The Price of Fish: Probative Value, Prejudice and Policy

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I. Introduction

For almost a hundred years, the admissibility of evidence in New Zealand courts was determined by a mishmash of statutory rules, regulations, and case law. This unsatisfactory state of affairs was finally remedied on 1 August 2007, close to 20 years since reform was put on the agenda, by the commencement of the Evidence Act 2006.[1] Not only did the Act repeal the Evidence Act that had been in force since 1908, but also proposed to form a comprehensive scheme relating to evidence and to replace most, if not all, of the common law in the area.

The Act affirms the fundamental common law principle that evidence must be relevant to be admissible. Further, evidence will be excluded[2] if (a) its probative value is outweighed by any unfairly prejudicial effect on the proceeding[3] or (b) it would needlessly prolong the proceeding. Along with various procedural requirements, the Act also sets out a number of more specific admissibility rules, which primarily correspond with what have been known at common law as exclusionary rules, such as the rule against hearsay and the rule against propensity (or conduct evidence[4]).

Recently New Zealand's criminal trial system has faced criticism following acquittals in several high profile cases. In May of this year alone, Chris Kahui was acquitted of murdering his twin sons, George Gwaze was acquitted of the rape and murder of his niece, and Murray Foreman was acquitted of the 2004 killing of farmer Jack Nicholas. The acquittals of former police officers in the Louise Nicholas case have also raised questions, not simply about police prosecutions, but about the efficacy of the justice system as a whole. In at least two of these cases, those of George Gwaze and Messrs Shipton, Schollum and Rickards, the admissibility of certain pieces of evidence were in dispute. Indeed, disquiet about the outcomes in the latter case impelled Justice Randerson, Chief High Court Judge, to explain, via an article in the New Zealand Herald, how the jury trial system works. In doing so, he made the following salient point;[5]

> An accused is entitled to be judged solely on the basis of the evidence. Gossip and innuendo are not evidence. Evidence is information that is admissible if it is deemed to be relevant and if the assistance it can provide in determining an issue outweighs any unfairly prejudicial effect.

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1 Hereafter referred to as 'the Act'.

2 Pursuant to section 8.

3 This aspect requires a Judge to take into account the right of the defendant to offer an effective defence.

4 At common law, evidence of conduct has also been referred to as similar fact evidence.

5 Justice Tony Randerson, 'Fair trial recognises competing interests' *New Zealand Herald Online* http://www.nzherald.co.nz. 16 March 2007.

In any litigation, facts must be proved, and facts require evidence to prove them. In turn, this depends upon the operation of the rules of evidence.[6] In light of questions about the ability of our criminal trial system to dispense justice, this article argues that the specific admissibility rules the Act contains do not provide for the admission of all relevant evidence, and accordingly are unlikely to achieve justice in criminal cases. An alternative determinant of admissibility is proposed – that evidence that is relevant is admissible unless its probative value is outweighed by illegitimate prejudice, or there is a policy reason to exclude it.[7] It will be argued that this test could be applied to any piece of evidence, regardless of its nature, without reference to any other condition for admissibility. Significantly, given further criticisms about our 'slow, costly'[8] justice system, the prejudice-policy test has the added advantage of being far less resource intensive than other approaches to admissibility and yet will still allow for the admissibility of, if not *all* truly cogent evidence, at least more than has been the position under the common law and arguably more than provided for by the Act. Hence the title of this paper reflects its central thesis – if the evidence is relevant to proving the price of fish, it should be admitted, subject only to exclusion based on illegitimate prejudice or policy.

To illustrate how the prejudice-policy test could work in practice, this paper will focus its attention on evidence that might otherwise be excluded by the operation of the rules against hearsay and evidence of conduct. But firstly any quest for justice must begin by exploring precisely what is sought.

II. Justice in Criminal Litigation?

What do we mean by 'justice' in criminal litigation? Do we seek the truth, in the sense of guilt or innocence, liability or none, of the defendant? The truth seems as good a place as any to start, and at least from the public perspective, justice does appear to be measured by a finding of either guilty or not guilty – depending of course upon whether those verdicts reflect what is perceived to be the truth. As noted in the introduction to this article, more recently it has been acquittals that have given rise to concern about the way in which cases are prosecuted. But there has also been unease, albeit not unanimous, about some guilty verdicts, notably those of Scott Watson for the murders of Ben Smart and Olivia Hope, and David Bain, who has recently been granted a retrial.

In discussing the relationship between truth and justice, Paciocco argues that '[t]he intuitively irresistible connection between truth and justice arises only because our system of criminal justice is "guilt-based".'[9] When Chief Justice Freedman of the Manitoba Court of Appeal questioned whether the quest for justice was synonymous with the truth, his answer was qualified;[10]

> In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from the law's deliberate policy.

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6 D M Paciocco, '"Truth and Proof": The Basics of the Law of Evidence in a "Guilt-Based" System' (2001) 6 *Canadian Criminal Law Review* 71.

7 This will hereafter be referred to as the prejudice-policy test.

8 'Ex-judge slates slow, costly justice system' *Waikato Times* 4 June 2008, 5.

9 Paciocco, above n 6.

10 S Freedman, 'Admissions and Confessions' in *RE Salhany & RJ Carter, Studies in Canadian Criminal Evidence* (1974) 99, cited in SA Cohen, 'Controlling the Trial Process: The Judge and the Conduct of Trial' (1977) 36 *Criminal Reports (Articles)* 15.

In referring himself to Justice Freedman's answer, Paciocco adds, 'In our system, just convictions remain tethered to truth. By contrast, just acquittals are not bound to the truth in the same way.'[11]

But what of 'unjust acquittals'? Paciocco notes with interest that the 'intuitive link between truth and justice' is now being used to support calls to reduce the degree to which exclusionary rules *benefit an accused*.[12] But comments made by New Zealand's Chief Coroner, Judge Neil MacLean, suggest that there is no such thing as an 'unjust acquittal'. In an article referring to the Kahui, Foreman, and Gwaze cases, Judge MacLean is quoted as stating, 'It's about the Crown proving an allegation about someone beyond reasonable doubt. If it can't, that's the end of the matter: "That's an acquittal".'[13]

So justice cannot simply be measured by verdicts that reflect guilt or innocence, or even by an error-free trial process. Sir Thomas Thorp also points out that a conviction that is justified by the relevant criminal code may still be a miscarriage of justice where there is credible evidence exonerating an accused that was inadmissible at trial.[14] Likewise, sometimes the truth will emerge, but for all the wrong reasons. Furthermore, a just verdict is not only one involving fairness to the accused but that also promotes the public interest in securing the convictions of those who pose a threat to society.

So truth alone is insufficient. What else determines a just outcome? Clearly, a fair process is also crucial, for of what good is a factually correct outcome obtained in breach of fundamental rights and principles of fairness? And thus, for centuries rigorous rules relating to the admissibility of evidence and the format of trial process have been applied in order that does not occur. But in many jurisdictions, rules of evidence have developed too far in favour of exclusion of evidence that might be highly relevant.

While in the English Court of Appeal case *Air Canada v Secretary of State for Trade*, Lord Wilberforce observed that if decisions are made 'in accordance with the available evidence and with the law, justice will have been fairly done,'[15] the problem is that rules of evidence do not allow for the admission of *all* available evidence. Thus, while justice may be done, as Jolowicz notes, the justice Lord Wilberforce refers to is procedural rather than substantive.[16] Is procedural fairness sufficient to support a claim that an outcome is just? I would suggest that just as the truth alone cannot be equated with justice, neither can procedural fairness.

Leane argues that any body of law is of little use if it simply provides for procedural justice. Outcomes, he writes, must be ones that:[17]

> …we, as parties and observers, can accept as believable, legitimate and justifiable according to some felt sense of 'fairness' and justice within some common web of understanding. It should not, for example, be an outcome pre-determined by the unthinking application of rigid, inflexible rules fashioned in an alien context and mechanically applied to a concrete case, regardless of the equity and reasonableness of the outcome.

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11 Paciocco, above n 6.

