SUPER-SLEUTH OR TRIER OF FACT?

KOZUL v. *R.*[1]

Introduction

During the course of a trial, the principal questions for which answers must be sought in the law of evidence are; firstly, what facts are in principle provable; and secondly, by what means are such facts to be proved. The methods by which the facts relevant to the case[2] are proved are through the vehicles of "testimonial", "circumstantial" and "real" evidence.

Real evidence consists primarily in the inspection of tangible things, other than documents, by the tribunal of fact.[3] Although the offering of such evidence will invariably involve the use of testimonial and/or circumstantial evidence, once the identification or explanation of such an object's existence has been provided, the production of material objects is without doubt the most persuasive form of evidence. Upon the production of the object, neither testimony nor inference is said to be relied upon, nor do the usual problems surrounding other items of evidence as to their cogency arise. Where the real evidence is *direct* evidence, as when it is offered to prove the facts about the object as an end in itself,[4] it will always pass the test of relevance since it must bear immediately on the facts in issue.

Unlike oral testimony, no inferential leap is required by the trier of fact from the time when the tangible thing is submitted for inspection to the time when a conclusion is drawn by the trier of fact as to the persuasiveness of such evidence. Upon submission, judge or jury are enabled by the direct use of their senses to perceive facts about the very things in evidence rather than making qualitative assessments between competing, and often conflicting pieces of oral testimony. The object is said to "speak for itself", unless of course its very genuineness is in dispute.[5] Yet it is this very characteristic of real evidence which renders it so uniquely persuasive

---

[1] (1981) 34 A.L.R. 429.

[2] Be they either facts "in issue", "relevant to the issue" or "collateral to the issue".

[3] According to the latest edition of *Cross on Evidence,* real evidence consists of "anything other than testimony, admissible hearsay or a document, the contents of which are offered as testimonial evidence, examined by the tribunal as a means of proof": 2nd Australian ed. (J. A. Gobbo, D. Byrne and J. D. Heydon eds.), 1979, para 1.25. Although G. D. Nokes would go as far as including the demeanour of a witness as "real" evidence, it would appear more logical to treat it as being merely ancillary to such witness' oral evidence: "Real Evidence" (1949) 65 *L.Q.R.* 57-71, esp. at 64.

[4] The classic example of real evidence being used as direct evidence is provided by the case of *Line* v. *Taylor* (1862) 3 F. & F. 731, where Earle, C.J. allowed the production of the defendant's dog into court where the plaintiff had brought an action that the defendant knowingly kept a fierce and mischievous dog.

[5] *Belt* v. *Lawes,* reported in *The Times,* November 17 and December 16, 1882.

which also allows for its potential abuse at the hands of all but the most competent jurors. When one considers that real evidence in criminal trials usually consists of weapons and instruments used in the commission of the crime charged, it would not be unduly cynical to imagine that the jury, by placing undue emphasis on the significance of a blood-spattered knife or a gruesome photo of the murder victim[6] *vis à vis* the other items of evidence, would be effectively giving priority to evidence whose inherently prejudicial elements may well outweigh its probative value. It follows, therefore, because items of real evidence are susceptible to a prejudicial emphasis at the expense of the accused, that judicial directions as to their use for the purposes of limited experimentation so as to determine which qualities are significant to the case being tried must clearly lay down the strict parameters within which the law recognises that such experimentation may proceed.

Although the practice of the jury taking exhibits into the jury room goes back many centuries, and despite its day to day practical importance, there is a dearth of case-law, other than purely allusive references, which purports authoritatively to lay down guidelines for the degree to which a jury can use such exhibits in reaching its decision. In *Kozul's Case,* however, the High Court of Australia was given the opportunity to lay down some firm guidelines with respect to what degree of experimentation was permissible in the jury room before such activity transgressed the traditional aims of mere examination and evaluation. It is respectfully submitted that although little fault can be found in the theoretical tenor of the judgments of the majority,[7] at certain points the learned justices have lost their way in the application of theory to the facts.

The Facts

The accused's application for special leave to appeal raised the important question of the appropriate direction as to the extent to which the tribunal of fact may, in considering its verdict, make use of a piece of real evidence in the form of an exhibit in the case.

