OXYMORONIC LAW: *AD HOC* 'EXPERT' OPINION EVIDENCE

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ad hoc *adj* done or set up solely in response to a particular situation or problem and without considering wider issues.
ex-pert *n* somebody with a great deal of knowledge about, or skill, training, or experience in, a field or activity.

During the 1980s, judges developed an exception to the general prohibition on opinion evidence that allowed non-experts to express opinions about the content of covert voice recordings. This article offers a critical overview of the ways in which this common law exception has been expanded under the Uniform Evidence Law (UEL) regime to enable police, and others involved in an investigation, to give highly incriminating opinion evidence about the *identity* of persons, on the basis of their exposure to recordings of sounds and images associated with criminal acts.[1]

CONSTRAINED BEGINNINGS: THE ADMISSION OF TRANSCRIPTS

In *R v Menzies* (1982), faced with very poor quality covert voice recordings, the New Zealand Court of Appeal affirmed jury access to a transcript of the recordings prepared by a detective.[2] The Court explained that the detective had become a 'temporary expert' in the sense that by 'repeated listening' to the tapes he has qualified himself '*ad hoc*'. The status of 'expert' enabled the detective to present his (otherwise inadmissible) opinion about what was said on the tapes.

Following *Menzies*, *ad hoc* expertise was almost always restricted to the production of transcripts from sound recordings as an interpretive aid for the jury. In the leading Australian authority, *Butera v DPP (Vic)* (1987), the High Court held that written translations of covert recordings could properly be given to the jury 'as an aid', in circumstances where the accredited interpreters who had prepared the translations had listened repeatedly to the recordings and had thus become '*ad hoc* experts as to what was recorded'.[3] Similarly, in *Eastman v The Queen* (1997) and *R v Cassar* (1999), both decided under the relatively new UEL, transcripts of covert recordings produced by police officers were admitted as aids to assist the jury to decipher the recordings.[4] In both of these cases, the police officers had listened repeatedly to the tapes. In relation to these early cases, two points should be emphasised. First, as both *Eastman* and *Cassar* acknowledge (though are perhaps reluctant to accept), the enactment of s48 of the UEL, with its generally permissive approach to the admission of transcripts, had effectively overcome the need to qualify the maker of the transcript as an *ad hoc* expert. Second, these cases do not provide a general warrant for interpreters, and others who have listened repeatedly to audio-tapes, to proffer their opinions about the 'identity' of the speaker as admissible evidence.

EXPANDING *AD HOC* EXPERTISE TO 'IDENTIFICATION'

Notwithstanding permissive statutory developments, consequent with the introduction of the UEL, the scope and use of the common law idea of the *ad hoc* expert actually expanded in the years after 1995. In response to the growth in voice recordings and incriminating images, *ad hoc* expertise was expanded to accommodate positive identification evidence. The Australian case marking the transition from assisting the fact-finder to decipher the content of audio surveillance tapes to the more problematic process of identification is *R v Leung* (1999).[5] This reconfiguration of the scope of the rule allowed the prosecutor, in effect, to bypass both the common law regulating voice identification (where the UEL was silent) and statutory restrictions on expert opinion evidence (ss76 and 79).

In *Leung*, the Court of Criminal Appeal (CCA), citing *Menzies*, *Butera*, *Eastman* and *Cassar*, concluded that the concept of the *ad hoc* expert 'continues to have application under the NSW evidentiary regime', and consequently allowed an interpreter – who had listened repeatedly to a number of surveillance tapes – to give positive identification evidence incriminating the accused. The court held that any limitations affecting the integrity or reliability of the identification – including, most disturbingly, the cross-lingual nature of the voice comparison – went to the weight of the evidence, rather than its admissibility.

This permissive trend continues in subsequent voice-identification cases, such as *Li v The Queen* (2003), *R v El-Kheir* (2004), *R v Madigan* (2005), and even *Korgbara v The Queen* (2007).[6] In *Li*, the CCA declared that voice-identification evidence ought not to be subject to the same constraints as visual-identification evidence, indicating that 'admission of voice-identification evidence, in contrast, turns on judicial discretion'. The court in *Li* also affirmed the admissibility of a police officer's visual-identification evidence.

