# "REINING IN THE JUDGES"? - AN EXAMINATION OF THE DISCRETIONS CONFERRED BY THE EVIDENCE ACTS 1995

## Some thoughts on the practical operation of the new legislation with special emphasis on the new discretionary provisions

CLIFFORD EINSTEIN QC*

## I. INTRODUCTION

### A. The Hallmark of the New Legislation

Mr Justice Grose, some two hundred and five years ago, expressed his dread that the rules of evidence should ever depend upon the discretion of the judges. He wished to find the rule laid down and to abide by it.[1] In the intervening period, judges have come to exercise many and varied discretions by way of evidentiary rulings, when presiding over criminal and civil proceedings. For a considerable time (and most particularly in recent years) the debate over, in some cases the existence, and in many cases the parameter of these discretions, had led to areas of considerable uncertainty in the law of evidence. I venture to suggest that the hallmark of the new evidence legislation is the attempt to adopt a codified approach[2] to these issues and most importantly to widen considerably the ambit of existing judicial discretions in relation to the admissibility of evidence. Only time will tell whether the legislature's attempt to impose a structured set of rules defining the criteria by which those discretions are to be exercised will in practice avoid the earlier uncertainties of the law.

---

* BA LLB (Hons) (Syd), Barrister at Law (Sydney).

1 *R v Inhabitants of Eriswell* (1790) 100 ER 815 at 819 (KB).

2 Whilst the Acts will cover the field in certain areas, they are not codes in the technical sense. Compare with ss 8 and 9 of the *Evidence Act* 1995 (NSW).

### B. The Need for Reform - Avoiding the Previous Traps and Pitfalls

The need for reform of the law of evidence was clear to all:

> The foregoing discussion reveals a multiplicity of differences in the laws of evidence capable of affecting the outcome of litigation according to the State or Territory which is the venue of trial. It also reveals significant uncertainty in all areas of the laws of evidence which can only be addressed by comprehensive uniform legislation. The extent of these differences and uncertainties is remarkable.[3]

> The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the unrepresented litigant baffled, frustrated and defeated. There are also many areas of uncertainty in the law of evidence - areas on which definitive law is yet to be pronounced by the courts. The need for reform is also demonstrated by what happens in practice: the complexities are ignored, oversimplified versions of the law are applied and judges try to discourage use of its technicalities.[4]

One example of the need for reform was in the area of hearsay:

> The rules against hearsay ... are notoriously defective, 'the most complex and confused area of the law of evidence',[5] 'absurdly technical',[6] liable to cause inconvenience and expense in the preparation and hearing of cases, and disruptive of the giving of testimony. The law is often internally contradictory: '... a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists'.[7][8]

### C. Practical Aspects of the Operation of the New Acts

It is appropriate to address certain practical aspects of the operation of the new Acts. What are some of the discretionary considerations warranting special attention by those charged with the task of appearing before the courts?

## II. THE GRID SYSTEM

The Acts achieve a crucial objective in the form of correcting an extremely common misconception as to how the rules of admissibility are intended to work. The misconception is to view the rules of admissibility as a mass of detailed rules and to search for a particular rule (usually an exception to an exclusionary rule) which is then interpreted as proving that certain evidence will be admissible. The approach taken by existing principle and emphasised by the Acts is to make clear[9] that even though a piece of evidence may come within an exception to the hearsay

---

3 Australian Law Reform Commission (ALRC), Interim Report No 26, *Evidence*, 1985 at [211].

4 ALRC, Report No 38, *Evidence*, 1987 at [3].

5 Ghana Law Reform Commission, *Commentary on the Ghana Evidence Decree*, 1975 at 90.

6 *Myers v Director of Public Prosecutions* (1965) AC 1001 at 1001, per Lord Reid.

