Probative value, illegitimate prejudice and the accused's right to a fair trial[1]

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Introduction

A fundamental rule[2] of evidence has caused great difficulty. It involves determining admissibility according to a comparison of the probative value of the evidence and the danger of unfair prejudice in admitting it. Here, this comparison, whatever variation it may take, is referred to as 'the rule'. It has been criticised as being illogical, vague, and difficult to predict in its application. It can conflict with what is now recognised to be the absolute right of an accused to a fair trial. In support of the rule, it can be said that it aims at protecting two important interests in criminal trials: the truth-seeking purpose, which includes the determination of the issues by reference to reliable evidence, and the interests of fairness to the parties by reference to procedural rules. It operates independently of the wider discretion, variously called the discretion (strictly, a duty) to prevent an abuse of process, or the public policy discretion, that protects other public interests. These interests are concerned with maintaining public confidence in the legitimacy of the criminal justice system, and the desirability of deterring police impropriety. The interests protected by that wider discretion are to be distinguished from an interest that is of central concern in this article: the right of an accused to be tried fairly. Does the rule under discussion adequately protect the accused's right to a procedurally fair trial?

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[1] To check for updates to this paper, go www.nzcriminallaw.blogspot.com and follow the link to papers available on this site.

[2] It is referred to here as a rule, but there is academic argument about whether it should be called a discretion, and whether there is a wider discretion underlying the rule: *Cross on Evidence* (Looseleaf) LexisNexis NZ Ltd, at [13.24]. It is described as fundamental because it has wide application, its development has been associated most often with the admissibility of similar fact evidence. It also applies in civil cases. *Cross* observes, at [13.1]: "This aspect of the law of evidence [similar fact evidence] is one of the most keenly litigated …. Its legendary difficulty is largely a reflection of the dilemma created by the clash of probative force and prejudicial effect which is at its most strident in this area." See also *Cross on Evidence* (6th Australian Edition, 2000, Butterworths), Chapter 11, especially paras 21001 and 21005, where the same point is made.

In one sense of trial fairness, both sides are entitled to a fair trial. While notoriously vague, "fair" entails the ability to gather evidence and present it to an unbiased tribunal of fact, and to test the evidence lawfully adduced by the other side by pre-trial scrutiny and by cross-examination at trial. In criminal trials there are constraints on the prosecution's pursuit of fairness: evidence gathered improperly is at risk of being excluded, hearsay evidence is often excluded, as is evidence of the accused's character. It is not unusual for the prosecution's interest in a fair trial to have to yield to other interests. One such interest is the right of the accused to a fair trial, and in this article that means the accused's right to adequate facilities to prepare and present a case (or a challenge to the prosecution case), and to have issues of fact determined according to law. The rule under discussion must, it is suggested, be applied so as to avoid compromising the right of an accused to a trial that is fair in this sense.

While early dicta expressed the rule as a discretion to admit evidence that would otherwise be inadmissible, these relating to "similar fact" evidence, it widened, with a shift in the burden of persuasion, to include a general discretion to exclude evidence that would otherwise be admissible. Although the cases tend to refer to it as a discretion, especially when it is expressed in exclusionary terms, it is understood as being a discretion in a narrow, criterion guided, sense. It may be thought of as a rule in the sense that certain consequences must follow upon a judicial evaluation of the circumstances. It has moved from its common law origins[3] into legislation, and it is expressed in a variety of ways.

Common law formulations and difficulties

For the purposes of the rule, the prejudice referred to is the illegitimate use of the evidence or the bias against the accused that would be created by its admission. An illustration of the recognition that a risk of prejudice may have to be tolerated in the interests of justice is a dictum of McHugh J in *Pfennig v R* (1995) 182 CLR 461 at [40]; 127 ALR 99:

> "If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in

[3] For a brief examination of the origins of the rule, see Brennan CJ in *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98 at 183, and Toohey, Gaudron and Gummow JJ at 191.

> adducing all relevant evidence of guilt must have priority over the risk of an unfair trial."[4]

The last sentence asserts that sometimes the risk of an unfair trial will be acceptable because of the overriding interests of justice. Such a position emphasises the truth-seeking function of the criminal trial. It allows the tripartite balancing of interests between the accused, the prosecution, and the public to give overriding effect to the right of the community to secure the conviction of the guilty.

Another statement of the meaning of illegitimate prejudice is in *R v Bull* 17/11/03; CA[NZ]313/03, at para 8:

> "… the ultimate inquiry is always whether the evidence in question is more probative than prejudicial. The word "prejudicial" in this context means prejudicial in an illegitimate way: ie. by inviting or suggesting a process of reasoning which the law does not allow. Evidence which is legitimately prejudicial to the accused is probative evidence. To be probative or legitimately prejudicial, the evidence must be relevant in the sense of logically tending to prove a fact or facts in issue."

Two views of the balancing aspect of the rule are illustrated in *R v Howse* 7/8/03; CA444/02 at [21]:

> "…If the risk that the jury will use the evidence inappropriately, in spite of proper judicial direction, is too great, the primary evidence should be excluded as involving too much potential prejudice as against its probative force. If that issue arises its resolution

[4] See also ALRC Evidence Report No. 26 Interim (1985) Vol 1 paragraph 644: "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" (quoted in an interesting discussion of problems associated with the admissibility of expert opinion evidence by Einstein C, "Understanding the Evidence Act 1995 – A Daunting Task!" http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/einstein_141100, viewed 5 April 2004, in which it is pointed out that there is authority for including procedural unfairness, including the inability of one party properly to cross-examine the other, within the scope of unfair prejudice, citing *Orduka v Hicks*, unreported, CA 40397/99, 19 July 2000, New South Wales Court of Appeal). Another example of the linking of prejudice to the concept of a fair trial is the Rome Statute of the International Criminal Court, 17 July 1998, Article 69(4): "The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence."

> will depend on the Judge's perception of the balance between the degree of probative force the evidence has as against its capacity for illegitimate prejudice."

