Ten rules for expert evidence

(and unreasonable verdicts)

Judge David Kent QC

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Prelude

"**Ode on a Grecian Urn**" is a poem written by the English Romantic poet John Keats in May 1819 and published anonymously in January 1820. The speaker addresses an engraved urn, expressing feelings about an imagined world of art, in contrast to the reality of life, change and suffering. Keats philosophised about art, beauty and truth.

The opening lines are:

> ***Thou still unravish'd bride of quietness!***
> ***Thou foster-child of silence and slow time***

Perhaps adaptable as a reference to the study of the law of evidence. The more famous last lines are:

> ***"Beauty is truth, truth beauty," – that is all***
> ***Ye know on earth, and all ye need to know.***

My somewhat stretched metaphor is that it is in a search for the beauty of truth that our legal system relies on evidence to prove facts, and endeavours to preserve this beauty by ensuring evidence is of the proper quality to achieve its goal. Keats would approve of this romanticism, and thus I will refer to expert evidence as an important category, sometimes under-appreciated, but in the romantic tradition of the beauty of truth.

Introduction

[1] Not every case will be the subject of expert evidence. However when expert evidence is appropriate or necessary, attention needs to be given to the presentation of the best quality evidence in the most persuasive way possible. Therefore attention needs to be given to all phases of the process, including identifying the issue upon which expert evidence may be relevant; selecting an appropriate expert; thoroughly preparing the brief for the expert; receiving the report in a timely way; disclosing it to the other side; conferring with the expert pre-trial; and calling the expert to give

evidence. As with all things, proper preparation and attention to detail greatly assists the best result.

[2] Expert evidence involves the expression of opinions, as an exception to the general rules of evidence. Thus a review of the relevant legal principles is helpful to a proper understanding of the issues.

Statement of the rule

[3] Other jurisdictions, and, indeed, the Federal Jurisdiction in Queensland, have statutory rules governing expert evidence in the Uniform Evidence Act. Thus in the *Evidence Act* 1995 (Cth) s 55 provides for evidence which is relevant and s 56 provides that relevant evidence is admissible. Section 76 outlaws opinion evidence generally, but s 78 provides for exceptions in relation to lay opinions and s 79 provides for exceptions based on specialised knowledge. Thus the opinion rule which generally excludes evidence of opinions, gives way to evidence of an opinion of a person which is wholly or substantially based on specialised knowledge from training, study or experience.

[4] The *Evidence Act* 1977 (Qld) does not contain the equivalent provisions, but there is of course at common law a general prohibition on a witness giving an opinion. However a witness may give an opinion on matters calling for special skills or knowledge if the witness is expert in such matters. The witness may not give an opinion on other matters if the facts upon which the opinion is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth, or if it would not assist the court in coming to a conclusion (see generally Wigmore, Evidence in Trials at Common Law 1978 Vol 7, Chapter 67; Cross on Evidence para [29005]).

[5] The expert will not be permitted to give evidence of matters which the tribunal of fact could determine for themselves or to formulate the expert's empirical knowledge as a universal law (see *Clark v Ryan* (1960) 103 CLR 486 at 491). The onus of establishing the conditions of admissibility of such material always rests on the tendering party (*R v Reed* [2010] 1 Cr app R 23 at [113]).

Nature of Opinion Evidence

[6] An "opinion" in this context means an inference from observed or assumed facts. The treatment of evidence of opinion by the law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is normally the function of the judge or jury, while the witnesses merely state facts. However the law recognises that where special knowledge or skill are involved, judges and jurors are not necessarily properly equipped to draw the proper inferences from established facts. Thus an expert witness may state an opinion with regard to such matters.

Purpose of Expert Evidence

[7] Expert evidence, as Heydon J said in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [90], "is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise." Expert opinion evidence is intended to assist the court, the tribunal of fact, in drawing the relevant factual inferences based on objective expertise and knowledge which the court may not otherwise possess.

Essential prerequisites

General Rules

[8] Matters which are essential to the proper introduction of, and reliance on, opinion evidence should be firmly kept in mind. The factual basis of an expert opinion had to be both identified and proved and in order to show the opinion was based on specialised knowledge, the particular reasoning process of the expert witness needs to be made known (*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]).

[9] In that case the plaintiff succeeded in an action concerning slippery stairs. She called Associate Professor Morton, a physicist who specialised in such matters. Without objection from Makita, the trial judge heard and accepted Morton's expert opinion evidence on this point and found that this caused the fall rather than the plaintiff simply losing her footing (at [3]).

[10] The defendant succeeded on appeal. Heydon JA noted at [85]:

1. It must be agreed or demonstrated that there is a field of "specialised knowledge";

2. There must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
3. The opinion proffered must be "wholly or substantially based on the witness's expert knowledge";
4. So far is the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and if the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;
5. It must be established that the facts on which the opinion is based form a proper foundation for it; and
6. The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.

