

# *'Whom do you Believe?': Criminal Appeals, Conflicting Testimony and the Burden of Proof*

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## **1. Introduction**

Australian trial judges are required to explain to jurors how the law applies to the particular factual issues before them. According to a lengthy line of Australian criminal appeal decisions, some of the things trial judges may say to jurors about conflicting testimony in this context may lead jurors to perform their fact-finding task in a way that fails to respect the criminal burden of proof. This article scrutinises how Australia's appeal courts respond to complaints that trial judges may have caused jurors to take an incorrect approach to conflicting testimony. It argues that, in practice, the cases operate, not as an appellate supervision of trial judges or of the jury's understanding of the law, but rather, at least in part, as an appellate supervision of the jury's fact-finding. It argues further that the operation of the cases is unsatisfactory and that reform is required, though traditional reform options are limited.

Part 2 introduces the 'either/or' cases, where appeal courts address the argument that remarks made by the trial judge may have led the jury into an approach to finding facts about conflicting testimony in criminal trials that is erroneous in light of the criminal burden of proof. It explains that neither the erroneous approach, the remarks said to encourage that approach nor the matters that are relevant to the outcome of an appeal can be comprehensively defined or analysed using traditional legal methods.

Part 3 considers the practical operation of the 'either/or' cases and the function that appeal courts must perform when they address this issue. Two possible views of the appellate function in these cases will be rejected. First, it will be shown that the trial judge remarks examined in these cases are not, primarily, the result of judicial slips of the tongue or lack of caution concerning the burden of proof, but rather emerge as inevitable features of the trial judge's complex task in directing juries in trials involving conflicting testimonies. Second, it will be demonstrated that the cases cannot be regarded as a supervision of the jury's understanding of the law, consistently with the traditional division of roles between judge and jury. Instead, the appellate resolution of 'either/or' cases must, in part, involve a review of the merits of the jury's fact-finding regarding conflicting testimony. This conclusion, which follows from an analysis of the nature of the issue to be

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considered by appeal courts, derives some support from the pattern of reported decisions in appeals from both jury and non-jury trials.

Part 4 outlines the danger of the 'either/or' cases and discusses the prospects for law reform. While there is nothing wrong with a degree of merits of review of jury decision-making, there is a considerable danger in an appellate review of assessments of conflicting testimony, particularly the type of review performed in the 'either/or' cases. However, traditional options for reforming the 'either/or' cases are limited. A special direction on the application of the burden of proof to conflicting testimony would be difficult to formulate and poses significant risks of intrusion into the jury's fact-finding province. Conversely, a reduced role for the trial judge in explaining the facts to jurors, to the extent that this would avoid the problem in the 'either/or' cases at all, would merely shift the problem of providing guidance for jurors on the difficulties of conflicting testimony to counsel. It is submitted that the essence of the problem in the 'either/or' cases is not the trial judge's direction, but rather an overlap between the jury's fact-finding function and the courts' function of ensuring compliance with the law. The most likely path to a resolution of this overlap, which is particularly acute in trials that turn on conflicting testimony, is through the development of an increased level of respect in Australia's appeal courts for jurors' capacity to approach the issue of credibility in a fair and appropriate manner. Potential ways forward include guidance from comparative jurisdictions, a High Court affirmation of juror abilities with respect to trials turning on conflicting testimony and empirical research into juror reasoning.

## 2. *The 'Either/Or' Cases*

This part explains why the line of cases discussed in this article is difficult to study using traditional legal analysis. One problem is simply locating all the decisions. Australian courts have not developed common terminology for describing the problem addressed in the 'either/or' cases. Rather, the courts discuss the issue using general terms that are also used in relation to many other recurrent problems in criminal appeals, for example, an 'error on the burden of proof', a 'misdirection' on the law, a potential 'miscarriage of justice'. This means that locating the judgments, many of which are unreported, using computer search techniques is next to impossible. As a result, only a sample can be located, in part by searching for citations of key judgments. Thus, the set of cases available for analysis is probably only a sample of the actual decisions, and an unrepresentative one at that.<sup>1</sup>

The research problem is symptomatic of a larger analytical problem. As will be explained in this Part, the cases do not operate on the basis of comprehensive rules

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1 It is difficult to know the number of Australian 'either/or' appeals, though the trend of recent years suggests that there have been at least 100 across the 1980s and 1990s, possibly a good deal more. The issue is recurrent in present Courts of Criminal Appeal, for example, *Latham v R* [2000] WASCA 57; *Morley v R* [1999] WASCA 161; *R v Dwyer* [1999] NSWCCA 47; *R v Griffiths* [1999] SASC 70; *R v Fennell* [1999] SASC 179 (leave to appeal to the High Court of Australia refused: 24 March, 2000). Most of the cases cited in this article were found by searching for references to key authorities, which means that the sample is non-random (for example, it has a South Australian bias, because *Calides* is South Australian). Undoubtedly, there are many more 'either/or' cases than those cited or discussed in this article.

designed to determine what a trial judge should say, when an appeal should succeed or, even, how jurors should reason about conflicting testimony. The result is that traditional legal analysis of the 'either/or' cases is of limited utility.

### A. *The Erroneous 'Either/Or' Approach to Fact-Finding*

Lacking common Australian terminology,<sup>2</sup> this article will adopt the language current in the Supreme Court of Canada. There, Cory J, writing for a majority of the Supreme Court, said the following in relation to trial judge directions in trials that turn on conflicting testimony:

It is erroneous to direct a jury that they must accept the Crown's evidence or that of the defence. To put forward such an *either/or approach* excludes the very real and legitimate possibility that the jury may not be able to select one version in preference to the other and yet on the whole of the evidence be left with a reasonable doubt. [Emphasis added.]<sup>3</sup>

The fullest Australian discussion of the 'either/or approach' is Wells J's judgment in the 1983 South Australian case, *R v Calides*.<sup>4</sup> Calides was charged with various drug offences. The evidence at the trial consisted of four prosecution witnesses (two police detectives and two of the defendant's alleged accomplices) and the defendant's sworn evidence. Justice Wells, writing the leading judgment in the Court of Criminal Appeal of South Australia, remarked that '[t]he trial... resolved itself very largely into questions concerning the credibility of the witnesses'.<sup>5</sup> The trial judge's charge included the following:

Well, that's all for you to say but it probably doesn't take me to tell you, ladies and gentlemen, that both versions in this case cannot be true. Either [the four crown witnesses] have told you things on oath that are not true, or the accused has. The two versions cannot be explained by any misunderstanding. It is for you to decide where the truth lies.<sup>6</sup>

The Court held that this remark meant that there must be a fresh trial, as the jury may have been led to reach its verdict in a manner that contravened the requirements of the criminal burden of proof.<sup>7</sup> Justice Wells explained the flaw in the charge by noting that, in a trial that turns on conflicting testimony, there are three positions in which the jury may find itself:<sup>8</sup>

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2 The only instance of common terminology in Australia is the occasional reference to the error described 'in *Calides*': *Addy v Goldsmith* (SA Supreme Court, 6 November 1987); *Schwager v Faehrmann* (SA Supreme Court, 8 December 1987); *Prater v Rowbottom* (SA Supreme Court, 12 March 1991).

3 *R v S(WD)* [1994] 3 SCR 521 at 533. Compare *R v W(D)* [1991] 1 SCR 742 at 757. For a full discussion of the approach taken by Canadian courts to this issue see Gans J, 'The *W.(D)*. Direction – Part One' (2000) 43 *Crim LQ* 212.

4 *R v Calides* (1983) 34 SASR 355 at 356–360.

5 *Id* at 357.

6 *Ibid*.

7 *Id* at 359 (Wells J), 360–361 (Legoe J), 361 (Matheson J).

8 *Id* at 358–359.

- 'the jury may be completely satisfied with the evidence led from the Crown'
- 'the jury may be perfectly satisfied with the version presented by the accused'
- 'the jury, after a full and careful consideration, may arrive at the result that they are unable to say where the truth lies, or that they are unable to say who is telling the truth'

The criminal burden of proof requires that the third possibility 'must never be overlooked.'<sup>9</sup> Later in the judgment, Wells J noted that it would be wrong for the jury to decide on the basis of 'inclination of opinion in favour of one side or the other'<sup>10</sup> Other Australian judgments have adopted a variety of formulations to describe erroneous reasoning involving the jury's neglect of a factual possibility<sup>11</sup> or its adoption of a positive approach to resolving a conflict in testimony<sup>12</sup>

The variety of different descriptions show that, while instances of the error can be described, it is difficult to formulate a single, comprehensive, description of the 'either/or' approach. The reason is that all descriptions of the approach involve a comparison with the correct approach to criminal fact-finding, which holds that the accused can only be found guilty if the elements of the crime charged are established beyond reasonable doubt. In Australia, the High Court has firmly rejected any attempt to define the words 'reasonable doubt', holding instead that the meaning of the words, and hence, the principle that applies them, cannot be accurately defined and are for the jury to interpret.<sup>13</sup> Thus, the 'either/or' approach can only be described negatively, as a fact-finding approach that is inconsistent with the principle of proof beyond reasonable doubt.

The obvious commonality of the cases is the context of resolving a conflict between the testimony of two or more witnesses. Thus, in this article, the 'either/or' approach is defined as *any* fact-finding approach that, if used to resolve a conflict between witnesses, may lead the jury to convict the accused without *necessarily* being satisfied of the accused's guilt beyond reasonable doubt.

