South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4315 (John Rau, Attorney-General).

<sup>4</sup> Bibi Sangha and Robert Moles, ‘Mercy or Right? Post-Appeal Petitions in Australia’ (2012) 14 *Flinders Law Journal* 293; Bibi Sangha and Robert Moles, ‘Post-Appeal Review Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300; South Australia, *Parliamentary Debates*, Legislative Council, 10 November 2010, 1420 (Ann Bressington); ‘The present process [of the operation of the pardon] appears to work effectively but it is open to criticism as lacking transparency, accountability and independence. The criticisms of the present system were thoroughly ventilated before the [Legislative Review] Committee’: South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

<sup>5</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 7; *Crimes Act 1900* (ACT) pt 20. The report of the inquiry might however not necessarily be available for publication.

This paper seeks to examine the likely efficacy of the South Australian reforms in the context of the post-conviction review landscape in Australia. This also requires an assessment of the operation and effectiveness of both the prerogative of mercy, once considered ‘an integral element in the criminal justice system,’<sup>6</sup> and the judicial inquiry, as remedial mechanisms to correct possible miscarriages of justice where the appellate system has failed.

The present reforms follow the 2012 Report of the Legislative Council Review Committee on the Criminal Cases Review Commission Bill 2010 (SA),<sup>7</sup> and directly address the criminal appellate process and post-conviction review through the operation of the mercy prerogative in South Australia. The emergence of the Criminal Cases Review Commission (‘CCRC’) in the United Kingdom, as an independent public body established to investigate possible miscarriages of justice, is indicative of a move away from executive discretionary justice to greater public scrutiny in the administration of criminal justice.<sup>8</sup> Although the Committee did not recommend the creation of a similar body in Australia, the work of the CCRC testifies to the significance of the problem of miscarriages of justice more generally.

In Australia, the extent of the problem of possible miscarriages of justice which result in wrongful convictions is difficult to establish.<sup>9</sup> In debate on the passage of the reform Bill, it was argued that ‘South Australia is not Texas’ and that the significance of the problem in respect of ‘substantial miscarriage of justice’ cases,<sup>10</sup>

<sup>6</sup> *Burt* [1992] 3 NZLR 672, 678, 681; *Bentley* [1994] QB 349, 362–3.

<sup>7</sup> A Private Member’s Bill introduced into the Legislative Council by the Hon Ann Bressington on 10 November 2010. The Bill sought to establish a Criminal Cases Review Commission (‘CCRC’) modelled on the CCRC in the United Kingdom, as an independent body with powers to investigate claims of wrongful convictions, and to refer substantiated claims to the Full Court for appeal.

<sup>8</sup> The efficacy of the Commission is demonstrated by statistics of the work of the CCRC to date, with over 15 000 cases referred to the CCRC since its inception in 1997, with 543 referrals to the UK Court of Appeal, resulting in 353 quashed convictions and 147 convictions upheld. See CCRC, *About Us* <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

<sup>9</sup> A wrongful conviction is necessarily only established by a court in a successful appeal. See Juliette Langdon and Paul Wilson, ‘When Justice Fails: a Follow Up Examination of Serious Criminal Cases Since 1985’ (2005) 17 *Current Issues in Criminal Justice* 179.

<sup>10</sup> South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (John Rau, Attorney-General):

The Bill may not satisfy everybody. Some may claim that it goes too far, others that it does go not far enough. My response is simple. The Bill strikes a careful balance. South Australia is not Texas. This State is not awash with wrongful convictions and the falsely imprisoned. Equally no system of criminal justice is infallible and there needs to be some means for convicted defendants to bring fresh and compelling evidence that questions the safety of their original conviction before a court. The Bill is a fair and balanced measure to reconcile the conflicting interests in this area.

comparable with some jurisdictions,<sup>11</sup> is relatively limited. But such arguments should not deny the injustice done to those who are wrongfully convicted, or the significant legal obstacles to challenge a conviction, particularly if new evidence favourable to the convicted person comes to light after all judicial avenues for appeal have been exhausted.<sup>12</sup> Yet the rights and interests of victims of crime must also be considered in any reform of criminal appeals and review. Although this integral aspect of the administration of criminal justice is beyond the scope of this paper, it is worth noting that in drafting the South Australian reforms heed was taken of the balance required in advancing the rights of the convicted with the rights of the victims of crime.

The present reforms are also a legislative response to the controversial case of Henry Keogh, convicted and sentenced to life imprisonment for the murder of his fiancée.<sup>13</sup> Keogh's appeal to the High Court was refused,<sup>14</sup> which is unsurprising as the threshold considerations by which special leave to appeal might be granted<sup>15</sup> render criminal appeal applications difficult.<sup>16</sup> Furthermore, the High Court is not a court

<sup>11</sup> Since the 1980s post-conviction DNA testing in the United States has exposed a series of miscarriages of justice, with over 250 cases of wrongful convictions uncovered in the following two decades. See, eg, Simon A Cole, 'Forensic Science and Wrongful Convictions: from Exposer to Contributor to Corrector' (2012) 46 *New England Law Review* 711.

<sup>12</sup> Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17 *Current Issues in Criminal Justice* 203.

<sup>13</sup> South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013 (Vicki Chapman, Deputy Leader of the Opposition). Keogh was convicted on 23 August 1995 and sentenced to life imprisonment with a non-parole period of 25 years. His appeal against conviction was dismissed on 22 December 1995: *R v Keogh* [1995] SASC 5397 (22 December 1995). There have been a number of other applications to reopen the original appeal, the particulars are set out in the decision of *R v Keogh* [2014] SASCF 20 (11 March 2014). Notably, Keogh was granted leave for a second appeal in *R v Keogh [No 2]* (2014) 121 SASR 307. As this case was decided at the time of publication of this article, only brief reference is made to this decision. See below nn 19, 138.

<sup>14</sup> His application to the High Court for special leave to appeal was dismissed: Transcript of Proceedings, *Keogh v The Queen* [1997] HCATrans 313 (3 October 1997). *Davies v The King* (1937) 57 CLR 170, 172 (Latham CJ): 'The only power of the [High] court as a court of appeal is to consider and determine whether the judgment of the court appealed from was right upon the materials before that court.' *Ratten v The Queen* (1974) 131 CLR 510; *R v LK* (2010) 241 CLR 177.

<sup>15</sup> *Judiciary Act 1903* (Cth) s 35A.

<sup>16</sup> *Morris v The Queen* (1987) 163 CLR 454, 475–6 (Dawson J).

of criminal appeal<sup>17</sup> and is unable to consider fresh evidence.<sup>18</sup> After four petitions for mercy which sought to cast doubt upon the validity of expert forensic evidence presented at trial, Henry Keogh was granted leave for a second appeal under the new South Australian legislation, the appeal was subsequently allowed and his conviction quashed with an order for a retrial.<sup>19</sup>

The passage of the *Statutes Amendment (Appeals) Act 2013* (SA) with all-party support through the South Australian Parliament, is the first enactment in Australia to enshrine a second or subsequent right of criminal appeal where the court is satisfied that there is fresh and compelling evidence which should, in the interests of justice, be considered on an appeal.<sup>20</sup> The court has considerable discretion in granting the appeal with the onus upon the appellant to satisfy the court of the single ground of appeal, a finding that a substantial miscarriage of justice had occurred. This is a reversal of the usual criminal appeal where the onus lies upon the prosecution to establish that *no* substantial miscarriage of justice has occurred upon the founding of a ground of appeal. The Attorney-General considered this was necessary to prevent vexatious or untenable applications:

The new procedure in the Bill should not preclude or deter genuine applications from convicted defendants. There is a strong public interest in closure and finality of criminal cases. ... It is important to guard against the potential for misuse of any new model of vexatious applicants. The spectre of endless untenable efforts to reopen old convictions should be avoided. A robust threshold is necessary to deter or deny untenable applications.<sup>21</sup>

<sup>17</sup> *Liberato v The Queen* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson and Dawson JJ); *Warner v The Queen* (1995) 69 ALJR 557 (Brennan, Deane and Dawson JJ), where the High Court in refusing special leave held that as the Court was not a court of criminal appeal, special leave to appeal on the ground that a verdict was unsafe or unsatisfactory (on the evidence before the jury) was unlikely to succeed. The Court finished: '[t]his Court cannot and should not wish to undertake a general supervisory role of courts of criminal appeal on questions of fact.'

<sup>18</sup> With respect to appeals from state courts exercising state jurisdiction: *Mickelberg v The Queen* (1989) 167 CLR 259 ('*Mickelberg*'), and federal courts or other courts exercising federal jurisdiction: *Eastman v The Queen* (2000) 203 CLR 1.

<sup>19</sup> *R v Keogh* [2014] SASFC 20 (11 March 2014); *R v Keogh [No 2]* (2014) 121 SASR 307. The trial is to be listed in early 2016.

<sup>20</sup> Legislation in New South Wales and the Australian Capital Territory provides for post-conviction review by way of judicial inquiry through application to the executive or Supreme Court. Notably under s 79(1)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW), an application to the Supreme Court for an inquiry may be referred to the Court of Criminal Appeal, 'to be dealt with as an appeal under the *Criminal Appeal Act 1912*' (which effectively acts as a second or subsequent appeal). See Part V below.

<sup>21</sup> South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

Given that the judicial inquiry is not available in South Australia, the Keogh case demonstrates that post-appeal practice might be for a defendant to petition the executive for exercise of the mercy prerogative. The petition need have no obvious merit nor be limited in number, with the only statutory threshold being that all other avenues of appeal were exhausted.

## II POST-CONVICTION REVIEW: THE PREROGATIVE OF MERCY

As ‘powers accorded to the Crown by the common law’,<sup>22</sup> and capable of limitation by both common law and statute,<sup>23</sup> the prerogative powers are that ‘residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown.’<sup>24</sup> The common law prerogative powers were received upon settlement,<sup>25</sup> and are recognised today as referred from the Crown under the *Australia Act 1986* (Cth)<sup>26</sup> and by Letters Patent, to the Governors of the states. The Commonwealth prerogative powers are vested in the Governor-General by virtue of s 61 of the *Constitution*.<sup>27</sup> However, by convention, the exercise of these powers is done on the advice of the executive body politic in right of the Crown.<sup>28</sup>

The constitutional structure in Australia finds the criminal law within the ambit of the states and, to a lesser extent, the Commonwealth. The prerogative of mercy, as

<sup>22</sup> *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

<sup>23</sup> *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508, 575 (Lord Parmoor); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.

<sup>24</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 424.

<sup>25</sup> Under the *Jurisdiction in Liberties Act 1535*, 27 Hen 8, c 24, s 1 the prerogative power to pardon was considered delegable to the Governors of the British colonies.

<sup>26</sup> Section 7(2) of the *Australia Act 1986* (Cth) provides that ‘all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.’ See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 259–64; Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) chs 3, 7.

<sup>27</sup> *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 304 (Dixon J); *Williams v Commonwealth* (2012) 248 CLR 156, 185 (French CJ).

<sup>28</sup> *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342, 364–6 (Mason J); *Lange v Commonwealth* (1997) 189 CLR 520; Arthur Berriedale Keith, *Responsible Government in the Dominions* (Oxford University Press, 2<sup>nd</sup> ed, 1928) 107–8; George Winterton, *Parliament, the Executive and the Governor-General: a Constitutional Analysis* (Melbourne University Press, 1983).

an ancient right of the Crown to pardon, partially or fully,<sup>29</sup> those who have been convicted of a public offence, must be examined within this context.<sup>30</sup> Although no longer viewed as ‘an arbitrary monarchical right of grace and favour’,<sup>31</sup> the mercy prerogative has been described as the exemplar of a pure, common law discretionary power,<sup>32</sup> with statutory recognition in most jurisdictions in Australia.<sup>33</sup> While frequently aligned with ‘miscarriage of justice’ cases, the rationale of the discretion to administer a pardon, in reference to the instrument granted under the prerogative, remains elusive.

A full pardon serves to remove ‘all pains penalties and punishments’ arising from a conviction, but not the conviction itself.<sup>34</sup> This modern view developed from the Supreme Court of Tasmania decision in *R v Cosgrove*,<sup>35</sup> that the pardon ‘is in no sense equivalent to an acquittal’, operating merely to give new credit and capacity from the date of the pardon.<sup>36</sup> There is no common law right to have a conviction quashed, post-pardon. The commutation of the sentence is a partial,<sup>37</sup> or conditional

<sup>29</sup> A T H Smith, ‘The Prerogative of Mercy, the Power of Pardon and Criminal Justice’ [1983] *Public Law* 398.

<sup>30</sup> Section 61 of the *Constitution* has been found to confer on the Commonwealth, ‘all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution’: *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9.

<sup>31</sup> *Burt* [1992] 3 NZLR 672, 678, 681, cited with approval in *Bentley* [1994] QB 349, 365.

<sup>32</sup> *De Freitas v Benny* [1976] AC 239, 247 (Lord Diplock) (*‘De Freitas’*); *Von Einem v Griffin* (1998) 72 SASR 110, 130 (Lander J) (*‘Von Einem’*), who describes the power as an ‘unconfined and uncontrolled’ personal, discretionary power.

<sup>33</sup> *Crimes Act 1914* (Cth) ss 16–22A; *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–7; *Crimes Act 1958* (Vic) s 584; *Criminal Code Act 1899* (Qld) sch 1 (*‘Criminal Code (Qld)’*) s 672A; *Sentencing Act 1995* (WA) pt 19; *Criminal Code Act 1924* (Tas) sch 1 (*‘Criminal Code (Tas)’*) s 419; *Criminal Code Act* (NT) sch 1 (*‘Criminal Code (NT)’*) s 431; *Crimes (Sentence Administration) Act 2005* (ACT) pt 13.2. See generally David Caruso and Nicholas Crawford, ‘The Executive Institution of Mercy in Australia: The Case and Model for Reform’ (2014) 37 *University of New South Wales Law Journal* 312.

<sup>34</sup> *R v Foster* [1985] QB 115, 130, approving *R v Cosgrove* [1948] Tas SR 99. See *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 371 (Wilson J); *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350–1 (Heydon J).

<sup>35</sup> [1948] Tas SR 99; *R v Foster* [1985] QB 115.

<sup>36</sup> *R v Cosgrove* [1948] Tas SR 99, 105–6.

<sup>37</sup> See generally Peter Brett, ‘Conditional Pardons and the Commutation of Death Sentences’ (1957) 20 *Modern Law Review* 131.

pardon,<sup>38</sup> with the remission of sentence a part of, but not limited to, the pardon's canon, which operates to cancel or reduce the sentence.<sup>39</sup>

The most high profile miscarriage of justice case in Australia concerned the conviction of Lindy Chamberlain for the murder of her baby daughter, and her husband's conviction for being an accessory after the fact.<sup>40</sup> The defence argued that a dingo had taken the baby from a camp near Ayers Rock. A Royal Commission (another much rarer form of post-conviction review)<sup>41</sup> convened in 1986,<sup>42</sup> found that the evidence was insufficient to sustain a guilty verdict and that the jury should have been directed to acquit.<sup>43</sup> The lack of any formal avenue in which to quash the Chamberlains' convictions subsequent to the grant of a pardon led to the amendment of the *Criminal Code* (NT) to provide the Attorney-General with the discretion to refer a case to the Northern Territory Supreme Court to consider quashing a conviction and entering a verdict of acquittal.<sup>44</sup> This the Supreme Court did with

<sup>38</sup> In colonial Australia the conditional pardon frequently operated to commute the death penalty to a penal sentence. See David Plater and Sue Milne, "The Quality of Mercy is not Strained": The Norfolk Island Mutineers and the Exercise of the Death Penalty in Colonial Australia 1824–1860' [2012] *Australian and New Zealand Law and History E-Journal* 1 <[http://www.anzlhsejournal.auckland.ac.nz/pdfs\\_2012/Plater-Milne-Piracy-and-mercy.pdf](http://www.anzlhsejournal.auckland.ac.nz/pdfs_2012/Plater-Milne-Piracy-and-mercy.pdf)>.

<sup>39</sup> In *Re an Arbitration between the Standard Insurance Co Ltd and Macfarlan* [1940] VLR 74, 81–4, a statutory entitlement to remission was determined not to be granted under the prerogative. However it has been argued that the principles underlying such statutory entitlements as parole are founded upon the same basis as is the operation of the pardon. See *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 368 (Mason J); Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1.

<sup>40</sup> *Chamberlain v The Queen* (1983) 72 FLR 1; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

<sup>41</sup> A Royal Commission might constitute another form of post-conviction review but they are infrequent occurrences, for example the Stuart and Splatt Royal Commissions were only convened in South Australia after extensive media and political agitation: see South Australia, Royal Commission in Regard to Max Rupert Stuart, *Report* (1959); South Australia, Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt, *Report* (1984).

<sup>42</sup> Northern Territory, Royal Commission of Inquiry into Chamberlain Convictions, *Report of the Commissioner* (1987).

<sup>43</sup> It has been noted elsewhere that, 'Morling J described much of the evidence at the Royal Commission as new. However, it might be equally apt to describe much of the allegedly new evidence as similar to the evidence which was discounted at the trial or in the appeals': Gary Edmond, 'Azaria's Accessories: The Social (Legal-Scientific) Construction of the Chamberlains' Guilt and Innocence' (1998) 22 *Melbourne University Law Review* 396, 436. However, in the application to quash the convictions, the Court found that the Royal Commission had received 'fresh evidence' in its findings: *Re Conviction of Chamberlain* (1988) 93 FLR 239.

<sup>44</sup> *Criminal Code* (NT) s 433A.

respect to the Chamberlains' convictions, after itself considering all of the material available including the findings of the Royal Commission.<sup>45</sup>

The South Australian reforms similarly amend the administration of mercy to allow application to the courts to have a conviction quashed post-pardon.<sup>46</sup> The conviction will only be quashed as the court 'thinks fit' in that the court believes that the evidence does not support the conviction.<sup>47</sup> This replicates the statutory position in other states<sup>48</sup> and territories, and in part the position in the UK, where a 'free' pardon, granted by the Sovereign following a recommendation by the Home Secretary, relieves the convicted of the consequences of the conviction but does not amount to an acquittal.<sup>49</sup> A conviction might be quashed, but only by a court,<sup>50</sup> and only where certain conditions are met,<sup>51</sup> including that the convicted is found to be both morally and technically innocent of the crime.<sup>52</sup> It is of course more than a moot question to evaluate 'moral innocence', and to this extent the UK position might be considered far more stringent than it is in Australia.

#### *A The Pardon and the Statutory Referral and Opinion Powers*

By convention, the operation of the prerogative of mercy in most Australian jurisdictions is triggered by a petition to the Governor. The Governor may respond to the petition in a number of ways.<sup>53</sup> Acting on the advice of the Governor in Council, the Governor might exercise the prerogative of mercy so as to pardon the petitioner

<sup>45</sup> *Re Conviction of Chamberlain* (1988) 93 FLR 239, 255 (Kearney J), citing *Ratten v The Queen* (1974) 131 CLR 510, 520 (Barwick CJ).

<sup>46</sup> The amendment is made to s 369 of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA'), which statutorily enshrines the prerogative of mercy (see Part II(A) *The Pardon and the Statutory Referral and Opinion Powers* below). Interestingly, the only previous amendments to this provision concerned striking out a reference to sentence of death, with the *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA), and the replacement of the reference to the 'Chief Secretary' with the 'Attorney-General' in 1991 with passage of the *Director of Public Prosecutions Act 1991* (SA).

<sup>47</sup> CLCA s 369(2).

<sup>48</sup> See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 84(2).

<sup>49</sup> *Halsbury's Laws of England* (Butterworths, 4<sup>th</sup> ed reissue, 1996) vol 8(2), 485 [826]; *R v Peace* [1976] Crim LR 119.

<sup>50</sup> See G R Rubin, 'Posthumous Pardons, the Home Office and the Timothy Evans Case' (2007) *Criminal Law Review* 41, 47, who notes that the executive lost the power to eliminate a conviction following the abolition of the royal prerogative of justice as part of the 17<sup>th</sup> century constitutional settlement.

<sup>51</sup> *DPP (UK) v Shannon* [1975] AC 717.

<sup>52</sup> *Bentley* [1994] QB 349, 355–6 (Watkins LJ), citing statements of previous Home Secretaries on the policy of the free pardon.