The central issue in the trial was whether the applicant deliberately fired at R., or whether the revolver was discharged accidentally as a result of a blow to the applicant's hand. The applicant's contention was that he held the revolver in an uncocked position in anticipation of a knife attack by R. According to the evidence delivered by a ballistics expert, an uncocked revolver required 12 pounds of pressure in order to discharge the trigger whereas only 4½ pounds of pressure was required if the gun was cocked; moreover, such a weapon would not fire accidentally when only

[6] In *R* v. *Ames* [1964-65] N.S.W.R., 1489, the accused argued that photos of the deceased's body lying in a hallway should not be admitted into evidence because they were prejudicial to the accused, whilst having little probative value. It was held, however, that the photographs could be admitted because they accurately showed the flow of blood from the deceased's body, thereby countering the accused's contention that the deceased committed suicide. It should be noted that the Crown could not in the instant case rely on oral testimony to answer the accused's defence with the same persuasiveness as was offered by the production of the photos.

[7] *Per* Gibbs, C.J., Stephen, Mason and Murphy, JJ., who all refused special leave to appeal, while Wilson, J. dissented.

subjected to moderate blows to the hand or dropped. The trial judge's questioning of the ballistics expert brought to the jury's attention the lack of correspondence between the circumstances described by the expert and those alleged to have existed at the time of the shooting. The tests conducted by the expert were not conducted in an atmosphere whereby the subject was either frightened or on the defensive (indeed, the subjects of the tests had been assured beforehand of the complete safety involved in such tests), nor could the expert imagine how such tests could be conducted.

In the course of his summing up, the trial judge instructed the jury on the use they might make of exhibits, and in doing so it was alleged by the applicant that he misdirected the jury with respect to the crucial question of whether the gun was fired accidentally. In dealing with the revolver in question, the trial judge remarked: "This pistol, you may look at it in the jury room, you may feel it, test it, examine it, indeed you should."[8] After commenting on all the possible interpretations of the facts, the learned trial judge proceeded to demonstrate the effect of a blow by one hand to the other which was holding the revolver. The revolver was struck twice by the learned trial judge, once when it was cocked and once in an uncocked position, and it appeared that the former but not the latter blow caused its discharge. Despite a subsequent direction to the jury of the difficulty involved in conducting a test that matched the conditions in which the revolver was used, counsel for the applicant submitted that it was wrong to invite the jury to conduct such an experiment. It was submitted that such experiment would be objectionable on two grounds: first, because it would be conducted in the applicant's absence, thus preventing him from revealing any flaws in the manner in which the tests were conducted; and, second, because the experiment would proceed on a false basis, since the subject holding the revolver would not be in a state of emotional stress, nor would they be surprised by the blow.

The Decision

It was regarded as a matter of trite law by all members of the High Court that the revolver in question was as much part of the evidence as the oral testimony of the witnesses and that the jury were entitled to examine it and have regard to it in reaching their verdict. According to Gibbs, C.J.,[9] the jury could manipulate such an exhibit in "a limited amount of simple experimentation", the extent of which was "readily understood in practice if difficult to define with precision".[10] The Chief Justice enumerated the pulling of the trigger, both in a cocked and uncocked position, as legitimate uses of the jury's power of experimentation, indicating that in doing so "the jury are doing no more than using their own senses to assess the weight and value of the evidence".[11] As a statement of general principle, the individual members of the Court appear to have accepted, to a greater or lesser degree, the oft-quoted statement of Davidson, J. in *Hodge* v. *Williams*[12] where it

[8] *Supra* n. 1 at 431.
[9] With whom Mason, J. agreed.
[10] At 433.
[11] *Ibid.*
[12] (1947) 47 S.R. (N.S.W.) 480 at 493.

was held that "it is not permissible for the judge or jury, in the absence of the parties, to gather by extraneous evidence or experiments of their own, anything in the nature of additional evidence, and apply it in the determination of the issue, unless the facts so obtained were ventilated and submitted to the comment of the parties or their counsel".[13]

Thus, when the experiments conducted by the jury became a means of supplying new evidentiary material, the High Court was of the opinion that such experiments became clearly impermissible.