9 Id at 359.

10 Id at 358. Compare Bollen J's modification of this formulation through the insertion of the word 'merely': *R v Clarke* (SA Court of Criminal Appeal, 11 December 1991).

11 For example, *R v Jackson* (1957) 74 WN (NSW) 477 at 478 ('the third possibility, namely that the evidence might leave the jury in a state of reasonable doubt as to where the truth lay'); *Price v R* (Tas Court of Criminal Appeal, 8 June 1962), (noted at (1962) 36 ALJ 235) (the 'possibility that they might not be satisfied as to the truth of either [account].'); *Bartho v R* (1978) 19 ALR 418 at 423, (Stephen J: the 'intermediate position to which the jury may come if not satisfied of either guilt or innocence') and at 424 (Murphy J: the position where jurors 'think the accused is probably guilty but are not satisfied beyond reasonable doubt').

12 For example, *Hargan v R* (1919) 27 CLR 13 at 17 (Barton J: the jury deciding as 'a mere matter between two oaths.');

*R v Lapuse* [1964] VR 43 at 46 (the jury 'asking themselves which body of evidence they preferred, and in that way determining the problem as it was posed to them');

*R v Smith* [1964] VR 217 at 224 (the jury 'convict on the basis that one version is simply more credible than the other.');

*Liberato v R* (1985) 159 CLR 507 at 520 (Deane J: the jurors seeing 'their task as essentially one of making a 'choice' between the Crown evidence and the [defence evidence]');

*R v Clark* (NSW Court of Criminal Appeal, 15 July 1991) (the jury seeing 'their task as being selection between two mutually inconsistent accounts.');

*C v R* (SA Court of Criminal Appeal, 19 May 1993) (the jury regarding itself as 'the adjudicator in a debate', asking 'Which side has debated the better?').

13 *Green v R* (1971) 126 CLR 28 at 32-33.

### B. *Remarks that Lead Jurors to the 'Either/Or' Approach*

Although the 'either/or' approach is an error with respect to the burden of proof, the cases do not involve any scrutiny of the traditional direction on the rules of proof in criminal trials.<sup>14</sup> Rather, the remarks at issue are those that, in Well J's words, are 'capable of affecting' the criminal burden of proof.<sup>15</sup> Such remarks generally arise in the trial judge's discussion of the facts. This is because much of the language used to describe facts and arguments can also be taken as approving or mandating a particular fact-finding approach.

One example is where the trial judge summarises the factual issues in the trial by pointing out that certain factual possibilities are not open on the facts. Although directions of this sort are entirely proper – indeed, they are necessary in complex trials – they may nonetheless lead the jury to resolve a conflict between two factual accounts without considering the possibility of being left in doubt as to the disputed facts.<sup>16</sup>

A further example is where the trial judge explains to the jury that particular factual matters are for them to decide. Again, such explanations are both proper and, in some trials, mandatory.<sup>17</sup> Nonetheless, the jury may interpret the judge's remarks as mandating or approving a particular fact-finding approach. This is problematic if it is possible to apply the approach described without complying with the requirements of the criminal burden of proof.<sup>18</sup>

It is important to recognise that a comment by a trial judge may raise the 'either/or' approach as a mere allusion. This means that the 'either/or' cases concern not only judicial comments that *mandate* an erroneous approach to fact-finding, but also those that merely *approve* an erroneous approach. In addition, the erroneous approach may not be explicitly described as a fact-finding approach by the trial judge, but may simply be considered *implicit* in the trial judge's mere reference to the resolution of a factual conflict involving conflicting testimony. Moreover, impugned remarks include those that the jury *may* interpret in this way or even remarks that might leave the jury *confused* on this point.

This variety requires a broad definition of 'either/or' remarks. 'Either/or' remarks include any reference, explicit or implicit, to the resolution of conflicting testimony in a particular trial. Given the flexibility of Australian trial directions,

14 *Woolmington v DPP* [1935] AC 462; *Ibid*; *R v Reeves* (1992) 29 NSWLR 109.

15 Above n4 at 357.

16 For example, *Hargan*, above n12 at 17; *R v Woods* [1956] SR (NSW) 142 at 143–144; *Jackson*, above n11 at 478; *Lapuse*, above n12 at 45; *Smith*, above n12 at 226–227; *Cheatley* (1981) 5 A Crim R 114 at 115; *R v Bebic* (NSW Court of Criminal Appeal, 14 October 1982); *R v Smith* [1984] 2 Qd R 69 at 70–71; *Egan* (1985) 15 A Crim R 20 at 38 (special leave to appeal to High Court of Australia refused: *Liberato*, above n12); *R v Hooper* (SA Court of Criminal Appeal, 9 December 1988); *Cox v R* (WA Court of Criminal Appeal, 18 January 1989); *Clark*, above n12; *Towner* (1991) 56 A Crim R 221 at 224; *R v Jacobs* (Qld Court of Criminal Appeal, 17 October 1991); *R v Beserick* (1993) 30 NSWLR 510 at 528; *R v Bernthaler* (NSW Court of Criminal Appeal, 17 December 1993); *R v G* [1994] 1 Qd R 540 at 541; *R v Ryan* (NSW Court of Criminal Appeal, 15 April 1994); *R v B* (SA Court of Criminal Appeal, 1 June 1995); *E* (1995) 89 A Crim R 325 at 329–330; *Griffiths*, above n1 at [21]; *Dwyer*, above n1 at [13]; *Morley*, above n1 at [5].

17 *R v Tikos (No 2)* [1963] VR 306; *R v Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55–56.

which are framed around particular sets of facts and the styles of individual judges, it is clear that the remarks can arise in many different guises. These include lengthy discussions on fact-finding, recurrent allusions to conflicting testimony throughout the charge and the briefest, once-off, comments, for example, '[t]he simple question in this case is: whom do you believe?', which resulted in a new trial in Tasmania in 1962.<sup>19</sup>

### C. *Appellate Decisions in the 'Either/or' Cases*

'Either/or' cases arise when a convicted defendant appeals her or his conviction on the basis that an 'either/or' remark by the trial judge may have led the jury to take an 'either/or' approach to fact-finding. The formal issue before courts of criminal appeal is not whether there has been a misdirection, but whether one of the statutory grounds of appeal has been established.<sup>20</sup> In *Calides*, Wells J took the approach that the relevant question for the appeal courts is whether or not there has been a miscarriage of justice, holding that the practical question for the appeal court is 'the impression that would have been created on the minds of the jury'.<sup>21</sup>

Resolving this issue is complex. Justice Connolly in the Queensland decision, *Ward*, dismissed an appeal because the 'either/or' remark neither referred explicitly to the burden of proof nor mandated a particular approach.<sup>22</sup> However, the features of the remark itself are not determinative of the outcome of an appeal. The jury's impression of the trial judge's words may depend on the words' context.<sup>23</sup> More importantly, the impact of any remark on the burden of proof will

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18 For example, *Jackson*, above n11; *R v El Mir*; *R v Safi* (1958) 75 WN (NSW) 191 at 192; *Price*, above n11; *Lapuse*, above n12 at 45; *Smith*, above n12 at 226–227; *Matthews v R* [1973] WAR 110 at 114; *R v Boyle* (NSW Court of Criminal Appeal, 15 December 1978); *R v Thompson* (NSW Court of Criminal Appeal, 8 June 1979); *R v George* [1980] Qd R 346 at 347; *Tegg* (1982) 7 A Crim R 188 at 197–199; *R v Prokop* (Vic Court of Criminal Appeal, 27 February 1987); *R v Whittingham* (1988) 49 SASR 67 at 71; *R v Carbone* (1989) 50 SASR 495 at 500; *Neale v R* (WA Court of Criminal Appeal, 29 May 1989); *R v Esposito* (NSW Court of Criminal Appeal, 23 July 1990); *Butun v R* (WA Court of Criminal Appeal, 15 February 1991); *Clark*, above n12; *Jacobs*, above n16; *Dennison v R* (WA Court of Criminal Appeal, 27 August 1992); *Beserick* above n16 at 528; *C*, above n12; *G*, above n16 at 541; *R v Keever*s (NSW Court of Criminal Appeal, 26 July 1994); *R v Greenall* (NSW Court of Appeal, 15 August 1994); *B*, above n16; *E*, above n16 at 329–330; *R v Holman* [1997] 1 Qd R 373 at 376; *R v Vawdrey* (NSW Court of Criminal Appeal, 16 April 1998); *Fennell*, above n1 at [6]; *Dwyer*, above n1 at [13]; *Morley*, above n1 at [5], *Latham*, above n1 at [6].

19 *Price*, above n11.

20 See for example, *Criminal Appeal Act* 1912 (NSW), s6.

21 Above n4 at 359 compare at 357. Recently, in a High Court hearing for an application for special leave, Gleeson CJ noted, of the 'either/or' cases, that '[t]he question in each case is ... whether or not the trial judge adequately conveyed to the jury the notion that the onus of proof was on the Crown and that the degree if proof was beyond reasonable doubt and did not confuse them by leading them to think that their task was simply to decide which of two competing versions appeared to them to be the more plausible.': *Fennell v R* above n1.

22 *Ward* (1984) 15 A Crim R 275 at 278. Compare *Matthews v R* [1973] WAR 110 at 115; *Bartho*, above n11 at 422; *Neale*, above n18, *Jacobs*, above n16 (Ambrose J); *R v Laz* [1998] 1 VR 453 at 465.

