ADMISSIBILITY OF SURVEYS IN EVIDENCE: HEARSAY AND GONE TOMORROW? *SHOSHANA PTY LTD AND SUE SMITH* v. *10TH CANTANAE PTY LTD*

Introduction

There is something of a controversy in the law of evidence in Australia concerning the admissibility of the results of public opinion and other surveys.[1] It is a controversy that finds an echo in American jurisprudence during the 1950s and early 1960s[2] where it seems to have been resolved in favour of acceptance.[3] Courts in other jurisdictions including England, New Zealand and Canada now approve such evidence.[4] Prior to *Shoshana Pty Ltd and Sue Smith* v. *10th Cantanae Pty Ltd*,[5] a decision of Burchett J. in the Federal Court reversed on other grounds by the Full Court,[6] Australian courts had very much set their faces against its reception, primarily on the basis that reports of responses made to an interviewer

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[1] Farmer 'Use of Survey Evidence in Trade Practices Cases' *Australian Trade Practices Reporter* ('A.T.P.R.') 9,501, 'The Admissibility of Survey Evidence in Intellectual Property Cases' (1984) *U.N.S.W.L.J.* (Special Issue) 57; Shanahan *Australian Trade Mark Law and Practice* (1982) 153*ff*; Ricketson *Law of Intellectual Property* (1984) 561; Cain 'Survey Evidence in Intellectual Property Matters' (1985) *Intellectual Property Forum* 3; Byrne and Heydon *Cross on Evidence* 3rd Australian Ed. (1986) ('Cross') para.s 15.31, 16.13 and 19.19; Gillies *Law of Evidence in Australia* (1987) ('Gillies') 276; Freckelton *The Trial of the Expert* (1987) 103*ff*.

[2] Caughey 'Consumer Polls as Evidence in Unfair Trade Cases' 20 *Geo. Wash. L.R.* 211 (1951), 'Public Opinion Surveys as Evidence: The Pollsters go to Court' 66 *Harv. L.R.* 498 (1953); Sorensen 'The Admissibility and Use of Opinion Research Evidence' 28 *N.Y.U.L.R.* 1213 (1953); Blum and Kalven 'The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science' 24 *U.Chi. L.R.* 1 (1956); Early 'Use of Survey Evidence in Antitrust Proceedings' 33 *Wash. L.R.* 380 (1958); Zeisel 'The Uniqueness of Survey Evidence' 45 *Corn. L.Qterly* 322 (1960); Bonynge 'Trademark Surveys and Techniques and their Uses in Litigation' 48 *Am. Bar Assoc. J.* 329 (1962); Sherman 'Use of Public Opinion Polls in Continuance and Venue Hearings' 50 *Am. Bar Assoc. J.* 357 (1964); Roper 'Public Opinion Surveys in Legal Proceedings' 51 *Am. Bar Assoc. J.* 44 (1965); and more recently McElroy 'Public Surveys—The Latest Exception to the Hearsay Rule' 28 *Baylor L.R.* 380 (1976).

[3] See *Wigmore on Evidence* (Chadbourne Revision 1976) ('Wigmore') para. 1731 and 76 *American Law Reports, Annotated Second Series* ('ALR2d') 619-670 and *Later Case Service* (1986) for the many cases collected there. Note also the 1975 Federal Rules of Evidence Rules 703, 803 and 804 which permit use of surveys as part of an expert's testimony as well as on their own.

[4] Examples are scattered throughout this case-note, but see *infra* nn 14 and 16 for the citations of some of the more important cases.

[5] (1988) 79 A.L.R. 279; (1988) A.T.P.R. 40-851. References will be to the A.L.R. report.

[6] (1988) 79 A.L.R. 299; (1988) A.T.P.R. 40-833.

repeated in court in the absence of the interviewee must be hearsay.[7] *Shoshana* has already been followed in another first instance decision of the Federal Court indicating that the case does indeed represent something of a turning point in this area of the law.[8]

Public surveys, or the principle behind them at least, are not such a stranger to the law as might first be supposed. Wigmore notes the 1702 case of *Hathaway's Trial* in which the accused was indicted for cheating by pretending to be bewitched by one Sarah M. Evidence was given by a doctor who told of people abusing him for having procured Sarah's liberation. The evidence was admitted over objections that it was hearsay on the grounds that it demonstrated the existence of the opinion in the community that the accused was indeed bewitched; this showed that he had succeeded in his fraud.[9] In a different context, the accused at trial has from early times been permitted to adduce evidence of his or her own good character,[10] which may only be given by statements as to reputation.[11] So too in defamation actions reputation evidence can be given in response to a defence of justification, or on the question of damages.[12] What is testimony on reputation if not a report of a casual survey by the witness of the community's attitude toward the accused or the plaintiff?[13] And yet, courts have been slow to welcome a more scientific and formalised assessment of public opinion and to extend the principle to other contexts.

Surveys, if admitted, are likely to find their greatest use in two distinct situations. The first is actions where the public state of mind, or a segment of it, is at issue. For instance, in passing off or trademark infringement actions a relevant question is whether a significant or substantial section of the public is or are likely to be confused by the defendant's conduct into thinking there is some connexion between their product and the plaintiff's product; surveys have a clear application here.[14] Similarly in actions under Part V section 52 of the Trade Practices Act 1974 (Cth).[15] In crimes involving offences to some community standard

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[7] The cases are discussed below in text accompanying nn 32, 36 and 44.

[8] *TV-am plc* v. *Amalgamated Television Services Pty Ltd* (1988) A.T.P.R. 40-891, discussed in text accompanying n. 139 *infra.*

[9] 14 How. St. Tr. 639, 654 (1702) noted in Wigmore *supra* n. 3 para 1731 (n. 4).

[10] See Cross *supra* n. 1 para. 10.21.

[11] *R* v. *James Rowton* (1865) Le. & Ca. 520; 169 E.R. 1497.

[12] See Fleming *The Law of Torts* (1983) ch. 24 *passim*; Cross *supra* n. 1 para. 10.33.

[13] *Phipson on Evidence* 13th ed. (1982) (*'Phipson'*) para 27.02.

[14] Trade Marks Act 1955 (Cth) s.62. In *Lego Systems A/S* v. *Lego M Lemelstrich Ltd* (*'Lego'*) [1983] F.S.R. 155 for instance surveys indicating confusion between the Israeli defendant's 'Lego' garden products and the plaintiff's children's toys were admitted to show passing off by the former. A survey of 500 people used as evidence in proceedings to remove from the UK trademark register a deceptive mark was found unobjectionable by the House of Lords in the *G.E. Trademark* case [1973] R.P.C. 297. See *Customglass Boats Ltd* v. *Salthouse Bros. Ltd* [1976] 1 N.Z.L.R. 36 and *Klissers Farmhouse Bakeries Ltd* v. *Harvest Bakeries Ltd* [1985] 2 N.Z.L.R. 129 for two New Zealand examples.

[15] An example of survey use in a s. 52 case is *TV-am*, discussed in text accompanying n. 139 *infra.* Blakeney believes there is a stronger case for the use of consumer surveys in s. 52 actions than in passing off given that the section is designed for consumer protection: 'The Protection of Industrial and Intellectual Property Rights under Section 52 of the Trade Practices Act 1978' (1984) *U.N.S.W.L.J.* (Special Issue) 39 at 51.

of behaviour or morality such as selling obscene material or behaving offensively, the public opinion on the conduct in question, or even more generally, could be useful.[16] Public attitudes or intentions may become relevant in assessing damages for breach of contract, for example when likely public patronage of an uncompleted facility designed for public use is at issue.[17] In applications for a change of venue when it is feared the accused is unlikely to get a fair trial the existence of bias or prejudgment in the community as revealed by surveys could be of assistance to the court.[18] Surveys might also have a place in demonstrating good character, defamation or contempt of court proceedings[19] and other applications can be imagined.

