APPLYING TO EXCLUDE EVIDENCE: STRATEGY, LAW AND ADVOCACY

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INTRODUCTION

[1] One of the joys and terrors of practising in the criminal courts is that the rules of evidence apply with their full force and vigour. The criminal practitioner must have an immediate and intuitive grasp of the principles of evidence law so that the words "I object" can be followed by a coherent justification for that statement.

[2] This paper is not about those moments (i.e. the "in running" moments where immediate judgment calls must be made). Rather it is about how to manage evidential issues pre-trial. Because criminal trials are about evidence. The strength of the prosecution case is about the individual and collective strength of the parts of the evidence that make it up. The strength of a defence case (if there is to be one) likewise. There are many ways to deal with the strength of your opponent's case. The most obvious are to try and show that discredit it, or to convince the tribunal of fact that it does not outweigh its weaknesses. But these are all methods of dealing with the evidence once it is before the tribunal of fact. The strategy that this paper is concerned with is trying to avoid having to deal with the evidence at all by having it excluded by court order.

[3] To that end, the paper addresses strategy (how and why to challenge the admissibility of evidence), procedure (how to do it in a practical sense), the law in relation to some common bases to exclude and advocacy (how to persuade the decision maker).

SOME BASICS

[4] But before we start on that process, some basics.

[5] Queensland's evidence law is found in a mix of common law and statute. The main statute is the aptly named *Evidence Act* 1977 (Qld), but important provisions are found in other statutes.

[6] Evidence that is not relevant is inadmissible. The flip side is that all relevant evidence is admissible, unless there is a specific rule (or discretion) that excludes it. Evidence is "relevant" when it tends to prove or disprove a fact in issue in the proceeding. The threshold for relevance is low. That is, so long as a piece of evidence has some logical

connection to a fact in issue in then it will be *prima facie* admissible. However, relevance is still a threshold that evidence must meet. An argument about relevance can be powerful in the right kind of case.

[7] Evidence that is otherwise admissible can be excluded either as a matter of law or as a matter of discretion. An example of evidence that is inadmissible as a matter of law is hearsay (unless an exception to the hearsay rule applies – you may be starting to see a theme). Hearsay is a statement made out of court that is *led to prove the truth of its contents*. This second requirement is often forgotten and can be a fertile basis for objection. The hearsay rule is discussed in more detail later.

[8] Even if evidence is admissible as a matter of law, there are several discretionary bases on which a judge can exclude it. The key ones are discussed later in this paper.

[9] The other critical thing to remember is that any evidence is admissible by consent. That is, the parties can agree to evidence of, for example, a hearsay statement being admitted. Often there will be good reason to do so.

[10] Please do not assume that because a certain type of evidence is "always led" that this means it is admissible or unchallengeable. As the brilliant lyricist Tim Minchin wrote: "I don't believe that just 'cos ideas are tenacious it means that they're worthy". They may be worthy, but that is not necessarily so.

[11] Finally, be very cautious about interstate authorities on evidence law. New South Wales and Victoria have both enacted the Uniform Evidence Act. While the UEA is deceptively similar to the common law of Queensland, there are significant differences.

STRATEGY AND CASE THEORY

[12] The most important step is often the least thought about. Why do you want to exclude the evidence? Obviously enough, from a forensic perspective, a party will want to have evidence excluded because the evidence damages its case. However, it is troubling how often applications are made to exclude evidence that does not hurt – or may even help – a party's case. Equally, it is often the case that evidence is not objected to, even though it turns out to be damaging. Experience tells us that (almost always) such mistakes cannot be remedied on appeal. That is because the Court of Appeal mainly adheres to rule that a party is bound on appeal by its conduct below. There are exceptions where truly inadmissible evidence was admitted without objection *and* without obvious forensic justification for the non-objection *and* where the admission of the evidence mattered to trial. The short point here is that appeals in relation to points

not taken below are uncertain on questions of law. It is much better to get it right at first instance.

[13] Getting it right at first instance requires three things.

[14] The **first** is a properly developed case theory. It is not possible to know what to object to unless you know, in detail, what your case is. As should be obvious, under no circumstances should you object to the admission of evidence that helps your case. This *should* be obvious but is often not done. For example, an interview of a defendant is conducted without proper warnings being given. She admits to stabbing the deceased but explains that she did so because she was in fear for her life. If your case theory is self-defence then you would not object to the interview. If your instructions are that she did not stab the deceased but was covering up for another person, then you *may* want to object.

[15] The **second** thing is a good grasp of the principles and rules of evidence. This allows you to identify possible admissibility issues. A good rule of thumb though is to trust your instincts. If a piece evidence seems like it was strangely obtained or is not consistent with the sort of evidence you have previously seen of a like kind then explore it further.

[16] The **third** thing is to *recognise* devastating or damaging pieces of evidence. Sometimes, the only way to win a case is to exclude a certain piece of evidence. If it stays in the case is over. If goes, then possibly not. Examples include the fruits of search warrant or an interview with police officers in which recorded admissions are made. Once the significance of such evidence is understood then appropriate effort can be put into identifying and deploying a strategy for exclusion. Sometimes this effort will be more important than the trial itself.

