discretionary power

and the *Evidence Acts* 1995 (Cth and NSW)

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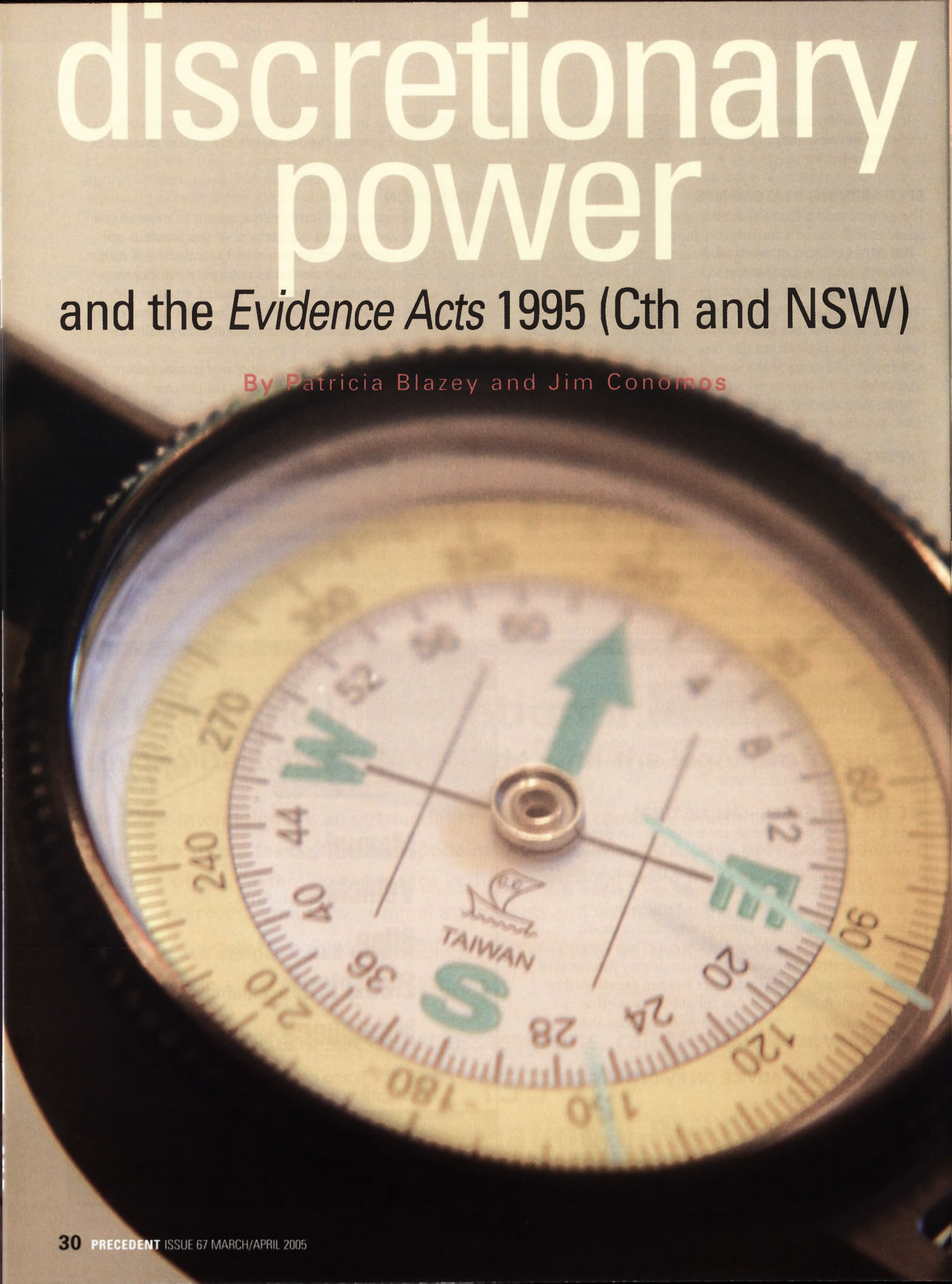

There is always a need – from time to time – to re-equate the profession with developments in the laws of evidence. Substantive law can operate only within the framework of such laws.

