Observations on s 8 of the Evidence Act 2006: General Exclusion[1]

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Probative value and prejudicial effect

The common law rule that evidence that is admissible must nevertheless be excluded if its probative value is outweighed by its illegitimately prejudicial effect is reflected in s 8 of the Evidence Act 2006:

> **"8 General exclusion**
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> " (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 proceeding; or
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> (b) needlessly prolong the proceeding.
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> "(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."

Section 8 applies to evidence adduced by any party. It is cast in mandatory terms. The first subsection applies to both criminal and civil proceedings. The Act makes it clear that s 8 is a matter of general application, so in this sense it applies in an overarching way to any admissible evidence. Once evidence is admissible pursuant to any other provision, it is then subject to exclusion if the operation of s 8 so requires.

The balancing of probative value against illegitimately prejudicial effect, although an established formula in the law,[2] has been thought to involve some conceptual

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

[2] The origins are summarised, in brief obiter remarks, in *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159 (para 29-30; 62-66). Here, the various ways of excluding evidence that would otherwise be admissible are discussed. The main focus in *Swaffield* was on two of these: the so-called fairness discretion, and the public policy discretion. In Australia these have been identified separately, whereas in New Zealand a broader public policy discretion has been used to cover the same field, and continues to do so under s 30 of the Evidence Act 2006. It may be that the Australian three-discretion analysis is overwrought. The main difficulty arises from the fairness discretion being treated as distinct from the policy discretion. Another difficulty arises from references to the reliability of evidence as being relevant to the fairness and the policy discretions, whereas reliability is usually a matter for the fact-finder except where the third discretion, the prejudice/probative value weighing, is used. In any event, the two discretions, fairness and public policy, were recognised in *Swaffield* as overlapping with each other (per Brennan CJ at 23, 26-28; per Toohey,

difficulties.[3] These arise from probative value and prejudicial effect being incommensurable.[4] I have discussed this in "Probative value, illegitimate prejudice and the accused's right to a fair trial" (2005) 29 Crim LJ 8.[5] With the growth in appreciation of the significance and meaning, in a criminal case, of the accused's right to a fair trial, it is possible to suggest a resolution of these difficulties.

The accused's right to a fair trial is absolute,[6] essential,[7] and primary.[8] A fair trial is one where the admissible evidence is correctly assessed and the facts are determined without

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Gaudron and Gummow JJ at 54, 74; per Kirby J at 128), and that indeed must be correct: they are logically indistinguishable. The joint judgment noted at para 64-65 that the fairness discretion did not involve a weighing of probative value against prejudicial effect. That too must be correct. Brennan CJ, however, claimed to recognise (para 26-28) the advantage of separating the unfairness discretion from the public policy discretion, noting that there was much to be said for dealing with unreliability using the fairness discretion, and subjecting reliable evidence to the public policy discretion. This introduction of unreliability is confusing. The joint judgment notes (para 54), introducing more confusion, that the fairness discretion overlaps with the probative value/prejudicial effect weighing to the extent that it concerns the accused's right to a fair trial (but, we would say, trial fairness is a different sort of fairness from that with which the discretion is concerned). The joint judgment also notes, ibid, that unfairness can arise without unreliability and in such cases there is a blurring of the line between the fairness and the public policy discretions. The rather questionable implications of the discussions of the discretions in *Swaffield* are that it would be appropriate to merge the fairness discretion into the probative value/prejudicial effect weighing, as both concern trial fairness, and to reserve the public policy discretion for dealing with fairness in the sense of "higher" matters of policy, usually arising from official misconduct, and not involving trial fairness. However, in *Tofilau v R* [2007] HCA 39 the High Court did not repeat the confusion introduced in *Swaffield*, and the three discretions were treated as separate. At para 399 it was noted by Callinan, Heydon and Crennan JJ (Gleeson CJ agreeing) that there was no need in this case to decide whether the policy discretion and the fairness discretion were really one, as (and this is a suggestive observation) the result would be the same.

[3] For example, in relation to the admissibility of similar fact (propensity) evidence: see Cross on Evidence (NZ ed, LexisNexis Ltd online) para 13.1.