PROCEDURE

Indictable cases

[17] In indictable cases in Queensland, unlike in many States, objections to evidence are heard as pre-trial applications in the Supreme and District Courts. The procedure is set out in section 590AA of the *Criminal Code*. There is a strong expectation from the courts that such issues will be identified well in advance of trial and dealt with by way of application and ruling. The hearing of an application involves evidence and legal submissions. As is discussed below in more detail, the evidence aspect of the process is often underdone and overlooked – but it should not be.

[18] It remains open to object to evidence at trial. Sometimes it is impossible to avoid if you come to a case late, if the evidence is disclosed late or if it has simply been overlooked. If so, trial judges appreciate as much warning as possible so that time can be taken to resolve the issue without too much interference with a jury.

[19] A magistrate presiding over a committal hearing cannot make rulings about evidence. However, that does not mean that the committal is irrelevant for these purposes. Cross examination of witnesses at committal to establish a foundation for a later application to exclude can be very effective. In particular, it allows you to "lock in" certain evidence, especially from Police witnesses at an early stage. Again, this requires the every early establishment of a case theory and the identification of critical evidence.

[20] As noted, the section 590AA application is the primary way to seek to have evidence excluded. So how can that be done effectively? The application itself needs to clearly identify the evidence to be excluded. The Form also permits the applicant to identify any witnesses required for the application. This is a critical step. Admissibility rulings are not decided in a factual vacuum. Indeed, they are intensely fact rich exercises. This requires careful and considered thought about how to establish the critical facts that you need to win the argument. There are a number of ways that the evidence to establish those facts can be put before the court.

a. A factual position can be agreed with the Crown. This simplifies the fact-finding exercise;
b. A selection of the depositions (statements and exhibits) can be put before the court;
c. Witnesses can be called to give oral evidence;
d. Any combination of the above.

[21] Which approach is taken is an intensely case specific question. If you are making a *Bunning v Cross* argument that the Police have behaved improperly then it is, in my experience, essential to cross examine the relevant Police Officers. If, however, the question is whether there was sufficient information in a search warrant application to rationally permit its issue, then nothing beyond the documents will likely be necessary.

[22] On this last kind of objection (insufficient basis to issue a warrant), there is a pervasive view that defendants are not entitled to the affidavit or other material on which a search warrant was based. As a matter of first principle that must be wrong. Such material is plainly relevant. At the very least, it is relevant to the question of whether evidence to be led against a defendant was lawfully obtained. There may be legitimate reasons for not disclosing some material in such an affidavit. The most obvious is police informer/human source information. But that is not a justification for blanket refusal

and, if it is the basis for refusal, then the usual processes for assessing claims of public interest immunity are available and should be followed.

[23] Whichever approach to fact finding is taken, some approach must be. The question of what facts need to be established is a first order of business, not an afterthought. But only put on the evidence that the judge actually needs to decide the issue. Do not overburden the court with material of only marginal relevance.

[24] One practical matter to keep in mind is to ensure that the material is well organised. A paginated bundle makes evidence handling and reference dramatically easier for the advocate and for the court.

[25] The other key component to a section 590AA application is written submissions. The usual comments about good written submissions apply here. Keep your writing clear and simple. Make plain the propositions that want the court to accept. Be concise. Deal with your "bad facts" as well as your "good facts".

[26] The best way to have evidence not led at trial is often the least used. That is to seek to convince your opponent not to lead it. If you are defending a criminal case then your opponent will be a Crown Prosecutor with an overriding duty to ensure justice is done. Early conversations about inadmissible evidence are often fruitful.

Summary cases

[27] Many of the same principles apply to summary cases in the Magistrates Court. The primary difference is, of course, that objections are dealt with in running rather than pre-trial. But they are just as important and should be approached in a similar way.

DISCRETIONS TO EXCLUDE

Illegally or improperly obtained evidence – Bunning v Cross discretion

[28] The now famous case of *Bunning v Cross*[1] established the courts' discretion to exclude illegally or improperly obtained evidence. The High Court has described the discretion as requiring a weighing exercise – balancing, on the one hand, the need to hold wrongdoers to account, and on the other, not endorsing the unlawful conduct of law enforcers.[2]

[1] *Bunning v Cross* (1978) 141 CLR 54.
[2] *Bunning v Cross* (1978) 141 CLR 54; *R v Ireland* (1970) 126 CLR 321 per Barwick CJ; *R v Milos* [2014] QCA 314, at [91]-[95].

[29] Evidence that is illegally or improperly obtained is not automatically inadmissible; these circumstances instead raise a discretion as to whether the evidence should be excluded.[3]

[30] The discretion reflects important public policy intertwined with the rule of law. As the High Court highlighted:

> *It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.*[4]

[31] It is not amongst the policy purpose of this discretion to seek to punish unlawful police conduct,[5] though exclusion of evidence may practically have that effect where the excluded evidence undermines the prosecution's case.

[32] Generally, cogency of the evidence is not a factor to be considered where the unlawfulness was intentional or reckless.[6] That is, cogency cannot usually be used as a 'make-weight' in favour of admitting the evidence. It is often relevant where evidence is obtained unlawfully but without being reckless or intentional.