23 For example, *Fennell*, above n1 at [10–11], [19].

depend on what else the trial judge says on that subject in the remainder of the charge. Appeal courts must assess whether the emphasis and repetition given to the formal statement of the burden of proof in the charge overlaid any remark potentially leading the jury into an 'either/or' approach.<sup>24</sup> In the case of certain 'either/or' remarks, some courts have held that a special instruction rejecting the 'either/or' approach would be necessary to save the charge.<sup>25</sup> For example, Connolly J in *Ward* held, in dicta, that a direction to the jury that 'they are to decide whether the Crown witnesses or the accused were lying' can be cured only by a direction that 'if they cannot determine where the truth lies, the accused is entitled to the benefit of the doubt.'<sup>26</sup>

Appeal courts considering the possibility that the jury took an 'either/or' approach to its fact-finding are not limited to considering the trial judge's charge. For example, it may be relevant to consider the remarks of counsel,<sup>27</sup> extra-curial material that might have influenced the jury<sup>28</sup> and any indication in the trial record of juror confusion about the burden of proof.<sup>29</sup> In *Calides*, Wells J held that the ultimate disposition of any appeal turns on 'matters of fact and degree, and general impression'.<sup>30</sup> The reference to 'general impression' is an apparent acknowledgement of the inevitable significance of appeal judges' personal conceptions of lay jurors' propensity to adopt an 'either/or' approach to their fact-finding in a particular trial.

Because there are so many factors that may influence an appeal court's determination of the jury's impression of the burden of proof in a particular trial, no blanket statements should be made about the acceptability of any particular charge, let alone an isolated portion of that charge. Despite dicta in some cases doing exactly that,<sup>31</sup> the correct position is that of the Victorian Supreme Court in the early judgment, *R v Smith*:

24 *Lapuse*, above n12 at 46; *Smith*, above n12 at 228; *George*, above n18 at 347–348; *Tegg*, above n18 at 202; *Smith*, above n16 at 73–74; *Egan*, above n16 at 38; *Carbone*, above n18 at 500; *Neale*, above n18; *Esposito*, above n18; *Jacobs*, above n16; *Beserick*, above n16 at 530; *B*, above n16; *R v Preston* (NSW Court of Criminal Appeal, 7 April 1997); *Vawdrey*, above n18; *R v PAH* (NSW Court of Criminal Appeal, 18 December 1998); *Fennell*, above n1 at [12], [18], [19]; *Dwyer*, above n1 at [16], [18]; *Morley*, above n1 at [7–8].

25 For example, *Jackson*, above n11 at 478; *El Mir*, above n18 at 193; above n4 at 360–361 (Legoe J); *Liberato*, above n12 at 515; *Whittingham*, above n18 at 71; *R v Allison* (SA Court of Criminal Appeal, 30 June 1989); *Butun*, above n18; *C*, above n12; *E*, above n16 at 330; *R v R* (SA Court of Criminal Appeal, 17 June 1998). Compare *Smith*, above n12 at 218; *Bebic*, above n16; *Clough* (1992) 64 A Crim R 451 at 466; *Hooper*, above n16; *Clarke*, above n10.

26 *Ward*, above n22 at 276.

27 For example, *Bebic*, above n16; *R v Pearson* (Victorian Supreme Court, 5 June 1995).

28 For example, New Zealand jurors are given a booklet entitled *Information for Jurors*, which tells jurors: 'In the end, you will have to decide what happened and who you believe.': New Zealand Law Commission, *Juries in Criminal Trials: A Discussion Paper – Part 1 – Volume 1* (1999) at 14. For an instance (unrelated to the 'either/or' issue) where passages in a pre-trial jury booklet were found to have prejudiced the defendant, see *People v Schoos*, 78 NE (2d) 245 (1948).

29 Jury questions on the burden of proof, as well as the length of jury deliberations, are important considerations in Canadian 'either/or' cases. See Gans, above n3.

30 Above n4 at 357.

31 For example, above n4 at 359; *Ward*, above n22 at 276.

It must very rarely happen that one can lay a charge in one case against that in another and say that the two cases bear such a marked resemblance to each other that because a court of appeal has held the one charge to be inadequate, the second charge must as a matter of law be held to be inadequate.<sup>32</sup>

Any attempt to adopt a 'bright line' rule would negate other important factors, potentially over- or under-estimating the likelihood of a miscarriage of justice. This explains why no 'either/or' case has taken on the character of an authoritative judgment on the outcome of appeals that examine the possibility of an 'either/or' approach in the jury's fact-finding.

### 3. *The Appeal Court's Function in the 'Either/Or' Cases*

Part 2 discussed the law (such as it is) surrounding the 'either/or' issue. Because the outcome of each appeal depends on myriad factors, it is not possible to state any determinative rules governing the case law, beyond the requirement that the courts consider the factors affecting the jury that may have resulted in a miscarriage of justice. Accordingly, any attempt to further analyse the 'either/or' cases using traditional legal research methods would be fruitless. Instead, it is useful to consider the function of appellate court determinations with respect to the 'either/or' approach to fact-finding.

The essence of the argument in this part is that the 'either/or' cases, which purport simply to regulate the trial judge's direction as it affects the jury's understanding of the burden of proof, in fact have a considerably different impact, allowing – and perhaps requiring – appeal courts to take on the role of reviewing the merits of the jury's fact-finding regarding conflicting testimony. First, two views of the appellate function in relation to the 'either/or' approach are rebutted. Then, a hypothesis about the practical operation of the 'either/or' appeals is developed by examining magistrates appeals.

#### A. *Supervising the Trial Judge*

The professional resource, *Australian Criminal Trial Directions*, regards 'either/or' cases such as *Calides* as instances of a broader set of cases where appeal courts have acted to restrain errant trial judges from embarking on 'the dangerous sea' of departing from formulaic directions on the criminal burden of proof.<sup>33</sup> This view implies that 'either/or' remarks will be avoided if trial judges approach their task with sufficient caution. Here, it will be argued that this view is, for the most part, incorrect.

As noted in part 2, 'either/or' remarks arise when the trial judge summarises the facts or explains the jury's function. To understand the constraints on trial judges performing this role, it is useful to consider the following direction, where a trial judge attempted to both summarise the issues and tell the jury its function:<sup>34</sup>

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32 *Smith*, above n12 at 225.

33 Glissan J & Tilmouth S, *Australian Criminal Trial Directions* (Butterworths Looseleaf Service, 1996) at 1-1000-35. Compare at 1-1000-95, 1-1000-105, 1-1000-110.

34 *E*, above n16 at 330.



The real issue here is whether it happened or it did not, whether you believe the girl or whether you do not, whether you believe the accused or you do not. That is your real function here as I perceive it. But it is a matter for you to decide.

In the 1995 New South Wales case that examined this remark, *E*, the Court of Criminal Appeal allowed the appeal, commenting that:

[I]t is commonplace for the issue in cases such as the present to be described as one of word against word. Sometimes it is unavoidable. But it is essential that, when such a description is given, the judge ensures that the jury understands that it is not a choice between the evidence of the Crown's principle witness and that of the accused.<sup>35</sup>

The Court's comments raise three sub-questions: (1) can trial judges avoid describing the facts as 'word against word'?; (2) if not, can that description be 'given' in a way that does not risk an 'either/or' approach?; and (3) if not, can additional comments be added to any description to negate the possibility of an 'either/or' approach? The answer to each of these questions is no. At least, not always.

The reason why a description of a trial as 'one of word against word' is '[s]ometimes ... unavoidable'<sup>36</sup> is because of the need for trial judges to make the issues in the trial clear to lay jurors. This is particularly important given that Anglo-Australian trials consist of a mass of testimony and argument that is often geared more to tradition, evidence law and advocacy than to juror comprehension. The trial judge's obligations were explained by the High Court in *Alford v Magee*:

[I]t was of little use to explain the law to the jury in general terms and then to leave it to them to apply the law to the case before them... [T]he law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case.<sup>37</sup>

Thus, where there is conflicting testimony on a particular issue, the trial judge cannot simply tell the jury that the testimony given by the two witnesses is relevant to that issue. Rather, the trial judge must explain that the two accounts imply different conclusions on that issue, with differing legal consequences. If, in doing so, the trial judge explicitly or implicitly plays down the fact that the two witnesses are in conflict, then the judge risks confusing the jury and, more importantly, has failed to provide an accurate account of the evidence and arguments in the case. Thus, the New South Wales Court of Criminal Appeal has remarked that in some cases 'it was not only permissible, but essential for the learned judge to point out to the jury that their starting point ought to be an examination of [the] evidentiary conflicts.'<sup>38</sup>

35 Ibid.

36 Ibid compare *Liberato*, above n12 at 515, 519 where members of the High Court described references to 'choice' and the question 'who is to be believed' as 'commonplace' and 'sometimes unavoidable'.

37 *Alford v Magee* (1952) 85 CLR 437 at 466. Compare *R v Zorad* (1990) 19 NSWLR 91 at 105.

38 *Bebic*, above n16.

