

UNDERSTANDING THE EVIDENCE ACT 1995 -

A DAUNTING TASK!

“Anyone studying the Acts will be forgiven for thinking that much is familiar. The language and concepts used will have a familiar ring to them. The Acts assume the continuation of the adversary system and its practices. They assume, for example, that, as in the past, it will be for the parties to invoke the rules except where the terms of the legislation indicates otherwise. As in the past, objections to the admissibility of evidence will require consideration of the evidence sought to be adduced and not the questions asked. That having been said, the task facing persons trying to become completely familiar with the Acts is a daunting one. They face a comprehensive statutory restatement of the laws of evidence which introduces changes in most areas of the law”.

[The Hon. Justice Smith, *“The More Things Change The More They Stay The Same? The Evidence Acts 1995 - An Overview”*, (1995) UNSWLJ (18) 1, at p.3]

THE SECTION 135, 136, 137 DISCRETIONS - AS APPLIED TO DATE

- APPELLATE COURT GUIDANCE V’S FETTERING THE MANNER IN WHICH THE DISCRETIONS ARE TO BE EXERCISED

OPINION EVIDENCE

- FIELDS OF ‘SPECIALISED KNOWLEDGE’

- EXPERTS VENTURING OPINIONS OUTSIDE THEIR FIELD OF SPECIALISED KNOWLEDGE

- AIJA SURVEY OF AUSTRALIA’S JUDICIARY

FIRST HAND [OR ‘CONTEMPORANEOUS’] HEARSAY

SCOPE OF THE APPLICATION OF THE EVIDENCE ACT

DECISIONS OF HIGH COURT IN - NORTHERN TERRITORY v GPAO (1999) 196 CLR 553

- MANN v CARNELL (1999) 73 ALJR 378

- ESSO v COMMISSIONER OF TAXATION (1999) 73 ALJR 339

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AUTHORITIES CITED

- Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.
Akins v Abigroup Ltd (1998) 43 NSWLR 539
Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 5] (1996) 64 FCR 73
Arnotts Limited v Trade Practices Commission (1989) 24 FCR 313 at 347
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1999] FCA 1269
Australia Resources Ltd v Commissioner of Taxation (1998) 83 FCR 511.
Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd and Exxon Coal Australia Ltd [unreported, Supreme Court of NSW, Einstein J, 8 February 1999]
Bank of Valletta PLC v National Prime Authority (1999) 165 ALR 60
Browne v Dunn (1893) 6 R 67
CDJ v VAJ (1998) 197 CLR 172
Chambers v Jobling (1986) 7 NSWLR 1
Clark v Ryan (1960) 103 CLR 486
Commercial Union Assurance Co of Australia v Ferrcom Pty Ltd (1991) 22 NSWLR 379
Commonwealth of Australia v McLean (1996) 41 NSWLR 389
Cropper v Smith (1884) 26 Ch D. 700
Dijkhuijs v Barclay (1988) 13 NSWLR 639
Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd (1992) 38 FCR 471
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 74 ALJR 339.
Frye v United States -293 F 1013 (1923)
Gordon (Bankrupt) Official Trustee in Bankruptcy v Pike (No. 1) (unreported, Federal Court of Australia, 1 Sept 1995, Beaumont J)
Graham v The Queen (1998) 195 CLR 606
Grant v Downs (1976) 135 CLR 674
Guide Dog Owners' and Friends' Association v Guide Dog Association of NSW and ACT (1998) 154 ALR 527
H G v The Queen (1999) HCA 2
Hughes Aircraft Systems International v Air Services Australia (1997) 80 FCR 276
Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd (1995) 36 NSWLR 242
Mann v Carnell (1999) 74 ALJR 378
National Employers Mutual General Association Ltd v Waind and Hill [1978] 1 NSWLR 372.
Norbis v Norbis (1985) 161 CLR 513
Northern Territory v GPAO (1999) 196 CLR 553
NRMA Limited v Morgan & Ors (unreported, Supreme Court of NSW, 1 September 1998, Giles J).
Orduka v Hicks CA 40397/9 9, unreported.
Osland v The Queen (1998) 159 ALR 170
Papakosmas v The Queen (1999) 196 CLR 297
Papakosmas v The Queen (1999) HCA 37
Quick v Stoland Pty Ltd (1998) 157 ALR 615
R v Adam (1999) 47 NSWLR 267
R v Andrews [1987] AC 281
R v BD (1997) 94 A Crim R 131
R v Bedingfield (1879) 14 Cox CC 341
R v Bonython (1984) 38 SASR 45

R v Lillyman [1896] 2 QB 167
R v Lockyer (1996) A Crim R 457
Ratten v The Queen [1972] AC 378
Rex v Christie [1914] AC 545
Tante v Roth (unreported, Supreme Court of NSW, 28 November 1996, McLelland J)
Telstra Corporation v Australis Media Holdings [No 1] (1997) 41 NSWLR 277
Trade Practices Commission v Port Adelaide Wool (1995) 60 FCR 336
Trust Company of Australia Ltd v Perpetual Trustees WA Ltd unreported 18 Sep 1996
US Supreme Court in Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993)
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Whitehouse v Jordan [1980] 1 All ER 650
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Introduction

Some five years have now passed since the *Commonwealth* and *New South Wales Evidence Acts* ('the Act') commenced in operation. In 1997, I was able, I believe correctly, to suggest that to many, practitioners and judges alike, the Act then remained a relatively unexplored wilderness, seldom referred to, rarely utilised and certainly more feared than welcomed. In 2000, the operation of the Act continues to attract close attention.

The significance of the new regime to practitioners and to the Court was then and remains obvious. Important discretions have been given to the Court across the full spectrum of conduct of proceedings. The discretionary provisions [sections 135, 136 and 137] permit the Court to exclude evidence or to limit the use to be made of evidence. Exceptions to the hearsay rule fundamentally altered the common law.

I intend to refer briefly to the Part 3.11 discretions to exclude evidence. There is now a body of case law, mostly unreported, which inform the mode in which judges have been applying these sections. These discretions have recently been referred to, inter alia, by the High Court of Australia and by the New South Wales Court of Appeal. I shall deal at the same time with aspects of opinion evidence endeavouring to point up the close interrelationship between the sections of the Act dealing with the two topics.

Some basal issues going to the extent to which the Evidence Act applies outside of the trial/hearing situation and to the extent to which the common law develops or is modified as a result of statutory law were addressed in three decisions of the High Court of Australia, the first decided in March 1999 and the second and third decided in December 1999. These issues are also dealt with.

The Discretions

The discretionary provisions are as follows:

‘The Relevance Discretions (to exclude or to limit use of evidence)

Section 135 “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; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.”

Section 136 “The court may **limit the use to be made of** evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.”

The Probative Value/Prejudice discretion

Section 137 “In a criminal proceeding, the court **must refuse** to adduce evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.”

These discretions play a pivotal role in a number of areas treated with by the Act. They temper the new and expanded definition of ‘relevance’ in section 55(1). Further, the discretions impact on the new regime introduced in relation to admissibility of expert evidence.

The Position before the Act

Prior to the commencement of the Act, to be admissible the opinion of an expert needed to satisfy the following tests:

- (1) the opinion had to be relevant to a fact in issue;
- (2) there had to be evidence capable of proving the facts upon which the opinion was based;
- (3) the witness had to disclose the facts upon which the evidence was based;
- (4) there had to be a relevant field of expertise, which was sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience;

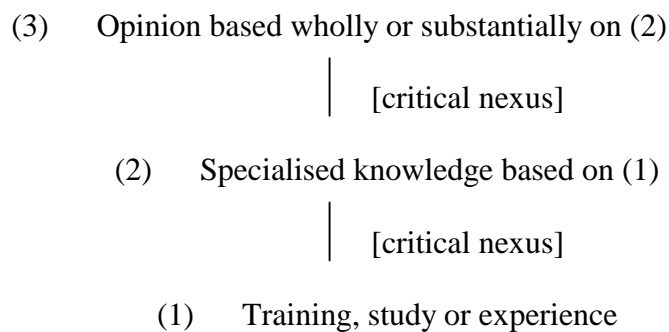
- (5) *the witness had to be an expert in that field;*
- (6) *the opinion could not be related to a matter of common knowledge;*
- (7) *the opinion could not concern the ultimate issue, that is, the expert was not permitted to give an opinion on the very issue of fact or law which the court had to determine.*

The position after the Act

The current rules for the admissibility of expert evidence at least include:

- (1) *the evidence must be relevant (s 55) and have sufficient probative value (s135 and in criminal proceedings s137);*
- (2) *the witness must have specialised knowledge based on training or experience (s 79);*
- (3) *the opinion expressed by the witness must be based wholly or substantially on that knowledge (s 79).*

Section 79 Tree



It is to be noted absent the making of a limiting order, s 79 will apply in terms. The section provides that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to an opinion of that person that is wholly or substantially based on that knowledge.

Section 79 appears to be a direct rejection of the American Frye Test [Frye v United States -293 F 1013 (1923)]. The Frye test had required that an expert's opinion be related to a recognised field of expertise or result from the application of theories or techniques accepted in that field.

It is important to note that an expert witness should not be allowed to stray outside the witness' area of expertise. It is for this reason that the opinion expressed by the witness

must be based wholly or substantially on the witness' specialised knowledge, which is in turn specialised knowledge based on training, study or experience.

At common law, the field of expertise prerequisite required a court in determining the admissibility of expert evidence, to assess the reliability of the knowledge and experience on which the opinion was based. An immediate question arose as to whether a similar exercise was required under the Act. The question appears to have been answered by Gaudron J in terms of the expression 'specialised knowledge' in a recent decision to which I shall refer.

I note that the Australian Law Reform Commission did not enter the difficult field of determining what were the criteria which were required to be shown before the field of expertise would be treated as a recognised or accepted field of expertise. The Commission recommended that there be no field of expertise test. The Commission's position was that:

"There will be available the general discretion to exclude evidence when it might be more prejudicial than probative, or tend to mislead or confuse the tribunal of fact. This could be used to exclude evidence that has not sufficiently emerged from the experimental to the demonstrable."

Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Vol.1 (AGPS, Canberra, 1985) at para 743.