[33] Relevant factors (which may or may not arise in any one case) to be considered in that weighing process include: [7]

- The nature of the unlawfulness of the police officer;
- whether the conduct involved a deliberate or reckless disregard of the law as opposed to a mere mistake or oversight;
- The cogency of the evidence and whether the illegality affected the cogency;
- The importance of the evidence in the proceeding;
- The ease with which the law might have been complied with;
- The nature and seriousness of the offence charged;

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[3] *R v Ireland* (1970) 126 CLR 321 per Barwick CJ; *Bunning v Cross* (1978) 141 CLR 54, per Stephen and Aickin JJ; *R v O'Neill* [1995] QCA 33.
[4] *Bunning v Cross* (1978) 141 CLR 54, at 75.
[5] *R v Healy* [2014] QSC 236, at [23].
[6] *Bunning v Cross* (1978) 141 CLR 54, per Stephen and Aickin JJ.
[7] *Bunning v Cross* at 78-80, *R v Milos* [2014] QCA 314 at [91]-[95], *Ridgeway v R* (1995) 184 CLR 19 at 38; *R v Versac* (2013) 227 A Crim R 569 at 571-2, 580.

- The legislative intent in relation to the safeguards breached;
- Whether important common law rights were interfered with; and
- Whether the conduct is encouraged or tolerated by senior police authorities.

PPRA Requirements

[34] In Queensland, Police conduct in relation to a suspect is primarily regulated by the *Police Powers and Responsibilities Act* 2000 ('PPRA') which sets out rules for questioning suspects and others.

[35] Non-compliance with the requirements of the Act renders police officers' actions unlawful. In *R v LR* [2006] 1 Qd R 435 the Court of Appeal described the purposes of the Act in this regard as follows:

> *One of the main reasons advanced for the passage of the PPR Act in 2000 was to 'provide powers necessary for effective modern policing and law enforcement' however it was also the intention of the legislature to 'ensure fairness to, and protect the rights of, persons against whom police officers exercise [those] powers...' Section 5 of the PPR Act [now s 7] states that it 'is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it'. A breach by a police officer of an obligation imposed by the PPR Act amounts, at a minimum, to a breach of discipline.*

[36] Critically, non-compliance with the PPRA does not mean that evidence procured as a result will be excluded automatically. Rather, the Act and the Responsibilities Code (contained in Schedule 9 to the *Police Powers and Responsibilities Regulation* 2012) are to be "regarded as a yardstick against which issues of unfairness (and impropriety) may be measured." (*R v LR* [2006] 1 Qd R 435 at 451-2 [51], citing *The Queen v Swaffield* (1998) 192 CLR 159, 190).

[37] There are several provisions within the PPRA which police must comply with lest their conduct be rendered unlawful, and thus subject to potential discretionary exclusion. Some of the most frequently encountered provisions in this context are warrantless searches and failures to properly caution a subject. Failure to comply with the special protections for Aboriginal and Torres Strait Islander people, pursuant to section 420 of the PPRA, is also worthy of consideration.

Warrantless searches

[38] The PPRA provides police with a range of powers to conduct searches, including in certain circumstances without a warrant. These powers extend to searching vehicles (sections 31 and 32), places (section 33 and sections 159-162), and people (sections 29 and 30), including those in custody (section 443).

[39] Section 29 of the PPRA allows a police officer "who **reasonably suspects** any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant…stop and detain a person [and/or] search the person and anything in the person's possession" (emphasis added). Section 30 sets out the prescribed circumstances, which include suspected possession of a weapon, unlawful dangerous drugs, stolen or tainted property, or something related to the commission of a particular offence as listed.

[40] Dalton J in *R v Bossley* [2012] QSC 292 ('Bossley') succinctly summarised the 'reasonable suspicion' test as follows:

> *The term "reasonably suspects" is defined in Schedule 6 to the PPRA as meaning, "suspects on grounds that are reasonable in the circumstances". There is also well-established common law authority in relation to both the concept of suspicion and the concept of reasonable suspicion. The meaning of suspicion in this context is discussed by the High Court in* George v Rockett*. A suspicion and a belief are different states of mind. A suspicion is a state of conjecture or surmise. It is more than idle wondering. It is positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence. Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief. Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion. The facts must be sufficient to induce the suspicion in the mind of a reasonable person. The suspicion must be reasonable, as opposed to arbitrary, irrational or prejudiced…*[8]

[41] Her Honour went on to find that there were no reasonable grounds for the police officer to have formed a suspicion prior to conducting a search of Mr Bossley at a music festival. The officer's observations that Mr Bossley had possession of a schedule 1 drug because he was "excited" and "talkative", wore a "bum-bag", and met with a younger female, were not grounds for a "reasonable suspicion" per section 29 of the PPRA. Her Honour found: "In effect then, DSC Caulfield saw a lean, lively young man, excited to be with his

[8] At [14], (citations omitted).

friends and family, and carrying a bum-bag, on his way to a music festival" which was nothing out of the ordinary.[9]

[42] The need for a reasonable suspicion to be formed also applies to a Justice of the Peace in granting a search warrant, as demonstrated in the recent case of *R v Benko* [2022] QDCPR 28. Allen DCJ found it was not open to the Justice of the Peace to have formed a reasonable suspicion that a search would reveal production of cannabis.