THE RANGE OF DISCRETIONS IN THE EVIDENCE ACTS

Discretions in the *Evidence Acts* range from being guided to unguided – that is, they range from giving the judicial officer guidelines as to the way in which a particular discretion should be exercised, through to a wide, unguided discretion.

The guided discretion

The guided discretion requires the judicial officer to consider a number of factors before deciding whether to exercise his/her discretion and exclude a category of evidence. This process of decision-making requires consideration of each sub-section and balancing the question of the assistance of the evidence to the court against factors such as probity, importance of the evidence, and gravity of the offence.

By way of example, s138(I)(3) sets out the matters that the court is to take into account in determining whether to exclude improperly or illegally obtained evidence.

'Section 138(I)(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and
(b) the importance of the evidence in the proceeding; and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
(d) the gravity of the impropriety or contravention; and
(e) whether the impropriety or contravention was deliberate or reckless; and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note: The international Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986.'

The unguided general discretion

The unguided discretionary sections give the judicial officer considerable freedom of choice that allows for value-laden decisions through a personal assessment of the facts and issues. Sections 135, 136 and 137 do not provide guidelines on the exercise of discretionary power, but are merely principles of justice familiar to the common law. The exercise of these discretions are, as Odgers[1] points out, situations in which evidence may be relevant in different ways depending on varying factual situations. Clearly arguments on discretionary limitations can be difficult and require careful consideration.

Examples include ss135, 136 and 137:

'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.

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.

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

'The Discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual and depends on the Constitution, Temper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which Human Nature is liable.'

Doe d Hindson v Kersey (1765), Lincoln's Inn Library Trial Pamphlet No. 204, p208.

HISTORICAL CRITICISM OF DISCRETIONARY POWER

Historically, discretionary power has been the subject of continued criticism. One of the most scathing statements was made by Lord Campden who, over 200 years ago, observed:

> ' The Discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual and depends on Constitution, Temper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which Human Nature is liable.'[2]

Twenty-five years later, Grose J in *R v Inhabitants of Eriswell*[3] levied criticism on both magistrates and judges in the Courts of Quarter Sessions for not confining themselves to evidential rules, stating *'I dread that rules of evidence shall ever depend upon the discretion of Judges; I wish to find the rule laid down and abide by it.'* Though Lord Campbell's statement may appear somewhat emotive and to a certain extent reflects an era in which judicial decision-making may not have been as sophisticated as it is today, it warns of the dangers of unfettered discretions.

DISCRETIONARY POWER AND THE *EVIDENCE ACTS* 1995

Judicial discretion in the *Evidence Acts* is limited to a certain extent by guiding principles, but the judicial officer has power to exercise discretion in relation to the facts of individual cases. The Acts contain imprecise terms such as 'substantially outweighed', 'unfairly prejudicial', 'causing undue waste of time', 'misleading or confusing', and 'danger'. Incorrect decision-making based on such vague standards can drastically affect the outcome of legal proceedings. Parties appearing before courts depend on a balanced exercise of discretion that is inherently free of bias. It can be argued that, in practice, discretionary power can lead to imprecise decision-making because it is intertwined with personal views, personal experiences and prejudices.

THE APPROACH OF THE COURTS

The review of discretionary decision-making is generally avoided by superior courts for a variety of reasons. In the first place, the question of whether judges should be given discretionary power has been the subject of diverse views both in relation to that imposed by statute and under the common law. In *R v Jeffries*[4] Jordan CJ – although he expressed a discomfort with such power – argued against restricting statutory discretions:

> 'When a discretion in terms unfettered, is conferred on a Court by an Act of Parliament, it is generally recognised to be undesirable for the Court to assume to tie its hands in advance by rules confining the exercise of the discretion to particular classes of case or sets of facts; but when the discretion proceeds from judge-made rules, and relates to trials for criminal offences, it is undesirable that the trial Judge, in directing himself as to how he should exercise it, should be set adrift on an unchartered sea with no instrument of navigation but the length of the Chancellor's foot.'