7 EM Morgan and JM Maguire, "Looking Backward and Forward at Evidence" (1937) 50 *Harv LR* 909.

8 New South Wales Law Reform Commission, Report No 29, *Report on The Rule Against Hearsay*,1978 at [1.1.7].

9 This is made clear by the inclusion of a flow-chart immediately before s 55, by the placing of relevant provisions in a separate part of the Act, by introducing new headings, by cross referencing and by inserting footnotes.

rule, for example, and to that extent be 'admissible', it may be caught by another exclusionary rule - for example the admission rule. It follows that it is incorrect to view a piece of evidence as being 'admissible' simply because it comes within an exception to one of the exclusionary rules:

> ... the threshold test of admissibility is relevance ... The structure of admissibility proposals in the Bill can be seen as a series of grids through which evidence must pass to be admissible. The first is the relevance grid. It will exclude irrelevant evidence and allow relevant evidence to pass. That evidence will be admitted unless it has to pass through other grids and fails to satisfy the exceptions built into those grids.[10]

The grid network is set out below. For convenience I have numbered the grids.

## A. Principal Operating Levers in the New Grid System

I turn first to what I regard as the principle operative levers in the new grid system, namely the first and ninth grids.

### *(i) Grid No 1 - The Expanded "Relevance" Grid*

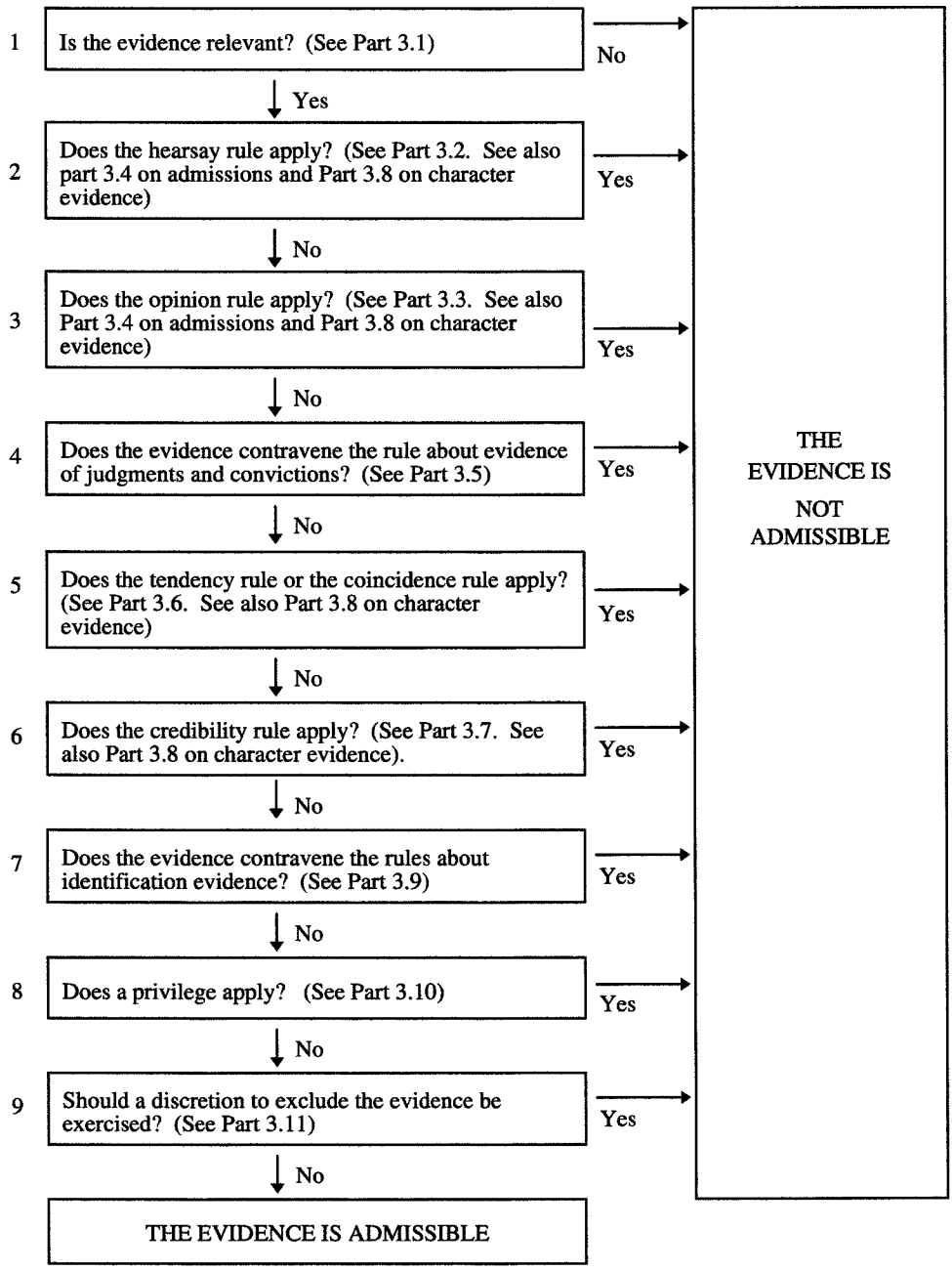
Grid No 1 which imposes the threshold test of admissibility, provides the new and expanded definition of "relevance" in s 55(1):