[11] If these matters are not made clear it is hard to be sure how the opinion is based on the expert's specialised knowledge and it may therefore diminish in weight, possibly to the point of not being admissible. Proper expert opinion is required rather than "a combination of speculation, inference, personal and second hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise"; see *HG v R* (1999) 197 CLR 414 at [41].

[12] The case eventually turned on a rejection of Professor Gordon's conclusions in favour of the proven history of incident-free use of the stairs, suggesting that they were not in fact slippery. The appeal was allowed on that basis.

Statement of the reasoning

[13] Another aspect of the pitfalls of expert evidence is that the expert, in stating their opinion, is required to expose their reasoning process. In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, an expert had given a report expressing the opinion as to the level of silica dust the plaintiff was exposed to as a labourer and stonemason. The particular problem was that the report outlined the materials provided to him, upon

which his report was based, but did not state his reasoning and therefore failed to demonstrate that his opinion was based wholly or substantially on his specialised knowledge based on his training, study or experience. This was ultimately fatal to the admissibility of his opinion evidence.

Specialised Knowledge

[14] There must be a proven reliance on the witness's specialised knowledge. In *Honeysett v The Queen* (2014) 253 CLR 122, the appellant had been convicted of armed robbery and a sentence to imprisonment. Part of the evidence against him which he challenged on appeal was expert evidence which was said to concern "biological anthropology and anatomy". The witness, Professor Henneberg, gave evidence of "body mapping" which tended to identify the appellant from a study of CCTV footage of the robbery. The robbers were, of course, disguised but the professor examined various points of alleged anatomical similarity between the appellant and the offender in the footage. The admissibility of the opinion relied on the professor's expertise and knowledge of anatomy. The evidence was admitted both at trial and on appeal, however the High Court held it to be inadmissible and the conviction was quashed and the case ordered for retrial.

[15] On appeal, the prosecution did not maintain that the professor had specialised knowledge based on his experience in viewing CCTV images. Rather, they relied solely on his knowledge of anatomy. The High Court held the evidence was not wholly or substantially based on the professor's specialised knowledge of biological anthropology or anatomy. Rather it was a subjective impression from looking at the images. This gave the "unwarranted appearance of science" (at [45]).

[16] The court emphasised the importance of the term "knowledge". This connotes more than subjected belief or unsupported speculation. Opinion tendered as expert evidence needs to be at least substantially based on the person's training, study or experience. The problem in *Honeysett* was that the professor was not really giving expert anatomical or anthropological evidence.

Discretionary Exclusion

[17] There may be challenges to the introduction of expert evidence on the basis of a discretionary exclusion, that is, that the evidence is more prejudicial than probative; the *Christie* discretion found in s 130 of the *Evidence Act 1997* (Qld).

[18] A challenge to admissibility of this kind was made in *R v Sica* [2013] QCA 247. In that case, the appellant had been convicted of murder, having entering the house of his girlfriend and her younger siblings, killed them and left their bodies in a spa bath on the upper floor of a suburban house. Introduced by the prosecution was evidence of a forensic podiatrist and also a crime scene expert from the Royal Canadian Mounted Police. The evidence concerned footprints left in bleach on the floor of the house, made apparently by either bare feet or feet wearing socks, which were proven by the experts to be consistent with those of the appellant; that is, the appellant could not be excluded as having left the footprints. A challenge to this evidence was rejected by the trial judge.

[19] On appeal, it was argued the evidence was inadmissible because there were no objective criteria against which the value of the opinions provided could be judged; that is, there were no statistical studies of how many people had similar feet. It was also said there were no criteria by which to judge whether the features identified are common or uncommon, whether they are in any sense related and their frequency of appearance in combination.

[20] It was also argued that they should be excluded on a discretionary basis because:

(a) a jury is likely to be impressed by the qualifications of expertise of the experts and place undeserved weight on them; the so-called "white coat effect"; and

(b) the way in which the expert opinions were framed was said to be likely to give the jury the inaccurate impression that they placed the appellant at the crime scene at the relevant time.

[21] The court held that the evidence did not purport to identify the appellant, rather, it was simply relevant, as part of a circumstantial case, to "not exclude" him. The foundation of the expert opinion was exposed to the jury. It complied with the primary duty of experts in giving opinion evidence, as noted by Heydon JA in *Makita* "to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions".

Formal requirements in civil cases – UCPR

[22] Bearing in mind the above legal principles and examples as to admissibility or exclusion of expert evidence, the *Uniform Civil Procedure Rules* have provided for management of this kind of evidence. Thus r 426 provides that an expert witness has a duty to assist the court which overrides their obligation to the retaining party.

