Preliminary Paper No 13

EVIDENCE LAW: PRINCIPLES FOR REFORM

A discussion paper

The Law Commission welcomes your comments
on this paper and
seeks your response to the questions raised.

These should be forwarded to:

The Director, Law Commission, PO Box 2590,
Wellington

by Friday 14 June 1991

April 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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Preface

The Law Commission's evidence reference is succinct and yet comprehensive:

> Purpose: To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.
>
> With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is:

> To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989.

This paper on principles for reform and the accompanying papers on codification and hearsay are the first of a series of Law Commission discussion papers on aspects of evidence law. Further papers are likely to deal with topics such as opinion evidence, evidence of character, privilege and confessions. Some of the topics which relate particularly to criminal evidence - such as confessions, the right to silence and the privilege against self-incrimination - will be considered in conjunction with the work on criminal procedure.

Our aim is to complete our review of core evidence law by 1992. Although this may be an ambitious undertaking, we believe it is preferable to deal with the whole topic in as short a period as possible rather than undertake a process of piecemeal reform. Dealing with the topic as a whole also helps to ensure that our proposals on each aspect are consistent. The result should be more coherent reform.

Our work on evidence law is being assisted by an advisory committee comprising the Hon Mr Justice R C Savage, Judge J D Rabone, Mr L H Atkins QC and Dr R S Chambers. Mr G Thornton QC, legislative counsel, is helping with aspects of drafting and Mrs G Te Heu Heu is acting as a consultant on issues relating to te ao Maori.

As the reference progresses, the Commission will be consulting a wide range of people with a special interest in evidence law. In respect of this paper we have already received valuable assistance from a number of people including Dr D L Mathieson QC, Mr R Mahoney of Otago University and Mr B W Robertson of Victoria University of Wellington.

The Commission hopes that each discussion paper will draw a wide response. Since the law of evidence is a subject of such practical significance, we particularly wish to consult and take account of the views of all those with an interest in the topic. We therefore ask that readers express their views at this and later stages of the project.

This paper does not merely discuss the issues and put questions for consideration. It indicates our provisional conclusions following extensive research and considerable preliminary consultation. We emphasise, however, that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, if at all possible, by Friday 14 June 1991. Any initial inquiries can be directed to Paul McKnight (04 733-453).

Summary of Views

1 The particular focus of the law of evidence, and therefore of the Commission's work, should be the proper scope of the rules that exclude logically relevant evidence from a court or tribunal. Other aspects of evidence law will, however, be included in our review. (Chapter II)

2 A review of evidence law should take into account the sometimes different needs of civil and criminal cases, jury and judge-alone cases, but without creating completely different "laws" of evidence since there is still much that remains in common. Our review will later be extended to evidential rules for tribunals. (Chapter III)

3 The rules of evidence must reflect the policies of the trial process. These are in particular: rational ascertainment of facts, party freedom (the substantial role the adversary system allows to parties), fair procedures, public and social interests (such as privilege and public interest immunity), and efficiency. In general terms, these point in the direction of a full reception of logically relevant evidence with only limited exceptions. (Chapter IV)

4 The main problem with our evidence law is a restrictive and artificial approach which has produced a body of case law with a multitude of fine distinctions and even outright conflicts. The focus of the law has tended to be on the technicalities of the rules rather than the principles. In the result valuable evidence is kept from the fact-finder. Indeed, it may be argued that the law only works because it is often ignored. (Chapter V)

5 The law of evidence is in need of substantial reform and codification is the best way of achieving this. The advantage of codification is that it enables a coherent, systematic and principled approach to be taken.

Summary of Questions

These questions appear at the end of the chapters of this paper.

1 How should "evidence" be defined and what should be included within the scope of evidence law? What other things might need to be considered in a review of evidence law? In particular:

- to what extent should relevance and weight be regulated?
- to what extent should public and social interests be reflected in evidence law?
- should matters such as the course of trial, examination of witnesses, the burden of proof and the standard of proof be dealt with in a review of the law of evidence?
- should the focus of evidence law be exclusively on the trial or should other stages of the process be considered as well?

(Chapter II)

2 Should there be substantially different laws of evidence for:

- criminal and civil trials?
- jury and judge-alone cases?
- courts and tribunals?

(Chapter III)

3 What should be the primary purposes of the trial? In particular, to what extent should evidence law facilitate all or any of the following policies:

- rationality and truth-finding?
- party freedom?
- procedural fairness?
- public and social interests?
- efficiency and finality?

How might the law of evidence further these policies? What distinctions should be drawn between criminal and civil trials? (Chapter IV)

4 Does the law of evidence work well or badly in practice? Is it in need of major reform? What are the specific problems? (Chapter V)

5 Is there a need for an evidence code? (Chapter VI)

I

Introduction

1 Law, traditionally understood, is a set of rules to guide conduct and determine disputes. The most formal method of resolving disputes is the trial. But more often than not the outcome of the trial turns more on the facts than on any real argument as to the nature of the law. The same is true of matters that are disposed of by tribunals, by informal methods of third party dispute resolution (conciliation, arbitration), and in lawyers' offices - except that these are determined by the opinion of the tribunal, referee or lawyer as to "the facts" rather than that of a judge or jury. In these circumstances, close attention must be paid to methods by which facts are determined. This is the particular concern of the law of evidence and the practical importance of the subject emphasises the significance of the Law Commission's reference on reform of evidence law.