This position one might have thought, is reflected in s 79 of the Act, which requires only that the expert have "specialised knowledge", with the exclusionary rules regarding irrelevant, prejudicial or misleading evidence presumably operating to exclude the opinions of specialists in unreliable and unacceptable fields of expertise.

[See generally Peter Berman *"Fundamentals of Expert Experience: part 2"* (1996) 3 Criminal Law News 55-56.]

It is appropriate then that a trial judge examine evidentiary reliability under s 79, s 56 and/or s 135, and when doing so, exercise the court's appropriate discretion to ensure that the manner in which evidence is adduced by an expert does not have the quite often unforeseen consequence, which by dint of s 60 and/or s 77 of the Act would otherwise result, namely that evidence which neither party intended to be evidence of the fact, becomes evidence of the fact. That situation can very easily arise if the court is not astute

to limit the precise purpose for which assumptions relied upon by experts in their reports or matters stated in those reports as facts, are admitted into evidence.’

‘Stephen Odgers has argued that the requirement of “specialised knowledge” itself could be interpreted to impose a standard of evidentiary reliability. He bases his argument on the use of the word “knowledge” which suggests more than belief or speculation. As he points out, the US Supreme Court in Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993) recently came to a similar conclusion when it considered r 702 of the Federal Rules of Evidence. That rule is similar to s 79 in that it refers to “specialised knowledge”. The court said:

“the word 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.’

...

The US Federal Rules of Evidence, as interpreted by the majority in Daubert v Merrell Dow Pharmaceuticals impose a broadly similar requirement upon the admissibility of expert evidence. Therefore the factors which the US Supreme Court suggested were matters which judges should consider in assessing the reliability of the field of expertise will be of considerable assistance when a judge performs that task under the Evidence Acts. As the minority in Daubert v Merrell Dow Pharmaceuticals point out, this will not be an easy thing for judges to do. Fortunately in the vast majority of cases there will be no dispute and the validity of the expert’s field of expertise will be accepted by all parties.

The matters which were listed “for a judge to consider when deciding the reliability of a scientific theory are:

- 1. Testability of the theory.*
- 2. Peer review and publication of the theory.*
- 3. Known or potential rate of error.*
- 4. General acceptance within the relevant scientific community.*

These factors were not to be considered inflexibly, and no one factor should be dispositive of whether a theory is reliable or not.

Of course this does not mean that only those fields of knowledge which are beyond doubt may be the subject of expert evidence. New and evolving fields of expertise may be areas of “specialised knowledge” with enough reliability to make opinion evidence based on that knowledge relevant and sufficiently probative even though there is a risk of inaccuracy and need for caution.’

[P. Berman, *supra* at 55-56]

In *H G v The Queen* (1999) HCA 2, Gleeson CJ adverted to the significance of the need for an expert whose opinion is sought to be tendered, to differentiate between the

assumed facts upon which the opinion is based and the opinion in question. In the view of the Chief Justice, the provisions of section 79 of the Act will often have the practical effect of emphasising the need for attention to requirements of form. His Honour said:

‘By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.’ [at para 39] [cf approach taken in *Trust Company of Australia Ltd v Perpetual Trustees WA Ltd* Supreme Court of NSW, unreported 18 September 1996 per McLelland CJ in Eq] [1]

Gleeson CJ pointed out that in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with section 79, to opinions which are wholly or substantially based on their specialised knowledge. As his Honour said at paragraph 44:

‘Experts who venture “opinions”, (sometimes merely their own inference of fact), outside their field of specialised knowledge, may invest those opinions with a spurious appearance of authority, and legitimate processes of fact finding may be subverted.’

In that case, Gaudron J saw the first question raised by the suggested expertise of the psychologist, as whether psychology or some relevant field of psychological study amounted to ‘specialised knowledge’. Her Honour said at paragraph 58:

‘The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable “to form a sound judgment . . . without the assistance of [those] possessing special knowledge or experience . . . which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.’

[Citing in support of that proposition Australian authorities running from *R v Bonython* (1984) 38 SASR 45 at 46-47, *Clark v Ryan* (1960) 103 CLR 486 at 491 through to *Osland v The Queen* (1998) 159 ALR 170 at 184].

Gaudron J then continued:

‘There is no reason to think that the expression “specialised knowledge” gives rise to a test which is any respect narrower or more restrictive than the position at common law.’

Gleeson CJ held that it was not in dispute that psychology is a field of specialised knowledge and that a psychologist may be in a position to express an opinion based on his or her specialised knowledge as a psychologist. However, his Honour’s holding was that the witness had to identify the expertise he or she could bring to bear and cited *Clark*

v Ryan (1960) 103 CLR 486 in support of the proposition that the opinions of the expert had to be related to his or her expertise.

Here again, the emphasis is on a close examination of the assumptions upon which the opinion is based and upon the nexus between the opinion on the one hand and the suggested specialised knowledge on which the opinion is said to have been wholly or substantially based, on the other hand.

The view expressed by Gaudron J focuses, when one is examining questionable special knowledge or experience, upon the parameters of whether that specialised knowledge or experience is firstly sufficiently organised, or secondly sufficiently recognised, to be accepted as a reliable body of knowledge or experience.

One thing which is clear in relation to the section 135, 136 and 137 discretions, as McHugh J stated in *Papakosmas v The Queen* (1999) HCA 37 at paragraph 97, is that those discretions contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case. Subject, as his Honour recognised, to the propriety of appellate courts developing guidelines for exercising the powers conferred by these sections so that certain classes of evidence would be usually excluded or limited, the sections ‘confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility’. I shall return to this below.

Unfair Prejudice

Up to this point in time, a number of judges have approached the term ‘unfairly prejudicial’ as including as appropriate, procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act. In *Gordon (Bankrupt) Official Trustee in Bankruptcy v Pike (No. 1)* (unreported, Federal Court of Australia, 1 Sept 1995), Beaumont J used his discretion under section 135(a) to exclude the transcript of a bankrupt, which would otherwise have been admitted as an exception to the hearsay rule pursuant to section 63, on the basis that the prejudicial effect of being unable to cross-examine the maker of the representation on a crucial issue in the litigation, substantially outweighed the probative value of the evidence. In *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389 at 401-402, the New

South Wales Court of Appeal also used section 135(a) to exclude hearsay evidence otherwise admitted via the exception contained in section 64, on the basis that the defendants were prevented by other evidentiary rulings from effectively challenging the evidence. However, the correctness, of such an approach has recently been questioned in some obiter comments by McHugh J in the High Court. It is convenient to start with those comments and then consider the cases prior to and subsequent to his Honour's observations.

Justice McHugh's Observation

In *Papakosmas*, McHugh J, in referring to *Gordon* and to *McLean* said at paragraph 93:

'It is unnecessary to express a concluded opinion on the correctness of these decisions, although I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of "prejudice" in a context of rejecting evidence for discretionary reasons.'

In referring to the "traditional meaning of prejudice", his Honour was presumably referring to a comment summarised by the Australian Law Reform Commission in its interim report in the following terms:

'By risk of unfair prejudice is meant the danger that the fact-finder may 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-finders' sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the factfinder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence, the factfinder may be satisfied with a lower degree of probability than would otherwise be required.'
[ALRC Evidence Report No. 26 Interim (1985) Vol 1 paragraph 644]

In an article entitled "'Reining in the Judges"? - An Examination of the Discretions conferred by the Evidence Acts 1995' (1996) 19 UNSW Law Journal 268 at 273-274, the commentator said as follows:

'It seems more likely that the concept of 'unfair prejudice' to a party will be construed to include situations where the party against whom the evidence is sought to be tendered would be placed, forensically, in an awkward or impossible position. [Santow J so held in *Wentworth v Wentworth* (unreported Supreme

Court of NSW, 17 April 1997) at page 12.] *This may occur for example, by reason of uncertainty as to the possible inferences to be drawn from the admission of the evidence in issue. The party resisting the tender may, if the tender is successful, be placed in the forensic position of having to elect:*

- (a) *whether to leave the evidence unanswered and to address submissions that no (or virtually no) weight should be given to the evidence in question because, properly viewed, it does not give rise to inference A; or*
- (b) *whether to avoid any doubt on the issue by calling other evidence in relation to the matter.*

The court may take the view that the weak probative value of the item of evidence in issue, in fairness to the party against whom the tender is sought to be made, ought not require that party to be placed in this forensic dilemma.

Many but by no means all of such situations would also be embraced within section 135(c). On the other hand, evidence having significant probative value (if admitted) may be unfairly prejudicial to a party and yet, by definition, may not cause or result in undue waste of time.

The concept of “unfair prejudice” would also appear to embrace the rule against pleading or procedure which is calculated to cause “surprise”, in the sense of “denying a party due warning of what is to be said against him, and so, effectively [denying] him an opportunity to be heard”.

The same commentator in referring to the words ‘misleading or confusing’ in sections 135(b) and 136(b) said:

‘Whether the admission of evidence or the particular use to be made of evidence will be misleading or confusing is a question of impression to be determined by the trial judge in the context of other evidence and of the issues being tried. The word “mislead” has been held to mean “to lead into error”.

The word “confusing” is unlikely to be given a narrow construction. The relevant confusion may arise from a particular item of evidence sought to be adduced seen in isolation or seen in the context of other material admitted or proposed to be admitted into evidence.’

In referring to section 135(c), the commentator said:

‘This sub-section has at least in civil proceedings, the potential to be the most used of the ss 135/136 gateways. The court may, for any number of reasons in any particular case, view the probative value of an item of evidence as substantially outweighed by the danger that the evidence may enable a blowout on a most peripheral issue. A single factual issue seemingly of the most marginal relevance to the principle issues in the case can, if allowed full rein, lead to an undue waste of time by way of prolongation of cross examination, the calling of

additional witnesses or evidence, the need to issue further subpoenas, the recalling of witnesses and the like.’

McHugh J specifically identified these pages of this article by that commentator in expressing the view to which I have referred. At paragraph 93 of his Honour’s judgment, the sentence referring to those pages is as follows:

*‘Some recent decisions suggest that the term “unfair prejudice” may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act.’ [Then referring to the article, to the Beaumont J decision in *Gordon* and to the Court of Appeal decision in *McLean*.]*

As I happen to have been the commentator who wrote that article, I have a special interest in his Honour’s tentative view that the approach expressed in the article and the case law trend suggest an excessive influence by the common law attitude to hearsay evidence, failure to give sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue and a failure to give sufficient weight to the traditional meaning of ‘prejudice’ in a context of rejecting evidence for discretionary reasons.

