THE CHRISTIE DISCRETION

The discretion to exclude admissible evidence in Queensland is recognised in s.130 of the Evidence Act which 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".

Section 130 appears to recognise the common law discretion first established in R v Christie [1914] AC 545 (the Christie discretion) to exclude admissible prosecution evidence which is "more prejudicial than probative".

Co-existent is a separate judicial discretion to exclude evidence illegally or improperly obtained- - (the Ireland discretion: R v Ireland (1970) 126 CLR 321; Bunning v Cross (1978) 141 CLR 54).

Whilst the Ireland discretion is not the subject of this paper (nor the Judges Rules and Police Powers and Responsibilities Act 2000), it ought to be remembered that both the Christie and Ireland discretions often overlap in practice – e.g. the inappropriate or illegal way in which evidence is obtained may consequently reduce its weight so that it becomes "more prejudicial than probative".

Historically, the Christie discretion was a tool which English judges employed to press counsel not to lead “unfair” evidence. The trial Judge “intimated” (compare with ruling) to the Crown Prosecutor that the evidence ought not be lead. This delicate language (with possibly indelicate ramifications if a prosecutor did not heed it) continued in England for some time (See eg Harris v DPP [1952] AC 694 at 707).

In Australia, Christie was accepted by the High Court in R v Lee (1950) 82 CLR 133. In Queensland, R v Hasler, exparte Attorney-General [1987] 1 Qd R 239 summarised the applicability of the Christie discretion, Thomas J said (at p.251) :

"It is desirable that I attempt to summarise the conclusions I have reached from reviewing the relevant authorities on this question.

(a) The exercise of the discretion is not a simple balancing function in which the judge decides whether the overall effect of the evidence is more prejudicial to the accused than it is beneficial to the Crown case.

Sometimes the discretion is elliptically described in headnotes and elsewhere as a "discretion to exclude where prejudicial value outweighs probative value". Such abbreviations should not be permitted to modify or distort the true test, and should be recognised as mere shorthand references to it.

(b) Exclusion should occur only when the evidence in question is of relatively slight probative value and the prejudicial effect of its admission would be substantial. Without dissenting from any of the five formulations quoted above, it is apparent that those stated by Barwick C.J. and by Stephen and Aickin JJ. in Bunning v. Cross (supra) give proper recognition to these factors and that they may safely be used as concise working statements of the principle.

(c) In performing the balancing exercise, the only evidence that should be thrown into the "prejudice" scale is that which shows discrreditable conduct other than those facts which directly tend to prove the offence itself. The "prejudice" cannot refer to the damage to the accused's case through direct proof of the offence. To speak of a "balancing" of prejudicial effect against probative value of such evidence is
absurd, because the weight of each will be exactly the same. If prejudice arising from strict proof of the case were to go into the "prejudice" scale, then the additional prejudicial effect would always tip the scales and the evidence would never be admissible.

The above matters support the earlier observation that the use of this discretion is not a loose balancing exercise. To the extent to which it is a broad discretion dictated in the end by the needs of justice, the traditional direct relationship between relevance and admissibility should not be overlooked."

It is clear that for the disputed evidence to be excluded, it is insufficient to merely show that its prejudicial effect is greater than its probative value. The evidence must have relatively slight probative value but substantial prejudicial effect.

Dowsett J in *R v Morris Ex parte Attorney-General* [1996] 2 Qd R 68 at 72, made it clear that prejudice refers to the opportunity of a fair trial.

“….There is a common misunderstanding of the term “prejudicial effect” in this context.

*Inculpatory evidence is always prejudicial to an accused person’s case, using the word “prejudicial” in a broad sense to mean “damaging”. However, the primary meaning of the word “prejudice” in the Shorter Oxford Dictionary is, “Injury, detriment or damage, caused to a person by judgment or action in which his rights are disregarded….”*. The word also has overtones of bias or prejudgment. It is in this sense that we speak of prejudice in the context of a discretionary exclusion of evidence. It is not damage to the defence case which is relevant, but damage to the prospect of a fair trial. Some evidence, although probative, may inflame a jury, causing them to ignore the rights of the accused or may otherwise undermine the fairness of the trial.