2 This paper

- examines the policies behind our evidence law as it operates in courts and tribunals;[1]
- considers how these ought to be balanced and adjusted; and
- comments on the need for reform of our law in the light of these policies.

3 Issues of evidence policy were discussed in the Australian Law Reform Commission's Issues Paper on Reform of Evidence Law and the conclusions they reached provided the foundation for their 1987 Report.[2] Our provisional conclusions on many of the policy issues are broadly similar to those of the Australian Law Reform Commission; and in principle it is attractive to endorse reforms which are both consistent with modern trends in evidence thinking and adapted for a closely related legal system. On the other hand, we need carefully to consider both the policy issues and the individual subject areas of evidence law before we endorse any particular approach to reform.

1 For a discussion of evidence in arbitration proceedings, refer to our forthcoming report on Arbitration.

2 ALRC Report No 38 (1987).

4 In examining the policy issues, we have been able to draw on the large volume of academic writing. Many of the issues in the law of evidence have been examined in depth by modern scholars and earlier writers like Bentham, Thayer, Wigmore and Morgan. Our examination of the issues has also been assisted by the reports prepared by the American Law Institute and the Canadian Law Reform Commission.[3] In addition, the Federal Rules of Evidence for United States Courts and Magistrates provide an example of an evidence code which has worked well in practice. We have endeavoured to make maximum use of this material.

5 Although the coverage of each issue is brief (in the interests of keeping the topic within bounds), the paper has been preceded by considerable research and consultation. In order to give a clear indication of the views the Commission is in the process of forming, provisional conclusions are indicated on each of the issues. We reiterate, however, that we are not committed to these views. By indicating them we do not intend to preclude further consideration of any of the issues.

3 American Law Institute, Model Code of Evidence (American Law Institute, Philadelphia, 1942); Canadian Law Reform Commission, Report on Evidence (Ottawa, 1975). See also the later report of the Canadian Federal/Provincial Task Force (1982).

II

The Scope of "Evidence"

6 The first policy question is: what should be included within the topic of evidence? "Evidence" in a non-legal sense means something which makes a fact or facts apparent or obvious. But in a legal sense its meaning is somewhat different. In the legal context "evidence" is understood to mean that which the law accepts as providing proof of facts in a trial situation. (Or sometimes it is taken to mean that which is offered in proof.) The term is also used to describe the law relating to evidence. Evidence in that sense has traditionally included various topics, but the reasons why the law of evidence has included any particular topic are not always clear. What then is it appropriate to include within the scope of evidence law?

EVIDENTIAL AND NON-EVIDENTIAL MATTERS

7 Some matters treated as evidential in the textbooks and cases clearly have more to do with procedural or substantive law policies than probative value. An example is the "parol evidence rule". This can be seen as reflecting a policy of contract law that the parties should be able to determine the form of their contracts (and having done so, should be held to that), rather than an evidential policy that written contracts are necessarily better evidence of agreement. Another is the doctrine of res judicata, which by providing for earlier judgments to be conclusive on an issue, reflects a policy that issues should not be relitigated rather than a policy about evidential value.

8 Thayer was concerned to restrict the law of evidence to primarily evidential matters. He suggested that much which is commonly considered to be the province of evidence law - including some of the examples just cited - could properly be treated as substantive or procedural law:

> It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often - more often than not, nay, much oftener than not - are dealt with in our text-books and cases as belonging to the law of evidence, when in real truth they ought to be carried to the border line of this subject and respectfully deposited on the other side.[4]

4 Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), p 515.

9 Under Thayer's conception, also, there are some aspects of evidence which are properly matters for logic and experience rather than law. In particular, although "relevance" is the one basis for admissibility of evidence which Thayer accepted, he did not accept that questions of relevance should be regulated by evidence law: rather relevance should be a matter purely of reason. The weighing of evidence is also something which he thought should not be the subject of legal rules. He therefore approved of the fact that there are almost no rules about weight in our law.

10 Thayer's approach has largely been followed in the modern evidence codes and draft codes. The United States Federal Rules of Evidence, for instance, do not attempt to regulate relevance or weight of evidence and neither do the codes proposed by the American Law Institute, the Canadian Law Reform Commission, and, most recently, the Australian Law Reform Commission (although all provide some judicial directions). And, with the exception of the California Code, which also has provisions about weight, none of the codes and draft codes deal with such topics as res judicata or parol evidence.[5]

11 For similar reasons of principle, we propose to accept that logical relevance should be the basis for admissibility and will focus our review of evidence law on the rules which exclude relevant evidence from the fact-finder. We do not, however, at this stage reject the possibility that the formulation of rules or guidelines as to weight may sometimes assist the fact-finding process. And we will consider the possibility of developing suitable guidelines in the course of our review.