[4] *Pfennig v R* (1995) 127 ALR 99; 182 CLR 461 (HCA), at p 528 per McHugh J, referred to in *R v Handy* (2002) 164 CCC (3d) 481 (SCC); 213 DLR (4th) 385, at paras 148-149.

[5] My suggestion is that the relevant bases on which relevant and otherwise admissible evidence may be excluded at common law are (1) to prevent an unfair trial for the accused, (2) to uphold a public policy value that, in the circumstances of the case, outweighs the public interest in securing the conviction of offenders. The weighing of probative value against illegitimately prejudicial effect is, in this scheme, a way of preventing trial unfairness to the accused. The Evidence Act 2006 reflects these in ss 6(b), 8 (securing trial fairness) and s 30 (public policy weighing).

[6] *R v A (No 2)* [2002] 1 AC 45, 65 per Lord Steyn, and p 81 per Lord Hope. *Condon v R* [2006] NZSC 62 (23 August 2006) at paras 76 - 78.

[7] *Mohammed v State (Trinidad and Tobago)* [1999] 2 AC 111, 123-124 per Lord Steyn. *Randall v R* [2002] 1 WLR 2237, para 29.

[8] See Mathias, "The accused's right to a fair trial: absolute or limitable?" [2005] New Zealand Law Review 217 and *R v Howse* [2006] 1 NZLR 433 (PC). The New Zealand Law Commission in its report NZLC R103 *"Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character"* (May 2008) does not refer to *Howse*, and neither does it cite *R v Randall* [2002] UKPC 19 and above. The Commission does, however, conclude at para 8.15 that "In the end, the Commission's view is that in a contest of values, the need for a fair trial should continue to have primacy." It also rejects the notion that a risk of some unfairness can be an acceptable balance: para 8.12 "the Commission cannot, as at present advised, see any field in which offending is so grave as to warrant conscious acceptance of risk of an unfair trial…" (8.13) "Another extreme approach is a concession in relation to "substantial" risk of prejudice, but assertion that some "lesser" degree should be accepted. Quite apart from definitional difficulties involved, this approach presents problems in principle. The approach assumes that prejudice

bias, and the law is properly applied to those facts. It is necessary to recognise the absolute nature of this right when the balancing of probative value against prejudicial effect is undertaken. This recognition requires a fresh look at what probative value and prejudicial effect mean in this context.

This weighing exercise concerns the use that is likely to be made of the challenged evidence. Probative value refers to the correct assessment of the significance of the evidence in the context of the other evidence in the case, and may include the correct application of the law to facts that are found to have occurred. Prejudicial effect here means the incorrect assessment of the significance of the evidence in the context of the other evidence in the case, and may include the erroneous application to the law to the facts that are found to have occurred.

Seen in this way, probative value and prejudicial effect are commensurable: they form a continuum of risk of error. The issue is, how much risk of error can be tolerated before the balance shifts to indicate that the trial would be unfair? In criminal cases, the level of tolerable risk of unfairness is likely to be recognised as being low; the description "real risk" might be used.[9] In civil cases, on the other hand, the position is different. In civil cases each party has the right to a fair hearing, and equality may require some balancing and compromise, since where the parties cannot settle their dispute, the court has to reach a decision.

The risk of unfairness arising from illegitimate prejudice may be able to be kept within tolerable limits by an appropriate direction to the jury on the use to which the evidence can be put. This lower end of the scale of degrees of prejudicial effect would include cases where the jury may have some misconception about the significance of the evidence, or the evidence may introduce complex issues.[10] Higher on the scale of prejudice would be cases where the jury could easily get confused, about the proper probative value of the evidence, the law, or both.[11] It is more likely in this area that a judicial direction would not be sufficient to overcome the prejudicial effect of admitting the evidence. At the highest level are cases of prejudice arising from admission of the evidence causing a reaction of bias, antipathy,[12] dislike from the fact finder.[13] Obviously in such cases, where a real risk of unfairness cannot be excluded, the evidence will be

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outweighs probative value, but not to a "substantial" degree. Implicit in this is the acceptance of some uncompensated risk to a fair trial. Over time it is a statistical probability that risk will come home to roost: there will be wrongful convictions of the innocent within this margin. It is wrong in principle to consciously facilitate such an outcome. Justice is not a military operation in which some casualties and collateral damage are acceptable."

