

EVIDENCE REFERENCE—PROGRESS REPORT

INTRODUCTION

1. **State of the Reference.** At the time of preparing this paper an Interim Report for the Evidence Reference had been completed by the Law Reform Commission and forwarded to the Attorney-General. The Report expresses the tentative conclusions reached by the Commission on such issues as whether there should be uniform comprehensive evidence legislation for federal and territory courts and whether the laws of evidence should be reformed and, if so, in what manner. It includes draft legislation. The Commission proposes to consult widely on the issues raised in the Report and to issue a Final Report towards the end of 1986.

2. **Content of paper.** In deciding what to discuss in this paper there were many alternatives. Obviously, the issues raised and proposals advanced in the report could be discussed. It has been necessary to take a different approach, however, because the Report may not have been made public by the time of delivery of this paper. It is proposed to refer to some of the difficulties found in analysing the law and preparing proposals. In that way some insight can be given into the task undertaken by the Commission without actually discussing the Report and some fundamental questions can be discussed.

3. There is a rich field from which to choose. There are many difficult challenges in the reference — defining 'the laws of evidence', identifying the purposes to be served by them, formulating a conceptual framework. Perhaps the greatest challenge, however, is to analyse and present the rules in a consistent and systematic fashion. Reference will be made to some of the issues that arose in our attempt to do this. Reference will also be made to some aspects of the law that are or should be the subject of debate. Some of these issues have received little attention — at least in Australia and English writing and judgments.

SYSTEMATIC TREATMENT

4. **Past attempts?** An examination of leading texts reveals an absence of systematic treatment. Generally, there is no attempt to group related topics such as rules of admissibility even though this is possible. In addition, the following is found in one or more of the leading texts:

- **Relevance.** The topic of relevance, which provides the key rule of admissibility, is discussed when dealing with a variety of introductory topics including examples of different types of evidence, discussion of the functions of judge and jury and identification evidence.
- **Sworn and unsworn evidences.** The rules relating to the giving of sworn evidence are considered in a chapter dealing with competence of witnesses — partly no doubt because they supply the only test of psychological competence. The right of

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the accused to give unsworn evidence, however, may be found in a chapter dealing with the accused as a witness or a chapter on the course of the trial.

- **Opinion evidence.** The rules controlling opinion evidence can be found within a section dealing with the examination of witnesses.
- **Evidence of character and conduct.** The topic may be found in a section dealing with relevance.
- **Credibility.** Rules controlling the admissibility of evidence relevant to the credibility of witnesses are dealt with in chapters relating to the cross-examination of witnesses.
- **Corroboration.** Corroboration can be found in between chapters on competence and compellability and the course of the trial or in a chapter on the course of the trial.
- **Cross-examination on documents.** Rules relating to cross-examination on documents can be found discussed in a chapter including the topic of the proof of the contents of documents.
- **Hollington and Hewthorn.** The rule in *Hollington v Hewthorn* is dealt with in different ways — in the context of opinion evidence, judgments and so on.

5. **Possible grouping.** It is possible to identify the following groups of rules:

- those relating to witnesses — the competence and compellability of witnesses; the giving of sworn and unsworn evidence; the questioning of witnesses;
- those controlling the admissibility of evidence — including relevance, hearsay, opinion, character, credibility evidence, privilege;
- those relating to proof — standard of proof, the facilitation of proof, corroboration.

6. **Issues.** But accepting those groups a number of issues arise. They include:

- **judicial notice** — is it a form of proof or does it define that which does not require proof by formal evidence.
- **authentication of evidence** — in requiring authentication of documents and other evidence, is the law prescribing a mode of proof or rules for exclusion of otherwise relevant evidence, or is the topic an aspect of relevance.
- **secondary evidence of documents** — are the requirements simply spelling out particular modes of proof or are they properly regarded as rules of exclusion.

In formulating rules consideration had to be given also to what rules could and should be codified.

SYSTEMATIC TREATMENT — SOME PROBLEM AREAS

7. **Judicial Notice.** All would agree that the use by the court of common knowledge for the purpose of finding a fact in issue or fact relevant to a fact in issue — be it normal gestation periods, that Flemington is a racecourse etc — involves the taking of judicial notice. There are

different views, however, as to whether the process is a form of proof or whether it defines that which need not be formally proved.

- **A Form of Proof.** It has been argued that judicial notice should be confined to the use of common knowledge to establish facts which are steps in the proof of a party's case. This, for example, should be distinguished from the use of knowledge in assessing 'the probabilities'. There, it is argued, the judge or juror is entitled to (and cannot avoid) drawing on his personal experience but that in doing so he is not taking judicial notice.¹ Other areas where it has been said to be appropriate for the judge or juror to rely on personal experience without taking judicial notice are:

- **Ultimate issue.** It has been held, for example, that the trial judge may decide whether an interest rate charged was excessive without any evidence being given² — although some statements are consistent with the view that it is common knowledge of general rates of interest that is applied.³

- **Interpreting, Weighing and Assessing Evidence.** In *Burns v Lipman*⁴ Chief Justice Barwick and Justices Stephen, Mason and Jacobs stated:

In explaining his reasons for judgment, his Honour said that he could take judicial notice of the habits of motorists in relation to the sounding of the horn when passing or commencing to pass another vehicle. We would point out that, whilst a jurymen or a judge may bring to the resolution of a case his knowledge of what usually occurs on a highway, that knowledge is not properly to be regarded as judicial notice.⁵

In *Weatherall v Harrison*⁶ a distinction was drawn between a magistrate using his personal medical expertise to assess, interpret and weigh the evidence on the one hand and substituting it for evidence on the other. The former was held to be permissible and the latter not. Carter⁷ and Eggleston⁸ argue that the use of the medical expertise in assessing, weighing, and interpreting the evidence is not an aspect of judicial notice. The Divisional Court clearly took the view that the medical knowledge could not be

¹ R Eggleston, *Evidence, Proof and Probability*, 2nd edn, Weidenfeld & Nicolson, London, 1983, 143-4.

² *Wilson v Moss* (1909) 8 CLR 146; *Samuel v Newbold* [1906] AC 461.

³ *id.*, 167.

⁴ (1975) 132 CLR 157, 161.

⁵ The High Court went on to say:

It use in this case was not appropriate to the determination of whether or not the appellant was negligent, but rather to the question of what the respondent was entitled in circumstances to expect of an overtaking motorist. The respondent could not use the absence of a warning as a justification for not having looked to his rear and for not signalling before making his turn to the right.

⁶ [1976] 1 QB 773.

⁷ Carter in E Campbell & L Waller, (eds), *Well & Truly Tried*, Law Book Co, Sydney, 1982, 96.