Yet beyond the broad statement of principle enunciated by Davidson, J. in *Hodge* v. *Williams* and subsequently embraced by the High Court in *Kozul,* it is difficult to glean from the decisions of Gibbs, C.J. and Stephen, J. how one is to go about deciding whether or not any particular degree of jury room experimentation falls on either side of the definition propounded in *Hodge* v. *Williams.*

The Chief Justice concluded that the learned trial judge's suggestion that the extent to which a blow to the hand may be instrumental in the discharge of the revolver could be discovered by means of an experiment conducted by the jury, was erroneous. In the circumstances, an experiment conducted for such a purpose would go beyond an *examination* and *evaluation* of the evidence provided by the revolver, having as its purpose the unauthorised gathering of additional evidence.[14] Nonetheless, Gibbs, C.J. felt that such error was corrected by the learned trial judge's subsequent direction to the jury of the difficulties involved in any attempted depiction of the incident which led to the discharge of the firearm. The Chief Justice remained satisfied that the summing up, when considered in its entirety, "fairly left it to the jury to consider properly the vital question whether they were satisfied that the revolver was discharged by accident".[15]

On the other hand, Stephen, J.[16] characterised the learned trial judge's direction to be a proper one, "calculated to assist in its task of evaluation of the evidence before it".[17] If indeed the jury could not experience for themselves the sensation of a blow to the hand holding the revolver, Stephen, J. continued, they would be

> . . . largely left to decide the matter by mere speculation. With it they could at least apply their fund of common sense and common experience. The explicit warning that no accurate reenactment was possible provided the necessary safeguard.[18]

After noting that with regard to areas which are essentially matters for expert evidence the jury must be warned not to substitute for that evidence its own inexpert view, Stephen, J. went on to conclude that the jurors' experiments were merely carried out to estimate the value of the testimony

---

[13] Cited with approval in *Kozul* v. *R., supra* n. 1, *per* Gibbs, C.J. at 433-34, Stephen, J. at 442 and Wilson, J. at 445.
[14] At 435.
[15] *Ibid.*
[16] With whom Murphy, J. agreed.
[17] At 440.
[18] At 441.

before them and not for the purpose of gathering additional evidentiary material.

Unlike the majority, Wilson, J. held that the invitation to the jury to experiment with the revolver clearly fell on the wrong side of the line drawn by Davidson, J. in *Hodge* v. *Williams*.[19] It is respectfully submitted that it is the dissenting judgment of Wilson, J. which best analyses the nature of the difficulties involved in the jury's ability to use real evidence in coming to their verdict after the close of evidence. His Honour's decision appears to be both correct in principle and on the facts, and it is to be hoped that his approach will be followed in future.

While the learned justice was at pains to point out that it was entirely proper for the jury to acquaint themselves with the operation of the trigger so as to understand the significance of the expert evidence given at the trial relating to the impact necessary for discharge of the firearm, it was another matter to encourage experimentation whose aim was to see whether the delivery of a blow to the hand would cause its accidental discharge. Such an object would clearly involve an invitation to create new material, which Wilson, J. found objectionable on two grounds; first (as was argued by the applicant), before any such experimentation can be validly taken into consideration, it must be exposed to the scrutiny and testing of the parties; second, that "such experimentation is totally irrelevant, unless for the purpose of the experiment the precise circumstances to which the applicant testified are recreated".[20] That, his Honour remarked, was "simply impossible".