[9] Compare the use of this expression in *Sungsuwan v R* [2005] NZSC 57 in relation to the risk of an unsafe verdict in the context of the proviso. Discussed in Mathias, "Proof, fairness and the proviso" [2006] NZLJ 156.

[10] *R v Shortland* 2/3/07, CA314/06, where evidence offered by the defence was excluded as being illegitimately prejudicial because of the complexity of the issues that it introduced.

[11] *R v Bull* 17/11/03, CA313/03.

[12] *R v G (CA400/02)* (2003) 20 CRNZ 985, excluding evidence that the accused had attended a sexual offenders' programme while in custody.

[13] In *Howse v R* [2006] 1 NZLR 433 (PC) the Board split 3-2 over whether the wrongly admitted bad character evidence could have been misused by the jury.

inadmissible. That is so, regardless of how strongly it suggests the accused's guilt. The weighing exercise does not involve probative value in that sense of the term.

Probative value is an expression usually reserved for describing the task of the fact finder when considering evidence that has been ruled admissible.[14] A synonym is the weight of the evidence: the jury, for example, must decide what weight to give the various items of evidence. It must assess the probative value of each item of evidence in the context of all the admissible evidence. That sense of the expression probative value is different from its meaning when used in the different context of determining whether evidence is admissible. This determination is the judge's task. The judge considers the relevance and cogency of the evidence. In the context of the weighing exercise required by s 8, probative value should have the meaning advocated above: the likelihood of the fact finder being able correctly to assess the weight to give the evidence and to apply the law to the facts determined accordingly.

Subsection (2) of s 8 is a little obscure. Its reference to "the right of the defendant to offer an effective defence" is not to any specific right in the Bill of Rights. The requirement that the judge must "take into account" this right in a criminal proceeding suggests that this is not a reference to an absolute right. It is not, on this reading, an elaboration of the role of the accused's right to a fair trial. A clue to the intended meaning of this subsection is provided by the Law Commission's commentary to its proposed Evidence Code.[15] The intention was to change the approach laid down by the Privy Council,[16] which had held that an accused's right to adduce relevant evidence is not subject to discretionary control. The intention thus seems to be that the subsection means that the accused's right to offer evidence is subject to the discretion set out in subsection (1). The accused has the right to offer an "effective" defence, but not to introduce evidence merely to obfuscate. The wording of subsection (2) is a rather oblique way of effecting this purpose: at first glance it appears to favour the admission of defence evidence. It is reasonable, of course, to prevent the defence from creating the sorts of errors that the prosecution is not allowed to introduce. That is unobjectionable if the accused's right to a fair trial remains an absolute right.[17]

If this suggested change in the interpretation of probative value in the context of the weighing exercise is adopted, that will illustrate how the gap between law and society is

[14] Probative value is not unique in having a contextually-dependent meaning. See Illingworth QC and Mathias, "The admissibility of hearsay statements and opinion evidence" in New Zealand Law Society Intensive "Evidence Act 2006" (June 2007), p 31, where reliability is shown to be a term that has different meanings, depending on whether it is associated with the fact finding exercise or with the admissibility determination.

[15] NZLC – R55, Vol 1 para 28 - 29.

[16] *Lobban v R* [1995] 1 WLR 877.

[17] The Law Commission's apparent intention is not supported by recent cases. In *R v Barlien* [2008] NZCA 180 at 65 it was observed that s 8(1)(b) gives the judge control over voluminous repetitive material. In *R v Alovili* 27/6/08, Wylie J, HC Auckland CRI-2007-404-162 at 32 s 8 was referred to in the context of ruling that the complainant was required to give evidence, rather than his hearsay statement being relied on, as the defence needed the opportunity to cross-examine him on the issue of self defence. That is consistent with a straightforward reading of s 8(2).

bridged by judicial interpretation. With increasing recognition[18] of an accused person's right to a fair trial,[19] the judicial response is an exercise in creative revision of the traditional approach.[20] Of course this is not just a revision of the common law, because the legislature may be taken to have replaced it, as to the weighing of probative value against prejudicial effect, with s 8 of the Evidence Act 2006. This provides a new interpretative opportunity for the courts.