<sup>53</sup> South Australia, *Parliamentary Debates*, Legislative Council, 6 March 2013, 3309–10 (Gail Gago). See, eg, the Victorian position described in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 282–6 [7]–[14] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

or commute the sentence. Alternatively, the Governor might advise the petitioner that it is not proposed to take any further action in respect of the petition. The other remaining forms for the operation of mercy are enlivened in South Australia by s 369 of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'). It is this statutory operation of the prerogative power which has triggered the present reforms.

As s 369 provides:

Division 5 — References on petitions for mercy

369 — References by Attorney-General

(1) Nothing in this Part affects the prerogative of mercy but the Attorney-General, on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information or to the sentence passed on a person so convicted, may, if he thinks fit, at any time, either —

- (a) refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
- (b) if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.

Section 369 of the *CLCA* and its analogues in other states and territories,<sup>54</sup> empower the Attorney-General, or other relevant Minister, to review a petition for mercy with respect to a conviction or sentence, referred from the Governor. This statutory power expressly does not abrogate the common law prerogative.<sup>55</sup> These provisions give the Attorney-General the discretion to consider the application for review of conviction or sentence, and either refer the matter to the Full Court for a new appeal hearing under the 'reference power' or refer any issue arising from the case to the judges of the Supreme Court for an opinion on the issue, under the 'opinion power'.<sup>56</sup>

The reference power by which 'the whole case' is referred to the appeal court, allows 'a full review of all the admissible evidence available in the case, whether new,

<sup>54</sup> *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–7; *Crimes Act 1958* (Vic) s 584; *Criminal Code* (Qld) s 672A, *Sentencing Act 1995* (WA) pt 19; *Criminal Code* (Tas) s 419; *Crimes (Sentence Administration) Act 2005* (ACT) pt 13.2; *Criminal Code* (NT) s 431.

<sup>55</sup> *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ).

<sup>56</sup> See Martin Hinton and David Caruso, 'The Institution of Mercy' in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519.

fresh or already considered in earlier proceedings'.<sup>57</sup> The court must apply the legal principles appropriate to criminal appeals.<sup>58</sup> In effect, as a 'second'<sup>59</sup> or 'further'<sup>60</sup> appeal, the issue for the appellate court is the same as that falling for resolution on appeal, 'namely whether there has been a miscarriage of justice.'<sup>61</sup>

In contrast, the opinion power enables the Attorney-General to request an opinion on any point arising from the case from judges of the Supreme Court, in order to determine further if the matter should be referred to the Court as an appeal. Non-judicial power, such as that exercised in an opinion reference, may validly be bestowed on the Supreme Court of a state provided it is incidental to the exercise of judicial power or is not incompatible or inconsistent with the exercise of federal judicial power.<sup>62</sup> The validity of the operation of the opinion power with respect to a state court determining a federal offence has a lower threshold test of incompatibility,<sup>63</sup> due to the separation of powers doctrine.<sup>64</sup> The constitutional validity of the opinion reference has yet to be tested for either a state,<sup>65</sup> or a federal matter.<sup>66</sup>

The discretion granted the Attorney-General to consider a petition is an administrative act, 'unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions.'<sup>67</sup> It enables consideration of wider issues in respect of a conviction, unavailable to a court,<sup>68</sup> possibly including public concern as to

<sup>57</sup> *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ) ('*Mallard*') in respect of the equivalent provision in s 140(1)(a) of the *Sentencing Act 1995* (WA), followed in *R v Moyle* (2007) 96 SASR 287. This construction is consistent with the approach of the majority in *Mickelberg* (1989) 167 CLR 259, 312 (Toohey and Gaudron JJ), and that adopted by Lord Diplock (Lords Scarman, Roskill, Brandon of Oakbrook and Templeman agreeing) in *R v Chard* [1984] AC 279 with respect to a similarly worded provision in the *Criminal Appeal Act 1968* (UK).

<sup>58</sup> *Mickelberg* (1986) 167 CLR 259, 312 (Toohey and Gaudron JJ).

<sup>59</sup> *Mallard* (2005) 224 CLR 125, 143 [48]–[49] (Kirby J).

<sup>60</sup> *Pepper v A-G (Qld) [No 2]* [2008] 2 Qd R 353, 360 [11] (Muir JA), 358 [1] (de Jersey CJ), 364 [34] (Fraser JA) ('*Pepper [No 2]*'), with respect to the equivalent provision in s 672A(a) of the *Criminal Code* (Qld).

<sup>61</sup> *Pepper [No 2]* [2008] 2 Qd R 353, 360 [12]; *R v Daley; Ex parte A-G (Qld)* [2005] QCA 162 (12 May 2005).

<sup>62</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51.

<sup>63</sup> *Fardon v A-G (Qld)* (2004) 223 CLR 575.

<sup>64</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>65</sup> *Re Ross* [2007] VSC 572 (20 December 2007).

<sup>66</sup> *Martens v Commonwealth* (2009) 174 FCR 114, 121 [25] (Logan J) ('*Martens*').

<sup>67</sup> *Mallard* (2005) 224 CLR 125, 129 [6]. In *Martens* (2009) 174 FCR 114, 128–9 [54] Logan J held that upon a petition for a reference under s 672A of the *Criminal Code* (Qld) (a provision analogous to s 369 of the *CLCA*), the Minister might take into account material that would not be admissible on a reference to the Court of Appeal, but was not obliged to take account of such material.

<sup>68</sup> *Martens* (2009) 174 FCR 114, 128 [53]–[54] (Logan J).

the propriety of a conviction.<sup>69</sup> There is merit in the provision of a wider discretion to consider a petition for mercy, which allows the decision-maker to consider the individual circumstances of a case. This approach finds some support in one common rationale for the administration of mercy, as a form of individuation of justice, whereby those who did not deserve punishment could be distinguished from those for whom punishment was justified.<sup>70</sup> However, in practice, given the nature of the consideration of a petition for pardon as a process removed from the public gaze, we can only surmise on the approach taken, which no doubt also attracts both policy and public interest considerations. Mercy as an exercise in forgiveness is a jurisprudential question beyond the scope of this paper, but appears counterintuitive to the ‘individuation of justice’ approach which seeks merit in a petition for a pardon.

The administration of the pardon appears to be commonly approached on the grounds of a ‘miscarriage of justice’, and adopts the judicial prism of the criminal appeal, albeit with regard to be had to material which would not be admissible as evidence in a court. In practice, this bears some similarity to the matters available for consideration in a Royal Commission or judicial inquiry.<sup>71</sup> But given the lack of investigative powers, if the information presented by the petitioner is incomplete, the Attorney-General might have limited material to consider, which could compromise the process significantly. Ultimately, where a pardon is not immediately forthcoming, if the case is referred to the court it must withstand the legal requirements of an appeal. Thus the role of the executive has been described as that of a ‘gatekeeper’,<sup>72</sup> ‘ensuring that the public interest in the administration of justice as furthered by the efficient allocation of judicial resources is not subverted by the referring of cases to the Court of Appeal which must inevitably fail.’<sup>73</sup>

### B *Prerogative of Mercy and Judicial Review*

In order to distinguish the public and transparent nature of the judicial appeal, it is necessary to briefly consider the amenability of the exercise of the mercy prerogative and the judicial inquiry, to judicial review. Although the prerogative powers are no longer immune from judicial review by virtue of their classification as prerogatives of the Crown,<sup>74</sup> the prerogative of mercy is still considered to concern subject

<sup>69</sup> *Mickelberg* (1989) 167 CLR 259, 272 (Mason CJ).

<sup>70</sup> See, eg. Daniel Kobil, ‘The Quality of Mercy Strained: Wrestling the Pardoning Power from the King’ (1991) 69 *Texas Law Review* 569; Carla Johnson, ‘Entitled to Clemency: Mercy in the Criminal Law’ (1991) 10 *Law and Philosophy* 109.

<sup>71</sup> See Part III below.

<sup>72</sup> *Martens* (2009) 174 FCR 114, 128 [53].

<sup>73</sup> *Ibid.*

<sup>74</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. See generally Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5<sup>th</sup> ed, 2013).

matter not amenable to review.<sup>75</sup> The statutory form of the mercy prerogative, such as s 369 of the *CLCA*, is also viewed as an executive power ‘not properly severed from but indeed referable to the [common law] prerogative of mercy.’<sup>76</sup> Additionally, the policy characterisation of the pardon as concerned with the ‘administration of criminal justice’, serves to substantially preserve its immunity from review,<sup>77</sup> despite statutory judicial review safeguards.<sup>78</sup>

However, in England, the 1993 decision in *R v Secretary of State for the Home Department; Ex parte Bentley*<sup>79</sup> signalled that the prerogative of mercy might be susceptible to judicial review. In *Bentley*, the sister of a man executed in controversial circumstances for the murder of a police officer successfully challenged the refusal of the Home Secretary to grant a posthumous pardon. The Divisional Court distinguished the full, unconditional pardon, which required that the convicted person was morally and technically innocent of the crime, as concerning criteria of a policy nature which were not justiciable.<sup>80</sup> The error of the Home Secretary lay instead in the failure to consider other forms of the pardon, an error of process considered reviewable. *Bentley* refined the test for reviewability of the mercy prerogative, by looking not to the nature and subject matter of the *power*, but to the nature and subject matter of the particular *decision* in question.

A series of Caribbean decisions involving the mercy prerogative demonstrates the continuing difficulties facing judicial review of this prerogative power, albeit in a different constitutional context and concerning capital sentences. The Privy Council in *De Freitas v Benny*,<sup>81</sup> a case on appeal from the Court of Appeal of Trinidad and Tobago, determined that the exercise of the prerogative of mercy was inherently extra-legal in nature and therefore not justiciable.<sup>82</sup> The Privy Council some 20 years later in *Reckley v Minister of Public Safety and Immigration [No 2]*,<sup>83</sup> on appeal from

<sup>75</sup> *Horwitz v Connor* (1908) 6 CLR 38. However, the disqualification of the exercise of the prerogative from review was made in the context of s 540 of the *Crimes Act 1890* (Vic), in denying a right of action in mandamus against the Governor in Council to consider a petitioner’s entitlement to remission of sentence in accordance with general regulations made under the Act. It did not directly concern the exercise of the prerogative of mercy. See also W M C Gummow, ‘Administrative Law and the Criminal Justice System’ (2008) 31 *Australian Bar Review* 137, 141.

<sup>76</sup> *Von Einem* (1998) 72 SASR 110, 114 (Prior J), 152 (Wicks J).

<sup>77</sup> *Ibid*; *Dohrmann v A-G (Vic)* [1995] 1 VR 274.

<sup>78</sup> In *Carter v A-G (Qld)* [2012] QSC 234 (29 August 2012) [11]–[12] Wilson J questioned the reviewability of the mercy prerogative on any grounds. *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; *Pepper [No 2]* [2008] 2 Qd R 353, where despite the statutory entitlement to reasons for refusal, the Court of Appeal found the reasons for refusal of a petition for pardon were protected from review.

<sup>79</sup> [1994] QB 349; *R (Shields) v Secretary of State for Justice* [2010] QB 150.

<sup>80</sup> *Bentley* [1994] QB 349, 363.

<sup>81</sup> [1976] AC 239.

<sup>82</sup> *Ibid* 247–8.

<sup>83</sup> [1996] 1 AC 527 (*Reckley [No 2]*).

the Bahamas with facts similar to *De Freitas*, followed its earlier view in *De Freitas* and determined that *Bentley* had no bearing on the case before them, reasoning, inexplicably, that it was not ‘directly concerned with the possibility of judicial review of the exercise of the prerogative of mercy in a death sentence case.’<sup>84</sup> But this is ‘precisely what *Bentley* was about.’<sup>85</sup>

Despite the anomaly of the *Reckley [No 2]* decision, the English courts have recognised that where an individual’s rights are affected by a decision involving the prerogative power,<sup>86</sup> the immunity of the decision-making process from curial review is lost,<sup>87</sup> but immunity is regained where ‘high policy’ considerations are present.<sup>88</sup>

In Australia the question of the justiciability of the exercise of the mercy prerogative has not developed as far as in England. A policy characterisation attached to the exercise of executive power, prima facie indicates that decisions made under its exercise are not amenable to judicial review. However, decisions determinative of individual rights and interests are much more likely to attract questions respecting natural justice and judicial review.<sup>89</sup> The mercy prerogative awkwardly straddles this distinction because by definition the process is triggered when such rights are exhausted and is extra-legal in effect. There is no place to talk of rights in a legal sense.<sup>90</sup> Although the statutory enactment of the power challenges these presump-

<sup>84</sup> Ibid 541. In *Lewis v A-G (Jamaica)* [2001] 2 AC 50, another Caribbean appeal, the Privy Council declined to follow both *De Freitas* and *Reckley [No 2]*, and considered that the prerogative should be exercised in consideration of a state’s international obligation requiring procedures which were fair and proper and amenable to judicial review.

<sup>85</sup> Christopher Gelber, ‘*Reckley (No 2)* and the Prerogative of Mercy: Act of Grace or Constitutional Safeguard?’ (1997) 60 *Modern Law Review* 572, 575.

<sup>86</sup> *R v Secretary of State for Foreign Affairs; Ex parte Everett* [1989] QB 811, 820 (Taylor LJ).

<sup>87</sup> *R (On the Application of B) v Secretary of State for the Home Department* [2002] EWHC 587 (Admin) (22 February 2002) [55] where the High Court held that a decision concerning remission of a prisoner’s sentence was a decision in exercise of the prerogative of mercy, but as it concerned matters upon which courts were well qualified to deal, it was a decision amenable to judicial review.

<sup>88</sup> Ibid [13]–[23] (Keene LJ).

<sup>89</sup> Sir Anthony Mason, ‘Administrative Review: The Experience of the First Twelve Years’ (1989) 18 *Federal Law Review* 122, 124, citing *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 198; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

<sup>90</sup> ‘Mercy is not the subject of legal rights. It begins where legal rights end’: *De Freitas* [1976] AC 239, 247 (Lord Diplock).

tions,<sup>91</sup> the focus is still very much upon the nature rather than the exercise of the power. In this sense, the judicial inquiry might be distinguished as questions of reviewability frequently look to the nature and subject matter of the decision in question, not of the power, much as decided in *Bentley*.

### III POST-CONVICTION REVIEW: THE JUDICIAL INQUIRY

Legislation in New South Wales<sup>92</sup> and the Australian Capital Territory<sup>93</sup> provides further opportunities for review of conviction by way of judicial inquiry, where evidence or material fact, or as further provided in New South Wales ‘any mitigating circumstances’,<sup>94</sup> raise a ‘doubt or question’ as to the convicted person’s guilt. This view may be formed where the material causes the person considering the matter unease or a sense of disquiet in allowing the conviction to stand.<sup>95</sup> The judicial inquiry provisions have their genesis in late 19<sup>th</sup> century legislative efforts,<sup>96</sup> in the absence of any common form appeal statutes,<sup>97</sup> to ‘authorise the Executive government to inform itself of possible miscarriages of justice resulting from deficiencies in the evidence adduced at trial.’<sup>98</sup> As remedial legislation designed to overcome injustices

<sup>91</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407 (Lord Scarman); *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170, 220–1 (Mason J); *Coutts v Commonwealth* (1985) 157 CLR 91, 100 (Wilson J); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277–8 (Bowen CJ).

<sup>92</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 ‘Review of convictions and sentences’.

<sup>93</sup> *Crimes Act 1900* (ACT) pt 20 ‘Inquiries into convictions’. The latest inquiry into the conviction of David Harold Eastman for the murder of Australian Federal Police Assistant Commissioner Colin Winchester was ordered on 3 September 2012, and hearings were completed on 15 May 2014, with the report of the Inquiry released on 22 May 2014, recommending that Eastman’s conviction be quashed. The Supreme Court quashed the conviction but have ordered a retrial. In *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014) a challenge by the Director of Public Prosecutions to the validity of this second inquiry into Eastman’s conviction was dismissed.

<sup>94</sup> Although the relevant provision (s 79(2) of the *Crimes (Appeal and Review) Act 2001* (NSW)) is open to interpretation: see, eg, *Sinkovich v A-G (NSW)* (2013) 85 NSWLR 783, 790–2 [27]–[32] (Basten JA) (*‘Sinkovich’*).

<sup>95</sup> *Varley v A-G (NSW)* (1987) 8 NSWLR 30, 48; *Application of Pedrana* (2000) 117 A Crim R 459, 463 [28]; *Application of Suey* [2001] NSWSC 543 (28 June 2001) [18].

<sup>96</sup> *Criminal Law Amendment Act 1883* (46 Vic No 17) ss 383–4. See the analysis of the history of these provisions by Hope JA in *Varley v A-G (NSW)* (1987) 8 NSWLR 30.

<sup>97</sup> See Part V below.

<sup>98</sup> *Eastman v DPP (ACT)* (2003) 214 CLR 318, 324 [8]–[9] (McHugh J); see particularly the historical analysis by Heydon J of the precursor legislation to s 475 of the *Crimes Act 1900* (ACT) in this decision.

that sometimes arise in the course of the administration of criminal justice,<sup>99</sup> the judicial inquiry seeks, like the South Australian reforms, to limit vexatious applications.<sup>100</sup>

The judicial inquiry can however be distinguished from the South Australian reforms. It is not an appeal, but is firstly an application for an inquiry triggered either by executive action,<sup>101</sup> or by application to the Supreme Court.<sup>102</sup> It does not involve judicial proceedings<sup>103</sup> and, as an administrative decision, is not subject to appeal.<sup>104</sup> In practice, it is not uncommon for the applicant to be unrepresented and successful applications are rare. In New South Wales, an alternative pathway provides that the executive or Supreme Court may consider the application and then refer the case to the Court of Criminal Appeal to be dealt with as an appeal, in the manner of the reference power, although such instances are again rare.<sup>105</sup> If an inquiry is ordered,<sup>106</sup> the inquiry is then conducted by a judicial officer in accordance with inquiry procedures,<sup>107</sup> subject to limitations in the exercise of an executive or administrative, rather than judicial power.<sup>108</sup> Paradoxically, the report of the inquiry has been considered to

<sup>99</sup> *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151, 154 [5], 155 [8].

<sup>100</sup> ‘It is expected that the inquiries power would be used only in exceptional cases ... It is not intended that the inquiries power be used as an alternative to the appeals process or as a means of endlessly challenging a conviction’: Explanatory Statement, Crimes Legislation Amendment Bill 2001 (ACT) 12. With respect to the New South Wales legislation, see, eg, *Application of Patsalis* [2012] NSWSC 1597 (20 November 2012).

<sup>101</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 2; *Crimes Act 1900* (ACT) s 423.

<sup>102</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 3; *Crimes Act 1900* (ACT) s 424.

<sup>103</sup> *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4); *Crimes Act 1900* (ACT) s 424(4); *Varley v A-G (NSW)* (1987) 8 NSWLR 30; *Patsalis v A-G (NSW)* (2013) 85 NSWLR 463 (‘*Patsalis*’).

<sup>104</sup> See *Crimes Act 1900* (ACT) s 425; *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4). The NSW legislation has been found to be ambiguous in the extent of the effect of the relevant provisions: *Patsalis* (2013) 85 NSWLR 463, 469–70 [23]–[24]; *Lodhi v A-G (NSW)* [2013] NSWCA 433 (18 December 2013) (‘*Lodhi*’).

<sup>105</sup> *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b), 79(1)(b). See *Re McDermott* (2013) 231 A Crim R 183 where the conviction was set aside and a verdict of acquittal entered.

<sup>106</sup> An inquiry is, however, not available for a matter concerning federal offences: *Application of El Hani* [2007] NSWSC 330 (12 April 2007) [23]; *Application of Toro-Martinez* [2008] NSWSC 34 (1 February 2008) [8].

<sup>107</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 4 and *Royal Commissions Act 1923* (NSW); *Crimes Act 1900* (ACT) pt 20 div 20.3 and *Inquiries Act 1991* (ACT).

<sup>108</sup> *Lodhi* [2013] NSWCA 433 (18 December 2013) [50]; *Patsalis* (2013) 85 NSWLR 463, 469 [22] (Basten JA), 465 [2] (Bathurst CJ), 465 [7] (Beazley P) found it unnecessary to decide the matter; *Sinkovich* (2013) 85 NSWLR 783, 787 [12] (Basten JA).

carry no legal consequences and so the outcome of the inquiry cannot be appealed.<sup>109</sup> The report of the inquiry is then presented to the originating body for further consideration with respect to the quashing of a conviction or review of sentence, with determinations on granting a pardon or remission of sentence remitted back to the executive. The limited remedies available upon completion of the judicial inquiry are not insignificant in an analysis of the utility of this process.