[23] Rule 427 provides that experts give evidence in chief via the report and there are also rules as to disclosure.

[24] Importantly, r 428 provides for the content of the report. The essential requirements include all the relevant material facts – r 2B; literature or research material relied on – r 2C; the relevant details of inspections, examinations or experiments – r 2D; a summary of the range of competing opinions – r 2E; the conclusions and whether any further facts would assist in a better conclusion.

[25] The expert must confirm the relevant matters in r 428(3) explicitly at the end of the report.

[26] No doubt these rules were designed to grapple with the problems of opinion evidence, and a proper report prepared with these requirements in mind would clearly have a sound basis for admissibility of the relevant opinion pursuant to the rules of evidence. It is noteworthy that many expert reports are obtained well before any proceedings are commenced or even contemplated. It is nevertheless no doubt prudent to ensure that any reports obtained address the requirements of r 428.

[27] Disclosure of the report is dictated by r 429 (see slide). There is also the ability for the court to direct a meeting of experts or "hot tub" – r 429B (see slide). Concurrent evidence is also sometimes ordered. As to retaining experts in the Supreme Court, see Practice Direction 2 of 2005 and r 429G – 429S; the Supreme Court tries to reduce the number of experts, hopefully to one in each area of expertise.

Criminal Code

[28] In criminal matters the duty of disclosure is set out in the *Criminal Code*. For the prosecution it is contained in s 590AH(2). For the defence, the accused is under a similar but not identical obligation in s 590B of the *Code*, referring only to expert evidence. It is noteworthy that the obligation in s 590B turns on the accused person

forming the intention to adduce expert evidence, whereas the obligation of the prosecution relates to a witness who is merely "proposed." It may be that the intention to adduce expert evidence may not be formed in advance of the trial. For example, it could be perfectly legitimate to delay disclosure of a defence expert on the basis that the accused's representative considered it likely that they would be able to obtain the relevant concessions in cross-examination of a prosecution expert rather than being required to go into evidence on the point. It would only then be at the point of a possible failure of that process where the relevant intention, and thus the obligation to disclose, would arise. I am not aware of this process being tested in court.

Bias

ASIC v Drake

[29] Mention should be made of bias. There are occasions when an expert witness may demonstrate bias in giving their evidence. This is, of course, the worst kind of result when considering expert evidence. An unfortunate example is *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 at [370] – [381]. The witness in that case, for whatever reason, displayed "the worst characteristics of partisanship"; paid scant attention to the key documents; when cross-examined resorted to answers which were "preposterous"; and generally did such a good job of self-destruction that the party calling him quite properly accepted that it could not reasonably submit that the court should accept his evidence except where it was essentially unchallenged. The witness failed to consider many basic documents or issues; made some basic misapprehensions about fundamental points; resorted to large and unsupported leaps of logic; when confronted with his problems took preposterous positions, at times lapsing into the bizarre; and constantly shifted ground in his evidence inclined to support his pre-determined position.

[30] This is, needless to say, the worst kind of result in retaining an expert witness.

Wood v R

Criminal Proceedings

[31] A further and more lurid example is from *Wood v R* [2012] NSWCCA 21 and the unfortunate participation of Associate Professor Cross.

[32] Was Caroline Byrne murdered by Gordon Wood or did she commit suicide? On 8 June 1995 her body was found wedged between rocks at the base of a cliff at Watsons Bay in Sydney; an area colloquially known as "the Gap". Mr Wood, her boyfriend and the chauffer/bodyguard of the high profile entrepreneur, investor and stockbroker, Rene Rivkin, was charged with her murder almost 11 years later, on 3 May 2006. He was convicted on 27 November 2008, sentenced to imprisonment for 17 years 4 months, and acquitted on appeal on 12 February 2012 (*supra*). The first and possibly most significant ground was that the verdict was "unsafe or unsatisfactory" i.e. "unreasonable", as in *M v R* (1994) 181 CLR 487 at 493:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[33] There were many contested facts and opinions in the case. Ms Byrne's body was found some distance from cliff face, but not definitively known if in "Hole A" or "Hole B", at different distances from the likely ledge from which she either jumped or was thrown. No police photos or notes were taken at the time, and the vital witness changed his mind between 1998 and 2004. The Crown case, by the time of the trial (relying on A/Professor Cross) was: Hole A, which was too far for her to jump, but a strong man could throw her there (in the dark, with her "not unconscious but not struggling" in a "spear throw", without himself falling over the cliff). From the north ledge, so went the theory, there was a 4m run up for her or the thrower.

[34] Cross did experiments e.g. with policemen throwing police women into a swimming pool (in daylight, with no danger or resistance). His opinions were strongly contested by defence experts who denied almost everything about them, particularly that she couldn't have jumped. He also had the run up wrong, it was 5.5m not 4m.

