

UNFAIRLY OBSERVED RIGHTS

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discusses R v Te Huia and common law fairness

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Compliance with the Bill of Rights does not mean that admission of the accused's statement will necessarily be fair. The common law discretion to exclude evidence provides a more vigorous standard of fairness than does the prima facie exclusion rule developed for use in the context of the Bill of Rights.

Although not usually acknowledged, the reason for this difference is the standard of proof of fairness. Under the prima facie exclusion rule the prosecution needs only to satisfy the Court that on the balance of probabilities there was no breach of the Bill of Rights, or, if there was, that on the balance of probabilities any such breach should be excused. In contrast, discretionary exclusion of evidence will occur where the Court has a reasonable doubt about the fairness of admission of the evidence in question. At least, that is the better statement of the discretionary exclusion rule, notwithstanding dicta to the effect that a judicial discretion of this kind is a matter of judgment not amenable to a standard of proof. Indeed, one doesn't have to think particularly deeply to realise that all judgments are necessarily made against a standard of proof. In law there are two recognised standards.

An interesting illustration of the interrelationship between challenges to admissibility under the Bill of Rights and under the common law discretion, and also of the need to deal sensibly with the matter of standard of proof, is *R v Te Huia*, HC Napier, 8.9.97, T17/97 Gendall J. The Crown sought, pursuant to s 344A of the Crimes Act 1961, a ruling that a videotaped interview with the accused and its transcript were admissible. The defence challenged admissibility on the grounds of (i) breach of s 23(1)(b) of the Bill of Rights, and (ii) unfairness.

The conclusion on the first ground was expressed as follows:

"As a matter of fact I am satisfied that the Crown has proved (to the degree required by *R v Te Kira* [1993] 3 NZLR 257 although I find further and beyond reasonable doubt) that there was no breach of the rights of the accused pursuant to the New Zealand Bill of Rights Act 1990. The videotaped evidence and transcript is not therefore inadmissible on that ground."

This properly reflects the position under the prima facie exclusion rule where the standard of proof is less than beyond reasonable doubt. In *Te Kira Cooke P* considered that the balance of probabilities was a sufficiently high standard.

The grounds advanced for exclusion pursuant to common law discretion were accepted in part although individually, and looked at in isolation, they were not sufficient to rule the evidence inadmissible. The conclusion was different, however, when they were considered together:

"However the cumulative effect leaves me with some anxiety It is largely because many of the incriminatory acknowledgements of the accused may be unreliable that I think overall fairness to him requires that the evidence not be led. My instinctive reaction is one of general unease. This probably equates with reasonable doubt ... [the Court must] decide whether overall unfairness might arise to the accused through the admission of his statements." [emphases added]

Then came the matter of the difficult dicta on the standard of proof. His Honour quoted one of these passages, from *R v Williams* [1970] 7 CRNZ 378, 383 (CA):

"... the issue is not one to be determined by reference to the onus of proof but as one of judgment. The discretion to exclude only arises where the evidence is admissible. Whether what has been done is so unfair as to call for the exclusion of admissible evidence involves the ascertainment of the facts and the conclusion as to their quality. That conclusion is one which reflects the public interest. Such matters do not readily succumb to evidentiary rules about onus or standards of proof."

Adroitly, his Honour skipped around this, saying

"I think that those remarks also apply to a situation such as this where, when viewed in the round, there would be possible unfairness to the accused to allow admissible evidence, yet with the danger of it being unreliable, to go before the jury.

"Accordingly for the cumulative effect of these reasons I exercise my discretion and exclude the videotape and its transcript." [emphasis added]

Clearly the correct approach is to require proof of fairness to the standard of beyond reasonable doubt. If the prima facie exclusion rule is to continue under the Bill of Rights it should be reformulated to recognise this. If it is discarded the way will be clear to deal directly with the real issue of overall fairness. A helpful reminder of the appropriate perspective was given by Baragwanath J in the context of an allegation of official misconduct: *R v Moresi (No 2)* [waiver: right to silence] (1996)14 CRNZ 322, 332: "The essential test is perhaps what a fair-minded member of the New Zealand community aware of the whole of the facts

and the ramifications would make of the matter". Usually, as in that case, there will be no need to refer to a standard of proof, but in borderline cases, like Te Huia, the feeling of "general unease" or "reasonable doubt" will lead a fair-minded Judge to exclude challenged evidence in the interests of overall fairness.