*A Judicial Inquiry and Judicial Review: The Eastman Cases*

The lack of a right of appeal from a decision on an application for an inquiry, and possibly from the inquiry itself,<sup>110</sup> does not deny a right of review of these decisions. Although the supervisory jurisdiction of the Supreme Court is not capable of reviewing the decision of a superior court judge acting in their judicial capacity, this immunity might not be available where that judge is acting in a non-judicial capacity, as with an application for inquiry.<sup>111</sup> Furthermore, it has been suggested that a decision on a judicial inquiry application might be susceptible to review for jurisdictional error.<sup>112</sup>

A complex series of decisions concerning the conviction of David Eastman for the murder of Australian Federal Police Assistant Commissioner Colin Winchester,<sup>113</sup>

<sup>109</sup> The 2014 inquiry into the conviction of David Eastman for the murder of Assistant Federal Police Commissioner, Colin Winchester, concluded that his conviction be quashed. An earlier inquiry was completed at the end of 2005, to determine whether Mr Eastman had been unfit to plead at any stage of his trial. The inquiry concluded that unfitness had not been established and a report furnished to the Attorney-General advised no further action be taken. Eastman sought to challenge the conclusions of the inquiry, but Lander J at first instance concluded that the report had no legal effect and carried no legal consequences: see *Eastman v Miles* (2007) 210 FLR 417; *Eastman v Australian Capital Territory* (2008) 227 FLR 279. There has been academic criticism of this decision: Aronson and Groves, above n 74, 795–7 [12.230].

<sup>110</sup> *Eastman v Miles* (2007) 210 FLR 417; *Eastman v Australian Capital Territory* (2008) 227 FLR 279.

<sup>111</sup> *Patsalis* (2013) 85 NSWLR 463, 473 [35].

<sup>112</sup> *Ibid.* *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014). In this matter the Supreme Court determined that the decision to order an inquiry into Eastman's conviction was infected by jurisdictional error, but that on account of matters that had been uncovered by the inquiry it was in the interests of justice that the inquiry be completed. See also the comments of French CJ in *Likiardopoulos v The Queen* (2012) 247 CLR 265, 268–70 [1]–[4], with respect to the immunity that the prosecutorial discretion exercised by the Director of Public Prosecutions may have from judicial review, absent jurisdictional error.

<sup>113</sup> After numerous applications for an inquiry into his conviction (subsequent to the inquiry completed in 2005), a judicial inquiry was ordered by the Australian Capital Territory Supreme Court on 3 September 2012 under s 424(1) of the *Crimes Act 1900* (ACT). The inquiry was in relation to matters including Eastman's fitness to plead or stand trial; the conduct of the prosecution; misconduct by investigating police; and the failure of the trial judge to oversee the interests of the applicant when he

has tested both the integrity of the judicial inquiry process and the amenability of the judicial inquiry process to review. The threshold test for judicial review requires a finding that the decision directly affects the legal rights of the applicant, or constitutes a step in a process which may result in legal consequences.<sup>114</sup> A decision to grant an inquiry gives rise to such rights,<sup>115</sup> but a decision not to grant an inquiry does not, for it fails to directly affect any right or entitlement of the applicant, as it is still open for the applicant to make further application.<sup>116</sup> A decision of the executive not to take any further action with respect to a petition for an inquiry after considering a report of a Supreme Court judge to whom the matter was initially referred, is also not amenable to judicial review, except insofar as the rules of procedural fairness require,<sup>117</sup> as the decision is done in the exercise of the prerogative.<sup>118</sup>

The 2014 Eastman judicial inquiry concluded that although there was evidence upon which a jury could convict, it would be dangerous to allow the guilty verdict to stand. Eastman had not received a fair trial, was denied a fair chance of acquittal and as a consequence a substantial miscarriage of justice had occurred. Given that Eastman had been in custody for almost 19 years and that a retrial was conceivably not feasible, the inquiry recommended that his conviction for murder be quashed.<sup>119</sup> The Supreme Court in an exercise of judicial power,<sup>120</sup> subsequently quashed his conviction and despite the recommendation of the inquiry, ordered a retrial.<sup>121</sup> In finding that a retrial was in the interests of justice, the Supreme Court reasoned that as an alternative verdict of acquittal was not available under the Act, a failure to order

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was not legally represented. On 29 May 2014 the report of the inquiry was delivered, recommending that Eastman's conviction be quashed and that a retrial was not recommended. The Supreme Court quashed the conviction and ordered a retrial, despite the recommendations of the inquiry.

<sup>114</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 161–2 (Brennan CJ, Gaudron and Gummow JJ).

<sup>115</sup> *Griffith University v Tang* (2005) 221 CLR 99; see also *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014).

<sup>116</sup> *Eastman v Besanko* (2010) 244 FLR 262. Special leave to appeal to the High Court was refused on 7 April 2011: *Eastman v Besanko* [2011] HCASL 79 (7 April 2011); *Patsalis* (2013) 85 NSWLR 463.

<sup>117</sup> *Eastman v A-G (ACT)* (2007) 210 FLR 440, 458 [78]. In doing so, his Honour distinguished *Von Einem* where the majority, insofar as they addressed the question of the reviewability of the Attorney-General's decision under s 369 of the *CLCA*, were addressing the decision itself, not the process.

<sup>118</sup> *Eastman v A-G (ACT)* (2007) 210 FLR 440. For New South Wales, see *Crimes (Appeal and Review) Act 2001* (NSW) s 82.

<sup>119</sup> Australian Capital Territory, Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester, *Report* (2014).

<sup>120</sup> As an exercise of judicial power under s 430(2) of the *Crimes Act 1900* (ACT): *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014).

<sup>121</sup> *Eastman v DPP (ACT) [No 2]* [2014] ACTSCFC 2 (22 August 2014).

a retrial would leave the guilt or innocence of Eastman undetermined. This decision demonstrates a dominance of the judicial remedy over an administrative finding.

#### IV BACKGROUND TO THE CRIMINAL APPEAL REFORMS

Prima facie, reforms to allow a second and subsequent right of appeal against conviction or sentence challenge the principle of finality of proceedings. This principle recognises, inter alia, that the findings of a tribunal of fact as to the guilt or innocence of the accused should stand, and that any perceived injustices or imperfections in the trial and appeal process must submit to the public interest in a matter being finalised.<sup>122</sup> The finality of the appellate process, in the words of Dixon J in *Grierson v The King*,<sup>123</sup> means that the ‘determination of an appeal is evidently definitive, and a conviction un-appealed is equally final’,<sup>124</sup> with the only remaining avenue for appeal usually residing with executive review in the form of a petition for mercy, or judicial inquiry.<sup>125</sup> The rationale for the principle of finality is to avoid the spectre of repeated efforts at re-litigation.

<sup>122</sup> The principle is often referred to in general terms, see, eg, *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson CJ and Hayne J), quoting *The Amphill Peerage* [1977] AC 647, 569 (Lord Wilberforce):

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps leads to a different result, but, in the interests of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.

<sup>123</sup> (1938) 60 CLR 431 (‘*Grierson*’); *R v Keogh* (2007) 175 A Crim R 153. In *R v Keogh* [2014] SASFC 20 (11 March 2014), the applicant was successful in applying for permission to bring a second appeal against his 1994 conviction for the murder, under s 353A of the *CLCA* (the South Australian reforms the subject of this paper).

<sup>124</sup> *Grierson* (1938) 60 CLR 431, 436 (Dixon J), affirming *R v Edwards [No 2]* [1931] SASR 376. In *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ opined, quoting *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34]:

‘A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.’ ... The principal qualification to the general principle of finality is provided by the appellate system.

<sup>125</sup> The role of post-conviction review in the appeal process was also prominent in Rich J’s construction of the statutory limitations on the appellate jurisdiction of the Court of Criminal Appeal: *Grierson* (1938) 60 CLR 431, 434 (Rich J), cited in *R v Keogh* (2007) 175 A Crim R 153, 165 (Doyle CJ).

The usual single right of appeal (whether against conviction or sentence), however, is not a common law remedy and the jurisdiction of the appellate criminal courts is statutory.<sup>126</sup> The definitive nature of the appeal has now been ameliorated through statutory reform in South Australia where appeals against conviction may be reopened. Similar reforms to reopen acquittals were enacted more widely in recent years in Australia to allow a retrial after an acquittal for a serious offence,<sup>127</sup> where fresh and compelling evidence which came to light post-acquittal should, in the ‘interests of justice’,<sup>128</sup> be reconsidered by the Court.<sup>129</sup> The High Court has also recognised the right of appeal from directed acquittals for federal offences, despite the guarantees of s 80 of the *Constitution*,<sup>130</sup> and therefore, presumably, the attendant powers of an appellate court to affirm or quash the acquittal appealed against, and to order a new trial. These reforms recognise that ‘no system of criminal justice is infallible’<sup>131</sup> and reflect a legal and policy response to developments in forensic science, particularly

<sup>126</sup> *Grierson* (1938) 60 CLR 431, 435–6 (Dixon J), citing *A-G (UK) v Sillem* (1864) 2 H & C 581, 608; 159 ER 242, 253; *Eastman v The Queen* (2000) 203 CLR 1, 11 [14] (Gleeson CJ). See *Federal Court of Australia Act 1976* (Cth) s 30AA; *Supreme Court Act 1933* (ACT) s 37E; *Criminal Appeal Act 1912* (NSW) s 5; *Criminal Code* (NT) s 410; *Criminal Code* (Qld) s 668D; *Criminal Law Consolidation Act 1935* (SA) s 352; *Criminal Code* (Tas) s 401; *Criminal Procedure Act 2009* (Vic) s 274; *Criminal Appeals Act 2004* (WA).

<sup>127</sup> The wider reforms emanated from recommendations of the Council of Australian Governments (COAG) Double Jeopardy Law Reform COAG Working Group, on 13 April 2007. *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2; *Criminal Code* (Qld) ch 68; *Criminal Law Consolidation Act 1935* (SA) pt 10; *Criminal Code* (Tas) ch XLIV; *Criminal Procedure Act 209* (Vic) ch 7A; *Criminal Appeals Act 2004* (WA) pt 5A. In the UK the operation of the double jeopardy rule was abrogated with respect to acquittals for serious offences by the *Criminal Justice Act 2003* (UK) c 44, pt 10 (entered into force 4 April 2005), following recommendations of The Inquiry into Matters Arising From the Death of Stephen Lawrence, *Report* (1999), concerning the racially motivated murder of Stephen Lawrence in 1993. The first conviction under the new laws was *R v Dunlop* [2007] 1 WLR 1657. One of the suspects in the Stephen Lawrence case had his acquittal quashed: *R v Dobson* [2011] 1 WLR 3230; and together with another suspect, Dobson, the two men were ordered for retrial, and both were convicted and sentenced on 4 January 2012. Dobson’s appeal against conviction was refused, with reasons provided: *Norris v The Queen* [2013] EWCA Crim 712 (15 May 2013).

<sup>128</sup> Or, alternatively, where it is ‘fair in the circumstances’, see *CLCA* pt 10.

<sup>129</sup> The reforms also allow prosecution appeals against acquittals and sentence, and retrials on tainted acquittals: *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2; *Criminal Code* (Qld) ch 68; *CLCA* pt 10; *Criminal Code* (Tas) ch XLIV; *Criminal Procedure Act 2009* (Vic) ch 7A; *Criminal Appeals Act 2004* (WA) pt 5A.

<sup>130</sup> *R v LK* (2010) 241 CLR 177.

<sup>131</sup> South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (John Rau, Attorney-General). For an analysis of the place of criminal appeals, see J R Spencer, ‘Criminal Law and Criminal Appeals — the Tail that Wags the Dog’ [1982] *Criminal Law Review* 260.

DNA evidence,<sup>132</sup> but are also to be balanced by recognition of the interests of the victims of crime in a holistic approach to criminal review.

The *Statutes Amendment (Appeals) Act 2013* (SA) amends the *CLCA*, *Magistrates Court Act 1991* (SA) and the *Supreme Court Act 1935* (SA). It introduces four new measures with respect to appeals in South Australia. The *Statutes Amendment (Appeals) Act 2013* (SA) enables renewed defence appeals against conviction where there is fresh and compelling evidence which comes to light after all avenues of appeal have been exhausted. The qualification that evidence be ‘fresh and compelling’ replicates pt 10 of the *CLCA*<sup>133</sup> which provides for renewed prosecution appeals against an acquittal for a serious offence. Secondly, the *Statutes Amendment (Appeals) Act 2013* (SA) enables the quashing of a conviction where a full pardon is granted on the basis that the evidence does not support such a conviction. The remaining provisions concern court efficiencies and include the right of the prosecution to cross-appeal on the application for an appeal against sentence, without need to obtain permission to appeal. Finally, the Chief Justice has the discretion to constitute a Full Court comprising two judges, rather than the usual three justices, for appeals against both sentence and conviction in South Australian courts.<sup>134</sup> In respect of post-conviction review, the focus of this paper is therefore upon the first and second reforms.

The threshold test for permission to appeal under the new second appeal provision in s 353A of the *CLCA* requires the establishment of three criteria: ‘fresh’ and ‘compelling’ evidence, which ‘in the interests of justice’ is required to be considered, to found the single ground of appeal, that of a ‘substantial miscarriage of justice’. These will be examined (in reverse order) in the context of the existing appeal process.

## V CRIMINAL APPEALS

To the extent that the legislation provides for a second or subsequent right of appeal against conviction in the Magistrates, District and Supreme Courts, on the basis of ‘fresh and compelling evidence that should, in the interests of justice, be considered

<sup>132</sup> *R v Button* [2001] QCA 133 (10 April 2001); see Lynne Weathered and Robyn Blewer, ‘Righting Wrongful Convictions With DNA Innocence Testing: Proposals for Legislative Reform in Australia’ (2009) 11 *Flinders Journal of Law Reform* 43; Gregor Urbas, ‘DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?’ (2002) 2 *Macquarie Law Journal* 141.

<sup>133</sup> Part 10 ‘Limitations on rules relating to double jeopardy’ and pt 10A ‘Appeal against sentence’ were inserted by the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA) and commenced on 3 August 2008.

<sup>134</sup> The *Statutes Amendment (Appeals) Act 2013* (SA) also extends the range of orders granted to the Full Court with respect to appeals brought against any decision on an issue antecedent to trial. In addition to the powers of the court to confirm, vary or reverse the decision, and to make consequential or ancillary orders, the court may also revoke any permission to appeal granted by the trial court.

on an appeal’,<sup>135</sup> the reforms advance the statutory referral for appeal beyond that commonly available in any Australian jurisdiction. The single ground of appeal is that of a substantial miscarriage of justice, with no time constraints on such appeals.

The right of appeal to the Full Court is only available upon permission being granted by a single judge of the Supreme Court; the basis of that permission has been articulated in substantially different approaches in the two applications so far heard under the new provisions. In *R v Drummond*<sup>136</sup> that permission was found to require satisfaction of the first two criteria for an appeal under s 353A(1): that the evidence was fresh and compelling. And this, Stanley J argued, would necessarily inform the findings of the remaining two criteria. In *R v Keogh*<sup>137</sup> Nicholson J considered that the threshold considerations outlined in s 353A(1) of the *CLCA* were properly left to the appeal court to decide, being preconditions for the conferral of jurisdiction upon which the court had a discretion to hear a second and subsequent appeal. His Honour reasoned that ‘should a judge refuse permission on the basis of non-satisfaction of s 353A(1) the question will arise as to whether this is strictly a refusal of permission or a finding that the appeal is incompetent.’<sup>138</sup> Justice Nicholson’s approach is sound as it conforms to the usual test for permission to appeal where an appeal does not lie as of right, and that is to determine whether the proposed ground of appeal has a sufficient prospect of success to warrant the grant of permission. Justice Nicholson then found that s 353A required the applicant at the permission stage to satisfy the court that it was reasonably arguable that there had been a substantial miscarriage of justice, adopting the test applied by an appeal court when deciding whether to set aside a conviction based upon fresh evidence. That is, that ‘the proper question is whether the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial.’<sup>139</sup>

In comparison, the New South Wales judicial inquiry legislation, which also enables application to the Supreme Court for a referral of the ‘whole case’ on appeal, occurs ‘indirectly’ in that it is a judicial inquiry application which grants a discretion to the

<sup>135</sup> See s 353A(1) of the *CLCA* in respect of the District and Supreme Courts, and s 43A(1) of the *Magistrates Court Act 1991* (SA) in respect of the Magistrates Court.

<sup>136</sup> (2013) 118 SASR 244, 254–5 [26]–[28] (Stanley J) (*Drummond*), citing *R v Parenzee* (2007) 101 SASR 456, 461 [22]–[24] (Doyle CJ), 468 [63] (Anderson J), 468 [64] (Kelly J).

<sup>137</sup> [2014] SASCFC 20 (11 March 2014) [63], citing *R v Milton* [2009] SASC 44 (26 February 2009).

<sup>138</sup> *R v Keogh* [2014] SASCFC 20 (11 March 2014) [34]. The Appeal Court upheld this interpretation but also considered that the threshold considerations of fresh and compelling evidence, which in the interests of justice should be considered on an appeal, was a jurisdictional fact that was also to be found to be reasonably arguable at the permission stage: *R v Keogh [No 2]* (2014) 121 SASR 307, 330–2, particularly at [80], [85] and [88].

<sup>139</sup> *R v Keogh* [2014] SASCFC 20 (11 March 2014) [70] (Nicholson J), quoting *Mickelberg* (1989) 167 CLR 259, 273 (Mason CJ), and adopting this test at [72].

Supreme Court,<sup>140</sup> either to direct an inquiry be conducted, or refer the whole case to the Court of Criminal Appeal to be dealt with ‘as an appeal’.<sup>141</sup> The discretion is then of wider application than the South Australian reforms, not being limited to matters raised by fresh evidence, but also with respect to a doubt or question as to the convicted person’s guilt, mitigating circumstances or as to any part of the evidence in the case.<sup>142</sup> The s 353A discretion in the South Australian legislation might suggest that given the textual omission of the requirement that ‘the whole case’ is referred on appeal, the appeal court might be limited to consideration of the fresh and compelling evidence in the context of the records of trial and appeal, in order to determine whether there has been a substantial miscarriage of justice.<sup>143</sup>

The common form appeal provisions, originally derived from the *Criminal Appeal Act 1907* (UK) and largely replicated in each of the Australian states and territories,<sup>144</sup> require an appellate court to decide an appeal against conviction from a verdict of a jury in criminal cases or from decisions of a single judge. The grounds upon which a conviction may be set aside by the appeal court are constituted in three broad forms, fundamentally investigative of the trial process, and concern: (a) a jury verdict considered by the court to be unreasonable or unsupportable on the evidence;<sup>145</sup> (b) a wrong decision on any question of law;<sup>146</sup> or (c) any ground where there has been a miscarriage of justice.<sup>147</sup> In any other case the court is directed to dismiss the appeal. If the appeal court is satisfied that the conviction should be quashed the remedies available are a retrial or an acquittal.

<sup>140</sup> The discretion to order an inquiry is also granted to the Governor: *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(a), (3), 79(3).

<sup>141</sup> The discretion to refer the case to the Court of Appeal is also granted to the Minister: *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b), (3), 79(1)(b).

<sup>142</sup> *Ibid* ss 77(2), 79(2).

<sup>143</sup> *R v Keogh* [2014] SASFC 20 (11 March 2014) [60]–[62].

<sup>144</sup> *Criminal Appeal Act 1912* (NSW) s 6(1); *CLCA* s 353(1); *Criminal Code* (Qld) ss 668E(1)–(1A); *Criminal Appeals Act 2004* (WA) ss 30(3)–(4); *Criminal Code* (Tas) ss 402(1)–(2); *Criminal Code* (NT) ss 411(1)–(2); *Supreme Court Act 1933* (ACT) s 370. Section 568(1) of the *Crimes Act 1958* (Vic) was a common form appeal provision which has been replaced by s 276 of the *Criminal Procedure Act 2009* (Vic), recently considered by the High Court in *Baini v The Queen* (2012) 246 CLR 469 (*‘Baini’*).