*If the probative value of such evidence is not great, then it may be unjust to receive it. The balancing exercise is between the probative value of the evidence in the trial and the possibility of prejudice to the prospects of a fair trial."

It is the principle of a fair trial which lies at the heart of this discretion. A judge exercising the discretion may exclude evidence which is otherwise admissible but would operate unfairly on the accused, i.e. deny the accused a fair trial and thus place him at risk of being improperly convicted.

Whilst exercise of the discretion is obviously one undertaken by the trial Judge, it is incumbent upon the accused’s legal representatives to first raise the point and then persuade the Judge to favourably exercise the discretion.

A defence application to request the exercise of the judicial discretion to exclude evidence can be undertaken before the commencement of the trial under s.590AA of the Criminal Code. Pre-trial directions and rulings. .s.590AA(2)(e) provides that “...a direction or ruling may be given in relation to- deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted...

Consistent with the acknowledgement that rulings on evidence at a committal hearing do not bind the trial Judge, discretionary exclusion of evidence is usually considered to be not available in committal proceedings: See *Moore v The Attorney-General* (1984) 53 ALR 513 at 540.

The onus of proof to be satisfied is on the defence to the civil standard *R v Lee* (supra)
Originally the Christie discretion was applied to exclude disputed confessions, particularly police records of interview, but it can also apply across a range of different types of prosecution evidence.

Examples include:

**Identification evidence.**

It is well established that because of the particular difficulties associated with identification evidence which may affect its reliability, there is ample scope for the discretion.

In *Alexander v The Queen (1981) 145 CLR 395*, Mason J refers specifically to the application of the unfairness discretion to the use of photographs by the police, citing instances where the prejudice to an accused person would involve circumstances where the photographs may tend to suggest a police record; or the collection of photographs shown to the identifying witness may be such that the accused is highlighted or stands out. Or the quality of the identification evidence is poor – a suspect brought alone to a witness at the police station;: *R v Corke (1989) 41 A Crim R 292*.

Not all applications for exclusion are successful - sometimes the probative value of the identification evidence is substantial, outweighing its prejudicial effect. In *Redshaw (CA No 331 of 1997)*, there was a nine week delay between the commission of the offence and the identification by photoboard. Whilst that may of itself suggest the evidence was prejudicial to the defendant, the fact that the witness had observed the defendant for “up to three to four minutes at close quarters” meant that the evidence was “not evidence of little weight”. The Court of Appeal, applying *Alexander*, accordingly did not interfere with the judge’s decision not to exclude the evidence.

(See generally in this area “Evidence of Identity” by Joe Briggs, available on LA Web).

**Photographic Evidence**

It can apply to photographic evidence where e.g. the precise nature of the injuries are not important and the graphic nature of the images are likely to inflame a jury and prejudice it against the accused, e.g. photos of burns to children caused by a kidnapper throwing petrol on them, or in a murder trial where the accused stabbed his wife 40 times (*R v Leslie Robert Brown, Unreported Qld Supreme Court, Shanahan AJ, 17/11/92*).

**S.93A Statements**

Statements which are admissible under s.93A of the Evidence Act may be excluded, with reliance placed on s.130 and/or s.98 of the Evidence Act, but note Pincus J’s comments in *R v FAR [1996] 2 Qd R 49* at p.61

> “I am inclined to the view that the enactment of s.93A constituted a sensible and useful reform, but courts, whether or not in agreement with the policy of the section, should in my opinion exercise the discretion to admit or exclude statements taken under it without any preconception that admission of such statements is unfair.”