It seems unlikely that McHugh J was confining his comments to criminal law or jury trial contexts. [See the references to the Beaumont J and Court of Appeal decisions.]

I note that in *R v Lockyer* (unreported, Supreme Court of NSW, 11 October 1996), Hunt CJ at Common Law said:

*‘Section 135 does not depart from the “Christie” discretion at common law. (His Honour cites a number of authorities, including *Rex v Christie* [1914] AC 545 at 559, 564.) Such prejudice is not established by the mere fact that the evidence has only slight probative value; nor is it established because it may (quite properly) reduce the effect of the Crown case . . . There must be shown to be a danger that the tribunal of fact will use the evidence upon a base logically unconnected with the issues in the case.’*

Lockyer involved a close examination of tendency evidence in a criminal trial and in particular the inter-relationship of sections 97, 101, 135 and 137. It is suggested that the references to the ‘Christie’ discretion and the context involved, make it reasonably clear that Hunt CJ’s discussion of section 135 was not intended to cover a civil suit.

The effect of McHugh J's observations as to the scope of the discretions invested by the *Evidence Act* is a particularly important question especially given the hitherto wide perception of the discretion conferred upon judges by those provisions.

Finally, I note that at common law there was no discretion in a court to reject evidence sought to be adduced in non-jury civil proceedings on grounds of unfair prejudice or limited probative value. Relevance was of course a different parameter. Stephen's definition of relevance was 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 conjunction with other facts proves or renders probable the past, present or future existence or non-existence of the other.'

[Digest of the Law of Evidence, 12th ed, Part 1]

As previously mentioned, the definition of 'relevance' in the *Evidence Act* represents a considerable expansion over the common law concept. The expanded definition is probably the single most significant aspect of the Act and is to be borne in mind at every turn.

Appellate Court Guidance

The question is one of particular importance when one takes into account the inter-relationship between many other sections in the Act and the discretionary provisions. Time and time again, the court has the opportunity to exercise the discretions so as to limit or exclude the use of evidence on an instant specific basis. As McHugh J pointed out, the three sections contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case.

His Honour further pointed out that 'it may be proper for appellate courts to develop guidelines where exercising the powers conferred by these sections so that certain classes of evidence are usually excluded or limited'. However, until very recently such guidance has been sparse. There is, of course, a fundamental disinclination in all courts to circumscribe the exercise of a discretion granted by the legislature too closely by yardstick or guideline as to how that discretion ought to be exercised. That disinclination is evidenced by a decision of the Court of Appeal - *Dijkhuijs v Barclay* (1988) 13 NSWLR 639 where Kirby P dealt with 'guidelines' to which the trial judge had adverted

in dealing with the new section 9(1) of the *Family Provision Act 1982*. Kirby P said at 652:

‘ . . . to the extent that the categories listed [by the trial judge] purport to harness the discretion stated in the wide terms of s9(1) of the Act, I consider that they impede rather than help the performance of the task assigned to the Court by Parliament.’

There is of course a close tension between, on the one hand, preserving the width of the discretion which the legislature has created, and on the other hand, the need for the guidance of appellate courts to assist in consistency. The position was put as follows by Mason and Deane JJ in *Norbis v Norbis* (1985) 161 CLR 513 at 519:

‘It has sometimes been said by judges of high authority that a broad discretion left largely unfettered by Parliament cannot be fettered by the judicial enunciation of guidance in the form of binding rules governing the manner in which the discretion is to be exercised: see, e.g. Mallet; Evans v Bartlam; and Gardner v Jay. However, it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well-settled principles: United Engineering Workers’ Union v Devanayagam. It has been a development which has promoted consistency in decision-making and diminished the risks of arbitrary and capricious adjudication. The proposition referred to at the beginning of this paragraph should not be seen as inhibiting an appellate court from giving guidance, which falls short of constituting a binding rule, as to the manner in which the discretion should be exercised: but cf. Reg. v Bicanin. And despite the generality of some of the statements to which we have referred, there may well be situations in which an appellate court will be justified in giving such guidance the force of a binding rule by treating a failure to observe it as constituting grounds for a finding that the discretion has miscarried.’

The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of evidence by appellate courts, whether in the form of principles or guidelines.’

In addition to the demands of consistency, appellate court guidance is especially necessary for the true issue under consideration is not so much the principles upon which an undoubted discretion may be exercised but the circumstances in which a Court possesses the discretion at all. For the words ‘unfair prejudice’ in s135(c) govern not

only the chief matter to be considered in the exercise of the discretion but the principal factor in the possession of the discretion in the first place.

I shall proceed to the first and examine the guidance by the Court of Appeal in *Commonwealth v McLean* and more recently by the Court of Appeal in *Orduka v Hicks*.

(i) *Commonwealth v McLean* (1996) 41 NSWLR 389

A close examination of the decision of the Court of Appeal in *McLean* throws up the possibility of a temporal or time specific, unfair prejudice. In short, evidence allowed as not unfairly prejudicial to the defendant at one point during the hearing was held by the Court of Appeal to have become unfair later when its use against the plaintiff was restricted. Hence, the progress of admission of evidence through the trial is to be regarded as dynamic and in particular circumstances what may appear to be the case at one point in the trial, may later alter.

The plaintiff was a seaman on HMAS ‘Melbourne’ on 10 February 1964 when it collided with and sunk HMAS ‘Voyager’. In 1995 he brought an action in the Supreme Court as a result of his experiences on the night of the collision claiming post traumatic stress disorder.

The First Ruling

The first ruling of the trial judge was that the plaintiff’s wife could give evidence of what the plaintiff had told her in February/March 1964 about the events on the night of the collision. The plaintiff had given evidence without referring to these events. The wife’s evidence was admitted under the exception in section 64 to the general exclusion of hearsay in section 59(1).

The evidence was allowed as first hand hearsay. In allowing the evidence in that fashion, the judge noted that it would also have been admissible as direct evidence to prove the plaintiff’s state of mind at the time, which may have been relevant on medical issues. The defendant objected that at the time of the conversation the events were no longer ‘fresh in the memory’ of the plaintiff and that section 64(3) was not satisfied. The judge held that spontaneity was not required as it had been under the *res gestae* exception at common law and that such traumatic events remained fresh in the memory of the plaintiff

at the time. Handley JA and Beazley JA with whose reasons Santow AJA generally agreed, were not persuaded that the judge fell into error in this ruling.

The Second Ruling

The trial judge's second ruling was his rejection of the defendant's applications to exclude the evidence under section 135 or to limit its relevance under section 136. The Court of Appeal saw no reason to differ from the conclusions of the judge that the evidence was not unfairly prejudicial to the defendant and that its use should not be limited.

The evidence of Mrs McLean allowed by that ruling, was as follows:

A. . . . I asked him what happened when the 'Melbourne' hit the 'Voyager' and he said it was horrific. He said picking bodies out of the water, severed arms, legs, heads, putting them in green plastic bags, he kept saying it was horrific and I said to him: "What about Leo?" and he hesitated and he said "Leo went down with it, he didn't have a chance" you know, "it could have been me". He said "I don't want to talk about it any more."

Q. On subsequent occasions did you ask him again about the "Voyager" collision?

A. I asked him quite a few times but he just avoided the question, wouldn't answer.'

The Third Ruling

The third ruling involved the defendants having called Mr Halley, a retired naval officer, and Dr Treloar, a former naval doctor, who had both been on the 'Melbourne' on the night of the collision, to rebut the hearsay evidence given by Mrs McLean. The plaintiff objected to such evidence being led, invoking sections 135 and 136. The judge, however, ruled that the evidence should be allowed, reserving the question of whether it could be used to challenge the plaintiff's reliability.

Mr Halley gave evidence of his movements after the collision which included being in command of one of the 'Melbourne's' motor boats which picked up survivors. He did not witness the events described by the plaintiff to his wife.

Dr Treloar was the senior medical officer on the 'Melbourne' responsible for the care of survivors brought on board, and the treatment of the injured. He stationed himself on the

deck where the survivors, rescued by the ‘Melbourne’s’ boats came aboard. He did not witness the events described by the plaintiff to his wife. He was responsible for the examination of any dead bodies brought on board, but had neither conducted nor arranged for any such examination. He said that any dead bodies would have been brought to the sick bay and disposed of from there and this did not happen.

The Fourth Ruling

The judge’s fourth ruling confirmed that this evidence could be used by the jury in deciding whether the plaintiff saw what he described to his wife. The credit of Mrs McLean, in the sense of her honesty, had not been challenged in cross examination, but her reliability was. There had been no occasion for the defendant to cross examine the plaintiff on these matters, but it did not seek to have him recalled for further cross examination after Mrs McLean had given evidence. Accordingly, there had been no challenge to the plaintiff on this point and, as the trial judge had stated, no serious challenge to the reliability of Mrs McLean either.

The Fifth Ruling

The trial judge held that it would be unfairly prejudicial to the plaintiff to allow the evidence of Mr Halley and Dr Treloar to be used to attack the reliability of the plaintiff and Mrs McLean. Accordingly he ruled, pursuant to section 136, that this evidence might be used to determine whether the plaintiff truly saw what he described to his wife ‘but may not be used . . . to impugn the credibility of the plaintiff or Mrs McLean by suggesting . . . that the plaintiff gave an untruthful account of matters to his wife or that Mrs McLean gave an untruthful account to the Court of her conversation with the plaintiff’. The Court of Appeal pointed out that it was clear in context that these references to ‘untruthful account’ were intended to cover their reliability as well as their honesty.

I shall set out hereunder a section from pages 401 to 402 of the Court of Appeal decision and take the opportunity to emphasise the two sentences which it seems to me, may well be the first or at least an early involvement of that Court in the area by way of pointing up some guidance in approaches to the Act.

‘Section 136 confers a discretion to limit the use to be made of evidence. . . .

The present difficulties have arisen because s 64 read with s 62 now allows first-hand hearsay. The first ruling allowed hearsay from Mrs McLean about events witnessed by the plaintiff as proof those events had occurred. The weight to be given to such evidence depends on the honesty and reliability of the person who made the representation, and the person giving the evidence.