<sup>145</sup> This criterion includes ‘unsafe or unsatisfactory’ verdicts: *Whitehorn v The Queen* (1983) 152 CLR 657, 688 (Dawson J).

<sup>146</sup> This is the most common ground for appeal against conviction and is seen to encompass wrong decisions of mixed law and fact, and so might include procedural errors, the admission of inadmissible material or failure to admit relevant evidence.

<sup>147</sup> A catch-all category, considered by Isaacs J in *Hargan v The King* (1919) 27 CLR 13, 23 to be ‘the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.’ See also the decision of Gleeson CJ in *Nudd v The Queen* (2006) 80 ALJR 614, 616–22, who examines the concept of ‘miscarriage of justice’ as requiring a determination of both outcome and process, akin to considerations of the concept of ‘justice’.

A proviso to these common form appeal provisions requires that if the court considers no *substantial* miscarriage of justice has *actually* occurred, despite an appeal point being decided in favour of the appellant, then the appeal may be dismissed. The onus is on the appellant to establish the initial grounds of appeal and, if successful, the onus then shifts to the Crown to satisfy the court that the proviso should be applied.

### *A Substantial Miscarriage of Justice*

A precise definition of what constitutes ‘no substantial miscarriage of justice’ has been rejected by the High Court,<sup>148</sup> as has a definition of its positive form ‘[w]hether there has been a “substantial miscarriage of justice”’.<sup>149</sup> The High Court in *Weiss v The Queen*, in a determination on the proviso, found:

It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused’s guilt of the offence on which the jury returned its verdict of guilty.<sup>150</sup>

The decision appears to conflate the first ground of appeal, that is, that a jury verdict is unreasonable or cannot be supported on the evidence, with the determination of the appellate court as to the application of the proviso.<sup>151</sup> There has been both

<sup>148</sup> *Weiss v The Queen* (2005) 224 CLR 300 (‘*Weiss*’).

<sup>149</sup> *Baini* (2012) 246 CLR 469, 479 [26], in the context of s 276 of the *Criminal Procedure Act 2009* (Vic). See also *R v Gallagher* [1998] 2 VR 671, 675–9 (Brooking JA); *TKWJ v The Queen* (2002) 212 CLR 124, 145 [71] (McHugh J).

<sup>150</sup> *Weiss* (2005) 224 CLR 300, 317 [44]; *AK v Western Australia* (2008) 232 CLR 438, 455 [53] (Gummow and Hayne JJ). Articulated again by Kirby J in *Gassy v The Queen* (2008) 236 CLR 293, 314 [59]–[60]; *Evans v The Queen* (2007) 235 CLR 521, 552 [116] (emphasis in original) as:

The central holding in *Weiss* ... was that the appellate function must, in every case, be discharged by the intermediate court for itself. It must be done by reference to principles derived from the statutory language. It is not to be discharged by incantations involving speculation concerning what the jury or judge at trial (or a future jury or judge) would, or might, or should have done ... It has emphasised the very substantial role and duty of appellate courts to review the evidence and to reach conclusions *for themselves* by the application of the statutory tests.

<sup>151</sup> *Weiss* (2005) 224 CLR 300, 312 [30]. This approach in *Weiss* argues that the jury trial has always been subject to the direction, control and correction both of the trial judge and the appellate courts. Once it is acknowledged that an appellate court may set aside a jury’s verdict ‘on the ground that it is unreasonable or cannot be supported having regard to the evidence’, it follows inevitably that the so-called ‘right’ to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified? And that, in turn, requires examination of when a court should conclude that ‘no substantial miscarriage of justice has actually occurred’.

curial and extra-curial criticism of this decision,<sup>152</sup> which requires that the role of the appellate court is both distinctive and interventionist. The operation of the remaining two grounds of appeal are now also less certain, with, for example, the observation that the operation of the third ground of appeal, as to a finding of a miscarriage of justice, refers to any departure from trial according to law, regardless of the significance of that departure.<sup>153</sup> This is a return to a more orthodox application of the rule. Thus, ‘when the term “miscarriage of justice” is so understood, the word “substantial” in the proviso has work to do.’<sup>154</sup>

There has been both criticism<sup>155</sup> and calls for reform of the proviso,<sup>156</sup> but the South Australian reforms do not address the problems of the proviso, nor do the second and subsequent appeal provisions provide any substantial departure from the proviso test. The appeal court is granted the discretion to allow an appeal against conviction, and quash the conviction and acquit, or direct a new trial,<sup>157</sup> ‘if it thinks that there was a substantial miscarriage of justice.’<sup>158</sup> Insofar as the requirement is a positive finding of a substantial miscarriage of justice, the onus is on the appellant to satisfy the court, and given the statutory framework in which the provision lies, arguably, this onus is likely to be significant to the outcome of an appeal. However, the question remains as to the nature of the test the court would adopt in determining what amounts to a substantial miscarriage of justice. In *Drummond*, Stanley J took from the Victorian legislation providing for a positive finding of a substantial miscarriage of justice

<sup>152</sup> See, eg, *R v Tofilau* (2006) 13 VR 28, 35–6 (Vincent JA); Stephen J Odgers, ‘The Criminal Proviso: a Case for Reform?’ (2008) 26 *Law in Context* 103; Philip Priest, ‘The Problematic Proviso: the Vice of *Weiss*’ (2007) 140 (Autumn) *Victorian Bar News* 32.

<sup>153</sup> The construction of ‘miscarriage of justice’ by the High Court in *Weiss*, was placed in its historical context in examining the *Exchequer Rule* where any and every departure from trial according to law, would require a new trial, regardless of whether the error affected the jury verdict. The proviso was the device subsequently created to qualify the operation of the *Exchequer Rule*. A history of the Rule is set out in *Weiss* (2005) 224 CLR 300, 306–9 [12]–[20].

<sup>154</sup> *King v The Queen* (2012) 245 CLR 588, 611 [53] (French CJ, Crennan and Kiefel JJ).

<sup>155</sup> Catherine Penhallurick, ‘The Proviso in Criminal Trials’ (2003) 27 *Melbourne University Law Review* 800; *Baini* (2012) 246 CLR 469, 486 [47] (Gageler J). See, eg, the discussion of proviso case law in the decision of Brooking JA in *Gallagher* [1998] 2 VR 671, who begins his judgment: ‘Plutarch tells us that Homer died of chagrin because he was unable to solve a riddle. Ever since I encountered s 568(1) of the *Crimes Act 1958* (Vic) [the Victorian common form provision and proviso] I have wondered what it means.’

<sup>156</sup> In 2011 a proposal before the Standing Committee of Attorneys-General concerned a proposal to amend the common form proviso to reflect the text of s 276 of the *Criminal Procedure Act 2009* (Vic). In 2014 the New South Wales Law Reform Commission completed an inquiry into all avenues of criminal appeals.

<sup>157</sup> *CLCA* s 353A(4); *Magistrates Court Act 1991* (SA) s 43A(4).

<sup>158</sup> *CLCA* s 353A(3); *Magistrates Court Act 1991* (SA) s 43A(3).

and considered recently by the High Court in *Baini v The Queen*,<sup>159</sup> ‘some guidance to ascertaining the meaning of the same expression in s 353A’.<sup>160</sup> His suggested approach was that ‘the Full Court will allow an appeal pursuant to s 353A if it concludes a guilty verdict cannot be supported on the evidence that was adduced at trial in the light of the fresh and compelling evidence it has heard.’<sup>161</sup>

A further requirement for the founding of a grant of appeal requires consideration of the matter being in the ‘interests of justice’.

### B *In the Interests of Justice*

The ‘interests of justice’ qualification is a requirement of fairness which is not, ordinarily, narrowly defined.<sup>162</sup> It is common to criminal appeal and review statutes and is possibly subject to wide interpretation that might leave open for consideration other matters, including the interests of victims.

### C *Fresh and Compelling Evidence*

The relevant provisions of s 353A (which refers to the District and Supreme Courts) of the *CLCA*<sup>163</sup> read:

- (6) For the purposes of subsection (1), evidence relating to an offence is—
- (a) **fresh** if—
    - (i) it was not adduced at the trial of the offence; and
    - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
  - (b) **compelling** if—
    - (i) it is reliable; and
    - (ii) it is substantial; and
    - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
- (7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

<sup>159</sup> (2012) 246 CLR 469.

<sup>160</sup> *Drummond* (2013) 118 SASR 244, 254 [25]; *Baini* (2012) 246 CLR 469, 478–9 [22]–[23].

<sup>161</sup> *Drummond* (2013) 118 SASR 244, 254 [25]. In *R v Keogh* [2014] SASFC 20 (11 March 2014) Nicholson J confined his analysis to the permission ‘filter’ requirement and left it open for the Appeal Court to determine the test on appeal.

<sup>162</sup> *Chapman v Jansen* (1990) 100 FLR 66, 74 (Nicholson CJ).

<sup>163</sup> Equivalent provisions for the Magistrates Court lie in s 43A(6) of the *Magistrates Court Act 1991* (SA).

The requirement of ‘fresh and compelling evidence’ replicates s 332 of the *CLCA*, as applied to s 337, which concerns the reception of fresh and compelling evidence in an appeal subsequent to an acquittal for a serious offence. The high standard for the admission of fresh evidence indicates the cautious approach of the *Statutes Amendment (Appeals) Act 2013* (SA), presumably to avoid vexatious applications.<sup>164</sup> The admission of fresh and compelling evidence is available on all criminal appeals and has a wider application than the operation of the existing acquittal appeal provisions with respect to fresh and compelling evidence,<sup>165</sup> and wider application than that recommended by the Legislative Review Committee, which had suggested appeals be limited to serious offences only.<sup>166</sup> A recommendation that a second or subsequent right of appeal be available on the basis of a tainted conviction was rejected as superfluous in light of the opportunity to raise fresh and compelling evidence.<sup>167</sup>

The contextual qualification of compelling evidence limited to issues in dispute at trial might be considered too narrow and to not allow ‘fresh evidence that would open up an entirely new and substantial line of defence’.<sup>168</sup> The qualification acknowledges the distinctive roles of the trial and appeal courts, the choice of arguments and evidence presented at trial, and in this context, whether it is in the interests of justice that the appeal court hears fresh argument or receives fresh evidence. In the civil context at least, fresh arguments on appeal are *prima facie*

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<sup>164</sup> South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

<sup>165</sup> Section 337 of the *CLCA* allows a retrial of a person acquitted of a Category A offence (defined in s 311, which includes, murder, manslaughter aggravated rape, aggravated robbery, and trafficking in, manufacturing or selling commercial quantities of a controlled drug), where there is fresh and compelling evidence and the retrial is fair in the circumstance, having regard to the length of time since the offence was alleged to occur, and the reasonable diligence of the police and prosecution in making an application.

<sup>166</sup> Recommendation 4 of the Report concerned the right of second appeal on the basis of fresh and compelling evidence, limited to serious offences only, (defined as Category A offences (see footnote above) and offences with penalties of 15 years or more): Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (2012) 81–3.

<sup>167</sup> A tainted conviction is one where a person is found guilty, in respect of the trial, of an administration of justice offence (for example, perjury or harassing jurors): *CLCA* s 333; South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

<sup>168</sup> South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3166 (Gail Gago). This interpretation was referred to and dismissed by the Hon Gail Gago in Parliament as an ‘unduly narrow’ view, and she argued that one ‘would think that one issue in dispute at the trial will always be whether or not the defendant committed the alleged crime’.

regarded to be against the interests of justice,<sup>169</sup> and if considered, ‘ought to be most jealously scrutinised’.<sup>170</sup>

There is no question that an intermediate appellate court may already have supplemental powers to receive evidence not given at trial in its inquiry as to whether there has been a miscarriage of justice.<sup>171</sup> These powers involve the exercise of an original rather than a strictly appellate jurisdiction,<sup>172</sup> which might allow new and fresh evidence,<sup>173</sup> when that evidence is relevant, credible, cogent, and likely to have produced a different verdict.<sup>174</sup> A determination must be made with respect to whether the absence of the new or fresh evidence from the trial amounted to a miscarriage of justice, in order for an acquittal to be granted.<sup>175</sup> If a miscarriage of justice is not established, fresh evidence might still go to the question of a retrial.<sup>176</sup> The High Court in *Weiss* determined that on an appeal against conviction, the appellate court is required to make its own independent assessment of the evidence, which exists wholly or substantially on the record.<sup>177</sup> Inevitably, such determinations on the admission of evidence require consideration of the important role of the jury in criminal trials, including the recognition that the jury is the constitutional body with the primary responsibility to determine guilt or innocence, and that they have the benefit of having seen and heard the witnesses.<sup>178</sup>

<sup>169</sup> *Water Board v Moustakas* (1998) 180 CLR 491, 497 (Mason CJ, Wilson, Brennan and Dawson JJ) and the authorities cited therein; see also *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598, 1608 [51] (Gleeson CJ, McHugh and Gummow JJ).

<sup>170</sup> *Owners of the Ship Tasmania v Smith* (1890) 15 App Cas 223, 225, quoted in *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1, 35 (Starke J).

<sup>171</sup> See, eg, *Criminal Appeal Act 1912* (NSW) s 12; *Criminal Code* (Qld) s 671B(1); *CLCA* s 359; *Magistrates Court Act 1991* (SA) s 42; *Criminal Code* (Tas) s 409. No such power exists with respect to the High Court, due to the constitutional nature of its position as a final appellate court: *Mickelberg* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

<sup>172</sup> *Eastman v The Queen* (2000) 203 CLR 1; *R v Keogh* (2007) 175 A Crim R 153, 164 (Doyle CJ).

<sup>173</sup> “‘New evidence’ is evidence that was available and not adduced at the trial. “Fresh evidence” is evidence which either did not exist at the time of the trial or, if it did, could not then have been discovered by an accused exercising due diligence’: *Wood v The Queen* (2012) 84 NSWLR 581, 615 [707] (McClelland CJ at CL).

<sup>174</sup> *Ratten v The Queen* (1974) 131 CLR 510, 518–19 (Barwick CJ); *Gallagher v The Queen* (1986) 160 CLR 392, 398–9 (Gibbs CJ).

<sup>175</sup> *Mickelberg* (1989) 167 CLR 259, 301.

<sup>176</sup> See the principles summarised in *R v Abou-Chabake* (2004) 149 A Crim R 417, 427–8 (Kirby J).

<sup>177</sup> This has been expressed as the court ‘is obliged to act on the record, but ordinarily does not hear or see witnesses, and typically decides appeals based substantially on selected extracts of the record emphasised by the parties or their representatives’: *Gassy v The Queen* (2008) 236 CLR 293, 314 [60] (Kirby J).

<sup>178</sup> *M v The Queen* (1994) 181 CLR 487.

The ‘fresh and compelling evidence’ provision is a threshold consideration for permission to appeal under s 353A,<sup>179</sup> and is a narrower test to that required by the common law. The robust threshold by which fresh evidence is admitted will limit applications to those with genuine merit. If an appeal is allowed, the remedies then available are an acquittal or a new trial, with ancillary powers attendant on the ordering of a new trial.<sup>180</sup>

## VI CONCLUSION

The modern approach to post-conviction review, as exemplified by both the judicial inquiry process and the South Australian reforms providing for a second and subsequent appeal against conviction, displace the role of the prerogative of mercy and promote an emphasis on evidential matters by which to substantiate a review of, or appeal against, conviction.

The New South Wales judicial inquiry legislation, outside the executive petition process, provides the Supreme Court with the opportunity to conduct a preliminary examination of the evidence and arguments advanced on an inquiry application, in order to: determine the robustness of the application in satisfying an appeal; conclude that there is a doubt or question which requires further investigation through the inquiry process; or refuse the application. Although this provides more avenues by which to have a conviction scrutinised, in practice the extremely high threshold and the discretions available to the Supreme Court in considering an application,<sup>181</sup> find that successful applications are rare.<sup>182</sup>

The *Statutes Amendment (Appeals) Act 2013* (SA) challenges the principle of finality, as ‘finality is a good thing, but justice is better’.<sup>183</sup> In seeking justice, the Act sets a high threshold, narrower than the common law approach to the admission of evidence on appeal, by which evidence must be established to allow an appeal. But a strong filter on a second and subsequent appeal is necessary in order to both distinguish it from ordinary appeals and to ‘deter or deny untenable applications.’<sup>184</sup> The remaining hurdle is the requirement of a positive finding of a substantial miscarriage of justice and what that means in its statutory context outside the common form appeal provisions and the application of the proviso. It is arguable that the South Australian courts will not take heed of proviso jurisprudence, and ultimately,

<sup>179</sup> *Drummond* (2013) 118 SASR 244, 249 [13], 250 [16].

<sup>180</sup> Including that the court may not direct the trial court with respect to conviction or sentence: *CLCA* s 353A(5); *Magistrates Court Act 1991* (SA) s 43A(5).

<sup>181</sup> *Crimes (Appeal and Review) Act 2001* (NSW) s 79(3).

<sup>182</sup> See generally *Application of Holland* [2008] NSWSC 251 (28 March 2008) [9].

<sup>183</sup> *Sinkovich* (2013) 85 NSWLR 783 [47] (Basten JA), citing *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2 (Lord Atkin).

<sup>184</sup> South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

the proof as to the effectiveness of the appeal provisions will be revealed in its future operation.

The *Statutes Amendment (Appeals) Act 2013* (SA) is cautious in its approach. It avoids the uncertainties of post-conviction review by way of the mercy prerogative and judicial inquiry, where courts have been reluctant to scrutinise too closely the operation of a discretionary power. However, the mercy prerogative and judicial inquiry allow consideration of matters unavailable to a court and outside the purview of evidential concerns. Arguably, if policy, public interest and the particular circumstances of the case, although not relevant to the judicial inquiry, are still significant in the administration of criminal justice, then the mercy prerogative still has a role to play. These matters uniquely identify the fundamental place of the prerogative of mercy and its exercise as residing entirely within the province of the Crown, distinguished from normal administrative decision-making.<sup>185</sup> If, as Lord Diplock observed, '[m]ercy is not the subject of legal rights. It begins where legal rights end',<sup>186</sup> its place is rightly removed from curial intervention.

Unlike the judicial inquiry, the South Australian second appeal does not straddle the breach between the judicial approach to post-conviction review by way of right of application to the courts, with the availability to the presiding judicial officer under the judicial inquiry process, of material which might not necessarily be available to a court. Ultimately, however, outside the administration of mercy, if the convicted seeks an appeal, the matter must meet the appellate standard of a 'substantial miscarriage of justice'. To this extent, the South Australian reforms provide a simpler, more transparent, and perhaps more achievable pathway than the New South Wales process,<sup>187</sup> and directly address the concerns of a lack of transparency and accountability in decision-making in post-conviction review.

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<sup>185</sup> *Secretary, Department of Justice v Osland* [2007] VSCA 96 (17 May 2007) [126]–[130] (Bongiorno AJA), cited in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 295 [43] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

<sup>186</sup> *De Freitas* [1976] AC 239, 247 (Lord Diplock).

<sup>187</sup> Of the two applications heard thus far under the new South Australian appeal process, one application has been granted.

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## THE RACIAL DISCRIMINATION ACT AND INCONSISTENCY UNDER THE AUSTRALIAN CONSTITUTION

### ABSTRACT

The *Racial Discrimination Act 1975* (Cth) has assumed a special place on the federal statute book in the forty years since its enactment. This is due to it operating as a national guarantee that rights shall be enjoyed equally by all people regardless of their race. This guarantee has, by virtue of s 109 of the *Constitution*, overridden inconsistent state legislation that detracts from such rights, and on one occasion has had a like effect on subsequent federal legislation. However, most such attempts to invoke inconsistency with state laws have failed due to limitations contained within the Act. Further, the effectiveness of the Act is limited at the federal level because the federal Parliament has the power to amend or suspend the Act's operation, something Parliament has done on two occasions. Stronger protection – such as by entrenching the principle of non-discrimination on the basis of race in the *Constitution* – is required to bring about a stronger form of protection against racial discrimination.