Norbis v Norbis[5] gives some guidance in the area of broad discretionary decision-making. Mason and Deane JJ state:[6]

> 'It has sometimes been said by judges of high authority that a broad discretion left largely unfettered by Parliament cannot be fettered by the judicial enunciation of guidance in the form of binding rules governing the manner in which the discretion is to be exercised ... *However, it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise*[7] ... The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines.'

This, it is argued, is the appropriate approach for appellate courts; therefore, without fettering the independence of the judicial officer, the need for justice is an overriding consideration, and principles and guidelines need to be provided by the superior courts.

At the end of the day, justice is the overriding factor and is summed up by Gibbs J (as he then was) in R *v Miers*,[8] where he states:

> 'The question then arises whether in all the circumstances, although the discretion was not properly exercised in the sense that a relevant matter was not considered, the result was, nevertheless, right or, even if the result was wrong, whether the appellants thereby suffered any prejudice.'

It is clear that discretionary decision-making rests in the court of first instance where effective, careful, well-prepared arguments will be required to ascertain the admission or non-admission of relevant evidence. The fundamental role of the courts in a criminal trial is to protect an accused from evidence that is technically admissible but which a jury is likely to use in an irrational manner.[9] Fairness to an accused

is an important factor, a requirement that is influenced by the gravity of the offence. However, public policy considerations such as offenders being brought to account and concern for victims of crime are not to be overlooked.

Judgments indicate opposing views as to whether there should be guiding principles in relation to wide discretionary decision-making. In *R v Sang,*[10] Lord Fraser expressed the view that where principles of fairness and probative value outweigh prejudicial effect, standards are not necessary. This is because, even though judges will exercise discretions according to their individual views and the standards by which they do so will be subjective and open to variation, it would not be practical to apply standards because judges are accustomed to deciding what is reasonable. Any attempt to lay down precise rules was not practicable because the sole purpose of having discretions is that they should be sufficiently wide and flexible to be capable of being exercised in a variety of circumstances, which cannot be foreseen.

Some Australian authorities support the need for judicial guidance when a discretion is exercised. The following passage from Dixon J's (as he then was) judgment in *House v The King*[11] is cited in many judgments in this regard:[12]

> '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 so doing. 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 substantial13 wrong has in fact occurred.'

AN EXAMINATION OF THE CASE LAW

In recent years there have been a number of important decisions emanating both from the High Court of Australia and the NSW Court of Criminal Appeal. The cases generally involve issues regarding statutory interpretation. *Papakosmas v The Queen*[14] is of the utmost importance, as it states the correct approach to be taken when considering the relationship between the *Evidence Act* and the pre-existing common law. The case concerned the admission of evidence of complaint. In this case, it was argued that statements made by witnesses in relation to evidence of complaint had no probative value beyond that at common law, and could therefore be used only to rebut an adverse inference in relation to the complainant's credit.

The High Court was required to consider whether the Act abolished the common law rule that recent complaint evidence in sexual assault cases is relevant only to the credibility of the complainant and not to any fact in issue. It was also argued that a miscarriage of justice had occurred because the trial judge had considered this section alone without reference to s136.

The trial judge admitted the evidence of complaint. The court held that such evidence should be admitted by reference to the Act and not with common law notions of relevance and admissibility.[15] Gleeson CJ and Hayne J stated:

> 'It is clear from the language of the Act and from its legislative history, that it was intended to make and that I has made, substantial changes to the law of evidence in New South Wales ... Section 9 of the Act provides that it does not affect the operation of the common law except so far as the Act provides otherwise expressly or by necessary intendment.
>
> Even so, the sections of the Act relevant to this case undoubtedly make express provision different from the common law. It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated. The appellant argues that the meaning and effect of that language, properly understood, is to be determined in the light of and in a manner that conforms to the pre-existing common law. >>

For reasons that will appear, that argument must be rejected. In order to explain it, however, it is necessary to refer to the position at common law.'[16]

It was also held that the powers to exclude or limit the evidence in ss135, 136 and 137 should not be invoked in a general fashion so as to effectively reinstate the common law rules and distinctions.