These two sentences in *Howse* reflect respectively the new and the old versions of the rule. The first begins by focusing on the risk of improper use of the evidence, and this amounts to the risk of the trial being unfair to the accused. When the risk is too great, the evidence must be excluded as its prejudicial effect would necessarily outweigh its probative force. The second sentence, however, leaves room for an interpretation of the rule that would allow the court to admit evidence notwithstanding a real risk of procedural unfairness to the accused.[5]

The Court of Appeal of New Zealand has, more recently, emphasised the need for trial fairness, taking up an old dictum of Roskill J, and this line of reasoning has the potential of introducing harmony with international rulings on fairness to the accused: *R v P and P* 5/4/04; CA389/03, at [10]:

> "It is of course fundamental that a trial court has a discretion to exclude otherwise admissible evidence on the ground that its prejudicial effect outweighs its probative value. As Roskill J said in *R v List* [1966] 1 WLR 9, at p12:
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> > 'A trial judge always has an overriding duty in every case to secure a fair trial, and if in any particular case he comes to the conclusion that even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter taken by the jury, then the trial judge, in my judgment, should exclude that evidence.'
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> This principle has been applied in New Zealand in a wide variety of contexts."

Further development is needed, as Roskill J's dictum, while recognising the overriding requirement of trial fairness, does not reflect current and emerging views on the burden and standard of proof (or persuasion) applicable to trial fairness, and nor does it distinguish fairness to each side from procedural fairness to the accused as the dominant requirement.

Statutory formulations and difficulties

Sometimes the rule is cast in mandatory terms, and sometimes in discretionary terms. Mandatory terms are used in the Evidence Act 1995 (Cth), s 137 which provides:

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[5] Tipping J proceeded to endorse the trial judge's application of *R v Manase* [2001] 2 NZLR 197 at [31] where the formulation was: "As a final check, as with all evidence admitted before a jury, the Court must consider whether hearsay evidence which otherwise might qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect." It is suggested, with respect, that the "final check" should concern the fairness to the accused of the proposed course.

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

An example of the rule being cast in discretionary terms is s 352 of the Californian Evidence Code:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The rule may be associated with decisions that are to be made according to the criterion of "the interests of justice." For example, in New Zealand, in respect of documentary hearsay evidence, the Evidence Amendment Act (No 2) 1980, s 18 sets out a discretion in these terms:

> Notwithstanding sections 3 to 8 of this Act, where the proceeding is with a jury, the Court may, in its discretion, reject any statement that would be admissible in the proceeding under any of those sections, if the prejudicial effect of the admission of the statement would outweigh its probative value, or if, for any other reason, the Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement.

It is not clear, in this section, whether the rule is intended to be seen as an instance of the interests of justice, or whether it is intended to be separate from the interests of justice. Probative value and the interests of justice were clearly linked by the Report of the Law Commission of England and Wales, "Evidence of Bad Character in Criminal Proceedings" (October 2001, Cm 5257), containing a draft Bill which in clause 8(3) set out, as a condition for admission of evidence of bad character going to a matter in issue, the following:

> The second condition is that the court is satisfied –
> (a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or
> (b) that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible in view of –
> (i) how much probative value it has in relation to the matter in issue,
> (ii) what other evidence has been, or can be, given on that matter, and
> (iii) how important that matter is in the context of the case as a whole."

This proposal in the Bill placed emphasis on the interests of justice in the circumstances of the case. However, the enacted discretion, Criminal Justice Act 2003[UK], s 101(3), departs from this:

> "The court must not admit evidence … if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it"

This is similar to s 78 of the Police and Criminal Evidence Act 1985[UK].[6] It is significant because it avoids a weighing of probative value against either the interests of justice or prejudice to the accused, and because of its focus on the adverse effect of admission of the evidence on the fairness of the proceedings. On the other hand, it does not say how much adverse effect on fairness is needed before the court ought not to admit the evidence, so it remains vulnerable to criticisms that allege some toleration of trial unfairness.

Following a proposal by the New Zealand Law Commission a general provision in these terms, linking the rule with (one of) the rights of the accused to a fair trial, has been enacted as s 8 of the Evidence Act 2006:[7]

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will -
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> (a) have an unfairly prejudicial effect on the outcome of the proceeding; or
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> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

This retains the difficulties associated with the weighing against each other of things that are not distinct.[8] The evidence in question can be both unfairly prejudicial, for example because the jury will be unable to apply it correctly to the relevant issue in the case, and at the same time it can be highly probative of that issue. Where the evidence is highly probative, the rule could suggest that a high risk of unfair prejudice to the accused can be permitted. The provision is also unclear on whether the right of the accused to offer an effective defence is different to the accused's right to a fair trial.

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[6] Quoted below, n 29; the clause in the Bill that was the subject of Lord Cooke's observations, quoted in the text below, differs from that formulated in the Law Commission's Report.

[7] NZLC R55 – Volume 2 "Evidence Code and Commentary" s 8 General exclusion.

[8] For criticism of the balancing process, see A Zuckerman, *The Principles of Criminal Evidence* (1989) p 233; J McEwan, *Evidence and the Adversarial Process* (1992) pp 4445; P B Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After *Boardman"* (1985) 48 MLR 29, 36; McHugh J in *Pfennig (No 2)* (1995) 127 ALR 99, 147; C Tapper in his commentary on *Pfennig* at [1995] 111 LQR 381, 384. For support of the balancing process, see C Tapper, "Proof and Prejudice", in E Campbell and L Waller (eds), *Well and Truly Tried* (1982) p 197: "When relevance is examined in the context of particular cases and sets of circumstances it becomes clear that the standard of proof and type of similar fact evidence which is relevant depends entirely upon the issues raised, the arguments advanced and the means of proof available. Exactly the same factors determine the extent to which such evidence is unduly prejudicial." These sources were all cited in the consultation paper by the Law Commission for England and Wales, "Previous Misconduct of Defendant" LCCP141, n 50, 51, http://www.lawcom.gov.uk/library/lccp141/part-7.htm#fn51 viewed 2 April 2004.

Inevitably, the accused's right to a procedurally fair trial will become the dominant consideration, as recent common law developments, considered below, demonstrate, so one might question whether there is any need for the rule.