[35] NSWCCA determined on an unreasonable verdict ground that that conflict could not be resolved; thus they couldn't conclude she did not jump and an acquittal was entered. Cross' opinions on any controversial matters were ultimately found to have minimal if any weight; he went outside his field of knowledge and assumed unproven

facts. His expertise was primarily the behaviour of gases at high temperatures (plasma physics) rather than trajectories of thrown objects.

[36] Cross helped the defence out by, after the verdict but prior to the appeal, publishing a book ("Evidence for Murder: How Physics Convicted a Killer") and giving a lecture about his successful efforts for the prosecution. These included **even involving himself and advocating to the prosecutor as to the actual decision to prosecute.** This was received as fresh evidence further eroding his credit. He was writing the book during the trial and clearly had a cause to serve. It wasn't necessary to decide admissibility, but McLellan CJ at CL probably would have excluded the evidence.

[37] **Duties** of expert witnesses are set out at para [719]; per Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82:

- Expert evidence presented to the court should be, and should be seen to be, the **independent** product of the expert uninfluenced as to form or content by the exigencies of litigation. See also *Whitehouse v Jordan* [1980] UKHL 12; (1981) 1 WLR 246 at 256 (Lord Wilberforce).

- An expert witness should provide **independent** assistance to the court by way of **objective unbiased** opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.

- An expert witness should make it clear when a particular question or issue falls outside his expertise.

- If an expert's opinion is not properly researched because he considers that **insufficient data** is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

- If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert reports, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

- Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

- The ***Akarian Reefer*** principles are applied in Australia – for example they are mentioned in ***Makita***.

[38] Thus the Crown prosecutor, Mr Tedeschi, was strongly criticised for resorting to fiction, impermissible reasoning and innuendo in the ***Wood*** case. Wood unsurprisingly sued the State of NSW for malicious prosecution and lost, but has appealed.[1]

Civil Proceedings

[39] At trial of this action, in the Supreme Court, Justice Fullerton conducted a lengthy analysis of all that went on at this curious trial. Her judgment spans 1346 paragraphs.

[40] As a threshold question, the plaintiff was required to prove that one or more of the putative prosecutors was a 'prosecutor' for the purposes of the tort, since liability for malicious prosecution can only be imposed on someone who plays an active role in the proceedings by initiating or maintaining them.

[41] Associate Professor Cross, who was said by the plaintiff to have acted dishonestly with the intention of persuading Mr Tedeschi and/or the chief investigator, Det Insp Jacob to initiate and maintain criminal proceedings against him for murder was not found to be a prosecutor for the purposes of the tort.

[42] In the result, only Mr Tedeschi was found to be a prosecutor for the purposes of the tort; a matter that was not put in dispute in the proceedings. Mr Wood was required

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[1] In fact the judgment dismissing the appeal was delivered shortly before the delivery of this paper, on 20 December 2019; *Wood v State of New South Wales* [2019] NSWCA 313

to prove each of the following four elements of the tort of malicious prosecution, the first two of which were not in dispute:

1. Criminal proceedings were initiated against him by the defendant;

2. Those proceedings terminated in his favour;

3. The defendant, through Mr Tedeschi, initiated or maintained the proceedings, acted maliciously.

4. The defendant, through Mr Tedeschi, initiated or maintained the proceedings without reasonable and probable cause.

[43] The Court was satisfied that there was a lack of reasonable and probable cause in initiating and maintaining the proceedings against the plaintiff by applying the objective test for proof of that element. The Court was satisfied that the evidence of A/Prof Cross was fundamentally flawed, and since his evidence was fundamental to the Crown proving the precise manner of Ms Byrne's death, namely that the plaintiff threw Ms Byrne from the cliffs to her death using a "spear throw", a prudent and cautious prosecutor would not have initiated the proceedings or maintained them to verdict.

[44] Mr Wood's claim failed because he did not establish that in initiating and maintaining the proceedings, Mr Tedeschi acted maliciously – that is, for a dominant purpose ulterior to the proper purposes of the criminal law.

[45] Amongst other things, Justice Fullerton canvassed how Hole B came to be appointed as the point of recovery (paragraphs [169]-[187]), this being later abandoned by the prosecution in favour of Hole A, between the original investigation in 1995 and some time in early 2004. This is emblematic of the degree of confusion in the prosecution theories. The Hole A assumption was part of the factual basis of Cross' opinions; and yet it had not been the conclusion of the police for the first nine years of the "investigation", although I pause to note that there had also been a lengthy coronial inquest process during that time. How this later re-invention could be the cornerstone of a case required to be established beyond reasonable doubt is at least surprising; it had not been the conclusion of the police for the first nine years of the "investigation", although I pause to note that there had also been a lengthy coronial inquest process during that time.