In practice, the issue will often be one of reliability: Davis JA (at page 61) with whom Pincus JA agreed on this point. The focus is on the contents of the statement or the way in which it is obtained. Unreliability is regarded as a touchstone of unfairness: *R v Swaffield (1997- 1998) 192 CLR 159* at 189. The unfairness refers to a concern with not jeopardising an accused person’s right to receive a fair trial. For example, in *R v Cumner (CA(Qld) No 108 of 1994,unreported,BC9404106)* the court regarded it as relevant as to whether the person charged could receive a fair trial. The fact that it was impossible for that person to challenge or test by
cross-examination the statements recorded by video tape and led at the trial. The child witness was unable to recall the incident which formed the subject of the charge, or to recall being interviewed by the police, or what was said in the course of the interview. The majority held that those circumstances, together with the circumstances identified in the judgment in that case of Davis JA, namely that the evidence was the uncorroborated and untested statement of a six year old made nine months after the incident, and when the child's mother had asked her every day for some two months whether the appellant in that case had touched her on, or in, the vagina, meant that the evidence of the video statement should not have been received.

Subsequent decisions such as *R v D [2003] QCA 151*, show that the mere fact that a s93A witness is unable to be effectively cross-examined will not, without more, ordinarily enliven the discretion.

**Accomplices/Indemnified Witnesses**

In relation to indemnified witnesses, the focus is usually on how the evidence has been obtained, or more generally the reliability of the evidence as the result of the obvious self interest such witnesses may have in giving evidence. In *R v McLean and Funk, Ex parte Attorney-General [1991] 1 Qd R 231* however, the court recognised that otherwise admissible evidence may be excluded if it was unfair to the accused and might cause a miscarriage of justice – though the bare fact of the indemnity was not itself sufficient, usually requiring some additional circumstance which would convince the trial judge to take the view that a fair trial could not be ensured by giving the usual warning to the jury; e.g. in *R v Falzon (No 2) [1993] 1 Qd R 618*, because the indemnity was conditional upon the witnesses testimony corresponding with his statement, a judicial comment was appropriate.

Whilst an indemnified witness has a powerful inducement to ingratiate himself, there is perhaps a greater sense of judicial unease about an unindemnified person giving evidence. He continues to be exposed to prosecution in relation to the very offences about which he is to give evidence. The courts have recognised the existence of this danger and have been prepared when necessary to reject such evidence. *R v Peirce and Others [1992] 1 VR 273*.

**Cross-examination of an accused**

It may apply in relation to cross-examination of an accused person as to his criminal convictions. Section 15(2)(c) of the Evidence Act requires a prosecution application to the court for permission if any of the criteria in s.15(2)(a)-(d) are satisfied to allow an accused person to be cross-examined as to previous offences of which he has been convicted or has committed or has been charged with or cross-examined to establish that he is of bad character.

In *Phillips v R (1985) 159 CLR 45*, the High Court in considering this provision, determined that the proviso gives statutory recognition to the basic discretion inherent in all trial judges to exclude evidence otherwise admissible if it would unfairly prejudice the accused. The discretion is an unfettered one, governed once it arises, solely by what the interests of justice require in any given case. The discretion to prevent such an attack on the accused would usually be exercised sparingly and cautiously. Such considerations in practice often results in the exercise of discretion, if at all, in favour of the Crown, only so far as the cross-examination of offences of dishonesty or those very similar to the offence which the jury is trying.

(See *Carter's Volume 2, s.15 Evidence Act, [80, 105]* particularly at [80, 105.15] and *Evidence Law in Queensland* by JRS Forbes pp 132-148).
Relationship Evidence


But in relation to similar fact evidence, given the test for admissibility formulated by the High Court in Pfennig v The Queen (1995) 182 CLR 461, (as applied by the Court of Appeal in R v O’Keefe (2000) 1 Qd R 564), this more onerous test gives little room for invoking the Christie discretion.