⁸ Eggleston, 144-5, 148-9.

substituted for evidence but did not analyse the question in terms of judicial notice.⁹

Under this approach judicial notice is regarded as a form of proof or substitute for proof¹⁰. But this is true only in a broad sense; in many cases no material on which to found notice is placed before the court.¹¹ Many facts are 'noticed' without reference being made to the occurrence:

Judicial notice of matters of fact is founded upon that fund of knowledge and experience which is common to both judges and jurors, and is not confined to the Bench. In many cases no reference is made during the trial to this aspect of judicial notice; if the fact is relevant, everyone in court will assume that rain falls, for example; and there is no ascertainable limit to the matters which are thus silently noticed by both judge and jury.¹²

A broader view has been followed in the United States of America.¹³

- **Defining that which need not be proved.** The judge and jury rely extensively upon their general knowledge and experience in making their findings on the facts. In addition the judge applies his general knowledge and experience whenever a decision has to be made about the relevance of evidence:

In the ordinary course of reasoning, whether a fact is capable of being inferred from the existence of given facts, depends upon what has been or is taken to be the human experience as to the relationship which exists between those facts . . . The courts have, of course, accepted that it is possible to reason in this way from given facts to human behaviour and from human behaviour to what the facts were . . . in the normal case, the judgments of commonsense or common experience are what is relied upon.¹⁴

Similar processes occur in determining the admissibility of evidence — for example, whether the features relied upon to justify the admissibility of the evidence of prior misconduct are unique as alleged. In determining damages awards, the judge or jury must act upon knowledge and experience. In weighing up the probative value of evidence against its prejudicial effect, the trial judge acts upon his assumptions about human behaviour and the likely effect of evidence on the mind of a juror. While judicial notice may be used to enable the court to make findings on the facts without

9 It is arguable, however, that the magistrate in that case was using the knowledge in substitution for the evidence — assuming the onus was on the accused to establish reasonable cause for not submitting to a blood test.

10 G D Nokes, 'The Limits of Judicial Notice' (1958) 74 *LQ Rev* 59, 63 (cf J F Stephen, *A Digest of Evidence*, Macmillan, London, 2nd edn & 3rd edn, ch VI).

11 *id.*, 63.

12 *id.*, 66.

13 *id.*, 60.

14 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 222, 224-5 (Mahoney JA); see also comments in Cross, para 7.21; Morgan, 66-7.

evidence being tendered in the normal way, the matters of which notice is taken frequently have no bearing on the matters that are in issue in the trial. Courts use material not formally proved in a wide variety of situations — in the interpretation¹⁵ of pleadings and other writings, in defining words and in the interpretation of conduct.

Courts take facts into account without proof not only in the process of making findings about the facts that are in issue but also in the process of formulating and developing the common law. Reference should also be made to the factual analyses and materials referred to by the members of the High Court in *Grant v Downs*¹⁶, in *Alexander v R*¹⁷ in determining the rules to be applied to the admissibility of photo-identification evidence, and in *Todorovic v Waller*¹⁸ in determining an appropriate discount rate for lump-sum damages awards. In determining the constitutional validity of legislation the courts take into account factual material that has not been formally proved.

8. If judicial notice is treated as a form of proof the distinctions that are required and referred to above can be stated, but they are extremely difficult to apply and it is questioned whether they have any sound basis. How is the line to be drawn, for example, between taking judicial notice of facts relevant to facts in issue and drawing inferences of fact from evidence formally proved? A proposal relating only to facts in issue could be drafted, but courts presently take judicial notice of facts relevant to facts in issue and facts relevant to procedural and other issues. The processes are essentially the same no matter how close or remote the knowledge is to the facts in issue. In all the cases mentioned and in all situations the personal knowledge of the judge or juror is being applied. In some cases it is knowledge shared with the community generally, in other cases it is shared with the members of a group in the community. In all cases the facts and matters asserted are regarded by the judge or juror as beyond dispute. The distinctions are unrealistic and artificial.

9. In any event, the distinctions are required only if it is thought desirable to allow the judge and juror to use personal knowledge which is open to reasonable dispute in, for example, assessing evidence or the probabilities.¹⁹ While it may be difficult to prevent, they should not, however, rely on facts and matters which they believe are reasonably disputable and have not been the subject of formal proof and testing by

15 J B Weinstein & M A Berger, *Weinstein's Evidence*, Matthew Bender, New York, 1982, vol 1, para 200 [02], 200 [03].

16 (1977) 51 ALJR 198, 203.

17 (1981) 55 ALJR 355; eg, Australia Law Reform Commission, Report No 2, *Criminal Investigation*, AGPS, Canberra, 1975; Departmental Committee on Evidence of Identification in Criminal Cases, Great Britain, *Report to the Secretary of State for the Home Department*, HMSO, London, 1976 (Chairman: Lord Devlin). Consider also the factual assumptions made by the High Court in *Bunning v Cross* (1977) 141 CLR 54.

18 (1981) 56 ALJR 59.

19 For example, legislation would set out the limits of judicial notice (common knowledge etc) but would state that the power of the tribunal to use its personal knowledge in assessing evidence, etc, was not to be limited by the judicial notice proposal.

the parties. The distinctions have been encouraged because the reported cases generally concern the use of judicial notice to plug a gap in a party's proof and existing legislation, similarly, is concerned with facilitating the proof of particular facts. In terms of principle and logic, however, it is difficult to argue for the narrow view.

10. Authentication of Evidence. It is difficult to find an analysis by Australian or English writers of the basis upon which evidence authenticating or identifying proffered evidence is required or how such requirements relate to rules of admissibility or proof. Cross comments that real evidence is 'of little value' unless it is identified 'as the object the qualities of which are in issue or relevant to the issue'.²⁰ The cases and texts discuss the law as if it consists of a collection of special unrelated rules of exclusion. For example:

- **Writings.** When a party wishes to tender a writing which it maintains is relevant to the issues in the case it is expected to adduce evidence authenticating the writing. The party is expected to adduce evidence that the writing is what it purports to be or what the party claims it to be. The form of the authenticating evidence will vary — it may be evidence by the author of the writing, the person who signed the agreement, an eyewitness, a person familiar with the writing, comparison of writing by an expert in handwriting and by non-experts etc.
- **Identifying Objects.** When a party wishes to tender a physical object — for example, the alleged murder weapon — it is expected to adduce evidence supporting a link between the object and the issues.
- **Evidence Produced by Devices or Systems.** It is well established that for a party to be able to adduce evidence produced by a machine or other device or system it must give evidence of the accuracy and reliability of the device or system and, where appropriate, the connection between the evidence produced by the device and the issues in the case.
- **Recordings of Sight and Sound.** Photographs (whether still or moving) may be admitted on evidence being given by some one who took the photograph or some one familiar with the subject-matter linking the photograph with the subject-matter — it represents that which the witness observed.²¹ An X-ray picture will require the foundation required for scientific instruments. Other evidence may be used — eg, videotape of a riot; evidence given linking tape with event by a witness deposing to tape coming from a team sent to a particular location, at particular time and date.²²

20 J A Gobbo, D Byrne & J D Heydon, *Cross on Evidence*, 2nd Aust edn, Butterworths, Sydney, 1979, para 1.18. Note, however, that Cross states that the issue of whether a confession was made by the accused, like the question of whether tape-recordings are genuine, is a question for the jury and that, therefore, the question for the judge is whether there is a prima facie case (id, para 3.10). Compare *Ladlow v Hayes* (1983) 8 A Crim R 377, 385.

21 *Wigmore on Evidence*, para 795; *R v Tolson* (1864) 4F & F 103; 176 ER 488.

22 *Kajala v Noble* [1982] *Crim L Rev* 433.