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally effect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Section 56 then provides that except as otherwise provided, evidence that is relevant in a proceeding is admissible whereas evidence that is not relevant is not admissible. I agree with the view expressed by Stephen Odgers[11] that in light of the fact that evidence that is not relevant is *never* admissible, the courts are likely to interpret the definition of relevance very broadly. Notions of sufficient relevance are no longer germane at this point.

10 Note 4 *supra* at [121].

11 S Odgers, *Uniform Evidence Law*, Federation Press (1995) p 83.


1
Is the evidence relevant? (See Part 3.1)
No
Yes
2
Does the hearsay rule apply? (See Part 3.2. See also part 3.4 on admissions and Part 3.8 on character evidence)
Yes
No
3
Does the opinion rule apply? (See Part 3.3. See also Part 3.4 on admissions and Part 3.8 on character evidence)
Yes
No
4
Does the evidence contravene the rule about evidence of judgments and convictions? (See Part 3.5)
Yes
No
5
Does the tendency rule or the coincidence rule apply? (See Part 3.6. See also Part 3.8 on character evidence)
Yes
No
6
Does the credibility rule apply? (See Part 3.7. See also Part 3.8 on character evidence).
Yes
No
7
Does the evidence contravene the rules about identification evidence? (See Part 3.9)
Yes
No
8
Does a privilege apply? (See Part 3.10)
Yes
No
9
Should a discretion to exclude the evidence be exercised? (See Part 3.11)
Yes
No
THE EVIDENCE IS ADMISSIBLE
THE EVIDENCE IS NOT ADMISSIBLE

*(ii) The All Important Grid No 9*

Secondly, I refer to the provisions in Grid No 9 which I regard as possibly the single most significant bracket of provisions in the entire Act. These are the Part 3.11 discretions to exclude evidence. Most of us would I think, be well aware of the body of authority which has built on the meaning of the words "misleading and deceptive conduct" as used in the *Trade Practices* Act 1974 (Cth). I believe we will in time find a similar emphasis and close examination on the not dissimilar words "misleading or confusing" in relation to evidence and more particularly on the words "undue waste of time" in the provisions set out below.

The Relevance Discretion (to exclude or to limit use of evidence):

s 135 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.

s 136 The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing.