No reconstruction, be it in the jury room or from the Bench, could possibly bear any correspondence to the circumstances which the applicant alleged to have existed at the instance of the firearm's discharge. A simple holding of a revolver in one hand whilst striking it with the other could in no way substitute as an accurate portrayal of a vigorous struggle between two men involving wrestling, the striking of blows and verbal abuse, in the course of which the alleged discharge took place. Nor could any jury room experiment take into account the operation of such vital variables as the violence of the blow, the manner of impact and the state of surprise, or lack thereof, which were important elements in the particular series of events in question. Moreover, "[any] attempt at such a reconstruction could be fraught with prejudice to both parties, a prejudice which in the case of the jury room is never likely to be revealed or recognized as such".[21]

In the opinion of Wilson, J. nothing more than the degree of force required to discharge the gun was to be learned by the jury in the confines of the jury room. It was felt that the learned trial judge had erred in his presentation of the problem to the jury as one which focused on the propensities of the firearm, when perhaps the critical factor was whether the trigger was pulled so as to discharge the firearm as a result of the

---

[19] At 446.
[20] At 447.
[21] *Ibid.*

applicant's spontaneous and unintentional reaction.[22] As it was so convincingly put by Wilson, J.,

> . . . [the] unknown factor in the attempted reconstruction in the jury room of the applicant's version of the incident was his reaction to the blow which R. delivered to the hand holding the pistol. No juror could reproduce a reaction so personal to the accused, let alone the circumstances which allegedly gave rise to it, as a means of testing the acceptability of that account.[23]

Accordingly, whether or not it had been proven beyond reasonable doubt that the applicant had fired the reolver as charged had to rest ultimately, in the opinion of Wilson, J., solely on the testimonial evidence given at the trial.

It is respectfully submitted that where, as in the instant case, it is contended by one of the parties that the discharge of the firearm was the result of a *sudden, involuntary response to surprise or fear,* it would appear to be a contradiction in terms to set up a "controlled" experiment to test the credibility of such claim. Where the existence or interaction of physical or psychological variables is involved in the operation of some object of real evidence, it is consonant with the view put forward by Wilson, J. that any query arising therefrom must be answered solely by recourse to the testimonial evidence, for any experimentation conducted by the trier of fact would invariably go beyond the limits of mere examination and evaluation. The jury would not in fact be discovering the *propensities* of the weapon nor investigating its *mechanical properties,*[24] which are inherent qualities of the revolver which remain constant regardless of who actually handles the object. In effect, the jury would be gauging the nature of the blow and its ramifications, which is an improper subject of study for the crude experimentation of the jury room.

Thus, although a jury is at liberty to inspect and experiment with exhibits "in any reasonable manner which occurs to them",[25] some limits must be set in each case by the trial judge as to what is "reasonable" in the particular circumstances. Regard should be had to the precise *definition* of what is sought to be proved by the production of the particular item of real evidence, the inherent *limitations* to which experimentation with such object is prone and the more general ground that its prejudicial effect outweighs its *probative value.* The judgment of Wilson, J. goes some way to clarifying these difficult aspects in the treatment of real evidence.

Finally, Wilson, J. considered that the depreciation of the value of the jurors' experiments by the learned trial judge in reminding the jury of the ballistics expert's evidence was insufficient to cure the defects of the summing up for two reasons; first, because the subsequent comment was expressly related to the evidence of the ballistics expert and not related

---

[22] *Ibid.*

[23] *Ibid.*

[24] The terms used by Street, C.J. and Glass, J.A. respectively in the unreported decision of the N.S.W. Court of Criminal Appeal in *Kozul,* cited by Wilson, J. *supra* n. 1 at 446.

[25] In the words of the Full Court of the Supreme Court of South Australia in *R.* v. *Hamitov* (1979) 21 S.A.S.R. 596 at 598.

directly to the jurors' experimentation; second, because he assumed that the caution which the jurors were invited to apply in their experimentation would not have been applied by them in their experimentation.[26] It would appear that the first reason put forward by his Honour is somewhat forced, but that the conclusion that the learned trial judge's subsequent depreciation of the jurors' experiments failed to cure a defective summing up with respect to uses to be made of items of real evidence, is correct on the facts. Indeed, it is difficult to see how the learned trial judge's warning of the difficulties of experimentation could cure the defects of his summing up when such a general warning was preceded by a detailed analysis of how and why the very experiment prone to such inaccuracy should nonetheless be attempted. Overall, it would appear that too much astuteness was being asked of the jurors in appreciating the degree to which their experimentation was prone to inaccuracy.