In the case of tape recordings, it has been held that they are admissible — provided the accuracy of the recording is proved and the voices recorded properly identified.²³ In *Conwell v Tapfield*,²⁴ Chief Justice Street stated that evidence of the trustworthiness of the recording and reproduction were, strictly speaking, required:

The chain of evidence commences with the conversation itself; the first link is the recording equipment; the next link is the record itself; the next link is the sound reproducing equipment; and the other end of the chain is the reproduced sound. Expert evidence is requisite, if not conceded, upon the competence and capacity of the recording and reproducing equipment. Once this has been accepted by the judge by way of a ruling on the *voir dire*, all three links in the chain, that is to say the recording equipment, the record itself and the reproducing equipment, become admissible in evidence.

11. There is ample authority on the standard of proof required of conditions precedent for admissibility of relevant evidence — the judge must be satisfied on the balance of probabilities. If the rules relating to authentication or identification were conditions precedent to the admissibility of relevant evidence, you would expect the same standard of proof to apply. The issue of the standard of proof required for authentication or identification of proffered evidence has not, however, been discussed to any great extent in the authorities. In practice the trial judge will admit evidence of objects and other evidence on being given an assurance that evidence capable of demonstrating its connection to the issues will be led. In practice, writings are admitted into evidence on the giving of evidence in chief as to their authenticity — that is, the court proceeds on the basis that it assumes that the evidence will be accepted. With evidence produced by devices or systems the courts appear to have required that the trial judge be satisfied as to the accuracy of the technique and of the particular application of it. Wigmore wrote of the need for 'preliminary . . . testimony',³¹ Chief Justice Burbury commented on the 'need to have evidence' but this was with a view to establishing the basis for admissibility. In the case of tape recordings, it has been held in England that a tape challenged as not being the original and authentic tape should be admitted if the prosecution set up a '*prima facie*' case.³² A '*prima facie*' test was adopted because of concern about usurping the jury's role — it should be for the jury to determine its authenticity.³³ In Australia there has been little discussion. In *Conwell v Tapfield*³⁴, however, it was held that a tape recording could not be admitted unless the judge accepted the competence and capacity of the

23 *R v Maqsd Ali* [1966] 1 QB 688; cited with approval *R v Matthews and Ford* [1972] VR 3, 11; *R v Nilson* [1968] VR 238, 241.

24 [1981] 1 NSWLR 595, 598-9.

31 *Wigmore on Evidence*, para 795.

32 *R v Robson* [1972] 1 WLR 651, 653-4; reference is made to a balance of probabilities test and to a '*prima facie*' test. The *prima facie* is cited in Cross (5th Eng edn) 13-4 but compare the evidence led regarding video tapes in *Kajala v Noble* [1982] *Crim L Rev* 433.

33 *R v Robson* [1972] 1 WLR 651, 656.

34 [1981] 1 NSWLR 595, 599.

recording and reproducing equipment. Such an approach treats the requirements in the same way as rules of admissibility.

12. In American writing a common analysis is that authentication and identification evidence is required to establish the relevance of the tendered object, document or output of the device or system. Weinstein comments³⁵:

Authentication and identification of evidence are merely aspects of relevancy which are a necessary condition precedent to admissibility. Michael and Adler wrote:

We shall call this condition 'the logical condition' of the admissibility of real proof. As we shall see, the satisfaction of this condition depends upon the identification of the offered thing or event with one of the litigants in some way. . .³⁶

In absence of such a showing of authenticity or connection the evidence is simply irrelevant.³⁷

The law is treated as an aspect of 'conditional relevance'.³⁸ Morgan explained the concept of conditional relevance as follows:

Assume that fact A alone or fact B alone has no recognized logical relation to fact C, but the existence of both does have such a logical relation. For example, C is the fact that defendant made a specified false statement to plaintiff; A is the fact that defendant made the false statement; B, that it was communicated to plaintiff . . . because the judge must rule on every objection to the admissibility of evidence, does it follow that in order to rule on the admissibility of evidence of A, if it is first offered, he must determine whether or not B exists, and, if evidence of B is first offered, he must determine whether or not A exists? If both could be and were offered as a unit, there could be no objection on the ground of irrelevancy. Limitations of time and space prevent the offering of both simultaneously. The rule that 'without exception nothing which is not logically relevant is admissible' does not contemplate that each item of evidence must of itself be unconditionally relevant when offered.³⁹

It may be argued that the relevance of evidence — its ability to affect the probabilities — in the form of a document, object or reading of a technical instrument depends on establishing other facts — authorship,

35 J B Weinstein & M A Berger, *Weinstein's Evidence*, Matthew Bender, New York, 1983, 901-20.

36 J Michael & M J Adler, 'Real Proof: 1' (1952) 5 *Vand L Rev* 344, 362.

37 See E W Cleary (ed *McCormick's Handbook of the Law of Evidence*, 2nd edn, West Publishing Co, St Paul, Minn, 1972, para 185; J W Strong, 'Liberalising the Authentication of Private Writings' (1967) 52 *Corn L Rev* 284, 285; E M Morgan, *Basic Problems of Evidence*, 4th edn, Practising Law Institute, New York, 1963, 378.

38 See generally *Weinstein's Evidence*, para 104 [09]. Compare also evidence of the behaviour of animals — eg, bloodhounds: *State of New York v Centolella* 305 NY Supp 2nd 279 (1969); chickens 'going home to roost': *State v Wagner* 222 NW 407 (1928); Judge Talbot Smith, 'The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise' (1968) 54 *ABAJ* 231, 234.

39 E M Morgan, *Some Problems of Proof under the Anglo-American System of Litigation*, Columbia University Press, New York, 1956, 88-91.

identity, accuracy. The standard of proof that should be applied is — as suggested by Morgan — whether it would be open to the jury to find the fact proved. The issue is the relevance of the proffered evidence. If it is capable of affecting the probabilities, its effect on the probabilities is for the tribunal of fact.⁴⁰ For example:

Suppose the defendant is charged with receiving stolen property. For example, the prosecution contends that the defendant was in Philadelphia on a given day. This may only be relevant if the stolen goods were also in Philadelphia on the same day.⁴¹

Both matters are for the jury to decide. Similarly in this example⁴²:

Consider a rape trial where the accused person disputes all relationship with the complainant. As evidence of intercourse and the complainant's lack of consent the Crown offers a torn woman's undergarment stained with blood and semen. Here, since the relevancy of the evidence is clear if the complainant was wearing the undergarment at the time of the alleged intercourse, relevancy depends on identifying this particular undergarment as the one she was actually wearing.

Other examples can be found where it is sought to prove that the accused did some earlier act which tends to establish a motive for the alleged crime — for example, acts of gambling to suggest a motive for embezzlement. Similar issues arise where a party wishes to have a copy document or the transcript of a tape recording admitted. Assuming that the original document or tape is relevant, the relevance of the copy or transcripts will depend on a preliminary finding that the copy or transcript is what the party claims it to be. Similarly, the relevance of machine-produced evidence depends upon it being that which the party tendering it claims it to be. This will depend in turn on the accuracy and reliability of the devices involved. The relevance of the machine-produced evidence is conditional on accepting the reliability/accuracy of the devices concerned. In each case the issues to be decided in determining the relevance of the evidence must be considered again and finally by the tribunal of fact. The appropriate test is whether it would be reasonably open to a jury to find the fact established. Wigmore, however, argued the need to refuse to admit objects and documents in evidence without evidence 'authenticating' them on the grounds that

- production of an object can have the unconscious effect of causing the tribunal to accept other aspects of the party's case⁴³; and

40 See E. W. Cleary (ed) *McCormick's Handbook of the Law of Evidence*, 2nd edn, West Publishing Co, St Paul, 1972, para 190; J B Weinstein & M A Berger, *Weinstein's Evidence*, Matthew Bender, New York, 1982, 104-21 — 'since the question of admissibility turns on relative probative force, it is within the realm of the usual duties and experience of the jurors. . .'