Examples of topics involving the use, or proposed use, of the prejudicial/probative rule are evidence of the accused's propensity (similar facts),[9] expert evidence,[10] and hearsay.[11] It can also be given, in combination with the trial fairness requirement, an overarching status.[12] Obviously the criminal courts will not lightly abandon a decision formula that has been used for at least a century. Yet there are good reasons for breaking the link between probative value and prejudicial effect, and for treating probative value as a matter going, first, to the relevance of the tendered evidence, and second, to its weight as assessed by the tribunal of fact. Prejudicial effect will then focus on the risk of unfairness to the accused that may arise from admission of the evidence, and will be independent of probative value. Whether this reinterpretation of the rule will be made depends on what conceptual model of the relationship between the interests of justice and fairness to the accused is ultimately accepted.

The interests of justice and fairness to the accused: competing models

The interests of justice are multiple, as are the functions of the law of evidence. The rational ascertainment of facts, the promotion of fairness to parties and witnesses, the protection of rights of confidentiality and of other public interests, and the avoidance of unjustifiable expense and delay have been identified as policy objectives through which the just determination of proceedings is sought to be achieved.[13] The "fairness to parties" aspect of the interests of justice can

[9] NZLC, n 6, s 45. The Evidence Act 1995 (Cth), s 101 prevents use of tendency evidence about the accused unless "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant"

[10] NZLC, n 6, s 25; this is in combination with the interests of justice criterion.

[11] For example, s 18 of the Evidence Amendment Act (No 2) 1980 [NZ], quoted above. In *R v J* [1998] 1 NZLR 20 (CA) it was held that the extent to which inability to cross-examine the maker of the hearsay statement would make no material difference to the weight to be given to it was critical. The right to examine witnesses for the prosecution (s 25(f) of the New Zealand Bill of Rights Act 1990) is on point. In *R v Moore (Kevin)* [1999] 3 NZLR 385 (CA), also reported as *R v Preston* (1999) 17 CRNZ 558, it was held that the party seeking exclusion of the evidence under s 18 bears the burden of persuasion. It is likely that now the burden, when on the defence, would be to show a real risk of unfairness. However there is, in *R v Watson* 18/3/03, [NZ]CA395/02 an indication that the Court may have resort to "the interests of justice" to admit evidence under s 18. It should be remembered, if that becomes accepted reasoning, that the dominant interest of justice is (as will be seen from the discussion below) the fairness of the trial for the accused.

[12] NZLC, n 6, s 8. The Evidence Act 1995 (Cth), s 135 gives the court a general power to exclude evidence that, inter alia, "might be unfairly prejudicial to a party". The court may, pursuant to s 136, limit the use of evidence if there is a danger that a particular use might be unfairly prejudicial to a party. The other over-arching provision, s 137, has been quoted above.

[13] NZLC R55 – Volume 1 "Evidence – Reform of the law" p 5.

provide grounds for exclusion of improperly obtained evidence, and this broader concept of fairness is distinct from the narrower concept of fairness to the accused at trial.[14]

Examples of references to "the interests of justice" occur in relation to evidence of a co-accused's propensity or truthfulness,[15] the complainant's prior sexual experience,[16] the introduction of further evidence after case-closure,[17] the judicial questioning of witnesses,[18] the re-calling of witnesses,[19] evidence of witnesses addresses and occupations,[20] expert evidence,[21] hearsay evidence,[22] improperly obtained evidence,[23] and procedural matters such as the presence of support persons[24] and the holding of a view.[25] Restrictions on cross-examination by unrepresented accused persons[26] may be the subject of interests of justice considerations as well as fairness considerations.

The interests of justice are therefore not necessarily defeated by a failure to get at the truth. A slightly different formula is used by appellate courts as the ultimate criterion for determining whether, notwithstanding some error in the court below, an appeal should be dismissed. This is the absence of a "substantial miscarriage of justice": Crimes Act 1961[NZ], s 385(1) proviso. Here, the truth may govern the result of the appeal, notwithstanding defects in the trial. For example, in *R v Johns* [1987] 1 NZLR 136 (CA) and *R v Blackburn* [1987] 1 NZLR 143 (CA), appeals against conviction were dismissed on the grounds of absence

[14] In *R v Handy* (2002) 213 DLR (4th) 385 at [150]; 164 CCC (3d) 481 the Supreme Court of Canada observed "Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process." The interests of justice depend on the context, and administrative decisions may involve a different approach to appeals against criminal convictions: see, for example *R v Owen* [2003] 1 SCR 779 at [52] and [54].
[15] NZLC , n 6, s 41.
[16] NZLC, n 6, s 46.
[17] NZLC, n 6, s 98.
[18] NZLC, n 6, s 100.
[19] NZLC, n 6, s 99. The Evidence Act (Cth), s 46 allows the court to give leave to a party to recall a witness if specified factual conditions exist.
[20] NZLC, n 6, ss 87, 88.
[21] NZLC, n 6, s 25. The Evidence Act 1995 (Cth), s 76 sets out a rule prohibiting opinion evidence, and there are exceptions in ss 77 – 79 and ss 110 and 111; there is no mention of criteria such as fairness or the interests of justice for determining when the exceptions apply.
[22] NZLC, n 6, s 20. The Evidence Act 1995 (Cth), Part 3.2 concerns hearsay evidence; s 65 includes a power to admit first-hand hearsay if, inter alia, the statement was made in circumstances that "make it highly probable that the representation is reliable". A business records exception is contained in s 69.
[23] NZLC, n 6, s 29. The Evidence Act 1995 (Cth), s 138 provides that improperly obtained evidence is not to be given "unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained", and there is a list of relevant considerations in subsection (3) which includes the probative value of the evidence.
[24] NZLC, n 6, s 80. The Evidence Act 1995 (Cth), s 26 allows the court, in this regard, to make any order it considers just.
[25] NZLC, n 6, s 82. The Evidence Act 1995 (Cth), s 53 enables the court to allow demonstrations, experiments, or inspections except to the extent that, inter alia, they "might be unfairly prejudicial".
[26] NZLC, n 6, s 95.