The second category of potential uses of surveys is to establish economic facts in restrictive trade practices or 'antitrust' cases under Part IV of the Trade Practices Act. In deciding if certain conduct by a corporation is anti-competitive (or 'substantially lessens competition' to use the words in several sections) its impact on the players in a particular market is relevant, hence their reaction or likely reaction to the conduct should be proved. Other complex facts may also require proving such as the state of competition in the market prior to the conduct. Also at issue might be the geographical or product boundaries in the market.[20] All of this can be a lengthy business that surveys could do much to expedite.[21] What sets these cases apart from the public opinion situation

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[16] Use of opinion polls in obscenity trials has been approved of in Canada; *R* v. *Prairie Schooner News Ltd* (1970) 75 W.W.R. 585, *R* v. *Pipeline News Ltd* [1972] 1 W.W.R. 241 but the surveys in these cases were rejected as unsatisfactory. It is arguable that a *considered* moral attitude is not discoverable by survey techniques; and difficulty in Australia for this use is presented by *Transport Publishing Co* v. *Literature Board of Review* (1956) 99 C.L.R. 111 at 119 where it was said that 'ordinary human nature, that of people at large, is not subject to proof by evidence, whether expert or not.'

[17] *Bevan Investments Ltd* v. *Blackhall (No. 2)* [1978] 2 N.Z.L.R. 97.

[18] See Sherman *supra* n. 2. While such use seems to be approved of in principle in the United States such evidence, for various reasons, is seldom accepted and acted on—see ALR2d *Later Case Service supra* n. 3 at 263*f* for a succession of unsuccessful attempts.

[19] Attempted unsuccessfully in *R* v. *Murphy* (1969) 4 D.L.R. (3d) 289. One form of contempt is 'scandalizing the court'—in effect damaging the standing of the court in the eyes of the community. Assuming it was possible to detect shifts in attitudes generally toward the court there seems no reason why such opinion evidence should not be lead—but it is scarcely possible that meaningful data could be collected to this effect.

[20] See *Outboard Marine Australia Pty Ltd* v. *Hecar Investments no. 6 Pty Ltd* (1982) A.T.P.R. 40-327; (1982) 66 F.L.R. 120. Bowen CJ. and Fisher J. in interpreting 'competition' for the purposes of s. 47(10) of the Trade Practices Act said: 'It would seem that 'competition' . . . must be read as referring to a process or state of affairs in the market. In considering the state of competition a detailed evaluation of the market structure seems to be required.' Thus emphasising the very empirical nature of the inquiry. By way of illustration, Wilcox J. in the *AMH* case *infra* n. 69 heard evidence from 32 cattle producers as to their inclination to sell their beasts locally which helped to establish the defendant's illegal monopoly in that market.

[21] Miller in *Annotated Trade Practices Act* (8th ed. 1987) writes: 'In many cases it will prove virtually impossible to identify the relevant market without resort to scientifically gathered survey evidence.' at 27. And see Farmer *supra* n. 1 (A.T.P.R.); 'Note: Commercial Lists' 46 *Iowa L.R.* 455 (1961); Early *supra* n. 2; Calvani *et al* 'Use of Private Sources of Market Share Data and Experts in Antitrust Litigation' 27 *Antitrust Bulletin* 1 (1982). For discussion of the special problems raised by proving economic facts in Australia and some solutions see: Blunt 'Use of Economic Evidence' (1986) 14 *A.B.L.J.* 261 and Pinos 'Is There Law After Economics: Some Issues of Integration' (1985) 11 *Mon.L.R.* See also Trade Practices Commission *Annual Report* 1984-5 which raises the issue whether reform is necessary to facilitate the Federal Court as a trier of economic questions.

is that while analogous issues may arise in Part IV litigation it is more often the case that what needs to be proved is a fact, not an opinion. Depending on what basis is relied on to support the admissibility of survey evidence (and there is a number available, at least theoretically) this second category may or may not come to enjoy the benefits that surveys can offer.

Slightly different policy justifications are offered for each category. In the first, it is argued that when the state of public opinion on an issue is relevant then a survey which is representative of the community and which, at its highest, is capable of providing an accurate appraisal of its views, is better quality evidence than that obtained from a parade of pre-selected and pre-briefed witnesses. Proving public opinion by witnesses is slow, costly and, more importantly, necessarily inconclusive.[22] In the second situation, economic or market facts are in issue which can be proved fairly conclusively, but may require copious amounts of time and money to do so. The justification lies in necessity; it is not so much that surveys are the more accurate way to prove the facts, but rather very often far and away the most convenient.[23]

The Shoshana Decision

Shoshana Pty Ltd and Sue Smith v. 10th Cantanae Pty Ltd[24] was an action in passing off and under sections 52 and 53 of the Trade Practices Act. Television presenter Sue Smith and her corporate incarnation Shoshana Pty Ltd took exception to an advertisement placed by the defendants in various magazines which displayed a picture of a woman sitting up in bed with a cat watching a television set equipped with a video recorder. Across the top of the picture were the words 'Sue Smith just took control of her video recorder'. Burchett J. held in favour of the plaintiffs in both passing off and under sections 52 and 53. Sue Smith was a well known television personality who had not given the defendants permission to use her name, and people could confuse the pictured person with the real Sue Smith.[25]

On the question of damages Burchett J. heard evidence that Sue Smith had previously earned substantial fees in promoting 'Pears' brand products, and that a person in her position could command $20,000 to $25,000 for the 'character merchandising' kind of use the defendants had made of her name. His Honour was also presented with public opinion polls taken over several years by an independent survey company which rated the various female television presenters on offer; Sue Smith generally

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[22] See for example Cain *supra* n. 1 at 3.

[23] See Early *supra* n. 2 at 380*ff.*

[24] *Supra* n. 5.

[25] It was this finding of fact which the Full Federal Court, Gummow J. dissenting, seized upon to overturn the decision. Wilcox and Pincus JJ. felt that the mere reference to the name 'Sue Smith' with a picture of a person dissimilar to the real Sue Smith would not have mislead the public: *supra* n. 6.

rated quite highly. The surveys were tendered by the managing director of the company, a person his Honour was satisfied was an expert qualified to give evidence on the subject of surveys of audience reaction.[26]

Objection was made to the surveys on the grounds that reports of the answers given by persons interviewed were hearsay since they were not called to testify. And, since it was not even the interviewers themselves who gave the evidence, this piled hearsay on hearsay.

In dealing with the first hearsay objection Burchett J. reviewed recent New Zealand and English authority, as well as some earlier Australian cases, to conclude that the objection was not sound. Three distinct bases for this conclusion are discernible in the judgment. Firstly, the answers given by interviewees when rehearsed in court were not hearsay at all but original evidence of the declarant's state of mind since they were not offered for their truth, but merely to demonstrate that they had been expressed:

> (W)hat has to be proved is not that the opinions surveyed are true. True or false,[27] a good opinion of Sue Smith held by a large number of people is relevant to establish her capacity to attract engagement for reward to endorse products . . .[28]

Second, the answers given fell within an established exception to the hearsay rule.[29] Third, the survey material was part of the foundation of the expert opinion compiled from a field wider than the issue before the court.[30] While all three bases were mentioned by his Honour directly, or indirectly in passages of cases he cited with implicit approval, no effort is made to distinguish them nor advert to the varying and at times conflicting consequences which follow from each. His Honour did seem to prefer to base his decision on the first and the third possibility however. All three will be discussed below.

In dealing with the further objection that even if direct evidence from the surveyed public could be dispensed with, the interviewers at least should have been called, Burchett J. called in aid the Evidence Act 1905 (Cth) and its business record provisions. The answers given to interviewers, whether reproduced in statistical tables or otherwise derived from the answers by statistical procedures, were part of the records of business of the survey company. They were statements of fact in a document forming part of a record of business made in the course of a business derived from information in statements made by qualified persons in the course of the business.[31]

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[26] *Supra* n. 5 at 489.

[27] I.e. deserved or undeserved.

[28] *Supra* n. 5 at 295.

[29] *Id.* 291*ff.*

[30] *Id.* 294.