12 Ibid.

13 C Masters, 'Reasonable doubt, and beyond' *New Zealand Herald Online* http://www.nzherald.co.nz. 31 May 2008.

14 Sir Thomas Thorp *Miscarriages of Justice* (2005) Legal Research Foundation 3.

15 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 411 per Wilberforce LJ, in JA Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281.

16 Jolowicz, ibid 286.

17 GWG Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) *19 Melbourne University Law Review 924*.

While it is not necessarily so that the law of evidence is made up of 'rigid, inflexible rules', many of them were developed in an alien context inasmuch as they evolved when what was *known* about crime and human behaviour (such as the ability of jurors to rationally assess evidence; or the fact that certain crimes have a high rate of recidivism, for instance) was more limited. Leane continues; 'We do not want procedural equality through formalism only to suffer substantive inequality through the thoughtless application of formal rules divorced from social reality.'[18]

In referring to Bentham's thesis that 'rectitude of outcome' is best achieved by natural rather than technical systems of proof,[19] Jackson notes that:[20]

> In recent years there has increasingly been a move away from the rules of evidence in favour of the principle of free proof under which triers of fact should be permitted to evaluate all evidence that is sufficiently relevant without the need for rigid exclusionary rules mandating the exclusion of entire categories of evidence.

It is true that modern Courts do tend towards a more flexible approach in determining admissibility, but it is fair to say that the 'exclusion of entire categories of evidence' is still possible. The potential for injustice that arises is convincingly demonstrated, in the context of the hearsay category, by the English case of *R v Blastland*.[21] A young boy had gone missing one evening and his body discovered the following morning. He had been sexually assaulted and strangled. Blastland was eventually charged with the sexual assault and murder. He pleaded not guilty to the murder, but admitted he had attempted buggery with the boy, stopping when the boy complained of pain. Blastland said that shortly afterwards he saw a third party, Mark, nearby. Afraid that he had been seen attempting buggery, Blastland ran away. The defence's contention was that Mark had murdered the boy and sought to call witnesses to give evidence that before the boy's body was discovered, Mark had made statements that demonstrated a knowledge of the killing. The Judge ruled the evidence inadmissible as hearsay and Blastland was convicted. He appealed against conviction on the basis that the Judge's exclusion of the evidence was in error. The Court of Appeal dismissed his appeal and Blastland appealed to the House of Lords. The House of Lords held the evidence was not wrongly excluded because Mark's knowledge, or state of mind, was not an issue, nor relevant to an issue, at Blastland's trial.

Lord Bridge of Harwich noted that statements made by a third party are not excluded by the hearsay rule when tendered to prove the state of mind of the maker or the person to whom the statement was made, but he added that this only applies where; '…the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial'.[22]

On one level, the Court's reasoning is sound, in that statements made by a third party are not excluded by the hearsay rule when they are tendered to prove the state of mind either of the maker of the statement or of the person to whom they were made. Allan argues that:[23]

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18 Ibid.

19 J Jackson, 'Evidence: Legal Perspective' in R Bull, & D Carson, (eds) *Handbook of Psychology in Legal Contexts* (1999) 170.

20 Ibid.

21 *R v Blastland* [1986] 1 AC 41; [1985] 2 All ER 1095 (HL).

22 Ibid, per Lord Bridge of Harwich at 54; 1099.

23 TRS Allan, Case and Comment 'Hearsay exception subject to relevance – relevance subject to hearsay' (1985) *Cambridge Law Journal* 345.

> [i]t is difficult to fault the logic of the decision. The rule admitting evidence of knowledge or state of mind could not sanction the reception of irrelevant facts. However, the decision starkly illustrates the rigid nature of the hearsay rule and the artificiality of its results.

While I would argue that the Court's finding on the question of relevance is suspect, what is more concerning, in the present context, is that the decision was justified on the basis of the hearsay rule. Lord Bridge of Harwich continued:[24]

> …to allow this evidence of what Mark said to be put before the jury as supporting the conclusion that he, rather than the appellant, may have been the murderer seems to me, *in the light of the principles on which the exclusion of hearsay depends*, to be open to still graver objection than allowing evidence that he had directly admitted the crime. [emphasis added]

My complaint here is that the 'principles on which the exclusion of hearsay depends' only arise if the statements are tendered to prove the truth of their contents:[25]

> Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.

The dangers that the hearsay rule is designed to avoid were clearly not present in the case at all. If the evidence was tendered to establish Mark's state of mind, his truthfulness and accuracy would not have required testing in cross-examination. If the statements were tendered to prove that a boy had been murdered, the position would clearly be different. But in *Blastland* there was no point in proving the truth of the statements because whether or not the boy had been murdered was not a fact-in-issue. So the disputed statements were not hearsay at all, despite the Court's acceptance of the trial Judge's reasoning that the evidence was an implied admission of guilt and therefore hearsay. The problem that this case clearly demonstrates, in the writer's opinion, is that the hearsay rule has diverted attention away from what should have been, and should always be, the fundamental question in any case – is the evidence relevant to a fact-in-issue?

A similar issue arose in *R v Bain*.[26] As it was in *Blastland*, the defence's theory was that another person was responsible for the killings and to support this theory, the defence wished to call evidence from a witness that would establish a motive for this other person. The evidence consisted of statements allegedly made by a third party to the witness. The trial Judge excluded the evidence. David Bain was convicted and appealed on the basis that the witness's evidence should have been admitted. The Court of Appeal approached the issue on the basis of whether it was admissible as an exception to the rule against hearsay. Thomas J stated:[27]

> It is preferable to have regard to the substance of the proposed evidence, who made the statement, the manner in which it was made, and all other relevant circumstances, including whether the original or direct evidence is available, and then to make an overall assessment whether the evidence is sufficiently relevant and reliable to be admitted, notwithstanding that it is hearsay evidence.

The Court of Appeal upheld the trial Judge's decision not to admit the evidence, noting that the trial Judge's decision that the evidence would not be reasonably safe or reliable was made having

24 *R v Blastland*, above n 21, per Lord Bridge of Harwich at 54; 1100.

25 Ibid, per Lord Bridge of Harwich at 53-54; 1099.

26 *R v Bain* [1996] 1 NZLR 129; (1995) 13 CRNZ 684 (CA).

27 Ibid 133; 692.

regard to the witness's appearance, his demeanour, his background and his general conduct. When compared with *Blastland*, this decision is sensible. While a motive for the third party was logically relevant to the primary issue, certain factors pertaining to the witness suggested the evidence might be less than reliable. And if the evidence is not reliable, it has a low probative value, and is therefore not sufficiently relevant.

Not surprisingly, the *Blastland* case has excited considerable sympathy for the accused in that case, who arguably was convicted in the absence of *all available evidence*.

Similar problems, albeit with varying results, arise in relation to evidence of prior conduct, or propensity evidence, as it is referred to in the Act. In *Noor Mohamed v R,*[28] the accused was charged with the murder of his second wife by poisoning her with cyanide. At his trial, the trial Judge admitted evidence that suggested that Noor Mohamed had murdered his first wife by the administration of cyanide. He had not been charged in relation to his first wife's death. On appeal, the Privy Council was of the view that if the evidence was of no substance other than to show that the accused was a person likely from his character or conduct to have committed the offence charged, it was not admissible. In other words, if the evidence was not relevant for some other purpose it was not admissible, because it breached the rule against evidence of conduct. The Privy Council held that the evidence was wrongly admitted. However, the evidence points to remarkable similarities in the circumstances of both deaths and possible explanation given by the accused for both deaths (suicide in respect of the second and it would appear accident or suicide in respect of the first). In other words, the evidence was relevant to rebut the defence of coincidence.

Yet in *R v Smythe*[29] evidence of a prior 'accident' was admissible. The accused was charged with burning down his house with intent to defraud his insurers. The house had recently been acquired and insured. Some weeks earlier, the accused was alleged to have allowed his recently acquired and recently insured lorry to fall over a cliff. The evidence tended to negative the possible defence that the fire had been unintentional. In the light of *Noor Mohamed*, Salmond J's obiter comments are illuminating:[30]

> When a similar accident happens to the same person too frequently to be reasonably and naturally accounted for by the law of chances, there is ground for the inference or suspicion that it is not an accident at all but an intentional result…So [a man] may lose one wife by the accidental administration of arsenic, but if he marries three successive wives and loses them all in the same way an inference of wilful murder may be justly drawn.