*A party against whom such evidence is tendered must be free to challenge any link in the chain, or the chain as a whole. It would be unfairly prejudicial within s 135(a) for evidence to be tendered against a party who could not contest it. The rule in *Browne v Dunn* (1893) 6 R 67 prevented the defendant from submitting that Mrs McLean had been dishonest in her evidence, or that the plaintiff had lied in the original conversation. Despite the tentative nature of the cross-examination of Mrs McLean directed to her reliability, we can see no reason why the defendant should not have been free to argue that the evidence of Mr Halley and Dr Treloar, established that the hearsay was unreliable, and therefore either Mr or Mrs McLean or both, although not dishonest, were unreliable on this issue.*

*The plaintiff’s legal advisers could have tendered the evidence of Mrs McLean under s 72 as evidence of the plaintiff’s health and state of mind at the time, but they elected to tender it as hearsay. It would have been unfairly prejudicial to the defendant to admit that evidence on any basis which restricted its capacity to answer it. The defendant was not entitled to protection from the rule in *Browne v Dunn*, but we fail to see why it should have been further restricted in the use it made of its evidence in answer.*

The judge acknowledged the unprecedented difficulties in dealing with first-hand hearsay under the new Act and, with the wisdom of hindsight, the better course may have been to disallow the wife’s evidence as hearsay. However, once her evidence was admitted, the plaintiff was not entitled to be protected from the consequences of that evidence being found to be an inaccurate account of what had occurred. It would be unfairly prejudicial for a party who showed that first-hand hearsay was unreliable to be denied the wider benefits of that finding.

The combined result of the . . . rulings was a one-sided situation in which the plaintiff was protected from some of the normal risks of adducing evidence. We cannot think of any instance in which such a one-sided situation could arise under the common law. Evidence should be “a two-edged sword”, with both benefits and risks for the party tendering it.

The result in our opinion was unjust. The evidence allowed as not unfairly prejudicial to the defendant became unfair when its use against the plaintiff was restricted. A similar situation could occur if first-hand hearsay was admitted under s 64(2) without the maker having to be called, because, for example, he was dead, ill, or out of the country. The other party could never cross-examine the maker, but if it proved that the representation was incorrect could it justly be denied the benefit of that finding on the credibility of the maker and the witness?

Such a situation bears a close analogy to the present, where the maker did not give evidence of the truth of the representation.

In our opinion the ruling of 25 July created an unfair situation which occasioned an injustice to the defendant and was clearly wrong. This ground of appeal has been established.'

There ought, I think, be said a number of things concerning the decision of the Court of Appeal in *McLean*.

In the first place, post the decision of the High Court in *Graham v The Queen* (1998) 195 CLR 606, it may be arguable that the evidence of Mrs McLean would not be allowed as an exception to the hearsay rule. The two ships had collided on 10 February 1964. The plaintiff had apparently told his wife in February or March 1964 about the subject events. Given the circumstances in which the accident in *McLean* occurred a question mark may arise as to whether the occurrence of the asserted fact was "fresh in the memory of the plaintiff" when the statement was made [cf: Act ss64(3), 66(2)]. *Graham* involved a complaint made six years after the last of the acts alleged against the appellant. Gaudron, Gummow and Hayne JJ held that too long had elapsed between the events and the complaint. Their Honours said at para. 4:

"The word 'fresh', in its context in s 66, means 'recent' or 'immediate'. It may also carry with it a connotation that describes the quality of the memory (as being 'not deteriorated or changed by elapse of time'... but the core of the meaning intended, is to describe the temporal relationship between 'the occurrence of the asserted fact' and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years'.

Callinan J, with whose reasons for judgment Gleeson CJ agreed, said at para. 34:

"Whilst it cannot be doubted that the quality or vividness of a recollection will generally be relevant in an assessment of its freshness, its contemporaneity or near contemporaneity, or otherwise will almost always be the most important consideration in any assessment of its freshness. The Court of Criminal Appeal took the view that the section laid emphasis on the 'quality' of the memory and in consequence, the regard that should have been paid to the delay in making the complaint was not paid. There may be cases in which evidence of and events relatively remote in time will be admissible pursuant to section 66, but such cases will necessarily be rare and requiring of some special circumstance or feature. It is desirable that s 66 be given such a construction not only for certainty but also to avoid as much as possible the delay and expense of voir dire hearings to

explore questions of vividness and the like, with their attendant opportunities for the rehearsal of cross-examination and evidence”.

[cf New South Wales Court of Appeal in *R v Adams* (1999) 47 NSWLR 267] [2]

Second, the prejudice to the defendant in the evidence of Mrs McLean was a prejudice not inherent in the evidence itself but prejudice which arose from the later ruling of the trial judge that the evidence of Mr Halley and Dr Treloar could not be used to attack the reliability of the evidence of the plaintiff and Mrs McLean. Third, the Court appeared to consider that the ruling of the trial judge was unfairly prejudicial to the plaintiff. To refuse to permit the evidence of Mr Halley and Dr Treloar to be used to challenge the reliability of the evidence of the plaintiff and Mrs McLean, seemingly on the basis that Mrs McLean was not cross-examined on that issue, was erroneous.

Perhaps the central proposition to be distilled from the intricate series of rulings in *McLean* is that unfair prejudice may arise not only from the nature of the evidence itself - that is, evidence which is emotive or likely to provoke an irrational reaction - but may also arise from the forensic mosaic in which the evidence is led. In particular, the decision of the Court of Appeal in *McLean* plainly shows that unfair prejudice may arise from an inability to challenge evidence and shows how evidence allowed as not unfairly prejudicial to one party, may become unfair when its use against the other party is restricted. What is sauce for the goose ought to be sauce for the gander! It is this additional source of unfair prejudice which seems to have attracted the observations of McHugh J in *Papakosmas*.

(ii) ***Orduka v Hicks* (unreported, CA 40397/99, 19 July 2000, New South Wales Court of Appeal)**

The Court of Appeal has in a very recent decision delivered on 19 July 2000 had occasion to deal with the cautioning by McHugh J against failure to give sufficient weight to the changes the *Evidence Act* has brought about in making hearsay admissible to prove facts in issue: *Orduka v Hicks*.

Those proceedings concerned an injury to the plaintiff at residential premises occupied by the defendant who was a 92 year-old lady whom the trial judge found to have been unable to give evidence. A statutory declaration made by the defendant was admitted into evidence under section 64 of the *Evidence Act*.

The trial judge had declined to exercise his discretion to reject the declaration it having been argued that its probative value was substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party. The submission had been that the statement was unfairly prejudicial because the plaintiff was denied the opportunity to cross-examine the defendant.

The trial judge stated:

“to my mind that is not what is meant by unfairly prejudicial in the context of section 135 of the Act. What is meant in the context of the Act is unfairness in the obtaining of the evidence, that is, in the circumstances under which the evidence was procured”
[emphasis added]

Sheller JA with whose reasons Meagher JA agreed made the important point that the term “prejudice” in section 135(c) was qualified by the term “unfair”. His Honour said:

“Any understanding of the way in which s135 works, where evidence is admissible under s64, must start by accepting that, conformably with s64, the hearsay rule does not apply to the statement. The admission of a document of probative value against a party involves prejudice to that party. However it is not prejudice, but unfair prejudice, which must be weighed against the probative value of the representation.”

After citing the passage from the judgment of McHugh JA which has already been set out in detail and the Australian Law Reform Commission’s view of the meaning of ‘unfair prejudice’ expressed at para 644 of its Interim Report No. 26, Sheller JA continued:

The purpose of s64 is to remove the obstacle of the hearsay rule in cases like the present where a party, due to age and ill health, is unable to give evidence and may suffer great injustice as a consequence. Inevitably the removal of the hearsay rule as an obstacle to admitting the statement carries with it prejudice to the other party. One such prejudice is that the witness whose statement is put in evidence cannot be cross-examined. Historically, one justification for the exclusion of hearsay evidence has been “the irresponsibility of the original declarant, whose statements were made neither on oath, nor subject to cross-examination”.

His Honour then quotes a passage from Phipson on Evidence 15th Edition, para 25-06 and goes on to say:

The irresponsibility referred to endures when, in the particular circumstance that it is impracticable for the witness to be called, the legislature provides that the hearsay rule is not to apply. But I do not think that it can be said that such irresponsibility makes the prejudice unfair to the point of outweighing material of high probative value such as this statutory declaration. It is not necessary in this case to decide whether it ever could or whether it is confined to situations, like those in the cases to which I have referred, where the statement has been obtained by unfair means or has a tendency wrongly to excite the fact finder's emotions and is of little probative value.

Judge Cooper gave an illustration of the ordinary case where s135(a) might apply. I am not persuaded that Judge Cooper erred in his approach to the question.

In any event... the statutory declaration was, in my opinion, rightly admitted into evidence. Of course, in determining what weight should be given to its contents, the trial Judge had to bear in mind, as he did, that the defendant had not been cross-examined. Some of the matters raised related to inconsistencies or unreliability. None of these things required the Judge to exclude the statutory declaration nor would exclude its admission in the proper exercise of discretion.”
[Emphasis added]

In summary, the view of Sheller JA appears to be that while the inability to cross examine the maker of a hearsay statement does not, without more, call for the exercise of the discretion to exclude on the grounds of unfair prejudice, the inability to cross examine is a matter to be taken into account in the weight to be given to such evidence. His Honour did not go on to express a view as whether the inability to challenge hearsay evidence could ever call for the exercise of the discretion or as to the exact ambit of the concept of ‘unfair prejudice’.

Mason P said:

“ At common law, it is doubtful whether otherwise admissible evidence could be rejected on the grounds of prejudice in proceedings other than criminal proceedings (see CDJ v VAJ (1998) 197 CLR 172 at 215 fn(106)). Sections 135 and 136 of the Evidence Act have now introduced such a rule, conferring a very wide discretion upon trial judges. Having regard to the likely common law position and the broad language of those sections, the notion that evidence might "be unfairly prejudicial to a party" should not be confined beyond that which emerges on a fair reading of the sections in context.