EVIDENCE AND PROCEDURE

12 There are still some grey areas within the Thayerite conception. At times it is difficult to distinguish between evidence and procedure. They share certain similarities. Both can be categorised as "adjectival law" - having more to do with the enforcement of rights and obligations than with their definition. Account needs to be taken of their interrelationship in carrying out our review. We accept, for example, that there may well be policy grounds for excluding confessions obtained in breach of certain procedural standards - even apart from considerations as to their probative value.

5 Stephen's older Evidence Code (in Stephen, A Digest of the Law of Evidence 1876), on the other hand, deals with all these matters and has been adopted in a number of former British colonies - see for instance the Indian Evidence Act 1872.

13 We also accept that the law of evidence may validly serve public and social policies. Examples are the law of privilege and public interest immunity. The exclusion of evidence under those heads is based, not on anything to do with probative value, but on the perceived need to protect relationships of confidence or the broader public interest. Although privilege and public interest immunity rules stem from those public and social policies, the practical impact which the rules have on the availability of evidence means that they are properly part of the law of evidence.

14 It is important, however, that those extrinsic grounds be clearly distinguished from, and balanced against, the purely evidential consideration of the probative value of the material. This is something to which we will return in Chapter IV.

EVIDENCE TOPICS OTHER THAN THOSE CONCERNING ADMISSIBILITY

15 There are some things that the codes and draft codes deal with which do not, strictly speaking, come within the narrowest Thayerite view of evidence - nor indeed within a common law view of evidence, although they are often included in textbook surveys. These topics only indirectly relate to the admission or exclusion of evidence and relate more to the process of proof than to probative value. They encompass rules relating to the course of the trial (for instance, the order of proof and the calling of witnesses), the examination of witnesses, and the burden and standard of proof. These topics are on the borderline of evidence law - involving aspects of procedure that are independent of the evidential material. As Wigmore, once a pupil of Thayer, commented:

> The question of who has the burden of proof, for example, is of a piece with the questions of who shall open and close the argument and of whether certain allegations require an affirmative or negative pleading. They form part of a treatise of evidence merely because their material is chiefly evidential material and because their problems constantly have to be discriminated from the strictly evidential problems.[6]

16 Our present view is that we will not initially deal with those borderline topics. But, since they provide a framework for the admissibility rules, we plan to proceed to them at a later stage of our review.

6 Wigmore, A Treatise of the System of Evidence in Trials at Common Law (Tillers (ed), 1983), s 3

FOCUS ON THE TRIAL

17 The focus of evidence law is normally on the trial or hearing stage of the proceeding and the rules are largely restricted to the assessment and use of facts in court.

18 However, as Twining points out, the reception of information is important at other stages of the trial process as well - from the time the proceedings are commenced to the determination of remedy or penalty.[7] Although we do not at this juncture propose to extend the scope of our review to those other stages, it may at times be valuable to compare the rules for receiving evidence in trial with those for receiving information at other stages of the process - and to consider whether different standards ought to be applied.

19 Adopting a broader perspective also enables us to consider whether controls over the obtaining of information might sometimes be better focussed on stages other than the trial. For instance, any effort to control police conduct may best be undertaken primarily at the earlier inquiry stage rather than, indirectly, through exclusion of unfairly obtained evidence at the later trial stage.

QUESTION

How should "evidence" be defined and what should be included within the scope of evidence law? What other things might need to be considered in a review of evidence law? In particular:

- to what extent should relevance and weight be regulated?
- to what extent should public and social interests be reflected in evidence law?
- should matters such as the course of trial, examination of witnesses, the burden of proof and the standard of proof be dealt with in a review of the law of evidence?
- should the focus of evidence law be exclusively on the trial or should other stages of the process be considered as well?

7 Twining, Rethinking Evidence (1990), pp 357-359.

III

Distinctions Based on the Nature of the Proceeding

20 The law of evidence differs depending on the nature of the trial. Thus in criminal trials special protections are accorded to the accused. On the other hand, tribunals are generally allowed to adopt a flexible approach to the reception of evidence. How far should this trend towards making distinctions be taken? Any conclusions we reach concerning this will have important consequences for the way in which we go about our review - in particular, in relation to the extent to which we develop different laws of evidence depending on the nature of the trial.

CRIMINAL AND CIVIL EVIDENCE

21 It has been said that there should be separate laws of criminal and civil evidence. Zuckerman, a proponent of this view, contends that the policies behind the rules of evidence are too closely linked with procedural and substantive law policies to be treated in abstract; and the procedural and substantive law policies are quite different for civil and criminal matters.[8] He points out that there are already basic differences between civil and criminal evidence and procedure. Not only are important concepts (such as the accused's right to silence, the presumption of innocence and the standard of proof beyond reasonable doubt) peculiar to criminal cases, but even the rules which are common (such as the rule against hearsay, the prohibition on opinion evidence, the treatment of evidence of character) may need to be dealt with quite differently.

