Among other reasons, Heydon J stated that a problem with the appellant's argument regarding *Old Chief* was the 'highly questionable' contention that 'even though two statements may be understood to contain the same content, they are still two discrete items of evidence.'[16] That exercise was characterised by his Honour as 'slicing up evidence.'

Endnotes

1. Section 135 of the Evidence Act allows a court to refuse to admit evidence if its probative value is substantially outweighed by danger that the evidence might be unfairly prejudicial, misleading or confusing, or result in undue waste of time.
2. (2010) 205 A Crim R 157; [2010] NSWCCA 272 at [99].
3. Ibid at [98].
4. Ibid at [99].
5. Ibid at [121].
6. (2012) 286 ALR 441; [2012] HCA 15 at [22]. Emphasis in original.
7. Ibid.
8. Ibid at [27]-[28]. Emphasis in original.
9. Ibid at [24]. Emphasis in original.
10. Ibid at [71].
11. Ibid.
12. Ibid at [71]-[72].
13. Ibid at [73].
14. Ibid at [74].
15. (1997) 519 US 172.
16. Ibid at [64].

Rape in marriage

Caroline Dobraszczyk reports on *PGA v The Queen* [2012] HCA 21

This case deals with the highly interesting and controversial issue as to whether the 'rape in marriage' defence was ever part of the common law of Australia.

On 5 July 2010 the appellant was charged for trial in the District Court of South Australia with numerous offences including two counts of rape contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) ('CLC Act'). Both offences were alleged to have occurred in 1963. The issue for the High Court was whether the appellant was correct in his argument that he cannot be guilty of the rape of his wife, given that they were married at the time of the alleged offences, and that his wife had given her consent to sexual intercourse as a result of the marriage contract. This concept of 'marital exemption' was argued to be part of the common law at the time.

The majority, French CJ, Gummow, Hayne, Crennan and Kiefel JJ, held that if the 'marital exemption' was ever part of the common law of Australia it had ceased to be so by the time of the enactment in 1935 of s 48 of the CLC Act.[1]

The majority considered what is meant by the term 'common law' and 'the common law of Australia.' In relation to 'the common law', they referred to the *Native Title Act Case*.[2] They noted that the term 'common law' is not only 'a body of law created and defined by the courts of the past, but also as a body of law the content of which, having been declared by the courts at a particular time, might be developed thereafter and be declared to be different.'[3] In relation to 'the common law of Australia', the majority noted that the 'common law' which was received in South Australia in 1836 did not include the jurisdiction with respect to matrimonial causes which in England was exercised by the ecclesiastical courts.[4] At [28] they referred to *Skelton v Collins*[5] where Windeyer J discussed the reception of the doctrines and principles of the common law in Australia as follows:

> To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts. ... In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory.

It is interesting to note that the main source of the appellant's argument was based on a particular passage in *The History of the Pleas of the Crown*, being the extra judicial writings of Sir Matthew Hale, chief justice of the Court of King's Bench (1671–1676), first published in

1736. The short version of this law was that a husband cannot be guilty of a rape he commits on his wife. This was repeated in numerous texts thereafter, however the majority noted that what was missing was any statement and analysis of reasoning to support the principle.[6] The majority however noted that whatever its character in law, Hale's proposition was not framed in absolute terms, and that the reason given by Hale was based on an understanding of the law of matrimonial status at the time he wrote the Pleas.[7]

It was noted that the law affecting matrimony and the status of women continued to change after Hale's time, for example trust law recognising separate property for a wife after her marriage; the married womens' property legislation; and the passage of divorce legislation, in the United Kingdom in 1857 and then in all the states of Australia.[8]

Heydon J noted, in dissent, that there are numerous cases, including Australian cases, in which courts have assumed Hale's proposition to be correct at common law.

The majority referred to *State v Smith*, a decision of the Supreme Court of New Jersey in discussing the relevance of nineteenth century legislative changes to the law concerning spousal rape:

> We believe that Hale's statements concerning the common law of spousal rape derived from the nature of marriage at a particular time in history. Hale stated the rule in terms of an implied matrimonial consent to intercourse which the wife could not retract. This reasoning may have been persuasive during Hale's time, when marriages were effectively permanent, ending only by death or an act of Parliament. Since the matrimonial vow itself was not retractable, Hale may have believed that neither was the implied consent to conjugal rights. Consequently, he stated the rule in absolute terms, as if it were applicable without exception to all marriage relationships. In the years since Hale's formulation of the rule, attitudes towards permanency of marriage have changed and divorce has become far easier to obtain. The rule, formulated under vastly different conditions, need not prevail when those conditions have changed.

In particular, the majority questioned 'If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract', may she not also revoke a 'term' of that contract, namely, consent to intercourse?'[9]

The majority also noted the following matters:

- the ecclesiastical courts never embraced the notion of a general consent to sexual intercourse;
- Australian colonies only received jurisdiction with respect to matrimonial causes via local statute; and
- the attitudes of the equity jurisdiction to the property rights of women could not substantiate an argument that a wife had no legal personality distinct from her husband.[10]

Accordingly the majority held at [64] that by the time the CLC Act was enacted in 1935, local statute law had removed any basis for continued acceptance of Hale's proposition. Therefore, at the relevant time in this case, a husband could be guilty of a rape upon his wife.

Heydon J noted, in dissent, that there are numerous cases, including Australian cases, in which courts have assumed Hale's proposition to be correct at common law.[11] Also, that the High Court was not taken to any authority stating that Hale's proposition was not the law and that the leading English and Australian academic lawyers specialising in criminal law agreed that the immunity existed.[12] Bell J, also in dissent, referred to various cases where the immunity was relied upon as well as the authority of the *Pleas of the Crown*.

Endnotes

1. *PGA v The Queen* [2012] HCA 21 at [18].
2. *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 484-486.
3. *PGA v The Queen* [2012] HCA 21 at [23].
4. at [25]-[27].
5. (1996) 115 CLR 94 at 134.
6. at [4].
7. at [43], giving the example of the *Matrimonial Causes Act 1858* (SA).
8. at [44]-[57].
9. at [59].
10. at [60]-[61].
11. at [100].
12. at [156].