[46] This is not to say the matter was straightforward. There were many curious aspects of the evidence, not least some very questionable details concerning Wood's account of his movements at the relevant time, and his "psychic" feeling that somehow his girlfriend was in trouble, causing him to look for her, somehow go to the correct scene, and somehow see her body, in the dark, from the top of the cliff, when no one else could. But he, of course, bore no onus of proof.

[47] The Crown prosecutor, Mr Tedeschi, was found to be somewhat disingenuous as to the importance of the Cross evidence in the case (at [265]). Ultimately the Court concluded that Mr Tedeschi's persisting lack of insight into the flawed approach he took to the prosecution of the plaintiff, and his lack of insight into the fact that his misconduct was ultimately productive of gross unfairness to the plaintiff in his trial, was more probably explained by his continuing inability or unwillingness to reflect upon the errors that had been revealed in his approach as a Crown Prosecutor and his continued failure to accept and acknowledge them, rather than impermissibly straining for a conviction.

[48] The degree of Cross' hubris is remarkable. When the judgment of the CCA was delivered, he published an article in response, criticising the court (at [565]). He really represents how not to do it; he seems to have displayed the opposite of scientific objectivity.

Conclusion

[49] What, then, are the rules for dealing with expert evidence? I offer the following:

1. Ensure that the expert opinion is both admissible, for example, in terms of the legislation and authorities referred to, that is it is based on specialised knowledge in which the witness is expert by reason of specified training, study or expertise;
2. The appropriate expert is chosen, that is, someone who is truly expert in the appropriate field and preferably has experience in giving evidence and doing so hopefully with the required degree of intellectual independence rather than being a "hired gun";
3. The expert is retained early enough that they can complete their investigations and report in a timely way so that court processes are not delayed;
4. The expert is well-informed of the expert witness requirements pursuant to the UCPR;

5. The expert is properly briefed, that is, with all relevant material, both favourable and unfavourable to the party's case;
6. The expert, whether or not the case is a civil one, is aware of their obligations in relation to necessary inspections, examinations or experiments. These should be undertaken directly by the expert rather than by an employee in order to protect the witness from any challenge concerning such matters;
7. The report should be received in time for the solicitors and counsel to consider it, possibly confer with the expert and consider whether a supplementary report or further investigation or examination is necessary; and
8. Ensure as far as possible that the expert is thoroughly prepared for the giving of evidence, whether in a normal trial process, or a conclave;
9. When cross examining, attempt to challenge the factual underpinning of the opinion including (a) any assumptions made (b) any investigation or experiment not personally conducted by the expert;
10. If required to put a contrary opinion to an expert, do your homework and ensure you can delineate the basis of your expert's opinion and precisely where it differs from the witness you are challenging.

Unreasonable Verdicts - Pell v The Queen

[50] The decision of *Pell v The Queen* is of interest because of its general notoriety, and its legal interest in that the High Court has referred the question of special leave to the full Court and will determine it concurrently with the substantive hearing of the appeal, rather than the more common practice of determining this as a preliminary step (and in practice in most cases leave is refused).

[51] As the judgment summary of the Victorian Court of Appeal records (the judgment is 226 pages, 1180 paragraphs, and 290 footnotes), by a majority (2 to 1), the Court dismissed Cardinal George Pell's appeal against his conviction for the commission of sexual offences. He will continue to serve his sentence of 6 years' imprisonment, until the High Court appeal. He will remain eligible to apply for parole after he has served 3 years and 8 months of his sentence.

[52] Cardinal Pell was convicted of five specific sexual offences alleged to have been committed on two occasions in the mid-1990s when he was the Catholic Archbishop of Melbourne. In a previous trial on the same charges the jury were unable to reach a verdict. Cardinal Pell's position is that he should not have been convicted.

[53] Cardinal Pell's conviction and the appeals have attracted widespread attention, both in Australia and beyond. He is a senior figure in the Catholic Church and is internationally well known. As the trial judge, Chief Judge Kidd, commented when sentencing Cardinal Pell, there was vigorous and sometimes emotional criticism of the Cardinal and he has been publicly vilified in some sections of the community.[2] There has also been strong public support for the Cardinal by others. Indeed, it is fair to say that his case has divided the community.

[54] It is important to stress at the outset that Cardinal Pell's conviction only concerns the five offences alleged to have been committed by him. Again, as the trial judge observed, he was not to be made a scapegoat for any perceived failings of the Catholic Church nor for any failure in relation to child sexual abuse by other clergy.[3] His conviction and sentence could not be a vindication of the trauma suffered by other victims of sexual abuse.[4]

[55] The offences in respect of which Cardinal Pell was found guilty by a County Court jury were one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16. The trial lasted for five weeks. The jury deliberated for several days. The jury's verdict was unanimous.