[31] *Id.* 290.

Previous Australian Authority

Three previous Australian decisions had rejected survey evidence. The first, *Hoban's Glynde Pty Ltd* v. *Firle Hotel Pty Ltd*,[32] was a decision of the Full Court of the South Australian Supreme Court; it was not mentioned in the *Shoshana* decision. All three judges gave separate consideration to the question of whether a Licensing Court had correctly admitted evidence of two surveys of approximately 400 people each which supported an application for a publican's licence. Counsel had argued that to demonstrate need for such a licence in the area it was inconvenient and costly to call hundreds of witnesses. Bray C.J., Walters J. and Zelling J. were all unmoved by this argument based on necessity; Bray C.J. felt that there were other more 'natural' ways of proving need,[33] Walters J. said the importance of compelling the parties to procure the best evidence they could overrode considerations of convenience.[34] All thought the surveys hearsay[35]—Bray C.J. saying it was 'not only hearsay, but double, perhaps treble hearsay'. It does not seem that any of the bases relied on by Burchett J. were argued before the court; rather, reliance was unsuccessfully placed on the fact that the Licensing Court was not exercising a 'strict judicial function' and so the rules of evidence did not apply with their usual rigour.

The second case rejecting surveys was a decision of a single judge of the Federal Court in *McDonald's System of Australia Pty Ltd* v. *McWilliams Wines Pty Ltd*.[36] Franki J. granted an interim injunction to McDonalds enjoining the defendants from advertising one of its wines as 'McWilliams' Big Mac'. In the course of the trial McDonalds had sought to tender a market survey showing confusion between the advertisement and McDonalds. It was argued that such evidence was either not hearsay, an exception to the hearsay rule, or deserved a new exception based on necessity.[37] All three arguments were rejected although it was said, a little ambiguously, that the ruling was not intended to be taken as one necessarily applicable to all types of market surveys.[38] In particular, Franki J. expressed doubt about the 'state of mind doctrine' and its applicability to an interviewer collecting opinions. He cited the English trademark case of *A. Bailey and Co Ltd* v. *Clark, Son and Morland Ltd*[39] as indicating that it is not permissible to put before the court answers

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[32] (1973) 4 S.A.S.R. 503.

[33] *Id.* 509.

[34] *Id.* 513.

[35] *Id.* 506, 513, 516.

[36] (1979) 28 A.L.R. 236.

[37] This third argument is not clear from the report but is mentioned by Farmer *supra* n. 1 (*U.N.S.W.L.J.*) at 63.

[38] *Supra* n. 36 at 255.

[39] (1937) 54 R.P.C. 134 at 150 (Court of Appeal); (1938) 55 R.P.C. 253 at 264 (House of Lords).

given by interviewees not proven by affidavit or oral evidence.[40] Burchett J. in *Shoshana* was able to distance *McDonalds* for the reasons that Franki J. had conceded that no extensive examination of United Kingdom or Australian cases had been made before him, because two Australian cases had since been reported supporting the state of mind doctrine,[41] and because several United Kingdom[42] and two New Zealand[43] cases supportive of surveys had been reported since the *McDonalds* decision. *Bailey* was not referred to.

Most recently, King J. of the Victorian Supreme Court in *Mobil Oil Corporation* v. *Registrar of Trade Marks*[44] showed similar distaste for such evidence in an appeal from a decision of the Registrar of Trademarks not to register the name 'Mobil' in Part A, Class 28 of the Register. Mobil had sought to rely on a survey of the public recording impressions upon being presented with the word 'Mobil'. For the reasons that the responses were irrelevant to the question in issue, mere expressions of opinion, and hearsay, the survey results were rejected. His Honour refused to follow the leading case in this area *Customglass Boats Ltd* v. *Salthouse Brothers Ltd*[45] saying 'I know of no other authority which supports the view that the right to cross-examine members of the public who furnish opinions to market surveyers can be disposed with . . .'.[46] Burchett J. parted company with King J. by following the *Customglass* decision. He was comforted in so doing by recent authority on the state of mind doctrine,[47] and the decision of Falconer J. (unavailable to King J.) in the *Lego* case[48] which had also followed *Customglass.* Burchett J. felt the *Mobil Oil* decision was difficult to reconcile with the authority he cited.[49]

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[40] *Supra* n. 36 at 253. The House of Lords decision in *Bailey* has been cited as giving qualified approval to survey evidence by Shanahan *supra* n. 1. The Court of Appeal had said that while only sworn affidavits may be put before the court the side adducing the questionnaire evidence by selected affidavits may *notify* the other side that many more such answers are available to like effect. The House of Lords however said that the fact that other answers to like effect were collected could be *stated in an affidavit* to the court.

It would appear that there is now some expectation by the courts that if a survey has been conducted and affidavits drawn from those interviewed then details of the survey should be proved. Wilcox J. in *Chase Manhattan Overseas Corporation* v. *Chase Corporation* (1986) A.T.P.R. 40 661 accorded no weight to affidavits of nine people interviewed in the course of a survey who associated 'Chase' exclusively with the applicants. His Honour held that in the absence of evidence of the survey itself it was to be inferred that the survey did not support the conclusion that a more general association of the name with the applicants existed and that the nine affidavits were merely peculiarly favourable responses among a sea of otherwise unfavourable answers.

[41] *Dobson* v. *Morris* (1986) 4 N.S.W.L.R. 681 and *Concrete Construction Pty Ltd* v. *Plumbers and Gasfitters* (1987) 72 A.L.R. 415; (1987) A.T.P.R. 40-775.

[42] *Lego supra* n. 14; *Imperial Group* v. *Phillip Morris Ltd* [1984] R.P.C. 293; *Stringfellow* v. *McCain Foods (G.B.) Ltd* (1984) 3 I.P.R. 71; *Process Church of the Final Judgment* v. *Rupert Hart Davis Ltd* noted in *Phipson* at 94-95. To which could be added *Budweiser* [1984] F.S.R. 413 and *Unilever plc's Trademark* [1984] R.P.C. 155 at 181.

[43] *Noel Leeming Television Ltd* v. *Noel's Appliance Centre Ltd* (1985) 5 I.P.R. 249 to which could be added *Klissers Farmhouse Bakeries Ltd* v. *Harvest Bakeries Ltd supra* n. 14 and *Auckland Regional Authority* v. *Mutual Rental Cars* (1988) 2 N.Z.B.L.C. 103,041.

[44] (1983) 51 A.L.R. 735.

[45] *Supra* n. 14.

[46] *Supra* n. 44.

[47] Examined below.

[48] *Supra* n. 14.

[49] *Supra* n. 5 at 285.

Are Surveys Hearsay?

In the *Customglass* case[50] Mahon J., relying on Canadian and United States authority,[51] as well as the House of Lords decision in the *GE Trademark* case,[52] admitted a survey in a passing off action arising from the use of the name 'Cavalier' by the defendants in connection with their sale of yachts. Counsel for the defendants did not challenge the evidence's admissibility, just its weight.[53] Mahon J. mentioned two grounds for admission—one was that the research survey was proof that the opinions existed and was not hearsay. He quoted from a leading United States article which argued that survey evidence is proof that such opinions exist:

> (T)he responses 'observed' by the opinion researcher in determining the public state of mind are like the conclusions of an oculist who peers into one's eye.[54]

His Honour also placed reliance on *Dobson* v. *Morris*[55] in which the N.S.W. Court of Appeal considered whether for the purposes of the Workers Compensation Act 1926 (N.S.W.) the applicant was travelling to work when she became involved in a car accident. Reynolds and Glass JJA. allowed evidence of her intentions stated to two witnesses that she would be travelling to work early that day. Reynolds JA. held that:

> (E)vidence of an extra curial statement of existing intention is admissible to prove its existence . . . not (as) hearsay but . . . as direct evidence.[56]

Burchett J. also relied on *Concrete Constructions*[57] in which Wilcox J. of the Federal Court allowed secondhand evidence of the willingness of suspended unionists to return to work and their belief that they were constrained from doing so until given union approval. Wilcox J. emphasised that this was primary evidence and not hearsay and approved the following passage from *Phipson*:

> Whenever the physical condition, emotions, opinions and state of mind of a person are material to be proved, his statements indicative thereof made at or about the time in question may be given in evidence.[58]

Along with Mahon J. in the *Customglass* case who had entertained the possibility that surveys 'did fall within the technical concept of hearsay',

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[50] *Supra* n. 14.