It is therefore respectfully submitted that not only was there an absence of direction as to the correct use to be made of the results of the limited experimentation, but that there was a positive misdirection by the learned trial judge.

The Trier of Fact as a Witness: The Analogy Afforded by Views and Reconstructions

Where the production of the object in question is impracticable, it has long been considered an appropriate proceeding for the tribunal of fact to go the place where the object is situated and there observe it. This process is traditionally known as a "view".[28] Modern legislative provisions merely supplement the inherent power of the Court to order views in the interests of justice.[29] Confusingly, the term "view" is often used as a compendious expression by both judges and commentators alike to refer to the observation by the tribunal of fact of a *demonstration* or *reconstruction,* which is often staged by the witnesses themselves either in court or at the locus in quo itself.

In the course of their judgments, both Gibbs, C.J. and Wilson, J. had extensive recourse to the case-law concerning the extent to which the tribunal of fact could use the information gathered by means of a "view" in coming to its decision, which they felt afforded certain striking analogies with the use made of material produced as real evidence. Conversely, Stephen, J. had certain reservations as to the helpfulness of drawing analogies concerned with "views".[30] Regardless of the approach taken by the individual members of the High Court as regards the applicability of decisions on "views" to the instant case, all their judgments are similarly notable for the absence of any discussion on the interrelationship between real evidence and other kindred forms of evidence.

---

[26] *Supra* n. 1 at 448.
[28] Wigmore, J. H., *Wigmore on Evidence,* Vol. 4, 1972.
[29] Solomon, E., "Views as Evidence", Pt. I, (1960) *34 A.L.J.* 46.
[30] *Supra* n. 1 at 442.

Although it is fair to say that both a view and a demonstration are species of real evidence,[31] it is imperative that the two concepts should be distinguished from one another. A *view simpliciter* is the examination during an adjournment in proceedings of the *locus in quo* or the scene where the property is situated, after it has been decided that it is both desirable and necessary for the tribunal to do so. A *demonstration* is the portrayal of some *activity* which is crucial to deciding the facts in issue.[32]

In Australia, it is settled law that the evidentiary status of what is known as a "view" is different from that of real evidence. It has been held by the High Court that the sense impressions gained at the view *cannot* be put in the place of evidence, but merely serve the purpose of enabling the Court to understand more clearly the issues raised and to follow more easily the evidence being given.[33] The sense impressions gained by the trier of fact as a result of witnessing a demonstration or reconstruction, however, are treated as evidence in the fullest sense of the word, but differ from real evidence in that the treatment by the courts of such evidence is typical of the general treatment offered to testimonial evidence. As such, demonstrations or reconstructions must be given as with other forms of testimonial evidence, in the presence of both judge and jury and the parties to the litigation. It necessarily follows that any demonstration not in the presence of everyone concerned is irregular and constitutes a fatal defect.[34] The same is not true of a view properly so called, where the *locus in quo* is inspected without any need for a demonstration; although this ought ideally to be done with all parties present, it need not be.[35] Indeed, it is doubtful whether there is anything to stop any juror during an adjournment in proceedings going off to look at the scene of events in question.[36]

At first glance, the evidentiary status of real evidence appears to form a curious legal hybrid, falling between the extremes of the "view" on the one hand, and the demonstration on the other. Real evidence not only carries the benefits not extended to the view (full evidentiary status), but is also not borne with the burdens attracted to a demonstration (presentation before judge and parties, and so on). The general principle is that the judge is required to decide all questions of admissibility,[37] and it is also in accordance with basic considerations of fairness that "no evidence affecting a party is admissible against him unless he has had an opportunity of testing its truthfulness by cross-examination".[38] In the light of these relatively

---

[31] Waight, P. K., and Williams, C. R., *Cases and Materials on Evidence,* 1980, at 489.

[32] Solomon, E., *op. cit. supra* n. 29 at 46.

[33] This principle was clearly established in *Scott* v. *Numurkah Corporation* (1954) 91 C.L.R. 300 and later wholeheartedly affirmed by the High Court in *Kristeff* v. *The Queen* (1968) 42 A.L.J.R. 233. Over the years, the rule has been subjected to much criticism and Solomon has argued, with ample justification, that the distinction between using a view to understand evidence and using a view as evidence is metaphysical, for although such an approach may have some theoretical reality, in practice it is wholly illusory and valueless: *supra* n. 29 (Pt. II) 71-72.