TENDENCY AND COINCIDENCE EVIDENCE

Sections 97(1) and 98(1) of the *Evidence Acts* 1995 (Cth & NSW) deal with the admission of tendency and coincidence evidence. Section 97(1) deals with the character, reputation or conduct of a person and propensity to act in a particular way or to have a particular state of mind. Section 98(1) deals with the admissibility of the evidence of two or more similar, related events. Under the common law, this type of evidence was termed 'propensity' and 'similar fact' evidence. This type of evidence can be admitted both in civil and criminal cases. Such evidence is highly prejudicial to an accused, in that it allows a jury and judicial officer (when sitting alone) to judge a person's conduct at other times and in other situations by admitting such evidence.

Section 97 relates to tendency evidence.

'97(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, either by itself or having regard to the other evidence adduced or to be adduced by the party seeking to adduce the evidence have significant probative value.

Section 98 relates to coincidence evidence.

98(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, either by itself or having regard to the other evidence adduced or to be adduced by the party seeking to adduce the evidence have significant probative value.'

In a criminal trial, the party seeking to admit such evidence must go through a second hoop under s101(2) of the *Evidence Acts*, which provides:

'tendency evidence about a defendant , or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant'.

Prior to the passing of the *Evidence Acts* the common law in this area prevailed. *Pfennig v The Queen*[17] (*Pfennig*) provided guidance as to the test to be applied when the judge was required to consider the admission of such evidence. The majority in *Pfennig* applied the test in *Hoch v The Queen:*[18]

'The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted it bears no reasonable explanation other than the inculpation of the accused in the offence charged.'[19]

This test required the application of a higher threshold test than that set out in the *Evidence Acts*. The tension between the common law and statutory law in this regard has been responsible for numerous appeals. A clear decision from a superior court was essential, and the decision in *Ellis* provides that guidance.

In *Ellis*, the trial judge admitted coincidence evidence by applying the words of the statute without regard to common law principles. On appeal to the NSW Court of Criminal Appeal, it was argued that the trial judge should have applied the common law test in *Pfennig* in order to satisfy the statutory test set out in s101(2) of the Act. Spigelman CJ rejected this argument and held that the *Evidence Act (NSW)* was a statutory scheme, which covered the field and excluded resort to the common law, as it was inconsistent with s101(2). *Pfennig*, he held, required the court to undertake a 'no rational explanation' test, which does not comply with the requirements of the statute. The statute should be read in accordance with the decision of the High Court in *Papakosmas v The Queen*.

Initially, special leave to appeal to the High Court of Australia was granted in *Ellis*, but such special leave was revoked by a full bench of the High Court. Their Honours did not cavil with the decision of the NSW Court of Criminal Appeal, as it followed the reasoning in *Papakosmas*. Kirby J observed that the facts in *Ellis* were 'unmeritorious' and the High Court could add nothing further in relation to this particular set of facts.[20] The transcript reveals the difficulties faced by an appellant in a case where an appeal point relating to further severance of the indictment had not been argued at first instance.

CHARACTER EVIDENCE

Stanoevski v the Queen[21] dealt with an appeal by a solicitor charged with conspiracy to cheat the NRMA of a sum of money. At her trial, she adduced evidence of good character. As a result, the Crown sought and was granted leave to cross-examine the appellant from statements contained in an investigative report by the Law Society of NSW. She was found guilty, and her appeal to the NSW Court of Criminal Appeal was dismissed. She was granted special leave to appeal by the High Court of Australia.