Following this reasoning, one could reasonably expect that Noor Mohamed was entitled to lose two more wives to cyanide poisoning before any adverse inferences could be drawn from such facts.

All levity aside, what these cases, and there are countless others, demonstrate is that while the ultimate question should be one of the relevance of the evidence, the operation of technical rules has lead to inconsistent outcomes, which make the application of the doctrine of precedent a somewhat problematic exercise. Indeed, the Explanatory Note to the Evidence Bill stated that:[31]

> [E]vidence law is largely Judge-made, comprising decisions that are made in response to the circumstances of particular cases. The statutory provisions dealing with evidence are contained in a number of statutes, and have been reformed on a piecemeal basis, responding to issues as they arise. The resulting

28 *Noor Mohamed v R* [1949] AC 182; [1949] 1 All ER 365 (PC).

29 *R v Smythe* [1923] NZLR 314.

30 *R v Smythe*, ibid, per Salmond J at 323.

31 Explanatory Note, p 1.

> complexity and inconsistency of the law of evidence results in undue legal argument, expense, and delays in proceedings to accommodate arguments over issues of admissibility.
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> The question is, does the Evidence Act 2006 ameliorate these problems?

III. Evidence Act 2006

In 1999, some ten years after receiving its terms of reference from the Minister of Justice, the Law Commission published the Evidence Code and accompanying report.[32] The Code contains the Law Commission's recommendations in respect of reform of the law of evidence, and the Evidence Act 2006 is based largely, but not entirely, upon these recommendations.

In order to overcome the problems of the existing law of evidence, noted above, the purpose of the Act, as set out in section 6, is to: [33]

> …help secure the just determination of proceedings by—
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> (a)providing for facts to be established by the application of logical rules; and
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> (b)providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
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> (c)promoting fairness to parties and witnesses; and
>
> (d)protecting rights of confidentiality and other important public interests; and
>
> (e)avoiding unjustifiable expense and delay; and
>
> (f)enhancing access to the law of evidence.

Interestingly, the commentary to the Law Commission's Evidence Code notes that one of the objectives of clause 6 was to 'help promote procedural fairness'.[34] There is no reference to the promotion of substantive fairness.

Sections 7 and 8 form the overriding inclusionary and exclusionary rules, namely that all relevant evidence is admissible,[35] but a Judge *must* exclude evidence if its probative value is outweighed by a risk that the evidence will have an unfairly prejudicial effect on the outcome, or would needlessly prolong the proceeding.[36] Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[37]

As noted above, the Act also sets out a number of other rules regarding admissibility as well as matters of trial process. The following sections of this article will canvass the provisions of the Act as they relate firstly to hearsay and secondly to propensity evidence.

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32 New Zealand Law Commission, *Evidence: Reform of the Law* NZLC R55 – Volume 1, Wellington, 1999; New Zealand Law Commission, *Evidence: Evidence Code and Commentary* NZLC R55 – Volume 2, Wellington, 1999.

33 *Evidence Act* 2006, s 6.

34 New Zealand Law Commission, *Evidence: Evidence Code and Commentary* NZLC R55 – Volume 2, Wellington, 1999, C50.

35 *Evidence Act* 2006, s 7. All relevant evidence is admissible except evidence that is (a) inadmissible under this Act or any other Act; or (b) excluded under this Act or any other Act.

36 *Evidence Act* 2006, s 8.

37 *Evidence Act* 2006, s 7(3).

A. Hearsay

Prior to the Act's commencement, the admissibility of hearsay evidence depended upon locating the evidence within one of a number of common law or statutory exceptions to the general rule of exclusion. Most recently, Courts admitted evidence under a 'general residual exception' that took account of three factors: the relevance of the evidence, the inability of the maker of the statement to give evidence, and the reliability of the evidence. Documentary hearsay was admissible provided it met certain statutory requirements; confessions and admissions were admitted as common law exceptions to the rule, as was evidence that fell within the *res gestae*.

Traditionally when a potential hearsay issue arose, the starting point was to question the purpose for which the evidence was sought to be admitted. The Act does not alter this position, since the definition of hearsay statement in s 4 is a statement that 'is offered in evidence at the proceeding to *prove the truth of its* contents' (emphasis added). Thus under s 7 when establishing the relevance of the statement, it is necessary to determine whether it is relevant for the fact that it was made, or whether its relevance depends upon the truth of what is asserted in the statement. If the answer is that the evidence falls within the former category, it is original evidence, and the hearsay rule does not apply.[38] If it falls into the latter category, then the second question to be asked is whether it is a 'statement' as defined in s 4:

> (a) A spoken or written assertion by a person of any matter; or
>
> (b) Non-verbal conduct of a person that is intended by that person as an assertion of any matter.

The third step is then to consider whether the statement is a *hearsay* statement. We have already established that it is to be offered in evidence at the proceeding to prove the truth of its contents, but it also must be made by a person who is not a witness. A witness is a person who gives evidence and is able to be cross-examined in a proceeding. This definition must necessarily be limited to a person *actually giving evidence* at the material time, since otherwise the new rules would make it possible to argue that a statement made by witness Y (who is yet to give evidence) would be admissible if witness X gives evidence of it. This has never been the general rule under common law and that position is doubtlessly unchanged by the Act.

In summary, if the evidence is an assertion of any matter, made by someone other than the witness giving evidence at the material time, tendered to prove the truth of the matter asserted, then it is hearsay.

In its 1999 report on reform of evidence law, the Law Commission referred to its earlier report specifically dealing with hearsay, noting that the Law Commission 'considered that the rule should operate to exclude evidence only if there are sound policy reasons for so doing'.[39]

While this comment could be seen as suggesting a reversal in approach to the general inadmissibility of hearsay evidence, the Act itself subjects all hearsay statements to the rule in s 17 and thus hearsay statements are *prima facie* inadmissible.[40]

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38 See for example *R v Rajamani*¸ unreported, High Court, Auckland (CRI 2005-004-001002). 5 June 2008. Heath J. In that case, decided under the Evidence Act 2006, statements made by a deceased to witnesses were offered as proof of her state of mind, and thus not subject to the hearsay rules in the Act.

39 New Zealand Law Commission, *Evidence – Reform of the Law* NZLC R55 – Volume 1, Wellington, 1999, 13.

40 Hearsay statements may also be inadmissible if tendered as opinion or propensity evidence, for instance, and they do not comply with the provisions of the Act dealing with those areas. They might also be excluded or inadmissible under any other Act: s 7. On the other hand, hearsay statements might be admissible, under other provisions of the Act or indeed if the hearsay provisions of the Act are inconsistent with another Act: s 5(1) and 17(b).

B. Exceptions – circumstances where hearsay evidence may be admitted

Notwithstanding that hearsay is prima facie inadmissible, the Act does provide for certain exceptions. Section 18 of the Evidence Act 2006 provides for a 'general exception' to the rule set out in s 17. Namely, a hearsay statement is admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable as a witness[41] or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness. 'Circumstances' are defined in s 16 to include the nature of the statement; the contents of the statement; the circumstances that relate to the making of the statement; any circumstances that relate to the veracity of the person (that is, the person who is *not* the witness); and any circumstances that relate to the accuracy of the observation of that same person.

It is immediately apparent that the parameters of the exception provided for by s 18 draw largely on those provided by the general residual exception. This exception would see evidence admitted if in the circumstances the evidence was relevant and reliable and unavailable in a form other than hearsay. The development of this exception began as early as 1989 in *R v Baker*[42] in Cooke P's eminent dicta:[43]

> At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards.

