Update - Evidence Law 1991

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Legislation

The most significant piece of legislation to be enacted in the area of Evidence law in 1991 was the Listening Devices Act 1991. It received Royal Assent on the 31 July 1991 but, at the date of writing, was yet to be proclaimed. This Act regulates the use of certain devices capable of being used for listening to private conversations. It is based on New South Wales legislation enacted in 1984. All other Australian States have already implemented similar legislation. Prima facie it would appear to conflict with Commonwealth legislation dealing with telecommunications. However, it is clear from cases which have dealt with this aspect of the New South Wales legislation that it does not apply to the interception of telecommunications as the Commonwealth Telecommunications (Interception) Act 1979 covers the field in relation to that matter: *Edelsten v. Investigating Committee of NSW* [1].

With regard to the admissibility of evidence obtained in contravention of the Act, the common law position as propounded in *Bunning v. Cross* [2] is preserved in relation to offences punishable by imprisonment for life or 21 years and for serious narcotics offences: s.14(3)(d) and(4). Accordingly, a trial judge has a discretion in such cases to admit the illegally obtained evidence. In all other cases, evidence obtained in contravention of the Act is inadmissible unless the principle parties to the conversations consent to it being admitted, or the proceedings relate to an offence against the Act.

Cases

In 1991 matters of evidentiary interest which arose for examination by the Supreme Court of Tasmania in its civil jurisdiction included the principles applying to applications for summary judgment and the reagitation in a civil action of issues determined in criminal proceedings. In the criminal jurisdiction, no novel matters of evidentiary moment were considered. The court was largely involved in determining such perennially recurring issues as the admissibility of improperly and unlawfully obtained evidence. Nevertheless, the decisions in these cases are of some interest, particularly in demonstrating the functioning of the judicial discretion to exclude technically admissible evidence. Another

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1 86 F.L.R 388.

2 (1978) 52 A.L.J.R. 561

matter of interest which was considered by the Criminal Court was the effect of the accused's failure to call a witness whom he alleged to be the perpetrator of the crime.

Civil Cases

(a) Applications for summary judgment

In *National Australia Bank Limited v. Munro*[3], Crawford J. reviewed the evidentiary rules applying to applications for summary judgment under Order 15 of the *Supreme Court Rules (Tas.)*. His Honour held that O.15, r.2 prescribes special rules in relation to affidavits filed in support of such applications. It admits statements of the deponent's information or belief provided that the sources and grounds thereof are also given. Its effect is to render hearsay, opinion evidence and secondary evidence of documents admissible. Without this provision the normal rules of evidence would apply.

In considering whether the sources of the information deposed to had been sufficiently identified in this case Crawford J. applied the decision of Thomas J. in *Commissioner of Taxation v. Ahern*[4]. Accordingly, he held that whilst these sources must be identified specifically, it is not necessary that each piece of paper in the relevant records be produced or explained.

In *Australia and New Zealand Banking Group Limited v. McCallum*[5] Zeeman J. was required to consider the relationship of O.15, r.4(4) and O.41, r.34(1) of the Supreme Court Rules (Tas.).

The plaintiff who was making an application for summary judgment gave notice under O.41, r.34(1) requiring the defendant to attend for cross-examination. The defendant argued that that subrule has no operation in respect of applications for summary judgment, the matter being governed by the provisions of O.15, r.4(4) which empowers a judge to order a defendant to submit to cross-examination. If accepted, such an interpretation would mean that, on the hearing of an application for summary judgment, a plaintiff would only be able to cross-examine a defendant with the leave of the court.

Zeeman J. held that O.15, r.4(4) does not exclude the operation O.41, r.34(1). Accordingly, having received a notice under O.41, r.34(1), the defendant was in the position that any affidavits he had filed in respect of the application for summary judgment would not be received in evidence unless he attended for cross-examination: O.41, r.34(1). If he wished to avoid cross-examination he should obtain the leave of the court to read the affidavits without submitting to cross-examination: O.41, r.34(2).

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3 Unreported No. 16/1991

4 (1986) 87 F.L.R 112

5 Unreported No. 74/1991

(b) Reagitation of issues determined in criminal proceedings

In *Nicholas v. Bantick*[6] the plaintiff sought to prove in solemn form a will in respect of which he had been convicted of four counts of uttering a forged will and sentenced to imprisonment. The defendant, who would inherit the entire estate of the alleged testator in the event of an intestacy, contested the claim on the basis that it would be an abuse of the process of the Court to permit the action to proceed.

Wright J. upheld the plaintiff's argument. In reaching his decision, His Honour relied upon the doctrine formulated by the House of Lords in *Hunter v. The Chief Constable* [7] and the principles enunciated by the High Court in *Gianarelli v. Wraith* (1988) 116 C.L.R. 543. Accordingly, he held that it is an abuse of the Court process for a convicted person to seek to challenge his conviction (having exhausted all grounds of appeal) by a collateral action in which the same issues are sought to be agitated.