The structure of the Evidence Act 2006 puts the general exclusion power in s 8 as the overarching provision. That is, it applies to all categories of evidence. It must, pursuant to s 10(1), be interpreted in accordance with the purposes of the Act, set out in s 6, including that of recognising the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990. Those rights include the defendant's right to a fair hearing. That right is therefore closely tied, in s 8, to the weighing of probative value and prejudicial effect. This legislative structure may be contrasted with that in the Criminal Justice Act 2003[UK], in relation to bad character evidence. The section governing the admission of such evidence refers only to probative value.[21] This does not, itself, permit exclusion to prevent unfairness, but unfairness can be prevented by reference to Rules made under s 111.[22] Thus, the UK enactment replaces the common law balancing of probative value

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[18] Geoffrey Robertson, "The Justice Game" (1998), Chapter Four, attributes the Privy Council's recognition, albeit a slow recognition, of the importance of human rights to three factors: criticism of English decisions in the European Court of Human Rights, the discovery of miscarriages of justice in prominent criminal cases (the Guildford Four, etc), and the Tiananmen Square massacre by the Chinese government which would soon rule Hong Kong. "As a result of these influences, and stocked by a new generation of judges, by 1990 the Privy Council started to make constitutional guarantees of human rights mean what they said."

[19] Louis Menand, "The Metaphysical Club" (2001), Chapter 15, points out that freedoms are socially engineered spaces where specified pursuits are protected against coercive interference, and "… rights are created not for the good of individuals, but for the good of society. Individual freedoms are manufactured to achieve group ends."

[20] See the discussion of this form of judicial creativity in Aharon Barak, "The Judge in a Democracy" (2006). He describes the need for the law to change while avoiding anarchy (p 11): "Like the eagle in the sky, which maintains its stability only when it is moving, so too is the law stable only when it is moving." In *R v Clode* [2007] NZCA 447 s 8(2) was treated as reflecting the essential nature of the accused's right to a fair trial, in the context of the discretion to permit cross-examination under s 44: see para 22, "… in every case the starting point is that the accused must have a fair trial and must not be precluded from putting things that are necessary to his or her defence … s 8(2) of the statute specifically refers to the 'right of the defendant to offer an effective defence'."

[21] Criminal Justice Act 2003[UK], s 101(1)(e).

[22] *Musone v R.* [2007] EWCA Crim 1237 (23 May 2007). At para 60 the Court concluded: "We emphasise that cases in which a breach of the procedural rules will entitle a court to exclude evidence of substantial probative value will be rare. A court should be most reluctant to exclude evidence of that quality by reason of a breach of the procedural code. Nonetheless, there will be cases, of which the instant appeal is an example, where the only way in which the court can ensure fairness is by excluding evidence, even when it reaches the quality described in section 101(1)(e). It should be remembered that the court was compelled to assume the truth of the evidence that Chaudry [the co-accused, whose confession to this historical murder the present appellant wished to adduce against him] confessed to murder. Section 109 gives rise to a stark choice between either an assumption that the evidence is true or rejection of its truth on the grounds that no court or jury could reasonably find it to be true. But in reality, as the judge himself remarked in his ruling, there will be evidence which, although capable of belief, is improbable and unlikely to be believed. Whilst the judge is compelled to assume the truth of such evidence for the purposes of section 101(1)(e), he need not take so extreme a view when considering whether to prevent the unfair effect of a breach of the

and prejudicial effect, which had been particularly problematic in relation to bad character evidence, with an assessment of probative value to determine admissibility, and a separate consideration of the effects of admitting the evidence on the fairness of the proceedings to determine whether the evidence, although admissible, should nevertheless be excluded. One way or another, in a criminal case unfairness to the accused must be prevented.

In the Evidence Act 2006 there are three kinds of decisions on admissibility. Firstly, decisions determined by *findings of fact*. These apply in relation to unreliable statements,[23] oppression,[24] visual and voice identification.[25] Second, decisions determined by an *evaluation* of the facts. In relation to evidence of veracity[26] there is a requirement of substantial helpfulness, as also there is in relation to expert opinion.[27] Evidence of a complainant's sexual experience[28] is admissible if exclusion would be contrary to the interests of justice. These are instances of judicial evaluation in determining admissibility. Third, there are decisions determined by a *weighing* exercise applied to relevant circumstances. These concern improperly obtained evidence,[29] propensity evidence,[30] and of course the general exclusion requirement of s 8.