[43] In that case, the Justice of the Peace had not been given any indication of time the Crime Stoppers report to police made, which was in fact three months old.[10] This may have "caused consideration as to whether, given that passage of time, one might still reasonably suspect that there would be evidence of production of a dangerous drug."[11] As there were no grounds on which to form a reasonable suspicion, Allen DCJ held the "finding of drugs and utensils and of the defendant's consequential admissions was unlawfully obtained" and, in the absence of the Crown arguing the evidence should be admitted on public policy grounds, was excluded.[12]

Cautions

[44] Section 431 obliges a police officer to caution a person before questioning, in the way required under the Responsibilities Code (s 431(1) and Regulation 26 of the Responsibilities Code). The caution must be given in or translated into a suitable language (s 431(2)) and if the officer reasonably suspects the person does not understand it, the officer may ask the person to explain the meaning (s 431(3)) and if necessary, the police officer must further explain the caution (s 431(4)). The provision does not apply if another Act requires the person to answer the questions (s 431(5)).

[45] The requirement to advise a person of his or her right to remain silent is probably the most important safeguard given by the Act in the context of questioning of suspects. It is to facilitate the understanding and proper exercise of this fundamental common law right that ss 416, 418, 420, 422 and 423 operate (See the discussion in *R v LR* [2006] 1 Qd R 435 at 449-450).

[46] The obligation to caution arises as soon as the preconditions of s 415 exist – the defendant being a suspect in the presence of police and is being or is to be questioned about the commission of an indictable offence (*R v Purnell* [2012] QSC 060 at [6]).

[9] At [13]-[15]. Though in this case, after considering the question of Mr Bossley's consent to the search and questioning, Dalton J ultimately found that Mr Bossley did consent and answered questions voluntarily, such that the search was lawful (at [17]-[33]).
[10] At [19].
[11] At [19].
[12] At [21].

[47] The obligation includes not only advising of the right to remain silent, but also informing the person that anything they say could be used in evidence. If the latter part is omitted, the choice of whether to speak or not is not an informed one (*R v Duggan* [2015] QSC 113 at [36], [38]).

[48] The cases also reveal that in order for the defendant to effectively consider the exercise of the right to silence, the nature of the offence being investigated should be disclosed (*R v Duggan* at [43], *R v Plevic* (1995) 84 A Crim R 570 at 579-581).

Special protections for Aboriginal and Torres Strait Islander people

[49] Section 420 provides additional protections in relation to the questioning of persons reasonably suspected by police of being Aboriginal or a Torres Strait Islander (s 420(1)), namely:

(i) The police officer must inform the person that a legal aid representative will be notified he or she is in custody and then notify that representative, unless the officer considers that, having regard to the person's level of education and understanding, the officer reasonably suspects that the person is not at a disadvantage in comparison with members of the Australian community generally (s 420(2) and (3)).

(ii) The police officer must first allow the person to speak to a support person confidentially and have a support person present for the questioning unless the person has expressly and voluntarily waived that entitlement, or the support person is unreasonably interfering with the questioning (and that waiver is recorded) (s 420(4), (5) and (6)).

[50] Some examples of the exercise of discretion as a result of breaches of s 420 are:

(i) In *R v Brown* [2006] QCA 136 the Court of Appeal considered there was no error in the discretion exercised to admit an interview where there was a failure to comply with the earlier equivalent of s 420, partly because the applicant was able to 'look after himself under questioning' as seen in the interview and in evidence, he was aware of his rights and there was no indication of the tendency to "gratuitous concurrence".

(ii) In *R v Noble* [2006] QDC 011 an interview was excluded where the support person arranged for an Aboriginal juvenile did not understand his role.

(iii) In *Bell v The Queen* [2012] QDC 358 the interview was not excluded despite the breach of s 420 in circumstances where other warnings were given and the offer

to contact Aboriginal Legal Aid was not taken up (contact having been had the day previously) and the method of questioning was ultimately not unfair.

(iv) In *R v Casey* [2014] QDC 151 the interview was excluded in the exercise of the fairness discretion and the public policy discretion, in circumstances where:

- There was evidence suggesting the accused did not understand the warnings about the right to silence, including the manner of administration of the warnings and the responses.

- Police officers stationed at a remote location with a large Aboriginal population had not been trained in cross-cultural interviewing of Indigenous persons and had limited understanding of the reasons for the protective provisions.

Prejudicial effect versus probative value

[51] Laconically referred to as the '*Christie* discretion', where the prejudicial effect of a piece of evidence outweighs the probative value, the court is entitled in its discretion to exclude that evidence.