22 It may well be that some of the rules of evidence are largely unimportant in civil trials - and that the parties themselves customarily do not observe them. If that is so, the question arises why those rules should be retained for civil cases. In Scotland, for instance, the hearsay rule has been abolished in civil proceedings.[9] In England, also, a rather more liberal approach has been adopted to hearsay evidence in civil proceedings - and different statutes govern civil and criminal evidence generally.[10]

8 Zuckerman, The Principles of Criminal Evidence (1989), chapter 1.

9 Civil Evidence (Scotland) Act 1988.

10 See Civil Evidence Act 1968, Police and Criminal Evidence Act 1984, Criminal Justice Act 1988. The English Law Commission is currently considering whether to follow Scotland in abolishing the hearsay rule in civil proceedings: see Law Commission (England and Wales) The Hearsay Rule in Civil Proceedings (Consultation paper 117, HMSO, London, 1991).

23 On the other hand, our own law as well as most modern evidence codes and draft codes tend to adopt a common approach to criminal and civil evidence, and within that make distinctions for criminal evidence. There is also no doubt that many fundamental concepts remain common to civil and criminal proceedings. Thus the principle that relevant evidence is prima facie admissible is accepted in both civil and criminal cases. Similarly, the distinction between admissibility and weight is found in both types of proceeding. And (even in Scotland and England) many of the exclusionary rules of evidence apply in both criminal and civil cases, although their content may in some respects be different.

24 We therefore incline to the view that an endeavour to develop completely different laws for civil and criminal evidence goes too far. Indeed it may be that the emphasis should be on congruence of approach - and that (provided there are adequate safeguards in the rules of criminal procedure) the exclusionary rules could be liberalised for criminal as well as civil trials.[11] This approach does not, of course, preclude the development of different rules for civil and criminal evidence in particular respects where these are desirable.

JURY AND JUDGE-ALONE CASES

25 Some of the arguments offered for maintaining a separate approach to criminal and civil evidence laws in fact suggest that the distinction which should be made is between jury and non-jury trials. Zuckerman, for instance, suggests that the availability of jury trials in most criminal cases (and their relative unavailability in civil trials) reflects the greater public interest in criminal trials.[12] If the availability of jury trials signifies something about the public interest, it might equally be argued that the distinction should be between jury and non-jury rather than criminal and civil trials, and that in minor criminal cases (where a jury is not available) the same rules should apply as in civil (non-jury) cases. Nevertheless that distinction is not often made directly. Rather, such arguments as there are for the separate treatment of jury trials tend to be along the lines of the supposed inability of juries to evaluate difficult evidence.

26 There is little doubt that the use of juries was a significant factor in the development of our law of evidence, although some might question the accuracy of Thayer's statement that evidence law is the "child" of the

11 See Law Commission, Hearsay Evidence: an Options Paper (NZLC PP 10, 1989), para 77.

12 Zuckerman, above note 8, pp 13-16.

jury system.[13] It is certainly often suggested that the inability of jurors to deal with difficult evidence provides a strong basis for retaining the exclusionary rules. On the other hand, in many respects jurors are expected to perform a complicated and difficult function. As Morgan points out in his foreword to the American Law Institute Model Code, current attitudes to jurors are confusing and contradictory:

> In some aspects jurors are treated as if they were low grade morons.... They are assumed to have insufficient intellectual capacity to evaluate ordinary hearsay evidence even with the help of counsel who can point out the dangers of uncross-examined material.... On the other hand, they are deemed to have extraordinary intellectual capacity and superlative emotional control. They can refrain from drawing any inference against an accused because of his failure to testify in his own behalf or against a party who claims a privilege preventing disclosure of material facts.... Of course, the truth is that the jurors are neither so foolish as some of the rules they are supposed to follow, nor so wise or able as other rules assume them to be. When they enter the jury-box, they do not lose their common sense, nor do they acquire new capacities or new wisdom. They cannot cast aside all experience of their lives; they endeavour to solve the problems put to them as they would do in like situations out of court; and they succeed in doing so with reasonable efficiency except when hindered by artificial rules of procedure and evidence.[14]

27 Although some special rules may be needed for jury trials, we consider it would be inappropriate to create different laws of evidence based on whether a trial happens to be before a jury or not. To do so might unreasonably influence the important decision whether to elect a jury trial, and might encourage election as a device to exclude adverse evidence. Moreover, with the increasing sophistication and knowledge of jurors, there is little reason to have different laws of evidence for jury and

13 Compare Morgan, "The Jury and the Exclusionary Rules of Evidence" (1936) 4 U Chi LR 747 - arguing that the adversary system had a role to play as well. It has also been pointed out that Thayer himself may not have intended to state the matter as strongly as his words might have indicated: ALRC, Evidence: an Interim Report (Report No 26, 1985), p 45.