of a miscarriage of justice, notwithstanding the Court's decision in each case that there was no admissible evidence of an element of the relevant offence.[27] The question in each case was whether, if everything had been done correctly to obtain the evidence, the accused would have been convicted. Again, in *R v Howse* 7/8/03, CA[NZ]444/02 it was held that notwithstanding the absence of a fair trial, there was evidence that compelled the conclusion of guilt,[28] and the appeal against convictions of two murders was dismissed. While this approach has merit from the point of view of the public interest in bringing offenders to justice, it should not be allowed to compromise the right of an accused to a jury trial. There is, in *Dietrich v R* (1992) 177 CLR 292, an indication that it is preferable to leave the evaluation of the evidence to the jury. Mason CJ and McHugh J jointly held (Deane, Toohey and Gaudron JJ agreeing) that although the evidence appeared strong there had been a loss of a fair chance of acquittal, and that accordingly there had been a miscarriage of justice,[29] and Deane J held (para 17) that applying the proviso would deprive the appellant of the right to trial by jury. Careful scrutiny of the evidence may reveal that the accused had not lost a fair chance of acquittal, notwithstanding that the trial had involved errors that amounted to a miscarriage of justice. In such cases the miscarriages would not be regarded as "substantial", although the trials may not have been fair. Whether it is acceptable to uphold convictions arising from unfair trials simply because in the opinion of the appellate court the guilty verdicts were inevitable, depends on whether the truth seeking aspect of the interests of justice is to prevail over the right of an accused to a procedurally fair trial.

It is possible to discern a shift in the way the concepts of the interests of justice, fairness to the parties, and fairness to the accused, are used, particularly if one takes a broad cross-jurisdictional view. The former position was that the overriding consideration was the interests of justice, and that within that was the requirement of fairness to the parties, and within that again was fairness to the accused. On that model, fairness to the accused would be vulnerable to weighing against fairness to the prosecution, and these matters would in turn be governed by the interests of justice. Accordingly, it would have been possible for a trial that was unfair to the accused to proceed because of the overriding interests of justice. As will be seen, that view has been rejected, most dramatically in the

[27] These cases are discussed and criticised by Orchard, "The criminal proviso: the question of inadmissible evidence" [1988] NZLJ 205.
[28] *R v McI* [1998] 1 NZLR 696, 711 (CA): "It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction." The Privy Council has granted leave to appeal in *Howse*.
[29] Applying *Mraz v R* (1955) 93 CLR 493, per Fullagar J at 514; *R v Storey* (1978) 140 CLR 364 per Barwick CJ at 376; *Wilde v R* (1988) 164 CLR 365 per Brennan, Dawson and Toohey JJ at 371-372.

context of prosecutions for crimes against humanity. Whether or not this model survives will be of central importance in trials for terrorist activities.

The more recent development in the interrelationship of the concepts of the interests of justice, fairness to the parties, and fairness to the accused, is the placing of fairness to the accused as the overriding requirement. On this model, fairness to the parties is governed by the interests of justice, but the ultimate consideration is the requirement of a fair trial for the accused. For example, fairness to the prosecution, and the interests of justice, may support concealment from the accused of the identity of a witness, but the requirement of trial fairness for the accused may nevertheless mandate disclosure of that identity. The growth of support for this later model can be seen from an overview of the courts' approach to fairness.

Fairness to the accused and proper application of the rule

In the following discussion, common law changes indicative of a correct interpretation of the rule that meets currently recognised values will be examined. The trend of these cases is that the rule needs to be interpreted as requiring consideration of two criteria: whether the evidence is sufficiently probative to be admitted, and, if so, whether there is a reasonable likelihood that admitting the evidence would result in an unfair trial for the accused. As will be seen, this reflects changes in the perception of the importance of trial fairness for the accused.

The first admissibility issue: probative value

An emphasis on fairness does not make probative value irrelevant. Probative value has always been of central importance, and a leading similar facts case, *DPP v P* [1991] 3 WLR 161 (HL), deals with almost nothing else. References in that case to prejudice to the accused were oblique to say the least. The real issue in *DPP v P* was whether the evidence of the accused's past behaviour was sufficiently relevant. Relevance requires analysis of the proper role of the evidence in the context of the case. Another illustration is *R v M* [1999] 1 NZLR 315 (CA), also reported as *R v Accused (CA461/97)* (1998) 15 CRNZ 674, highlighting the need for a logical inference that the evidence of past conduct strengthened the Crown case against the accused. This is essentially a requirement of sufficient relevance. The logical inference just referred to is the link without which the evidence will be inadmissible. It can be said that without that link the evidence is more prejudicial than probative, but it is equally sufficient to say that without the link the evidence is irrelevant. This is apparent from the judgment in *M*, which concerned the accused's prior sexual activity with persons other than the present complainant:

> "There must be a sufficient factual link between the similar fact evidence and the direct evidence of the crime in question. That link is necessary to make the similar fact evidence more probative than prejudicial. It is the strength of the link constituted by the points of similarity, whatever form they take, which is the crucial question. If the evidence is admitted, its probative force comes from that link. This is what makes the evidence relevant to the credibility of the complainant, if that is an issue. It is for the jury to determine whether, and if so to what extent, the suggested link assists the Crown case on the issue to which the link is said to be relevant.
>
> Evidence of the other conduct will not be admitted unless the Judge is satisfied that, if accepted, it establishes the necessary similar characteristics or link. Where it is admitted, it is still for the jury to decide whether to accept it and then whether it shows such similarity to the conduct asserted by the complainant on the charge they are considering that by logical inference, because of that similarity, it supports the prosecution case."

R v M also assists in understanding the concept of illegitimate prejudice, as will be seen below.

R v Bull 17/11/03, CA[NZ]313/03 at para 9, emphasises the fundamental point that the first issue to be decided in questions of the admissibility of similar fact evidence is the relevance of that evidence:

> "… if there can be discerned in the events of the other occasion or occasions a cogent enough link to the allegations now in issue such that general similarity is elevated to sufficient specific similarity, the law takes the view that the evidence has, or is at least capable of having, the necessary legal relevance to allow it to go to the jury for its assessment."