The kind of decision involving *weighing* applied to probative value and unfairly prejudicial effect occurs in two forms: as a criterion for admission of evidence,[31] and as a criterion for exclusion of evidence that would otherwise be admissible.[32] As an admissibility criterion, this prejudicial effect refers to the defendant, whereas as an exclusion criterion it refers to the proceeding. Perhaps this allows co-defendants to seek to rely on the exclusionary power, whereas they would have had no standing in relation to the admission issue.

This weighing of probative value against risk of unfairly prejudicial effect as an exclusion criterion occurs in the Australian uniform evidence legislation.[33] For example:

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procedural rules by excluding the evidence. *The more credible the evidence, the less likely it is that the judge will exclude it on grounds of a breach of a procedural requirement.* But where, as in the instant case, the evidence is improbable, the judge is entitled to take that factor into account in deciding whether to exclude it, in circumstances where the rules have been deliberately breached." [emphasis added] It is questionable whether the italicised passage is correct. Procedural fairness requirements apply irrespective of the likelihood of the accused's guilt: see, for example, *Randall v R*, above note 6.

[23] Section 28(2).

[24] Section 29(2).

[25] Sections 45(1) and (2), and s 46.

[26] Section 37(1).

[27] Section 25(1).

[28] Section 44.

[29] Section 30(2)(b). Here the weighing involves giving appropriate weight to the impropriety, and taking proper account of the need for an effective and credible system of justice.

[30] Section 43(1). Here the weighing is of probative value against risk of unfairly prejudicial effect.

[31] Section 43(1).

[32] Section 8.

[33] Evidence Act 1995 (C'th), s 135 and s 137. The uniform legislation has a similar fundamental structure to the New Zealand provisions, in that the three kinds of decisions outlined above are identifiable, and they apply in similar ways. Thus firstly, decisions determined by *findings of fact* apply in relation to unreliable statements (s 85(2), where the criterion for admission is whether the circumstances were not such as to

> "s 135. **General discretion to exclude evidence**
> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time."

The Australian Law Reform Commission said that this addresses "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."[34]

The other Australian provision is

> "s 137. **Exclusion of prejudicial evidence in criminal proceedings**
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

Here, probative value, which is defined,[35] essentially means degree of relevance.[36] Central to this is the process of rational assessment of the evidence. Further,[37]

> "…the risk of unfair prejudice means the danger that the jury may use the evidence to make a decision on an improper, and perhaps emotional, basis. Alternatively, it means that on hearing the evidence the jury may be

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make it likely that the truth of the admission was adversely affected), statements obtained by oppression (s 84, which requires that the court must be satisfied that the statement was not influenced by violence, oppression, etc), and visual identification (s 114, where the court must determine whether it would have been unreasonable to hold an identification parade, or that the accused refused to take part, and that there was no influence brought to bear on the identifying witness). Secondly, decisions determined by an *evaluation* of the facts occur in relation to veracity (s 103(1), requiring a determination of whether the proposed evidence has substantial probative value). Thirdly, decisions determined by a *weighing* exercise occur in relation to improperly obtained evidence (s 138(1), the criterion is whether the desirability of admitting the evidence outweighs the desirability of not admitting it). An exception to the similarity in the legislative schemes is in relation to propensity evidence, which in New Zealand is a matter of weighing, whereas in the uniform Australian legislation it is subject to evaluation (s 97(1)(b), whether the evidence has significant probative value; in this respect the Australian provision is similar to that in the UK, see above, note 19 and text). Broadly, however, the Australian discretions to exclude evidence that would otherwise be admissible (ss 135 and 137, see the text below) apply to evidence that has been ruled admissible after the same sort of decision process as applies under the Evidence Act 2006[NZ].

[34] ALRC 26, Vol 1 at [644], cited by Weinberg CJ in *R v McNeill (Ruling No 1)* [2007] NFSC 2 (& February 2007) at para 293.

[35] Schedule dictionary: ""probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue." There is no definition of "prejudicial effect". Relevant evidence is defined in s 55(1) as "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

[36] *R v McNeill (Ruling No 1)*, above, at para 301.

[37] *R v McNeill (Ruling No 1)*, above, at para 303.