[51] *R* v. *Prairie Schooner*, *R* v. *Pipeline News* *supra* n. 16; *People* v. *Franklin National Bank* 105 N.Y.S. 2d 81 (1931).

[52] *Supra* n. 14.

[53] A point mentioned by King J. in *Mobil Oil* *supra* n. 44 in not following the decision.

[54] Sorensen *supra* n. 2.

[55] *Supra* n. 41.

[56] *Id.*

[57] *Supra* n. 41.

[58] *Id.* 433. The reference is to *Phipson* (*supra* n. 13) para. 7.34 and see generally Wigmore *supra* n. 3 para. 1731, and Cross *supra* n. 1 para. 19.18.

Burchett J. also raised (and dismissed) the doubt that 'evidence of an expression of an opinion is not evidence that the opinion is actually held'.[59] In other words, the mere fact that the opinion is expressed is indication enough that the opinion is a genuine reflection of the declarant's beliefs. But is it; or might a person express a false or unconsidered opinion?

The fact that there is no authoritative definition of hearsay provides something of a smokescreen here. The Privy Council's statement in *Subramaniam* v. *Public Prosecutor*[60] that evidence 'is not hearsay and admissible when it is proposed to establish . . . not the truth of the statement, but the fact that it was made' certainly promotes a literal approach to the hearsay question. To take a situation most favourable to this view: a response to a question such as 'Who is the best female presenter on television?' given as 'Sue Smith' might be said not to be going to establish that Sue Smith in *fact* is the best presenter but merely that X said so, and so it is not hearsay. This approach does not take account of the implied assertion contained in the statement *viz*, '*I believe* Sue Smith is the best presenter'. The opinion is of no value unless there is implied a belief in its truth by the declarant, and it is this warrant of belief that constitutes hearsay when the declarant is not called as a witness to verify its existence. Recent cases in the United Kingdom and Australia confirm that implied hearsay breaches the hearsay rule. In both *In re Van Beelan*[61] and *R.* v. *Blastland*[62] confessions were made (expressly in the first, by implication in the second) out of court by parties other than the accused. Secondhand evidence of them was inadmissible to exculpate the accused in both cases. The only reason for admitting them would have been on the basis of the implied hearsay that the confessors had believed their statements to be true—but only they were witnesses to this fact.[63]

It is true that implied assertions are more likely to be free from the risk of deliberate lying because usually the declarant has his or her mind on a different point than that which his or her statement is taken to be making. *Cross* notes that a person does not say 'Hello X' in order to deceive passers by into thinking that X is there, therefore there are good reasons to accept secondhand evidence of the declaration as establishing X's presence at a particular place.[64] But even accepting that there is merit in this view, implied assertions of truthfulness with regard

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[59] *Supra* n. 5 at 295.

[60] [1956] 1 W.L.R. 965 at 970.

[61] (1974) 9 S.A.S.R. 163.

[62] [1986] A.C. 41.

[63] See Campbell 'Identification and Hearsay' (1987) 11 *Crim. L.J.* 345 at 348*f.* Other support for this analysis comes from *Wright* v. *Doe d Tatham* (1837) Ad & E 313; 112 E.R. 488; Cain *supra* n. 1 at 8; Morgan 'Hearsay Dangers and the Application of the Hearsay Concept' 62 *Harv. L.R.* 177 at 185 (1948); 'Note: Pollsters go to Court' *supra* n. 2 at 502; *Zippo Manufacturing Co* v. *Rogers Imports Inc.* 216 F Supp 670 at 683 (1963); Gillies *supra* n. 1 at 273 *f.* But *cf* Wigmore *supra* n. 3 at para. 790, and Cross *supra* n. 1 at para. 16.8 esp. at 742.

[64] *Supra* n. 1 at para. 16.8.

to an opinion are not of this class; to use a phrase in *Cross*, they are 'intentionally assertive'. The declarant intends to assert what is implied by the statement, ie that he or she actually believes what is said. It now seems clear that even unintentionally assertive implied statements are caught by the hearsay rule. In *Ahern* v. *R*[65] the High Court was called upon to decide the use which could be made of acts and statements of co-conspirators apart from the accused in a case of conspiracy to defraud the Commonwealth by avoiding the payment of income tax. It was held that its only permissible use was to first establish the fact of the conspiracy; and, only if there was sufficient independent evidence implicating the accused in that conspiracy could they be relied on to establish the nature and extent of the accused's participation. Except for this use, peculiar to conspiracy cases, statements or acts made or done outside the presence of the accused would be hearsay if sought to be proved against them. The Court included 'acts' even though strictly speaking they could not of themselves constitute hearsay because:

> (A)cts may contain an implied assertion on the part of the actor which makes it appropriate to treat evidence of those acts for some purposes as equivalent to hearsay.[66]

An implied assertion contained in an act will generally be 'unintentionally assertive'. If these are caught by the rule then *a fortiori* intentionally assertive statements will be. It therefore follows that expressions of opinion where they are relied on for the fact that they are genuinely held opinions (which will invariably be the case) are hearsay if given by an interviewer.

It might be said that this is just a quibble and too fine and technical a distinction to bother drawing, especially where the reception of survey evidence and all its advantages can be had by its non-observance. But as Lord Reid commented in *Myers* v. *Director of Public Prosecutions*,[67] the law regarding hearsay is technical, even 'absurdly technical'. And since law reform bodies have proposed reforms to the rule,[68] and while the respective Parliaments consider the reports, it would perhaps be inappropriate for courts to legislate judicially to circumvent its operation.

Burchett J. did not canvass these points; he merely concurred, albeit with just the slightest circumspection, with the interpretation previous courts had arrived at. With respect, Burchett J. was not entitled to found the admissibility of surveys on the basis that they are original evidence and not hearsay.

The hearsay objection presses even more closely to surveys employed to gather economic data. A statement such as 'I sell my fattened cows

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[65] (1988) 80 A.L.R. 161.

[66] *Id.* 163.

[67] [1965] A.C. 1001 at 1019.

[68] N.S.W. Law Reform Commission *Report on the Rule Against Hearsay* (1978) para 2.4.10 at 87; Australian Law Reform Commission Report no. 26 *Evidence* (Interim) v. I para 1025 at 564.

to X's abattoir' made by Y, relevant in deciding the geographical boundaries of a market for such cows in an illegal merger action for instance,[69] is offered for its testimonial content, i.e. that Y does sell their cows to X. Thus, even if this first basis could be used to admit opinion surveys, it could not be used to admit economic surveys not involving questions of opinion.

State of Mind as an Exception to the Hearsay Rule

While it would seem to be accepted now in practice, if not in theory, that evidence of state of mind is original evidence, an alternative possibility mentioned by Mahon J. in the *Customglass* decision in a passage quoted by Burchett J. was reliance on an exception to the hearsay rule. That is, it might be recognized that while expressions of opinion when deposed to by a witness to them are hearsay, still, they come within, or constitute, a special exception to the rule. Mahon J. relying on *R* v. *Vincent*[70] had said:

> I can for myself see no objection to the classification of such evidence as proving a public state of mind on a specific question, which is an acknowledged exception to the hearsay rule . . .[71]

Authority in America admitting surveys has relied on both the original evidence basis as well as an exception to the hearsay rule.[72] *Cross* treats evidence of state of mind or emotion as hearsay but as coming within the *res gestae* exception to the rule. The authors qualify this by saying that this is an entirely dogmatic assertion and add 'there does not seem to be a single practical consequence that may or may not ensue according to whether the evidence is received as original or received by way of exception to the hearsay rule'.[73]

Certainly the cases seldom make clear the distinction or explore its implications. From what has been said above however it should be conceded that if state of mind evidence is to be admitted to justify the reception of surveys it must be as an exception to the hearsay rule and not as original evidence.