### I INTRODUCTION

**T**he *Racial Discrimination Act 1975* (Cth) ('*RDA*') is in many ways just another federal statute. It may be repealed or amended by the federal Parliament at will and has no special constitutional status. Despite this, Sir Harry Gibbs, a former Chief Justice of the High Court, went so far as to say that in the *RDA* 'we may already have what appears to be a bill of rights, limited it is true in scope, which is effective[ly] entrenched against the States.'<sup>1</sup>

Sir Harry's comment no doubt had a rhetorical tone to it, but it nonetheless highlights how the *RDA* has assumed a special place in the statute book some 40 years after its

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<sup>1</sup> Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1, 13.

enactment. One aspect of this is the political importance attached to it over and above almost any other piece of federal legislation. This no doubt stems from the fact that the *RDA* touches upon fundamental community values in amounting to Australia's most significant national prohibition of racial discrimination. Its importance is highlighted, rather than diminished, when the *RDA* is set in contrast to Australia's lengthy past history of enacting laws that discriminate on the basis of race. The *RDA* marks a key legal and political turning point from laws such as those that denied Aboriginal people the right to marry or move freely, or to cast a vote in federal elections.<sup>2</sup>

The iconic nature of the *RDA* can be apparent when a federal government proposes that it be amended or wound back. The recent controversy over the proposal by the Abbott Government that s 18C of the Act be amended or repealed is a case in point.<sup>3</sup> Similarly, the suspensions of the *RDA* brought about in 1998 in respect of native title<sup>4</sup> and in 2007 in regard to the Northern Territory intervention<sup>5</sup> sparked long-running national debates. They also gave rise to a strong sense of grievance amongst Indigenous peoples, who have been the only group in the community ever denied the protection of the Act.

The political and community importance attached to the *RDA* is reflected in the effect given to the Act by the *Australian Constitution*. It is in this respect that the *RDA* comes closest to establishing an overarching, national principle of racial non-discrimination, and so to resemble Sir Harry's description of it as some form of bill of rights. Section 109 of the *Constitution* states:

#### 109. Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The effect of this provision is to render inoperative a section of a state statute that is inconsistent with a federal law. This can typically arise in any one of three ways:

1. If it is impossible to obey both laws.
2. If one law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish.

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<sup>2</sup> For example, as to the last, see *Commonwealth Franchise Act 1902* (Cth) s 4.

<sup>3</sup> See, eg, the federal Government's exposure draft of a Freedom of Speech (Repeal of s 18C) Bill 2014 at Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975* (30 April 2014) <<http://www.ag.gov.au/Consultations/Pages/ConsultationsonamendmentstotheRacialDiscriminationAct1975.aspx>>.

<sup>4</sup> *Native Title Amendment Act 1998* (Cth).

<sup>5</sup> *Northern Territory National Emergency Response Act 2007* (Cth).

3. If the Commonwealth law evinces a legislative intention to ‘cover the field’, and a State law also operates in that same field. In this case there need not be any direct contradiction between the two enactments.<sup>6</sup>

This supremacy of federal law over state law, combined with like rules that operate with respect to territory laws,<sup>7</sup> has enabled the *RDA* to set down a standard of racial non-discrimination not only at the federal level, but also for state and territory conduct.

This article examines this constitutional dimension to the *RDA*, that is, the extent to which the *RDA* has proved capable of overriding other laws so as to set down a national standard of freedom from racial discrimination. We do so by examining the cases in which it has been argued that the *RDA* overrides a state, territory or federal law. We do not deal with other constitutional questions, such as the source of power that enabled the Commonwealth to enact the *RDA*,<sup>8</sup> or broader issues such as the efficacy of the *RDA* or whether it has acted as a limited bill of rights in other respects.

## II INCONSISTENCY WITH STATE AND TERRITORY LAWS

This Part considers the cases in which a party has sought to invalidate or override a provision of a state or territory Act because of its inconsistency with the *RDA*. Since 1975, such arguments have been raised in 26 cases, of which seven have been successful.<sup>9</sup>

### *A Covering the field*

The *RDA* was enacted by the federal Parliament in 1975 to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*

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<sup>6</sup> George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6<sup>th</sup> ed, 2014), 298.

<sup>7</sup> In the case of the Australian Capital Territory, see *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. No such legislative provision operates with respect to the Northern Territory, however a like principle of inconsistency nonetheless applies (*Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, 366–367 (Lockhart J)).

<sup>8</sup> See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>9</sup> These cases were identified by conducting searches on LexisNexis for all cases referencing the *Racial Discrimination Act 1975* (Cth) and containing either of the terms ‘inconsistent’ or ‘override’ (or their variants). All 753 results were considered, though after duplicates and irrelevant cases were excluded, only 26 remained. The seven successful cases are *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth; Wororra Peoples & Biljabu v State of Western Australia* (‘*Second Native Title Act Case*’) (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2006) 152 FCR 150; *James v Western Australia* (2010) 184 FCR 582.

(*ICERD*).<sup>10</sup> The *Convention* seeks to ensure equality in the enjoyment of human rights by people of all races. The *RDA* implements this object by creating a series of unlawful acts and offences,<sup>11</sup> by establishing a Race Discrimination Commissioner<sup>12</sup> and by creating a statutory right to equality before the law.<sup>13</sup>

In *Viskauskas*<sup>14</sup> and *Metwally*,<sup>15</sup> both decided in 1983, the High Court considered whether sections of the *Anti-Discrimination Act 1977* (NSW) dealing with racial discrimination were invalid because of inconsistency with the *RDA*. In *Viskauskas* the Court found that the *RDA* ‘covered the field’ of racial discrimination law in Australia, stating that the Act was ‘intended as a complete statement of the law for Australia relating to racial discrimination’.<sup>16</sup> As a result, the relevant sections of the NSW Act were held to be inoperative.

The Commonwealth Parliament responded to the decision in *Viskauskas* by inserting s 6A(1) into the *RDA*. It states:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the *Convention* and is capable of operating concurrently with this Act.<sup>17</sup>

This provision establishes that the federal Parliament does not intend the *RDA* to ‘cover the field’ relating to racial discrimination in regard to every state or territory law on the subject. Section 6A(1) is significant in saving the operation of current state and territory laws of this kind, and also in leaving room for future state and territory laws to provide broader protection for racial discrimination, such as in the event that the *RDA* is wound back.

A possible example of this was the Abbott Government’s proposal to amend or repeal s 18C of the *RDA*. If that had occurred, a state or territory could have responded by re-enacting s 18C in its jurisdiction without necessarily encountering a problem of inconsistency with the federal law. It is not possible to be conclusive about the issue of inconsistency because even though ‘covering the field’ inconsistency might

<sup>10</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>11</sup> *Racial Discrimination Act 1975* (Cth) pts II, IIA and IV.

<sup>12</sup> *Ibid* pts III and VI.

<sup>13</sup> *Ibid* s 10(1).

<sup>14</sup> *Viskauskas v Niland* (1983) 153 CLR 280 (*‘Viskauskas’*).

<sup>15</sup> *University of Wollongong v Metwally* (1983) 158 CLR 447 (*‘Metwally’*).

<sup>16</sup> *Viskauskas* (1983) 153 CLR 280, 292 (Gibbs CJ).

<sup>17</sup> *Racial Discrimination Act 1975* (Cth) s 6A(1).

be precluded, other forms of direct inconsistency can still arise, such as if the two statutes cannot be obeyed simultaneously.<sup>18</sup>

Section 6A(1) came under immediate scrutiny in *Metwally*, where the High Court held that it could not operate retrospectively to validate state legislation which, at the relevant time, was still in fact invalid by reason of s 109 of the *Constitution*. However it made no such finding about the *prospective* operation of s 6A, and indeed Gibbs CJ considered that from the day the amending Act came into force all state racial discrimination legislation would ‘thereupon revive’.<sup>19</sup>

### B *Other forms of inconsistency*

Section 10(1) of the *RDA* provides broad recognition of rights to non-discrimination on the basis of race, and so is an obvious source for inconsistency with other statutes. It provides:

#### 10 Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This section can operate in two ways, as first identified by Mason J in *Gerhardy v Brown*,<sup>20</sup> and later adopted by the High Court in *Western Australia v Ward*.<sup>21</sup> The first is where a state law creates a right which is not universal because it is not conferred on people of a particular race. In such cases, s 10(1) will supply and confer that same right to people of the race previously neglected. Importantly, the state law is not invalidated in this scenario – rather, the federal law complements the state law by filling the gap the latter created.

The second scenario is where a state law imposes a prohibition forbidding the enjoyment of a human right by persons of a particular race, or deprives those people of a right previously enjoyed regardless of race. In that situation, s 10(1) confers the right on the people prohibited or deprived, and because this necessarily results in a direct inconsistency between s 10(1) and the state law, the state law is invalidated to

<sup>18</sup> *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563–564 (Mason J).

<sup>19</sup> *Metwally* (1983) 158 CLR 447, 456 (Gibbs CJ).

<sup>20</sup> (1985) 159 CLR 70, 98–9 (Mason J).

<sup>21</sup> (2002) 213 CLR 1, 99–100 [106]–[107].

the extent of the inconsistency due to s 109 of the *Constitution*. In both cases s 10(1) has a clear rights-protecting function, however, only in the latter case is that function dependent on the constitutional dimension of the *RDA*.

The paradigm example of this second scenario was the High Court's decision in *Mabo v Queensland (No 1)* ('*Mabo No 1*'),<sup>22</sup> which established a clear precedent for the interaction between s 10(1) of the *RDA* and state laws on native title. The case also had a broader significance in clearing the way for the High Court to subsequently determine that Aboriginal and Torres Strait Islander peoples retain rights to native title in Australia.<sup>23</sup>

The plaintiffs in *Mabo No 1* were Murray Islanders and members of the Miriam people who sought recognition of their traditional rights and interests in relation to the lands, seas, seabeds and reefs of Murray Island. After they had commenced proceedings seeking this, the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985* (Qld), which purported to retrospectively abolish all rights and interests that the Miriam people may have held prior to its enactment. The plaintiffs argued that the 1985 Act was invalid because of s 10(1) of the *RDA*.

The Court, in a 4:3 split, found for the plaintiffs. As Brennan J in the majority explained:

[Section] 10(1) of the *Racial Discrimination Act* clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community ... The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.<sup>24</sup>

This is the most common kind of inconsistency with the *RDA*, that is, where a state law seeks to prohibit or deprive people of a certain race from enjoying a human right, and s 10(1), reinforced by s 109 of the *Constitution*, invalidates the law to the extent of the inconsistency. The same reasoning was again applied in striking down parts of the *Land (Titles and Traditional Usage) Act 1993* (WA) in 1993,<sup>25</sup> and parts of the *Mining Act 1978* (WA) in 2010.<sup>26</sup>

While almost all of the cases dealing with *RDA* inconsistency have involved s 10(1), this is not the only source for a potential clash between federal and state laws. Section 9, which makes 'act[s] involving a distinction... based on race' unlawful, is

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<sup>22</sup> (1988) 166 CLR 186.

<sup>23</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>24</sup> *Mabo No 1* (1988) 166 CLR 186, 218–9 (Brennan, Toohey and Gaudron JJ).

<sup>25</sup> *Native Title Act Case* (1995) 183 CLR 373.

<sup>26</sup> *James v Western Australia* (2010) 184 FCR 582.

often cited as an alternative.<sup>27</sup> Its success rate in such cases is limited, as courts have considered that s 10(1) is the provision more readily designed to deal with legislative inconsistency, while s 9 is directed at non-legislative actions.<sup>28</sup> That said, there is the potential for conflict where a state law makes lawful the doing of an act which s 9 forbids.<sup>29</sup>

Inconsistency may also arise where a state anti-discrimination Act contains provisions that are incapable of operating alongside the federal Act. This was argued in *Central Northern Adelaide Health Service v Atkinson*,<sup>30</sup> where a state exception to the prohibition on discriminatory legislation had a broader ambit than the *RDA* equivalent of s 8 (the ‘special measures’ provision).

Brian Atkinson had been refused medical care by the Central Northern Adelaide Health Service, which operated a medical centre providing services exclusively to ethnic minorities, including Indigenous Australians and migrants. Atkinson lodged a complaint under the *Equal Opportunity Act 1984* (SA) (‘*EOA*’), alleging discrimination on the grounds of both age and race. The South Australian Equal Opportunity Tribunal found in his favour and ordered the Health Service to make an apology. The Health Service appealed, arguing that its business fell within s 65 of the *EOA*, which provided: ‘This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race.’<sup>31</sup>

Atkinson argued in the South Australian Court of Appeal that this provision was inconsistent with s 8 of the *RDA* – the ‘special measures’ exemption to racial discrimination – as that exemption, which invoked art 1.4 of *ICERD*, allowed:

Special measures taken for the *sole purpose* of securing adequate advancement of certain racial or ethnic groups or individuals *requiring such protection* as may be necessary... [provided] they shall *not be continued after* the objectives for which they were taken have been achieved.<sup>32</sup>

Justice Gray (with whom Kelly J agreed), found that the *RDA* exemption was considerably narrower than its South Australian counterpart, as it was curtailed in both scope and duration. He went on to find:

There is a tension between s 8 of the *RDA* and s 65 of the *Equal Opportunities Act* [sic]. In my view a literal reading of s 65 would lead to an inconsistency with the

<sup>27</sup> *Racial Discrimination Act 1975* (Cth) s 9.

<sup>28</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 93 (Mason J).

<sup>29</sup> *Ibid*, citing *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

<sup>30</sup> (2008) 103 SASR 89 (‘*Atkinson*’).

<sup>31</sup> *Equal Opportunity Act 1984* (SA) s 65.

<sup>32</sup> *Atkinson* (2008) 103 SASR 89, 103 [66] (Gray J), citing *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1.4 (emphasis added).

*RDA* such that s 109 of the *Australian Constitution* would have application, and as a consequence, s 65 would be inoperative.<sup>33</sup>

Rather than strike down the *EOA* provision, Gray J observed that ‘a purposive construction is the usual or general approach to be taken to issues of statutory construction’,<sup>34</sup> and found that the *EOA* could be construed purposively as permitting ‘a scheme or undertaking for the benefit of persons of a particular race’ so long as, consistently with the *RDA*, that benefit was the sole purpose of the scheme or undertaking, and that it would not be continued after the purpose was achieved.<sup>35</sup> In other words, the Court adopted a construction of the *EOA* that removed the inconsistency between the federal and state acts.

### C Why do *RDA* inconsistency arguments fail?

Despite these noteworthy wins, in the majority of cases where a party has alleged that a state or territory law is inconsistent with the *RDA*, the argument has failed. There have been three main reasons for this. The first is that the impugned legislation falls within the just mentioned ‘special measures’ exemption in s 8 of the *RDA*, meaning that its sole purpose is to secure the advancement of certain racial groups in order to ensure their equal enjoyment of human rights with other groups.

For example in *Maloney v The Queen*,<sup>36</sup> an Indigenous resident of Palm Island in Queensland was charged with possession of more than the prescribed quantity of liquor in a restricted area predominantly inhabited by Indigenous people. While the High Court agreed that Maloney’s ‘right to own property’ had been limited more than that of non-Indigenous persons in Queensland, it found that the Schedule to the *Liquor Regulation 2002* (Qld) curtailing that right was a ‘special measure’ that was reasonably necessary to ensure the equal enjoyment of other human rights by Indigenous people, namely security of person, protection against violence and public health.

The second way these arguments fail is where the statute in question does not discriminate on the basis of race. For example in *Aurukun Shire Council v CEO Office of Liquor*,<sup>37</sup> a state Act prohibiting all local governments from selling alcohol was found to operate equally throughout the entire state of Queensland, without differentiation on the grounds of race. The state Act was therefore upheld as consistent with the *RDA*. At times though, legislation which on its face involves no racial discrimination will, in practice, operate in a way that does involve discrimination. For this reason, courts must consider that s 10(1) is directed at ‘the practical operation and

<sup>33</sup> *Atkinson* (2008) 103 SASR 89, 115 [106].

<sup>34</sup> *Ibid* 107 [79], citing *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194.

<sup>35</sup> *Ibid* 116 [111]–[113].

<sup>36</sup> (2013) 298 ALR 308.

<sup>37</sup> *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [2012] 1 Qd R 1 (‘*Aurukun*’).

effect' of an Act and is 'concerned not merely with matters of form but with matters of substance'.<sup>38</sup>

The third reason such arguments fail is that the party alleging inconsistency cannot identify a valid right that has been affected. This was another weakness in the appellants' case in *Aurukun*, where the Court held that 's 10 requires the identification of a right enumerated in Art 5 of the CERD',<sup>39</sup> and that 'the opportunity to have access to a licensed source of alcohol supply provided by local government... has not been recognised as such a human right or fundamental freedom.'<sup>40</sup> This highlights the importance when embarking on a challenge to a state or territory law to begin with an examination of the 19 rights listed in art 5 of *ICERD* in order to identify a right that the *RDA* will protect.

### III INCONSISTENCY WITH FEDERAL LAWS

#### *A Principles*

Section 109 of the *Constitution* provides no basis for the *RDA* to override other, inconsistent federal statutes. Indeed, the ordinary rule, which is an incident of parliamentary sovereignty, is that the federal Parliament may by express words, or by implication, amend any of its own statutes through the making of a subsequent statute. This power enables the federal Parliament to amend or repeal the *RDA* as it chooses.<sup>41</sup> Unlike at the state level, where state parliaments can entrench certain statutes from repeal by way of manner and form provisions, such as by requiring a referendum, there is very limited scope for the *RDA* to be protected from the future actions of the federal Parliament.<sup>42</sup>

Absent a change to the *Australian Constitution*, Parliament cannot be prevented from amending or repealing the *RDA*. So long as Parliament does so by specific and direct amendment, its capacity to do so cannot be doubted. Normally, it is also accepted that subsequent statutes can amend earlier statutes by way of implied repeal, that is, that the earlier statute can have its operation altered when a later statute provides an inconsistent rule, even if that rule is not expressly stated to override the earlier

<sup>38</sup> *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] citing *Mabo v Queensland (No 1)* (1989) 166 CLR 186, 230 (Deane J).

<sup>39</sup> *Aurukun* [2012] 1 Qd R 1, 65 [139] (Keane JA).

<sup>40</sup> *Ibid* 67 [148] (Keane JA).

<sup>41</sup> See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

<sup>42</sup> *Work Choices Case* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

statute. This rule of implied repeal is so widely accepted that it even applies to the state constitutions, which are themselves merely Acts of parliament.<sup>43</sup>

There is nevertheless scope to argue that the principles of implied repeal do not apply to the *RDA*, meaning that federal Parliament can only amend the statute if it does so expressly. Reasoning of this kind has gained currency in other comparable nations, with appellate courts in Canada and the United Kingdom considering new approaches to the amendment or repeal of ‘constitutional’ or ‘human rights’ legislation. Thus, in *Winnipeg School Division No 1 v Craton*,<sup>44</sup> the Supreme Court of Canada held:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. [It] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.<sup>45</sup>

Similarly, in the United Kingdom in *Thoburn v Sunderland City Council*,<sup>46</sup> Laws LJ identified a class of statutes that enlarge or diminish ‘what we would now regard as fundamental constitutional rights’.<sup>47</sup> He argued that amendment of ‘constitutional statutes’ could not be effected in the same way as any other statute.<sup>48</sup> Instead, it must be shown ‘that the legislature’s actual – not imputed, constructive or presumed – intention was to effect the repeal’.<sup>49</sup>

<sup>43</sup> *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457; *McCawley v The King* [1920] AC 691.

<sup>44</sup> [1985] 2 SCR 150.

<sup>45</sup> *Ibid* 156. See the similar argument put by Shaw QC in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 6. The position of the Canadian Supreme Court has been criticised: see Peter W Hogg, *Constitutional Law of Canada: Volume 1* (Carswell, 5<sup>th</sup> supplemented ed, 2007) 12–17 n 67.

<sup>46</sup> [2003] QB 151.

<sup>47</sup> *Ibid* 186 [62].

<sup>48</sup> This approach and its lack of clarity have been criticised: see, eg, *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Rodger LJ); ‘Editorial – Constitutional Statutes’ (2007) 28(2) *Statute Law Review* iii. See also *Attorney General v National Assembly for Wales Commission* [2013] 1 AC 792, 815 [80] (Lord Hope DP, with whom Lord Clarke, Lord Reed and Lord Carnwath SCJJ agreed) (doubting that the ‘description’ of a statute as ‘constitutional’ could ‘be taken to be a guide to its interpretation’ and holding that ‘the statute must be interpreted like any other statute’).