The exception was ultimately set out in *R v Manase*[44] to require that to be admitted, hearsay evidence must be relevant and reliable, and the primary witness be 'unable' to give evidence. While section 18 of the Act does not expressly provide for relevance as a requirement, as *Manase* does, s 7 explicitly applies to evidence offered under the Act. Thus s 18 can be read as requiring relevance, reliability (a reasonable assurance that the statement is reliable) and inability (unavailability).

In terms of 'circumstances relating to the statement', it is important to note that these, as defined under s 16, do not include the veracity, or truthfulness, of the witness who is giving the evidence in Court. As noted in *R v Shortland & Hughes*,[45] this is because the veracity of that witness can be tested by the fact-finder on cross-examination. While *Shortland* was decided before the commencement of the Act, the Court of Appeal in that case expressed doubt that it would prove practicable to exclude from an assessment of the 'circumstances', the accuracy and truthfulness of the witness who gives evidence of it. In that case, defence counsel for the two appellants charged with murder, wished to tender evidence of admissions by a third party, Piripi Shortland, who had since died. The evidence was to be given by a Ms Shelford, an ex-girlfriend of Piripi Shortland. She had given five different accounts of what she said she was told by the deceased and claimed

41 For the purposes of this part of the Act a person is 'unavailable as a witness', as defined in s 16, if that person
Is dead; or
Is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
Is unfit to be a witness because of age or physical or mental condition; or
Cannot with reasonable diligence be identified or found; or
Is not compellable to give evidence.

42 *R v Baker* [1989] 1 NZZLR 738; (1989) 4 CRNZ 282.

43 Ibid, per Cooke P at 741; 285.

44 *R v Manase* [2001] 2 NZLR 197.

45 *R v Shortland & Hughes* [2007] NZCA 37.

that any difference in her accounts was due to the improprieties of the police. She did not disclose any information at all until 12 days after the appellants had been arrested. She was illiterate and had a history of mental illness. As noted, the case was not decided under the Act but the decision of the Court identifies some of the considerations that may arise under the Act. The Court pointed out that:[46]

> [i]f the evidence is led, it will result in the jury being required to hear evidence about the various statements which Ms Shelford has made. This could be a lengthy process given her illiteracy and complaints of police misconduct and it may well be that all police officers who interviewed her and the private investigator would have to give evidence. There may well be an inquiry into Mr Piripi Shortland's character (including an alleged propensity for violence). All of this would undoubtedly be distracting for the jury. Further, there is necessarily some subtlety to an assessment of the overall reliability of the evidence. Critical to that assessment is how Mr Piripi Shortland's alleged role in the relevant events fits in with the evidence as a whole. As well, the reliability of Ms Shelford's evidence is distinctly in issue and, in the background, so too is the reliability of Mr Piripi Shortland. The layered nature of the exercise will not be easy for a jury to grasp and this itself carries the risk of further distraction.

Earlier, in *R v Bain*[47] there was also some discussion concerning the fact that questions of reliability can arise at different stages of the inquiry. The Court ultimately approved of the trial Judge's exclusion of the evidence, noting that:[48]

> [i]n deciding whether the evidence would be reasonably safe or reliable in the circumstances, the Judge concluded that he must exercise his judgment having regard to [the witness's] appearance, his demeanour, his background and his general conduct. After making an allowance for the way in which the hearing had taken place and his then circumstances, the Judge nevertheless decided that [the witness's] evidence would not be reasonably safe or reliable.

Thus, the Court in *Bain* focused on the reliability of the witness who was to give evidence of the statement, not the reliability of the maker of the statement and the circumstances relating to the making of the statement. In light of this, and the comments of the Court of Appeal in *R v Shortland and Hughes*, it remains to be seen whether, in applying the Act, the question of reliability of the witness is considered as part of the preliminary assessment of relevance or whether it is factored in to the reliability requirement in s 18, notwithstanding that it is not a 'circumstance relating to the statement'.

The Act also provides for hearsay statements contained in business records to be admitted under s 19, which is not subject to a reliability test, and for the admissibility in civil proceedings of hearsay statements in certain documents under s 20.[49] In criminal proceedings only, section 22 requires the giving of notice if a party wishes to offer a hearsay statement. Such notice includes seven different pieces of information, and further requirements must be complied with if the state-

46 *R v Shortland & Hughes*, ibid, para 39.

47 *R v Bain*, above n 26.

48 Ibid, per Thomas J at 132; 691.

49 Prior to the Act's commencement there were three main common law exceptions to the hearsay rule, namely confessions and admissions, general residual exception, and *res gestae*. Under the Act, section 18 provides largely for the general residual exception, and s 27 provides for the admission of defendant's statements, but *res gestae* is not explicitly provided for by the Act. It is implicitly provided for, if it comes within s 18, and clearly if the statement was made in circumstances of such spontaneity and contemporaneity that the risk of concoction or distortion can be disregarded, then there is a 'reasonable assurance as to its reliability'. But as s 18 is subject to the notice requirements of s 22 thus a party who tenders such evidence faces a hurdle that did not exist at common law.

ment is in writing. One of the main criticisms levelled at the hearsay provisions in the Act is that the notice requirements may have the effect of increasing the length and cost of trials.

It is clear that while the Act aims to avoid undue expense and delay, the provisions relating to hearsay do not lend themselves well to achieving this objective.

To date there have been only a few cases in which admissibility decisions have turned upon the hearsay provisions in the Act. In *R v Rajamani*[50] some of the tendered statements were not hearsay since they went to the victim's state of mind. Other statements contained a double hearsay element which the Judge did not consider fell within the meaning of 'hearsay statement' in the Act. For these reasons, there was no application of the reliability test in s 18. In *R v Kereopa*[51] a statement by a witness who died before trial was not admitted because it did not meet the reasonable assurance of reliability hurdle in s 18. In that case, the Court accepted defence counsel's arguments that there was no reasonable assurance of reliability because the statement would be relied upon for identification purposes; there were inconsistencies between the statement in question and those of other witnesses; the witness had previous convictions for dishonesty offences; she had made a statement that she did not drink and yet had a conviction for drink driving; and there were issues about lighting conditions that threw the level of detail of her observations into doubt. The defence argued that on those grounds it would be inherently unfair to admit the statement, in the absence of the opportunity to cross-examine.[52] *Kereopa* thus gives some guidance about the interpretation and application of s 18, and in particular, the 'circumstances relating to the statement' as they are defined in s 16.

It is appropriate at this point to return to the case of George Gwaze, referred to in the introduction to this article. In May 2008, George Gwaze stood trial and was acquitted of the rape and murder of his niece, Charlene Makaza. Charlene lived with the accused and his family, her parents both having died from the AIDS virus in Zimbabwe. Charlene herself was HIV positive, and it was the defence's position that there was neither a crime of rape nor murder and that Charlene had become suddenly overwhelmed by the HIV infection. Relatively late in the trial, the defence became aware of the opinion of a South African paediatric surgeon, Dr Heinz Rode, to the effect that there were similarities between Charlene's symptoms and those of children in South Africa who had died of AIDS.[53] Justice Chisholm admitted the surgeon's evidence as hearsay. Following the acquittal it was reported that the Solicitor-General was considering seeking a retrial on that point, although to date there appears to have been no decision on this.[54]

In the absence of a written record of the Judge's ruling, we can only speculate as to his reasoning, but some conclusions are self-evident. In terms of 'unavailability', clearly the maker of the statement, Dr Rode, was outside New Zealand, and presumably Justice Chisholm decided it was not reasonably practicable for him to be a witness. We have little information on the circumstances relating to the making of the statement that provided a reasonable assurance that it is reliable. In terms of the nature of the statement, it could have been written or oral. At least one newspaper ar-

50 *R v Rajamani*, above n 38.

51 *R v Kereopa*, unreported, High Court, Tauranga (CRI 2007-087-000411). 11 February 2008. Cooper J.

52 Ibid, para 31.

53 'Gwaze lawyer urges quick decision on possible retrial' *New Zealand Herald* online http://www.nzherald.co.nz. 30 May 2008.