The next question is whether the trial judge's description of conflicting testimony can be worded so as to avoid any implications about the jury's fact-finding task. Recall that an 'either/or' remark occurs whenever the trial judge uses language that can be seen as an implicit reference to the resolution of a conflict between two witnesses' testimony. The reader may wish to consider whether the trial judge's remark from *E*, set out above, could be re-phrased without using words such as 'believe' or 'describe', which are references to the fact-finding process and could potentially trigger an 'either/or' approach. One approach is for the trial judge to state: 'the accused says that there was no sexual intercourse, while the complainant says that there was, so that there is contradictory evidence on whether or not the 'sexual intercourse' element of the crime of sexual assault was established.' However, even if one puts aside concerns that this statement is inadequate or that it still might still invoke an 'either/or' approach, the difficulty remains of telling the jury that the resolution of a conflict in the testimony is a question for them. A generalised statement such as 'questions of fact are for you, the jury' is too abstract to be sufficient.<sup>39</sup> Without language referring to fact-finding in the context of the trial itself, the trial judge cannot ensure that the jury understands what its function is; however, once such language is used in relation to conflicting testimony, there is an automatic possibility that the jury may read these words in a way that raises an 'either/or' approach.

The third question is whether the trial judge can add additional comments to any description of the fact-finding process that might negate the risk of an 'either/or' approach. At first glance, this seems like the most attractive option, as it does not restrict the trial judge from fulfilling the requirements of cases like *Alford v Magee*. However, a closer analysis reveals that this approach is a difficult and dangerous one. From a practical point of view, it should be observed that, even in simple cases, the trial judge will undoubtedly refer to crucial matters such as conflicting testimony a number of times and in a variety of ways. The New South Wales Court of Criminal Appeal has observed that it is 'plainly impossible' for a trial judge to qualify every factual comment in a jury direction with a 'reminder' of the criminal burden of proof.<sup>40</sup> An even less tractable problem is exemplified by the following observation of Green CJ of the Court of Criminal Appeal of Tasmania:

In my view, because the directions and comments in the passage I have set out above [posing the question for the jury as one of choice between witnesses] were specific and concrete, it is likely that they would have had more impact than the other, more general directions as to the burden of proof which were given by the learned trial judge and there must therefore be a real risk that the summing up as a whole might have misled the jury as to their function.<sup>41</sup>

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39 *Courtney-Smith*, above n17.

40 *Bebic*, above n16.

41 *Cheatley*, above n16 at 116. Compare *R v Khoury* (NSW Court of Criminal Appeal, 17 June 1998).

Chief Justice Green's argument is that very specific language is required to negate some of the language that might raise the 'either/or' approach. However, the task of directing on the specific application of the burden of proof to factual issues is an extremely difficult one, as the High Court has pointed out both in past cases on attempts to elaborate on the criminal standard of proof and in recent cases where the Court has preferred rules of silence on aspects of credibility that implicate the presumption of innocence.<sup>42</sup> A stark illustration of these dangers in the 'either/or' context is the recent appeal, *R v R*, which considered the following direction by the trial judge:

There is one final point I must make about the evidence in this case, because it does really boil down to a question of who you believe. It is question of oath against oath, and in those circumstances, it is sometimes very difficult to be satisfied about something beyond reasonable doubt. It is possible, therefore, that at the end of your deliberations you simply won't be able to decide where the truth lies. You may ponder for quite some time. You may just not be sure whether the accused was telling the truth or whether [the complainant] was telling the truth. If you do find yourself in that position it follows that you must have a reasonable doubt, and if you do have a reasonable doubt your verdict must be not guilty.<sup>43</sup>

The Court of Criminal Appeal of South Australia appreciated that this direction was an obvious attempt to nullify the 'either/or' approach; indeed, the trial judge set out Wells J's three options explicitly later in the direction.<sup>44</sup> However, the majority held that 'it seems patently likely' that the comment's effect was to leave the jury 'with the impression that they were merely to make such a choice' between the two witnesses.<sup>45</sup> This suggests that any attempt to disavow the 'either/or' approach may be too subtle for lay jurors and might actually increase the risk of juror confusion on the burden of proof. On this approach, trial judges would be better advised to let remarks on conflicting testimony pass without additional comment, rather than risk giving emphasis to the point.

The above discussion demonstrates that it is difficult for trial judges to avoid language that might prompt the jury into an 'either/or' approach in trials that involve conflicting testimony. Thus, the 'either/or' cases are not really about judicial 'slips' of language, but rather involve inevitable side-effects of the trial judge's complex function in Anglo-Australian criminal trials. Of course, 'either/or' remarks will not necessarily appear in every trial where there is conflicting testimony. It is not impossible for trial judges to avoid such language. As pointed out in part 2, the impact of judicial language is always one of degree and turns on many factors, many of which are within the trial judge's control. However, particularly when one considers that trial judges are only human, are not necessarily perfect writers and orators, and often work under considerable time

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42 *Green*, above n13; *Robinson v R* [No 2] (1991) 180 CLR 531; *Palmer v R* (1998) 193 CLR 1.

43 *R*, above n25.

44 *Ibid*.

45 *Ibid*. Compare *Tilley v R* (SA Court of Criminal Appeal, 6 September 1994) (Olson J dissenting).

pressure, it is likely that, despite best intentions, many trials involving conflicting testimony will potentially be open to an appeal on the 'either/or' ground.

Thus, it is unlikely that the 'either/or' cases operate in practice as a supervision of trial judges. Certainly, 'either/or' remarks occur often in contemporary courts.<sup>46</sup> Part 4 will discuss whether the Australian law regulating the jury charge can be changed to avoid the recurrent appearance of 'either/or' cases.

### ***B. Supervising the Jury's Understanding of the Law***

In jury trials, there is a division in function between judges, who are responsible for legal issues, and jurors, who are responsible for factual issues. In accordance with this tradition, appeal courts' supervision of the jury is ordinarily limited to the jury's understanding of the law, although appeal courts also have an exceptional jurisdiction to consider whether the jury's verdict, and hence its fact-finding, was safe. In the case of the substantive criminal law, this distinction is sustainable because it is easy to conceptualise the jury's deliberation as involving two stages, the fact-finding process and the application of the substantive law to the facts found through that process. Some of the 'either/or' judgments purport to take this approach with respect to the courts' supervision of the jury's understanding of the burden of proof, for example, by holding that a trial judge's remark on conflicting testimony was innocuous, because it related to 'the jury's preliminary task of evaluating the evidence' rather than 'the standard of proof to be applied in the trial.'<sup>47</sup> Here, it will be argued that this view of the 'either/or' cases is not tenable and, thus, that appeal courts that address the 'either/or' issue cannot be regarded as simply supervising the jury's understanding of the law applicable in a criminal trial.

The first point to observe is that 'the jury's preliminary task of evaluating the evidence' is a process that, at least potentially, can be governed by rules. As the Supreme Court of Canada observed:

[I]t is unrealistic to view a jury's decision as some epiphanic pronouncement of guilt or innocence; rather, the jurors engage in a deliberate process of evaluating the evidence presented to them.<sup>48</sup>

In *Shepherd*, the High Court ruled that a factual issue must be proved to the criminal standard if it forms a 'link' in a 'chain' of reasoning, but that proof to that standard is not required for other issues<sup>49</sup> However, this does not mean that the

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46 See above n1.

47 *Boyle*, above n18 (Slattery J dissenting). Compare *Matthews*, above n18 at 115; *Bebic*, above n16; *Neale*, above n18; *Jacobs*, above n16 (Ambrose J); *Dennison*, above n18; *Beserick*, above n16 at 528.

48 *R v MacKenzie* [1993] 1 SCR 212 at 238–239.

49 *Shepherd v R* (1990) 170 CLR 573 at 579. Compare *Chamberlain v R* (No 2) (1984) 153 CLR 521. See generally Ligertwood A, *Australian Evidence* (3<sup>rd</sup> ed, 1998) at para 2.54–2.55; Wells W, *Natural Logic, Judicial Proof and Objective Facts* (1994); Hamer D, 'The Continuing Saga of the *Chamberlain* Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23 *Monash ULR* 43.

rules of proof are inapplicable to issues that, while potentially critical to the verdict, are not determinative, ie the metaphorical strands in a 'cable' of proof.

One way of conceptualising fact-finding concerning conflicting testimony is to picture the assessment of the prosecution witness's testimony and the assessment of the defence witness's testimony as two 'strands' that, together, permit an overall factual finding on a point in dispute. It is possible that the jury may first consider the prosecution witness's testimony and accept it as truthful, and then reason that any testimony inconsistent with that witness's account is wrong and dismiss it. If the jury approaches and finds the facts in this way then, at the end of its preliminary fact-finding, the jury will have found that the facts are represented by the prosecution witness's account and will, accordingly, have dismissed the defence witness's account. Obviously, where the two witnesses were in conflict on an important factual issue, this process of reasoning does not ensure that the accused's guilt was proven beyond reasonable doubt, as it may be that the rejected defence evidence might have raised a doubt about the overall prosecution case. Thus, if the jury takes this approach in its preliminary fact-finding, then its pre-verdict reasoning will be inadequate to meet the requirements of the criminal burden of proof.

It is not possible to set down a single rule about how the jury should approach the 'cables' of factual issues that arise with respect to conflicting testimony. The precise requirements of the burden of proof vary according to how the jury chooses to approach the conflicting testimony and the relevance of that conflict to other matters in the trial. If the sole evidence in the trial is a conflict between two witnesses and the jury chooses to make two assessments, one of the credit of the accused and one of the credit of the prosecution witness, then, as pointed out by Wells J in *Calides*, the burden of proof will be respected if the jury considers the possibility of being left in doubt.<sup>50</sup> However, Wells J's test cannot be used if the jury approaches the conflicting testimony in a different way. For example, the jury may choose to consider one particular aspect of the conflicting testimony, for example, a dispute between the witnesses on the timing of the event in issue, before considering other matters. Or the jury may focus on one aspect of credibility, for example, the stories' 'air of reality', or the witnesses' demeanour or motive to lie, before considering other matters. The situation becomes still more complex when the conflicting testimony is only one part of the evidence in the trial.