The Probative Value/Prejudice Discretion:

s 137 In a criminal proceeding, the court must refuse to adduce evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

## B. The Relevance Discretion as Applied in Practice

Since coming into effect last year, there are only a few judgments on the operation of the new Acts. I thus make no apology for referring to a short *ex tempore* judgment delivered by Justice McLelland on 28 September 1995,[12] which is an early pointer to the use of the relevance discretion. A question arose in relation to the admissibility of a paragraph in an affidavit. The evidence went to a matter not directly in issue, namely the subjective intention or actual state of mind of the deponent. His Honour approached the matter thus:

> The only possible relevance of the evidence is that it could have some rational bearing on the probability or otherwise of some of the disputed acts and words on the occasion in question. It would therefore be admissible pursuant to ss 55 and 56 of the *Evidence Act* unless that Act otherwise provided.
>
> The Act contains no provision excluding evidence of this class. In this regard the Act has effectively abolished what has been called the rule against self-corroboration, as illustrated by such decisions as *Gillie v Posho Ltd*,[13] *Corke v Corke*[14] and *Spittle v Spittle*.[15] However, s 135 of the Act empowers the court to refuse to admit evidence if

12 *Joyrao Pty Ltd v Marule* (unreported, Supreme Court of New South Wales, McLelland CJ, 28 September 1995) (the *Joyrao* case).

13 (1939) 2 All ER 196 (PC).

14 *Corke v Corke and Cooke* (1958) 1 All ER 224 (CA).

15 (1965) 1 WLR 1156.

> its probative value is substantially outweighed by the danger that the evidence might amongst other things, cause or result in undue waste of time.
>
> In the circumstances of the present case the probative value of this evidence is very slight and its admission may well substantially prolong the cross examination ... and also result in the pursuit of other issues, the probative value of which is likely to be equally slight.
>
> For those reasons I am of the opinion that the condition expressed in s 135 is satisfied with respect to para (c) therefore and I refuse to admit the evidence.

## C. "Unfairly Prejudicial", s 135(a) and s 136(a)

The concept of "unfair prejudice" here invoked is unlikely to be construed as referring (at least in non-jury civil proceedings) to the danger that the court will be 'duped' into a use of the evidence which would be unfairly prejudicial to a party. Any such construction would fly in the face of the function of the court constituted by a judge sitting alone, to give the evidence such weight as the particular piece of evidence sought to be adduced deserves, in the light of the whole of the proceedings, including *all* of the evidence.

It seems more likely that the concept of 'unfair prejudice' to a party will be constructed to include situations where the party against whom the evidence is sought to be tendered would be placed, forensically, in an awkward or impossible position. This may occur for example, by reason of uncertainty as to the possible inferences to be drawn from the admission of the evidence in issue. The party resisting the tender may, if the tender is successful, be placed in the forensic position of having to elect:

(a) whether to leave the evidence unanswered and to address submissions that no (or virtually no) weight should be given to the evidence in question because, properly viewed, it does not give rise to inference A; or
(b) whether to avoid any doubt on the issue by calling other evidence in relation to the matter.

The court may take the view[16] that the weak probative value of the item of evidence in issue, in fairness to the party against whom the tender is sought to be made, ought not require that party to be placed in this forensic dilemma.

Many but by no means all of such situations would also be embraced with s 135(c).[17] On the other hand, evidence having significant probative value (if admitted) may be unfairly prejudicial to a party and yet, by definition, may not cause or result in undue waste of time.

The concept of 'unfair prejudice' would also appear to embrace the rule against pleading or procedure which is calculated to cause 'surprise', in the sense of

16 For example, by reason of inherent ambiguities or obscurities in the item of evidence in issue.

17 See note 3 *supra* at [644] where the ALRC expressed the view that an example of the risk of the court being misled was the possibility that the court would incorrectly assess the weight of the evidence. It is difficult to accept that this example could extend outside of a jury trial.

"denying a party due warning of what is to be said against him, and so, effectively [denying] him an opportunity to be heard".[18]

## D. "Misleading or Confusing", s 135(b) and s 136(b)

Whether the admission of evidence or the particular use to be made of evidence will be misleading or confusing is a question of impression to be determined by the trial judge in the context of other evidence and of the issues being tried. The word "mislead" has been held to mean "to lead into error".[19]

The word "confusing" is unlikely to be given a narrow construction. The relevant confusion may arise from a particular item of evidence sought to be adduced seen in isolation or seen in the context of other material admitted or proposed to be admitted into evidence.