41 SA Saltzburg & K R Redden, *Federal Rules of Evidence Manual*, 2nd edn, Michie Co, Charlottesville, 1977, 37.

42 SA Schiff, *Evidence in the Litigation Process*, Carswell Co, Toronto, 1978, 72.

43 J H Chadbourn (ed) *Wigmore on Evidence*, Little, Brown & Co, Boston, 1978, para 2129. He argued that 'authentication' is to be preferred to 'identification' — eg, the link between the murder weapon and the accused.

- in the case of documents, there are added dangers in that the document purports to indicate its authorship and the perception that this element is nevertheless missing and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has to be constantly emphasised by the judicial requirement of evidence to that effect. Further, the writing tends to be produced whereas the object does not. So there is a greater opportunity for the tribunal to be influenced by documents.⁴⁴

Other grounds advanced for maintaining special rules are that the relaxation of the law may 'open the gates to potential fraud'⁴⁵ and it is possible that a mistake may be made in attributing a letter purporting to be written by 'John Smith' to the wrong John Smith.⁴⁶

13. The issues raised are dangers to accurate fact-finding and unfairness to parties because, in the absence of evidence of authorship of the writing, identity of the object or accuracy of the instrument, the tribunal may place undue weight on the evidence, be misled or be deceived. The dangers, however, will vary with the nature of the material offered in evidence and are minimal:

- **Writings.** In everyday life we accept letters and the like at face value — we assume their authenticity.⁴⁷ It may be argued that most writings introduced in evidence are not fraudulent. Further, in the case of writings purporting to originate from a party, the probability that they do is high.⁴⁸ The risks are likely to arise in the minority of cases.
- **Objects.** With objects, it is unlikely that the tribunal will make a connection between them and the case without some connecting evidence. The possibility for fraud would be similar to that with writings — but it would take the form of direct perjury on the part of the witness giving the identifying evidence.
- **Tapes.** There is scope for tampering with tapes and, at times, a temptation to do so. This would arise, however, because, paradoxically, they contain within them strong self-authenticating evidence — the tribunal can hear witnesses and their voices. Allegations of tampering, however, are rarely made.⁴⁹
- **Scientific and Technical Instruments.** It is suggested that the concern here should be more about confusion and wasting the time of the tribunal than fraud. The temptation to tamper with the instrument will vary depending upon the extent to which the persons using it etc, are connected to the parties or the case.

44 *Wigmore on Evidence*, para 2150.

45 Strong, 'Liberalising the Authentication of Private Writings' (1966-7) 52 *Cornell Law Quarterly* 284, 285.

46 Strong, 286.

47 *Wigmore on Evidence*, para 2148; Strong, 285.

48 Strong, 293-4.

49 See T B Radley, 'Recording as Testimony to Truth' [1954] *Crim L Rev* 96.

Against these minimal dangers, the existing law requires a party to make sure that it is possible to authenticate the evidence whether it is in dispute or not. This can impose significant cost burdens and cause great inconvenience.

14. The issue in formulating proposals is whether to control the admissibility of the evidence to be authenticated by application of relevance proposals, or whether to do so by imposing special conditions of admissibility. The former approach has been taken in the US Federal Rules and in the Canadian proposals.⁵⁰ This approach is sound in principle. Under it, the dangers identified above can be addressed by the application of a relevance discretion.⁵¹ The probative value of the tape recording, for example, will depend upon whether and to what extent evidence is adduced about the making of the recording, the identification of the voices, and the identity of the tape with that used in the recording. If no evidence is adduced, the court could say that it is not possible to make a prima facie finding as to its authenticity and that it should be excluded. If enough evidence is led for the judge to say that it would be open to the jury to find that the tape is authentic, assuming the supporting evidence is accepted, it would still be open to him to refuse to admit the evidence of the tape because its probative value (which depends upon the supporting evidence) is outweighed by the risk of prejudice, confusion, misleading the court and time wasting. It should be noted, however, that Professor Saltzburg has voiced concern about the implications of this approach. He refers to examples such as establishing the chain of custody of the narcotics in a drug possession case and the authentication of recordings. At common law, stringent requirements were laid down which had to be satisfied before the proffered evidence was admitted. The liberal approach of the Federal Rules removes the rigid requirements but gives no guidance. Professor Saltzburg also questions whether some authentication cases should be treated as requiring preliminary fact-finding by the judge.⁵²

15. The conditional relevance approach is, however, a flexible one. It is the approach presently taken in practice with writings and, arguably, tape recordings. It is suggested that the topic should be dealt with as an aspect of conditional relevance and that any proposal should include a provision which would have the effect that where the relevance of evidence depends upon the court making some other finding the judge may admit such evidence if satisfied that it would be open to a reasonable jury to find that the evidence is what its proponent claims it to be. The alternative would be to advance proposals for particular

50 US Federal Rules of Evidence, r 901 contains detailed examples of authentication. Rule 902 facilitates authentication of public documents, foreign documents ('purporting' to be signed or sealed etc, official publications, trade inscriptions). See Law Reform Commission of Canada, Report, *Evidence*, Information Canada, Ottawa, 1975, 46-7 and Federal/Provincial Task Force of Canada, *Report on Uniform Rules of Evidence*, Carswell Co, Toronto, 1982, para 29.5, para 30.2. In the case of documents, special provisions were enacted to facilitate authentication — similar to the US Federal Rules.

51 As under the US Federal Rules, eg r 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, see *Weinstein's Evidence*, para 403[05], 403-48.

52 S A Saltzburg & K R Redden, *Federal Rules of Evidence Manual*, 2nd edn, Michie Co, Charlottesville, 1977, 642ff.

categories of evidence such as tape recordings, scientific instruments and computers. Such proposals, however, could never completely and adequately deal with the issues. They would also be likely to suffer the fate of legislation such as the computer legislation — it is too detailed and restricted to facilitate the authentication of computer output.

16. **Secondary Evidence of Documents.** The statements of the 'best evidence rule' found in leading texts usually take the form of a rule prescribing particular forms of proof of the contents of writings. At the same time, the rule can be seen as a rule of admissibility excluding certain categories of evidence relevant to the issue of the contents of documents.

17. Within the Commission views were divided. It is suggested that the correct view is that the rule prescribed modes of proof and is not a rule excluding relevant evidence. Commonly, the rule first operates at the moment when a party seeks to give evidence authenticating a document — establishing, *prima facie*, its relevance and admissibility. In such a situation a party may produce to the court the original document and lead evidence to support the conclusion that the document is what the party claims it to be — for example, by having a witness identify it and identify the handwriting. If the original is lost or destroyed but a copy is available, the party may seek to establish the authenticity and identity of the original by having a witness give evidence of its former existence, that the document produced is a copy and identify any handwriting in the document. The rules thus prescribe the process by which writings and modern documents may be authenticated or identified and their conditional relevance thereby established in a trial.