Thus, there are an infinite number of ways the jury may approach conflicting testimony. The ways such fact-finding must be modified to accommodate the burden of proof are similarly unlimited. This explains the myriad definitions of the 'either/or' approach given in the case law. While it is possible to describe particular instances of incorrect approaches to the burden of proof, for example, Wells J's reference to fact-finding on the basis of mere 'inclination of opinion',<sup>51</sup> it is impossible to define comprehensively the distinction between correct and

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50 Above n4 at 357.

51 *Id* at 359.

incorrect fact-finding. Indeed, it could be argued that the burden of proof itself is not a 'rule' at all, at least not as that term is commonly understood. As one writer has observed:

[C]onsider the direction on burden and standard of proof... Essentially, what is conveyed to the trier of fact is that the entire criminal justice system is ultimately committed to protecting innocent people from conviction. If a conviction follows, it can be said that this result is given legitimacy by the fact that this protection was expressly built into the final phase of the trial process [for instance, the fact-finder's deliberation.]<sup>52</sup>

On this view, to avoid the 'either/or' approach, jurors must ensure that their fact-finding conforms, not to a rule, but to the criminal justice system's policy of avoiding convicting the innocent.<sup>53</sup> It would follow that appeal courts, in determining appeals raising the 'either/or' approach, in fact must consider whether the jury will have paid sufficient regard to the policy of protecting innocent persons from conviction in reaching their verdict.

A corollary of the above discussion is that the 'either/or' cases cannot, in practice, simply be concerned with whether the jury comprehends the burden of proof analogously to the way appeal courts test the trial judge's direction to ensure that the jury understands the substantive law. Rather, as will be argued next, the cases must, to some degree, involve a supervision of the entirety of the jury's fact-finding.

### C. *Supervising the Jury's Fact-finding*

The above discussion rejects two characterisations of the appellate function in the 'either/or' cases. Those cases do not primarily operate as a supervision of trial judges because the language that is said to raise the risk of an 'either/or' approach is largely unavoidable. Nor can the appeals be described as a pure exercise in ensuring that the jury understands the legal rules applicable in the trial, as the burden of proof has a role throughout the fact-finding process that can neither be exhaustively defined nor conceptualised as confined to the 'law application' aspect of the jury's task. Here, a most plausible account of the operation of the 'either/or' cases is developed.

In fact, the broad practical operation of the cases has already been established by process of elimination. Appeal courts supervise the trial below and, in particular, the performance of the various officers. If the 'either/or' cases are not concerned with the performance of the trial judge, then they must be concerned with the jury. As the 'either/or' cases are not simply concerned with the jury's understanding of the law, this leaves only the jury's fact-finding task. The need for

52 Doran S, 'The Symbolic Function of the Summing-up in the Criminal Trial: Can the Diplock Judgment Compensate?' (1991) 42 *Northern Ireland LQ* 365 at 359. Compare Zuckerman A, *The Principles of Criminal Evidence* (1989) at 136.

53 Compare the main High Court case on 'reasonable doubt' *Green*, above n13 at 33, where the Court held that the jury defines what is reasonable and 'to their task of deciding facts they bring to bear their experience and judgment.'

appeal courts to supervise jury fact-finding arises because the burden of proof is built into all aspects of the fact-finding process regarding conflicting testimony.

Indeed, on the reasoning of two High Court judges in a 1985 special leave application, *Liberato*, appeal courts that decline to supervise the jury's fact-finding commit an error of law.<sup>54</sup> *Liberato* was an appeal against the Court of Criminal Appeal of South Australia's use of the proviso to dismiss the accused's complaint that the trial judge had encouraged the jury to make a 'choice' between two conflicting versions of an alleged sexual assault.<sup>55</sup> The state court had dismissed the appeal, despite the trial judge's errors, because the defendant's conviction implied that the jury accepted the complainant's evidence, which amounted to overwhelming evidence of the accused's guilt.<sup>56</sup> In the High Court, Deane J held that the state court's approach was unacceptable, because it ignored the possibility that the jury's final verdict followed from the jury's assessment of the conflicting testimony, which in turn may have been tainted by an 'either/or' approach caused by the trial judge's erroneous remarks on how to approach that conflict.<sup>57</sup> Justice Brennan described the state court's approach as circular.<sup>58</sup> Each would have allowed the appeal on this point.<sup>59</sup>

However, the identification of the broad appellate function in the 'either/or' cases does not explain how appeal courts perform their role. In part 2, it was observed that appeal courts must consider many factors to determine whether an appeal on the 'either/or' issue should succeed. Discerning which factors the courts actually consider and the role of each factor is difficult, because the 'either/or' judgments are almost all quite opaque and discussion is invariably limited to an assessment of the trial judge's charge to the jury. Fortunately, greater analysis is possible with respect to one branch of 'either/or' cases that have more transparent appellate reasoning: appeals from magistrates' verdicts, which consider the fact-finder's actual reasons for judgment, rather than jury directions that may or may not have influenced those reasons. An analysis of Australian magistrates appeals suggests a disturbing hypothesis on the practical operation of the 'either/or' cases.

A pair of South Australian magistrate appeals from the late 1980s illustrate how the appellate task in relation to the 'either/or' issue is transformed once it is recognised that the erroneous approach can occur with respect to many aspects of the fact-finding process. In *Harris v Mill*, von Doussa J applied Wells J's approach in *Calides* in the context of a magistrate's reasons for judgment.<sup>60</sup> The discussion began unremarkably, criticising the magistrate for (implicitly) posing the question

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54 *Liberato*, above n12.

55 *Egan*, above n16 at 38, 47.

56 *Id* at 27.

57 *Liberato*, above n12 at 520–521.

58 *Id* at 517.

59 The majority in the High Court refused special leave on the basis that the appellant had not shown that the lower court applied the wrong test in applying the proviso. The majority did not specifically address the lower court's assumption about the jury's assessment of the complainant's credibility.

60 *Harris v Mill* (SA Supreme Court, 7 April 1988).

‘which of the parties giving the competing stories is to be preferred?’ However, von Doussa J elaborated by arguing that the problem with the test of ‘preference’, as well as the test of ‘rejection of the defendant’s evidence’, is that such tests ‘do not provide positive proof of guilt.’<sup>61</sup> A year later, in *Selig v Hayes*, Jacobs J characterised von Doussa J’s remarks as setting out ‘[t]he risk of error in treating credibility as the only real issue.’<sup>62</sup> Indeed, von Doussa J’s remarks even suggest that there is a danger in treating particular aspects of credibility, such as honesty or reliability, as determinative in the fact-finding process, because of the possibility that other issues will raise a reasonable doubt about the accused’s guilt.<sup>63</sup>

The dicta in *Harris* and *Selig* demonstrate that the ‘either/or’ approach can occur, not only through a misstatement of the burden of proof, but also as a result of any failure to have regard to a relevant factual issue in finding facts in relation to conflicting testimony. This is because any such failure can be regarded as applying an insufficient fact-finding approach for the purposes of the burden of proof. An examination of magistrates appeals on the ‘either/or’ issue reveals a number of instances where a magistrate’s reasoning has been found to reveal an ‘either/or’ approach, even when the magistrate explicitly and repeatedly stated the proper test required by the criminal burden of proof, simply because of the way the magistrate framed the crucial factual questions for determination.<sup>64</sup> Under this approach, appeals courts may – and, given the approach in *Liberato*, must – regard the burden of proof as contravened whenever the fact-finder adopts a fact-finding approach that can be characterised as an inadequate consideration of the factual issues raised by a particular instance of conflicting testimony. Thus, the issue of whether an ‘either/or’ approach has occurred must be determined, in part, through a judgment of the merits of the fact-finder’s approach to the evidence.

The approach taken in magistrates appeals suggests an important hypothesis about the practical operation of the ‘either/or’ cases: *to resolve whether the fact-finder has adopted an ‘either/or’ approach, appeal courts must assess the merits of the fact-finder’s reasoning about conflicting testimony.*

The claim that appeal judges are partly influenced by their view of the merits of the verdict below in determining criminal appeals is an easy claim to make. However, this article’s analysis is not based on a cynical observation about

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61 Ibid. Compare *Gibbons v SA Police* (1993) 173 LSJS 465 at 470–471; *Harling* (1997) 94 A Crim R 437 at 443

62 *Selig v Hayes* (1989) 52 SASR 169 at 171.