It is not suggested that mere relevance is sufficient to satisfy this admissibility issue in relation to similar fact evidence. The exceptional course of admitting such evidence has always been accompanied by the requirement that it be not just relevant but highly probative of the issue on which it is relevant. This is reflected in the references in the above dictum to "a cogent enough link" and "sufficient specific similarity".

The second admissibility issue: procedural fairness to the accused

As an alternative to using the concept of prejudicial value of the challenged evidence, the exclusionary power may be defined in terms of fairness to the accused. The Evidence Act 1958 (Vic), s 5 does this, preserving the common law:

> This Division does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or, if admitted, would operate unfairly against the defendant.

The same formulation is used in the Evidence Act 1977 (Qld), s 130.

As was noted above, the Criminal Justice Act 2003[UK], s 101 also uses fairness rather than prejudicial value:

> The court must not admit evidence … if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[30]

In the debate on this provision of the Bill in the House of Lords, Lord Cooke of Thorndon observed, Hansard 15 Sept 2003: column 727:

> "Apparently, 'some adverse effect' on fairness would not be enough. 'Such' seems to require something blatantly unfair. Be that curiosity as it may, in posing a test concerning unfairness in a particular case, the provision would require a discretionary judgment, wider if anything than the probative value test."

And he later added, Hansard 18 Sept 2003: column 1085:

> "… it is not clear to me, and, if I may say so, it has become increasingly unclear as the debate has proceeded, what function Clause 93 [now s 101] is intended to serve. Is it intended to change the existing law or is it not? If the emphasis is still to be on the judge having a duty to weigh probative value against prejudicial effect, that is the existing law. One can talk about a change of emphasis, and so on, but ultimately … it will come to the same thing. It is not at all clear what purpose Clause 93—or, indeed, this whole chapter—will achieve. Why not leave it to the common law?"

Examples of application of the "trial fairness" criterion are the exclusion of unacceptable questions,[31] restrictions on cross-examination by unrepresented accused persons,[32] as well as procedural directions as to the mode in which

[30] This formulation follows, but with mandatory emphasis, that concerning the exclusion of unfair evidence in the Police and Criminal Evidence Act 1985[UK], s 78(1) "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[31] NZLC, n 6, s 85, which enables the judge to disallow questions that are, inter alia, unfair. The Evidence Act 1995 (Cth), s 26, enables the court to make such orders as it considers just in relation to, inter alia, the way witnesses are questioned. In considering the following references to this legislation, it must be borne in mind that, pursuant to s 11, the common law rules continue to apply except as expressly changed by the Act. Accordingly, where a provision is silent on the criteria for exercise of a given power, the common law will be relevant. By contrast, the proposal of the NZLC in its "Evidence Code" is to articulate the decision criteria, such as fairness or the interests of justice, or the probative value of the evidence compared with its prejudicial value. The proposed Code provides, in s 12, that "matters of evidence that are not provided for for by this Code are to be determined consistently with the principles of this Code." Similarly, in respect of inherent powers, s 11 preserves those not expressly changed by the Code, and requires that a court "must have regard to the purpose and principles of this Code when exercising inherent powers to regulate and prevent abuse of its procedure."

[32] NZLC, n 6, s 95; this is in combination with the interests of justice criterion. The Evidence Act 1995 (Cth), s 41 gives the court power to disallow certain kinds of questions, without specifying a governing criterion such as fairness or interests of justice.

evidence shall be given.[33] Trial fairness can also justify refusal to allow a claim of privilege.[34]

It is now possible to speak of fairness to the accused in a more precise way than previously, when a more generalised and vague notion of fairness was often referred to. The generalised notion of fairness is highlighted in Australian common law,[35] where a broad notion of fairness, which included trial fairness as well as police discipline and the integrity of the criminal justice system, was described in *R v Ireland* (1970) 126 CLR 321, per Barwick CJ at 334. In *R v Swaffield* (1998) 192 CLR 159 the narrow view of fairness, focusing on trial fairness and the effect of misconduct on the reliability of evidence, was held to be the sole concern of the fairness discretion. This change was designed to satisfy criticisms leveled at the broad but nebulous notion of fairness to the accused that had existed.[36] Those matters not impinging upon trial fairness are now clearly within the public policy discretion, in which the public interests in bringing wrongdoers to conviction are balanced against the interests in discouraging police misconduct. Although there has been some uncertainty on the point, it has become clear that balancing of interests is not done at the expense of the accused's right to a fair trial.

The concept of a fair trial has evolved.[37] In *Bannon v R* (1995) 70 ALJR 25 at [7] Deane J observed:

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[33] NZLC, n 6, ss 102, 103.

[34] NZLC, n 6, s 71, giving the judge the power to disallow a claim of privilege if the information is necessary to enable a defendant in a criminal proceeding to present an effective defence.

[35] See the research note by Presser, "Public policy, police interest: a re-evaluation of the judicial discretion to exclude improperly or illegally obtained evidence" (2001) Melbourne University Law Review 757. In very briefly summarising the Australian position the New Zealand Court of Appeal, in *R v Shaheed* [2002] 2 NZLR 377 at [66] did not consider the implications of the separation of the fairness discretion from the public policy discretion, and consequently *Shaheed* could give the wrong impression that trial fairness in Australia involves a balancing exercise.

[36] Kirby J in *R v Swaffield*, n2, at 211. In the light of refinements in the analysis of fairness, exclusion of improperly obtained evidence can now be seen not to involve trial fairness to the accused. This is contrary to the dictum (cited by Kirby J in *R v Swaffield*, at [129]) of Wilson, Dawson and Toohey JJ in *R v Van der Meer* (1988) 82 ALR 10, at 26 to the effect that exclusion of wrongfully obtained confessions reflects the accused's right to a fair trial.