In *Smith v The Queen* (2001), the High Court restricted the practice of police officers, with limited familiarity of the accused, making identifications from incriminating security images.[7] Following dicta in *Smith*, however, police and prosecutors began to solicit the services of experts – primarily anatomists and physical anthropologists – to interpret incriminating images. These *experts*, often described as 'facial-mappers' or 'face and body-mappers', produced positive identification evidence, often with very high levels of confidence, by comparing facial features, and sometimes body features and movement. Initially, and apparently with good reason, this evidence seems to have been excluded by the District Court of NSW. Its eventual admission, in cases such as *R v Tang* (2006), *R v Jung* (2006) and *Murdoch v The Queen* (2007), provided grounds for appeal.[8]

In *Tang*, the CCA ruled that face and body-mapping evidence, offered by an anatomist, was not admissible as opinion evidence of identity based on 'specialised knowledge'. However, the court decided that the anatomist was qualified as an *ad hoc* expert, on the basis of her repeated exposure to the images. As an *ad hoc* expert, she would be allowed to describe similarities (and, in theory, >>

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differences) between images of an unknown offender and the accused.[9] The approach in *Tang* was authoritatively endorsed at common law by the NT Court of Criminal Appeal (NTCCA) in *Murdoch*. While the NTCCA determined that the technique employed by the same anatomist did not have a 'sufficient scientific basis' for identification purposes, as an *ad hoc* expert, she could give evidence that there were no meaningful differences between Murdoch and the person of interest.

For a civil justice example, see the trademark infringement case of *Nokia v Truong* (2005).[10]

LEGAL AND TECHNICAL PROBLEMS

Inconsistency and analytical untidiness

A comparison of the courts' approaches to voice and visual identification reveals an admissibility jurisprudence that is itself *ad hoc*.

In relation to voice-recordings, police officers involved in an investigation are entitled to make positive identifications in court if they have listened repeatedly to them. These investigators need not have any prior experience or personal familiarity with those allegedly speaking. They do not require 'training, study or experience' with voice comparison. Positive voice identifications can also be made by interpreters and experts, such as linguists. Again, these can be based on the aural comparison of voice-recordings, even where the language and conditions are different and the interpreter or linguist does not possess expertise in voice comparison or even the language spoken.

When it comes to incriminating images, things are different, but nonetheless disturbing. Highly qualified anatomists and physical anthropologists, for example, are prevented from making positive identifications on the basis of comparisons of images, or between images and a corporeal target. Instead, they are restricted to giving testimony about apparent similarities and differences between the accused and a person of interest in an image linked to a crime. At the same time, police officers with no relevant qualifications or training are allowed to make positive identifications from images on the basis of very limited familiarity with an alleged peculiarity – such as gait, posture or hair style – gained during the course of an investigation.

The lack of principle is compounded if we include judicial responses to attempts by defence counsel to introduce expert evidence or to argue for a more restrained approach. While Australian courts seem to be expanding avenues for the admission of incriminating opinion evidence of unknown reliability, attempts to use rebuttal experts to respond to the opinions of *ad hoc* experts conjured by the prosecution have occasionally been unsuccessful. Judges routinely allow incriminating evidence from *ad hoc* experts but have prevented an accused person from adducing evidence from rebuttal witnesses actually qualified in an ostensibly relevant field – such as acoustics, linguistics or psychology.

Validity and reliability problems with voice and image identifications

The most serious problem with *ad hoc* expertise is the fact that the techniques employed by police, and even those with formal qualifications, have not been adequately tested, and the evidence is often obtained in circumstances which accentuate the risk of contamination and error. It is important to stress that the various techniques associated with voice and visual identification, which rely primarily upon different kinds of comparison and repeated exposure, could be tested but have not been.[11] It would not be difficult to rigorously and independently test the ability of police, interpreters and anatomists to make voice and visual identifications. If the techniques or technologies are new or contested, then judges should expect to read about validation studies, rates of error and proficiency. Prior admissibility decisions, along with the confidence and the eminence of the expert, are no substitute for evidence of validity and accuracy.

Nor does limiting opinions to comments on similarities and differences somehow sanitise incriminating opinion evidence. Where *ad hoc* experts are not able to make reliable identifications because of problems with unproven techniques, they will not necessarily be able to undertake useful comparisons. If sounds and images are poorly resolved, or there are no credible means of overcoming artefact impediments (that is, technical imperfections and distortions), then allowing experts to opine about similarities and differences is as undesirable as positive identification evidence.

Legal 'safeguards'

Judges who admit *ad hoc* expertise tend to place confidence in the restorative potential of cross-examination, defence (or rebuttal) experts and judicial warnings (ss116 and 165). On closer examination, the effectiveness of these purported safeguards seems to be more of an article of faith than any kind of rational response to the very real risks to the accused. Little empirical evidence supports the contention that cross-examination, rebuttal experts and directions are effective at consistently and fairly exposing problems with expert opinion evidence, let alone *ad hoc* expert opinions.