63 Above n60.

64 For example, *Ivanoff v Urie* (SA Supreme Court, 14 July 1987); *Schwager*, above n2; *Gibbons*, above n61; *Hall v Police* (SA Supreme Court, 13 May 1994); *R v Hetherington* (SA Court of Criminal Appeal, 24 August 1994); *Burlinson v SA Police* (1994) 75 A Crim R 258 at 261; *Robson v Police* (SA Supreme Court, 3 July 1997); *Harling*, above n61; Compare *Butun*, above n18; *R*, above n25; *Laz*, above n22 at 465. One apparent outcome of these cases is a change in magistrate behaviour, in favour of directly citing *Calides* in reasons given in trials involving conflicting testimony. Compare Cox J’s complaint that *Calides* is often cited unnecessarily in South Australia: *Police v Candy* (SA Supreme Court, 3 May 1995); *Heatlie v Police* (SA Supreme Court, 1 June 1995).



appellate decision-making, but rather on an analysis of the issue that appeal courts must resolve in 'either/or' cases. Merits analysis is not merely a plausible feature of judicial review in the 'either/or' cases but, rather, is positively compelled by the inherent logic of the issue. Because the 'either/or' approach can emerge exclusively through the emphasis given by the fact-finder to particular factual issues, it is insufficient for courts hearing appeals in jury trials to rely merely on their assessment of the trial judge's direction or the jury's abstract understanding of the law. Rather, to determine whether an 'either/or' approach has occurred, the court must assess whether the jury's verdict accords with fact-finding that, in the court's view, would follow from sufficient consideration of all the factual matters relevant to resolving any conflict in testimony. Such an assessment will be one factor, alongside the others discussed in part 2, that will determine the outcome of each 'either/or' appeal.

In the case of jury trials, the court has no direct window on the fact-finding process. Rather, the court must speculate about whether the jury paid sufficient regard to all relevant factual issues. To achieve this, the court will have to consider the evidence in order to determine whether the fact-finder's verdict may have arisen through inadequate attention to a particular factual matter. A (non-jury) example of this procedure is apparent in *Wood v Tothill*, an appeal from a decision of several justices concerning a traffic offence.<sup>65</sup> The justices' crucial finding was extremely brief: 'On this evidence, we are of the opinion that the motor cyclist would not have been able to safely stop prior to the stop line.' These reasons are almost as opaque as a jury's verdict. Justice White, on appeal, expressed a concern about the merits of the lower court's decision, suggesting that the justices had not 'properly' analysed the inconsistencies in the prosecution evidence and the weight of additional, independent evidence. Despite a complete absence of any detailed discussion by the justices of their fact-finding approach, White J held that there was 'a real danger' that the justices had simply 'preferred' the prosecution witnesses, contrary to *Calides*, and that '[t]he justices must have applied the wrong onus of proof.'<sup>66</sup> The verdict was overturned.<sup>67</sup>

It is difficult to observe appellate assessments of the merits of fact-finding in jury trials, because, in 'either/or' cases arising from such trials, the judgments focus on the trial judge's remarks. The inevitable merits analysis is subsumed within the typically brief appellate assessments of whether the trial judge's remarks caused a miscarriage of justice. Nonetheless, circumstantial evidence of the role of merits analysis in such appeals can be derived from a number of 'either/or' jury appeals that have explicitly turned, in part, on the presence or absence of special jury warnings on factual features of the evidence. In a number of instances, Australian courts have held that there is a link between the question of whether an 'either/or' approach might have been adopted, and the question of whether a special warning about the prosecution's reliance on a single witness (for instance, the old 'corroboration' warning and its successors) ought to have been given (with

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65 *Wood v Tothill* (1986) 131 LSJS 13.

66 *Id* at 19.

67 *Id* at 20.

the absence of such a direction making an ‘either/or’ approach more likely, or vice versa).<sup>68</sup> These cases are only explicable if appeal courts regard matters that go to the factual merits of the jury’s verdict as relevant to the question of whether the jury erred on the burden of proof.

How does the appellate merits review of the jury’s fact-finding in relation to a possible ‘either/or’ approach interact with the formal appellate merits review that arises in response to the claim that a verdict was ‘unsafe and unsatisfactory.’<sup>69</sup> It could be argued that the availability of a formal mechanism to review the jury’s findings, even regarding conflicting testimony,<sup>70</sup> means that appeal judges would not be inclined to use the ‘either/or’ issue to review the merits of the jury’s verdict, and that even if the ‘either/or’ cases operate in this way, no new opportunity for overturning an appeal arises. However, there is a vital difference between the ‘unsafe and unsatisfactory’ ground and the operation of the ‘either/or’ cases. The High Court has repeatedly affirmed that appeal courts applying the ‘unsafe and unsatisfactory’ ground are bound to defer to the jury’s assessment of credibility, to the extent that the jury’s direct observation of the witnesses and the trial would give it an advantage.<sup>71</sup> This is a considerable contrast with the required approach to jury fact-finding that appeal courts must apply to the ‘either/or’ issue. Because the ‘either/or’ approach can render any aspect of the fact-finding process unreliable, courts are entitled – indeed, as Deane and Brennan JJ argued in *Liberato*, required – not to defer to the jury’s factual assessments.

Indeed, because the informal merits review inevitably embedded in the ‘either/or’ issue is more intrusive than the exceptional ‘unsafe and unsatisfactory’ ground, it may operate to undermine the restrictions placed on the formal merits review ground. In many trials, both the ‘either/or’ issue and the ‘unsafe and unsatisfactory’ ground are argued on appeal. It is possible that, even where the ‘either/or’ approach is not formally addressed or is dismissed, the aspersion cast on the jury’s fact-finding by the possibility of an error on the burden of proof might operate to render the appeal court less inclined to defer to the jury’s fact-finding when applying the ‘unsafe and unsatisfactory’ ground. It is even possible that a latent concern about the jury adopting an ‘either/or’ approach may undermine the requirement of appellate deference to juror fact-finding regarding conflicting testimony in appeals where the ‘either/or’ issue was not raised at all, and where no ‘either/or’ remarks occurred in the trial judge’s charge.

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68 *Hooper*, above n16; *Allison*, above n25; *Butun*, above n18; *Pix v R* (SA Court of Criminal Appeal, 15 June 1993); *Tilley*, above n45; *B*, above n16; *R v Glencourse* (NSW Court of Criminal Appeal, 21 April 1995); *Preston*, above n24; *PAH*, above n24; *Fennell*, above n1 at [13–19]; *Dwyer*, above n1 at 17–18.

69 This terminology was disapproved in *Gipp v R* (1998) 194 CLR 106 at 122–127. However nothing in the argument in this article turns on the question of terminology.

70 *M v R* (1994) 181 CLR 487.

71 *Id* at 494. Compare *Whitehorn v R* (1983) 152 CLR 657; *Chamberlain*, above n49; *Morris v R* (1987) 163 CLR 454; *Chidiac v R* (1991) 171 CLR 432; *Knight v R* (1992) 175 CLR 495. A similar point could be made concerning deference to findings by trial judges. Compare *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

#### 4. *Critique and Reform*

So far, this article has been descriptive of the 'either/or' cases. This part considers whether the appellate function outlined in part 3 is satisfactory. Concluding that it is not, it considers the prospect for reforming the operation of the Australian 'either/or' cases.

##### A. *The Problem of Appellate Fact-finding*

Ogders points out that there is nothing inherently wrong with the jury's fact-finding being supervised by another institution:

To recognise that the jury has constitutional responsibility for deciding *at trial* whether guilt has been proved beyond reasonable doubt does not mean that the jury has sole responsibility for answering the question. There is no logical reason why the appeal courts should not apply precisely the same test, as a form of fail-safe designed to minimise the risk of convicting an innocent person – which is arguably the primary aim of the criminal justice system.<sup>72</sup>

However, Ogders's argument, does not address a narrower issue: should *appeal judges* be the ones to review juror fact-finding? Here, this question will be examined, as well as the related question of whether the mode of fact-finding described in part 3, especially the lack of deference to jury fact-finding, is acceptable.

Lord Devlin puts the core argument against giving appeal judges too much power in the criminal justice system:

The power that puts the jury above the law can never safely be entrusted to a single person or to an institution, no matter how great or how good. For it is an absolute power and, given time, absolute power corrupts absolutely. But jurors are anonymous characters who meet upon a random and unexpected summons to a single task (or perhaps a few), whose accomplishment is their dissolution. Power lies beneath their feet but they tread on it so swiftly that they are not burnt.<sup>73</sup>

At its simplest, Devlin's argument is a warning against putting the eggs of the criminal justice system in too few baskets. In New South Wales, there are 34 judges eligible to sit on the Court of Criminal Appeal,<sup>74</sup> while every year there are approximately 300000 citizens on call for jury duty.<sup>75</sup> Moreover, judges hear many more cases than any juror and are empanelled for a considerably longer period. Even though most trials are not appealed, it is clear that a single appeal

72 Ogders S, 'Commentary' (1995) 19 *Crim LJ* 98 at 99.

73 Devlin P, 'The Conscience of the Jury' (1991) 107 *LQR* 398 at 404.

74 The NSW Court of Criminal Appeal comprise the nine appellate judges, the 19 judges of the common law division of the Supreme Court, three acting judges, the President of the Court of Appeal, the Chief Judge at common law and Chief Justice of the Supreme Court.

75 In 1998, approximately 580000 'notices of inclusion' were sent to New South Wales citizens, roughly 55 per cent of whom remained on the roll after their responses were processed. (Figures supplied by the NSW Sheriff's Office).

judge has an enormously greater potential influence on criminal justice outcomes than any single juror. This is particularly the case with respect to the appellate function described in part 3, both because of the absence of any requirement of deference to the jury and because of the vast number of cases where there is a possibility that the jury adopted an 'either/or' approach.