Relationship evidence in the context of uncharged acts of sexual activity is usually led by the prosecution to show the true nature of the relationship between the defendant and complainant. It can be used to explain otherwise inexplicable conduct by the complainant such as submitting without protest, to what is alleged to have occurred. It is not directly relevant to the facts in issue. Arguably then, it carries less probative weight than similar fact evidence but its prejudicial effect may not be lower because usually, the evidence is of the same character as that charged, i.e. evidence of previous similar misconduct. There is a real chance that despite any judicial warnings that may be given, the jury may focus on the uncharged acts and reason that the accused had a tendency to commit the type of offence for which he is charged, i.e. propensity. Moreover, as the nature of the allegations are sexual, there is an inherent danger of additional jury bias. Arguably, because relationship evidence relies on a particular predilection of the accused to act unlawfully towards the particular complainant, it is more prejudicial than similar fact evidence, which may disclose a generalised disposition on behalf of the accused to act in a similar way to that now alleged.

Chesterman J in his dissenting judgment in R v A [2000] QCA 520 was of the view that relationship evidence should not be admitted unless it is genuinely required to prove contextual elucidation of the relationship. It is admissible then only when the complainant’s evidence about the offences might appear unintelligible or incredible unless put in context. This would not occur in a case where e.g. a number of offences occurring over a long time are charged on the one indictment so that the complainant’s evidence in support of each offence will reveal the relevant factual context. Chesterman J says (at para 56):

"The purpose for which it is sought to be tendered should be identified before or at the time it is adduced. This point is made repeatedly in the cases: Pearce at 591, Gipp at para 184 per Callinan J and W per Pincus JA and Muir J at 532. Often such evidence will be inadmissible, either because it does not fulfil a legitimate role or because, as a matter of discretion, prejudice outweighs probative value. It seems to me that, ordinarily, an accused should object to the reception of such evidence which ought not to be admitted unless and until its purpose is identified and it can be seen to be appropriate for that purpose".

(See generally in this area “Propensity Evidence” by Paul Leask, available on LA Web).

Certain behaviours

In R v LM [2004] QCA 192, the Court of Appeal determined that the term factitious disorder (Munchausen’s Syndrome by proxy) is merely descriptive of a behaviour, not a psychiatrically identifiable illness or condition, it does not relate to an organised or recognised body of knowledge or experience. Therefore psychiatric evidence given at the trial was inadmissible. McMurdo P in the leading judgment further stated (at para 68):

“If I am wrong and the evidence was technically admissible, in my view it should, in any case, have been excluded in the exercise of the judge’s discretion. Judges and prosecutors must take particular care to ensure fairness in cases of this type where jurors will, naturally, feel sympathy towards the completely vulnerable and dependant child victims.
and abhorrence towards any mother who might act so unnaturally towards her babies. The
danger of admitting the evidence is that lay jurors may place undue emphasis on its very
limited relevance and probative value. It comes from a psychiatrist using impressive
medical expressions to address in a general way facts potentially apposite here, for
example, that the behaviour known as factitious disorder by proxy is sometimes perpetrated
by apparently caring, rational mothers who may sometimes harm themselves and more
than one of their children.”

Interwoven Admissible Evidence

Sometimes in practice, if the evidence sought to be excluded is inextricably interwoven with other
admissible evidence which could not be properly presented or would be out of context, then the
discretion will probably not be exercised – e.g. *R v Hasler* - where the Court of Appeal found that
the confessional evidence which also contained confessions to sexual offences with young girls
other than the complainant should not have been excluded. It deprived the evidence generally of
essential context and credibility.

A direction by the trial Judge may be appropriate when prejudicial evidence which might otherwise
be excluded is inextricably interwoven with admissible and probative evidence.

On an appeal, given that reasonable minds may differ as to what is or is not an appropriate
exercise of the discretion, it must be shown that a refusal to exclude prejudicial evidence was a
misconception of a legal principle or plainly wrong *Kyriakou (1987) 29 A Crim R 50*

Whilst *Christie* is an exercise in judicial discretion, it is for the defence to first raise the point by
clearly identifying the lack of probative value and the prejudicial effect alleged. The judge is not
obliged to raise a point of discretionary exclusion if the defence does not do so.