RELEVANCE AND FACTS IN ISSUE

A Plea for a More Easily Applied Classification of Relevant Facts

By W. A. N. Wells*

Many of the difficulties encountered when applying the rules of evidence in criminal cases arise either from careless classification or from imprecise terminology. Professor Stone in his now famous article *"Res Gesta Reagitata"*[1] has demonstrated the truth of this assertion in the realm of "Res Gesta". The same kind of difficulty however frequently appears when the fundamental question "Is fact A. relevant to the issue or not?" has to be answered. In the ebb and flow of forensic battle, in legal periodicals and in text books judges, counsel and writers sometimes fail to acknowledge the fact that any decision about relevance involves the solution of two distinct problems—one a problem of logic, the other of human conduct. Some may say that there are not two problems but simply two aspects of the same problem. Such a distinction is verbal: the important thing to remember is that, for the most part, the relevance of a fact can only, it is submitted, be determined after two conclusions have been reached. These conclusions are, first, as to whether there is a sufficient direct or an indirect link between the defendant, the evidence tendered and the facts in issue (basically a problem of logic) and secondly, as to whether, having regard to human nature and the ordinary course of affairs in life, the evidence tendered suggests the existence of the facts in issue (basically a problem of human behaviour and conduct).

The brief analysis which follows is offered as an aid to the determination of relevance and is aimed at solving the dual problem referred to above.

Direct or indirect link between the defendant, relevant facts and facts in issue.

Speaking broadly, if you want to show that a certain person (D.) did something (which is the fact in issue), you can, apart from proving that fact *directly* through a witness who speaks from his own observation (which cannot always be done), show it in one of two ways or a combination of both):

(a) By providing a *direct* link.

You can lead evidence that D. did or said certain things, from which you can argue that D. must have committed the actual deed which is

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1. (1939) 55 L.Q.R. 66.

now in issue. Put another way: you seek to show, from what D. is *known* to have done, that he *must* have done something *further*; namely, the acts alleged against him.

For example: D. is charged with murdering V. by administering poison to him.

You have proved that V. died from arsenical poisoning. You then lead evidence:

(i) That D. bought arsenic a week before V. died, giving a false name to the person from whom he obtained it.

(ii) That D. was staying alone with, and looking after, V. who was in bed with sciatica when he died.

(iii) That D., two weeks before V. died, insured V.'s life for £20,000.

These facts (if accepted) are *directly linked* with D. The question to be asked about them then is: "D. did all these things; do they help the Court to say that he must have done something *further*, that is, killed V.?"

(b) Providing an *indirect* link.

You can prove a number of *independent* facts, which taken at first sight, and judged separately, have no link, or at least only a very remote link, with D., and therefore with the offence alleged against him. In favourable circumstances, however, it is frequently possible to say "No one of these facts *judged alone* does any more than make me suspect that D. is somehow linked with these facts *and*, in consequence, with the offence alleged against him. But if I regard those same facts *collectively*, it is impossible to explain them away as mere coincidence. *The only sensible explanation is one which links D. with the apparently independent facts and thus makes them relevant to the facts in issue.*"

This notion is nowhere better expressed than in the judgment of Napier C.J. in *Jones* v. *Harris*.[2]

> "It seems to me that the administration of the criminal law would be impossible, if it were not open to the prosecution to prove objective facts, leaving it to the jury to say whether they are prepared to draw the inference that connects the facts with the accused and makes them relevant to the charge. I refer to the illustration that I gave during the argument, of an accused person who is seen to pass the spot where—as it appears from other evidence—stolen property has been thrown over the fence: It seems to me that, in these circumstances, the prosecution must be allowed to prove the fact, with a view to asking the jury to infer that the prisoner had been in possession of the property. If the evidence stopped there it might be colourless; but if instances are multiplied—if the same sort of

2. [1946] S.A.S.R. 98, 104.

> thing seems to happen wherever the man goes—then sooner or later, the point is reached at which reason rejects the hypothesis of mere coincidence, and the inference of a causal[3] connection becomes irresistible."

For example: D. is charged with stealing a torch from an electrical store. He was seen by a Constable to enter a rarely used cul de sac.

Five minutes later D. was seen by the same Constable to emerge from the cul de sac.

The Constable searched the cul de sac and found hidden away in a hedge a new torch which he subsequently traced to the electrical store about 100 yards away, and it is established that *it must have been stolen about 15 minutes before D. entered the cul de sac.*

D. when questioned, refuses to answer any questions, and offers no explanation to the Court.

It is discovered that he lives on the other side of town from the cul de sac.

The preliminary fact to establish is that D. "planted" the torch in the cul de sac. No-one saw him do this. All that is known is that the torch was found in the hedge not far from the store; that it can not have been there more than fifteen minutes; and that D. spent five minutes on some undisclosed business in the rarely used cul de sac, shortly after the torch was stolen. There is no direct link between D. and the torch; all that there is, is *a series of objective facts.* In all the circumstances, it may be that a Court would say: "These apparently separate facts cannot be accounted for by mere coincidence. The only reasonable explanation is that D. put the torch there. If he did, then this is clearly relevant to the charge of stealing the torch with which D. is now linked."

Or again (V. is speaking to D.): "I'm not saying you steal my cutlery but every time you come to dinner something seems to go off."

Of course, nearly all cases involve both the direct and the indirect methods of proving the facts in issue.

Relevance of human nature and the ordinary course of human affairs.

When particular facts being investigated are given their rightful place in human affairs, we gain a convenient label for them and we can also understand why they can help us to find out the truth. Thus, we may claim that facts are relevant *because* they tend to prove that D. had a "motive" or an "opportunity" for doing something, or because they tend to disclose the carrying out of detailed preparation for, or significant actions or statements after, the alleged offences. All that is being said is that, human nature being what it is, we expect that a person with a strong motive for doing something is more likely to have actually done it than one who has no motive; that deliberate acts

3. It has always been accepted that the word "casual" in the report is a misprint.

are likely to be preceded by preparation and the contriving of opportunity; or that a guilty mind tends to produce subsequent conduct which can usefully be related back to what has gone before.

Again, conduct which may indicate some emotion (mutual hatred, mutual love, curiosity, suspicion, distrust, fear, pride), may be used, speaking generally, to show the *reason* for doing something alleged to have been done, and hence that it *was* probably done *for that reason.* Other conduct such as flight, attempts to mislead or deceive the police or to destroy incriminating evidence, or to induce a potential prosecution witness to commit perjury, may show the guilty mind and may be used to support the old argument that if a man is trying to hide something, it is because he believes its disclosure would do him no good.

It is unwise to think of applying only one of these two methods of classifying relevant facts when considering the rules of evidence generally or the weight of evidence in any particular case. It is essential to use them together.