Of course, appeal judges are not merely a permanent set of jurors. They hold special qualifications and benefit from lengthy experience in assessing evidence, both in earlier careers and in years on the bench. However, these characteristics are a mixed blessing for any appellate fact-finding role. The practical and political prerequisites to judicial office virtually guarantee that judges will be less diverse than the wider population, which raises the prospect that their fact-finding will be based on a narrower extra-curial experience than that of lay jurors. As the High Court has pointed out, lay experience is critical for determinations of 'whether and, in the case of conflict, what evidence is truthful'.<sup>76</sup> According to the Supreme Court of Canada, juror experience is especially vital in resolving the issues in sexual assault trials, which almost always turn on conflicting testimony.<sup>77</sup>

Appeal judges' routine hearing of criminal appeals also carries the danger of 'case hardening', whereby judges come to base their decisions less on the merits of the case before them than on over-broad generalisations.<sup>78</sup> The resolution of trials involving conflicting testimony is a task that can be radically transformed if a fact-finder approaches the task on the basis of general rules of thumb. For example, in 1996, Mahoney ACJ of the Court of Criminal Appeal of New South Wales commented:

[W]here the case is ultimately word against word, I would not allow the conviction to stand. The reason why one chooses the one witness rather than the other is, in such a case, impression rather than analysis; at least, ordinarily it is so. I do not think that that is a basis sufficient to do to a man what gaol does.<sup>79</sup>

As Kirby J later pointed out, Mahoney ACJ's approach would nullify the legislature's intent, particularly in relation to sexual assault law reform.<sup>80</sup> Indeed, if Mahoney ACJ's view was common on the appellate bench, then few, if any, convictions in trials that turn on the uncorroborated testimony of a prosecution witness, including most incestuous child sexual assault trials, would withstand appeal.

A further danger posed by the appellate fact-finding role described in part 3 is that this mode of fact-finding may differ from the sort of fact-finding performed by jurors at the trial itself. Consider the test that a majority of the High Court has

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76 *Doney v R* (1990) 171 CLR 207 at 214. Compare Nesson C, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98 *Harv LR* 1357 at 1370.

77 *R v François* [1994] 2 SCR 827 at 837-838.

78 Jackson B, and Doran S, 'Judge and Jury: Towards a New Division of Labour in Criminal Trials' (1997) 60 *Mod LR* 759 at 764-765.

79 *R v VRJ* (NSW Court of Criminal Appeal, 22 November 1996).

80 *Jones v R* (1997) 191 CLR 439 at 465.

set down for appeal courts faced with an 'unsafe and unsatisfactory' ground in a trial that turns on credibility.<sup>81</sup>

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.

This test is remarkable for its focus on the flaws, rather than the strengths, of the prosecution case. The High Court's fact-finding approach consists of a search for doubts raised by each witness's testimony, without any necessary consideration of the strengths of that testimony, such as the 'air of reality' of the account, the absence of an apparent motive to lie or the presence of aspects of the evidence that are inconsistent with a dishonest account.<sup>82</sup> Arguably, the flaws of a witness's testimony will be more readily apparent to appeal courts than the testimony's strengths, because appeal judges' sole view of the evidence is a written transcript supplemented by appellate advocacy, where individual errors may be more visible than overall cogency.<sup>83</sup> A focus on particular flaws of a witness's account is particularly likely in the 'either/or' cases, where there can be little or no deference to the jury's direct observation of global aspects of credibility such as a witness's demeanour, emotion or tone. A narrow appellate focus on the flaws of each witness's testimony will inevitably favour the defence in trials that turn on conflicting testimony, because any doubts in criminal matters must be resolved against the prosecution.

In summary, appellate supervision of jury fact-finding without the necessity of deference to the jury is a dangerous way of protecting innocent defendants against wrongful jury convictions. The danger arises from both the qualities of appeal judges and the likely nature of appellate fact-finding, especially in contrast to (and without deference to) the jury. In particular, it is possible that a routine, non-deferential fact-finding role would push the balance in criminal trials that involve conflicting testimony unnecessarily far towards the defence. Such a consequence is especially dangerous given that it would be applicable to the balance of sexual assault and child sexual assault trials.

### ***B. The Problem of Reform***

The above argument amounts to a case for reforming the operation of the Australian 'either/or' cases. However, acceptable reform options are very limited.

The obvious candidate for traditional law reform is the trial judge's direction on the facts. Part 3 argued that 'either/or' remarks are not, for the most part,

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81 Above n70 at 494.

82 Compare above n80 at 467, where Kirby J, dissenting, argued that appeal judges ought to consider all of these matters.

83 Above n70 at 507 (Brennan J dissenting).

careless slips, but rather are an inevitable consequence of the task that the trial judge is required to perform in the Anglo-Australian system. There is some support in Australian case law for two major modifications to the trial judge's role to avoid the occurrence or impact of 'either/or' remarks. Unfortunately, neither is likely to be a safe or effective way of reducing the number of 'either/or' cases.

The first approach is to require the trial judge, in appropriate trials, to give a detailed instruction to the jury setting out how the burden of proof applies to conflicting testimony. Possible directions have appeared in dicta in a number of Australian cases.<sup>84</sup> Canada provides the main example of this approach, where a brief 1991 judgement from the Supreme Court of Canada suggested a three-step instruction to be given in trials where credibility is important:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence, which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.<sup>85</sup>

In the decade since that judgment was handed down, this case has become the most frequently cited Canadian authority on criminal procedure.<sup>86</sup> Unfortunately, this reform, while superficially attractive, is flawed and dangerous. The facts of every criminal case are unique; even in simple trials that turn on a conflict between witnesses, the differences between any two trials will outweigh their similarities. As part 3 pointed out, for any one set of facts, there are many valid ways that the jury could use to analyse the evidence and reach its verdict. To be acceptable, any direction would have to navigate between the Scylla of narrowing the jury's acceptable fact-finding options and the Charybdis of failing to adequately discourage the jury from taking an 'either/or' approach. Simple directions, like the Canadian three-step instruction, that set down a single valid approach to fact-finding, risk leading the jury to place too high a burden on prosecutorial proof and potentially exclude legitimate ways of dealing with conflicting testimony consistently with the burden of proof.<sup>87</sup> As noted earlier, it is almost inevitable that more complex directions, no matter how carefully worded, will create too great a risk of confusing the jury or even leading them into error.<sup>88</sup> To date, Australian

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84 *Jackson*, above n11 at 478; *El Mir*, above n18 at 193; above n4 at 360–361 (Legoe J); *Liberato*, above n12 at 515; *Carbone*, above n18 at 500; *Allison*, above n25; *Butun*, above n18; *C*, above n12; *E*, above n16 at 330; *R*, above n25.

85 *W(D)*, above n3.

86 See Gans, above n3.

87 See *ibid* and Gans J, 'The *W.(D.)* Direction – Part II', *Crim LQ*, forthcoming, for a full treatment of the Canadian direction and a more extensive discussion of the pitfalls of special directions on the 'either/or' issue.

88 See for example, *R*, above n25.

courts have rightly rejected calls for a mandatory direction on credibility and reasonable doubt absent a misdirection by the trial judge.<sup>89</sup> They should go further and ban trial judges from any direction that suggests a sole legitimate approach to fact-finding in credibility trials, beyond the requirement that the accused's guilt be proved beyond reasonable doubt.<sup>90</sup>

An apparent alternative reform is to take entirely the opposite tack: remove the obligation for the trial judge to discuss the facts altogether. This approach was recently promoted by a majority of the High Court in an appeal from a jury trial that turned on credibility, albeit not in the context of addressing the possibility of an 'either/or' approach:

[I]t has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge may comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safe course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

This dicta, in a joint judgment of Gaudron ACJ, Gummow, Kirby and Hayne JJ, bears the unmistakable imprimatur of Kirby J, who made a similar suggestion when he was on the NSW Court of Appeal.<sup>91</sup> In the past, he has canvassed the approach of the United States, where jury charges consist mainly of directions on the law and most comments on the facts are forbidden.<sup>92</sup> However, it is highly questionable whether the American approach could easily be transplanted to Australia, where jurors, counsel and judges alike have expectations shaped by the present system and where rules of evidence and procedure have developed accordingly. Moreover, the benefits of the change are far from certain. The trial judge's continuing responsibility to direct jurors on the law, including the jury's function as fact-finder and, perhaps, other incidental references to the facts, means that an avenue for the trial judge to raise the 'either/or' approach will still remain, even if the High Court's suggestion catches on. In addition, juries could still be led into an 'either/or' approach by the remarks of counsel, who, under the United

89 *Smith*, above n11 at 218; *Bebic*, above n16; *Hooper*, above n16; above n10; *Clough*, above n25 at 466; *R v Bielawski* (SA Court of Criminal Appeal, 20 February 1996). Notably, the High Court has, on four occasions this past decade, refused leave in response to a complaint that the trial judge omitted a direction on the 'either/or' issue: *Ryan v R* [1994] HCA; *R v Lapa* [1996] HCA; *Bielawski v R* [1997] HCA; *Fennel v R*, [2000] HCA.

90 This argument is put at length in Gans J, *Rape and the Golden Thread* (Doctoral Thesis), catalogued at the UNSW Library, Sydney, 1998. Recently, the High Court commented that '[t]o attempt to instruct the jury about how they may reason towards a verdict of guilt (as distinct from warning the jury about impermissible forms of reasoning) leads only to difficulties...': *RPS v R* [2000] HCA 3. Surely, the warning should apply equally to instructions to the jury about how they may (or especially, must) reason towards a verdict of *not* guilty.

91 *R v Yildirimtekin* (NSW Court of Criminal Appeal, 5 September 1994).