[52] The test for whether the evidence should be left to the jury is whether the nature and content of the evidence may lead the jury to give it more weight than it deserves.[13] If that question is answered in the affirmative, the evidence should be excluded. That is, "[u]nfair prejudice exists where there is a real risk that the evidence will be misused by the jury in some unfair way."[14]

[53] Under the formulation expressed in *R v Hasler* [1987] 1 Qd R 239, an exclusion under the common law discretion "should occur only when the evidence in question is of relatively slight probative value and the prejudicial effect of its admission would be substantial".[15]

[54] A pertinent example is provided by *R v Moore & Tracey* [2021] QSCPR 3. In that case, Burns J ruled that evidence in a murder trial was to be excluded on the basis its "slight" probative value was outweighed by its "substantial" prejudicial effect.[16] While his Honour refused to exclude evidence that two knives were missing from a knife block at one of the accused's home, he excluded evidence of an allegedly similar knife block

[13] *R v Moore & Tracey* [2021] QSCPR 3, at [19].
[14] *R v Sica* [2013] QCA 247, at [113].
[15] *Hasler* at 251.
[16] *R v Moore & Tracey* [2021] QSCPR 3, at [24].

purchased by police. His Honour found this evidence was of only "slight" probative value, but posed a real danger that it "might unfairly inflame the jury in their consideration of [explanations for allegedly missing knives]."[17] As a result of that exclusion, the Crown decided to discontinue the trial.[18]

Unfairness – section 130 Evidence Act 1977 (Qld)

[55] Section 130 recognises a discretion to exclude evidence in criminal proceedings which would be unfair to the accused to admit. The section provides:

> *Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.*

[56] The interpretation of section 130 as a third category of discretion to exclude evidence is somewhat unsettled. The courts in Queensland have primarily described the section 130 "unfairness discretion", as distinct from the "general" probative versus prejudicial discretion of *R v Christie* [1914] AC 545.[19] Dalton J in *R v Playford* [2013] QCA 109, cited with approval by Flanagan J in *R v Ford* [2017] QSC 205 at [46], indicates the "unfairness" discretion developed at common law prior to *Ireland* and *Bunning v Cross* (the unlawful/improperly obtained evidence discretion), such that section 130 is simply a statutory acknowledgement of the existing common law unfairness discretion.

[57] Meanwhile others, such as Burns J in *R v Moore & Tracey* [2021] QSCPR 3 indicate that section 130 merely provides a mechanism through which discretions such as the '*Christie* discretion' can be applied.[20]

[58] There is some overlap between the "unfairness" discretion and "illegally or improperly obtained evidence" discretion. The High Court has explained:

> *What Ireland involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by Ireland it follows that it by no means takes as its central point the*

[17] *R v Moore & Tracey* [2021] QSCPR 3, at [24].
[18] *R v Moore & Tracey* [2021] QSCPR 3, at [2].
[19] *R v Smith* [2019] QDCPR 14, at [19]; *R v Smith* [2019] QDCPR 14.
[20] *R v Moore & Tracey* [2021] QSCPR 3, at [18].

question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.[21]

[59] In essence, "unfairness" to an accused offers a discretionary basis on which to exclude evidence, and equally forms one amongst several factors in determining whether illegally or improperly obtained evidence should be excluded under the *Bunnings v Cross* discretion.

Exclusion of admissions or confessions

[60] In relation to admissions and confessions, the fairness discretion permits evidence to be excluded even where the confession was voluntarily made. It was explained by Brennan CJ in *R v Swaffield* (1998) 192 CLR 159, [15] on this basis:

The unfairness discretion thus acted as a residual safeguard, allowing evidence of admissions to be excluded if, despite the fact that they appeared to be 'voluntary', it would be unfair to the defendant to admit them.

[61] *Swaffield* is the leading case on the application of the fairness discretion to admissions and confessions.

[62] There are two ways in which this discretion operates. First, it operates to exclude admissions or confessions where the probative value of the evidence is slight but the risk of prejudice (improper reasoning) by the jury is high. Second, it operates to exclude admissions that have been obtained through improper or unlawful conduct by the authorities where such conduct impacts the reliability of the admission or confession.

[63] It can immediately be seen that the second overlaps very substantially with the discretion to exclude improperly or illegally obtained evidence. The point of difference – if in truth there is one – lies in whether or not the conduct has impacted on the reliability of the admission or confession.

[64] The distinction is illustrated in *Swaffield* itself where Toohey, Gaudron and Gummow JJ were explaining, in the context of a covertly recorded interrogation of a defendant by an undercover police officer, two distinct bases for exclusion.

[65] The first was that the police's conduct took away the freedom of the defendant to decide to speak to the police, particularly where he had in that case already declined to speak with the police. There followed unfairness in the trial that warranted remedy (the unfairness discretion).

[21] *Bunning v Cross* (1978) 141 CLR 54.

[66] The second was that even without any unfairness, the price of the evidence was too high according to contemporary community standards (the improperly obtained evidence discretion).

[67] *Swaffield* can be contrasted with *Em v The Queen* (2007) 232 CLR 67 where the High Court held that there was no unfairness in a covert recording per se. *Swaffield* was distinguished on the basis that he had earlier declined to be spoken to by the police.

[68] As Field convincingly explains at [12.62] a touchstone for the admissibility of admissions or confessions under the fairness discretion is increasingly the perceived reliability of the admission or confession.