[37] In *Dietrich v R* (1992) 177 CLR 292 the development of the notion of trial fairness over time was discussed by Deane J at 326 - 328; Gaudron J at 362 - 365. The dissenting judges, Brennan and Dawson JJ, held that a trial could proceed if it was as fair as reasonably possible, asserting that not every case of unfairness involves a miscarriage of justice. By contrast, the majority, while acknowledging that a trial is not necessarily unfair just because it is less than perfect, focused on the fairness of the trial for the particular accused, expressing the criterion as whether the unrepresented accused had been deprived of a real chance of acquittal. It is obviously in the interests of justice that there should be no miscarriage of justice. Appellate decisions are often couched in the language of miscarriage of justice, so that there has been a miscarriage if the court finds that the error in the court below resulted in a real possibility that the verdict would otherwise have been different: an illustration is *R v Lyttle* 2004 SCC 5, 12 February 2004. An example of apparent misinterpretation of *Dietrich* is *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* 22/10/03; CA[NZ]192/02 at [65] where the requirement was said to be "serious unfairness", and it is incorrectly stated that a stay was ordered in *Dietrich* (a new trial was ordered). That, however, is a civil

> "The central prescript of our criminal law is that no person should be convicted of a crime unless his or her guilt is established beyond reasonable doubt after a fair trial according to law. The specific content of the requirement of a fair trial may vary with changing circumstances, including contemporary standards and perceptions [citing *Carr v The Queen* (1988) 165 CLR 314 at 338; *The People (Attorney General) v Casey* (No 2) (1963) IR 33 at 38]. When it appears that judge-made rules of evidence or procedure conflict, or are liable to conflict, with the basic requirements of fairness, it is a function of a final appellate court, such as this Court, to address the question whether those rules should be altered or adjusted to avoid such conflict."[38]

Changes in judicial perception of trial fairness for the accused are apparent in recent case law.[39] The original perception was that there could be some values that justified restrictions on the right of an accused to a fair trial. It was thought that such values would only rarely come into play, where the public interest in proceeding with the prosecution was high. Defence rights to disclosure, equality of arms, and the right to present a defence were seen as inviting this type of derogation in the face of claims of privilege or public interest immunity.

Cases involving prosecution requests for witness anonymity reveal a shift in the perception of the requirements of fairness to the accused. Typical of the courts' approach to this problem was a tri-partite balancing of interests, whereby it was thought that the accused's interests in a fair trial may have to yield to the complainant's interests in privacy combined with the public interest in the

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case, and the Court observed that there is no power to stay civil proceedings. Fairness in civil cases may require compromises on both sides, as the court must come to a decision; fairness to both sides in a civil case may, rather cynically, be thought of as equal unfairness to each side. The truth-seeking function of the court, in the context of the civil standard of proof, makes this workable. There is a point of comparison here, with the approach of European continental courts in criminal cases, where the trial judge has an overriding duty to discover the truth. The focus of such courts is on the probative value of the evidence, which is not balanced against any assessment of prejudicial value: see *"Evidence in Criminal Proceedings: Previous Misconduct of a Defendant"* Law Commission for England and Wales, Consultation Paper 141, Appendix, at B108 and B117.

[38] Brennan CJ at [6] in *Bannon* had doubts about the ability of judges to determine fairness in relation to statements made by people from whom the judge had not heard oral evidence. The answer may lie, in cases like *Bannon* where one accused seeks to rely on admissions by a second co-accused which exculpate the first, in compelling evidence in *voir dire*.

[39] The brief discussion of this in Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (OUP, 2003) p 666 is already outdated. The cases cited therein for the proposition that trial fairness means fairness to both sides, *R v Hines* [1997] 3 NZLR 529, *R v B* [1995] 2 NZLR 172, *R v Griffin* [2001] 3 NZLR 577 (the authors quote, misleadingly, a passage from a dissenting judgment in this case) have been overtaken on this point. Even the dissent of Thomas J in *Griffin* is not as extreme as those of Brennan and Dawson JJ in *Dietrich*, as Thomas J acknowledges that the ultimate issue is the fairness of the trial to the accused, determined after a careful examination of the circumstances of the trial; those circumstances may have involved a balancing of interests of the victim, the public and the accused, and it is the result of that balancing that matters. However, Thomas J's treatment of the appellate court's inquiry as to whether there has been a substantial miscarriage of justice re-introduces the balancing of interests and thereby takes a different line from the majority in *Dietrich* (a case not cited in *Griffin*).

prosecution of those suspected of serious offending. A vivid illustration of the move away from this position is given by decisions of the International Criminal Tribunal for the Former Yugoslavia, in which the dissenting judgment of Sir Ninian Stephen, recognising fairness to the accused as a matter beyond compromise, in *Prosecutor v Tadic (Protective Measures for Victims and Witnesses)* (1995) 105 ILR 599, has become accepted as the approach that must prevail.[40] Yet the balancing approach, when fairness was seen in a general sense without fairness to the accused being given a special status, seemed to senior judges to be appropriate. What was seen as the attractiveness of the majority view in *Tadic* is reflected in the joint judgment of Richardson P and Keith J in *R v Hines* [1997] 3 NZLR 529 (CA), where a commentator's claim that the right to a fair trial is not "non-derogable" was called an "important point".

Human rights legislation recognising the right of an accused to a fair trial has resulted in correction of the common law's derogation of the accused's right to a fair trial which had involved balancing it against other interests. In *Montgomery v HM Advocate* [2003] 1 AC 641, 673B Lord Hope of Craighead observed, in a passage concurred in by the other members of the Board,[41] that Article 6 of the European Convention on Human Rights, which includes the right to a fair trial, and which has become part of the relevant domestic law, does not permit a balance to be struck between the rights which it sets out and the public interest. The absolute nature of the accused's right to a fair trial was also recognised in *R v Forbes* [2001] 1 AC 473 and *Brown v Stott* [2003] 1 AC 681.

There is thus a difference between this absolute right, and lesser rights that can be the subject of a balancing exercise. This point was made by the Privy Council in *Mohammed v The State* [1999] 2 AC 111, 124:

> "… a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded … the judge must perform a balancing exercise in the context of all the circumstances of the case."

The absolute quality of the accused's right to a fair trial is illustrated by the House of Lords decision in *R v H* [2004] UKHL 3 (5 February 2004), which deals with the approach that judges should take to determining claims of public interest immunity. The issue was seen as one of whether derogation from the

[40] See the detailed discussion of this in Lusty, "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 Sydney Law Review 361, citing the article by Sir Ninian Stephen, "International Criminal Law and its Enforcement" (2000) 74 ALJ 439.