18. The Research Paper proposal was drafted in terms of what evidence may or may not be tendered. It prescribed modes of proof. It emerged in discussion of these proposals that while this is the correct analysis of the existing law and the most accurate approach to be taken, the law in practice is seen as a rule of admissibility. From a practical point of view that is the end result of the law — if a particular form of evidence cannot be tendered, any other form should not be admitted. It was also found that the admissibility approach was easier to understand. From a practical point of view it does not matter if it is treated as a rule of admissibility provided that it can operate at the authentication stage.⁵³

19. **What can be codified?** While the rules as to competence and compellability and the rules of admissibility lend themselves to codification, the rules controlling the questioning of witnesses do not. These rules are based upon the discretionary power possessed by courts to control their proceedings. Justice Barry, in discussing the issue of whether a judge can control the use of leading questions in cross-examination, said:

It is the duty of the Judge to regulate and control the proceeding so that the issues for adjudication may be investigated fully and fairly. The circumstance that the proceeding is one between adversaries each contending for the decision imposes limits . . . upon the effectiveness with which the Judge can perform his duties. Within these limits,

53 It may also require special proposals to ensure that an appropriate standard of proof applies.

however, the existence of this duty clothes the Judge with all the discretionary powers necessary for the discharge of the duty, and he may therefore control and regulate the manner in which the evidence is presented or elicited.⁵⁴

20. The topic is not something that appears to be discussed at length in the texts.⁵⁵ Best, however, in an early text on evidence⁵⁶ argued that:

The rules of evidence, especially of evidence tendered in *causa*, are, as has been shown, rules of law, which a court or judge has no more right to disregard or suspend than any other parts of the common or statute law of the land.⁵⁷ It is otherwise, however, with the subject of the present chapter⁵⁸; for, although the mode of receiving and extracting evidence is regulated by established rules, yet a discretionary power of relaxing them on proper occasions is vested in the tribunal.

Best then went on to consider the steps that occurred in the course of a trial, the power to order witnesses out of court, the question of who has the right to begin and rules relating to leading questions, discrediting the party's own witness and discrediting the other party's witness and some other matters. In drafting rules in this area, one is defining aspects of the court's discretionary power to control proceedings. That power extends to non-evidentiary matters — the power to determine which party begins, whether the accused should be present, the order of speeches. It is not possible to codify this area without dealing with all aspects of the court's powers.

21. It would be theoretically possible to state exhaustively the rules to be applied in facilitating the proof of documents — their seals, signatures, etc. It is not necessary, however, for proposals applying in federal and Territory courts. They can exist side by side with the State or Territory rules which apply where the court is sitting. If either makes the task of proof easier, it should be available. The situation is complicated by the fact that Commonwealth legislation — the State and Territorial Laws and Records Recognition Act — which consists primarily of such provisions, applies in both State courts as well as federal and Territory courts. It must be allowed to continue to do so.

22. A final matter to consider is the relationship between a comprehensive Commonwealth Evidence Act and the many provisions in existing Commonwealth legislation dealing with evidentiary matters. A prudent course to follow would be to preserve their operation but to develop and finalise proposals of general application. Once that is done,

54 *Mooney v James* [1949] VLR 22, 28. See also E M Morgan in American Law Institute, *Model Code of Evidence*, Philadelphia, 1942, 104; Law Reform Commission of Canada, *Report on Evidence*, Information Canada, Ottawa, 1975, 90; *Mather v Morgan* [1971] Tas SR 192, 207.

55 cf, J B Weinstein & M A Berger, *Weinstein's Evidence*, Matthew Bender, New York, 1982, vol 3, para 611 [01]; J H Buzzard, R May & M N Howard, *Phipson on Evidence*, 12th edn, Sweet & Maxwell, London, 1976, para 1543 for discussion of the use of interpreters.

56 W M Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, Sweet, London, 1849. (Reprinted by Garland Publishing, New York & London) para 430ff.

57 Best was here referring to rules relating to admissibility.

58 Rules of forensic practice respecting evidence.

then the task can be undertaken of examining the individual evidentiary provisions with a view to reform or removal.

SUBSTANTIVE ISSUES

23. **Matters for debate.** Views differ on many topics. Should the oath be abolished? Should spouses, de facto spouses, parents or children of an accused be compellable witnesses? Should non-compellability of witnesses extend to others? Should the unsworn statement be abolished? What inferences, if any, should be drawn from the accused's silence? How should hearsay evidence be controlled? Should the 'voluntariness' test for confessions be replaced? Should we have rules controlling the admissibility of identification evidence? The report raises many issues for debate — some old, some new. For this paper it is proposed to refer to two topics of current interest — similar fact evidence and client legal privilege.

24. **Similar fact evidence.** An analysis of recent High Court decisions reveals confusion on a number of issues. One issue yet to be laid to rest is whether and to what extent reasoning via propensity is allowed under existing law. The law in this area remains particularly uncertain — partly because of the language used in the classic statements of the rule.

25. In *Makin v Attorney-General for NSW* Lord Herschell, stated:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue. . .⁵⁹

In *Markby v R*⁶⁰, acting Chief Justice Gibbs, as he then was, regarding this passage as authoritative, restated the principles:

The first principle, which is fundamental, is that the evidence of similar facts is not admissible if it shows only that the accused had a propensity or disposition to commit crime, or crime of a particular kind, or that he was the sort of person likely to commit the crime charged. The second principle, which is a corollary of the first, is that the evidence is admissible if it is relevant in some other way, that is, if it tends to show that he is guilty of the crime charged for some reason other than that he has committed crimes in the past or has a criminal disposition.

26. In the quoted passages and other judicial statements three concepts are referred to: character, disposition and propensity. Often it is not clear whether they are used interchangeably; indeed, it is probable that they overlap considerably in meaning. 'Character', according to the Concise Oxford Dictionary, is a 'description of a person's qualities', inferred from a variety of sources. It is clear that the prosecution cannot

⁵⁹ [1894] AC 57, 65.

⁶⁰ (1978) 140 CLR 108, 116 (Stephen, Jacobs and Aickin JJ concurring).

adduce evidence of the accused's character to support an assertion that he committed the crime charged.⁶¹ 'Propensity', again according to the Concise Oxford Dictionary, means 'inclination or tendency'. A propensity reasoning process involves inferring a person's tendency to do a certain act simply from the fact that he has done similar acts in the past. The overlap with character reasoning is clear, but the important difference is that 'propensity' is highly elastic in content.

