The Need to be Proactive in Pre-Recordings

Introduction

1. There have been numerous successful appeals to the Court of Appeal from decisions of judges of the District Court arising from inadmissible evidence being put before juries. This evidence ought to have been excluded at the pre-recording or at trial. A view has been expressed in the past that it is the duty of the trial judge to exclude such material. The position taken by counsel on either side is not determinative of the issue. Obviously, it is the duty of a trial judge to exclude inadmissible evidence.[1] However, it is contended in this paper that a judge should call for submissions during a pre-recording where it is clear that irrelevant or highly prejudicial evidence has been given. This memorandum has been provoked by comments made in a recent journal article.[2]

2. There are two reasons for that contention. Firstly, such evidence should be excluded at the first available opportunity in accordance with the law.[3] Secondly, there are practical problems which arise at trial which may prevent editing of the video tape or the transcript at the trial. This is more likely to occur on circuit where the facilities are not available to edit particularly the transcript which is made available to the jury.[4] In any event, even if it is in a centre which has the facilities, the trial can be delayed whilst the inadmissible material, identified by the judge or belatedly by counsel, is deleted.

Article by Pincus QC

3. Pincus QC was talking of how to approach the evidence issues raised in HML which deals with discreditable conduct or uncharged acts.[5] He stated:

> *The judge will ordinarily be asked to determine the admissibility of similar fact evidence in such cases early in the proceeding, when (or even before) the complainant gives evidence. The rest of the complainant's evidence and the examination and cross-examination of other witnesses, including any evidence given for the defence, might well displace or confirm an initial view that the similar fact evidence is sufficiently powerful to pass whatever test the judge applies.*

4. It is contended that any similar fact evidence should be considered at the pre-recording stage. It is suggested in HML that the prosecutor be asked at the

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1 *R v Gately* [2007] HCA 55 at [42] per Gleeson CJ; *R v Libke* [2007] HCA 30 at [35] and [47] per Kirby and Callinan JJ refer to the duties of a trial judge in the context of ensuring a fair trial)

2 Bill Pincus QC, *Similar Facts Again*, (2008) 82 ALJ 445 at 449

3 Gately v The Queen [2007] HCA 55 at [89]

4 The video may now be able to be edited electronically from Brisbane but it all takes time

5 (2008) 82 ALJR 723

beginning of a trial what use is to be made of such evidence.[6] Why not deal with it at an earlier stage? If the trial judge is asked to exclude such evidence, there will be practical problems as references to such discreditable conduct may be littered throughout the s 93A statement or statements and it may be the subject of cross examination at the pre-recording but not probative of an issue in the case and /or consistent with innocence. The observations by Pincus QC apply equally to inadmissible evidence at a pre-recording.

The effect of Gately's case

5. Reference should be made to s 21AM(1) of the *Evidence Act 1977* (Qld).[7] It provides:

> 21AM Use of pre-recorded evidence
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> (1) A video-taped recording of the affected child's evidence made under this subdivision for a proceeding, or a lawfully edited copy of the recording—
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> (a) is as admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court;

6. You may recall that in *Gately's* case, the jury were allowed unsupervised access to the videos in court without the judge being present. This was held to be contrary to established rulings.[8] Hayne J stated:[9]

> *The evidence that the affected child gives, although given at a "preliminary hearing", is given subject to all applicable rules governing relevance and admissibility.*

7. By itself, that statement is sufficient to justify the assertion that judges and counsel should be pro-active on a pre-recording to ensure that only admissible evidence be allowed.[10] The duty to exclude inadmissible should not be delegated to the trial judge alone. There are also the practical problems of editing the transcript at the commencement of the trial as has been discussed above. The duty of a judge hearing a pre-recording is not discharged by merely giving the legal representatives leave to edit. The primary duty of the judge is to initiate such discussion and to make appropriate rulings.