[41] "The right of the accused to a fair trial by an independent and impartial tribunal is unqualified. It is not to be subordinated to the public interest in the detection and suppression of crime. In this respect it may be said that the Convention right is superior to the common law right."

"golden rule" of full disclosure was required, and when derogation was necessary, whether such derogation was the minimum necessary to prevent a real risk of serious prejudice to an important public interest; if the result was that the trial process, viewed as a whole, would be unfair to the accused, then fuller disclosure should be ordered (at [36]). Importantly, the question of fairness to the accused has to be kept under review if less than full disclosure is ordered, because of "the cardinal and overriding requirement" (at [10]) that the trial process, viewed as a whole, must be fair. Accordingly, fairness to the accused may require an order for disclosure that the prosecution finds unacceptable to the extent that it might elect to discontinue its case (at [36]).

In the light of recent affirmations of the primacy of the accused's right to a fair trial,[42] the issue in such cases is properly put as whether, when full compliance with the defence rights is not appropriate, the trial would nevertheless be fair to the accused. This is different from requiring the trial to proceed in circumstances where the trial would be less than fair for the accused.

What is "a fair trial" for the accused?

The ability properly to challenge the prosecution case[43] and properly to advance the defence case are central to what is, from the accused's point of view, a fair trial. The case for each side must consist of evidence that has correctly been ruled admissible. In conjunction with these is the right to have the facts determined by an unbiased tribunal that correctly applies the law. "Properly" in relation to challenging the prosecution case and advancing the defence case does not necessarily require putting the best of all possible means at the disposal of the defence, instead, bearing in mind the burden and standard of proof, it means giving the defence such opportunities as are open in the circumstances of the case to raise reasonable doubts about the prosecution case.[44]

Some pre-trial matters will impinge on the fairness of the trial. Full disclosure of the prosecution case and ancillary materials, access to legal advice at

[42] See also *R v Griffin*, n 38, per Richardson P, Blanchard and Tipping JJ at [40]; *Randall v R* [2002] 1 WLR 2237 (PC) at [28]; *Dietrich v R*, n 36, per Mason CJ and McHugh J at 298, Deane J at 326, Toohey J at 353, Gaudron J at 362 - 365; *Montgomery v HM Advocate* [2003] 1 AC 641 (PC).

[43] *R v Lyttle* 2004 SCC 5, 12 February 2004, on the right to cross-examine prosecution witnesses where there is a good faith basis for the questions, see [66]. At [51] the Court refers to the need to balance the right of the accused to receive a fair trial with the need to prevent unethical cross-examination, but, with respect, the real question is what a fair trial entails. It is difficult to imagine cross-examination that would be unethical at the same time as being necessary for a fair trial.

[44] Consistent with this is the approach to appeals on the basis of fresh evidence: *Clarke v R* [2004] UKPC 5 (22 January 2004) at [30], where the critical issue is whether the appellate court, in relation to the fresh evidence, considers that if the evidence had been presented to the jury at the trial the jury would possibly have had a reasonable doubt.

appropriate stages, and the ability to carry out investigations and summon witnesses all have a bearing on the fairness of the trial.

Important ingredients of trial fairness for the accused are unbiased tribunals of fact that apply the law correctly. The misuse of similar fact evidence or of evidence of the accused's lies, through incorrect reasoning are common examples of unfairness. Where a decision has to be made on the admissibility of evidence of the accused's prior misconduct, the judge will have to consider the relevance of the evidence[45] and also how the jury should be directed if the evidence is admitted. If there was a real risk that a direction on the use of the evidence would be insufficient to prevent its improper use, then the evidence should not be admitted, in order to protect the accused's right to a fair trial. In *R v M* the importance of a proper direction on the use of the evidence was made clear:

> "It is not sufficient for the Judge, having satisfied himself that the evidence is admissible, then to leave it to the jury to use it without guidance: see *R v W* [1995] 2 NZLR 548; (1994) 12 CRNZ 500 (CA); *R v Kuru* unreported, 17 October 1996, CA155/96. That is because of the risk that it will be used simply as a springboard to the conclusion of guilt, without scrutinising it *to ensure they find in it the proper basis for inferring logical probative value*. The jury must be told of the purpose for which the evidence may be used. That will be clear if there is a ruling on its admissibility properly identifying what it is probative of. The jury also should be told how they should use the evidence, the manner in which to go about using it, with a warning that assumption of guilt from the prior conduct without reasoning by reference to the material characteristic or pattern and the link said to be created is wrong and unfair to the accused. [emphasis added]
>
> "… Where there is a real risk that a proper direction as to the use of the similar fact evidence will not be sufficient to *prevent* the jury placing weight on it beyond that which is justified by its logical value, it should be excluded." [emphasis added]

Similarly, in *R v Holtz* [2003] 1 NZLR 667 (CA) at [47], judgment of the Court by Gault P, who also delivered the judgment in *M*, it was held:

> "The care with which evidence of similar acts is scrutinised is justified because of the prejudice that inevitably arises from the risk of guilt being improperly inferred from mere propensity or disposition evidenced by previous bad conduct. But, where the evidence is truly probative and cogent, admission is appropriate so long as the circumstances are such that, while allowing the probative value of the evidence to be availed of, the risk of improper use can be *avoided* by appropriate directions to the jury." [emphasis added]

Again, in *R v Bull* 17/11/03, CA[NZ]313/03 the Court explained the need to be able to protect the accused from improper use of the evidence:

> "[10] The Judge of course has the obligation of explaining to the jury the use which they can properly make of the evidence and the use to which it may not be put. Thus in assessing whether "similar fact" evidence should be admitted the Judge must always

[45] Discussed above in relation to *R v M*.