14 American Law Institute, Model Code of Evidence (1946), pp 8-10. Even though this code was never implemented - being superseded by the Federal Rules - it was the forerunner of the modern codes and largely established the modern approach to codification.

non-jury trials. If there are concerns about the ability of jurors to assess the proper weight of particular types of evidence, these may also apply to some extent to judges.[15] Where judges are better equipped than jurors they are also able to provide appropriate guidance when summing up to the jury. Generally, we take the view that jurors can be relied on to assess evidence - and that technical rules may do more to hinder than encourage the commonsense fact-finding abilities of jurors.

COURTS, SPECIALISED COURTS AND TRIBUNALS

28 The evidence reference requires us to consider the rules of evidence in relation to tribunals - and along with this we must consider the particular nature of specialised courts which do not necessarily follow the same rules as ordinary courts.[16] The distinctions that already exist may suggest there are reasons for concluding that different rules should apply.

29 It is very common for statutes to authorise a specialised court or tribunal to dispense with the rules of evidence and determine admissibility in a free manner.[17] One reason for this may be a perceived need for greater flexibility of procedure to accord with the varied and informal nature of these bodies. An historical reason may be that juries are not used in specialised courts and tribunals, with the result that the provisions were not tailored with juries in mind.[18] A third reason may be that, since it is thought tribunals will not always have the same grasp of the technicalities of evidence law as judges, it is better to dispense with the rules than have them wrongly applied.

30 These reasons can be critically evaluated. The last does not explain why specialised courts presided over by judges, and other tribunals with legally trained members, have these provisions. The second reason does not lead to particular conclusions about the merits of continuing such provisions. The first reason may provide some basis for

15 Frank, "Are Judges Human?", Courts on Trial (1950), pp 146-154, although he did think judges were generally to be preferred over juries.

16 For instance Family Courts.

17 See for instance s 40 of the Disputes Tribunals Act 1988, s 164 of the Family Proceedings Act 1980 and s 149 of the Town and Country Planning Act 1977.

18 Both reasons were cited by Campbell in "Principles of Evidence and Administrative Tribunals", Well and Truly Tried, (Campbell & Walker (eds), 1982), pp 36-87.

maintaining a different approach to evidence in specialised courts and tribunals, since complex and artificial rules detract from the aim of achieving simplicity and flexibility in their proceedings. Yet these bodies in many instances deal with very important rights, and simplicity and flexibility are desirable in court proceedings as well.

31 We consider that the decision whether there should continue to be a different approach to evidence for specialised courts and tribunals can only be made after decisions are taken about reform of the law in the ordinary courts. It may be that the rules for ordinary courts can themselves be made sufficiently straightforward to be valuable for these other bodies as well. Alternatively, since at least some of the rules (for example relevance) must apply to all courts and tribunals, it may be possible to specify certain basic rules which should apply universally, while leaving specialised courts and tribunals free to dispense with the remaining rules. Or again, it may be better to leave matters more or less as they now are. These are issues to which we will return at a later point in our review.

QUESTION

Should there be substantially different laws of evidence for:

- criminal and civil trials?
- jury and judge-alone cases?
- courts and tribunals?

IV

Evidence Law Policies

32 The law of evidence reflects certain policies. These, in turn, reflect the purposes of the trial generally. We need to consider these policies or purposes in order to assess the law and determine how it should be reformed. A variety of policies can be identified - all of which need to be considered.

RATIONALITY AND THE PURSUIT OF TRUTH

33 To say that evidence is concerned with probative value, presupposes that adjudication is concerned with facts which may be proved. Indeed evidence scholarship almost invariably operates on a model that the primary purpose of the trial is rectitude of decision. According to Twining, the rationalist model involves the following propositions:

> [T]he primary end of adjudication is rectitude of decision, that is, the correct application of rules of substantive law to facts that have been proved to an agreed standard of truth or probability. The pursuit of truth in adjudication must at times give way to other values and purposes, such as the preservation of state security or of family confidences; disagreements may arise as to what priority to give to rectitude of decision as a social value and to the nature and scope of certain competing values - for example, whether it makes sense to talk of procedural rights or to recognise a privilege against self-incrimination. But in the end the enterprise is clear: the establishment of truth.[19]

While Twining expresses some scepticism about the approach, he largely accepts the rationalist model.