[56] Each of the three judges on the appeal watched recordings of the evidence given by 12 of the 24 witnesses at the trial. They also watched recordings of the view the jury were taken on, the walk through of the Cathedral by the complainant and the recorded interview of Cardinal Pell before he was charged. Those recordings went for more than 30 hours. The judges have watched some of those recordings more than once. The written transcript from the trial is approximately 2000 pages in length. The judges read that transcript, some parts of it multiple times. Like the jury, the judges were taken to St Patrick's Cathedral to be shown what the jury had seen.

Grounds of appeal

[57] Cardinal Pell sought leave to appeal from his conviction. As is common, the application for leave and the appeal itself were heard together. There were three

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2 *DPP v Pell* [2019] VCC 260, [5]

3 Ibid [10].

4 Ibid [11].

proposed grounds of appeal. The main ground was that the guilty verdicts were 'unreasonable and cannot be supported having regard to the evidence' ('the unreasonableness ground'). The second ground concerned the refusal by the trial judge to allow Cardinal Pell's counsel to use a 19 minute animation in his closing presentation to the jury. The third ground was about whether there was a fundamental irregularity in the trial process based on an argument that Cardinal Pell did not enter his plea of not guilty in the presence of the jury panel.

[58] In a unanimous decision, the Court of Appeal refused leave to appeal in respect of the second and third grounds. Cardinal Pell was successful in seeking leave to appeal in relation to the first ground. However, by majority, the appeal was dismissed.

First ground of appeal

[59] The offences were alleged to have been committed by Cardinal Pell on two occasions, in 1996–1997, against two 13 year old choirboys in the St Patrick's Cathedral choir. The first occasion was said to have involved both boys. The second occasion involved only one of them. The first incident was alleged to have taken place in the Priests' Sacristy at St Patrick's. The second incident was alleged to have taken place in the corridor outside the Archbishop's and Priests' Sacristies at the Cathedral.

[60] By the time the complainant first spoke to police, in June 2015, the other boy had died from accidental causes. In 2001, the other boy's mother asked him whether he had ever been 'interfered with or touched up' while in the Cathedral choir. He said that he had not.

[61] In addition to the complainant, a number of other witnesses who held official positions at the Cathedral, or were members of the choir, during the relevant period gave evidence as to processes and practices at the Cathedral ('the opportunity witnesses'). This 'opportunity' evidence was relevant to the question of whether there was 'a realistic opportunity' for the offending to have taken place. The jury were also shown the video recording of Cardinal Pell's voluntary interview with police before he was charged. He strongly denied the allegations.

[62] The prosecution case was that the complainant was a witness of truth, on the basis of whose evidence the jury could be satisfied beyond reasonable doubt that the events he described had occurred. Cardinal Pell's case was that the complainant's account

was a fabrication or a fantasy, that it was implausible and that, in any event, the evidence of the opportunity witnesses, taken as a whole, combined to make the complainant's account 'either literally impossible, or so unlikely it's of no realistic possibility'.

[63] Where the unreasonableness ground is relied upon, the task for the appeal court is to decide whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[64] The inquiry which this ground requires is a purely factual one, rather than a discrete question of law where the argument is that the trial judge has made an error. When the unreasonableness ground is relied upon, the appeal court reviews the evidence as it was presented to the jury. The appeal court asks itself whether — on that factual material — it was reasonably open to the jury to convict the accused.

[65] Having reviewed the whole of the evidence, two of the judges of the Court of Appeal (Chief Justice Ferguson and Justice Maxwell, President of the Court of Appeal) decided that it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences charged. In other words, those judges decided that there was nothing about the complainant's evidence, or about the opportunity evidence, which meant that the jury 'must have had a doubt' about the truth of the complainant's account. They stated that it is not enough that one or more jurors 'might have had a doubt.' Rather, the jury 'must have had a doubt.' The Chief Justice and Justice Maxwell stated that they did not experience a doubt.

[66] The Chief Justice and Justice Maxwell accepted the prosecution's submission that the complainant was a very compelling witness, was clearly not a liar, was not a fantasist and was a witness of truth. They said:

> Throughout his evidence, [the complainant] came across as someone who was telling the truth. He did not seek to embellish his evidence or tailor it in a manner favourable to the prosecution. As might have been expected, there were some things which he could remember and many things which he could not. And his explanations of why that was so had the ring of truth.

[67] The majority went on to examine the evidence of other witnesses relevant to the issue of whether there was a realistic opportunity for the offending to have occurred. Was there a reason to doubt the complainant's account? Having read (and in some cases

watched) the evidence of all of the "opportunity" witnesses, they accepted that there was general consistency, and substantial mutual support, in 'the picture they painted' of what occurred at the Cathedral before, during and after Sunday Mass in the period when Cardinal Pell was Archbishop. The Chief Justice and Justice Maxwell said that this was unsurprising since a defining feature of religious observance is adherence to ritual and compliance with established practice.