54 Ibid.

ticle suggests the evidence was given via a statement Rode made to police.[55] Arguably the maker of the statement, a paediatric surgeon in another country, has little motive to give false evidence. Also, the evidence would have been in the form of an expert opinion and not a statement of fact as such. Thus the maker of the statement, Dr Rode, arguably can be compared favourably with the maker of the statement in the *Shortland* case, at least in terms of circumstances that relate to the veracity and accuracy of the observation of the person.

On the other hand, the content of the statement was crucial to the case – in the absence of the evidence, the jury could well have concluded not only that a crime had been committed, but also that George Gwaze committed it. The evidence is critical in that it tends to prove that there was no crime at all. Thus, given the centrality of the evidence to the issues in the trial, the inability of the prosecution to cross-examine the witness may have been sufficiently prejudicial to the prosecution case so as to outweigh its probative value, as was argued and accepted in *R v Kereopa*.[56] But section 8(2) also requires a Judge to take into account the right of the defendant to offer an effective defence. And again, the fact that the disputed evidence was crucial to the defence case is of vital importance when considering this point.

C. Propensity

In general terms, the exclusion of previous convictions has been justified in many cases on the basis that their relevance has been insufficient to outweigh the prejudice that might accrue to the accused's right to a fair trial. As was noted by Justice Randerson, above, an accused should be judged only on the evidence relating to the current charge. Admitting previous convictions can result in a jury erroneously reasoning that, despite any other evidence in the case, because the accused has committed a related crime in the past, they therefore did so on the occasion giving rise to the current charge. Notwithstanding this risk, in many cases evidence of the earlier conduct of an accused person can be of a compelling nature, depending upon what is sought to be proved.

In New Zealand the test for the admissibility of previous convictions at common law was that the probative value of the evidence outweighed its prejudicial effect.[57] In assessing probative value the Judge looked to any particular similarities between the earlier offending and the current charge. For example, in a burglary case, if there were particular features of the earlier offending such as that they took place late at night while occupiers were asleep, only cash was taken, entry was effected in the same way each time, for example, and the circumstances of the current charge involved those features, then the earlier burglaries might have a *tendency to prove* that the same offender was responsible for the current charge. That is, the earlier offending establishes a *modus operandi* that is probative of the fact that the person with that *modus operandi* committed the current charge. The more previous convictions the accused has for those types of burglaries, the stronger the probative value. On the other hand, the length of time between the earlier offending and the current charge tends to decrease the probative value, since there is a chance that the accused may have reformed. But even if the evidence was highly probative, the Judge was required to balance that against the prejudicial effect of the evidence, which derives from the fact that an

55 D Chisolm, 'Crown looks to appeal Gwaze verdict' *Sunday Star Times,* 25 May 2008. http://www.stuff.co.nz/4560073a11.html.

56 *R v Kereopa*, unreported, High Court, Tauranga (CRI 2007-087-000411). 11 February 2008. Cooper J.

57 In this context, New Zealand courts adopted the approach taken in the House of Lords decision in *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337 (HL).

accused's right to a fair trial may be threatened by the risk that a jury will use the evidence improperly and convict the accused on suspicion rather than proof beyond reasonable doubt.

Unsurprisingly, post-acquittal revelations about an accused's previous convictions, held inadmissible before the jury, usually give rise to increased public criticism of the justice system. In early 2007, prior to the Act's commencement, Clint Rickards, Bob Schollum and Brad Shipton faced trial on charges of sexual offending against two women in Rotorua during the 1980s. The identity of one of the complainants (B) is statutorily protected. The other woman was Louise Nicholas, who waived her entitlement to the same protection. All three accused were acquitted on all charges at both trials. Following the disposition of the second trial, involving complainant B, it was revealed that Messrs Schollum and Shipton were currently in prison, having been convicted with two other men of the pack rape of another woman in 1989. While there have been allegations that the jurors in the Rotorua trial actually knew about these convictions, they were not entitled to employ that knowledge in their deliberations. There is nothing to suggest that juries are incapable of separating these issues. Indeed, given the verdict there is little room for an argument that the jury afforded any consideration at all to the previous convictions.

Under the Act, evidence of propensity covers what at common law was often referred to (not always accurately) as similar fact evidence. Section 40 of the Act defines propensity evidence as evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved.[58]

Section 41 allows defendants in criminal cases to offer propensity evidence about themselves, but under s 41(2) the Judge may then permit the prosecution or another party to offer propensity evidence about the defendant. Section 43 (to which s 41(2) is not subject) allows for the prosecution to tender propensity evidence about a defendant (even if the defendant does not put it in issue) only if the probative value of the evidence outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant. In assessing the probative value of such evidence, the Judge can take into account the frequency of the acts; connection in time between acts; extent of similarity between the acts; number of persons making allegations; whether allegations might be the result of collusion or suggestibility; the extent to which the acts are unusual.[59] When assessing the prejudicial effect of the evidence the Judge must consider whether it is likely to unfairly predispose the jury against the defendant and whether the jury will give it disproportionate weight. Despite comments made in the Court of Appeal in *R v Taea*,[60] to the effect that s 43 itself gives adequate guidance, it would seem that the Judge's exercise under the new Act will be much as the same as is currently applied in these types of cases, in that probative value is to be weighed against prejudicial effect. But in identifying the factors that are relevant to the assessment of probative value, the Evidence Act expressly recognises what the House of Lords did in *DPP v P,* that the factors from which probative force is derived:[61]

> may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed consisting of unusual characteristics in its execution the necessary relationship is by

58 It does not include evidence of an act or omission that is one of the elements of the offence for which the person is being tried or the cause of action in the proceeding.

59 *Evidence Act* 2006, s 43(3)(a)-(f).

60 *R v Taea* (CA442/07) [2007] NZCA 472, at para 20.

61 *DPP v P*, above n 57, 462; 348.

> no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection.

Thus under the Act what may be used as propensity evidence includes evidence which may not constitute similar fact evidence at all. Evidence that falls within the *res gestae* is an example, and as cases such as *R v Shortland*[62] and *R v Karetai*[63] demonstrate, there is no requirement that conduct that forms the *res gestae* bears any relation to the acts charged, save that they were contemporaneous. But the term 'propensity' itself, especially the way it is defined in the Act, is one that seems to be more concerned with evidence that shows a 'constant or continual attitude',[64] or 'system or underlying unity'[65] (that is, similar fact evidence) than evidence of *res gestae* or other types of conduct evidence. It is difficult to see how a disposition to act in a particular way can be proved *other* than by showing that the defendant has acted in the same (or similar) way on previous occasions. In other words, while *res gestae* evidence arguably falls within the propensity rules in the Act, I am not convinced that the evidence necessarily shows a *disposition* to act in a particular way or have a particular state of mind. The evidence might suggest the accused had a particular state of mind, but a disposition for it, not necessarily.

The Court of Appeal in *R v Wyatt,*[66] relying in particular upon s 43(3)(c) (extent of similarity) and s 43(3)(f) (extent to which the acts are unusual) admitted evidence of 'high risk, almost voyeuristic'[67] sexual offending which demonstrated the respondent's degree of interest in the physical and sexual development of the complainants. In *R v S,*[68] the Court of Appeal allowed a Crown appeal against a High Court decision to exclude propensity evidence. The respondent was to be tried on a number of charges of sexual offending, against one complainant, alleged to have occurred between 1967 and 1978. The High Court ruling excluded evidence from two witnesses other than the complainant that the respondent had touched them inappropriately during the same period. The Court of Appeal was of the view that the High Court Judge had understated the extent of similarity between the incidents relating to the complainant and one witness, and the evidence would not unfairly predispose the jury against the respondent. The Court of Appeal held the evidence of the other witness could not be tendered as propensity evidence since it described a 'one-off incident of minor touching'[69] but it was admitted as being directly relevant to the charges since the incident involved the witness, the complainant, and the respondent.