27. The law relating to propensity reasoning is uncertain. On one view, evidence tendered by the prosecution⁶² to show propensity is, like evidence of character, inadmissible.⁶³ But there is increasing support for the view that there is no rule of automatic exclusion for propensity evidence.⁶⁴ At the most, only reasoning via general propensity⁶⁵ is automatically prohibited. Evidence of a specific propensity may be so probative that it should be admitted, despite the dangers.⁶⁶ Research has not revealed a case which held explicitly that reasoning via a specific, unusual propensity was prohibited. There was nothing in Lord Herschell's propositions to suggest that nor was there on proper analysis in Chief Justice Gibbs's statements. In *Markby's* case His Honour said that similar fact evidence was not admissible if it showed 'only that he had a propensity to commit crime, or crime of a particular kind, or that he was the sort of person likely to have committed the crime charged'. This is not specific unusual propensity. He then went on to say 'the second principle, which is a corollary of the first, is that the evidence is admissible if it is relevant in some other way, that is, if it tends to show that he is guilty of the crime charged for some reason other than that he has committed crimes in the past or has a criminal disposition'. Again, His Honour in referring to the corollary, speaks of general propensities rather than a specific and unusual one. He is again saying that it is evidence which shows no more than bad character that is inadmissible. It is also interesting that in his discussion in *Perry*⁶⁷, His Honour puts *Makin* and *Smith* in the category of cases relying on improbability reasoning but not *Ball* and *Straffen* and a system case (*Martin v Osborne*). In referring to *Straffen*, he refers specifically to the fact that the accused had 'in the past, committed crimes in a particular and unusual manner' and said that that fact 'may be relevant to show that he was the person who committed the crime in question when that was

61 *Attwood v R* (1960) 102 CLR 353, 359. The evidence is inadmissible because its probative value is minimal and will invariably be outweighed by risks of prejudice and the danger that the fact finder will give it too much weight.

62 The only requirement where such evidence is tendered by a co-accused is that it be relevant: *Lowery v R* [1974] AC 85, 102 (PC); *Knight v Jones, ex parte Jones* [1891] Qd R 98 (FC); *R v Gibb and McKenzie* [1983] 2 VR 155, 170. But cf *R v McBride* (1983) 34 SASR 433, 442-3, 447.

63 *Markby v R* (1978) 140 CLR 108, 116 (Gibbs ACJ); *Perry v R* (1983) 57 ALJR 110, 113 (Gibbs CJ), 123 (Brennan J) who also indicated that the prosecution cannot adduce evidence for the purpose of showing that the accused has a propensity to commit crimes of the sort with which he is charged. Also *Sutton v R* (1984) 58 ALJR 60, 72, 75 (Deane and Dawson JJ).

64 P B Carter, *Cases and Statutes on Evidence*, Sweet & Maxwell, London, 1981, 535. D K Piragoff, *Similar Fact Evidence*, Carswell Co, Toronto, 1981, 14. P K Waight & C R Williams, *Cases and Materials on Evidence*, Law Book Co, Sydney, 1980, 396; *Cross on Evidence*, para 14.2; J D Heydon, *Cases and Materials on Evidence*, Butterworths, London, 1975, 255.

65 Which is close to 'character' and may be analogous to 'disposition'.

66 *DDP v Boardman* [1975] AC 421, 456-7 (Lord Cross).

67 57 ALJR, at 113.

committed in the characteristic manner'. This is specific propensity reasoning and is support for the view that in *Markby*, His Honour used the term 'propensity' to refer to evidence of general propensity as opposed to evidence of a specific and unusual propensity. It must also be borne in mind that he believed that he was restating Lord Herschell's dictum. The 'principle'⁶⁸ based on the dangers of propensity evidence is a principle in fact, not a rule, and subject to exceptions in certain circumstances. Thus Justice Murphy stated in *Perry v R*⁶⁹ that evidence of a specific propensity has in fact been admitted in the past⁷⁰, 'despite protestations to the contrary', and the supposed rigid distinction between 'prohibited use of previous criminality to show propensity' and other uses 'is unsatisfactory'. Justice Wilson, without expressing a firm conclusion, noted the 'impressive' body of academic writing which takes the view that recent cases⁷¹ interpret the traditional formulation:

not in terms of a rule of exclusion with certain categories wherein exceptions may be found, nor in terms of mere propensity or something more, but as requiring the court to compare, in the context of each case, the probative value of the evidence with the risk of prejudice it conveys.⁷²

In his opinion, 'there is much to be said for this reconciliation of the twin principles stated by Lord Herschell, although there is no reason to treat any particular formulation as exclusive'.⁷³ The Canadian Supreme Court recently adopted this approach in *Sweitzer v R*⁷⁴, stating that the admissibility of similar fact evidence 'will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission *whatever the purpose of its admission*'.

28. What should be the law? If the correct view of the law is that similar conduct evidence is not admissible to show a propensity, general or specific, of the accused, this prohibition might be justified on a similar basis to the prohibition of general character evidence relating to the accused. Clearly, evidence relevant to the issue of the accused's guilt solely because it tends to prove that he has a general propensity to commit the offence charged should not be admissible when tendered by the prosecution, because the probative value of the evidence will be outweighed by the counter-balancing disadvantages of admission. It is also suggested that the probative value of evidence of specific conduct of the accused adduced to show a specific propensity is, where there is no similarity of act and circumstance, almost invariably likely to be outweighed by the counter-balancing disadvantages of admission. It is also suggested that the probative value of evidence of specific conduct of the accused adduced to show a specific propensity is, where there is no similarity of act and circumstance, almost invariably likely to be outweighed by the disadvantages consonant with admission of the

68 Stated by Gibbs ACJ in *Markby v R* (1978) 140 CLR 108, 116.

69 (1983) 57 ALJR 110, 115-6.

70 See also *R v Young* (1923) SASR 35 and *Zaphir v R* (1978) QdR 151; *R v Ball* [1911] AC 47; *R v Straffen* [1952] 2 QB 911; *O'Leary v R* (1946) 73 CLR 566; *R v Chandler* [1956] 56 SR (NSW) 335; Lord Hailsham in *Boardman*, 452 (where Ball and Thompson noted as propensity cases and approved).

71 In particular, the House of Lords decision in *DPP v Boardman* [1975] AC 421.

72 (1983) 57 ALJR 110, 121.

73 *ibid.*

74 (1982) 137 DLR (3d) 703.

evidence. Exclusion seems appropriate. Where such similarity exists, disadvantages remain:

- (a) **Risk of Mis-estimation.** The fact-finder may not allow for the possibility that a person who has performed an act in one set of circumstances will not perform it again in the same circumstances; ie the fact-finder may put too much weight on the similarities. Proof that a person could have performed the act claimed does not prove that he did do it on the occasion in question, but it is easy to leap to that conclusion. There is likely to be a tendency to diminish the size of the class of people with the same tendencies — to infer more readily that the accused, capable of certain behaviour, was the person who behaved in that way on the occasion in question.⁷⁵ A fact-finder, sure that one crime leads to another, might not give other evidence in the case, particularly that evidence which tends to exonerate the accused, the weight which it deserves.
- (b) **Prejudice.** A jury may infer from the evidence that the accused was responsible for previous crimes or other misconduct. The danger of prejudice derived from the conduct having a negative moral component, which it usually will, is totally independent of the probative value of the evidence.
- (c) **Confusion, Surprise and Time.** The same is true of problems of confusion and time wasting — indeed, it has already been noted that often the more probative the evidence the more these problems are exacerbated. As to surprise, a person involved in a trial may be surprised when specific conduct evidence is introduced, and be unable to muster contradictory evidence without an adjournment:

Evidence of disposition, particularly that which is inferred from similar fact evidence, may take the person against whom it is tendered by surprise unless he is prepared to defend himself with respect to all the bad acts of his life. In Willes J's words, 'if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and . . . upon a trial for murder you might begin by shewing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice. . .'⁷⁶

- (d) **Pre-Trial Significance.** An accused with prior convictions similar to the crime in question is more likely to be investigated and runs the danger of being prosecuted simply because of that record.