The High Court examined the statutory scheme governing the admission of character evidence and the leave required pursuant to s112 of the Act. Section 192(2) of the Act must be also be considered before evidence of this nature can be admitted.

'Leave, permission or direction may be given on terms

192(1)If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) without limiting the matters that the court may taken into account in deciding whether to give the leave, permission or direction it is to take into account:
  (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
  (b) the extent to which to do so would be unfair to a party or to a witness; and
  (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
  (d) the nature of the proceedings; and
  (e) the power (if any) of the court to adjourn the hearing or to make another order to give a direction in relation to the evidence.'

In a unanimous decision, the High Court held that the trial judge had failed to avert to the statutory discretion in s192(2) and, in so doing, had not considered all the matters set out in the section. The result was that a miscarriage of justice had occurred. The conviction was quashed and a new trial ordered.

IDENTIFICATION EVIDENCE

In *R v Blick*[22] the Crown case relied on the admission of photographic identification. An application was made to the trial judge to have the evidence excluded under s137 of the Act. This application was refused. The trial judge approached the exercise of his discretion by applying the common law test as set out in *R v Christie*.[23] On appeal and in a unanimous decision, the NSW Court of Criminal Appeal held that there had been a miscarriage of justice and stated that '*...the correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of prejudice to the defendant there is no residual discretion. The evidence must be rejected.*'[24] Hence, a trial judge must adhere to the wording of the discretionary section when exercising a discretion.

CONCLUSION

The discretionary sections in the *Evidence Acts* are many and varied. Adherence to the statutory scheme and not to the prior common law is a matter that advocates and judicial officers alike need to be conscious of at all times, whether the case is in a civil or criminal jurisdiction. Every case has a unique set of facts, and the application of discretion is affected by the context and type of evidence sought to be admitted. There will no doubt be many more appeals in this area of law, and the High Court decision in *Papakosmas* must be followed in this regard. However, at the same time it is hoped that the legislature will provide more guidance in the sections of the Acts in relation to the exercise of judicial discretion that appear to cause interpretation problems. Though judicial discretion is essential to a balanced system of justice, the words of the Honourable Mr Justice Smith are important:

'Detailed rules of evidence lend to the trial the appearance of proceedings controlled by the law, not by the individual trial judge's discretion, and reduce the scope for subjective decision'.[25] ■

Notes: **1** S Odgers, *Uniform Evidence Law,* Federation Press, (1995) Sydney, at 232. **2** *Doe d Hindson v Kersey* (1765) Lincoln's Inn Library Trial Pamphlet No. 204, p128. **3** (1790) 100 ER 815 at 818. **4** (1947) SR (NSW) 284 at 291 See also *R v Jessop* [1974] Tas SR 64 at 83. **5** (1986)161 CLR 513. **6** *Ibid* at 519. **7** Authors' emphasis. **8** [1967] Qd R 547 at 552. **9** *Noor Mohamed v The King* [1949] AC 182, at 192. **10** [1979[2 All ER 1222 at 1241-2. **11** (1936) 55 CLR 499 at 504-505. **12** See *Norbis v Norbis* (1986) 161 CLR 513 and *R v Scott Codey; R v Phillip Gaeta* (1994) No. 60736 and 60737. **13** Emphasis added. **14** [1999] 196 CLR 297 para 97. **15** [1999] 196 CLR 297 para 97. **16** *Ibid,* at para 10. **17** (1995) 182 CLR 461. **18** (1988) 165 CLR 292. **19** (1995) 182 CLR 461 at 481. **20** *Ellis v The* Queen [2004] HCA Trans 488, 1 December 2004, at www.austlii.com.au at p14. **21** (2001) 202 CLR 115. **22** (2000) 111 A Crim R 326. **23** [1914] AC 545 at 559 and 564. **24** (2000) 111 A Crim R 326 at para 20 per Scheller JA. **25** The Hon Justice Smith, 'The More Things Change the More They Stay the Same? The Evidence Acts 1995 – An Overview', in *UNSW Law Journal,* Vol. 18(1), 1995.

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