Part of that context is the significant qualification of the hearsay rule in the Evidence Act itself. In light of this, McHugh J has cautioned against failure to give sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue (Papakosmas v The Queen (1999) 196 CLR 297 at 325-6)..... Sheller JA ...points out that the Australian

Law Reform Commission in its Interim Report on Evidence, No 26 at par 644 conceived of unfair prejudice as: the danger that the fact-finder may 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.

In my view this danger identifies the core notion of "unfair prejudice" and the purpose of the discretion to exclude evidence on that basis. In R v BD (1997) 94 A Crim R 131 at 139, Hunt CJ at CL referred to evidence as unfairly prejudicial "if there is a real risk that the evidence will be misused by the jury in some unfair way". Citing this, the learned author of Odgers, Uniform Evidence Law 3rd ed (1998) states at p443: Plainly, it is likely that this 'danger' will usually only have significance in a jury trial. Where the trial is by a judge without a jury, it will be an unusual judge or magistrate who is prepared to concede that a danger exists that he or she might be "unfairly prejudiced" by evidence. On the other hand the provision is not limited to misuse of the evidence by the tribunal of fact. Unfair prejudice may arise from procedural considerations. Thus an opposing party may be significantly prejudiced by hearsay evidence if unable to cross-examine on a crucial issue in the litigation. Alternatively, the opposing party may be unfairly prejudiced by evidence if prevented from properly challenging its reliability

I agree. See also Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1999] FCA 1269.

It is unnecessary to consider whether unfair prejudice extends to substantive unfairness in the obtaining of evidence, as suggested by the primary judge in the present case. If it extends that far, it is certainly not confined to that category of case. Indeed that category is outside the core category of situations to which the discretion is primarily addressed, as I have endeavoured to show."

[Emphasis added]

To my mind following the decision in *Orduka* it is likely that a trial judge is entitled to approach section 135 of the Act upon the basis that unfair prejudice may indeed at the least arise from procedural considerations.

Such procedural considerations may include the inability of one party to properly challenge evidence led by the other. The mere inability of one party to cross-examine the maker of a hearsay statement which was properly admissible as an exception to the hearsay rule cannot, without more, call for the exclusion of the evidence. As McHugh J and Sheller JA have pointed out, to do so would be to circumvent the substantive provisions of the Act. But when the procedural factors would result in one party being unable to challenge or contradict evidence which is clearly partial or incomplete, it is conceivable that it would be unfair to permit that evidence to be led. If the core meaning of 'unfair prejudice' refers to the irrational use of evidence then such a situation is surely

capable of coming within it. To proceed on evidence which is partial or incomplete and not capable of being tested or contradicted is truly prejudicial; that is, it is to judge matters on less than full information. To my mind, this was the basis of the decision of the Court of Appeal in *McLean*. After *Orduka* it remains good law.

What is an Opinion?

Section 76 provides:

‘Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.’

Importantly, the word ‘opinion’ is not defined in the Act.

In an address delivered in February last year [(1999) 18 Australian Bar Review 122], Heydon JA (then Heydon QC) identified several recent decisions of the Federal Court which applied the common law definition as stated by Wigmore:

‘ . . . an inference from observed and communicable data.’ [3]

These decisions involved reliance evidence that had the witness known of certain facts [which had not been known at the time - which non disclosure formed the basis of a *Trade Practices Act* s52 count], the witness would not have acted in a particular way. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 5]* (1996) 64 FCR 73 involved the admissibility of a statement by an employee of Colonial Management Associates Incorporated. He had recommended that certain funds managed by Colonial invest in debentures owned by Linter Textile. The Court admitted evidence that had the witness known that it was intended that Linter Textiles was to give certain guarantees to banks, he would not have given the recommendation.

The point about the admission of this statement into evidence is that Lindgren J held that it was not ‘opinion’ evidence. It was rather ‘direct’ evidence from the person uniquely placed to give it of what that person would have done in a hypothetical situation. As Heydon JA points out:

‘[Lindgren J] admitted the evidence. . . . He said that the aversion of the common law to evidence of opinion is based on the concern of the common law to receive the most reliable evidence. Reliance evidence of the type under consideration was

reliable in the sense that where the issue is what a person would have done in a situation different from that which actually occurred, the person in question is better qualified than all others to give evidence on the matter.'

To the cases referred to by Lindgren J, namely *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471, *Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242; *Commercial Union Assurance Co of Australia v Ferrcom Pty Ltd* (1991) 22 NSWLR 379, may be added *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd and Exxon Coal Australia Ltd* [unreported, Supreme Court of NSW, Einstein J, 8 February 1999] which deals with a suggested, but rejected by the Court, constraint on the hypothetical comparison, based upon the proposition that the evidence must be rejected as 'a wrongdoer cannot be assumed to put forward a hypothetical involving his own wrongdoing'.

Of course, questions of reliability of evidence of the type in question arise. Samuels JA, as Heydon JA points out, said in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 581 that it was 'open to a Court to disbelieve evidence tainted by hindsight'.

Three other cases which applied the common law definition of 'opinion evidence' are *Hughes Aircraft Systems International v Air Services Australia* (1997) 80 FCR 276; *Guide Dog Owners' and Friends' Association v Guide Dog Association of NSW and ACT* (1998) 154 ALR 527 and *Quick v Stoland Pty Ltd* (1998) 157 ALR 615 at 617 per Branson J.

Contemporaneity - First Hand Hearsay

Papakosmas concerned the effect of the *Evidence Act* on evidence of recent complaint in sexual assault cases.

The facts were as follows:

- '4. *In December 1995 both the appellant and the complainant worked for a television company; the appellant as a producer, and the complainant as a secretary. They were both present at a Christmas party held by their employer on the evening of 16 December 1995. During the course of the evening, when both were affected by drink, there was some jocular conversation between them about sexual matters in the presence of other people. Later, as the complainant was leaving a toilet, she encountered*

the appellant in a corridor. They spoke to one another and he guided her into a small room. He tried to kiss her, and attempted unsuccessfully to persuade her to engage in an act of fellatio. This was not disputed. According to the complainant, the appellant then forced her to have sexual intercourse with him, despite her resistance and protests. The appellant agreed that he had sexual intercourse with the complainant, but said that she consented. The complainant said that she asked the appellant to let her go, and told him that she was going to be sick. She said the appellant then left the room and closed the door behind him, and she fell on to the floor and vomited into a waste bin. She then went to a bathroom where she washed her face and her underwear.

5. *The complainant, and a number of other witnesses, gave evidence, [Stephens, Fahey and Ovadia] without objection, of virtually immediate complaint. According to that evidence, as the complainant was leaving the bathroom she saw a workmate, Ms Ovadia. The complainant was crying. Ms Ovadia asked her what was wrong, and the complainant said she had been raped by the appellant. That evidence was supported by Ms Ovadia. Ms Ovadia took the complainant outside to a table where she repeated her complaint to Ms Stephens. She was crying and holding her head in her hands, and appeared distressed. Shortly afterwards the complainant repeated her complaint to Ms Fahey. The evidence of Ms Fahey was that the complainant was crying uncontrollably and appeared extremely distressed. Soon afterwards, the complainant attended a hospital and was examined by a doctor, who took a history and made clinical observations.*

In that case, the issue at the trial was not whether sexual intercourse between the appellant and the complainant had occurred, but whether the complainant was a consenting party.

The trial judge gave the jury the following directions about the evidence of complaint:

“Stephens, Fahey and Ovadia give what is called ‘hearsay evidence’ because the [complainant] complains to them that she has been raped by the accused. . . .

Under the law in this State, the hearsay evidence, as it is called, is some evidence of the fact that the incident did take place. Once again, you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie but, if you are telling the truth about it, then it is some evidence of the fact. It is a matter for you as to whether you accept it or not, but it is evidence of the fact of the proof of the truth of the allegation that was being made - that is, that she had not consented to having intercourse with this man, that she had been raped.

There is criticism concerning her and the details of what was said to the various women in that Counsel for the accused says there were inconsistencies, and there were. You heard the evidence as it was given here and I am not going to go through it again, but you will remember he pointed to those inconsistencies that occurred in the evidence between what she had said to one woman and another. Is it important in the circumstances of this particular case that there were some inconsistencies in the evidence - if you find there to have been some inconsistencies? When I say there were, it is a matter for you to decide if there were or were not inconsistencies concerning it. So that you have got that evidence concerning the complaint, as I say, that is hearsay evidence but it is some evidence of the fact. If you accept it, in relation to what took place on this night, that goes to support what the complainant says occurred.”

The case contains a detailed discussion of the common law approach with respect to evidence of recent complaint. That approach was expressed in *R v Lillyman* [1896] 2 QB 167 at 170 as follows:

‘It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.’ (emphasis added)

Gleeson CJ and Hayne J at paragraph 20 of their joint judgment, pointed out some of the difficulties which the Australian Law Reform Commission took into account in determining the exceptions to the hearsay rule now set out in the Act. They said in paragraph 20:

20. *Insisting upon the observance of the common law rule against hearsay, whilst, at the same time, receiving evidence of recent complaint, and instructing juries, consistently with Lillyman . . . as to the use that could be made of such evidence, involved the drawing of a distinction which juries might not have found easy to comprehend or apply. The facts of the present case provide a good example. The issue was that of consent. There was no dispute that sexual intercourse had occurred between the appellant and the complainant. There was evidence, from the complainant herself, and from a number of witnesses, that almost immediately after the intercourse had occurred, the complainant was in a very distressed condition, crying uncontrollably, and saying that she had been raped. Evidence of her condition, and her distress, was admissible, and in the*

circumstances could be considered by the jury in determining whether or not she was telling the truth when she said that she had not consented to what occurred. However, when it came to the matter of her statements that she had been raped, at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what she was asserting, but as evidence which had a bearing upon her credibility, and in particular, upon the consistency of her behaviour and her allegations.' (emphasis added)

The joint judgment at paragraph 22 also included the following:

'That evidence of complaint is at least potentially relevant, and is capable, depending upon the circumstances of the case, of having substantial probative value if it is received as evidence of the truth of what is asserted by the complainant, may be illustrated by reference to cases which were treated by the common law as a true exception to the hearsay rule: cases involving receipt of evidence as part of the res gestae. The law on this subject was considered by the House of Lords in R v Andrews [1987] AC 281. In his speech, Lord Ackner referred to the opinion given by Lord Wilberforce in Ratten v The Queen [1972] AC 378. He also referred to the well-known case of R v Bedingfield (1879) 14 Cox CC 341. In that case the accused was charged with murder. The defence was suicide. There was an attempt to lead evidence that the victim, who had been in a house with the accused, rushed out of the house with her throat cut, and said: "See what Harry has done". That evidence was excluded, but Lord Ackner said that Bedingfield would be decided differently today. He also remarked that there could "hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement". . . . Although it may be necessary to exercise caution to guard against the possibility of fabrication, it cannot be doubted that the evidence in Bedingfield was evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. Whatever view may be taken as to the policy of the law in relation to the reception of evidence that a mortally wounded woman immediately asserts that a named person did it, an argument that such evidence was irrelevant would be surprising.'