[68] The majority said that, at the same time, the evidence of the opportunity witnesses varied in quality and consistency, and in the degree of recall, both as between witnesses and within the evidence of individual witnesses. They cited at least two possible explanations for this. First, the passage of 22 years between the alleged events and the trial meant that there was, inescapably, a real degree of uncertainty attaching to the memories of the opportunity witnesses. Secondly, attempting to recall particular events is all the more difficult when the events being described are — as they were here — of a kind which was repeated week after week, year after year, and involved the same participants, in the same setting, performing the same rituals and following the same routines.

[69] Part of Cardinal Pell's case on the appeal was that there were 13 solid obstacles in the path of a conviction. The majority rejected all 13. By way of example, one of the 13 'obstacles' was said to be that the acts alleged to have been committed by Cardinal Pell in the first incident were 'physically impossible'. The defence relied on categorical statements by Monsignor Portelli (the prefect of ceremonies to Cardinal Pell) and by Mr Potter (the sacristan) that it was not possible to pull the Cardinal's robes to the side.

[70] The robes were an exhibit at the trial and had been available to the jury in the jury room during their deliberation. Having taken advantage of the opportunity to feel the weight of the robes and assess their manoeuvrability as garments, the Chief Justice and Justice Maxwell decided that it was well open to the jury to reject the contention of physical impossibility. The robes were not so heavy nor so immoveable as the evidence of Monsignor Portelli and Mr Potter had suggested. The Chief Justice and Justice Maxwell found that the robes were capable of being manoeuvred in a way that might be described as being moved or pulled to one side or pulled apart.

[71] Cardinal Pell did not have to prove anything in the trial. Rather, at all stages of the trial the burden of proof rested with the prosecution. It was a matter for the prosecution to prove beyond reasonable doubt that there was a realistic opportunity for the offending to take place. That involved showing that the offending was not impossible. The prosecution also bore the burden of proving beyond reasonable doubt that the particular sexual acts took place. The majority stated that while the defence for Cardinal Pell maintained submissions based on 'impossibility' in the appeal, they bore steadily in mind that there was and is no onus whatsoever upon Cardinal Pell to prove impossibility, that is, that it was impossible for the offending to have occurred

[72] Thus in relation to the 'unreasonableness' ground of appeal, the majority held that it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences charged. They did so on the basis that there was nothing about A's evidence, or about the opportunity evidence, which meant that the jury must have had a doubt about the truth of A's account noting that it was not enough that one or more jurors might have had a doubt.

[73] On the nature of the relevant test, the majority referred to Hayne J in *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] where he said (with footnotes omitted):

> "It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is **whether it was open to the jury** to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. In the present case, the critical question for the jury was what assessment they made of the whole of the evidence that the complainant and the appellant gave that was relevant to the issue of consent to the digital penetration that had occurred in the park. That evidence did not require the conclusion that the jury should necessarily have entertained a doubt about the appellant's guilt". (emphasis added)

Dissent - Weinberg J

[74] In his (828 paragraph) dissenting judgment, Justice Weinberg found that, at times, the complainant was inclined to embellish aspects of his account. He concluded that his evidence contained discrepancies, displayed inadequacies, and otherwise lacked probative value so as to cause him to have a doubt as to the applicant's guilt. He could not exclude as a reasonable possibility that some of what the complainant said

was concocted, particularly in relation to the second incident. Justice Weinberg found that the complainant's account of the second incident was entirely implausible and quite unconvincing. Nevertheless, Justice Weinberg stated that in relation to the first incident, if the complainant's evidence was the only evidence, he might well have found it difficult to say that the jury, acting reasonably, were 'bound' to have a reasonable doubt about the Cardinal's guilt. He went on to note, however, that there was more than just the complainant's evidence. In Justice Weinberg's view there was a significant body of cogent and, in some cases, impressive evidence suggesting that the complainant's account was, in a realistic sense, 'impossible' to accept; for example the evidence of Portelli and/or Potter, apart from the point about the robes, gave no opportunity for the offences (basically because Pell was never alone) and was thus a complete answer to the Crown case if it was even reasonably possible that that evidence was correct. To his mind, there is a significant possibility that the Cardinal may not have committed the offences. In those circumstances, Justice Weinberg stated that in his view the convictions could not stand.

[75] Nevertheless, the appeal on the unreasonableness ground was dismissed because the other two judges took a different view of the facts.

Second ground of appeal

[76] The Court of Appeal unanimously refused leave to appeal in relation to the second and third grounds, which concerned legal (rather than factual) issues.