<sup>49</sup> *Thoburn v Sunderland City Council* [2003] QB 151, 187 [63]. An Australian court would reject the idea that courts could identify an ‘actual’ intention of Parliament distinct from its imputed, constructive or presumed intention: *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

In Australia, while there is no precedent for a distinction between ‘human rights’ or ‘constitutional’ statutes and other statutes, courts might arrive at a similar result by applying existing principles of statutory interpretation governing the implied repeal of statutes.<sup>50</sup> For instance, if an existing Commonwealth law expressly confers a right, privilege or immunity, there may need to be at least ‘strong grounds’,<sup>51</sup> such as ‘clear words’,<sup>52</sup> manifesting in ‘actual contrariety’,<sup>53</sup> before a later Act will be taken to have impliedly repealed the earlier right, privilege or immunity.<sup>54</sup> The fact that the right conferred by the earlier statute was discernibly ‘important’ or ‘fundamental’ would strengthen any inference that the later statute did not intend to repeal it.

Similarly, by invoking another tenet of statutory interpretation, the principle of legality, courts will assume that it is ‘improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness’.<sup>55</sup> While this principle is ordinarily associated with the protection of common law rights,<sup>56</sup> it has also been applied to statutory rights.<sup>57</sup>

Each of these principles, which might enable the *RDA* to prevail over an apparently inconsistent later federal statute, is a rebuttable presumption. This means that if the federal Parliament decides to unambiguously oust the operation of a rights-protecting statute such as the *RDA*, it can do so. As Gageler and Keane JJ of the High Court explained in *Lee v New South Wales Crime Commission*,<sup>58</sup> the principle of legality

<sup>50</sup> Taking this approach would better accord with the view expressed by French CJ in *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195. There, French CJ suggested that questions such as those considered in *Thoburn* were likely to be resolved through the ‘characteristics of a statute’ rather than through the designation of a statute as ‘constitutional’: 218 [56]

<sup>51</sup> *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ).

<sup>52</sup> *Wurridjal v Commonwealth* (2009) 237 CLR 309, 366–7 [114] (French CJ), 378–9 [158]–[159] (Gummow and Hayne JJ).

<sup>53</sup> *Putland v The Queen* (2004) 218 CLR 174, 189 [40] (Gummow and Heydon JJ).

<sup>54</sup> See also *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J); cf 18–19 [44]–[48] (Crennan, Kiefel and Bell JJ).

<sup>55</sup> *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4<sup>th</sup> ed, 1905) 122.

<sup>56</sup> George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 36–46.

<sup>57</sup> See Perry Herzfeld, Thomas Prince and Stephen Tulley, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 227, citing *Tassell v Hayes* (1987) 163 CLR 34 (statutory right to elect trial of indictable offence by jury); *Buck v Comcare* (1996) 66 FCR 359 (statutory compensation for workplace injury); *Schofield, Re; Ex parte Rangott v P & B Barron Pty Ltd* (1997) 72 FCR 280 (limitation on admissibility of transcripts of examination of bankrupt); *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603 (superannuation).

<sup>58</sup> (2013) 251 CLR 196, 310 [313].

exists to protect rights from ‘inadvertent and collateral alteration’, and ‘does not exist to shield those rights ... from being specifically affected in the pursuit of a clearly identified legislative object’.<sup>59</sup>

The Commonwealth Parliament has cleared this hurdle twice with regard to the *RDA*. The first instance was the *Native Title Amendment Act 1998* (Cth), which implemented the Howard Government’s ‘ten point plan’ for native title after the High Court’s decision in *Wik Peoples v Queensland*.<sup>60</sup> In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, ‘bucket-loads of extinguishment’, the Act overrode the *RDA*. This was achieved by introducing a new s 7 into the *Native Title Act 1993* (Cth), which expresses an intention that the *RDA* only overrode the *Native Title Act* where the provisions of the *Native Title Act* were ambiguous. The second suspension of the *RDA* was achieved under the legislation that brought about the Northern Territory intervention in 2007 in response to findings of child sexual abuse within Aboriginal communities.<sup>61</sup>

### B Cases

It is important to mark a distinction between federal–state inconsistency and federal–federal inconsistency involving the *RDA*. In Part II above we discussed cases where the *RDA* ‘overrode’ or prevailed over state laws to the extent that they were inconsistent with the *RDA*. For the reasons just explained, the *RDA* cannot ‘override’ another federal law, as federal laws emanate from the same Parliament and therefore operate on an equal footing. What the *RDA* can do, however, is compel or constrain the statutory construction of another federal law so that the two laws operate harmoniously, thereby removing the inconsistency between the laws. It is only in very rare cases that the principles of implied repeal or of legality might further render the latter statute inoperative.<sup>62</sup>

There have been 13 attempts to allege inconsistency between the *RDA* and a subsequent federal law. On 12 occasions, the argument failed. This occurred for the same reasons identified above in respect of the unsuccessful arguments to prove inconsistency between the *RDA* and state and territory laws. The single occasion in which the argument succeeded in regard to a subsequent federal law was *Shi v Minister for Immigration and Citizenship*.<sup>63</sup>

<sup>59</sup> Ibid.

<sup>60</sup> (1996) 187 CLR 1.

<sup>61</sup> *Northern Territory National Emergency Response Act 2007* (Cth).

<sup>62</sup> *Coco v The Queen* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ): ‘[I]t would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope’.

<sup>63</sup> (2011) 123 ALD 46.

Mr Shi was a citizen from the People's Republic of China who had lived in Australia for 13 years, eventually obtaining a visa that gave him a right to permanent residency. During that time, he was convicted of three offences – malicious wounding in company, supply of a prohibited drug and detaining a person with intent to obtain an advantage – and spent over six years in prison. A delegate of the federal Minister for Immigration and Citizenship sought to cancel Mr Shi's visa on 'character grounds' under s 501(2) of the *Migration Act 1958* (Cth).

Mr Shi sought review of this decision in the Administrative Appeals Tribunal. The Tribunal was required to have regard to a Direction given by the Minister under s 499(1) of the Act that allowed the person's 'ties and linkages to the Australian community' to be considered. In affirming the decision to cancel Mr Shi's visa, Senior Member Allen held:

The Applicant was aged 14 years when he arrived in Australia. To that extent [sic] this primary consideration weighs in his favour. On the other hand a large part of his upbringing and character formation was in China. Such ties to the Australian community that the Applicant did develop appear to have been ethnically based and with persons who had little regard for the law.

Mr Shi appealed to the Federal Court, arguing that the ethnicity of persons with whom he chose to associate was an irrelevant consideration. In deciding in favour of Mr Shi, Perram J considered the interplay between s 10(1) of the *RDA* and s 499(1) of the *Migration Act 1958* (Cth):

The effect of s 10(1) is ... to require this Court to construe [the *Migration Act*] (and, hence, the Direction) as not permitting decision-making processes in which ethnicity is an integer. It is true, as the Minister submits, that the Tribunal had to consider the links which Mr Shi had to the Australian community. But the effect of s 10 of the *RDA* is that, whatever else that concept denotes, it lacks ethnic features.<sup>64</sup>

In reaching this decision, Perram J noted that 'it would require express words to convey an intention that a general power to make regulations for a stated purpose authorised the repository to repeal or amend the Parliament's own enactments'.<sup>65</sup> In the absence of such words, the *Migration Act* could not be construed so as to permit a finding that took into account the appellant's ethnicity, and so the Tribunal's decision was quashed. While neither the *Migration Act* nor the Direction made under

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<sup>64</sup> Ibid 50 [19] (Perram J).

<sup>65</sup> Ibid [20] citing *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 212 (Brennan CJ and Dawson J); Pearce and Argument, *Delegated Legislation in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2005) [19.21].

it were held to be inoperative, the *RDA* directly affected their operation in such a way that preserved the appellant's rights under s 10(1) of that Act.<sup>66</sup>

#### IV CONCLUSION

The *RDA* has proved to be a powerful instrument in setting down a national standard of racial non-discrimination. This has been due in large part to the overriding force given to the statute by s 109 of the *Constitution*. This aspect to the *RDA* has been of great legal and political significance, such as in *Mabo No 1* where it led to the overturning of Queensland's pre-emptive strike against the recognition of native title.

This effect of the Act has been important, but it should not be overstated. The potential of the *RDA* to override state and territory laws has not often been realised over the past four decades. Indeed, of the 26 occasions in which such an argument has been put in an Australian court, it has only succeeded seven times. As these statistics make clear, in the majority of cases, attempts to rely upon the *RDA* in this way have failed. These cases have demonstrated the limits of the protection offered by the *RDA*.

A further area in which the *RDA* has had little impact is with respect to federal statutes. Orthodox principles of parliamentary sovereignty and statutory interpretation establish that the *RDA* can be overwritten by subsequent federal statutes, at least so long as the intention to do so is manifested in clear language. This has occurred on two occasions. More generally, other federal statutes may operate despite inconsistency with the *RDA*, although interpretive techniques do exist to mitigate or reduce the possibility of this occurring.

The *RDA* appears to be an unequivocal rejection of racial discrimination. However, its capacity to achieve this is subject to significant constraints, especially in regard to federal statutes. Four decades after its enactment, it is appropriate to consider whether the protection offered by the *RDA* should be strengthened. If the principle of racial non-discrimination is as fundamental as political and community support for the *RDA* might suggest, then that principle should be put beyond the possibility of suspension or repeal by the federal Parliament.

This could be achieved by entrenching the principle of non-discrimination on the basis of race in the *Australian Constitution*. This possibility has arisen in the context of the ongoing debate about whether Aboriginal and Torres Strait Islander peoples should be recognised in that document.<sup>67</sup> The debate has extended beyond recognition of Indigenous peoples by way of symbolic words inserted into the *Constitution*. It has also encompassed the question of whether the document should be changed

<sup>66</sup> Although not expressly identified in Perram J's judgment, the right to 'equal treatment before the tribunals and all other organs administering justice' is a protected *ICERD* right under the *RDA*.

<sup>67</sup> See generally Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015).

to expressly prohibit racial discrimination. A number of proposals have been put forward to achieve this, ranging from a freestanding protection against such discrimination,<sup>68</sup> to a re-drafted federal power with regard to Aboriginal and Torres Strait Islanders that only protects them from such harm.<sup>69</sup> None of these proposals seek to replicate the terms of the *RDA* in the *Constitution*, nor to incorporate terms of the *ICERD*. Instead, they are more modest and focused in seeking only to prohibit the specified form of discrimination.

Constitutional protection from racial discrimination is commonplace in other nations<sup>70</sup> and indeed Australia is exceptional not only in lacking such protection, but in having two provisions in its *Constitution* that not only run counter to the objects of the *RDA*, but to the whole idea of racial non-discrimination. These are s 25, which contemplates that states may deny people the vote on the basis of their race, and s 51(xxvi), which enables the federal Parliament to pass laws that both discriminate for and against people on the basis of their race.

The former section was included for the apparently benign purpose of penalising states that maintained pre-Federation policies of disenfranchising people due to their race. However, in so doing, it acknowledged that each state retains the power to disqualify people on that basis.<sup>71</sup> The latter section is in the *Constitution* in order to, in the words of Sir Edmund Barton, Australia's first Prime Minister and one of the first members of the High Court, enable the Commonwealth to 'regulate the affairs

<sup>68</sup> Most prominently, the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), 173 recommended the insertion of the following new section:

**Section 116A Prohibition of racial discrimination**

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

<sup>69</sup> For example, the idea that the races power in section 51(xxvi) of the *Constitution* should be replaced with the following words: 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them'. See Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the *Australian Constitution*' (2014) 25 *Public Law Review* 83, 87; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Progress Report (Commonwealth of Australia, October 2014) 8.

<sup>70</sup> For example, s 15(1) of the *Canadian Charter of Rights and Freedoms* states: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability' (*Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*')).

<sup>71</sup> See George Williams, 'Removing Racism from Australia's Constitutional DNA' (2012) 37 *Alternative Law Journal* 151, 151.

of the people of coloured or inferior races who are in the Commonwealth'.<sup>72</sup> One has to ask just how deep Australia's commitment to racial non-discrimination runs when clauses of this kind remain in the nation's most important law. Indeed, we are not aware of any other constitution in the world that still provides a licence to its national Parliament to discriminate negatively on the basis of race.

It is understandable that people laud the achievements of the *RDA* by way of marking its 40 years of operation. On the other hand, it is also important to reflect upon its limitations. If Australia is serious about eradicating racial discrimination, and especially within the law, the *RDA* should be seen as a stepping stone to even stronger protection. It is appropriate that Australia finally remove clauses from its *Constitution* that enable racial discrimination, while also entrenching the principle that no law or policy, whether at the federal, state or territory level, may discriminate against a person on the basis of their race.

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<sup>72</sup> *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, vol 4, Melbourne, 27 January 1898, 228–9 (Edmund Barton).

Emily Carr\*

## *R v KEOGH [NO 2] (2014) 121 SASR 307*

### I INTRODUCTION

In *R v Keogh [No 2]*,<sup>1</sup> the South Australian Court of Criminal Appeal (‘the Court’) considered an application to grant leave for permission to pursue a ‘second or subsequent appeal’ pursuant to s 353A of the *Criminal Law Consolidation Act 1935* (SA) (‘*CLCA*’). In reviewing the decision reached in *Keogh*, this case note analyses the Court’s approach to the interpretation of the scope and limitations of its power under s 353A of the *CLCA*. In particular, it examines the soundness of the Court’s substantive distinction between its jurisdiction to hear secondary criminal appeals on the grounds of ‘fresh and compelling evidence’<sup>2</sup> under s 353A in contrast to its jurisdiction under s 352 of the *CLCA*.

### II SECOND OR SUBSEQUENT APPEALS

Prior to the enactment of s 353A of the *CLCA*,<sup>3</sup> the right to appeal against a criminal conviction in South Australia followed the ‘finality principle’<sup>4</sup> — that is, that once convicted, the conviction should stand. Thus, in South Australia there existed, as in other jurisdictions,<sup>5</sup> a single statutory appeal against conviction.<sup>6</sup> The right to only one appeal against conviction was enshrined in s 352 of the *CLCA*, and this principle was reflected at common law in *Burrell v The Queen*.<sup>7</sup> Under s 352 of the *CLCA*, an appeal against criminal conviction was available as of right where the appeal concerned a ‘question of law’<sup>8</sup> or with the leave of the Court on ‘any other

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<sup>1</sup> (2014) 121 SASR 307 (‘*Keogh*’).

<sup>2</sup> *CLCA* s 353A(1).

<sup>3</sup> *Statutes Amendment (Appeals) Act 2013* (SA).

<sup>4</sup> David Harmer, ‘Wrongful Convictions, Appeals, the Finality Principle: The Need for a Criminal Cases Review Commission’ (2014) 37 *University of New South Wales Law Journal* 270, 280.

<sup>5</sup> Generally referred to as ‘common form provisions’, each jurisdiction in Australia has enacted appeal rights which reflect to an extent the wording of the *Criminal Appeal Act 1907* (UK). See also *R v Keogh* [2014] SASCF 20 (11 March 2014) [6].

<sup>6</sup> Bibi Sangha and Robert Moles, ‘Post-Appeal Review Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300, 305 (‘Post-Appeal Review Rights’).

<sup>7</sup> (2008) 238 CLR 218 (‘*Burrell*’).

<sup>8</sup> *CLCA* s 352(1)(a)(i).

ground.<sup>9</sup> In South Australia, where a criminal appeal has already been exhausted, an applicant's method for recourse lay through the 'petition referral procedure'<sup>10</sup> under s 369 of the *CLCA*, which vests the prerogative power of mercy in the Attorney-General.<sup>11</sup> Subject to this power, the Attorney-General possesses the discretion to refer the matter to the Full Court for determination<sup>12</sup> or to grant a full pardon<sup>13</sup> to the convicted and to direct the Full Court to quash the applicant's conviction.<sup>14</sup>

Traditionally, Australian courts have been reluctant to infer any authority to entertain appeals against criminal convictions beyond their statutorily conferred jurisdiction.<sup>15</sup> The courts have been at pains to emphasise, as was stated in *R v Edwards*, that an appeal court 'should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give it.'<sup>16</sup> Thus, the notion that criminal appeal courts have the jurisdiction to hear subsequent appeals on the basis of fresh and compelling evidence has been firmly rejected by the High Court.<sup>17</sup> This issue was further considered in *Mickelberg v The Queen*,<sup>18</sup> where the High Court held that it does not have jurisdiction on appeal to consider fresh evidence which has not been put before a criminal appeal court.<sup>19</sup> Therefore, subject to a single right of appeal against conviction, there was no further avenue for appealing on the basis of fresh and compelling evidence other than by way of the petition referral procedure.

<sup>9</sup> Ibid s 352(1)(a)(ii).

<sup>10</sup> Bibi Sangha, Robert Moles and Kim Economides, 'The New Statutory Right of Appeal In South Australian Criminal Law: Problems Facing an Applicant — Unanticipated Interpretive Difficulties' (2014) 16 *Flinders Law Journal* 145, 148 ('The New Statutory Right of Appeal').

<sup>11</sup> In practice, however, petitions are made to and received by the Governor, who seeks the advice of the Government by referring the matter to the Premier and, subsequently, the Attorney-General and Solicitor-General.

<sup>12</sup> *CLCA* s 369(1)(a).

<sup>13</sup> Ibid s 369(1), (2).

<sup>14</sup> It is relevant to note that at the time of Keogh's subsequent appeal under s 353A of the *CLCA* before the Full Court, Keogh had petitioned under the referral procedure in s 369 of the *CLCA* five times, of which the first three failed, the fourth was withdrawn and the fifth was reserved for decision pending the result of the current matter. See also *Keogh* (2014) 121 SASR 307, 312 [12].

<sup>15</sup> Sangha and Moles, 'Post-Appeal Review Rights', above n 6, 305. See also *Burrell* (2008) 238 CLR 218.

<sup>16</sup> *R v Edwards [No 2]* [1931] SASR 376, 380 ('*Edwards*').

<sup>17</sup> *Burrell* (2008) 238 CLR 218; *Grierson v The King* (1938) 60 CLR 431; *R v Parenzee* (2008) 101 SASR 469.

<sup>18</sup> (1989) 167 CLR 218 ('*Mickelberg*').

<sup>19</sup> Ibid 264. This is also due to the limited power of the High Court's appellate jurisdiction under s 73 of the *Australian Constitution*. In receiving 'fresh' evidence, the High Court would be exercising its original, rather than appellate, jurisdiction. Thus, this would result in the High Court exercising original jurisdiction in respect of state judicial power. See also Sangha and Moles, 'Post-Appeal Review Rights', above n 6, 308.

The current position in relation to subsequent appeals against criminal convictions has not been met without criticism.<sup>20</sup> In its submission to the Legislative Review Committee of South Australia,<sup>21</sup> the Australian Human Rights Commission ('AHRC') noted that the petition procedure may breach art 14(5) of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>22</sup> as it requires Australia to ensure that there is a 'right to a review of conviction and sentence on law and facts' and 'the right to introduce fresh evidence.'<sup>23</sup> The AHRC also criticised the petition procedure in relation to the Governor's unfettered discretion to refer a matter to the Full Court. As *Von Einem v Griffin*<sup>24</sup> establishes, the Governor's prerogative power is not subject to judicial review.<sup>25</sup> These concerns were acknowledged by the South Australia Legislative Committee, which ultimately recommended the enactment of a new provision within the *CLCA*. Under the proposed recommendation, a person would be able to mount a subsequent appeal against a conviction where 'the court [was] satisfied' that 'the conviction [was] tainted' and 'where there [was] fresh and compelling evidence in relation to an offence which may cast reasonable doubt on the guilt of the convicted person.'<sup>26</sup> On 5 May 2013, the South Australian Government enacted s 353A of the *CLCA*<sup>27</sup> and established a statutory right for a subsequent appeal against a conviction on the basis of 'fresh and compelling evidence that should, in the interests of justice, be considered on appeal.'<sup>28</sup>

### III BACKGROUND

#### *A Facts*

On the evening of Friday 18 March 1994, Anna Jane Cheney was found dead at her home by her fiancé Henry Vincent Keogh after having allegedly drowned in her bathtub. An autopsy was later performed by Dr Collin Manock. During his examination of Ms Cheney's body, Dr Manock formed the opinion that Ms Cheney was conscious at the time her head was submerged in the bath, as 'he found no mark

<sup>20</sup> Sangha, Moles and Economides, 'The New Statutory Right of Appeal', above n 10, 148.