[34] *Tameshwar* v. *R.* [1957] A.C. 476 and *Goold* v. *Evans* [1951] 2 T.L.R. 1189.

[35] See Solomon, E., *supra* n. 29, *passim*; *Goold* v. *Evans supra* n. 34; *Salisbury* v. *Woodland* [1970] 1 Q.B. 324.

[36] See Solomon, E., *supra* n. 29 *passim*; *Tameshwar* v. *R.* [1957] A.C. 476, *per* Denning, M.R. at 481; also see *R.* v. *Hamitov* (1979) 21 S.A.S.R. 596.

[37] *Karamat* v. *The Queen* [1956] A.C. 256.

[38] *Per* Lopes, L.J. in *Allen* v. *Allen* [1894] P. 248 at 253-4.

fundamental tenets of admissibility, the question remains to be answered; why should real evidence be accorded such a privileged position?

It is respectfully suggested that the real rationale underlying the differences in evidentiary value of all these modes of observation stems from the *nature* of what is being observed, which in turns offers some guide to how the courts should treat it in order to minimise any degree of prejudice which may arise, either practically or theoretically, to the parties.

Where what is being observed is a purely *static* scene which fulfils the function of providing the situational setting or backdrop for the specific activity from which the cause of action is alleged to have arisen (the *locus in quo*), the courts are of the opinion that the results of such observation do not warrant it being granted the status of evidence. A number of reasons have been put forward for such an approach. First, in contrast with other forms of evidence, a view need not necessarily be given in the presence of both the judge and the parties to the litigation. Second, it is felt that the view is particularly susceptible to misuse at the hands of a jury which, by attaching undue weight to its results, or by drawing inferences from observations which are really matters for expert evidence, or by raising issues as a result of observation not directly arising from the testimonial evidence, or in failing to restrict the results of the view to the purpose for which it was granted, may often involve the improper fusion of judge or jury with the role of a witness which may in turn lead to injustice with respect to one or both of the parties.[39] Third, it has been said that an appellate tribunal is unable to assess what effect a view had in nullifying oral evidence or discrediting witnesses because it is incapable of translation into the official records of proceedings.[40] Finally, there remains the very real danger that in the interim period between the incident giving rise to the cause of action and the proceedings themselves, a distinct physical change has overcome the *locus in quo* which renders the perception of the scene *as it was* rather hazardous (for instance, the growth of foliage, the erection of buildings and other structures which could block a driver's view, and so on).[41]

By way of contrast, a demonstration is by definition a *dynamic process* rather than a *static situation*[42] and for that reason alone, it is imperative in the interests of justice that any purported reproduction of a past event must provide an exact simulation of the event in question; this can only be facilitated where (a) the parties themselves agree that it is to be treated as an accurate reproduction, or (b) where it can be proved by oral evidence to the judge's satisfaction that the demonstration really did produce the operations described.[43] Since any attempted reproduction will invariably

---

[39] Solomon, E., *supra* n. 29 at 51.

[40] McCormick, C. T., *Cases and Materials on the Law of Evidence*, 3rd ed., at 392.

[41] See *Commissioner for Railways* v. *Murphy* (1967) 41 A.L.J.R. 77, as a practical example of the difficulties involved.

[42] A classic example is the demonstration witnessed in *Buckingham* v. *Daily News Ltd.* [1956] 2 Q.B. 534 where the plaintiff demonstrated the manner in which he was cleaning the blades of a rotary press when the accident for which he sought damages for his employers' alleged breach of their common law duty to provide a reasonably safe system of work took place.

[43] *Scott* v. *Numurkah Corporation*, *supra* n. 31 at 316, *per* Fullagar, J.

be focal to the facts in issue (whereas the situational setting need not necessarily be so), it follows that its probative value to the trier of fact is crucial: as such, the limits imposed on its use should be roughly proportional to its importance. Because the conclusions drawn from a reconstruction can be so compelling, basic principles of fairness dictate that the parties to the litigation must be somehow protected from its potentially prejudicial effects.