8. The problems with s 93A statements are exacerbated when there is more than one statement tendered. The High Court in *Gately* saw no difficulty in having more than one statement tendered, even though it was repetitive of the

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6 at [123]

7 *Gately's* case at p 7

8 per Gleeson CJ at [31] referring to *R v H* [1999] 2 Qd R 283 at 290-291

9 at [89]

10 The video is marked for identification only with appropriate warnings given when tendered: per Gleeson CJ at [3] and per Hayne J at [28] with whom Crennan J agreed

complainant's evidence.[11] In fact, the High Court saw no problem leading the evidence in chief as well.[12] There have been cases recently which have had up to four statements.[13] In another case,[14] there were two s 93A statements or records of interview.[15] They were made up of four audio tapes each with a corresponding transcript.[16] One interview did not correspond with the transcript which was retained on the court file purporting to reflect the evidence on the tape. It contained prejudicial material relating to drug abuse by the accused and a sexual interest in the complainant's sister. That material had been excluded by the judge and was not on the tape but retained in the unedited transcript. Although it was common ground that the jury got the edited transcript without the offending material, the Court of Appeal found that there was some uncertainty as to what material the jury had and was critical of the record keeping at trial. In fact, there was still one reference to drugs left in the audio tape which was plainly prejudicial and not admissible. This was one ground for finding that there was a miscarriage of justice and a new trial was necessary. This case illustrates the need for counsel and the judge to be vigilant, preferably at the pre recording stage.

9. There have been other aborted trials where inadmissible evidence on the pre-recording was not excluded. Examples of such instances include reference to being in gaol or previous criminal history, threats to kill and a history of violence, and other sexual activities not probative of the issues in the case. The occasion for pre-recordings can also be used for s 590AA applications. It is a waste of judicial resources to adjourn questions of admissibility when the judge hearing the pre-recording is in as good a position at that point as another judge who would have to reconsider the material at a later point. Further, the pre-recorded evidence includes the cross examination at trial. Defence counsel cannot expect to cross examine at large and then, if dissatisfied with the resultant evidence, seek to edit the transcript. Counsel should consider questions of admissibility prior to the pre-recording, and also before the trial. If there are issues of admissibility to be argued, notice should be given to the court, especially for a pre-recording. Arrangements can be made to avoid child witnesses being required to wait unnecessarily.

Children – Special Witness - Competence

10. Children and special witnesses may present other problems for a judge in a pre-recording. Problems can occur where a judge has not taken appropriate steps to determine the intellectual impairment of a special witness [17] or whether the witness is competent to give evidence.[18] Expert evidence can be called if necessary.[19]

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11 per Hayne J at [101]-[102] and [105] subject of course to ss 98,99, 102 and 130 of the *Evidence Act 1977*

12 per Hayne J at [103-104]

13 *R v Madden*, September 2008, Tutt DCJ, unreported.

14 *R v Beattie* [2008] QCA 299

15 ibid at [4]

16 ibid at [27]

17 *Evidence Act 1977*, s 21A

18 Ibid, ss 9A, 9B

19 *R v Libke* (2007) 81 ALJR 1309 at [97]

This should occur at the pre recording.[20] It did not occur in *R v R*. The first trial could not proceed once the problem was raised and another pre recording was ordered.[21] The test for declaring a person a special witness [22] is quite different to what is required under ss 9A and 9B.[23]

11. There is a requirement that the judge determine the competence of the witness.[24] In *R v R*,[25] both counsel concurred that the complainant was a special witness. Counsel for the defendant indicated that the competence of the complainant to give evidence would not be an issue at trial. The issue was raised by different counsel for the defence at the first trial. This necessitated another pre-recording hearing.

M.W. Forde DCJ

18 October 2008

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20 Forbes, JRS "*Evidence Law in Queensland*" 7th Ed, Thompson at [9C1]

21 The second trial commenced before Tutt DCJ on 14 October 2008 at Gympie.

22 *Evidence Act 1977*, s 21A

23 *R v Libke* (2007) 81 ALJR 1309 at [97]-[99]

24 *Evidence Act 1977*, ss 9A, 9B

25 Op cit