IV. Probative Value & Illegitimate Prejudice

It scarcely needs repeating that the first and utmost consideration in determining admissibility of evidence is whether or not the evidence is relevant, and this is affirmed by section 7 of the Act. As noted earlier in this article, evidence is relevant if it has a tendency to prove or disprove a fact-in-issue in the case.[70] If the evidence does not tend to prove or disprove the proposition for which it

62 *R v Shortland* [1991] NZLR 428.
63 *R v Karetai* (1988) 3 CRNZ 564.
64 *R v Huijser* [1988] 1 NZLR 577, 579.
65 *Hsi En Feng* [1985] 1 NZLR 222, 225.
66 *R v Wyatt (CA311/07)* [2007] NZCA 436.
67 Ibid, para 29.
68 *R v S (CA514/07)* [2007] NZCA 497.
69 Ibid, para 30.
70 *Evidence Act* 2006, s 7(3).

is tendered, it is not admissible as it has no bearing on the case. In determining whether or not a particular item of evidence is relevant, Courts will look to its probative value – in other words the *degree* to which the evidence tends to prove or disprove a fact-in-issue. Because individual items of evidence have differing degrees of strength in their tendency to prove, assessing the probative value of the evidence is essential to a determination of admissibility, since if the probative value of the evidence is low, the evidence is not particularly relevant.

Reliability is also critical to an assessment of relevance. Probative value and reliability are distinct concepts in that probative value is derived from the reliability of evidence, but even reliable evidence may not necessarily be probative of a fact-in-issue.

However, even if the evidence is probative, it may be excluded when it is displaced by substantial prejudice to a party. The prejudicial effect of the evidence does not alter the degree of probative value of the evidence; rather the evidence is not probative *enough* to justify incurring prejudice to one party. In this sense, it is preferable to refer to such prejudice as illegitimate prejudice because, as noted by Tipping J in *R v Calder,*[71] all evidence that constitutes a logical step in the evidence against a party is prejudicial to that party. Tipping J noted:[72]

> It is only where prejudice of an illegitimate kind is involved that the question arises. Illegitimate prejudice can exist where the impugned evidence has little probative force but may lead the jury into an erroneous process of reasoning or may lead the jury to conclude that the accused is guilty on an insecure or improper basis.

Most evidential exclusionary rules are underpinned by either concerns about the probative value or prejudicial impact of certain types of evidence. With regard to probative value, one of the justifications for excluding hearsay statements is that they can be unreliable. The extent to which a piece of evidence might be unreliable reduces its probative value. Thus the relevance of an out-of-court statement made by an intoxicated witness, who was standing too far away from the incident to see anything, is limited since it is unlikely to be reliable. In terms of prejudice, prior convictions are generally inadmissible because of the risk that the jury will convict an accused solely on the basis of antecedent bad acts than the evidence relating to the present charge, therefore prejudicing the accused's right to a fair hearing.

Similar reasoning illustrates that some common law *inclusionary* rules have admitted particular types of evidence because the probative value of those types of evidence is so high. The doctrine of *res gestae* is an example. The contemporaneity requirement of that rule provides for a degree of reliability that is not necessarily present in evidence that falls outside the application of the rule. In *R v Andrews,* a case in which the *res gestae* rule was applied in a hearsay context, Lord Ackner held that:[73]

> [T]he judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

It is difficult to conceive of cases where *res gestae* evidence will be excluded, at least when considering hearsay evidence. If the possibility of concoction or distortion can be disregarded, the

71 *R v Calder,* unreported, High Court, Christchurch, T154/94, 12 April 1995, Tipping J.

72 Ibid, 13.

73 *R v Andrews* [1987] 1 AC 281, 301.

probative value of the evidence is high (and therefore relevant, assuming that the statement is material to a fact-in-issue). Illegitimate prejudice only really arises in this context from the inability to cross-examine the maker of the statement – and the need to do so is diminished precisely because the statement is likely to be reliable. In the context of conduct, the probative value of *res gestae* evidence is derived from the contemporaneity of the evidence and its ability to explain why a person acted in a particular way, or that it was more likely that he or she acted in that particular way. However, the risk of illegitimate prejudice is higher in the case of conduct evidence because it relies upon a circumstantial inference. The prejudice that might ensue is borne of the risk that the jury could draw the wrong (or improper) inference.

V. Policy Considerations

While many exclusionary rules are derived from considerations of probative value and prejudice, other exclusionary rules originate from broader policy considerations and exclude evidence that might be relevant and highly probative, and yet not illegitimately prejudicial. Evidential privileges provide examples. As noted by Cooke J in *R v Uljee,*[74] '[T]here are occasions when the public interest in the truth and in obtaining the conviction of guilty persons is recognised to be outweighed by some other public interest'.[75]

This point was affirmed, in somewhat stronger terms, by Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court ex parte B*:[76]

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

In a similar way, the general prohibition on admitting involuntarily obtained confessional statements is based upon the policy that no person shall be compelled to confess guilt, as well as upon concerns about the reliability of an induced confession. As mentioned by the Court of Appeal in *R v Cameron*[77] the Law Commission noted as much when it published its discussion paper on police questioning: 'The values emphasised by the Commission were reliability (evidence which was unsafe to put before a jury should be excluded) and the protection against oppression'.[78]

Also, concerns about the way in which the criminal justice system has re-victimised complainants in sexual cases, as much as relevance, are at the heart of legislative bans on questioning such complainants about their sexual history with anyone other than the accused.

Under the prejudice-policy test, when a policy ground operates, evidence should be conclusively excluded. In this sense, policy considerations extend beyond the rationales for existing exclusionary rules. Policy considerations should be limited to cases where the justification for excluding the evidence is paramount to any other consideration. As an example, defendants' statements obtained by oppression should never be admitted. On the other hand, it would not be

74 *R v Uljee* [1982] 1 NZLR 561 (CA).

75 Ibid, 567.

76 *R v Derby Magistrates Court ex parte B* [1996] 1 AC 486, 507-508.

77 *R v Cameron (CA430/07)* [2007] NZCA 564.

78 Ibid, para 61.

sufficient to argue that hearsay statements should be excluded because there is a policy against admitting out of court statements where there is no opportunity to cross-examine the maker of the statement. While certainly the inability to cross-examine the maker of a hearsay statement is a central justification for the rule against hearsay, it is not the only, or even most significant, consideration. In *R v L*[79] the Court of Appeal noted that:[80]

> Cross-examination is aptly described as the greatest legal engine ever invented for the discovery of truth where credibility is in issue. The right to cross-examine an accuser is regarded in our system of justice as an important element of criminal process…But neither the specific legislation nor the Bill of Rights guarantee elevates the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself.

The statement at issue in *R v L* was a sworn statement of a complainant who had since died. Thus the Court of Appeal found that the circumstances of the statement gave an assurance of reliability since it was made under oath. Richardson J continued 'It is because of the indications of reliability that the public interest in the receipt of relevant evidence justifies its introduction where the witness is dead or otherwise unavailable'.[81]

Applying this reasoning it is clear that even statements not made on oath may be admissible where there are assurances as to reliability, and thus as to probative value. On this basis, there is no policy ground that excludes statements simply because the opportunity to cross-examine the maker of the statement is absent.

VI. The Prejudice-Policy Test – Application

I return now to my original thesis – that exclusionary evidential rules do not assist in achieving justice since they operate to exclude much evidence that is relevant. Would the prejudice-policy test achieve a 'more just' result in the sense that Leane identifies – ones that we can 'accept as believable, legitimate and justifiable'?[82] In order to measure the efficacy of the prejudice-policy test in this way, I will now apply the test to the facts of some of the cases already mentioned.

In *R v Blastland*,[83] the disputed evidence was clearly relevant. The statements said to have been made by Mark demonstrated his knowledge, prior to the victim's body being discovered, of a killing. That Mark had such knowledge was consistent with the defence's theory of the case that Mark was the perpetrator of the crime and not Blastland. As Lord Bridge of Harwich noted, Mark could have come by that knowledge in other ways,[84] by seeing Blastland commit the offence, for instance. But the fact that he made statements to several witnesses that a boy had been killed, that he was also dishevelled and shaking during one such conversation, that he made and retracted admissions to the police, all provide a sufficient basis for the jury to infer that he came by that knowledge by participating in the offence rather than by being a bystander. It is noteworthy, in the context of Mark's admissions to police, that there is no evidence that Mark's statements to other witnesses that a boy had been killed included identifying Blastland, or indeed any other person, as the perpetrator. That is, it seems reasonable to suggest that Mark did not offer any explanation for

79 [1994] 2 NZLR 54.