## E. "Cause or Result in Undue Waste of Time", s 135(c) - the Likely Driver of Grid No 9 in Civil Proceedings

This sub-section has, at least in civil proceedings, the potential to be the most used of the ss 135/136 gateways. The court may, for any number of reasons in any particular case, view the probative value of an item of evidence as substantially outweighed by the danger that the evidence may enable a blowout on a most peripheral issue. A single factual issue seemingly of the most marginal relevance to the principle issues in the case can, if allowed full rein, lead to an undue waste of time by way of prolongation of cross examination, the calling of additional witnesses or evidence, the need to issue further subpoenas, the recalling of witnesses and the like. The approach taken by McLelland CJ in the *Joyrao* case[20] is in point.

## F. Limiting Use to be Made of Evidence, s 136

Without an order limiting the use to be made of evidence, the effect of s 60 will permit evidence relevant for a non-hearsay purpose to be relied upon as original evidence. Thus an assumption misdescribed in an expert's report as a statement of fact will become primary evidence of that fact without the requirement that the fact be independently proved. In this situation, the court can be expected to accede to an application for the making of a s 136 order limiting the use to be made of the evidence. Such an order would provide that unless and until independently proved, the so called statement of fact will be admitted only as proving that it was one of the assumptions upon which the expert had based his opinions.

Other situations may be envisaged in which the court will be likely to set limits upon the use to which particular items of evidence may be made. For example an order may be made that a statement be admitted on the basis that it is admissible only as representing the opinion of the witness.

---

18 Compare with JR Forbes, "Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases" (1988) 62 *ALJ* 210 at 213, citing an obiter dictum of Channell J in *Hales v Kerr* (1908) 2 KB 601.

19 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 181, per Gibbs CJ.

20 Note 12 *supra*.

## G. Prejudice/Unfair Prejudice, s 137

In relation to the probative value/prejudice discretion, the Law Reform Commission[21] expressed the view that:

> 'Prejudice' seems to involve two concepts;[22] danger that the fact-finder may over estimate the probative value of the evidence[23] and danger that the fact-finder may use the evidence to make its decision on an improper (often emotional) basis ie on a basis logically unconnected with the issues in the case. Various formulations of the test have been used, including:
>
> - 'Where its prejudicial effect outweighs its probative value'
> - the 'prejudicial effect was out of all proportion to their probative value' ...[24]

An accused person is entitled as a matter of principle to be protected by a criminal court from evidence which, although technically admissible, is so gravely prejudicial to the accused that the evidence ought be excluded, as a matter of fairness and due attention to the interests of justice.[25] The likelihood of a jury using such evidence in an irrational manner underlies the principle.[26]

## H. The Relevance Discretion as Impacting on the Hearsay Provisions - A Trap for the Unwary

As I have sought to make clear, a trap for the unwary is to assume that all the sections relevant to hearsay are to be found in Part 3.2 entitled "Hearsay". This is not the case. Reposing in Part 3.11 are the very potent Grid No 9 provisions. These may be used to exclude from evidence material otherwise admissible under the exceptions to the hearsay rule.[27]

## I. "The Hidden By-pass Grid", s 190(3) - Power to Order a Waiver of the Rule of Evidence

Section 190(3) provides that in civil proceedings[28] the court may order that any one or more of a number of specific provisions not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute; or
(b) the application of those provisions would cause or involve unnecessary expense or delay.