34 Others have expressed greater doubts. The Australian Law Reform Commission suggests that dispute resolution is more important than truth-finding: that is, the parties go to court seeking a resolution of their dispute and finding the "correct" facts is only a part of this. Moreover, the court is largely restricted to the version (or versions) of the facts provided by the parties, which may not completely correspond with the way things really happened; and a method of dispute resolution which is procedurally fair in the sense that it addresses the arguments and responds to the evidence provided by the parties is socially more important

19 Twining, "Evidence and Legal Theory" (1984) 47 MLR 261, 272.

than that the judgment should meet some "higher" standard of truth.[20] Others, also, have suggested that our society's adoption of the adversary method of dispute resolution (rather than an inquisitorial process where the judge conducts the investigation) indicates that the emphasis is more on procedural than substantive truth-finding values.[21]

35 At a deeper level, philosophers have questioned whether there really is such a thing as "the truth".[22] Others have argued that, even if the truth exists it is beyond our powers to discern it in retrospect since our inquiries are overlaid with our own values which cannot help but distort our understanding.[23] The possibility of rationality - a logical and coherent way of determining the truth - is thus put in doubt, since there may be as many "rational" methods as there are "truths" to be determined. At the extreme, these arguments suggest that, rather than truth-finding, the fact-finder's role in the adversarial system as we know it is really to decide on some other basis which of the different versions of the story to accept.

36 The above views about both dispute resolution and truth-finding seem unduly sceptical to us. It is possible to accept a model for dispute resolution based on the adversary system and yet think the parties themselves would normally expect the court to ascertain the truth.[24] Moreover, the judge has some responsibility which goes beyond the positions adopted by the parties. Already, our system is by no means purely adversarial. For instance, the judge may ask questions, take judicial notice of generally known facts without requiring them to be proved, and raise issues the parties themselves have not considered. These features of our legal system should not be underestimated -

20 ALRC Reform of Evidence Law (Issues Paper No 3, 1980) pp 8-14, Evidence: an Interim Report (Report No 26, 1986) pp 26-32.

21 Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study" (1973) 121 U Pa LR 506 - although limiting his discussion to the criminal trial.

22 See, for instance, Ayer, "Philosophical Skepticism", Contemporary British Philosophy 3rd Series (Lewis, 1961).

23 In the legal context Frank, drawing on the historian Becker, was a particular proponent of this view: see for instance Law and the Modern Mind (1930). See also Brankowski, "The Value of Truth: Fact Scepticism Revisited" (1981) 1 Legal Studies 257; Berger & Luckman The Social Construction of Reality (1967).

24 Frank, "The Psychology of Litigants", Courts on Trial (1950), p 374.

and it may be that, in the interest of truth-finding, the judge's powers should receive greater emphasis.[25] Thus there have recently been suggestions that there should be greater judicial supervision of the interrogation of suspects.[26]

37 While we may agree that it is often difficult to find the truth - and indeed this is one of the great truisms of evidence[27] - we can still accept that a goal of objective reality is worth pursuing. We can also continue to operate on the basis that things exist objectively notwithstanding the arguments of the sceptics, although we should be prepared to question some of the easy assumptions about the absoluteness of our perceptions. The fact that the standard of proof in civil trials is the balance of probabilities, and in criminal trials is beyond reasonable doubt, indicates that we never expect to have absolute certainty of the truth. Rather, we expect to be convinced to a realistic standard which varies depending on the nature of the case and the seriousness of the allegation.

38 In our view a primary purpose of the trial is the rational ascertainment of facts. We also consider that it is possible to enhance rationality in the process of fact-finding at trial - ensuring that relevant and useful material can be brought before the court, filtering out irrelevant material, making use of logical methods of reasoning, avoiding obvious prejudices, and questioning unsafe assumptions. The law of evidence should assist this.

PARTY FREEDOM

39 Dispute resolution is an important purpose of the trial process. Our adversary system rests on the proposition that the parties exert substantial control over the proceedings. They are the ones who initiate and defend the claim, they present the arguments and evidence and they, for the most part, define the issues. Fuller describes the

25 See Brooks, "The Judge and the Adversary System", The Canadian Judiciary (Linden (ed) Osgoode Hall Law School, York University, Toronto, 1976). On an expanded role for the judge dealing with expert evidence see Langbein "The German Advantage in Civil Procedure" [1985] 52 U Chicago LR 823. Under the law as it stands, powers exist, for example, under High Court Rule 324 for the court to appoint expert witnesses, and under s 23D Evidence Act 1908, as inserted by s 3 Evidence Amendment Act 1989, for the judge to call for reports on how a child witness in a sexual abuse case ought to give evidence.

26 Lord Scarman, writing in The Independent, 20 June 1990.

27 Twining, "Some Skepticism about Some Skepticisms", Rethinking Evidence, p 129.

judge's role in the adversary system as largely dictated by this focus:

> [T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned argument for a decision in his favour. Whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.[28]

40 A particular feature of the adversarial system in Fuller's eyes is the control over the proceedings it has traditionally given to the parties, providing them with an opportunity to have their claims resolved by a neutral adjudicator. Thus, while not going as far as the Australian Law Reform Commission in suggesting that dispute resolution takes priority over truth-finding,[29] Fuller's contentions support the view that dispute resolution is an essential aspect of the adversarial system.