<sup>21</sup> Australian Human Rights Commission, Submission No 16 to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011.

<sup>22</sup> *International Covenant on Civil and Political Rights*, signed 18 December 1972, [1980] ATS 23, entered into force 23 March 1976, art 14(5).

<sup>23</sup> Australian Human Rights Commission, above n 21, [4.12].

<sup>24</sup> (1998) 72 SASR 110 ('*Von Einem*').

<sup>25</sup> Australian Human Rights Commission, above n 21, [5.3(e)].

<sup>26</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* (2010) 3.10, 7.

<sup>27</sup> *Statutes Amendment (Appeals) Act 2013* (SA).

<sup>28</sup> *CLCA* s 353A(1).

on the surface of the brain at the autopsy.<sup>29</sup> After conducting further examinations, Dr Manock also discovered ‘bruising to the lateral and medial aspects of Ms Cheney’s lower left leg’,<sup>30</sup> the graphical imprints of which he considered to be consistent with that of a ‘hand grip’<sup>31</sup> and which he estimated to have occurred within four hours of Ms Cheney’s death.<sup>32</sup> These suspicions ultimately led Dr Manock to suspect that ‘Ms Cheney’s drowning was assisted’.<sup>33</sup>

The principal suspect of the prosecution case was Ms Cheney’s fiancé Henry Keogh, who stood trial for her murder in 1995. It was the prosecution’s case that Keogh had murdered Ms Cheney in order to benefit from approximately \$1 150 000 in life insurance payments that he had taken out in her name by forging her signature just weeks before her death.<sup>34</sup> It was generally accepted during the trial that, notwithstanding evidence supporting a motive, the expert forensic evidence given by Dr Manock was ‘circumstantial evidence’<sup>35</sup> which was insufficient of itself to prove Keogh’s guilt beyond reasonable doubt.<sup>36</sup> Notwithstanding the circumstantial nature of the case, on 23 August 1995, Keogh was convicted by jury for the murder of Anna Cheney.

A subsequent appeal by Keogh against his conviction in December 1995 to the Court of Criminal Appeal was dismissed.<sup>37</sup> Keogh made two further attempts to mount an appeal, both of which were unsuccessful. In 1997, the Court of Criminal Appeal also refused an application to reopen the first appeal or to hear a second appeal, on the basis that the Court lacked the jurisdiction to do so.<sup>38</sup> Permission was denied to appeal for a second time in 2007 on the basis that the Court lacked jurisdiction<sup>39</sup> and special leave to appeal from this decision was also refused by the High Court of Australia.<sup>40</sup>

<sup>29</sup> *Keogh* (2014) 121 SASR 307, 311 [4].

<sup>30</sup> *Ibid* 312 [6].

<sup>31</sup> *Ibid* 314 [20].

<sup>32</sup> *Ibid* 312 [6].

<sup>33</sup> *Ibid* 311 [4].

<sup>34</sup> *Ibid* 320 [49]–[50].

<sup>35</sup> *Ibid* 312 [7].

<sup>36</sup> *Ibid*.

<sup>37</sup> *R v Keogh* (Unreported, Court of Criminal Appeal, South Australia, Matheson, Millhouse and Mullighan JJ, 22 December 1995).

<sup>38</sup> *R v Keogh* (Unreported, Court of Criminal Appeal, South Australia, Matheson, Millhouse and Mullighan JJ, 13 May 1997).

<sup>39</sup> *R v Keogh* (2007) 175 A Crim R 153.

<sup>40</sup> Transcript of Proceedings, *Keogh v The Queen* [2007] HCATrans 693 (16 November 2007). See also *James v Keogh* [2008] SASC 156 (13 June 2008) where an appeal was launched by Keogh against a decision of the Medical Board of South Australia against Dr Ross James, one of the four expert forensic pathologists involved in Ms Cheney’s autopsy. It was alleged by Keogh that Dr James had engaged in unprofessional conduct

In 2013, Keogh became aware of recantations made by Dr Manock in relation to the forensic evidence he had submitted at trial; namely, the timing in which the bruising on Ms Cheney's left leg was said to have been sustained, the proposed gripping mechanism used to submerge Ms Cheney and that she was conscious at the time she was submerged. On the basis of these discoveries, Keogh instigated an application for leave to pursue a second appeal pursuant to s 353A of the *CLCA*.

### B Decision

Both the application for leave to appeal and the substantive second appeal against conviction were heard *instanter* by Gray, Sulan and Nicholson JJ. The Court delivered a unanimous judgment in respect of both matters. Keogh was granted leave to appeal under s 353A of the *CLCA*, as the Court held that Dr Manock's recantations about the accuracy of his expert evidence submitted at trial<sup>41</sup> constituted 'fresh and compelling evidence' which could not with due diligence have been available before the first appeal and that should subsequently, in the interests of justice, be considered on appeal.<sup>42</sup>

Having granted leave to appeal, the Court also found that, in light of Dr Manock's recantations, the 'trial process was fundamentally flawed' whereby a significant number of Dr Manock's forensic opinions 'materially misled the prosecution, the defence, the trial Judge and the jury.'<sup>43</sup> The Court therefore allowed the second substantive appeal, set aside Keogh's conviction for murder and directed the matter for retrial.<sup>44</sup>

## IV THE EVIDENTIARY FILTER UNDER S 353A

At the current time, South Australia remains the only Australian jurisdiction to have enacted a statutory scheme for second or subsequent appeals against criminal

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by providing inaccurate evidence that haemolytic staining was a symptom consistent with freshwater drowning and that he also failed to disclose his belief that a tissue sample taken from a bruise on Ms Cheney's left leg did not confirm that the mark was in fact a bruise. However, this appeal was also unsuccessful, with the Court holding Dr James not guilty of unprofessional conduct.

<sup>41</sup> The Court also considered other relevant evidentiary material to constitute 'fresh and compelling evidence' which it found should, in the interests of justice, be considered on a second appeal. However, it was primarily Dr Manock's recantations and other expert evidence scrutinising the accuracy of his evidence which was said to have had a substantial bearing in proving a miscarriage of justice had occurred.

<sup>42</sup> *Keogh* (2014) 121 SASR 307, 409 [353].

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* 409 [356].

convictions.<sup>45</sup> Subsequently, the principal issue for the Court in *Keogh* concerned the proper statutory construction of s 353A, in relation to the Court's jurisdiction and power to grant leave for secondary appeals against conviction and how this power differs from its jurisdiction under s 352 to grant primary appeals<sup>46</sup> and the equivalent common form provisions.

The overarching structure, operation and interrelationship between the need for jurisdiction and permission to appeal under s 353A was considered by the Court at length. *Keogh* held that s 353A requires a prospective applicant to establish three essential conditions (or one essential pre-condition known as the 'jurisdictional fact'),<sup>47</sup> before the Court can be satisfied that it has jurisdiction to hear a secondary appeal against conviction.<sup>48</sup> Thus, for the Court to possess jurisdiction to entertain an appeal, the appellant must principally demonstrate that there is 'fresh' evidence within the meaning of s 353A(6)(a), 'compelling' evidence within the meaning of s 353A(6)(b) and, 'in the interests of justice', the evidence should be considered on an appeal under s 353A(1).<sup>49</sup>

<sup>45</sup> Ibid 328 [72]. See also the case of *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014). On November 3 1995, David Eastman was convicted for the murder of Assistant Federal Police Commissioner Colin Winchester. A primary appeal was lodged and refused by the High Court in *Eastman v The Queen* (2000) 203 CLR 1. In 2011, a court-ordered inquiry was lodged into Eastman's conviction under Pt 20 of the *Crimes Act 1900* (ACT). The final report of the inquiry recommended that Eastman's conviction should be quashed and that a retrial should not be ordered. *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014) considered whether Eastman could enforce, by way of appeal, the recommendation of the inquiry that his conviction be quashed, in spite of s 424 of the *Crimes Act 1900* (ACT) which stated that the proceedings of the inquiry were administrative, rather than judicial in nature. The Court considered whether or not ss 430 and 431 of the *Crimes Act 1900* (ACT) required the Supreme Court of the Australian Capital Territory to exercise judicial or administrative power, and whether or not it had the jurisdiction to quash or confirm Eastman's criminal conviction. In considering the scope of the Court's jurisdiction, the Court determined that the making of a s 430(2) order did involve the exercise of judicial power, as the Court's function under s 430(2) affects the legal status of a conviction and thus forms an inherent part of the Court's judicial power to determine. The Court subsequently quashed Eastman's murder conviction and ordered a retrial in *Eastman v DPP (ACT) [No 2]* [2014] ACTSCFC 2 (22 August 2014). Whilst the practical result of Eastman is comparable with the decision reached in *Keogh*, the appeal process in the Australian Capital Territory is not a secondary 'appeal' process in the traditional sense, but is rather a two-tiered statutory scheme. It firstly involves submitting an application to institute an administrative inquiry under either s 423 or s 424, which then secondly as a result of recommendations of the inquiry, enlivens the Court's judicial power under s 430(2) to either confirm or quash the conviction on the basis of the general principles of procedural fairness.

<sup>46</sup> 'Primary' in this context is used to mean 'first' or 'original appeal,' in contrast to 'second or subsequent appeal.'

<sup>47</sup> *Keogh* (2014) 121 SASR 307, 330 [80].

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

In doing so, their Honours emphasised that the jurisdictional fact requirement ‘operates as a filter’ which protects the Court from hearing appeals that are ‘plainly unmeritorious.’<sup>50</sup> This construction of the limitations of the Court’s power to grant permission is largely uncontroversial. It consistently applies the reasoning in *R v Parenzee*, which asserted that permission to appeal should be refused where the ground is ‘not reasonably arguable’ or ‘found to lack any substance’ or has ‘no reasonable prospect of success.’<sup>51</sup> Therefore, at least in its overall structure and purpose, s 353A does not differ dramatically from s 352.

### *A Fresh Evidence*

In *Keogh*<sup>52</sup> their Honours distinguished between the meaning of ‘fresh evidence’ as it is understood under s 353A(6)(a) and its common form interpretation under *Ratten v The Queen*.<sup>53</sup> Under the principles held in *Ratten*, evidence will constitute ‘fresh’ or ‘new’ evidence, and enliven the jurisdiction of the Court under s 352, where it is evidence which ‘was not actually available ... at the time of trial’ *or* could not have been adduced by ‘reasonable diligence’.<sup>54</sup> Whilst not dissimilar, their Honours found that ‘fresh evidence’ within the meaning of s 353A has a narrower definition than its common form counterpart. For evidence to be ‘fresh’ as opposed to ‘new’ evidence, *Keogh* requires that the evidence ‘was not adduced at trial’ *and* that it ‘could not have been adduced at trial ‘even with the exercise of due diligence.’<sup>55</sup>

*Keogh* therefore asserts that the onus for establishing ‘fresh evidence’ requires satisfaction of a higher burden of proof to invoke the jurisdiction of the Court to consider a second appeal than that which is required for a primary appeal. This reasoning appears correct in light of Parliament’s ‘evidentiary filter’ approach to the construction of s 353A, which supposes that the purpose of the ability to seek a second appeal is not to adduce *any* fresh evidence which was not previously available, but rather fresh evidence that has only come to light after an appeal has already proven unsuccessful and where the evidence has a ‘reasonable’ potential to prove a substantial miscarriage of justice has occurred.<sup>56</sup>

### *B Compelling Evidence*

The legislation applied in *Keogh* establishes that not only must evidence be fresh, but it must also be ‘compelling’ within the meaning of s 353A(6)(b), in that the evidence

<sup>50</sup> Ibid 331 [83].

<sup>51</sup> *R v Parenzee* (2007) 101 SASR 456, 461 [22].

<sup>52</sup> (2014) 121 SASR 307, 335–7 [97]–[103].

<sup>53</sup> (1974) 131 CLR 510.

<sup>54</sup> Ibid 516–17 [17].

<sup>55</sup> *Keogh* (2014) 121 SASR 307, 335 [97]–[98].

<sup>56</sup> Attorney-General of South Australia, *Report on Statutes Amendment (Appeals) Bill 2012 (SA)* (27 November 2012) <<http://www.agd.sa.gov.au/about-agd/what-we-do/initiatives/statutes-amendment-appeals-bill-2012>>.

is ‘reliable,’ ‘substantive’ and ‘highly probative’ to the issues in dispute at trial.<sup>57</sup> ‘Reliability’ was a significant point of consideration for the Court on the facts. Interestingly, in determining whether the evidence was compelling, their Honours placed significant weight not just upon the reliability of fresh expert forensic evidence which denounced Dr Manock’s observations and his autopsy examination as ‘wholly inadequate’<sup>58</sup> but also gave consideration to the corresponding unreliability of Dr Manock’s expert evidence and other evidence tendered at trial.<sup>59</sup>

The evidence submitted by the appellant in *Keogh* arguably resulted in a curious application of what constitutes ‘compelling’ evidence, when contrasted against the reasons for accepting the original evidence at trial. It is somewhat ironic that in holding the reports of three expert forensic witnesses (which discredited Dr Manock’s original evidence) to be reliable, that the Court determined these reports to be ‘reliable’ on the basis of *further* expert evidence. This is not to suggest that their Honours were incorrect in their determination that the evidence was compelling, but it may suggest, at least in the context of conflicting forensic evidence, that ‘reliable’ forensic evidence can only ever be determined according to what is considered to be ‘unreliable,’ as opposed to positively accurate or unequivocally accepted evidence.

### *C In the Interests of Justice*

In assessing the scope and interrelationship between the subsections within s 353A, the legislation applied in *Keogh* establishes that, notwithstanding that there is fresh and compelling evidence, a secondary appeal should only be allowed where it is ‘in the interests of justice.’<sup>60</sup> This reasoning accords with Parliament’s intention to strike ‘a proper balance and [allow] genuine and meritorious applications but [deter] or [restrict] vexatious or unsupportable applications.’<sup>61</sup> Relevantly, their Honours did not state precisely in what circumstances an appellant’s application for appeal will be in the interests of justice.<sup>62</sup> However, it can safely be assumed that this will at least be where fresh evidence establishes ‘a substantial miscarriage of justice’.<sup>63</sup> Indeed, this approach remains consistent with the decision in *R v Drummond*, which asserts

<sup>57</sup> *Keogh* (2014) 121 SASR 307, 337 [104].

<sup>58</sup> *Ibid* 358 [183].

<sup>59</sup> *Ibid* 382 [271].

<sup>60</sup> *Ibid* 339 [115]; *CLCA* s 353A(1).

<sup>61</sup> Attorney-General of South Australia, *Report on Statutes Amendment (Appeals) Bill 2012 (SA)* (27 November 2012) <<http://www.agd.sa.gov.au/about-agd/what-we-do/initiatives/statutes-amendment-appeals-bill-2012>>.

<sup>62</sup> *Keogh* (2014) 121 SASR 307, 339 [116].

<sup>63</sup> *CLCA* s 353A(3).

that where the evidence fails to meet the jurisdictional fact threshold, it cannot be in the interests of justice to allow the appeal.<sup>64</sup>

#### D Miscarriage of Justice

On the facts in *Keogh*, the Court was satisfied that Dr Manock's recantations of the accuracy of his evidence at trial constituted fresh and compelling evidence, which should, in the interests of justice, be considered on second appeal.<sup>65</sup> However, it remains unclear in *Keogh* whether 'miscarriage of justice' as a ground of appeal in the context of s 353A has the same application as it does under s 352 of the *CLCA*.

The court considered the scope of the ground by comparing its formulation in s 352, but found this largely unhelpful,<sup>66</sup> and instead preferred to adopt the reasoning in *Baini v The Queen*<sup>67</sup> as the guiding authority. *Baini* recognised that the categories of miscarriage of justice are not limited<sup>68</sup> and whilst their Honours did not restrictively define the limits of what constitutes a miscarriage of justice, they held that if despite procedural or substantive irregularity, conviction was not inevitable, then a substantial miscarriage of justice will not be established.<sup>69</sup> Indeed, as stated in *Whitehorn v The Queen*, although unreasonable findings of evidence by juries and wrong decisions on questions of law are recognised as separate grounds of appeal, they implicitly involve miscarriages of justice.<sup>70</sup> Therefore, *Keogh* ultimately suggests that, notwithstanding the stricter jurisdictional threshold required under s 353A to obtain leave, once leave has been granted, fresh and compelling evidence may be led which falls within any of the previously recognised grounds of appeal under the common form provisions and s 352.

<sup>64</sup> *R v Drummond* [2013] SASFC 135 (12 December 2013) [42]. However, see also *R v Drummond [No 2]* [2015] SASFC 82 (5 June 2015) in which the Full Court of the South Australian Court of Criminal Appeal (Gray, Peek and Blue JJ) granted Drummond a second appeal against conviction, after deciding to set aside his conviction on the basis of fresh and compelling evidence under s 353A of the *CLCA*. Subsequent evidence given by a forensic expert asserted that the absence of the accused's DNA on the victim was highly probative and that the original trial forensic evidence was misleading to suggest, in the absence of DNA linking Drummond to the victim, that contact could still have occurred. The Court (Gray J dissenting) found that there had been a miscarriage of justice on the basis of the trial evidence and that it was in the interests of justice to set aside Drummond's conviction. The matter is currently awaiting retrial.

<sup>65</sup> *Keogh* (2014) 121 SASR 307, 404 [341].

<sup>66</sup> *Ibid* 340 [122].

<sup>67</sup> (2012) 246 CLR 469, 479, 480–1 [25]–[26], [28]–[33] ('*Baini*').

<sup>68</sup> *Ibid* 480–1 [28]–[33].

<sup>69</sup> *Keogh* (2014) 121 SASR 307, 344 [128].

<sup>70</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 685 ('*Whitehorn*').

## V CONCLUSION

In its broader social and legal application, *Keogh* has been instrumental in emphasising the potential dangers and injustices which may occur not only as the result of an unfairly conducted trial, but also from a lack of statutory protection to rectify substantial miscarriages of justice where they occur after appeal rights have already been exhausted. However, the effect of s 353A in allowing secondary and subsequent appeals against criminal convictions still largely remains to be seen. Whilst in *Keogh* a successful second appeal can in some respects be viewed as an ending, it is in many ways also just another beginning. Ultimately, as a result of the decision reached in *Keogh* at least, it is important to be reminded that in pursuing the truth in law, as in science, we must not be too eager to shut the door before we have even looked at what might lay beyond.

*Paul Babie\**

***LAW, RELIGION, CONSTITUTION: FREEDOM OF  
RELIGION, EQUAL TREATMENT, AND THE LAW***

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I

There is certainly no shortage of recent books that deal with the relationship between religion and constitutions, both from the perspective of protecting religion from the predations of the state and from that of promoting religion through constitutionalism. Recent contributions to this growing body of literature include T Jeremy Gunn and John Witte's *No Establishment of Religion: America's Original Contribution to Religious Liberty*,<sup>1</sup> Ran Hirschl's *Constitutional Theocracy*,<sup>2</sup> and Richard Moon's *Freedom of Conscience and Religion*.<sup>3</sup> Need matches supply. It comes as no surprise that against the backdrop of a global religious revival<sup>4</sup> and the increasingly plural approach to spirituality internationally and nationally,<sup>5</sup> religion increasingly finds its way into the public square. To name just three of the most significant recent examples demanding a good deal of our attention: the Arab Spring and the Islamic uprisings of 2011–12;<sup>6</sup> the ongoing

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<sup>1</sup> T Jeremy Gunn and John Witte (eds), *No Establishment of Religion: America's Original Contribution to Religious Liberty* (Oxford University Press, 2012).

<sup>2</sup> Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010).

<sup>3</sup> Richard Moon, *Freedom of Conscience and Religion* (Irwin Law, 2014).

<sup>4</sup> See John Micklethwait and Adrian Wooldridge, *God Is Back: How the Global Revival of Faith Is Changing the World* (Penguin, 2009).

<sup>5</sup> See, eg, Gary D Bouma, *Australian Soul: Religion and Spirituality in the 21<sup>st</sup> Century* (Cambridge University Press, 2007).