80 Ibid, per Richardson J at 61.

81 Ibid.

82 Leane, above n 17.

83 *R v Blastland*, above n 21.

84 Ibid, per Lord Bridge of Harwich at 54; 1099.

how he came by his knowledge. On the whole then, the evidence tends to prove that Mark could have committed the offences with which Blastland was charged. There would have been no prejudice to Blastland in admitting the evidence, but unfair prejudice can be occasioned to parties other than an accused in criminal cases. Obviously, the evidence was prejudicial to Mark. But Mark was not on trial. If the admission of the evidence resulted in an acquittal for Blastland, and Mark were to be charged, then the statements would have been admissible against him (subject to any question of involuntariness being raised by the defence). The only real prejudice to Mark arises in the fact that the police could have charged him with the offence, but the police already had the relevant information and could have charged him at any time. It is difficult to find any real grounds on which it could be argued that the admission of the evidence at Blastland's trial was unfairly prejudicial. There also appears to be no policy grounds for excluding the evidence in the absence of any arguments that Mark's statements were covered by a privilege of any type. Thus, according to the test proposed in this paper, the evidence would have been admitted.

In *Noor Mohamed,*[85] evidence that suggested that Noor Mohamed had murdered his first wife with cyanide is relevant to whether he murdered his second wife in the same way. That he had not been charged in relation to the first death is, in my view, irrelevant. The fact that he was not charged does not mean he had nothing to do with Gooriah's death. To say so is not the same as stating he did have something to do with her death. As the decision in *R v Smythe*[86] establishes, evidence of this nature is entirely relevant to establishing an absence of coincidence, without it necessarily amounting to a conclusion that the accused was guilty in relation to the earlier events. Lord du Parq himself thought that a hypothetical conclusion in this regard was appropriate:[87]

> Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide.

I would add that even if the appellant deliberately caused Gooriah to take poison, it would not necessarily have resulted in a conviction. Thus, as I have already stated, whether Noor Mohamed was held responsible for Gooriah's death is irrelevant. What is relevant is that the evidence shows a connection between the deaths of two women with whom the accused was living at the material times, and as such casts doubt on any suggestion that both women's deaths were the result of accident or suicide.

The evidence was prejudicial to the accused but, I would argue, not *unfairly* so when weighed against its probative value. It has always been the case that the jury must be satisfied beyond a reasonable doubt that the accused committed all elements of the offence *for which he or she is charged*. What the disputed evidence does is to add weight to all other evidence in the case – it does not by itself equate to a conclusion that the accused was responsible for either of the two deaths. There do not appear to be any relevant policy grounds for excluding the evidence. Again, applying the test proposed in this paper, I would have admitted the disputed evidence in *R v Noor Mohamed*.[88]

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85 *Noor Mohamed v R*, above n 28.

86 *R v Smythe*, above n 29.

87 *Noor Mohamed v R*, above n 28, per Lord du Parq at 193; 371.

88 Ibid.

In the case of George Gwaze, the prejudice-policy test would also lead to admission of the hearsay evidence. I have already referred to factors in favour of its admission.[89] It is relevant to whether or not there was any crime at all. That Charlene's symptoms were consistent with other children who had died from the HIV infection is probative of the fact that she may indeed have died from that infection and not at the hand of any other person. The probative value of the evidence is not decreased by concerns about the reliability of the evidence. There is no *illegitimate* prejudice to the prosecution by an inability to cross-examine the witness.

Finally, the trials of Messrs Rickards, Shipton and Schollum for offending in relation to Louise Nicholas and complainant B (the Rotorua case) gave rise to numerous issues about the admissibility of propensity evidence. For present purposes the most significant issue, it would appear from the post-acquittal fallout, was whether the jury were entitled to hear about the previous convictions of Bradley Shipton and Robert Schollum for the rape of another woman at Mount Maunganui in the late 1980s. At the time of the trial for the Rotorua case, there were extensive suppression orders surrounding the Mount Maunganui case, including the names and identities of Shipton and Schollum, along with evidence of allegations about the use of a police baton. Interestingly, in relation to the Rotorua trial, it was conceded by the Crown that 'at least some members of the jury would be likely to be aware of [Shipton's and Schollum's] previous convictions for rape'.[90] Perhaps even more interesting is that the admissibility of Shipton's and Schollum's convictions for the Mount Maunganui rape does not appear ever to have been contested by the Crown. The ruling of Justice Randerson on pre-trial admissibility applications contains the following reference:[91]

> In view of suppression orders made in respect of Messrs Shipton and Schollum and the orders made prohibiting the publication of references to the police baton, I do not accept there is any material risk of a jury concluding that at least two of the accused were involved in allegations that a baton was used in the Mt Maunganui incident.

While there are similar references scattered among the many judgments engendered by the Rotorua case, my research has failed to locate any decision turning on the admissibility of the convictions themselves. That the Crown may not have sought their admission is unsurprising. It is more than likely that any Judge would have determined that any probative value in relation to the previous convictions would have been vastly outweighed by illegitimate prejudice. This is because the previous convictions related to sexual offending occurring in Mount Maunganui in 1989, some years after the Rotorua offending, involving two other accused who had nothing to do with the Rotorua offending. Significantly, the accused in the Mount Maunganui case were acquitted of allegations that a baton was used,[92] which is the only real connection between the allegations in both cases. I will return to this point shortly.

Also for consideration in the Rotorua case was whether there be joint or separate trials in relation to the two complainants. Justice Randerson declined the application for severance on the grounds that there were striking similarities between the offending alleged by each complainant in respect of the use of objects by the accused, namely that both complainants were teenagers at

89 See text following fn 54.

90 *R v Rickards, Shipton & Schollum,* unreported, High Court, Auckland (CRI 2005-063-1122). 13 September 2006. Randerson J. para 37(b).

91 *R v Rickards, Shipton & Schollum,* unreported, High Court, Auckland (CRI 2005-063-1122). 28 November 2005. Randerson J, para 112.

92 Ibid para 47.

the time of the alleged offences, and the allegations involved 'group sexual activity'.[93] Somewhat ironically, given that Shipton and Schollum denied the use of a police baton in the way alleged in the indictments,[94] in arguing that the evidence of the two complainants was not sufficiently similar, defence counsel submitted that 'violating a woman with an object was not an uncommon practice in Rotorua at the time'.[95]

The accused appealed against Justice Randerson's decision on the severance issue. The Court of Appeal did not disagree with Justice Randerson's finding of probative value:[96]

> The common features of the two incidents are, in our view, remarkable. They share the use of a foreign object as, to use Mr Stanaway's words, an instrument of abuse and degradation. All three accused are alleged to have been present and to have taken an active role. The incidents are closely related in time and circumstances. The similarities are striking. Their force is undiminished by the dissimilarities relied on.

Where the Court of Appeal and Justice Randerson were at variance, however, was the risk of illegitimate prejudice. The Court of Appeal thought there were two sources of prejudice in this case. The first source of prejudice was derived from the fact that the evidence of each complainant was admissible as similar fact or propensity evidence in relation to only some of the charges in relation to the other complainant. Secondly, there was evidence of four witnesses as to the use by Shipton and Schollum of police batons in the course of sexual activities. The latter evidence was only admissible in relation to some of the charges alleged by Louise Nicholas. The Court of Appeal held:[97]

> The risk of prejudice from both sources would conventionally be met by appropriate directions. However, these directions would be additional to the similar fact directions required in relation to the complainant's evidence and that of the four witnesses. We have a real concern at the potential for confusion which would arise from such a bewildering array of directions.