Papakosmas includes a number of specific statements by the Court on the discretionary provisions and in particular on section 136. Gleeson CJ and Hayne J said as follows:

- '36. The appellant's second submission is that, even assuming the hearsay evidence in the present case was relevant, and fell within the exception created by s66, nevertheless there was a miscarriage of justice because the trial judge (although not asked to do so) failed to apply one of the additional safeguards, being that expressed in s136.*
- 37. In brief, the appellant contends that this was a case in which s136 should have been applied to limit the use that could be made of the evidence of complaint to the use which could have been made of such evidence at common law, as explained in cases such as Lillyman and Kilby. The jury,*

it is argued, should have been given the standard common law direction in relation to the use of evidence of recent complaint in sexual assault cases.

38. *Counsel went so far as to argue that, as a general rule, a court which receives evidence of complaint in any criminal case should limit its use under s136 so that it is not used for a hearsay purpose.*
39. *The submissions must be rejected. They amount to an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded.*
40. *There may well arise circumstances in which a court, in the exercise of a discretion enlivened by the requirements of justice in the facts and circumstances of the particular case, will see fit to limit the use of complaint evidence, and, in some instances, it may be appropriate to effect that limitation in a manner which corresponds to the previous common law. To assert a general principle of the kind for which the appellant contends, however, would be to subvert the policy of the legislation.*
41. *In the instant case, the facts and circumstances surrounding the complaint were not such as to make the use of the evidence for a hearsay purpose either unfairly prejudicial to the appellant, or misleading or confusing. The recency and spontaneity of the complaint, and its consistency with other aspects of the complainant's appearance and demeanour, meant that it was not unfairly prejudicial. There is nothing to suggest such evidence was either misleading or confusing in its use for a hearsay purpose.'*

The Discretionary Cocktail

Particularly significant is the circumstance that the facts will often permit a court to base its exercise of the section 135 discretion upon a combination of the section 135 subparagraphs. In *Tante v Roth* (unreported, Supreme Court of NSW, 28 November 1996) McLelland CJ in Eq ruled as follows:

'I do not admit those parts because they either do not fall within s79 or I think that I should decline to admit them by virtue of s135(c), which requires a balance between the probative value of the evidence and the prospect of undue waste of time which may be involved in its being admitted and in some instances also by virtue of para (a) and para (b) of s135.'

NRMA Ltd v Morgan

An interesting example of the use of section 135 as an alternative approach to rejection of particular expert evidence is to be found in an interlocutory judgment in *NRMA Limited v Morgan & Ors* (unreported, Supreme Court of NSW, 1 September 1998, Giles J).

In that case, evidence was sought to be adduced from a Mr Hackett who had a degree in psychology and considerable experience in that part of the advertising industry concerned with market research and in that connection, the devising and analysis of communications with consumers. He gave evidence that in that area it was necessary to understand the consumers' point of view and how communications were working and would work, presumably to affect the consumers' conduct. He described the principles he applied as really about trying to isolate in his own mind the effects of communications on peoples' behaviour, and said that they were simply logical principles based on experience and that there was no discipline analysing the effect of communications on peoples' opinions and behaviour in any structured way. Giles J expressed the view that it seemed that at least part of what Mr Hackett meant by logical principles was what he described as the basic principle of eliminating other factors and then drawing the conclusion that the communication was the agent of change.

Evidence was sought to be adduced from Mr Hackett, based on certain assumptions as to his views as to whether it was likely that a smaller proportion of votes cast would have been in favour of the proposal, than were cast, and as to what could be said as to the likelihood that 75% of the votes cast had been in fact in favour of the proposal - the assumptions being intended to be to the effect that the prospectus and the external communications were not misleading because of the use of the notion of free shares or the inadequate disclosure of disadvantages found unacceptable in the Full Federal Court.

Giles J importantly pointed out that Mr Hackett had no experience of market research in relation to voting or voting intentions of members of a company, in relation to a demutualisation such as that the subject of the proposal, or at all.

Giles J accepted that Mr Hackett's opinion was clearly enough opinion evidence falling within Part 3.3 of the Act and referred to section 76 of the Act which of course makes it inadmissible to prove the existence of a fact about the existence of which the opinion is

expressed - in the *NRMA* situation the facts being the likelihoods in relation to the casting of votes. As Giles J pointed out, that operation of the opinion rule is overcome in the circumstances prescribed in section 79 of the Act.

The NRMA submitted that Mr Hackett's opinion had not been shown to be wholly or substantially based on his specialised knowledge. Giles J pointed out that it was necessary that the link between the opinion and the knowledge, and between the knowledge and the training, study or experience, be shown. That was not easy as his Honour pointed out, if it was not clear what the specialised knowledge was. But assuming something to do with the behaviour of consumers was the specialised knowledge, Giles J held that that element in section 79 was not satisfied.

His Honour pointed out that the evidence did not descend into a description of the application of whatever were the principles according to which Mr Hackett acted in order to arrive at his opinion. It did not identify what it was, if anything, in the files of documents which Mr Hackett had been furnished, being evidentiary material, from which Mr Hackett arrived at his opinion. Three of those files were volumes of documents in evidence in the proceedings being documents to do with market research conducted by NRMA in relation to the proposals. The other two files contained what had been called in the proceedings, the external communications, being documents such as media releases, material in the 'Open Road' and question and answer scripts, through which the proposal was publicised and described in the period prior to the meeting of members. His Honour pointed out that there was simply reference to the five files and the assumptions and the expression of the opinions.

Prior to the Act, his Honour was of the view that the witness's statement would have fallen foul of the requirement that the expert identify the facts he had assumed - see *Arnotts Limited v Trade Practices Commission* (1989) 24 FCR 313 at 347 to 349. His Honour continued:

'But now applying section 79 of the Act, it must be able to be concluded that the opinions of Mr Hackett are wholly or substantially based on his specialised knowledge, and I am unable so to conclude. This is particularly so when, as I have said, Mr Hackett's experience did not include market research in relation to voting or voting intentions of members of a company, and although it may or may not be that whatever the general principles are upon which market researchers act would permit someone suitably qualified to express opinions in relation to

voting or voting intentions of members of a company, that is not something which I assume and is not something which has been established.'

Giles J then held that for those reasons, the witness's statement was inadmissible. But his Honour went further_referring to section 135 of the Act. His Honour held that the probative value of Mr Hackett's opinions was quite frankly slight because, for the reasons his Honour had set out, it could not be seen how it was found in the five files, how whatever Mr Hackett's specialised knowledge was, had enabled him to arrive from the material in those files and the assumptions his opinions, or how whatever his specialised knowledge was, could properly be translated and applied to assessment of the voting or voting intentions of members of a company. His Honour added:

*'The risk of prejudice, if this evidence were admitted, is, it seems to me, high, because in a similar manner as in the case of the evidence of Professor Corcoran, the NRMA would be left with a vast mass of material, being the five volumes, with unclear specialised knowledge, and with an unexpressed line of reasoning or application of the knowledge from the five files and the assumptions to the opinions, and would have to either take the matter up in cross-examination and itself seek to find out what really lay behind the opinions or run the risk of the weight which the Court might attribute to the opinions. This would place the NRMA in the unfair forensic dilemma to which Santow J referred in *Wentworth v Wentworth* . . .*

To this may be added the nature of the assumptions which Mr Hackett was asked to make.'

His Honour then referred in detail to the assumptions and said:

'It seems to me that, when faced with opinions founded on assumptions which include the assumption I have described, the prejudice to NRMA is increased, because in grappling with the unstated reasoning and application of whatever is Mr Hackett's specialised knowledge, it has to take up a large number of uncertain aspects of the assumption in this respect.'

Finally, his Honour expressed the view that his Honour would have reached the conclusion quite apart from that last matter that in the balancing exercise under section 135 of the Act, in which his Honour said, there was also an element of undue waste of time given the manner in which the witness statement was put forward and the possibility of evidence being misleading or confusing that the witness statement should not be

admitted. In his Honour' opinion, the balancing exercise called for refusal to admit the witness statement.

This judgment draws together the number of ways in which a Court may treat with the evidence of an expert and in particular and crucial as it seems to me, points to the significance of the requirement that it must be concluded that the subject opinions are wholly or substantially based on the specialised knowledge.

AIJA Survey

An interesting survey was carried out by Dr Ian Freckleton, Dr Prasuna Reddy and Mr Hugh Selby between mid 1997 and April 1999 entitled '*Australian Judicial Perspectives on Expert Evidence : An Empirical Study*'. The survey focussed upon the attitudes of Australian judges to expert evidence. The survey instrument was circulated to all 478 Australian judges in mid 1997 by the Australian Institute of Judicial Administration and 244 judges or 51.05% of the Australian Judiciary responded.

In relation to the Act, the report on the survey stated at paragraph 1.7, inter alia:

'It may be that there will be increased focus upon ascertaining what constitutes an expert opinion, as against an opinion that essentially is speculation or is not based on the expert's specialised knowledge. The exclusionary discretions have an important and potentially enhanced role in regulating the admissibility of expert evidence as a result of the legislative changes. How this will translate into admissibility decisions remains to be seen. The survey respondents, drawn from all jurisdictions, when asked to evaluate those provisions revealed little inclination, however, to abolish traditional approaches to the admissibility of expert evidence.'

In dealing with the question of bias amongst forensic experts, the report included the following comment made by SG Gross in somewhat unsubtle terms in 1991:

'One of the most unfortunate consequences of our system of obtaining expert witnesses is that it breeds contempt all around. The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes, people who live by selling services that should not be for sale. They speak of maintaining 'stables' of experts, beasts to be chosen and harnessed at the will of their masters. No other category of witnesses, not even parties, is subject to such vilification.'