Franki J. in *McDonalds* had expressed doubt about any state of mind exception,[74] however its existence in one form or another can hardly be questioned now.[75] The real issue is whether its application can be

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[69] An example drawn from *T.P.C.* v. *A.M.H. Pty Ltd and Borthwicks plc* (1988) A.T.P.R. 40-876.

[70] (1840) 9 C. & P. 275.

[71] *Supra* n. 14 at 41.

[72] See generally *supra* n. 3.

[73] *Supra* n. 1 at para. 19.26.

[74] *Supra* n. 36 at 254. Cain *supra* n. 1 at 10 would agree: 'The state of mind exception has no firm footing in either precedent or principle . . .'

[75] In addition to the cases already mentioned Burchett J. cited *Process Church of the Final Judgment* v. *Rupert Hart Davis Ltd supra* n. 39. To this same effect are *Ratten* v. *R* [1972] A.C. 378 at 387-8 and *R* v. *Blastland supra* n. 62 in which Lord Bridge for all the Lords said:

justified where opinions are harvested from the broad acres of the population, rather than witnessed adventitiously on a one off basis.

King J. in *Mobil Oil* thought not, expressing the view that responses evidencing a state of mind should be prompted by 'actual real life situations';[76] otherwise they are inadmissible as mere expressions of opinion. He did think however that evidence could be given by retailers as to passing off confusion in their customers since these responses were spontaneous and unconsidered.[77] With respect, this qualification is not sustainable. First, because it confuses state of mind with the *res gestae* doctrine, implying that only the excitement of a real life (say) commercial situation will guarantee the accuracy of an expression of opinion. There is no reason why this should necessarily follow—the real question is the accuracy of the reaction or opinion and, given that in most circumstances the interviewee will have no motivation to lie or dissemble, this will be the same in an interview as in 'real life'. Of course, the asking of leading or biased questions would have to be controlled. Secondly, it might be asked: when a person's or a group of people's opinion is in issue, what makes an interviewer's question any less a 'real life situation' than any other situation? Thirdly, given that evidence of 'trap orders' is admitted in passing off and related actions,[78] what makes these clearly 'created' situations any different from other methods of eliciting responses such as showing members of the public the allegedly offending product and asking who they think produced it?

The real problem with relying on 'state of mind' as either original or exceptional evidence, for surveys generally and for economic surveys, are the inherent limitations. It is, after all, limited to demonstrations of contemporaneous opinion, intention etc; past states of mind would not fall within its purview. The doctrine is also of no assistance when what is in issue are facts apart from states of mind. Thus, it could not be invoked to usher in much economic survey evidence in restrictive trade practices cases. Further, it is limited to first hand reports by interviewers—unless of course the business record provisions can be invoked. But it will not always be the case that these provisions will be applicable; for instance, where the litigants themselves or their solicitors wish to conduct the survey, perhaps especially for the impending litigation. All the same,

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[75] *continued*

> It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind of either the maker of the statement or of the person to whom it was made. What a person said or heard said may be the most direct evidence of that person's state of mind.

And see Cross *supra* n. 1 para. 19.18 for the older cases cited there.

[76] *Supra* n. 44 at 739-40.

[77] Franki J. in *McDonalds supra* n. 36 shares this view. See also *Angoves* v. *Johnson* (1982) 43 A.L.R. 349.

[78] *Bryant* v. *Keith Thomas & Co Pty Ltd* (1980) 33 A.L.R. 437 is an illustration. It is interesting to note that some United States cases do not draw any distinction between 'trap orders' and surveys proper: *Wembley Inc* v. *Diplomatic Tie Co.* 216 F Supp 565, 570-72 (1963).

calling a bevy of interviewers is still an improvement on calling still more members of the public as witnesses.

One further aspect worth noting is that there is strictly no need for the involvement of experts. Although it is common to employ market research professionals there would seem to be no reason why private individuals should not be able to report what a group of people told them indicating their opinions on some topic. However, if it is desired to say not only that certain people held certain opinions, but that this should be taken as indicating something about the wider population, then experts will be required.

In passing off cases at least it need only be shown that a 'substantial number' or 'significant proportion'[79] of likely purchasers were or are likely to be confused by the defendant's conduct there would seem no need to prove anything of the wider population. In such cases it ought to be enough to show simply that certain people reported certain opinions and this will satisfy the test.

Surveys as a Basis for Expert Evidence

The third identifiable thread in Burchett J.'s decision is that a survey may constitute the basis for expert opinion evidence. The *Lego* case[80] was cited where Falconer J. said:

> [E]xpert evidence based on the results of a survey carried out on a representative sample of the relevant public on accepted market research principles is admissible.

Does the basis for the expert opinion need to be independently proved? There is a fine line here dividing two rules which might determine whether this can be an independent basis for admission. The first rule says that an expert in giving an opinion is entitled to have regard to the writings and research of other experts including statistical material whether published or unpublished, and these need not be formally proved.[81] The second rule says that the basis of an expert opinion must be proved in evidence—an expert is not entitled to rely on hearsay or other offensive material.[82] The consequences of not proving or not being able to prove the basis of the expert's opinion may mean that the opinion itself is not admissible, or what is more likely, the opinion will be accepted on a

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[79] These are two formulas suggested in *Kark (Norman) Publications* v. *Odham Press Ltd* [1962] R.P.C. 163 and *Cadbury-Schweppes Pty Ltd* v. *Pub Squash Co. Ltd* [1980] 2 N.S.W.L.R. 865.

[80] *Supra* n. 14 at 176.

[81] *R* v. *Abadom* [1983] 1 All E.R. 364; Cross *supra* n. 1 at para.s 15.15 and 15.32; and see Von Doussa J. 'Difficulties of Assessing Expert Evidence' (1987) 61 *A.L.J.* 615 at 619.

[82] *English Exporters Ltd* v. *Eldonwall Ltd* [1973] 1 All E.R. 726. The status of the 'basis rule' is far from clear: ALRC Report *Evidence* (interim) v.II at 179*ff*; Cross *supra* n. 1 at para. 15.14; Freckelton *supra* n. 1 ch. 6.

devalued basis.[83] In the case of an expert basing their opinion squarely on inadmissible survey data, this could mean his or her evidence would be as good as valueless. Although, there is room for argument that a hearsay foundation should not discredit the expert testimony of a social scientist. As Blackburn J. of the Supreme Court of the Northern Territory in *Milurrpum* v. *Nabalco Pty Ltd* commented in the context of anthropological evidence relating to Aboriginal land holding:

> To rule out any conclusion based to any extent on hearsay—the statements of other persons—would be to make a distinction for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings . . .[84]

It was not made clear in the *Lego* case which of the above two rules were thought to apply to allow the expert evidence based on the surveys. *Shoshana* clearly suggests that it is the first. Burchett J. applied the following quote from *Cross*:

> An expert may base his opinion upon material compiled over a field which is wider than the case before the court. Where he gathers raw data specifically for the court hearing, this must be authenticated like any evidence.[85]

His Honour concluded that since the ratings expert had been gathering his survey material from a wide field during a period of years preceding the accrual of the cause of action his evidence was admissible. But if he had conducted a survey specially for the purpose of the case it would not have been,[86] presumably because, *ex hypothesi*, it would need to be 'authenticated' first.

Burchett J. also cited the New Zealand High Court case of *Noel Leeming Television Ltd* v. *Noel's Appliance Centre Ltd*[87] where Holland J. taking a similar line had said that had there been no evidence from the duly qualified experts the evidence of the interviewers might well have been inadmissible as containing hearsay and no more. He said he did not regard the evidence of the results of the interviews standing alone as being evidence in the case.[88] Although again, if they had been

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[83] *Paric* v. *John Holland (Constructions) Pty Ltd* (1985) 59 A.L.J.R. 844 at 846, *R* v. *Fowler* (1985) 39 S.A.S.R. 441 at 443. In *Ramsay* v. *Watson* (1961) 108 C.L.R. 642 unproved statements of various patient's condition were held properly excluded by the trial judge, but expert opinion based on them was still admitted.