Cross-examination and rebuttal experts provide means of challenging *ad hoc* expertise and exposing some of its weaknesses although, in practice, effective cross-examination

and rebuttal experts are often just possibilities. Proponents assume that the defence is in a good position to challenge the opinion of senior police or experienced interpreters and forensic scientists retained by the prosecution. Confidence in cross-examination and the restorative potential of defence experts assumes that defence lawyers are familiar with the technical detail and limitations of *ad hoc* expertise, that they will be capable of effectively conveying limitations to a lay jury (and judge), and that they have the resources to undertake the task. It also assumes that rebuttal experts can be identified and funded, will agree to participate, and will be admitted.

Unfortunately, judicial directions and warnings appear to have limited potential in combating problems with *ad hoc* expertise. Virtually all of the experimental studies and empirical research suggests that judicial directions and instructions are difficult to follow, especially when presented *seriatim* (in series) at the end of the trial.

None of this should be understood to suggest that cross-examination and rebuttal experts cannot, in some cases, be highly effective. Similarly, judicial instructions might occasionally find their mark. This, however, does not provide adequate grounds for making them the *primary* bulwark against the opinions of investigators (and others in their 'camp') masquerading as 'specialised knowledge'. As protections, cross-examination, rebuttal experts and directions provide impressive rhetorical grounds for allowing *ad hoc* expertise to go before the jury, rather than standing as effective protections for the accused. They also require the defence to negate evidence of unknown probative value.

To the extent that the jury remains a viable institution, judges should not require it to determine the basic reliability of forensic techniques relied upon by the state. Its constitutional role is not compromised by the exclusion of unreliable evidence or incriminating evidence of unknown reliability.

AD HOC EXPERTISE AND THE UEL

It is striking that the transition – from the use of *ad hoc* experts in cases concerned with the content and admission of transcripts of covert sound recording – to *ad hoc* experts expressing opinions that purport to identify the accused from audio or visual recordings has passed without comment. It is also striking that this expansion of the use of *ad hoc* expertise occurred in the face of the new UEL, under which s48 removed the need to rely on this common law exception for the admission of transcripts. But there are further reasons why *ad hoc* expertise sits uncomfortably within the UEL regime.

Ad hoc expertise, the opinion rule and 'specialised knowledge'

Under the UEL, opinion evidence is presumptively excluded by the *opinion rule* (s76). That is, most witnesses are prevented from proffering their opinions to prove things even if the opinions are relevant to a fact in issue. There are, as there were at common law, exceptions to the severity of the operation of the opinion rule. The UEL provides s78 (the limited lay opinion exception) and s79 (the expert opinion exception). Neither provides an adequate basis for the admission of the kinds of evidence admitted in cases such as *Leung*, *Li* and *Tang*.

Section 79 provides an exception to the exclusionary impact of the opinion rule where the witness has 'specialised knowledge' based on their 'training, study and experience' and the opinion is 'wholly or substantially based' on that 'knowledge'.[12] Australian judges are yet to define 'specialised knowledge', although in *Tang* the CCA endorsed the following:

> '"knowledge" connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts on good grounds.' [138]

What is apparent, on the basis of this definition, is that few (if any) of the *ad hoc* experts encountered so far would seem to possess 'knowledge', let alone 'specialised knowledge', enabling them to make identifications that are not subjective or speculative. Just because *ad hoc* experts have a comprehensible 'technique' – such as repeated listening, close scrutiny of images and even technical enhancement – does not mean that their opinions have a credible basis (for example, *Makita v Sprowles*) or are more than subjective belief or unsupported speculation.[13] Repeated listening may produce confirmation bias, contaminate the evidence, and does not provide reasonable >>

grounds for admitting identification evidence or evidence of similarity. In the absence of evidence about the validity and reliability of techniques, there are few reasons to believe that incriminating *ad hoc* expert opinions are 'known facts', or are inferred from them on 'good grounds'.

Section 79, in theory, provides protection for the accused against prosecution predicated on the untested opinions of investigators. By expanding the scope of *ad hoc* expertise, the requirement that incriminating opinions should be based on 'specialised knowledge' *and* based on a person's 'training, study or experience' has been circumvented. *Ad hoc* expertise does not, by definition, involve 'specialised knowledge'. If it did, it would be simply 'expertise'. The fact that prosecutors and judges have to appeal to *ad hoc* expertise suggests that there is no 'specialised knowledge' or no legally recognisable experts able to do – in a methodologically rigorous way – what *ad hoc* experts are allowed to get away with. *Ad hoc* expertise would seem to generate the kinds of undesirable opinions that ss76 and 79 were designed to exclude from the courtroom.