[SG Gross, '*Expert Evidence*' (1991) *Wisconsin Law Review* 1113 at 1135.

Gross of course deals with the situation in relation to the United States where there are significant differences to our system in the practice of litigation. In particular the combination of contingency fees and the availability of experts regarded as ‘for hire’ and the absence of the rule in civil litigation that costs generally follow the event, are suggested by the authors of the report as having bred a culture that remains foreign to that which prevails in Australia. Of course, similar concerns about expert partiality have been occasionally and individually ventilated by judges, legal practitioners and commentators in Australia.

The report also treats with the position in Australia and in the United Kingdom of codes of ethics for expert witnesses. The English decisions have endorsed a code of ethics for expert evidence, the primary focus of which is to avoid partisanship and its consequences and which include as the duties and responsibilities of expert witnesses in civil cases, the following:

- ‘(1) *Expert evidence . . . should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
- (2) *An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness . . . should never assume the role of an advocate.’*

[Report page 27]

Judges were asked which of certain categories of problems was the ‘single most serious’ problem with expert evidence. Over one third ranked ‘expert bias’ as the most serious problem, with failure to prove the bases of expert opinions, failure by advocates to pose questions adequately and failure by advocates to cross-examine effectively, the next most serious problems. [Report at para 4.9]

In relation to lawyers settling expert reports, Judges expressed concern. The report includes the following passage from a judgment of Lord Denning in the Court of Appeal in relation to the partisanship that excessive involvement by the experts in the legal process has brought about:

‘[The] joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually “settled” by counsel. In short, it wears the colour of special

pleading rather than an impartial report. Whenever counsel “settle” a document, we know how it goes. “We had better put this in”, “we had better leave this out” and so forth. A striking instance is the way in which Professor T’s report was “doctored”. The lawyers blocked out a couple of lines in which he agreed with Professor S that there was no negligence.’ (Whitehouse v Jordan [1980]1 All ER 650 at 655)

Judges were asked to identify the single most persuasive factor when an expert is giving expert evidence. The ranking ‘clarity of explanation’ was the most common answer.

I interpolate that in the report, the authors identified from the decision of Chief Justice Gleeson in *H G v The Queen*, the significance, in evaluating the admissibility of allegedly expert opinions, of assessing whether a field of expertise exists in the first place and then whether a proposed witness expresses opinions deriving from specialised knowledge in turn based on the witness’s training, study or experience. Hence as the authors of the report point out at page 92:

‘Three issues need to be proved before expert evidence can be adduced: the legitimacy of the field of expert endeavour, the relationship between the opinions and the specialised knowledge, and the person’s training, study or experience - see also Quick v Stoland 1998 157 ALR 615.’

As one would expect, the end result of the report was that judges had identified clarity of explanation by expert witnesses as vitally important - and more important than many other factors that might play a part in influencing the evaluation of expert evidence. Judges candidly conceded that many of them - some 70% - had had occasions when they had felt that they had not understood expert evidence in the cases before them. Some 20% of judges responding to the survey said that they ‘often’ experienced difficulty in evaluating opinions expressed by one expert as against those expressed by another - report at page 4.

In conclusion in relation to opinion evidence, may I refer to a passage from Dr O.C. Mazengarb CBE, QC’s work ‘Advocacy in our Time’. Dr Mazengarb said: *‘Beware of the experts’*.

I would have to agree with the opinions of Mr J.N. West QC, expressed in his paper *‘Advocacy and Evidence : The New Evidence Act’* 26 September 1995 in referring to Dr

Mazengarb's 'injunction'. Mr West first cites the following cautionary note given by Mahoney JA in *X & Y (by her tutor X) v PAL* (1991) 23 NSWLR 26 at 31:

'Expert evidence, is in my opinion, to be approached with reserve or scepticism because of the nature of it. It may take a number of forms. In the present case, it involves, as I shall describe it, a reasoning back. The experts had before them the end result of the birth process : the child had deficiency and deformities. Their tasks was to reason back from that end result to the cause or causes that produced it.'

In such a reasoning back process as is here involved, the experts' reasoning process ordinarily involves: that the expert defines precisely what the end results of the process are; that he states the relevant principles of his expertise; and that he infers, from the application of those principles to the results which he has defined, what was the cause or precedent condition which led to those results.

The reason why a Court ordinarily should approach expert evidence in the way that it does is, I think, because of the imprecision of the facts and (or the uncertainty of principles in the particular case). In Chambers v Jobling (1986) 7 NSWLR 1 at 24 I said:

"The weight to be given to inferences drawn by an expert will depend upon, inter alia, the certainty of his facts and the stringency of his principles.'

Mr West's view, which I share, is that Dr Mazengarb's injunction to 'beware of the experts', should not be dissolved.

Scope of the Application of the Act

A question which vexed various first instance judges and intermediate appellate courts was the precise reach of the provisions of the Act. In terms, the Act applies only to proceedings in court: s4(1). However, the notion - which may be traced back to the decisions of McLelland CJ in Eq in *Telstra Corporation v Australis Media Holdings [No. 1]* (1997) 41 NSWLR 277 [4] and Branson J in *Trade Practices Commission v Port Adelaide Wool* (1995) 60 FCR 336 - that the Act had an indirect or flow on effect to pre-trial proceedings, such as the issuing of a subpoena, or notice to produce, the answering of interrogatories, or the discovery of documents, obtained the approval of the NSW Court of Appeal in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, and of the Full Court of the Federal Court in *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360. The latter decision was, however, overruled by a majority of a five member Full Court of the

Federal Court in *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511.

The question whether the Act has an application by analogy to matters ancillary to proceedings in Court has now been resolved in the negative by the High Court in three recent decisions. *Northern Territory v GPAO* (1999) 196 CLR 553 decided in March 1999 dealt relevantly with issues concerning the interaction between the *Family Law Act* (Commonwealth) and the *Evidence Act 1995* (Commonwealth), and the *Community Welfare Act 1975* an enactment of the Legislative Assembly of the Northern Territory. The issue which arose for decision was whether the Manager Trial and Family Protective Services of the Northern Territory was obliged to produce documents relating to a young child in Family Court proceedings concerned with that child's guardianship. At the father's request a subpoena was issued by the Registrar of the Family Court pursuant to Order 28 r1 of the Family Law Rules (Commonwealth) requiring the Manager to produce "all files and records in relation to [the child]". On the return date, it was argued that the Manager was not obliged to produce the documents in question because of section 97 (3) of the Community Welfare Act which provided:

"A person who is, all who has been, an authorised person shall not, except for the purposes of this Act, be required to-

- (a) produce in a court a document that has come into his possession or under his control; or*
- (b) disclose or communicate to a court any matter or thing that has come under his notice,*

in the performance of his duties or functions under this Act"

A number of constitutional questions and questions of immunity arose for consideration on the case which was stated to the Full Family Court which asked whether the provisions of section 97 (3) of the Community Welfare Act were inconsistent with the provisions of

the *Family Law Act* or the *Evidence Act* such that the provisions of section 97 (3) of the *Community Welfare Act 1983* were inoperative to the extent of such inconsistency.

The short issue relating to the Act concerned whether the Act applied to production of documents in response to a subpoena.

The High Court held that the Act had no application to the obligations of a party to produce documents in answer to a subpoena issued by the Family Court or to the principles which underpin the court's power to grant leave to parties to inspect documents in answer to a subpoena: at 571 per Gleeson CJ and Gummow J with whom Hayne J agreed, at 629 per McHugh and Callinan JJ. Kirby J expressly refrained from expressing a view on the matter: 649 - 650.

The issue was re-visited in two cases decided on the same day in December 1999: *Mann v Carnell* (1999) 74 ALJR 378 and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 74 ALJR 339. Relevantly, both concerned the analogous application of the provisions of the Act which deal with the application of legal professional privilege ('client professional privilege'). *Esso* involved the commencement of proceedings by the appellant who appealed against notices of amended assessment of income tax issued by the Commissioner of Taxation. General orders for discovery were made. *Esso* claimed privilege in respect of certain documents in its list of documents asserting that their disclosure would result in the disclosure of a confidential communication made between it and a lawyer for the dominant purpose of the lawyer providing legal advice to *Esso*.

On the decision of a separate question of law, Foster J held that the 'sole purpose' test as formulated by the High Court in *Grant v Downs* (1976) 135 CLR 674 was the correct test for claiming legal professional privilege. The holding was further that the Federal Court did not have the power to make an order to exclude from production documents which had been discovered, on the basis that such documents satisfied the 'dominant purpose' test set out in sections 118 and 119 of the Evidence Act.

The Full Federal Court majority decision essentially upheld the decision of the trial judge but modified the order concerning the second question. The holding was that the Federal

Court was empowered to exclude production of discovered documents for the reason that they satisfied the 'dominant purpose' test, although to do so would in the circumstances have been an improper exercise of power.

It was made clear by Gleeson CJ, Gaudron and Gummow JJ (at para 16) that the Act deals with the adducing of evidence, at the interlocutory, trial and appellate stages, but does not deal with all circumstances where a claim for privilege is made, and in particular had no application to the instant circumstances, viz., a claim for an order for privilege in respect of documents produced on discovery. McHugh J (at para 64), Kirby J (at para 91), and Callinan J (at para 149) expressed the same view.

Mann v Carnell also concerned a claim for privilege in respect of pre-trial documents, in particular a contention by the appellant that privilege had been waived by disclosure of the respondent to another individual. Mann involved an application by the appellant who was a surgeon, for preliminary discovery of legal advices provided by the Chief Minister of the Australian Capital Territory, to an independent member of the ACT Legislative Assembly, as part of a practice of members being confidentially briefed by Territory ministers. The appellant sought pre-trial discovery with a view to commencing defamation proceedings against the Chief Minister.

The High Court dealt with whether the legal professional privilege attaching to the advices had been lost by reason of the disclosure by the Minister to the member of the Legislative Assembly. No issue was raised but that, although the privilege relevantly belonged to the Australian Capital Territory, the Chief Minister acted within her authority in disclosing the communications to the independent member of the Legislative Assembly.