41 Freedom of the parties, as well as rationality, suggests that the focus should be on minimising the restrictions on the evidence the parties can adduce to support their case. Thayer conceived of the law of evidence as a mixed group of exceptions to a principle of free proof. Twining develops this line of reasoning further, saying that:

> "Free proof" means an absence of formal rules that interfere with free enquiry and natural or commonsense reasoning. In the adversary system, where the parties have primary control over what evidence is to be presented in what form and what questions are or are not put to witnesses, the freedom of enquiry by judge, juror or other triers of fact is strictly limited. It is for the parties to determine whom and what they see or hear, but not how they evaluate and reason from the evidence. This "freedom" is largely a freedom of the parties and to a lesser extent that of the judge, jury or trier of fact.[30]

"Free proof" in this sense does not necessarily lead to all relevant evidence being placed before the court. Nevertheless, we consider that rational ascertainment of facts and freedom of proof are generally consistent with freedom of the parties.

28 Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv LR 353, 364.

29 See para 34.

30 Twining, "What is the Law of Evidence?", Rethinking Evidence, pp 194-195.

42 Although Thayer did not advocate removing all constraints on the principle of free proof, he did suggest they might be radically pruned. Bentham, the extreme exponent of laissez faire, advocated the abolition of all formal rules of evidence.[31] Generally, the tendency since Bentham's time has been towards a more receptive approach to evidence (although there has certainly been resistance to the abolition of all rules). And the modern codes and draft codes have all moved towards liberalisation of the common law.

43 This is a trend we would expect to follow, although we would not wish to abolish rules which have a demonstrably rational foundation and which therefore promote rather than hinder fact ascertainment.[32] There may also be other bases for retaining some limitations on the freedom of proof, some of which are discussed below.

FAIR PROCEDURES

44 As the previous discussion suggests, party freedom is an important consideration in criminal as well as civil trials. At the trial, the accused has the same opportunity as the prosecution to present evidence and reasoned arguments in order to obtain a verdict in his or her favour. The judge and jury are largely expected to respond to the parties' arguments. On the other hand, it is often claimed that there should be a stronger emphasis on fairness of procedures in criminal trials.

45 Zuckerman points out that the public interest in criminal trials is already very pronounced.[33] Balanced against the public interest in convicting criminals is the public interest in seeing that the innocent are not convicted. On this view, public interest also requires that any imbalance between the individual accused on the one hand and the weight of the state on the other should as far as possible be rectified.

46 The question is sometimes asked why we should be so interested in preventing the wrongful conviction of the innocent? In civil trials we accept a greater risk that wrong findings will be made against a defendant, who will then have to suffer the stigma of being found liable and the possibility of payment of crippling damages. Zuckerman says

31 Bentham, Rationale of Judicial Evidence (1827).

32 See para 38.

33 Zuckerman, The Principles of Criminal Evidence (1989), pp 4-6.

the prospect of punishment in criminal trials is all-important:

> The object of the criminal trial is to punish offenders. Punishment can deprive the accused of his most cherished right: his personal freedom. But the consequences of punishment can exceed the material disadvantage represented by the sanction of incarceration or fine. It can mark the convict with a moral condemnation that may hurt more than imprisonment and could inflict permanent injury on the convict's self-respect and standing in the community.[34]

Zuckerman concludes that a legal system which respects the rights of the individual has to devise a criminal procedure that affords due protection from punishment to the innocent citizen.

47 Although that is not a complete answer (since even in civil trials a defendant's reputation and good name may be at stake, and there is sometimes the prospect of punishment in punitive damages), it provides some explanation of the greater emphasis on procedural fairness in criminal trials. In very simplistic terms, society's moral condemnation which comes with conviction, represented by the punishment inflicted, distinguishes the criminal accused from the civil defendant and makes it important to protect the innocent from conviction. On the other hand, the importance of protecting the interests of victims and providing the community with adequate protection from crime should not be understated; nor should the interests of the parties in civil proceedings - plaintiffs as well as defendants.

48 The interest in promoting procedural fairness leads to the conclusion that there are certain rights which should be protected by the law of evidence. Already acknowledged in our present law, and reflected in the New Zealand Bill of Rights Act 1990, are the right to silence and the privilege against self-incrimination, the presumption of innocence, and the right to confront accusers.[35] Such rights inevitably influence the law of evidence in criminal cases. To a lesser degree there may be said to be analogous rights in civil proceedings - for instance, the right not to receive an adverse judgment unless a case has been made out, and the right to call and cross-examine witnesses. Our adversary system endorses every party's right to present his or her case, to make arguments and elicit evidence in

34 Zuckerman note 33 p 5.

35 See especially s 25(d) (the right "not to be compelled to be a witness or to confess guilt") and s 25(f) (the right "to examine the witnesses for the prosecution").

support. In the Bill of Rights these are protected through a general right to natural justice.[36]

49 How exactly the evidential effect of procedural and other rights should be worked out in practice, particularly where these conflict, and what is the best way to protect the interests involved is something we need to consider carefully.