The curious status of an object of real evidence, it is therefore proposed, must be linked to the notion that the examination of such object should be limited to the study of its characteristics which are of a constant, and not a dynamic, fluctuating nature. Thus, the fact that real evidence occupies such a favoured evidentiary position is counterbalanced by the imposition of implied fetters on the *extent* to which it can be used. Objects of real evidence are logically conferred full evidentiary status because by limiting experimentation with such objects to their inherent properties only, the dangers of undue prejudice to either party are minimised. Neither party can in such circumstances be said to be disadvantaged as a result of their inability to cross-examine the jurors as to their method of treating the exhibit, because their experimentation cannot conceivably be said to have resembled anything like a dynamic process.

On the basis of this approach, it is respectfully submitted that the experimentation in which the jury partook in *Kozul's Case* clearly transgressed those natural and theoretical limits which the law relating to the examination of objects of real evidence permits. Furthermore, the decision of the majority tended to neglect the prejudicial ramifications which could ensue as a result of an unclear exposition by the trial judge of *what* the significance of real evidence is and *how* it is to be naturally limited in its use. If it be otherwise, the danger will always lie that the juror can take it upon himself to act as a sleuth where testimonial evidence is largely indeterminate of the issue at hand.

The Mandatory/Discretionary Approach

Where there is a jury trial, the particular value in introducing real evidence lies in the fact that the jury takes all exhibits in the case in reaching its decision.[44] In contrast, no transcript of the oral testimonies may be taken into the jury room, although the transcript can be read aloud in the courtroom.[45] In the case of *The Queen* v. *Bradshaw,* however, a particularly strongly worded judgment of King, J. indicated that although as a general rule exhibits are sent into the jury room, this need not be the case in all circumstances, and may be departed from where it would not be the prudent course to follow. His Honour remarked that the direction and control of the jury was, within the limits laid down by the law, a matter for the discretion of the trial judge. Any use of items of real evidence would, by parity of reasoning, be circumscribed by reference to such judicial discretion. The learned Justice cited the disproportionate influence of such evidence to its true weight, and the fact that its probative value may be

[44] *The Queen* v. *Bradshaw* (1978) 18 S.A.S.R. 83 *per* Zelling, J. at 93.
[45] *R.* v. *Gaudion* [1979] V.L.R. 57.

minimal, as major reasons for refusing such items.[46] In light of the preceding discussion, it would appear that the discretionary approach towards the acceptance of real evidence favoured by King, J. would best serve the interests of justice.

The position of the law in various United States jurisdictions could provide the prescription for future changes to the law in this country. According to one prominent text-writer, where there exists the possibility that the worth of an object of real evidence could be stressed beyond its intrinsic value, there is always the need for *discretion* and *discrimination,* with most jurisdictions allowing a judge in his discretion to determine whether a given exhibit shall be sent to the jury.[47] Generally, when the *qualities* of the object are in issue, inspection will always be permitted unless some overriding contrary consideration of prejudice or physical difficulty exists in the particular situation. On the other hand, and most importantly, where the real evidence is circumstantial or inferential in its bearing, then the trial judge, on the question of admissibility, "has a wider power of balancing the probative value of the evidence against its dangers of undue prejudice, distraction of the jury from the issues, and waste of time".[48] It is to be hoped that the general trends exhibited in the United States case-law towards real evidence,[49] where the subject has been the topic of much judicial and academic refinement, will be followed in Australia where it is clear, if the decisions of the majority of the High Court in *R.* v. *Kozul* are any indication, that the development of the law with regard to the use of exhibits by the trier of fact is still in its embryonic stages.

PETER ALEXIADIS, B.A. — Third Year Student.

[46] *Supra* n. 44 at 97-98.
[47] McCormick, C. T., *op. cit. supra* n. 40 at 394.
[48] *Op. cit. supra* n. 40 at 385-6.
[49] Called "demonstrative" evidence by McCormick and "autoptic" evidence by Wigmore.