<sup>6</sup> See Saban Center at the Brookings Institution Books (ed), *The Arab Awakening: America and the Transformation of the Middle East* (Brookings Institution Press, 2011).

debates about Obama-care and its impact on religious freedom in the United States;<sup>7</sup> and, closer to home, the work of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>8</sup> These events, and the religious issues they raise, call for careful assessment of how a society deals with religion through law generally, and through its constitution specifically. And, without putting too fine a point on it, Australia does the latter badly.<sup>9</sup>

How might Australia (especially its politicians and the legal community) begin, on the one hand, to consider what is necessary when using a constitution to deal with and to protect religion, and, on the other, to rectify the problems created through long constitutional neglect of religion? Well, it can begin to look to other countries, and their experts who have the experience with these matters, for guidance. Gunn and Witte, Hirschl, and Moon are a start, but those offerings are limited in the sense that Gunn and Witte and Moon deal with only one jurisdiction each — the United States and Canada respectively, while Hirschl deals with a particular issue — theocracy through constitutions. A new addition to the literature on this topic, however, draws together within one set of covers the plurality of possible national constitutional approaches to religion, the range of ways in which religion might be treated in one offering and the leading scholars in the world on the topic in their respective jurisdictions: W Cole Durham Jr, Silvio Ferrari, Cristiana Cianitto and Donlu Thayer (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*.<sup>10</sup>

The contributors to Durham, Ferrari, Cianitto and Thayer seek to answer the range of possible questions that any nation, including Australia, must face when considering the interplay between its constitution and religion. If, as the book's cover notes, 'Constitutions are at the centre of almost all contemporary legal systems and provide

<sup>7</sup> See, eg, Micah Schwartzman and Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall* (26 November 2013) Slate <[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html)>; Kristina Peterson, 'Supreme Court's Hobby Lobby Ruling Ignites Debate Over Religious-Freedom Law', *The Wall Street Journal* (online), 30 June 2014 <<http://online.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510>>.

<sup>8</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, established by Letters Patent of the Governor-General of the Commonwealth of Australia, dated 11 January 2013, pursuant to the *Royal Commissions Act 1902* (Cth). For details of the Commission's work, see [www.childabuseroyalcommission.gov.au](http://www.childabuseroyalcommission.gov.au).

<sup>9</sup> See Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) *Brigham Young University Law Review* 821; Laira Krieg and Paul Babie, 'The Space for Religion in Australian Society: An Assessment of the Impact of Australian Anti-Discrimination Legislation on Religious Freedom' in Hilary Regan (ed), *Child Sexual Abuse, Society and the Future of the Church* (ATF Press, 2013) 83.

<sup>10</sup> W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013).

the principles and values that inspire the action of the national law-makers',<sup>11</sup> then some important questions arise: What is the place assigned to religion in the constitutions of contemporary states? What role is religion expected to perform in the fields that are the object of constitutional regulation? Is the separation of religion and politics a necessary precondition for democracy and the rule of law?<sup>12</sup> This latest offering to the growing literature of constitutional treatment of religion addresses these questions through a careful analysis of relevant constitutional texts from a number of national jurisdictions. This book therefore ought to be read by Australians. To assist in that, this brief review outlines what one finds.

The editors divide the book into three parts. Part I examines some topics that are central to the constitutional regulation of religion. Building on that, Part II considers a number of national systems, covering countries with a variety of religious and cultural backgrounds. Part III considers the constitutional regulation of some particularly controversial issues, such as religious education, the relation between freedom of speech and freedom of religion, abortion, and freedom of conscience. I want here only to highlight one of the chapters from each section, to provide a flavour of what one can expect to find and to guide the reader as to where to find it.

## II

Part I of the book, entitled 'Religion and Constitutions: Main Themes', contains six chapters: Iván C Ibán, 'God in Constitutions and Godless Constitutions'; Gerhard Rober, 'Church and State Relations in the Constitutions'; Jorge Precht Pizarro, 'Constitutional Reception of International Law Provisions on Religious Freedom'; Gianluca P Parolin, 'Religion and the Sources of Law: Shari'ah in Constitutions'; and Johan D van der Vyver, 'Constitutional Protections and Limits to Religious Freedom'. The chapter of greatest assistance for present purposes, though, is W Cole Durham Jr's introduction to the collection, 'Religion and the World's Constitutions'.

W Cole Durham Jr, one of the world's leading experts on law and religion, frames the discussion around which the entire book and its offerings revolve. The focus is on religious autonomy in a narrow sense: 'a competence of religious communities to decide upon and administer their own affairs without governmental interference'<sup>13</sup> — in other words, this explores the self-determination of religious groups. For Durham, this autonomy has four dimensions: horizontal (from core community to affiliated entities), vertical (from leaders at the top down to those doing essentially secular work), depth (the pluralistic depth of types of horizontal and vertical structures that a society allows), and temporal (the variance in the allowed institutions over time). Each dimension has a bearing on numerous substantive areas

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<sup>11</sup> Ibid, cover description.

<sup>12</sup> Ibid.

<sup>13</sup> W Cole Durham Jr, 'Religion and the World's Constitutions' in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 3, 6.

of law and these practical issues are nested in progressively more abstract levels of discourse: in specialised legal disciplines; constitutional law; trans-constitutional shifts in overarching legal paradigms; and finally, a more theoretical discussion about ‘the nature of and justification for religious institutions in free societies’.<sup>14</sup>

### III

Durham’s opening chapter not only frames the other essays in Part I, but also shapes the assessment of the range of national experiences and cases in Part II. This Part contains eleven chapters which together cover a range of possible national constitutional approaches to religion: Latin America (Carmen Asiaín Pereira); Mexico (Pauline Capdevielle); Sub-Saharan Africa (Kofi Quashigah); Maghreb (Nassima Ferchiche); South Africa (Helena van Coller); Israel (Natan Lerner); Nepal (Kanak Bikram Thapa); China (Liu Peng, Brett G Scharffs, and Carl Hollan); Spain (Santiago Cañamares Arribas); and the European Union (Emma Svensson).

Closest to home, from a historical and doctrinal perspective, is England, which is covered in chapter 16, ‘The Right to Religious Liberty in English Law’, by Julian Rivers. Moreover, England only recently established national human rights protection, constitutional or otherwise, and in this sense, is closest to Australia. And, like Australia, where Manning Clark famously referred to religion as a ‘shy hope in the heart’,<sup>15</sup> Rivers concludes that for Britain the protection of religious freedom takes the form of an underlying value, the definition of which is ‘inherently interpretative’.<sup>16</sup>

Rivers describes the right to religious liberty ‘by reference to eight basic elements which underlie much of the relevant law’:<sup>17</sup> religious belief is voluntary; no religion or belief is contrary to the policy of the law; public bodies are non-religious; religious groups are autonomous within their own sphere; powers and privileges of religious groups are available on terms of equality; public and religious bodies coordinate action and collaborate in the areas of education and social welfare; personal religious commitments are accommodated in public; religious people and places receive special protection from hostile acts.<sup>18</sup> These eight facets of the underlying value of religious freedom in England might be seen as demonstrating the lack of necessity for any comprehensive constitutional or legislative protection for religion within a nation’s legal structures. Rivers reminds us, however, that there has been a movement in the United Kingdom towards such protection, in the form of

<sup>14</sup> Ibid 11–19.

<sup>15</sup> John Thornhill, *Making Australia: Exploring Our National Conversation* (Millennium, 1992) 172, cited in Bouma, above n 5, 32.

<sup>16</sup> Julian Rivers, ‘The Right to Religious Liberty in English Law’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 285, 287.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 287–99.

the European Convention on Human Rights, the *Human Rights Act 1998* (UK), and the *Equality Act 2010* (UK).<sup>19</sup>

Yet, in this seemingly positive movement towards the formal recognition of and protection for religious freedom, Rivers draws attention to three troubling developments: an increase in litigation involving religious questions; the tendency of religious individuals, organisations, and representatives to lose when challenging secular bodies (and the tendency of religious bodies to lose against individuals); and a lack of historical awareness in the judicial consideration of such questions.<sup>20</sup> For these reasons, Rivers concludes that while religious liberty in the private sphere is secure, the law seems to reflect ‘an increasing intolerance of the public presence and status of religion’.<sup>21</sup>

#### IV

In any attempt to provide some place for religion in a constitutional framework, difficult issues will arise, and certainly Part II adverts to some of them. But it is Part III, in five chapters, that drills down into the detail of some of the issues of greatest concern to states today: freedom of speech (Alain Garay); freedom of conscience and education (Pamela Slotte and Rafael Palomino Lozano); abortion (Ofrit Liviatan); and religious pluralism (Zachary R Callo). The last of these may be of greatest interest to Australians, given the increasing religious and cultural pluralism here.<sup>22</sup>

In ‘Secular Human Rights and Religious Pluralism: The British Debate’, Zachary R Calo explores pluralism, describing it as ‘the core ... principle’<sup>23</sup> adopted by the European Court of Human Rights when considering questions of religious freedom. Yet, despite that, Calo addresses what he sees as a ‘facial discontinuity’ between the Court’s endorsement of religious pluralism and its treatment specifically of Islam, which reveals a tension in the relationship between religion, pluralism, and human rights.<sup>24</sup> Calo declines to pass judgment on whether an approach favouring ‘accessible space’ to religion, or one which takes a non-liberal approach compatible with religious group rights is the preferable approach. Rather, and usefully for Australia, he seeks only to bring the pluralism debate within a theological framework, which

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<sup>19</sup> Ibid 299.

<sup>20</sup> Ibid 299–300.

<sup>21</sup> Ibid 300.

<sup>22</sup> See Bouma, above n 5.

<sup>23</sup> Françoise Tulkens, ‘The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism’ (2009) 30 *Cardozo Law Review* 2575, 2579, quoted in Zachary R Calo, ‘Secular Human Rights and Religious Pluralism: The British Debate’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 403, 403.

<sup>24</sup> Zachary R Calo, ‘Secular Human Rights and Religious Pluralism: The British Debate’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 403, 404.

can be taken as a starting point for constitutional debate on pluralism in a multicultural society.<sup>25</sup>

## V

There is little question that Australia's approach to the protection of religious freedom has been piecemeal and ad hoc at best, and absent at worst. This failing is not merely a constitutional one, but the lacuna found there is a good place to start, and Durham, Ferrari, Cianitto and Thayer's, *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* offers an excellent roadmap to the considerations that Australians ought to have foremost in their mind in starting off on this journey of discovery. This book offers a theoretical framework for assessing the constitutional protection of religious freedom, national examples of how a constitution can be drafted so as to achieve that protection and to treat the delicate issues that may require addressing along the way. While Australians who care about the *Constitution* and its protection of fundamental rights and freedoms should read this book, even if they do not, they will not be able to avoid the issues it raises.

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<sup>25</sup> Ibid 412.

*Paul Babie\**

## ***FREEDOM OF CONSCIENCE AND RELIGION***

**BY RICHARD MOON**

**IRWIN LAW, 2014**

**240 PP**

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### I INTRODUCTION

It might seem strange to review a Canadian book in an Australian law review. Strange, unless one considers the subject matter with which the book deals: the legal protection afforded to freedom of conscience and religion. It is well-known that Australia remains the last Western democracy without a comprehensive mechanism for the treatment of fundamental human rights and freedoms, either constitutionally or legislatively. And while Australia has made many attempts to remedy this gap in its treatment of rights and freedoms, the result has been, as I have called it in previous work, a case of ‘déjà vu all over again.’<sup>1</sup> What is perhaps most interesting about these failed attempts at a comprehensive treatment of rights and freedoms is that the most recent attempt, in 2009-10, when faced with the possibility of some protection for freedom of conscience and religion, it was not those opposed to religion playing any part in the public square who led the charge against comprehensive rights protection, but religious groups themselves.<sup>2</sup> That fact always astounds anyone to whom I relate this story outside of Australia (it ought, of course, to astound Australians, too, but it rarely seems to, as does the lack of any comprehensive protection of rights and freedoms itself).

Why would religious groups oppose the very thing that the citizens of other countries, perhaps less free than Australia, would dearly cherish, were it possible?<sup>3</sup> Reduced to their simplest form, these groups provide two reasons: first, a fear that placing the power to invalidate legislation in the hands of the judiciary would have dire

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<sup>1</sup> Paul Babie and Neville Rochow, ‘Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom’ (2010) *Brigham Young University Law Review* 821.

<sup>2</sup> Ibid 845–53.

<sup>3</sup> See, eg, Vietnam, Decree 92, and its regulation of religion and its practice: International Buddhist Information Bureau *Government Decree 92 tightens controls on religions in Vietnam* (29 November 2012) Que Me: Action for Democracy in Vietnam <[http://www.que.me.net/eng/news\\_detail.php?numb=1955](http://www.que.me.net/eng/news_detail.php?numb=1955)>.

consequences for the freedom of religion. How? The answer to that is the second reason: that any protection of rights would contain not only a protection for freedom of conscience and religion but also of equality and, it is claimed, judges would use their new found power to establish a priority of rights, placing equality at the pinnacle of that pyramid and use it to ‘trump’ all other rights, especially freedom of conscience and religion.<sup>4</sup> That would likely have the effect, again, so it is claimed, of invalidating the exemptions from anti-discrimination legislation carved out for religious groups and those holding religious views to discriminate in furtherance of one’s faith and its doctrines.<sup>5</sup>

For these reasons, it is not only appropriate in an Australian law review, but necessary, to review Richard Moon’s *Freedom of Conscience and Religion*.<sup>6</sup> Necessary, because some perspective is sorely needed on the way in which not only human rights, including equality, but also freedom of conscience and religion can be constitutionally protected in one document and live equably with one another following judicial treatment of the relationship between them. And there could be no better person to whom to turn in attempting to find this needed perspective than Richard Moon, Canada’s leading authority on the protection of freedom of conscience and religion. Moon’s thorough, careful and thoughtful analysis injects some much-needed dispassion into what has become an increasingly passion-driven approach, on both sides of the debate, to religion in Australia’s public forum.

## II RELIGION AND SOCIETY

In the Introduction, Richard Moon covers the range of ways in which religion is found in Canadian society and the treatment of religious freedom by Canadian law. In doing so, he provides an outline of the attempt by the Canadian courts to present a principled account of religious freedom, its justification and treatment under the *Canadian Charter of Rights and Freedoms*,<sup>7</sup> as well as addressing the issue of state neutrality towards religion and its limits.<sup>8</sup>

Having set this important background to what religious freedom is and how a constitution might treat it, Moon turns to the specific points of contact between a society and religion that characterise not only Canada, but any contemporary society, including Australia’s: government support for religion; the restriction and accommodation of religious practices; the autonomy of religious organisations, religious schools or

<sup>4</sup> On these reasons see Babie and Rochow, above n 1, 845–53.

<sup>5</sup> On these exceptions see Laura Krieg and Paul Babie, ‘The Space for Religion in Australian Society: An Assessment of the Impact of Australian Anti-Discrimination Legislation on Religious Freedom’ in Hilary Regan (ed), *Child Sexual Abuse, Society and the Future of the Church* (ATF Press, 2013) 83–115.

<sup>6</sup> Indeed, and books like it from other national jurisdictions which have taken similar approaches to that found in Canada are equally worthy of consideration in Australia.

<sup>7</sup> *Canada Act 1982* (UK) c II, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’).

<sup>8</sup> Richard Moon, *Freedom of Conscience and Religion* (Irwin Law, 2014) ch 1.

education, parents and children; and freedom of conscience.<sup>9</sup> The interested reader finds a fuller exploration of the role played by religion in the Canadian public sphere in another recent Canadian book edited by Solange Lefebvre and Lori G Beaman entitled *Religion in the Public Sphere: Canadian Case Studies*.<sup>10</sup> Any Australian would be well-served by reading both Moon's and Lefebvre and Beaman's assessment of the issues surrounding the place of religion in the Canadian public sphere and in Canadian law simply for what it tells us, through comparison, about the protection of religious freedom generally in western democratic states.

In order to provide a response to Australian religious concerns with the constitutional protection of fundamental rights and freedoms generally and freedom of religion specifically, the remainder of this review considers Moon's assessment of the protection of religious freedom pursuant to the *Canadian Charter of Rights and Freedoms*, which comprises the largest section of the book.

### III CHARTER OF RIGHTS AND FREEDOMS

The *Canadian Charter of Rights and Freedoms* contains three provisions relevant to the protection of religious freedom, and which will be of interest to Australians seeking to understand the Canadian approach:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Extensive Canadian case law has interpreted the interplay of these sections, and Moon summarises and assesses the effect of that interaction. Clearly, as we might expect from what we know about the Australian position, the central consideration here is the relationship between freedom of religion and equality.<sup>11</sup> The approach adopted by the Supreme Court of Canada to the protection of conscience and

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<sup>9</sup> Ibid chs 2–7.

<sup>10</sup> Solange Lefebvre and Lori G Beaman (eds), *Religion in the Public Sphere: Canadian Case Studies* (University of Toronto Press, 2014).

<sup>11</sup> Ibid ch 3.

religious freedom in s 2(a) of the *Canadian Charter of Rights and Freedoms* involves two stages: first, ‘that section 2(a) is breached any time the state restricts a religious practice in a nontrivial way’ and, second, ‘the state must justify the restriction under section 1 and the [*R v*] *Oakes*<sup>12</sup> test, and this is said to involve a balancing of competing interests, the individual’s freedom to practise his religion weighed against the state’s ability to advance what it understands to be the public good.’<sup>13</sup>

While the courts have dealt with s 15 *Canadian Charter of Rights and Freedoms* claims involving possible violations of equality rights, they have not used the s 15 right as part of the s 1 balancing of the s 2(a) right to religious freedom against the public interest, as required by *Oakes* and s 1. Rather, Moon concludes:

The issue in most freedom of religion cases is whether a religious individual or group should be exempted from ordinary law. An exemption will be allowed only when its impact on state policy will be relatively minor. This would seem to involve a pragmatic trade-off of interests rather than a principled reconciliation of rights.<sup>14</sup>

In other words, while it may at first blush appear that there is some substance to the claim made by some of Australia’s religious groups that the protection of both equality and religion in one constitutional document may produce unwanted outcomes for the latter right, the Canadian experience with these two rights demonstrates that the equality right is not the source of such outcomes – rather it is a pragmatic means of accommodating any fundamental rights found in the *Canadian Charter of Rights and Freedoms* and the public interest. That is a matter of the s 1 *Oakes* test, which balances interests, rather than a trumping of religion specifically by equality.

Indeed, equality itself, based upon a mere textual reading of ss 1 and 15 of the *Canadian Charter of Rights and Freedoms*, is subject to such pragmatic balancing – a position supported by the Supreme Court of Canada in its equality jurisprudence.<sup>15</sup> While a pragmatic balancing of this sort may be lamented, is it any worse than the ad hoc and piecemeal approach to the ‘protection’ of religious freedom currently achieved through exemptions for religion found in Australian state and territory anti-discrimination legislation? While there is no doubt that some might see it that way, surely a positive, constitutionally entrenched, protection for religious freedom provides a more robust foundation for this fundamental right than a legislatively tenuous exemption from equality itself. Lest we forget that constitutions tend to have greater longevity than legislation. In short, at least for Australia, if not for Canada, the contest between a pragmatic trade-off of rights versus their principled reconciliation may be a distinction without a difference.

<sup>12</sup> *R v Oakes* [1986] 1 SCR 103 (‘*Oakes*’).

<sup>13</sup> Moon, above n 8, 132.

<sup>14</sup> *Ibid* 138.

<sup>15</sup> *Ibid* 136–7.

#### IV CONCLUSION

Richard Moon ultimately concludes that

[t]he challenge for the courts is to fit this complex conception of religion [both an aspect of an individual's identity and as a set of judgments made by the individual about truth and right] into a system of constitutional rights that distinguishes between immutable or deeply rooted traits that must be respected by the state as part of a commitment to human equality and choices or commitments that are protected as a matter of human liberty but subject to laws that advance the public interest. Because religion can be seen through both lenses, as cultural identity and personal commitment, this shifting by the court between equality- and liberty-based conceptions of section 2(a) may be unavoidable.<sup>16</sup>

And this conclusion, offered by Canada's leading expert on the matter, following an extensive and careful review of the entire corpus of *Canadian Charter of Rights and Freedoms* jurisprudence on freedom of religion, may serve Australia well in any future debates about the protection of human rights through the *Australian Constitution* generally, and freedom of religion and equality specifically.

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<sup>16</sup> Ibid 201.



## SUBMISSION OF MANUSCRIPTS

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In preparing manuscripts for submission, authors should be guided by the following points:

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