[84] (1971) 17 F.L.R. 141 at 161.

[85] *Supra* n. 5 at 294. The reference is to Cross (*supra* n. 1) at para. 15.32.

[86] *Supra* n. 5 at 294.

[87] *Supra* n. 43—a decision on this point reminiscent of the Canadian case *City of St John* v. *Irving Oil Company Ltd* (1966) 58 D.L.R. (2d) 404 at 414 in so far as both cases ignore the formal status of the evidence supporting the expert evidence, and simply concentrate on the opinion as being the only thing in issue.

[88] *Id.* 251.

'authenticated' no doubt they could have stood alone. Certainly Burchett J. contemplated that a survey might be prepared with a specific case in mind. However since the risk of the introduction of biased questions and methods is greater in such a situation 'meticulous care' is required.[89]

The precise status of survey evidence and its relationship to expert testimony is perhaps the most complex aspect of the whole question. It is an area that will require clarification and one can be excused for not being able to fully fathom its intricacies. However, one distinction useful to bear in mind is the one already mentioned above—the distinction between general background material relied upon by experts in their field, and particular material upon which they specifically rely or which forms the basis of their evidence. As was noted, formal proof is required in the latter case but not the former. An opinion survey should be eligible to come within this second category. Economic surveys might not be capable of proof under the state of mind or 'not hearsay' grounds of admission. If so, expert opinion evidence relying obliquely on survey data not collected specifically for the case might be the only alternative. Necessarily it would need to be given by an economist or someone else knowledgeable in the area who might have some claim to expertise apart from knowledge gathered from the survey itself. A market researcher could not qualify as an expert unless, like the expert in the *Shoshana* case, he or she had a long experience with the industry. However expert opinion evidence on economic questions has not always been enthusiastically received.[90]

A second distinction worth noting is that adverted to by Von Doussa J. of the South Australian Supreme Court where, in a piece of extra-judicial writing, he said:

> An important distinction is well recognised in Australia, between, on the one hand, evidence of facts which may be given by an expert because his particular study or experience enables him to identify facts, perhaps with the aid of sophisticated equipment and techniques, which are obscure or invisible to a lay witness; and on the other hand, of an opinion, that is, of an inference which is based on other facts.
>
> His evidence as to facts might readily be accepted, but his opinions might be open to question.[91]

The use of surveys in court may display both kinds of evidence—both of facts or 'scientific evidence',[92] and opinion. When proved in court a survey would be (expert) evidence of the bare facts which the survey

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[89] *Supra* n. 5 at 294.

[90] Wilcox J. showed little faith in economic experts to settle what he said was a factual question in the *AMH* case *supra* n. 69.

[91] *Supra* n. 81 at 615, 616.

[92] To use Phipson's words for this kind of evidence: *supra* n. 13 at para. 28.08.

represents, i.e. that certain people were asked certain questions in a certain locality and gave certain answers. If the expert draws conclusions from the sample population to the wider population this would be expert opinion evidence. It is conceivable that a court would accept the former but reject the latter.

A final distinction requiring consideration is that adverted to above by Blackburn J. in *Milurrpum*.[93] Perhaps a case can be made for expert testimony based squarely on hearsay where the field of expertise necessarily involves the collection of data from human beings—to hold otherwise would make the social scientist the 'poor relation' to the physical scientist who labours under no such impediment in court with respect to their collected data.

Other Bases for Admitting Surveys

The possibilities raised by Burchett J. in *Shoshana* do not exhaust the bases which have been suggested for the reception of survey evidence. As might have been expected the *res gestae* doctrine described by Lord Wilberforce as having a provenance in 'an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking',[94] has been suggested in this context.[95] The argument is that where a survey in effect simulates actual incidents, for example by showing people an advertisement or product then obtaining their immediate responses, these responses are truly part of the *res gestae*.[96]

One difficulty with this, at least so far as proving passing off is concerned, is that an interviewer showing a member of the public an allegedly offensive product or advertisement may not constitute a *res* or transaction. Barton J. in *Brown* v. *R*[97] adopted the definition of 'transaction' in Stephen's *Digest of the Law of Evidence*[98] where it was said:

> A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

In so far as a misrepresentation is the gravamen of an action in passing off[99] and evidence of actual confusion in the public is a working of that wrong on the plaintiff trader who is likely to lose business as a result, evidence of confusion in situations over which the defendant has no control, and as a result of which the plaintiff is unlikely as a direct result to

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[93] *Supra* n. 84.

[94] *R.* v. *Ratten supra* n. 75 at 389 quoting Morgan in 31 *Yale L.J.* 229 at 229 (1922).

[95] Farmer (*U.N.S.W.L.J.*) *supra* n. 1 at 64.

[96] *Ibid.*

[97] (1913) 17 C.L.R. 570 at 582-3.

[98] Part 1, Ch. 2 Art III.

[99] *Erven Warnink Besloten Vennootschap* v. *J. Townend & Sons* (the '*Advocaat* case') [1979] A.C. 731.

suffer, does not really arise from a 'transaction' so defined.[100] What happens in an interview is not the 'wrong' of the defendant, so contemporaneous statements do not arise from the *res gestae.* As well as this rather technical objection, the use of the *res gestae* doctrine in this way has other shortcomings. While it might have some application in situations where through the use of 'props' the interview situation itself can be characterised as a *res* (and this remains very doubtful) it would not extend to cover public opinion gathered by direct questioning, nor the situation where the respondent is required to draw on personal or historical experience,[101] nor where it is sought to admit economic surveys.

Another possibility would in effect require the creation of a new broad exception to the hearsay rule based on a 'necessity' principle.[102] Because it would be all embracing, and capable of admitting economic evidence which has eluded the bases for admissibility so far discussed, there is much to recommend such a principle. In the early case of *Burton* v. *Driggs*[103] the United States Supreme Court said:

> When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proven by the person who made the examination.

Although this principle taken at its widest has never actually taken root, variations on it have been applied from time to time; in one case to admit a survey of smokers in a passing off action involving allegedly deceptive cigarette lighters. It was held that where the state of mind of the smoking population (115,000,000) is in issue a scientifically conducted survey is necessary because the practical alternatives do not produce equally probitive results.[104] The principle has also been called in aid to avoid calling 4000 insured people who never received their policies due to the fraud of insurance agents.[105]

Closer to home, Mahon J. in the *Customglass* case[106] referred to the interminable parade of witnesses deposing individually that would

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[100] Lord Diplock in the *Advocaat* case *id* talked of the injury or likely injury to business or goodwill by the misrepresentation of a trader in passing off as having to be 'reasonably foreseeable'. Even if damage is done to the plaintiff's goodwill by the actions of an interviewer it would hardly have been foreseeable by the defendant.

[101] Cain *supra* n. 1 at 11. And relying on *Ratten* v. *R supra* n. 75 and the peculiar emphasis now placed on the *res gestae* doctrine in the United Kingdom he doubts whether in a buying transaction (and *a fortiori* in an interview transaction) there will ever be sufficient 'drama' in which the declarant is involved to preclude reflection to ensure that the possibility of concoction can be excluded.

[102] Of course, the existing exception to the hearsay rule that statements by a person as to their health at a particular time are admissible when deposed to by a witness to such statements finds its justification in 'necessity'. The High Court in *Ramsay* v. *Watson supra* n. 83 said that very often by reason of ill health or death this is the only evidence available. But as *R.* v. *Perry (no. 2)* (1981) 28 S.A.S.R. 95 shows, ill health or death of the declarant is not a precondition for admission.

[103] 87 U.S. (20 Wall) 125, 136 (1873) noted in Early *supra* n. 2 at 683-4.