EXCLUSION OF EXPERT EVIDENCE

[69] Expert evidence must satisfy several criteria in order to be admissible. The criteria have largely been set out in the New South Wales case of *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, which has been adopted in Queensland. The criteria have been more recently summarised by Bond J,[22] in a manner quoted with approval by Callaghan J[23] (with whose reasons Sofronoff P agreed[24]), as follows:

> *In Makita … at [85], Heydon JA stated that for expert opinion evidence to be admissible, it must meet the following criteria:*
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> *(a) it must be agreed or demonstrated that there is a field of "specialised knowledge";*
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> *(b) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;*
>
> *(c) the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";*
>
> *(d) so far as the opinion is based on facts "observed" by the expert, those facts must be identified and admissibly proved by the expert;*
>
> *(e) so far as the opinion is based on "assumed" or "accepted" facts, those facts must be identified and proved in some other way;*

[22] *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 5)* [2019] QSC 210, [45].
[23] *Speets Investment Pty Ltd v Bencol Pty Ltd* [2020] QCA 247, [140].
[24] *Speets Investment Pty Ltd v Bencol Pty Ltd* [2020] QCA 247, [1].

(f) it must be established that the facts on which the opinion is based form a proper foundation for it; and

(g) finally, the expert's evidence must explain how the field in which the expert has expertise – as established pursuant to (a), (b) and (c) – applies to the facts assumed or observed so as to produce the opinion propounded."

[70] As Kent QC DCJ expressed, writing extra-curially:

> *If these matters are not made clear it is hard to be sure how the opinion is based on the expert's specialised knowledge and it may therefore diminish in weight, possibly to the point of not being admissible.*[25]

[71] Importantly, as Ann Lyons J expressed in *Pentland* [2020] QSCPR 10, the methodology utilised by the expert must also have been "accepted by the scientific community as reliable and accurate" in order for the expert's evidence to be admissible.[26] The High Court in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 held an expert's report, which did not adequately explain the expert's reasons for his opinion evidence about silica exposure, was not admissible. Similarly, in *Pentland*, her Honour excluded an expert's evidence as to the probability of ammunition found at a murder scene being isotopically consistent with ammunition found at another location.[27] He Honour found the method of comparative analysis employed had not yet been accepted by the scientific community as valid.[28] Her Honour held the expert's evidence was therefore inadmissible, as it did not satisfy this criteria, and equally on this basis would have been unfair to the accused to admit it into evidence.[29]

[72] The courts have also emphasised that the expert's testimony must not function to usurp the role of the jury. [30] While the expert evidence should be based on specialised knowledge or training outside of the jury's experience,[31] it must also be explained to the jury in a way understandable by an ordinary person.[32] This reflects the primary duty of experts, in giving their opinion, "to furnish the trier of fact with criteria enabling

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[25] David Kent, 'Ten rules for expert evidence (and unreasonable verdicts)', (7-14 January 2020) *Conference paper delivered at the Europe Pacific Legal Conference at Courmayeur, Italy,* <https://archive.sclqld.org.au/judgepub/2020/kent20200112.pdf>, at [11].
[26] At [32].
[27] At [15], [51].
[28] At [51]-[53].
[29] At [54]-[56].
[30] *R v D* [2003] QCA 151.
[31] *R v D* [2003] QCA 151.
[32] *R v Sica* [2013] QCA 247, at [124].

evaluation of the validity of the expert's conclusions".[33] That is, the expert's evidence must enable "the judge or jury to…assess the evidence based on their own judgment."[34]

[73] The onus of establishing the admissibility of expert evidence lies with the tendering party.[35]

HEARSAY EXCLUSIONS

[74] Hearsay may be briefly summarised as any evidence given by a person who did not themselves perceive the matter asserted and where the evidence is led to prove the truth of its contents.

[75] Notably, both statements and conduct may constitute hearsay. Hearsay also extends, of course, documentary evidence.[36] Hearsay evidence is by its nature inadmissible, unless it falls within a recognised exception.

[76] The connection between the rule against hearsay and the "best available evidence" rule helpfully elucidate why exceptions to the hearsay rule are admissible. In essence, the exceptions to the hearsay rule offer reasons why the evidence, despite being hearsay, may be reliable.[37]

[77] *Subramanium v Public Prosecutor*[38] established the well-known 'exception' to the hearsay rule – that hearsay evidence may be admitted, not for the truth of its contents, but for the fact that the statement was said. While some describe this as an 'exception' to the rule, others – perhaps more accurately – describe the evidence as being admissible simply as "original" evidence of what the witness themselves perceived.[39] Whichever semantic approach is used, the *Subramanium* principle has been solidly established in Australian common law, and is reflected in section 59 of the *Evidence Act* 1995 (Cth).

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[33] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [44] per Heydon J; cited with approval in *R v Sica* [2013] QCA 247, at [104].
[34] At [27].
[35] David Kent, 'Ten rules for expert evidence (and unreasonable verdicts)', (7-14 January 2020) *Conference paper delivered at the Europe Pacific Legal Conference at Courmayeur, Italy,* <https://archive.sclqld.org.au/judgepub/2020/kent20200112.pdf>, at [6].
[36] See, for example: ss 84, 92, 93, 93A, 95 *Evidence Act* 1977 (Qld).
[37] Australian Law Reform Commission, 'Uniform Evidence Law: Chapter 7 – The Hearsay Rule and Section 60' (ALRC Report 102, 16 August 2010), https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/7-the-hearsay-rule-and-section-60/the-hearsay-rule/, at [7.10]-[7.12].
[38] [1956] 1 WLR 965 (PC).
[39] I A Wilson 'Documentary Hearsay: Scope of the Queensland Evidence Act' (1985) 1 *Queensland Institute of Technology Law Journal* 111, at 111.