> satisfied with a lower degree of probability than would otherwise be required. If there is no real possibility that the evidence will be used in any improper or unfair way then there is no "danger of unfair prejudice", and no basis for its exclusion."

These views on the process of weighing probative value against risk of unfairly prejudicial effect appropriately emphasise the proper use of the evidence. The critical determinant of admissibility is where - on the scale of proper, to risk of improper, use of the evidence - the balance rests. The sort of bias that occurs when the fact finder misuses evidence by giving it an inappropriate weight or by being influenced by it against the accused so as to require an inappropriate standard of doubt, is the essence of "unfairly prejudicial effect". As Lord Bingham said, delivering the advice of the Board in *Bain v R (New Zealand)*, a case where the question was whether the jury may have been misled by the evidence (or, by the absence of the freshly obtained evidence):[38]

> "…a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial."

In *Bishop v Police*[39] the inability of the defendant to cross-examine the complainant, whose hearsay statement had been ruled admissible, was submitted to have given rise to unfairness in terms of s 8. The following observations on the word "unfairly" in s 8(1)(a) and (2) were made:

> "[32] The word "unfairly" was not used in s 18 of the 1980 Act. Its introduction is, in my view, an important development. It recognises that the admission of hearsay evidence in any form is likely to create some risk of prejudice. The risk of prejudice alone, however, is not sufficient to require the Court to exclude the evidence. Instead, the prejudice must carry with it a risk of unfairness. In a criminal proceeding an important aspect of that risk, and one 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.
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> "[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.

[38] [2007] UKPC 33 (10 May 2007), at para 115.
[39] 28/2/08, Lang J, HC Gisborne (unnumbered).

> "[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.
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> "[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.
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> "[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, as was the case in *R v J* [1998] 1 NZLR 20 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."

The circumstances referred to in para 35 here are illustrations of how inappropriate weight may be given to the hearsay statement, resulting in unfairness to the accused. The reference to specific prejudice in para 34 is important: counsel was required in this appeal to specify matters that cross-examination may have revealed that would have favoured exclusion of the hearsay complaint.

An illustration of where potential unreliability of a hearsay statement could only be exposed by crossexamination is *R v Holtham (No 1)*.[40] Here, after the accused had been interviewed in a police station and had listened to excerpts of audio recordings which allegedly incriminated him on drug dealing charges involving methamphetamine, which he denied, he was taken to a cell by an officer, who was unlikely to be available to give evidence at the trial, and whose deposition (on which he had not been crossexamined) contained an account of comments allegedly made by the accused and which were admissions of guilt. In deciding whether to exclude the alleged comments under s 8, Miller J observed that, although it was unlikely that the officer would admit he was

[40] 9/5/08, Miller J, HC Nelson CRI-2006-042-2569.

mistaken in what he had heard, there was no indication of the manner in which the comments had been made by the accused. The situation was:

> "[6] The Crown now wishes to lead Constable Arnold's evidence as an admission of guilt on all of the charges faced by Mr Holtham. The defence wishes to cross-examine the Constable to challenge the reliability of his evidence. For example, the defence wishes to test how much attention he paid to what Mr Holtham said given that he had no substantive role in the investigation, whether he recorded the statement in his notebook at the earliest available opportunity and, if so, what was that opportunity, whether the statement was made in a jocular or sarcastic or intoxicated manner, and whether, if the statement was made, it is possible to ascertain which of the charges the accused intended to plead guilty to."
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> "[16] … the issue does go to reliability of the evidence. Although there is nothing in the circumstances to suggest that the statement was unreliable if made, its hearsay quality allows [counsel for the accused] to challenge it on the grounds, for example, that the Constable misheard or misrecorded what Mr Holtham said. And the evidence does go to the heart of the defence, which is that Mr Holtham was not dealing in methamphetamine; rather, he explains the evidence against him by saying that it points to dealing in cannabis and party pills. The Crown intends to lead evidence that he made the statement to Constable Arnold immediately after having been taxed with methamphetamine dealing.
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> "[17] In the circumstances, I consider that the evidence should be excluded. Loss of the right to cross-examine is seriously prejudicial in the circumstances, and cannot be compensated for sufficiently by a warning to the jury."

That ruling was made on the assumption that the witness would not become available to give evidence during the trial.