[104] *Zippo Manufacturing Co* v. *Rogers Imports Inc. supra* n. 63.

[105] *Capitol Life Insurance Co.* v. *Rosen* 69 F.R.D. 83 noted in ALR2d *Later Case Service* 199. See also *United States* v. *Aluminium Co. of America* 35 F Supp 820 (1940).

[106] *Supra* n. 14 at 42.

otherwise be necessary if a survey of their opinions was not accepted—although this was offered as comment and not to establish a separate basis of admissibility. Comments by Dixon J. in *Potts* v. *Miller*[107] in which his Honour was prepared to admit a company's books and balance sheets for the purpose of proving the result of its financial operation, would seem supportive of a 'necessity' principle. He said 'the law is not so futile as to reject the only practicable source of information when an issue so arises', although he added 'but reliance on American doctrine is unsafe. For it goes much further than English practice.'[108] Franki J. in the *McDonalds* case[109] declined to make a new exception to the hearsay rule on this basis,[110] just as the South Australian Supreme Court had been unmoved in *Hoban's Glynde*.[111]

Notwithstanding the desirability of such a principle it must be an unlikely path for the courts to follow; *Myers* v. *Director of Public Prosecutions*[112] is taken to have ended the possibility of future exceptions being created to the hearsay rule, at least in the United Kingdom, with its clear call to Parliament to act by Lord Reid. Given the law reform reports currently abroad on this topic, it would be a little unseemly for courts to intervene in this way.[113]

It is interesting to note that there is a statutory doctrine of necessity already on the books. The N.S.W. Supreme Court Act 1970 and the Federal Court Rules both contain provisions whereby the court may dispense with the rules of evidence where they might cause expense or delay.[114] Franki J. in *McDonalds* was asked to apply this rule to the survey in that case but declined to do so partly because the trial had commenced under the old rules which had no such provision, and also because it was unlikely that there would be any reduction in delay since counsel for the respondent intended to cross-examine a number of interviewers.[115] Given that business record provisions may be available to make this unnecessary as *Shoshana* held, this is unlikely to be a reason preventing its application in the future. Perhaps due to the uncertainty of these provisions the N.S.W. and the Australian Law Reform Commissions have suggested additional provisions to ensure that surveys would be admissible under their draft legislation.[116] To 'expense' and 'delay' are added 'inconvenience' and 'would not be reasonably practicable . . . to call the person'.[117] Perhaps this is all the

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[107] (1940) 64 C.L.R. 282 and see also *Re Montecatini's Patent* (1973) 47 A.L.J.R. 161.

[108] *Id.* 305.

[109] *Supra* n. 36.

[110] See comments in n. 37 *supra.*

[111] *Supra* n. 32.

[112] *Supra* n. 67 at 1021-22.

[113] See n. 68 *supra* and related text.

[114] Section 82 and Order 33 r 3 respectively.

[115] *Supra* n. 36.

[116] *Supra* n. 68 at para 2.4.10 at 87 and vol. 1 para 1025 at 567 respectively.

[117] *Supra* n. 68 sections 62(1)(3)(d) and 58(2) respectively of the draft legislation. Other reforms to the hearsay rule suggested in the reports would also assist.

statutory amendment that is required to guarantee all surveys, which by their very definition aim to reduce expense, time and inconvenience, a welcome reception.

For the sake of completeness it is worth briefly mentioning some other possibilities. Under the Federal Court Rules the court might appoint its own expert to take a survey.[118] Or, the parties could agree to settle an issue by a survey, such agreement being confirmed by a consent order.[119] Again, a survey contained in a public document would be admissible so long as the 'public document' satisfied the dictates of the common law.[120] A tape recording could be made of responses.[121] Finally, it has been suggested that the Victorian equivalent of Part II of the Evidence Act 1898 (N.S.W.) could support the reception of survey findings into evidence.[122] This Part allows into evidence statements in documents. Unfortunately, this course does not seem to be open since a requirement is that oral evidence of that statement must otherwise be admissible. The report of an interview is not otherwise admissible if given orally (or rather, this begs the question) and gains no extra magic by being contained in a document.[123]

Concluding Remarks

The stance of the courts towards survey evidence is an issue which can be seen as part of a wider controversy in the law—the scope for science (social and physical) in the courts and the role of the expert. Although as we have seen there is no theoretical necessity for experts to become involved in all surveys and their forensic application, it is a fact that

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[118] Order 34 r 2(1). See Farmer (*A.T.P.R.*) *supra* n. 1 at 15-140.

[119] Such an order was made in *Graynell Investments* v. *Hunter Douglas* (unreported directions hearing of 12.9.79. but see n. 135 *infra*) under Order 35 r 10 of the Federal Court Rules. Cross notes that it is the practice in patent and trademark cases in the United Kingdom for a party who wishes to rely on a market survey to provide the other party with the raw data upon which his expert will rely in giving an opinion without proving it unless challenged to do so *supra* n. 1 at para. 15.33.

[120] *R* v. *Halpin* [1975] 3 W.L.R. 268 and see generally Cross *supra* n. 1 at para.s 17.69*ff.*

[121] In the Scottish trademark infringement case of *Coca-Cola* v. *William Struthers and Sons Ltd* [1968] R.P.C. 231 Coca-Cola tendered an audio survey of people reading the words 'Koala Kola'—the respondent's product—many of whom pronounced it 'Coca-Cola'. The tape was held to be capable of proving that some people at least did confuse the two names but was nonetheless held to be of very little weight for a multiplicity of reasons including the lack of specific information concerning each interviewee recorded. Interviews recorded on video and sound tape were found to be of no persuasive value by Franki J. in interlocutory proceedings in *United Telecasters Sydney Pty Ltd* v. *Pan Hotels International Ltd* (1978) A.T.P.R. 40-085. His Honour expressly reserved the question as to whether such evidence would be admissible at any final hearing. Of course the mere fact of being recorded on audio or visual tape does not prevent the hearsay objection being raised, and a basis for admissibility independent of the fact of recording would still need to be established: see Gillies *supra* n. 1 at 35, Cross *supra* n. 1 para 1.59. Most of the hearsay dangers are not present in automatic recording.

[122] Cain *supra* n. 1 at 17*ff.* The Victorian provision is the Evidence Act 1958 (Vic) section 55.

[123] The section does not operate to deodorise otherwise offensive evidence; see *Russell* v. *Craddock* [1985] 1 Qd R. 377 where the Queensland Supreme Court refused to use the Queensland documentary evidence provisions (section 92 Evidence Act 1977 (Qld)) to admit proof of a conviction in civil proceedings. In other respects the section has been fairly restrictively interpreted—even otherwise admissible evidence will not be admitted under the section if it is an attempt to present substantially all of a witness' evidence through a document: *T.P.C.* v. *T.N.T. Management Pty Ltd* (1984) A.T.P.R. 40-483 at 45,581.

public opinion testing and market research is conducted by experts using scientific paradigms and it is the expert commercial pollsters that litigants often go to. Courts, as a matter of tradition and with sound reasons, have been wary of experts.[124] Criticisms commonly made are their inability to give definitive, unhedged answers; a too close identification with the side that calls them—they are often seen as 'hired guns'; and the undue respect and deference juries are apt to pay them.[125] Two reasons for circumspection were offered in *United States* v. *Baller*[126] applied in *R* v. *Gilmore*[127] by the N.S.W. Court of Appeal:

> Because of its apparent objectivity, an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact. In addition, it is difficult to rebut such an opinion except by other experts.

It is something of a standing joke to observe how often the 'experts' on the basis of opinion polls get the results of an election wrong.[128] The attitude of the Australian courts in *Hoban's Glynde*,[129] *McDonalds*[130] and *Mobil Oil*[131] may in some sense be seen as part of this quite natural caution, and the decisions in these cases might equally be regarded as decisions reflecting this suspicion as decisions on hearsay—but of course both have issues of reliability at their core.