⁷⁵ Showing that a person accused of a particular burglary has committed prior burglaries does not, for example, demonstrate that he is more likely than the thousands of other people with burglary convictions to have committed this particular one. But it may be significantly probative if the issue in the trial is only one of mental state.

⁷⁶ New South Wales Law Reform Commission, Working Paper, *Evidence of Disposition*, Govt Printer, 1979, 21 (NSWLR WP) quoting Willes J in *R v Rowton* [1865] All ER Rep 549.

- (e) **Policy Considerations.** Once someone has been punished for criminal behaviour, and thus 'paid his debt to society', it might be seen as unfair to use that previous behaviour against him at some time in the future.

It cannot be maintained, however, that the variable probative value of specific propensity evidence will always be outweighed by these disadvantages, justifying automatic exclusion. In addition, it must be borne in mind that evidence relevant for some reason other than evidencing a specific propensity can be admitted — for example, to show improbability of coincidence. But such evidence will have similar dangers in any event. If, for example, the prosecution seeks to adduce evidence of previous crimes in order to suggest that coincidence was improbable and that the accused must have been responsible for all of them, the following dangers exist:

- (a) The jury may conclude that the accused was in fact responsible for the previous crimes and decide to punish him for those, regardless of whether he is guilty of the crime with which he is charged.
- (b) A jury may incorrectly assess the probative value of the evidence. This may happen in two ways. The jury, having inferred that the accused is a 'criminal' or a 'bad person' may then overestimate the extent to which this information is important in determining whether the accused committed the crime in question. Alternatively, the jury may overestimate the unlikelihood of coincidence involved in the particular combination of events. While a trial judge may be unwilling to draw any conclusions from the existence of similarities in separate events, a jury may tend to give the unlikelihood of coincidence greater weight. Stated differently, the jury may misestimate the extent to which a particular combination of events is unlikely to have occurred without a connecting cause. As Justice Murphy stated in *Perry v R*⁷⁷, 'common assumptions about improbability of sequences are often wrong. A suggested sequence, series or pattern of events is often incorrectly regarded as so extremely improbable as to be incredible'.
- (c) There is also the risk of the jury being distracted and trials being lengthened.⁷⁸ The pre-trial significance and policy considerations noted above may also apply to similar fact evidence adduced for this reasoning process.

Further, although evidence of similar conduct which shows a specific propensity can often be admitted to show an improbable coincidence of similar events, that will not always be the case. If, for example, an accused were charged with a sexual offence relating to his daughter, and he asserts that someone else was responsible, evidence of his prior convictions of incest with other daughters would be substantially probative only because it showed a specific propensity for such conduct. An alternative view of the

77 (1983) 57 ALJR 110, 116.

78 Gibbs CJ in *Perry v R* (1983) 57 ALJR 110, 113.

legal position has gradually developed, whereby propensity reasoning is not always prohibited. The Herschell dictum in *Makin*, on this view, was intended only as a general indication that character evidence, evidence which does no more than show general (criminal) propensities, should be excluded. It did not automatically exclude all evidence suggesting a behavioural propensity, nor evidence having relevance otherwise than via propensity. Lord Hailsham's 'forbidden type of reasoning', as stated in *Boardman*, should not be considered as covering all propensity reasoning, but, rather, insufficiently probative propensity reasoning, reasoning from evidence of general behaviour without any sufficient nexus to the occasion in question.⁷⁹ There is much to be said for this type of approach. It is clearly arguable that it is not totally prohibited at present. Such an approach is more realistic when the court is confronted by the *Straffen* type of case. The dangers of such reasoning appear to differ very little from other 'permissible' modes of reasoning. Such an approach would enable general provisions to be advanced which would control the admissibility of previous conduct evidence in all cases.

29. **Client/legal privilege.** Many assume that *Grant v Downs* defined exhaustively the circumstances in which this privilege can operate. In that case, privilege was claimed for internal reports made to the Upper Secretary and the Director, Division of Establishments, of the Department of Public Health⁸⁰ relating to the circumstances surrounding the death of the appellant's husband. The reports could be described as communications passing between servants and agents of the defendant. This material was supplied to the legal advisers. The Master upheld the claim for privilege. On appeal, Justice Rath also upheld the claim but only after the filing of an affidavit by the then Director of State Psychiatric Services who deposed that there were three purposes for the preparation of reports of the type in question:

- to ascertain any breaches of discipline;
- to check if there had been any breach of security arrangements so as to minimise injuries to patients; and
- to have a contemporaneous detailed report, including commentary, to submit to the Crown's legal advisers to enable them to advise the Department about its legal position and to represent the department at inquests and in any civil action that may ensue.

The NSW Court of Appeal refused an application for leave to appeal from the decision of Justice Rath. On appeal to the High Court it was held that the reports were not privileged.

79 See *Cross on Evidence*, para 14.1; Z Cowen & P B Carter, *Essays on the Law of Evidence*, Oxford University Press, London, 1956, 160-1; D W Elliott, 'The Young Persons Guide to Similar Fact Evidence' [1983] *Crim L Rev* 284; D K Piragoff, *Similar Fact Evidence*, Carswell, Toronto, 1981, 191; C Tapper, 'Proof and Prejudice' in E Campbell & L Waller (ed) *Well and Truly Tried*, Law Book Co, Sydney, 1982, 198; Waight & Williams, 396; the recommendations of the Criminal Law Revision Committee (England and Wales) Eleventh Report, *Evidence (General)*, Cmmd 4991, HMSO, 1972, 174-5, 58-9; NSWLRC WP, *Disposition*, 32.

80 The defendant Downs was the nominal defendant appointed to represent the government: *Grant v Downs* [1974] 2 NSWLR 401, 402.

- **Justices Stephen, Mason and Murphy.** In the course of their majority judgment their Honours referred to the line of English cases which supported the proposition that documents brought into existence after an accident, pursuant to a standing instruction previously given, may be privileged.⁸¹ This is only the case, their Honours stated, however, if the court finds that litigation could be reasonably anticipated at the time when the document was prepared. Further, more was required to attract the privilege — ‘the document must be called into being for advice’. The issue was the extent to which it must be intended to serve this purpose.⁸²

The differing English authorities were considered. Their Honours then stated that they had to determine the relevant principles governing:

. . . communications and materials submitted by a client to his solicitor for the purpose of advice or for the purpose of use in existing or anticipated litigation.⁸³

Thus they formulated the issue in such a way that their subsequent statement of the law can be said to apply to both the advice and the litigation situation. Their Honours concluded that ‘the privilege should be confined within strict limits’.⁸⁴ They held that ‘. . . the sole purpose test should now be adopted as the criterion of legal professional privilege’.⁸⁵ The purpose for which the materials were created as distinguished from the purpose for which they were received has since been affirmed to be the question.⁸⁶

This test presumably is to apply to communications and other materials⁸⁷ submitted by the client both for advice and for use in pending or anticipated litigation. Applying this test the majority held that:

neither the evidence nor the documents themselves sufficiently establish that the purpose of submitting the documents to the respondent’s legal advisers was the sole purpose of their being brought into existence . . . the documents have about them a flavour of routine reports such as would be made by any institution or corporation relating to an occurrence of the kind that took place so as to inform itself of the circumstances in which the death of the patient occurred and with a view to disciplinary action and the reform of any procedures that might be found to be defective.⁸⁸

81 (1976) 135 CLR 674, 682.