92 *R v Finn* (NSW Court of Criminal Appeal, 8 July 1988); *R v Reynolds* (NSW Court of Criminal Appeal, 25 August 1992); Compare 75B *Am Jur* 2d §§ 1188–1207, 1417, 1420; 23 A *Corp Juris Sec* §1294.

States approach, bear the task of summarising the facts. More importantly, given the intrinsic difficulties posed by the application of the golden thread principles of criminal justice to conflicting testimony that would inevitably arise for discussion in the jury room, it would be counterproductive for the trial judge to refrain from giving guidance on these matters.<sup>93</sup> To plead for a reduction in the quantity of jury directions, rather than suggesting practical improvements to their quality, is to sweep one of the most difficult issues in criminal procedure under the carpet.

Indeed, it is unlikely that any change to the trial judge's role will solve the problem raised by the 'either/or' approach. Part 3 shows that the trial judge's direction is somewhat of a red herring in this area; in practice, the 'either/or' cases are really the product of a functional overlap of two other groups: jurors, who must find the facts, and appeal judges, who must ensure that the jury followed the law. The functional division between these two groups breaks down because the most fundamental law in criminal trials, the burden of proof, is intertwined with the fact-finding process; in relation to conflicting testimony, the two are logically inextricable. Neither the jury's function nor that of appeal courts is amenable to significant reform. Obviously, changes to the jury system are unlikely, while it is clear that appeal courts must retain their power to overturn jury convictions where there is a miscarriage of justice, especially a suspected disregard of the criminal burden of proof. Thus, because the 'either/or' cases are the product of fundamental features of the Anglo-Australian criminal justice system, a traditional law reform approach is not viable.

However, this does not mean that the operation of the 'either/or' cases as a routine occasion for non-deferential appellate fact-finding is inevitable. A comparative analysis of the incidence of 'either/or' cases in Australia and the United Kingdom indicates that there is room for variety in how the 'either/or' issue will operate within the Anglo-Australian system. In the UK, like in Australia, concern about the 'either/or' approach was apparent in appeal courts in the 1950s.<sup>94</sup> However, since the 1960s, British 'either/or' cases have been rare, a stark contrast to Australia. Given the arguments in part 3, it is unlikely that contemporary British trial judges are somehow avoiding the language that triggers review in Australia. Rather, it seems that there is a lower level of concern amongst UK appeal judges about the possibility of an 'either/or' approach, a point that has resulted in fewer attempts to raise that issue on appeal. In part 2, it was observed that an inevitable factor influencing the outcome of 'either/or' cases is each judge's pre-existing view of the inherent likelihood that the jury will adopt an 'either/or' approach in a criminal trial. Arguably, the difference between the UK and Australia arises from a difference in appellate attitudes towards jurors, with U.K. appeal judges less inclined to find that jurors have been led, by judicial comments on conflicting testimony, into disregarding the requirements of the

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93 A full version of this argument is put in Gans, above n90.

94 For example, *Blackburn* (1955) 39 Cr App R (note); *Murtagh & Kennedy* (1955) 39 Cr App R 72.



burden of proof.<sup>95</sup> This suggests that the dangers of an intrusive appellate fact-finding role in 'either/or' cases will be reduced, or even avoided, if appeal judges had a high degree of trust in jurors, specifically in regard to conflicting testimony and the 'either/or' approach.

Obviously, appellate judges' attitudes towards jurors cannot be the subject of traditional law reform. Nonetheless, there is some scope for shaping the attitudes of judges currently on the bench.

One option is useful guidance from highly authoritative appellate benches. Notably, such guidance appeared early in the U.K in judgments that tended to discourage appellate intervention on the basis of the 'either/or' approach.<sup>96</sup> By contrast, despite the recurrence of such cases in Australia, the High Court of Australia is yet to give an authoritative judgment on the 'either/or' issue. Indeed, the High Court has refused special leave on cases raising the issue on at least six occasions, including three times in the past five years.<sup>97</sup> It would seem that the special leave system operates to prevent the High Court from dealing with legal questions where the principles are clear, but their practical application is complex and potentially dangerous. Unfortunately, when questions about the principles of criminal justice, the fact-finding process and jury directions have reached the Court, the Court's judgments have consisted of lofty declarations of principle and outright prohibitions of particular directions, rather than a detailed consideration of how appeal courts should approach their task of deciding whether there was a miscarriage of justice in a particular trial.<sup>98</sup> Such approaches leave Australia's top national court poorly positioned to evict the many devils in the details of the criminal justice system, including the problems discussed in this article. A High Court judgment along the lines of the 1964 Victorian judgment, *R v Smith*,<sup>99</sup> which held that, ordinarily, the presence of the general burden of proof direction in the jury charge is sufficient for an appeal court to presume that the jury understood and applied the principles of criminal justice in its fact-finding, would be a useful step towards ensuring that appeal judges approach 'either/or' cases with an appropriate level of trust in the jury to have proper regard to the burden of proof when considering conflicting testimony.

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95 Notably, there is a clear divergence between the UK and Australian courts on a cluster of issues akin to the 'either/or' error: the acceptability of certain jury directions on the accused's and complainant's motives that may bear on the presumption of innocence. In *R v Feltrin* (UK Court of Appeal, 8 November 1991) *The Times* (5 December 1991); *The Independent* (16 December 1991), the Court of Appeal was unconcerned by a direction that would clearly be grounds for a new trial under the High Court decisions in *Robinson*, above n42, and *Palmer*, above n42. Like the 'either/or' cases, the issue at stake in relation to these matters is trust in the jury in the face of factual discussions at the trial: see Gans J, *The Direction on the Accused's Interest in the Outcome of the Trial* (1997) 21 *Crim LJ* 273; Gans J, ' "Why Would I Be Lying": The High Court in *Palmer v R* Confronts an Argument That May Benefit Sexual Assault Complainants' (1997) 19 *Syd LR* 568.

96 *Bullard v R* [1957] AC 635; *McInnes* (1971) 55 Cr App R 551.

97 *Bartho*, above n11; *Liberato*, above n12; *Ryan*, above n89; *Lapa*, above n89; *Bielawski*, above n89; *Fennell*, above n89.

98 For example, *Robinson*, above n42; *Palmer*, above n42. See Gans, above n95.

99 Above n12 at 218.

An alternative prospect for influencing appellate attitudes is to perform and publish empirical research on jurors' regard for the burden of proof and the policies behind the rules of proof, including how these notions are applied in fact-finding regarding conflicting testimony.<sup>100</sup> An example of this type of research is a recent study of juror fact-finding by the New Zealand Law Commission.<sup>101</sup> Some of the findings in that study suggest that appeal judges should not be quick to find a likelihood of a flawed jury impression of the burden of proof and conflicting testimony that could result in a miscarriage of justice to the accused's disadvantage. On the topic of credibility, the study suggested that jurors have a tendency themselves to be sceptical about witnesses' testimony, with a preference for 'hard evidence' and a focus on the flaws of testimony.<sup>102</sup> On the topic of the burden of proof, the study found a variation in how jurors voice their understanding of the rule, but no evidence that jury verdicts vary with that understanding, arguably supporting the view that the formulation of the rule is unimportant, in contrast to the jury's understanding of the policy behind it.<sup>103</sup>

A further way to promote appropriate appellate attitudes in 'either/or' cases is through more transparent and precise legal analysis in Australian appeal judgements on this topic. Arguably, the greatest danger in the 'either/or' cases is that the true appellate function is buried within brief and opaque judgments about whether or not the trial judge 'misdirected' the jury on the burden of proof. Clearly, if appeal judges (consciously or otherwise) approach the 'either/or' issue on the basis that the appellate task involves chastising trial judges for slips of language or ensuring that the jury understands a technical legal rule, then the risk of regular, wide-spread and non-deferential appellate fact-finding is high. On the other hand, if the courts view their function in 'either/or' cases consistently with the approach described in this article, then the scope for dangerous appellate fact-finding regarding conflicting testimony will be greatly reduced.<sup>104</sup>

## 5. Conclusion

'Whom do you believe?'<sup>105</sup> The Australian judges that regard this very question, posed to jurors in trials involving conflicting testimony, as a potential miscarriage of justice or this article's argument that the way this issue may work in practice in Australia may itself threaten the proper operation of the criminal justice system? Like many apparent dichotomies, the answer is that both views are correct. The interaction between the criminal burden of proof and fact-finding in relation to

100 Compare *Jury Act 1977* (NSW), s68A(3).

101 Young W, Cameron N & Tinsley Y, *Preliminary Paper 37 – Volume 2: Juries in Criminal Trials: Part Two: A Summary of Research Findings*, New Zealand Law Commission, Wellington, November 1999.

102 *Id* at 27–28.

103 *Id* at 54.

104 Indeed, a surprising number of recent Australian 'either/or' appeals have been dismissed, raising the possibility that appellate faith in the jury is increasing: for example, *Fennel*, above n1; *Griffiths*, above n1; *Dwyer*, above n1; *Morley*, above n1 but compare *Latham*, above n1.

105 *Price*, above n11.

conflicting testimony raises subtleties that potentially render many jury charges open to misunderstanding and compel appeal courts to supervise the jury's fact-finding. Because this situation derives from fundamental features of Australia's criminal justice system, including its principles, institutions and traditions, it is difficult to change. The best, perhaps only, prospect for reducing the dangers of non-deferential appellate fact-finding function in relation to conflicting testimony is the development of appropriate judicial attitudes towards the jury, especially as regards the resolution of conflicting testimony consistently with the criminal burden of proof.