Shoshana has struck a progressive blow in favour of the science of surveys. In the area of novel scientific evidence a court is usually inclined to make an inquiry into the scientific technique underpinning the evidence. One test that has been followed in N.S.W. is 'there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticise the means by which it was reached'.[132] It appears that Burchett J. took judicial notice of the fact that survey techniques are indeed 'scientific' and established in this sense. Given the sheer volume of survey material now being generated for both commercial and private research use, given the number of organisations involved in this activity, given the number of years surveys

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[124] Sir George Jessel M.R. in *Lord Arbinger* v. *Ashton* (1873) 17 L.R.Eq 358 at 374 said '(I)n matters of opinion I very much distrust expert evidence . .'. Cross states they are an evil—albeit a necessary one *supra* n. 1 at para 15.16 and see Freckelton *supra* n. 1 at 151 and *passim.*

[125] Freckelton *supra* n. 1 *passim.*

[126] 519 F2d 403 (1971).

[127] [1977] 2 N.S.W.L.R. 435.

[128] Which is probably due largely to people changing their intentions, and the fact that in a close election a couple of percentage points can be vital. Court applications would not require this sort of accuracy. It is important to keep in mind that the technical adequacy of a survey depends upon the task it is required to perform. The qualitative norms of the law, tests such as 'significant number' or 'substantial number', should be forgiving of a less than technically perfect survey. The survey literature reveals how very finely tuned survey methodology has become: see by way of illustration Collins 'Interviewer Variability: a review of the problem' in 22 *Journal of the Market Research Society* 77; it would be unfortunate (and stultifying) if the courts were to encourage this level of nit-picking.

[129] *Supra* n. 32.

[130] *Supra* n. 36.

[131] *Supra* n. 44.

[132] *R* v. *Gilmore supra* n. 127.

have been on the scene, given the extensive literature dealing with the technical side of survey preparation, this was clearly correct.

The debate may continue as to the strict legal correctness of admitting survey evidence as either not hearsay at all, as part of the state of mind doctrine, or as material upon which an expert may express an opinion, or indeed whether a more appropriate and workable basis exists. But perhaps the more fruitful focus for debate is now whether, having approved of survey evidence, the common law is capable of providing sufficient methodological safeguards to overcome some of the hearsay dangers that still exist (such as the asking of leading questions) and to ensure that valid conclusions can be drawn for the wider community. It might be asked whether these issues are better addressed by legislation.[133] Neither the N.S.W. Law Reform nor the Australian Law Reform Commissions in approving of the admission of survey evidence have addressed the methodological issues which must be settled for the benefit of intending litigants and to guarantee a high degree of reliability.[134] The prospects are promising though; criteria have been laid down in two cases. The first being a directions hearing before Lockhart J. in the Federal Court in *Graynell Investments Pty Ltd* v. *Hunter Douglas Limited*[135] and the second being *Imperial Group plc* v. *Phillip Morris*.[136] In both cases only the broadest principles or guidelines were laid down, but there is a massive literature dealing with survey design and technique and even a body of literature touching the issue of their application in litigation which is capable of fleshing these out.[137]

Burchett J. did not address any such questions in *Shoshana*; perhaps because the defendants put their litigious energy into contesting the survey on the threshold issue of admissibility rather than looking for holes in technique which would only have affected its weight. His Honour did satisfy himself however that careful controls were used to ensure the representativeness of the sample evidence used, and was bolstered in his view by the fact that the techniques were also used overseas.[138]

Although it can by no means be assumed that surveys will now be admitted automatically into evidence as a result of *Shoshana*, and by no means is the decision encouraging for economic evidence not of the opinion variety, perhaps in subsequent cases the fight will now shift

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[133] Cain *supra* n. 1 at 20 is of this view and see the U.S. Federal Rules of Evidence referred to in n. 3 *supra*.

[134] *Supra* n. 68.

[135] Unreported directions hearing of 12.9.79. but the principles are repeated in Farmer (*A.T.P.R.*) *supra* n. 1 at 15-140 and Freckelton *supra* n. 1 at 111.

[136] *Supra* n. 40.

[137] See Farmer (*A.T.P.R.*) *supra* n. 1 at 15-140 for the references collected there; and also Fellner 'Survey Evidence in Passing Off Cases' (1984) 5 *Journal of Media Law and Practice* 273. Miller 'Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation' 40 *Rutgers L.R.* 101 (1987) addresses the misuse of statistical evidence and discusses various other methodological issues in the gathering of data for statistical analysis.

[138] *Supra* n. 5 at 289.

to these questions of methodology and a judge will not have the luxury of passing on technical adequacy with the ease that Burchett J. was able to—both in terms of the methodological aspects of how data is gathered and the statistical techniques used to analyse it.

That this is likely to be the pattern in future cases is demonstrated by the recent *TV-am* case.[139] Here, surveys were admitted on the authority of *Shoshana* by Einfeld J. who did not feel the need to make an independent examination of previous decisions, nor to advance a theory to ground admissibility generally; the only issue was technical adequacy. The case concerned claims under sections 52 and 53 of the Trade Practices Act and in passing off made by the English broadcasting company TV-am plc against ATN Channel 7 who had commenced a morning television show called 'TV-AM' (the reason for the complaint is immediately obvious). Both parties conducted surveys: the applicant from a sample of 167 interviewed discovered 21 or 12.5% were aware of TV-am plc; the respondent from a sample of 57 found 39 (or 70%) had not heard of TV-am.[140] Clearly the evidence was a little primitive, but capable of proving TV-am plc had some kind of reputation in Australia. His Honour held that:

> (H)ere the evidence is admissible as to reputation but its worth must be greatly reduced by the small sample, the conflicting results and the novelty of the respondent's program.[141]

No cases or materials addressing appropriate methodology were cited to support this conclusion. It is regrettable that Einfeld J. decided the issue of technical adequacy with such brevity; it would have perhaps have been of use to future litigants had the principles behind the finding been made explicit.

It is apparent from *TV-am* that fundamental tensions will arise from the interface of statistical and survey science with the law. While the former deals in quantified percentages, the latter's concern is with qualitative norms. The applicant in the case had to show 'sufficient reputation' in Australia to establish a misrepresentation by the respondent—in fact it demonstrated (albeit unconvincingly for the court) that 12% of Sydney residents knew of its existence. Is 12% 'sufficient'? Heretofore a court would have been in a position of applying necessarily inconclusive proof—perhaps a parade of witnesses—to an indefinite standard. But the situation now presents itself where, as long as methodological strictures are met, precedents can arise in terms of specified percentages: 15% might be 'sufficient', 25% 'substantial' and who knows, maybe 40% will be 'significant'. Given that these normative criteria are not hard and fast, perhaps the percentages will attach to the matter in issue: 15% recognition in

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[139] *Supra* n. 8.

[140] *Id.* at 49662.

[141] *Ibid.*

the community might establish reputation, 25% of people misconceiving a message might establish the requisite confusion. It is, of course, an unlikely scenario because quite properly courts are unwilling to create or to follow inflexible standards which cannot be modified in particular cases, because there is involved an odious element of arbitrariness in arriving at a benchmark figure, and because there will probably not be a sufficient number of decisions to establish the parameters. However, the essential incongruity of legal norms and scientific exactness is evident.

Aside from methodology another theatre for future skirmish will involve the kind of questions upon which surveys will be held to be relevant. And if, and by what means, economic surveys will be admitted.[142] Such questions await the imaginative litigator and the beleaguered judge.

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[142] It may be that legislative reform is the only answer for these kinds of surveys. The New Zealand equivalent of the Trade Practices Act—The Commerce Act—provides that the Court may receive in evidence any statement, document or information that would not be otherwise admissible but which may in its opinion assist to deal effectively with the matter: section 79. Legislative reform of the hearsay rule in the United Kingdom in the shape of the Civil Evidence Act 1968 would also permit survey evidence generally, subject to procedures for the giving of notice to the other side. Following the *Lego* case (*supra* n. 14) however they are admitted under the common law instead as not being hearsay at all.