Thus, notwithstanding that the Court of Appeal was of the opinion that the evidence of each complainant was 'likely to provide powerful support for the account of the other', it overturned Randerson J's ruling and ordered that the trials be severed. Louise Nicholas's evidence would have been admissible on a similar fact basis at the trial of the other complainant's evidence, and vice versa. But a result of severance could well have been 'a weakening in the cogency of the probative force' of the evidence.[98] In any event, following the acquittals at the trial involving Louise Nicholas' complaints, the Crown did not seek to call her as a witness in the case involving B.[99]

Applying the test proposed in this paper, the evidence of Shipton and Schollum's previous convictions for rape would not, by themselves, have been admissible. What was relevant was evidence relating to the use of a baton. Indeed, in the Rotorua case there was evidence from other witnesses as to the use by Shipton and Schollum of police batons in the course of sexual activities. As to the admissibility of that evidence, Justice Randerson was satisfied that:[100]

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93 Ibid para 110.

94 Ibid para 134.

95 *R v Rickards, Shipton & Schollum*, ibid, para 110.

96 *R v Rickards & Schollum*, unreported, Court of Appeal (CA491/05; CA 503/05). 2 March 2006. William Young P, Potter & Rodney Hansen JJ, para 41.

97 *R v Rickards, Shipton & Schollum,* ibid, para 44.

98 D Mathias, 'Similar fact evidence and severance of counts' [1986] *New Zealand Law Journal* 42.

99 *R v Rickards, Shipton & Schollum,* above n 90, para 21.

100 *R v Rickards, Shipton & Schollum*, above n 91, para 133.

> …the evidence goes beyond establishing mere propensity or bad character. The key to its probative value is that it demonstrates the accused had on other occasions during the relevant period engaged in sexual activity of a sufficiently unusual or distinctive character as to give it probative force which outweighs any legitimate prejudice. The distinctive characteristics of the behaviour of which these witnesses depose is that it involves joint sexual activity by two serving police officers featuring the use of a police baton.

The principal stumbling block to the admissibility of the baton evidence in relation to the Mount Maunganui case is that Shipton and Schollum were acquitted of the charges involving the use of a baton. However, previous acquittals are not presumptively inadmissible – in some cases they can be admitted as 'similar fact' or propensity evidence. In New Zealand, earlier cases on point held that acquittals might be admitted if admission does not amount to allegation that accused had committed the offence for which he or she was acquitted.[101] In *R v Degnan*[102] the Court of Appeal held that evidence of acquittals is admissible subject to the discretion of the Court to exclude if admission would be unfair to the accused or would result in an abuse of process.[103] In talking about striking a balance between the rights of those previously acquitted and the interests of society in having all relevant evidence before the court, the Court of Appeal made the following salient point:[104]

> The accused has the benefit of the earlier acquittal or acquittals in that he can never again be tried for the offences involved. But he should not have the further benefit of being immunised from the relevant evidence when facing a similar charge in the future.

Taking those views into account, the evidence relating to the allegations about the use of a baton by Shipton and Schollum in relation to the Mount Maunganui complainant should have been admitted against Shipton and Schollum in the Rotorua cases. There may have been a number of reasons why they were acquitted on those charges without necessarily equating to a conclusion that Shipton and Schollum did not use a baton, or have a baton present, in relation to the Mount Maunganui incident. The evidence is prejudicial, but again, not illegitimately so, in the light of its probative value. There are no policy arguments in favour of exclusion.

Thus it would seem that the prejudice-policy test would tend to admit a wider range of relevant evidence than would have been the case at common law. Given that the Evidence Act 2006 is still in its infancy, it is difficult to draw any inferences as to outcomes from the relatively few cases that have been decided to date. However, given that under the Act both hearsay and propensity evidence is *prima facie* inadmissible, it seems reasonable to infer more hurdles to admissibility than the prejudice-policy test. These hurdles, at least in relation to hearsay, are compounded by the notice requirements.

VII. Conclusion

In applying the prejudice-policy test, the factors that originally justified the exclusionary rules simply become factors to be taken into account to the extent that they affect the probative value of the evidence or create illegitimate prejudice to one party. For example, concerns about the unreliability of hearsay evidence can be taken into account in assessing the probative value of that evidence. Similarly, in terms of conduct evidence, a twenty-year-old conviction is more likely to

101 *R v H (T20/93)* (1994) 11 CRNZ 342, 346.

102 *R v Degnan* [2001] 1 NZLR 280.

103 Ibid, 292.

104 *R v Degnan*, above n 102, 291.

be more prejudicial than probative, when compared with a recent conviction. But these factors do not need to be statutorily defined or limited since there may be a range of other considerations that bear upon both probative value and prejudice that cannot readily be foreseen.

Critics of this approach would no doubt argue that the discretion it affords to judges is too wide and gives no guidance as to how the discretion should be exercised in the individual case. As Sankoff writes:[105]

> The notion that judges have the flexibility to 'choose' how to resolve a legal question, or even that they may legitimately reach different results when confronted by similar fact patterns, still acts as a red flag to many.

But the doctrine of precedent and its reliance upon material facts should give sufficient guidance. Further, despite the current existence of *prima facie* exclusionary rules, Judges have long been required to exercise discretion in determining whether evidence should be admitted (as falling within an exception, for instance). This has usually involved weighing prejudice against probative value.

The prejudice-policy test has meaning and Judges will need to apply that meaning to the facts of the individual case. When considering probative value the questions to be asked are: what fact-in-issue does the evidence tend to prove and how strongly does it tend to prove it? In terms of prejudice the questions are how significant is the risk that this information will be used *improperly* by the jury, or that the jury will give the evidence more weight than it deserves? It is not within the scope of this paper to canvas the capacity of juries to follow judicial directions that explain to them the uses to which evidence can be put, but this may be a factor for consideration. We also must bear the criminal standard of proof in mind – if there is a reasonable doubt then the jury must acquit. The recent acquittals referred to at the beginning of this chapter may simply be a reflection that juries do understand that much and this is as it should be. An acquittal may not reflect the reality of an accused's guilt or innocence, but it reflects at least that a case has not been proved to the requisite standard.

Even before the Act's commencement, in respect of many of the exclusionary rules, Courts had tended away from strict application towards a more flexible approach. In terms of propensity evidence, since the House of Lords decision in *DPP v P*[106] the test applied in New Zealand courts was expressed in terms of a probative value versus prejudicial effect balancing exercise that recognised that probative value can be derived from a variety of factors. In terms of hearsay, the case of *R v Baker*[107] opened the door for the development of a common law rule that took indicia of reliability into account in determining admissibility. Similarly, when considering the admissibility of novel scientific evidence in *R v Calder*,[108] Tipping J set out the test as being one of relevance and helpfulness:[109]

> To be relevant the evidence must logically tend to show that a fact in issue is more or less likely. To be helpful the evidence must pass a threshold test which can conveniently be called the minimum threshold of reliability. This means the proponent of the evidence must show that it has a sufficient claim to reli-

105 P Sankoff, 'The Search for a Better Understanding of Discretionary Power in Evidence Law' (2007) 32 *Queen's Law Journal* 487.

106 *DPP v P*, above n 57.

107 *R v Baker*, above n 42.

108 *R v Calder*, above n 71, 13.

109 Ibid, 7.

> ability to be admitted. If this threshold is crossed the weight of the evidence and its probative force can be tested by cross-examination and counter evidence and is ultimately a matter for the jury.

Thus, as already noted, Judges are no strangers to the type of balancing exercise proposed in the prejudice-policy test. While some regulation of trial process, questioning of witnesses, and modes of giving evidence may be necessary, all questions of admissibility can be dealt with by ascertaining that there is no illegitimate prejudice outweighing probative value and that there is no policy consideration excluding the evidence. As noted, previous statute and case law provides numerous examples of what policy considerations might include. While the overall goal of the prejudice-policy test is to support the admission of 'all relevant evidence', it is arguably less time-intensive because there is no requirement to refer to presumptive rules. The test represents a trend away from procedural box-ticking, and is also in line with the policy underlying the new Criminal Procedure Act, namely the promotion of efficiency and fairness in the criminal justice system. It is to be hoped that overall the concept of fairness is broad enough to encompass substantive justice.