[78] *Walton v The Queen*[40] expanded this caveat by allowing hearsay evidence to be admitted for the purpose of establishing the mindset of the person that made the statement. *Walton* was a case in which a witness was allowed to recall what was said during a phone conversation the murder victim had, arranging a meeting before she was killed. During that conversation both the victim and her young son indicated they believed the victim's ex-partner to be the caller. That is, the evidence was not admissible as proof that the caller actually was the victim's ex-partner, but it was admissible as original evidence of the victim and her son.[41]

[79] The number of exceptions to the rule against hearsay is extensive. At common law, exceptions include:[42]

- res gestae (things done or said in the agony of the moment or contemporaneous with events);
- deceased declarations (including dying declarations, declarations against pecuniary or proprietary interest, and declarations in the course of duty);
- declarations about a person's own health or mental state;
- statements made in previous proceedings between the same parties;
- informal admissions;
- co-accused's statements for purpose of drawing inference of the accused's consciousness of guilt;
- vicarious admissions;
- statements of co-conspirators (one pre-concert established by other evidence); and
- a range of documentary evidence.

Many of these exceptions have come to be reflected in state and federal legislation.

Unavailable witness provisions of Evidence Act 1977 (Qld)

[80] Under Queensland's Evidence Act, the sections 92 and 93B provide exceptions to the rule against hearsay where the maker of a statement had personal knowledge of the matters dealt with by the statement or document, but in unavailable to be called as a witness. Section 92 deals with the exception in civil cases, while sections 93 and 93B apply in criminal proceedings.

<u>Civil proceedings</u>

[40] (1989) 166 CLR 283.
[41] See the succinct summary of this case in David Field *Queensland Evidence Law* (LexisNexis Butterworths, 5th ed, 2019) at [9.25].
[42] David Field *Queensland Evidence Law* (LexisNexis Butterworths, 5th ed, 2019); J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapters 17 and 18; I A Wilson 'Documentary Hearsay: Scope of the Queensland Evidence Act' (1985) 1 *Queensland Institute of Technology Law Journal* 111, at 112.

[81] In civil proceedings, the unavailability of the witness may be justified because of a range of reasons, namely where:

- the person is deceased or unfit to attend as a witness;
- the person is out of Queensland and it is not reasonable practicable to secure their attendance;
- the person cannot "with reasonable diligence be found or identified";
- it cannot be reasonably supposed that the person would, considering the time that elapsed since the statement or information was supplied, would have any recollection of the matters dealt with;
- no party to the proceeding who would have the right to cross-examine the person requires the person to be called; or
- if it appears to the court that, in all the circumstances, calling the person as a witness would cause undue delay or expense.

[82] Notably, section 92(3) provides that, in the context of civil proceedings, "The court may act on hearsay evidence for the purpose of deciding any of the matters" above establishing a reason for the person's unavailability as a witness.

[83] If the court is satisfied that the person is not unavailable, documentary evidence of the person's statement may be admitted as an exception to the hearsay rule, if the document was produced by the person, recorded with the person's knowledge, recorded "in the course of and ancillary to a proceeding", or recognised by the person.[43]

Criminal proceedings

[84] In criminal proceedings, section 93B provides for more limited circumstances which justify the admissibility of the hearsay evidence.[44]

[85] In relation to documentary evidence, this shall only be admissible if the document forms part of a record made in the course of a trade or business by a person with personal knowledge and the person is unavailable to attend because:

- the person is deceased or unfit to attend as a witness;
- the person is out of Queensland and it is not reasonable practicable to secure their attendance;
- the person cannot "with reasonable diligence be found or identified";

[43] s 92(4), *Evidence Act 1977* (Qld).
[44] s 93B(4), *Evidence Act 1977* (Qld).

- it cannot be reasonably supposed that the person would, considering the time that elapsed since the statement or information was supplied, would have any recollection of the matters dealt with.

[86] Meanwhile, the unavailability of the witness will only be justified in "prescribed criminal proceedings" if the person "is dead or mentally or physically incapable of giving the evidence."[45] "Prescribed criminal proceeding" means a proceeding against a person for an offence contained in chapters 28 to 32 of the *Criminal Code*. These include offences of homicide, endangering life or health, assaults, and rape and sexual assaults.[46]

[87] Section 93B also prescribes that the hearsay rule does not apply to a person's evidence about the representation s/he perceived must have been made contemporaneously to the asserted fact and in circumstances making it "unlikely the representation is a fabrication", "highly probable the representation is reliable" or "against the interests of the person who made it" at the time it was made.[47] If such evidence is admitted, the hearsay rule will not apply to evidence adduced by another party about that or another representation observed by another person.[48]

[88] Burns J in *R v Sanchez* [2017] QSC 143 at [11] emphasised:

> *The requirements of s 93B must be strictly made out before the hearsay rule will be trumped by that provision. The representation in question will only be admissible if that would have been the case if the original maker of the representation had been called as a witness.* ***In determining whether a representation of an asserted fact is admissible, the focus is not on whether, in all the circumstances, there is a "probability" or a "high probability" of reliability. Rather, it is on whether the circumstances in which the representation was made determine that there is such a probability.*** *As to this, evidence "tending only to prove the asserted fact may not be considered" and* ***prior or later statements or conduct of the maker of the representation may be considered*** *"to the extent that they touch upon the reliability of the circumstances of the making of the representation – but not if they do no more than tend to address the asserted fact or ultimate issue".* ***However, such prior or later statements or conduct may be relevant to the exercise of the court's discretion to exclude evidence that is otherwise admissible under s 93B: s 98****.* (emphasis added)

[89] In that case, the video-recorded police interview of the deceased, in which she stated the accused had made the first blow against a victim of an alleged assault, was allowed to be admitted pursuant to section 93B. His Honour was satisfied in all the

[45] s 93B(1)(b), *Evidence Act* 1977 (Qld).
[46] *Criminal Code Act* 1899 (Qld).
[47] s 93B(2), *Evidence Act* 1977 (Qld).
[48] s 93B(3), *Evidence Act* 1977 (Qld).

circumstances that the recorded statement was made in circumstances that made it "unlikely that they were fabricated." Despite the deceased being affected by prescribed medication at the time, and being a partner of the victim (such that she was not an "independent witness"), the contemporaneity of the statement, distressed state of the deceased - who was aware of the victim's injuries, and the fact she gave those answers "about a serious event" and to a "person in authority" made it unlikely the version she provided was deliberately false.[49]

Co-conspirators exception to the rule against hearsay

[90] Another noteworthy exception to the rule against hearsay is the co-conspirators exception. This exception relates to acts or declarations made by a co-conspirator in the absence of the accused.

[91] At the outset the multiple uses of co-conspirator evidence, including as non-hearsay evidence, must be addressed. That is, co-conspirator evidence is admissible as original evidence of the agreement formed to commit an unlawful act(s); in that case, the hearsay rule and exception to do not apply.[50] Equally, co-conspirator evidence may be admitted as circumstantial evidence for that same purpose.[51]

[92] Co-conspirator evidence also forms an important exception to the rule against hearsay. Under the exception, a co-conspirator's evidence about acts or declarations of the accused in furtherance of the agreement can be admitted for the truth of its contents once pre-concert has been established.[52] Importantly, the co-conspirator's evidence is only admissible under the exception in reference to the common object of the original plan, and not in reference to past transactions or the share others may have had in the execution of the plan.[53]

[93] The admissibility of co-conspirator's evidence is governed at a federal level by section 87(1)(c) of the *Evidence Act* 1995 (Cth). No equivalent provision exists in Queensland's *Evidence Act*, but the exception is recognised under common law.[54]

[94] The High Court in *Ahern v The Queen* 165 CLR 87 ('*Ahern*') at [17] summarised the principle:

> *Where an accused is charged with conspiracy, evidence in the form of acts done or words uttered outside his presence by a person alleged to be a co-*

[49] At [16]-[17].
[50] See: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapter 17 Pts 3-4.
[51] See: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapter 17 Pts 3-4.
[52] *Tripodi v The Queen* (1961) 104 CLR 1; see *R v Hardstaff* [2016] QSC 299, at [48] for an example of where pre-concert was not established; see also: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapter 17 Pts 3-4.
[53] See: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapter 17 Pts 3-4.
[54] See: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020), Chapter 17 Pts 3-4.

conspirator will only be admissible to prove the participation of the accused in the conspiracy where it is established that there was a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the acts or words, that the accused was also a participant.

[95] The importance of pre-concert being established before the exception is applicable was also highlighted in *Ahern*:

> *The implied authority on the part of one conspirator to act or speak on behalf of another will only arise if the latter is part of the combination. Evidence of the acts or declarations of the former may, however, be led to prove that very fact.* ***That is where the dilemma lies in cases of conspiracy because, to assume the participation of the latter in order to admit the evidence on the basis of implied authority is to assume the very fact which is sought to be proved by that evidence. If there were no prerequisite to the admission of such evidence " hearsay would lift itself by its own bootstraps to the level of competent evidence"****…* (emphasis added)[55]

[96] The establishment of a pre-concert by independent evidence is a matter for the trial judge to determine.[56] If satisfied a there is sufficient evidence, the trial judge will then make a direction to the jury in the terms set out in the Benchbook.[57]

[97] Even if the evidence is admissible under the co-conspirator exception, the court retains a discretion to exclude it on the basis its admission would be unfair to the accused.

CONCLUSION

[98] Choices about which evidence to challenge and which to leave alone can be crucial to success in a criminal trial. Making such challenges successfully stems from an understanding of the case theory to be deployed and careful and thoughtful consideration of how best to present both the factual and legal aspects of the challenge.

Saul Holt QC

8 May 2022

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[55] At [9], (citations omitted); cited in *R v Hardstaff* [2016] QSC 299, at [17].
[56] Supreme and District Court Benchbook, 'Evidence in Conspiracy Cases' (No 73.1, March 2017 Amendments), < https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/86078/sd-bb-73-evidence-in-conspiracy-cases.pdf>.
[57] Supreme and District Court Benchbook, 'Evidence in Conspiracy Cases' (No 73.1, March 2017 Amendments), < https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/86078/sd-bb-73-evidence-in-conspiracy-cases.pdf>.