The *Christie* discretion: ss135 and 137

In addition to Pt 3.3, one might have thought that the statutory incarnation of *Christie*, the common law discretion empowering the trial judge to exclude evidence where the probative value of the evidence was outweighed by the danger of unfair prejudice to the accused, would provide a means of excluding *ad hoc* expert opinion evidence.

While s137 seems to offer the means to exclude evidence – especially where there is a very real chance that the jury might attach considerable weight to the incriminating opinions of police officers, interpreters, linguists and anatomists – in practice, ss135 and 137 do not provide much protection for defendants.

Unfortunately, rather than determine the probative value of the evidence and balance that against real dangers of unfair prejudice, judges take the probative value of the evidence – lay and expert – *at its highest*. The trial judge balances the risk of unfair prejudice against the maximum value that the opinion evidence could, *if accepted*, sustain. This means that the trial judge assumes that the evidence *is reliable* – because a jury might – and then considers dangers associated with the evidence on the basis of that assumption. So, without knowing about the reliability of the evidence – that is, whether *ad hoc* expert witnesses can actually do what they claim – *the judge assumes they can* and then considers what unfairness might arise if the opinions were reliable. This approach is structurally oblivious to the most serious prejudice associated with the admission of any opinion evidence. It ignores unreliability and the very real danger that the jury might actually rely upon unreliable identification evidence, especially where the evidence is presented by an investigator or person highly qualified (or experienced) in a discipline apparently related to the opinion evidence.

There is a conspicuous tendency among judges who continue to use the concept of *ad hoc* expertise to effectively ignore s137. Because these judges are disrupting the operation of the *Evidence Act* to rationalise the admission of highly incriminating opinion testimony, they tend to downplay risks and dangers to the accused. This response betrays a disconcerting and unprincipled tendency to expand the rules facilitating the admission of incriminating opinion evidence of limited probative value on the basis of common law categories, and a simultaneously narrow construction of statutory rules designed to protect the accused from unfairness and unreliable opinion evidence.

CONCLUSION

Ad hoc expertise has provided an exception to the statutory opinion rule driven by convenience to investigators and prosecutors. Judges seem to be intent on allowing investigators to testify so that jurors are not left to listen to recordings or view images without *assistance*. Recourse to *ad hoc* expertise provides a means of allowing otherwise inadmissible incriminating opinions to go before the jury, regardless of the reliability of the techniques employed.

Such recourse to *ad hoc* expertise should stop immediately. The concept should have been abandoned with the introduction of the UEL. There is no scope for expert opinion intended 'to prove the existence of a fact about the existence of which the opinion was expressed' outside of the statutory exceptions to s76. When it comes to incriminating opinion evidence adduced by the prosecution, it must be based on 'specialised knowledge'. *Ad hoc* expertise is not 'specialised knowledge' or even expertise. It is speculation, assertion (*ipse dixit*), and subjective opinion of unknown reliability. ■

Notes: **1** The Uniform Evidence Law is embodied in a series of substantially similar acts (for example, the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth)) with application in NSW, Tasmania, the ACT, the Federal Court and, in the near future, Victoria. **2** *R v Menzies* [1982] 1 NZLR 41. **3** *Butera v DPP (Vic)* (1987) 164 CLR 180 at 187. **4** *Eastman v The Queen* (1997) 76 FCR 9; *R v Cassar* [1999] NSWSC 436. **5** *R v Leung* (1999) 47 NSWLR 405. **6** *Li v The Queen* (2003) 139 A Crim R 281; *R v El-Kheir* [2004] NSWCCA 461; *R v Madigan* [2005] NSWCCA 170; *Korgbara v The Queen* (2007) 170 A Crim R 568. **7** *Smith v The Queen* (2001) 206 CLR 650. **8** *R v Tang* (2006) 65 NSWLR 681, *R v Jung* [2006] NSWSC 658; *Murdoch v The Queen* (2007) 167 A Crim R 329. **9** In *Tang*, the Chief Justice marginalised admissibility jurisprudence in NSW through a curious reluctance to read 'reliability' into 'specialised knowledge' (s79). **10** *Nokia Corporation v Truong* [2005] FCA 1141. **11** National Research Council, *Strengthening the forensic sciences in the US: The path forward* (2009) 5. **12** *HG v The Queen* (1999) 197 CLR 414 at [39]. **13** *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305.

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