> seek to identify what feature or features of the events which occurred on the other occasion or occasions give those events sufficient specific similarity to the instant allegations to constitute the necessary legal relevance. *If the necessary specific feature or features cannot be identified in a way which can clearly be put to the jury as being the basis upon which they are entitled, if they accept the evidence, to regard it as probative, there must necessarily be doubt as to whether the evidence qualifies for admission.* [emphasis added]
>
> "[11] The appropriate reasoning process in a case of similar facts of the present kind, where there is no question of identification and the issue is whether the conduct alleged occurred at all, is sometimes only imperfectly addressed in summings-up and rulings. The probative force of similar fact evidence in these circumstances is not as direct proof, in the sense that if the accused has behaved in a certain way on another occasion, he must have done so on the occasion now under consideration. That approach, from which the jury should be guarded, involves at least the difficulty of where and how the jury starts in its consideration of the facts. Rather the probative force of the similar fact evidence lies in the support which it gives to the credibility of the instant complainant because of the unlikelihood, absent collaboration, that the relevant specifics of that complainant's allegations have been manufactured when the accused is said or can be shown to have behaved in that specific way on another occasion. In considering these issues it does not much matter whether one speaks in terms of mere propensity not being enough, whereas specific propensity is enough, or uses other terminology. That is of less importance than demonstrating a clear appreciation of the permissible reasoning process and bringing it home to the jury."

It is significant that these dicta refer to the need to prevent the jury from using the evidence improperly, rather than the need to admit the evidence in the face of the likelihood of improper use. This latter risk seems to have been tolerated in earlier cases, and the shift in judicial attitude can be seen, for example, by comparison with *R v Accused (CA274/91)* [1992] 2 NZLR 187, 191; (1991) 8 CRNZ 699, 703:

> "the real question is always whether, as a matter of common sense, the evidence is sufficiently supportive of the prosecution case to justify allowing it to go to the jury notwithstanding any illegitimate prejudicial effect that it might have."

There is thus some New Zealand authority that suggests a judicial tightening of the protection for the accused against the illegitimately prejudicial effect of evidence. This trend parallels the international emphasis of the need for fairness to the accused.

Conclusion

The common law has an ability to change in response to current values in ways that can reveal the inappropriateness of legislative provisions. The dominance of such legislation can cause difficulties in legal reasoning. These two themes are operative in the subject discussed here. Current values give dominance to the

need for trial fairness for the accused. This dominance operates over other considerations of general fairness and the interests of justice. Fairness for the accused is not a matter that can be subject to balancing against other interests. These developments run counter to legislation that has been formulated to reflect an earlier stage of the evolution of the common law.

The weighing of probative value against prejudicial effect is a formula that is found with some variations in numerous common law jurisdictions, and which reflects the common law in its traditional form. It needs to accommodate the emphasis on procedural fairness for the accused. The two elements, probative value and prejudicial effect, tend to overlap rather than being discrete items that can be contrasted. Probative value is equivalent to relevance in combination with weight, acknowledging that different items of evidence can have differing weight in proving a matter in issue in any given case. Prejudicial effect equates to the tendency that admission of that evidence would have in causing unfairness of trial for the accused. An item of evidence can be both highly probative and unfairly prejudicial, and if the rule were to be taken to require exclusion only where there is so much unfairness that it outweighs the probative value of the evidence that would be plainly inappropriate. The overriding requirement of a fair trial for the accused must be accommodated in the application of the rule in criminal proceedings.

It is therefore of particular concern that s 8 of the Evidence Act 2006 [NZ], which was recommended by the Law Commission before the common law articulation of the developments referred to here, contains an over-arching formulation of the admissibility rule that is, as far as criminal proceedings are concerned, at risk of misinterpretation. It apparently threatens to compromise the accused's right to a fair trial by setting probative value against unfairly prejudicial effect, and by placing the right of a defendant to present a defence as only a matter that must be taken into account.

Update: interpretations of s 8 of the Evidence Act 2006

In *Bishop v Police*[46] "the right of the defendant to offer an effective defence"[47] was held to be a reflection of the starting point that the accused must have a fair trial and must not be precluded from putting things that are necessary to his or her defence.[48] The introduction of the word unfairly in the expression "an unfairly prejudicial effect" was held to mean "the prejudice must carry with it a risk of unfairness. In a criminal proceeding an important aspect of that risk, and one

[46] 28/2/08, Lang J, HC Gisborne (CRI omitted from judgment), at para 22.
[47] Evidence Act 2006, s 8(2), quoted above.
[48] The starting point of the trial's fairness to the accused was mentioned in *R v Clode* [2007] NZCA 447 at para 22; this case was cited by Lang J in *Bishop v Police*.

that the Court is required to consider, lies in the potential restriction that the admission of the statement may have on the ability of the defendant to exercise his or her right to offer an effective defence."[49]

Lang J continued:

> "[33] Concepts of "fairness" and "unfairness" are obviously incapable of precise or universal definition. Whether or not the risk of unfair prejudice will arise in any given case will therefore depend upon the circumstances of that case. The mere fact that the maker of the statement is unavailable for cross-examination will not, however, be sufficient to engage s 8. In order for the section to apply, the absence of the witness will need to create the risk of unfairness in the proceeding.
>
> [34] That risk may arise because the admission of the hearsay statement may create a risk of specific prejudice to the defendant in conducting his or her defence.
>
> [35] It may, for example, arise where there is reason to believe that the absent witness could provide evidence to support the proposed defence, thereby removing the need for the defendant to enter the witness box. Similarly, where crossexamination alone could expose the false or unreliable nature of the witness's evidence. Such a risk could also arise where there is reason to believe that the maker of the statement might not come up to brief if required to give oral evidence and be cross-examined. Or it may surface where there are grounds to believe that the maker of the statement would recant the allegations contained in the statement or, at the least, accept that some of them were incorrect.
>
> [36] As before, the nature and quality of the hearsay statement may also assume importance. To a large extent this factor is recognised by the requirement that the circumstances in which the statement is made provide reasonable assurance that the statement is reliable. There may, however, still be a risk of unfair prejudice where a party seeks to introduce a hearsay statement in circumstances where … there is no independent evidence to support any of the crucial factual allegations contained in the statement. The courts should still exercise real caution in allowing hearsay evidence to be adduced in those circumstances. In cases where there is absolutely no independent evidence to support the version of events contained in the hearsay statement, the defendant may be at a real and unfair disadvantage if he or she is not able to cross-examine the maker of the statement."

[49] *Bishop v Police*, above, at para 32.