82 id, 683.

83 id, 682.

84 id, 685.

85 id, 688.

86 *O’Reilly v Commissioners of The State Bank of Victoria* (1983) 57 ALJR 130.

87 The view is taken that the expression ‘communications’ is qualified by the words ‘submitted by client’. If it was intended to deal with lawyer/client communications as such, one would expect a different choice of words. In any event, the case concerned ‘communications and materials’ obtained by the client and submitted by the client to the legal adviser.

88 (1976) 135 CLR 674, 689.

For these reasons, the reports in question were not considered to be privileged and the appeal was allowed. The test has since been explained by Justice Glass as follows:

If the purpose which actuates the party who commissions documents is not single, but multiple, each must be identified. Unless all of them fall within the protected group of purposes, namely submission to legal advisers or use in litigation, no privilege attaches.⁸⁹

Chief Justice Barwick and Justice Jacobs. Their Honours advanced different tests but agreed with the majority that the materials were not privileged.⁹⁰

30. *The Effect of Grant v Downs*. It has been said that the decision 'has considerably narrowed the ambit of the doctrine of legal professional privilege'.⁹¹ It is suggested, however, that it has also widened the ambit of the privilege⁹² and that the effect of the majority judgment is open to debate. A preliminary issue is the question of whether the test in *Grant v Downs* was intended to be exhaustive. In two single judge decisions, the view has been expressed that the sole purpose test was not intended to be an exhaustive statement of the law on legal professional privilege. In *Trade Practices Commission v Sterling* it was argued that the categories of legal professional privilege previously relied upon have been replaced by a test that confines the privilege to:

documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or use in legal proceedings. . . the other categories. . . have now gone.

This argument was rejected:

It is clear that the High Court in *Grant's* case was considering the relevant principles of law governing privilege attaching to communications and materials submitted by a client to his solicitor for the purpose of advice or for the purpose of use in existing or anticipated litigation and not otherwise. *Grant's* case has nothing to say as to the other well-established categories of legal professional privilege.⁹³

89 *National Employers' Mutual General Insurance Association Ltd v Waind* [1978] 1 NSWLR 372, 376 (Court of Appeal) cited with approval by Mason J in the High Court Appeal (1979) 141 CLR 648, 656.

90 (1976) 135 CLR 674; Chief Justice Barwick adopted a less strict test — the 'dominant' purpose for which it was produced (676, 677); Jacobs J adopted the test — does the purpose of supplying the material to the legal adviser account for its existence (692, 694).

91 Aronson, Reaburn & Weinberg, para 9.18ff. See also Mason J (Gibbs CJ concurring) and Murphy J in *O'Reilly v Commissioners of The State Bank of Victoria* (1983) 57 ALJR 130.

92 It extended protection to third party communications in a purely advice context.

93 (1978) 36 FLR 244, 248. In *Packer v Deputy Commissioner of Taxation* 55 ALR 242, Sheppardson J stated that the High Court propositions did not change the law as it applies to solicitor's notes (259). Andrews SPJ, considered that the privilege could be available to protect portions of trust account ledgers which recorded advice or other communications of the type referred to in *Grant v Downs* (246).

In *Kelly v The Commonwealth*⁹⁴ it was argued that the sole purpose test applied to letters passing between the client and legal adviser. This argument was also rejected:

. . .nothing in *Grant v Downs* related to documents which themselves are confidential communications between solicitor and client for professional purposes; these are privileged without regard to the question whether they were made for the purpose of actual or contemplated litigation.⁹⁵

Recently, however, the view was expressed in *Electrona Carbide Industries Pty Ltd v Tasmanian Government Insurance Office*⁹⁶ that the High Court was attempting to deal exhaustively with the topic of legal professional confidentiality.⁹⁷ Justice Cosgrove referred to and rejected the passages quoted above from *Grant v Downs*, stating that the judgments of Chief Justice Barwick and Justices Stephen, Mason and Murphy lead inexorably to the conclusion that the court intended to lay down principles of universal application.⁹⁸

31. In two recent cases, the High Court has considered whether legal professional privilege entitled a refusal to produce documents or information in response to search warrants and the like. In neither was it necessary for the court to define the content of the privilege. The statements of the law by Justice Murphy suggest that he sees the *Grant v Downs* formula as exhaustive.⁹⁹ Justice Mason¹⁰⁰, in the first case — *O'Reilly's* case — discussed the application of the test to contracts, agreements, correspondence and extracts of transactions processed through the trust account of the solicitor on the basis that the sole purpose test was the test to be satisfied. While it may be implicit in his statements that the test is exhaustive, it is not expressly stated to be so.¹⁰¹ In the second case (*Baker v Campbell*), however, Chief Justice Gibbs, after stating that privilege related to communications between lawyer and client and communications with third parties where litigation is in contemplation, added 'for completeness' that the privilege is 'confined to documents. . .brought into existence for the sole purpose of

94 (1979) 39 FLR 372; and see A F Smith, 'Erosion of the Doctrine of Privilege' (1982) 56 *LIJ* 460, 464.

95 *id.*, 373; cf *Minter v Priest* [1930] AC 558 where a request to a solicitor to procure a loan was held to be privileged.

96 Unreported, No 12, Tas SC (26 February 1982) (Cosgrove J).

97 See eg, *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648, 654 (Mason J).

98 *Electrona Carbide Industries Pty Ltd v Tasmanian Government Insurance Office*, unreported, No 12, Tas SC (26 February 1982) 5 — the passages are: (1976) 135 CLR 674, 676, 677, 682. It is clear that Barwick CJ attempted to lay down principles of universal application. It is not clear that the majority did. His Honour also relied upon statements (*id.*, 4) by Mason J in *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648, 654 where His Honour does not expressly state the test to be exhaustive, although it may be argued to be implicit.

99 *O'Reilly v Commissioners of The State Bank of Victoria* (1983) 57 ALJR 130, 139. The privilege attaches to and is confined to communications solely for the purpose of advice or 'for the purpose of use in existing or anticipated litigation': *Baker v Campbell* (1983) 49 ALR 385, 408 (Murphy J), 429 (Deane J).

100 (1983) 57 ALJR 130, 133 with Gibbs CJ concurring.

101 Note also C A Sweeney, 'The Beginning of the End for Legal Professional Privilege' (1983) 57 *ALJ* 357.

their being submitted to legal advisers for advice or for use in legal proceedings'.¹⁰² Justice Dawson clearly does not treat the *Grant v Downs* statement as exhaustive.¹⁰³ The issue remains to be resolved.¹⁰⁴

CONCLUSION

32. The foregoing issues are just a few of the issues raised in the Evidence reference. The reference is a mammoth one and is not yet finished. It is proposed to seek responses to the issues raised in the Interim Report and then to submit a Final Report. The Law Reform Commission needs the help of law teachers knowledgeable in the subject. We need their comment generally on the issues raised in the report and the proposals. But we look to them particularly for criticism of the existing law, comment on policy and conceptual issues and comment on the structure and organisation of the proposals.

102 (1983) 49 ALR 385, 389.

103 *id.*, 439; he restricts the sole purpose test to documents submitted to the lawyer.

104 T Pagone, 'Legal Professional Privilege after *Baker v Campbell*' (1984) 58 *LIJ* 124, 126.