The relevant provisions, inter alia, deal with 'General rules about giving evidence'[29]; 'Cross-examination'[30]; 'Documents'[31]; 'Other evidence'[32]; 'Hearsay'[33]; 'Opinion'[34]and 'Admissions'[35]

---

21 Note 3 *supra* at [259].
22 *R v Duke* (1979) 22 SASR 46 at 47-8; *R v Haidley* (1984) VR 229 at 253. See also JA Gobbo, D Byrne and JD Heydon, *Cross on Evidence*, Butterworths (2nd ed, 1980) p 22.
23 *R v Bridgeman* (1980) 24 SASR 278 at 280.
24 *Wilson v R* (1970) 44 ALJR 221 at 224; *R v Herron* (1967) 1 QB 107; *R v West* (1973) Qd R 338 (CCA).
25 *Noor Mohamed v The King* (1949) AC 182 at 192.
26 JR Forbes, note 18 *supra* at 211.
27 Sections 63-6, 69-71, 73-5
28 In criminal proceedings the court may, if the parties consent, dispense with certain provisions of the *Evidence Act*, see s 190(1).
29 Sections 26-36.
30 Sections 40-6.

It follows that in civil proceedings the court has the discretion, subject to these criteria being satisfied, to carry out radical surgery to the Act by excising a large number of the rules of evidence from having any operation whatsoever. The whole or specified sections of the Part 3.2 "Hearsay" provisions are vulnerable to this treatment. Hence the s 190 hidden grid by-pass may well be called upon (as occasion may warrant) to permit either the admissibility of evidence otherwise excluded by the exclusionary rule, or to reject the admissibility of evidence which, by falling into one of the exceptions, had survived the exclusionary rule.

Section 190(3)(a) effectively repeats provisions found elsewhere, empowering a court to dispense with the rules of evidence for proving any matter which is not bona fide in dispute.[36] The discretion to dispense with the rules of evidence must itself be exercised subject to the requirements of natural justice.[37]

To my mind, s 190(3)(b) provides the court with an altogether over extensive power capable of mismanagement. The criteria required to be satisfied are extremely wide and it is difficult to accept that the exercise of the discretion so conferred would be readily amenable to being reversed on appeal.

## III. GUIDELINES ON THE EXERCISE OF THE DISCRETIONS - UNLIKELY TO GIVE OTHER THAN THE MOST GENERAL GUIDANCE

The courts are naturally astute to avoid adopting fixed or firm guidelines[38] which may be interpreted as fettering a trial judge's discretionary powers. The width of the new discretions suggest difficulty in seeking to adopt guidelines for identifying (with narrow precision) the type of factors to be taken into account in considering whether the discretions should be exercised in any given case.

The general rules governing statutory discretions were referred to in *Salido v Nominal Defendant*:[39]

> A discretion, conferred by parliament upon a donee of discretionary power, does not entitle the donee to act upon whim. That would be the negation of the rule of law. The discretion must be exercised according to the terms in which, and to achieve the purposes for which, parliament has provided ...[40]
>
> The general principle was stated by Earl Loreburn LC (with whom Lords MacNaghten, Atkinson and Shaw of Dunfermline agreed) in his speech in *Hyman v Rose*:

---

31 Sections 47-51.

32 Sections 52-4.

33 Sections 59-75.

34 Sections 76-80.

35 Sections 81-90.

36 Compare with, for example, *Supreme Court Act* 1970 (NSW), s 82(1)(a).

37 J Giles, "Dispensing With the Rules of Evidence" (1991) 7 *Aust Bar Rev* 233.

38 Or in some instances, any guidelines; see *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639 at 652, per Kirby P.

39 (1993) 32 NSWLR 524 at 535-6.

40 See *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 544, per Murphy J and *British Equitable Assurance Co Ltd v Bailey* [1906] AC 35 at 42f.

> ... Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion ... If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted.[41]

As Lord Denning MR observed in *Firman v Ellis*:

> In former times it was thought that judges should not be given discretionary powers ... The law should define with precision the circumstances in which judges should do this or that. Those days are now passed. In statute after statute, Parliament has given powers to the judges and entrusted them with a discretion as to the manner in which those powers should be exercised. In many of these statutes, Parliament sets out 'guide lines' indicating some of the considerations to which judges should have regard.
>
> ... Sometimes Parliament has entrusted the judge with a discretion without setting out any guide lines ... and then the judges themselves set out the guides lines: see *Ward v James*.[42] In all such cases the judges in making their decisions set a pattern from which the profession can forecast the likely result of any given set of circumstances: see *Bickel v Duke of Westminster*.[43] So a sufficient degree of certainty is achieved - as much certainty as is possible consistently with justice.[44]