The rationale for the doctrine is that to permit a collateral attack upon a court decision might result in an inconsistent decision being reached in relation to the matter by a different court. The original decision would still stand, though its status would inevitably be tarnished by the outcome of the collateral proceedings. Such a situation would be destructive of public confidence in the administration of justice.

The most noteworthy aspect of this case is that whilst Wright J. did acknowledge the necessity to set limits to the principle enunciated in *Hunter*, he rejected the argument that its application might depend on whether the primary purpose of the litigation was to bring the decision of the original court into disrepute. In this regard, his decision runs counter to a number of cases where it has been held that the rule in *Hunter* should be confined to cases whose sole purpose is to mount a collateral attack upon the earlier decision[8]. It also conflicts with the views of text writers who have interpreted the statement of principle in *Hunter* as leaning very heavily on the purpose for which the civil proceedings are brought [9].

What, then, may be the ramifications of Wright J.'s decision? Cross is of the view that without the emphasis upon purpose, the rule in *Hunter* may enable the erosion, possibly even the jettison of an entire body of law, - the strict rules relating to res judicata and issue estoppel. They would be replaced with a general discretion based on

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6 Unreported No. 81/1991

7 (1982) A.C. 529

8 See for example *Lamari v. Lamari* (1988) 1 Qd. R. 144 and *Mickelberg v. The Director of the Perth Mint* [1986] W.A.R. 365.

9 See Phipson on Evidence, 14th ed. para 33-69; Cross on Evidence, 4th Australian ed. para 5175.

vexation[10]. With this possibility in mind Phipson has suggested that *Hunter* should be applied only in the most extreme and scandalous cases[11]. However, the necessity to set limitations to the *Hunter* doctrine should not require that it be constrained by impracticable or absurd rules. In this regard, there is considerable force to Wright J.'s argument that it would be capricious and contrary to principle to apply or not apply the rule depending on the motives of the litigants. From a practical point of view, in any event, it may be impossible to determine what motive lies behind the action. There may be a single motive, or a mixture of motives none of which has predominance. In principle, moreover, it is difficult to disagree with Wright J.'s view that it would be absurd to place someone who has instituted civil proceedings to cast doubt upon his criminal conviction in a less advantageous position than a person whose motive in taking action is to recover damages.

Finally, whilst Wright J.'s decision has the potential for giving the principle in *Hunter's* case a wider ambit than has previously been accorded to it, this should not inevitably lead to the abrogation of the strict rules applying to res judicata and issue estoppel. For example, these rules will still normally apply to prevent a party in a civil action from relying upon, or even leading evidence of, a previous conviction or acquittal arising out of the same facts. What *Hunter's* case does, however, is to cover the gap left by these estoppels and to prevent abuse of the court process where their strict rules have been circumvented.

The precise ambit of the principle in *Hunter* is yet to be decided. However, in a civil case which involves an attack on a previous criminal verdict, it may be that the courts will permit the action to proceed if fresh evidence of a particularly cogent kind is available which could not reasonably have been obtained at the time of the original trial and which might have caused a different outcome had it been available. Wright J., indicated that such a case might provide an example of at least one limit to the *Hunter* principle. Other limitations remain to be identified.

Criminal Cases

(a) Unlawfully and improperly obtained evidence

The question whether a trial judge should exercise his discretion to exclude improperly obtained evidence arose for consideration by the Criminal Court in a number of cases in 1991. Predictably, there was no uniformity of outcome in these cases despite the fact that they were consistent in their application of the relevant established principles.

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10 ibid.

11 Phipson on Evidence 14th ed. para. 33-68.

In *R. v. MacLeod*[12], Slicer J. ruled inadmissible both real and confessional evidence obtained pursuant to an improperly obtained search warrant. He also rejected confessional evidence obtained through the improper use of s.90D *Poisons Act* 1971. This section empowers the police to compel a suspect to supply certain information to them. His Honour examined the approach to s.90D adopted in a number of magistrates' decisions and held that it was inappropriate for the police to use that section to obtain information about the *suspect's sale* of a prohibited substance. Section 90D was intended to achieve the apprehension of those *from whom the suspect had obtained* the prohibited substance (my emphasis). Accordingly, where questioning goes beyond matters pertaining to supply, the police should ensure that the suspect is not under the impression that he is required to answer. This may require them to give a further warning to the suspect of his right to silence, or it may necessitate the conduct of a separate record of interview.

In *Maher v. Maynard*[13] Crawford J. was also required to consider the admissibility of evidence obtained pursuant to a search warrant. Here, however, the question was whether the lower court had correctly exercised its discretion to exclude that evidence. The prosecution had failed to tender the warrant in evidence at trial, and accordingly, the court had no way of determining whether the warrant existed or what it authorised. The magistrate hearing the matter therefore concluded that because it had not been proved to him that the police search was lawful and in pursuance of the terms of the warrant he had a discretion to exclude the evidence obtained during the search.