[77] The animation depicts a blueprint of the Cathedral complex with a series of coloured dots and lines shown moving through the complex. Each coloured dot or line is attributed to a particular person or group (for example, the complainant or the choir as a whole when processing out of the Cathedral after Sunday solemn Mass). On the right hand side of the screen, a window of text is featured. At the top of the window, quotes taken from the transcript of evidence of witnesses favourable to Cardinal Pell's case fade in and out throughout the course of the animation. These quotes are said to accord with the movements of the various dots and lines depicted. At the bottom of the window, quotes taken from the transcript of the complainant's evidence fade in and out, ostensibly to accord with the movement of the dots representing himself and the other boy.

[78] The trial judge ruled that the animation could not be shown to the jury as part of the defence final address. The Court of Appeal agreed with the trial judge. The animation bore little resemblance to the actual state of the evidence but rather presented a distorted picture of that evidence. The animation was tendentious in the extreme. For example, it showed the Priests' Sacristy, with the complainant and the other boy in the room, in company with a large number of concelebrant priests. There was no evidence of any kind that this particular scenario had occurred. It was plainly intended to implant in the minds of the jury that the complainant's account must have been impossible because the evidence showed that there were concelebrant priests in the room at the time of the alleged offending. The visual representation, ostensibly based on the state of the evidence at trial, had the potential of misleading or at least confusing the jury. The Court of Appeal held that the trial judge correctly ruled that the animation should not be used in the way contemplated by Cardinal Pell's lawyers.

Third ground of appeal

[79] As noted, ground 3 concerned whether there was a fundamental irregularity in the trial process. This was said to be on the basis that Cardinal Pell was not arraigned 'in the presence of the jury panel' as required by the *Criminal Procedure Act*.[5] A person is arraigned when the court asks the accused (in this case, Cardinal Pell) if he is the person named on the indictment. Each charge is read out and the accused is asked whether he pleads guilty or not guilty. The question in this case was whether that was done 'in the presence of' the jury panel. The jury panel were in a different room watching by video link when these things were done. The Court of Appeal held that the word 'presence' in the context of the legislation included presence by video link and did not require physical presence. Leave to appeal on this ground was refused.

Is there a difference in the tests?

[80] One possibility for debate in this case, given that the High Court referred the question of special leave to the hearing of the appeal, is whether the test from *Libke* has in fact

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[5] Sections 210 and 217.

narrowed the scope for the unreasonableness ground as set out earlier in *M*. This was something on which Weinberg J commented, e.g. at [613]-[618]; was it 'open to the jury', acting reasonably, to convict? At the end of the day, however, it may be that Weinberg J simply formed a different view of the facts.

[81] The High Court having not refused special leave, but referred that question to the full hearing, is a positive for Pell. The possibilities now are that when the full appeal is heard, with the special leave application, the Court may (a) refuse leave, at which point Pell must simply continue to serve his sentence; or (b) grant leave, hear the appeal but find against him; again, he serves his sentence; or (c) grant leave, hear the appeal and allow it, but order a retrial; or (d) grant leave, allow the appeal and enter a verdict of acquittal. A retrial seems unlikely on the present state of the grounds; if it is an unreasonable verdict, then consistently with the judgment of Weinberg J, the result would be an acquittal.

[82] From the limited information presently available, it seems the grounds of the appeal may be that the Court of Appeal majority erred by finding that their belief in the complainant required the applicant to establish that the offending was impossible to raise and leave reasonable doubt; and in concluding that the verdicts were not unreasonable as, in light of the findings made by them, there remained reasonable doubt as to existence of any opportunity for the offending to have occurred. This second aspect may well be the main focus.

[83] This practice of hearing the special leave application at the same time as the substantive appeal is not unknown but is relatively rare in the High Court in recent times; this is apparently the first since 2014. Whether it bodes well for Cardinal Pell, time will tell. Written submissions are due by the end of February. Generally, success in the High Court is rare; for example, on the day *Pell v The Queen* was listed, it was one of 22 such applications. All the others failed that day, and Pell may yet fail to get special leave or in the substantive appeal.[6]

[84] A positive sign for Cardinal Pell may be the recent decision of *Fennell v The Queen* [2019] HCA 37, where the Court upheld a conviction appeal in a murder case, on the

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[6] As history now shows, since delivery of this paper, Pell was successful, in terms broadly in line with the judgment of Weinberg J; *Pell v The Queen* [2020] HCA 12. In brief, the evidence of the opportunity witnesses compelled a reasonable doubt.

unreasonableness ground. It was a different kind of case, where the real question was whether the circumstantial case was sufficient, and the Court concluded it was not, based on the approach in *M*. It does demonstrate the Court's willingness to overturn convictions where it was not open to the jury to be satisfied beyond reasonable doubt of guilt; i.e. the kind of case where there is a factual rather than a strictly legal error.