And as Kirby P (as he then was) reminded us:

> Where Parliament has conferred a judicial discretion which envisages a decision based upon the facts of a particular case, a court may not fetter the exercise of that discretion by purporting to lay down guidelines which state a general binding rule to be observed, whatever the circumstances of the case: see *Jenkins v Bushby*;[45] *R v Bicanin*;[46] *Mallet v Mallet*;[47] cf Brennan J in *Norbis v Norbis* (at 537).[48]

The criteria to be weighed by the court in applying ss 135 to 137 and s 190 are expressed in fairly general terms. Questions as to whether evidence is likely to prejudice a party unfairly, or is likely to be misleading or confusing or to result in an undue waste of time are questions uniquely appropriate to be answered by a trial judge in the context of a given set of proceedings. It is unlikely that an appellate court will often be in as good a position as the trial judge in weighing up the considerations material to determination of questions of this nature. As Kirby P (as he then was) has held:

> The more general the expression of the criteria for the exercise of a statutory discretion the more natural it is for courts to endeavour to provide elaboration and guidance for the future. Yet the more general is the expression of the criteria, the more difficult it may be to give that guidance without frustrating the legislative objective of an individualised decision in each case. Often that discretion may invite an ultimate judgment which is little more than one of impression reached after reference to relevant considerations.[49]

---

41 [1912] AC 623 at 631.

42 [1966] 1 QB 273.

43 [1977] 1 QB 517 at 524.

44 (1978) QB 886 at 905 (cited in *Salido v Nominal Defendant*, note 39 *supra* at 537). Compare with *McGee v Yeomans* (1977) 1 NSWLR 273 at 278; *Thompson v Brown* (1981) 1 WLR 744 at 752.

45 [1891] 1 Ch 484 at 493.

46 (1976) 15 SASR 20 at 25.

47 (1984) 156 CLR 605 at 621-2, 624-5, 637.

48 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 401.

49 *Bankinvest AG v Seabrok and Ors* [1988] 14 NSWLR 711 at 716.

# IV. LIMITATIONS ON APPELLATE REVIEW OF THE EXERCISE OF THE NEW DISCRETIONS

The most commonly cited passage setting the parameters of appellate review of an exercise of discretion on points of practice and procedure[50] is in *Re the Will of FB Gilbert (deceased)*[51], where Jordan CJ stated:

> ... I am of opinion that ... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges at first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed, interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal.[52]

The principles governing the manner in which an appeal against an exercise of discretion should be determined are likewise clearly spelled out:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[53]

---

50 Many sections of the Acts deal with matters which can only be regarded as points of practice and procedure.

51 (1946) 46 SR(NSW) 318.

52 *Ibid* at 323. Compare with *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642:

> The principles which require leave of the Court to appeal from interlocutory decisions apply with special force where the decision in question is one that may be categorised as one of practice and procedure. The reason for this restraint, accepted by appeal courts is partly described in the oft quoted language of Jordan CJ in *Re the Will of FB Gilbert (Deceased)* (1946) 46 SR (NSW) 318 at 323; 63 WN 176 at 179. I say that the reasons are there stated 'in part' because, since 1946, there has been an increasing realisation of the public costs which are involved in litigation and the public interest that necessitates, particularly in the multitude of practice decisions that must daily be made in the courts, a high respect for finality. Without this, other litigants will be delayed and the burden on judges and the appellate process will be unacceptably increased, with consequent public expense.