Crawford J., however, held that the magistrate had taken the wrong approach to the matter. He discretion to exclude the evidence did not arise until it had been shown that the evidence was unlawfully obtained. No discretion existed if the unlawfulness was not established. The onus to establish the unlawfulness was on the defendant. Accordingly, even though the magistrate concluded that there was insufficient evidence upon which he could find that the search was lawful, that did not mean that there was sufficient evidence to establish the contrary and so enable him to exercise his discretion.

In two list "B" cases the admission of statements obtained in breach of the Police Commissioner's Standing Orders arose for consideration. In both cases the police had failed to give the suspects warning of their right to silence prior to the time when admissions were made by them. In the first case, *R. v. Braithwaite*[14], the court approved statements of Everett J. in *R. v. Whitford*[15] to the effect that

12 Unreported No. 61/1991
13 Unreported No. 78/1991
14 Unreported No. B24/1991
15 [1980] Tas. R. 98

where there is a clear breach of the Judges' Rules it is the duty of the trial judge to exercise his discretion and, in exercising it, to bear in mind that to admit inculpatory evidence in the face of a clear breach of those rules would largely stultify their purpose. Adopting that approach in this case, Zeeman J. excluded evidence of the confessions.

Another interesting aspect of this case is its discussion of the correct procedure the police should employ in relation to recording interviews with suspects. Zeeman J. referred to the decision of the High Court in *McKinney v. The Queen*[16] and held that where facilities to make a video-taped recording of the interview are available a suspect should first be invited to participate in an interview recorded by this means. If those facilities are not available, then the interview ought to be recorded in the traditional way. An alternative, though less desirable course is to record the interview in the traditional form then to record its rereading to the suspect on video. His Honour specifically disapproved of the method which had been adopted by the police officers in this case, that is, to offer the accused a number of alternatives in relation to the interview - video-taping, a typed record of interview, writing his own statement, or dictating his statement. His Honour held that this procedure gave rise to the suspicion that the police were not anxious to conduct a video-taped interview because that would record material which they did not want recorded. The very difficulties sought to be overcome by the use of audio-visual recording were, in fact, created by offering the suspect a number of options in the manner employed by the police here.

In *R. v. Thomas*[17], the police requirement to warn a suspect of his right to silence also arose for consideration. In this case, however, Underwood J. declined to follow *R. v. Whitford,* stating that he did not agree with Everett J.'s formulation of the duty to exercise the judicial discretion to exclude evidence in the circumstances postulated. Instead, his Honour relied upon the judgment of the High Court in *R. v. Lee*[18] and held that the Judges' Rules are no more than a general description of an appropriate standard of propriety. The inquiry should not be simply whether the Judges' Rules have been breached but whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to the accused to admit his statement against him. In this particular case, his Honour found that there was nothing in the content of the interview to suggest that the manner of questioning was in any way oppressive or unfair to the accused. Further, the statement sought to be adduced was exculpatory and not inculpatory. In the circumstances therefore, Underwood J. was not persuaded to exercise his discretion in favour of the accused.

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16 (1991) 98 A.L.R. 577
17 Unreported No. B36/1991
18 (1950) 82 C.L.R. 133

The real significance of these cases, it is submitted, is that they clearly demonstrate the continuing vitality of the judicial discretion to exclude evidence in criminal cases. There has been a trend in recent High Court cases to restrict the scope and operation of judicial discretions in a number of important areas, as for example, in relation to directions trial judges must give to juries concerning disputed confessional evidence (see McKinney v. the Queen[19]) and identification evidence (see Domican v. the Queen[20]). Nevertheless, it is apparent from the cases discussed here that the judicial discretion to reject or admit technically admissible evidence remains, within recognised boundaries, largely unfettered.

(b) Failure to call a witness

In *Webster v. White*[21], Zeeman J. considered what inferences the court was entitled to draw from the accused's failure to call a witness whom he alleged to be the real perpetrator of the crime charged. His Honour concluded that the court was not entitled to draw any inferences adverse to the accused. The usual position would be that an unexplained failure by an accused to call a witness would lead to the inference that the testimony of the uncalled witness would not have helped the accused in his defence: *Jones v. Dunkel*[22]. However, in such a case as that under consideration, there was an explanation for not calling the witness. By its very nature the evidence which the witness would have been called upon to give would have been self incriminatory. It would therefore be unreasonable to expect him to appear to testify. Further, it would be unfair to place a person in a position where they might not be astute enough to object to answering on the ground of self incrimination. Accordingly, there being an explanation for not calling the witness, no adverse inferences could be drawn.

19 (1991) 98 A.L.R. 577
20 Unreported No. 11/92
21 Unreported No. 58/1991
22 101 C.L.R. 298