Gleeson CJ, Gaudron, Gummow and Callinan JJ (at para 27) referred to the decisions in *GPAO* and *Esso* to conclude that the ACT Supreme Court and a Full Court of the Federal Court had erred in applying the Evidence Act to determine a claim for privilege and the question of its loss by waiver in respect of documents produced on discovery. McHugh J did the same (at para 41). Kirby J expressed the opinion that 'a host of undesirable and even irrational distinctions' would be avoided if a broad view of the application of the

Act were taken, and that arguments existed for a wider application of the Act and its application to ancillary proceedings intimately connected with the adducing of evidence for later use in a Court hearing. However, his Honour bowed to the authority of *GPAO* as settling the issue.

In the course of their judgment in *Mann*, Gleeson CJ, Gaudron, Gummow and Callinan JJ stated that no argument had been made before Miles CJ (at first instance) or on appeal before the Full Court of the Federal Court or before their Honours to the effect that the inability of a party to prove the contents of a document under the *Evidence Act* might constitute a discretionary reason for refusing the order for preliminary discovery sought by the appellant under Order 34A, Rule 5 of the ACT Supreme Court Rules.

There are a number of questions raised by this suggestion. To my knowledge, it has not previously been the position that a document which is relevant in the applicable sense (itself a vexed question in New South Wales at the moment) and which does not enjoy any claim for privilege, is not properly discoverable because that document may not be capable, for one reason or another, of being adduced into evidence. Indeed, in relation to documents produced on subpoena, that proposition was specifically rejected by the New South Wales Court of Appeal in *National Employers Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372. The suggestion of Gleeson CJ, Gaudron, Gummow and Callinan JJ may well be productive of further disputes in this area.

The decision of the High Court in *Esso* to overrule *Grant v Downs* (1976) 135 CLR 674 and alter the common law rule for legal professional privilege has however deprived this question of much of its previous practical importance. Further, in New South Wales the *Supreme Court Rules* (Part 23, Rule 1(c)) adopt the Act provisions to determine what a privileged document is for the purposes of discovery or for documents produced on subpoena or notice to produce (Part 36, Rule 13). The effect of the Rules is that, notwithstanding the decisions of the High Court considered above, when it comes to the application of legal professional privilege in most instances in connection with litigation - both in Court and in matters ancillary to it - it is to the Act that one must now look.

Conclusion

Courts (both at first instance and at appellate level) have, albeit ever so slowly and carefully, commenced to treat with the Act in terms of a principled but necessarily pragmatic approach to a number of difficult questions thrown up not the least of which concerns the reach of the Act. This paper has sought to highlight some only of the recent developments of significance in the area.

[1]

This emphasis appears to suggest the correctness of the approach taken by McLelland CJ in Eq., in *Trust Company of Australia Ltd v Perpetual Trustees WA Ltd* Supreme Court of New South Wales unreported 18 Sep 1996, which was as follows:

- To first examine the training, study or experience of the witness ;
- To next examine whether the witness has been shown to have specialised knowledge based upon that training, study or experience
- To then outline the extent to which the witness has been shown to be entitled to express opinions based wholly or substantially on the specialised knowledge which has in turn been shown to have been based on his or her training, study or experience.

Hence His Honour said: *"I consider that [the witness], has been shown to have specialised knowledge based on his training and experience... which qualifies him to express opinions on matters of the following descriptions which do appear in his report [and his Honour then set out the particular areas in respect of which the expert evidence was to be admitted]."*

In relation to opinions expressed in the report on matters going beyond those descriptions, my view is that assuming, without deciding, that they would be admissible under section 79, I would refuse to admit them in the exercise of the Court's power under section 135, in particular in reliance on sub paragraph (c)."

[2]

Ogders - *Uniform Evidence Law* LBC Information Services 4'th Edition, 2000, points out that the majority in Graham explained that limiting this hearsay exception to statements made "very soon after" the events in question reflects experience that "the memory of events does change as time passes" and will ensure that attention will not be distracted from the quality of the evidence that the witness gives in court by material of "little usefulness". As the Author further observes at 66.4 :

" This approach reflects the views of the ALRC. Psychological research on memory suggests that memory tends to diminish rapidly at first, and then more slowly. Within hours of an event there is likely to be a substantial loss of memory. The remaining memory may be "reliable" (at least, in one sense) but not "fresh". Equally, care must be taken in differentiating "freshness" of memory from the strength of the "impression" which the person who made the representation has at the time of making it. A memory of a traumatic event sometime in the past may be vivid but not reliable and certainly not "fresh". Apart from lost memory of relevant details, psychological research suggests that post-event information is likely to contaminate (change) the memory of the event, altering it and filling in gaps arising from the rapid process of "forgetting"

That the courts will continue to have difficulty in applying Graham is clear from the later decision of the New South Wales Court of Appeal in *R v Adam* (1999) 47 NSWLR 267 which involved a trial of the appellant who was found guilty of the murder of an off-duty police officer who was killed on the evening of 18 April 1997 in the carpark of the Cambridge Tavern Hotel at Fairfield. The report summarises in great detail the events of the night in question and the evidence of the murder of the police officer adduced at the trial from a number of witnesses. Relevantly the Court of Appeal had to deal with the admissibility under section 66 of the Act of representations made by a witness in the police interview some 10 weeks after the events in question. The Court of Appeal points out that Graham establishes that the

reference to "fresh" in section 66 means "recent" or "immediate" and is not concerned with the vividness or quality of the recollection. The Court of Appeal points out that the trial judge did not, in his judgment, deal at length with the issue of freshness which may have been because he had considered Graham in detail in an earlier judgment where the question which arose was leave under section 32 of the Act for a witness to refresh his memory. The Court of Appeal points out that in that earlier judgment the trial judge was concerned with the ability of a witness to refresh his memory from a recorded interview seven weeks after the events in question. Wood CJ at CL who was the trial judge, had said:

"In my view the judgment of Gaudron J, Gummow J and Hayne J was not intended to confine the expression "freshness strictly or exhaustively in terms of mere hours or days. As the Law Reform Commission Report underlined, a measure of flexibility is appropriate. The question is, as their Honours point out, one of fact and degree

In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after events of the kind here involved. Having regard to normal expectation and experience of life, I would regard a statement made at that point of time as still being fresh in the memory of a relevant witness"

The joint judgment of the Court of Appeal said that this view had much to commend it. However it was not necessary for the Court of Appeal to express a final opinion on that alternative basis for admissibility by reason firstly, of the application of section 60 and secondly, that it was not entirely clear that Wood CJ at CL was making a finding of fact on "freshness".

[3]

The Wigmore statement of the common law definition of an opinion as "an inference from observed and communicable data" applied by Lindgren J in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No. 5)* (1996) 64 FCR 73, is difficult to apply..

The Full Federal Court has held that a statement by a member of the National Crime Authority that 'the information then available did not identify... any particular suspect person in relation to any offence', was not an "opinion":

"The substance of his evidence is that the Authority has no information that enables it to identify a particular offence or suspect. That is a statement of fact. It is true it is made by a person who has knowledge of the material currently before the Authority and is made after that person has read the material. But it is a statement about a negative fact. The circumstance that the statement concerns that material does not make it an inference from observed and communicable data, any more than it would be such an inference if a witness were to depose that a file did not contain any document printed on yellow paper"

[*Bank of Valletta PLC v National Crime Authority* (1999) 165 ALR 60 at paragraph 22]

[4]

The test for client legal privilege applied by the Act was the dominant purpose test-whether the communication was made, or the document was prepared, for the dominant purpose of the lawyer providing legal advice or legal services. This was the test which was favoured by Barwick CJ in his dissenting judgment in *Grant v Downs* (1996) 135 CLR 674. The majority in that case preferred the "sole purpose test". Since 1976, courts in this country have applied the common law of legal professional privilege on the basis that privilege will only attach to a confidential communication, oral or in writing, made for the sole purpose of obtaining or giving legal advice or assistance or use in legal proceedings.

The situation in which practitioners and judges were unaware as to how to reconcile the apparently inconsistent treatment of privilege, depending as one applied the Act or as one applied *Grant v Downs*, had become a daily occurrence. One commentator published an article entitled "The Demise of *Grant v Downs*" (1995) 7 ILJ 234 which after dealing with the differences in the two tests, advocated the proposition that it was appropriate for practitioners to discover less documents applying the "dominant purpose" test as long as those practitioners made plain to their opponents that this was their view of the appropriate approach now permissible to be taken.

McLelland CJ in Eq. then held in *Telstra Corporation v Australis Media Holdings*, that although the provisions of the Act relating to client legal privilege do not, upon the true construction of the Act, apply of their own force to ancillary processes such as the production of documents in response to subpoenas, they were applicable to such ancillary processes in lieu of previous common law principles, for historical, conceptual and practical reasons. That implication of an alteration of the privilege for ancillary processes mirrored the development of the privilege itself in the last four centuries. That privilege emerged in the 16th century as a natural exception to ancillary processes as those processes in turn emerged and developed. As McLelland CJ in Eq. put it:

"In this sense the principles of legal professional privilege applicable to testimony at a trial, provide the paradigm and the extension of the same principles to ancillary processes was derivative in nature. Accordingly, any change to the paradigm should rationally be reflected in the derivatives."

Ultimately the High Court pointed up the fundamental difficulty with the line of reasoning adopted by McLelland CJ in Eq.. His Honour had concluded that the Act had created an entirely new setting to which the common law was now required to adapt itself. The problem was that the legislation does not apply throughout Australia and presently applies only in Federal courts and in the courts of New South Wales and the Australian Capital Territory. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court at 563 had held that there is but one common law in Australia which is declared by the High Court as the final court of appeal. The High Court (Gleeson CJ, Gaudron and Gummow JJ) pointed to the differing legislation concerning privilege to be found in a number of legislatures in Australia and to other differences where it was not possible to discern a consistent pattern of legislative policy to which the common law in Australia could adapt itself. Their Honours held that the fragmentation of the common law implicit in the qualification that such adaptation should occur only in those jurisdictions in which the Act applies was inconsistent with what was said in *Lange* and was unacceptable.

In short it was not possible to identify a "common law" of Australia with respect to questions of privilege where different legislatures had enacted differing legislation concerning privilege.