The provision contained in the *Supreme Court Act* 1970, s 101(2)(c), necessitating leave in a case such as the present, amounts to a legislative recognition of these considerations. Accordingly, it is normally necessary for a claimant for such leave to show something more than that the appeal court would, if exercising its discretion afresh, have come to a conclusion different to that reached by the trial judge. Some error of principle in the exercise of the discretion, a consideration of irrelevant matters or some other manifest mistake is needed to take the case out of the ordinary situation in which, wherever a discretion is to be exercised, minds may differ on the result: compare with *Maiden v Maiden* (1909) 7 CLR 727 at 742; *McCauley v McCauley* (1910) 10 CLR 434 at 455, per Kirby P at 644.

53 *House v The King* (1936) 55 CLR 448 at 504-5, per Dixon, Evatt, McTiernan JJ. Compare with *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1985) 162 CLR 24 at 47.

That these are the principles currently being followed by New South Wales courts is clear.[54]

Questions of the admissibility of evidence may of course raise questions of law and may raise questions of discretion.[55] The fact that these questions may throw up common issues ought not lead to the misconception that the questions are other than disparate and in consequence do not require independent assessment. The principles which inform appeals from these questions are in turn different in nature.

Insofar as questions of discretion are raised, the task of satisfying an appellate tribunal that an exercise of one of the discretions referred to above has miscarried, although naturally dependent on the facts of each particular case, will in my view generally not prove easy to discharge. This is particularly because of the width of the new discretions.

## V. CONCLUSION

In my view the new evidence legislation overtly confers upon judges wide powers to exclude evidence on bases which by and large are unlikely to be reviewable on appeal. The Acts are predicated upon the sensible approach that advocates will have to identify immediately the use to which the evidence is to be put. If such use satisfies the 'relevance' test, the possible application of exclusionary rules will be addressed. Superimposed however upon the workings of crucial parts of the Act is a set of discretions which must be carefully analysed to understand their far ranging reach. That analysis throws up the clear conclusion, as it seems to me, that the holding of a level playing field providing justice to each party is squarely left to decisions on matters of practice and procedure of trial judges.[56] In general, these decisions will by and large not lend themselves to appellate review. That is perhaps as it should be. Some would say - that is as it always was. With respect, I would not agree. To my mind the Acts, particularly insofar as conferring discretions based on criteria such as causing or

---

54 *R v GG Alexandroaia,* (unreported, Supreme Court of New South Wales, Court of Criminal Appeal, 7 July 1995) at 7; *Wallace v Stanford* (unreported, Supreme Court of New South Wales, Court of Appeal, Handley JA, 29 June 1995) at 4; *Director of Liquor and Gaming v Sydney RSL and Ors* (unreported, Supreme Court of New South Wales, Spender J, 27 June 1995) at 5; *State Bank of New South Wales v White* (unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Mahoney JA, 14 June 1995) at 8; *CIC Insurance Ltd v Bankstown Football Club Ltd* (unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, 14 December 1994) at 6; *Fowdh v Fowdh* (unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, 4 November 1993) at 7, per Kirby P, suggesting however that no mechanical rejection of all appeals against interlocutory orders was called for; *Goldberg and Ors v Ng and Others* (1994) 33 NSWLR 639 at 644.

55 *Collins v R* (1980) 31 ALR 257, per Brennan J at 307. Compare with *Cleland v The Queen* (1982) 151 CLR 1.

56 The Law Reform Commission appears to have, at least in part, recognised this: "The fairness of the proceeding will also depend on the conduct of the judicial officer - the more arbitrary or subjective it appears to be, the less acceptable to all concerned." See note 4 *supra* at [34(b)] dealing with civil trials.

resulting in "undue waste of time"[57] or "unnecessary expense or delay"[58]: represent a significant extension of the powers of trial judges in matters of admissibility.[59]

57 Section 135(c).

58 Section 190 (3)(b).

59 Compare with *Polycarpou v Austin Wire Industries* (1995) 36 NSWLR 49 at 60-7 for a discussion by Kirby P of the history and development of the discretion of the court in criminal and civil trials to exclude relevant evidence whose prejudicial effect outweighs its probative value, the Court of Appeal holding that no such discretion applied to civil trials.