PUBLIC AND SOCIAL INTERESTS

50 There are other policies besides truth-finding and procedural fairness underlying the adjudicative process. Even within the rationalist tradition it is accepted that the goal of truth-finding must at times give way to other important public and social interests.[37] For example, the whole body of evidence law known as privilege reflects this. Louisell comments:

> [T]here are things even more important to human liberty than accurate adjudication. One of them is the right to be left by the State unmolested in certain human relations. At least, there is no violence to history, logic or common sense in a legislative judgment to that effect. It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by the recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations - husband-wife, client-attorney, and penitent-clergyman.[38]

51 A related doctrine is that of public interest immunity. Here it is not so much a particular relationship between two individuals which is protected, but the proper functioning of the executive and therefore the public interest more generally. But again the policies extend beyond the purely evidential.

52 Possibly, the ambit of these public and social policies may be questioned and we will consider this when we deal with privilege and public interest immunity. At this point it is sufficient to record that we recognise these rules reflect important social values and are a legitimate constraint on the truth-finding function of the trial.

36 Section 27.

37 See note 19 and accompanying text.

38 Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today" (1956) 31 Tul LR 101, 110.

EFFICIENCY AND FINALITY

53 Efficiency and finality are of no little significance to the trial process and our evidence reference specifically refers to them. The Australian Law Reform Commission emphasised the consistency of such policies with the adversary process - since the parties themselves need to have their disputes resolved promptly and effectively.[39] But it is the judge who is primarily required to exercise control over the efficiency of the process. There are also good reasons, beyond the interests of the particular parties, which justify making efficiency and finality important policies for adjudication. As Weinstein points out:

> A system for determining issues of fact very accurately in all tribunals might permit a few adjudications a year of almost impeccable precision. But the resulting inability of the courts to have time to adjudicate the thousands of other pending litigations would mean that justice would be frustrated; people could flout the substantive law with relative impunity, knowing that the likelihood of being brought to trial was remote; and plaintiffs would be forced to avoid litigation because of its extraordinary expense and delay.[40]

54 We do not see efficiency and finality as subsidiary policies for the trial. They are important trial policies and must therefore play an appropriate role in evidence law. In particular, efficiency provides a good justification for minimising complications in the exclusionary rules of evidence (simply to avoid the time-wasting and confusion caused by arguing about them). Considerations of efficiency and finality also provide a justification for excluding evidence in cases where its probative value cannot justify the time, cost and general complexity involved in considering it.

QUESTION

What should be the primary purposes of the trial? In particular, to what extent should evidence law facilitate all or any of the following policies:

- rationality and truth-finding?
- party freedom?

39 ALRC Reform of Evidence Law (Issues Paper No 3, 1980), pp 38-40.

40 Weinstein, "Some Difficulties in Devising Evidentiary Rules for Determining Truth in Judicial Trials" (1966) 66 Col LR 223, 242.

- procedural fairness?
- public and social interests?
- efficiency and finality?

How might the law of evidence further these policies? What distinctions should be drawn between criminal and civil trials?

V

Need for Reform of the Law

55 Acceptance of the policies articulated in the previous chapter might suggest there is no great need for reform since, by and large, the policies accord with those considered to be the basis of our present law. Nevertheless, there are, in our view, fundamental problems with the law of evidence. These, however, have more to do with the way the law works in practice than the policies it seeks to reflect. It is not primarily the aims and aspirations of the law of evidence which are at fault, but rather the failure of the rules to promote these adequately.

THE LAW IS UNNECESSARILY TECHNICAL AND ARTIFICIAL

56 A serious criticism of our evidence law is that it hinders rather than aids the search for truth through the creation of artificial and unnecessary constraints on the evidence which may be admitted. Instead of enhancing and facilitating the rational common sense abilities of the judge and jury, the law makes it difficult to formulate a complete view of what actually happened. The focus is on the technicalities of the rules and their exceptions, rather than the broader policies lying behind them:

> The rules of evidence have been developed in myriads of cases, wherein the later judges have felt themselves bound by the doctrine of stare decisis to adhere to the pronouncements of their predecessors but bound also to avoid the absurdities which the simple application of those pronouncements would produce. In attempting to escape this dilemma they have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in haphazard fashion, one rule seeming to have no relation in reason to another.[41]

Five examples spring to mind - hearsay evidence, opinion evidence, evidence of character, confessions and the rules relating to relevance.

Hearsay evidence

57 Under the hearsay rule, subject only to limited exceptions, all evidence other than that provided in direct testimony at trial is excluded on the basis that it is inherently unreliable and/or cannot be the subject of

41 Morgan, Foreword to American Law Institute, Model Code of Evidence (1942), p 5.

cross-examination. (Neither of these explanations provides a complete description of the way the law has evolved). Yet in ordinary life we customarily make decisions on the basis of hearsay evidence and would feel highly constrained if this was precluded. The exceptions to the hearsay rule which have developed over the years mean that many of the arguments centre around whether the particular facts of a case fall within the terms of a given exception - rather than whether, as a matter of principle, the evidence should be excluded.[42] The exceptions themselves are narrowly framed and, for example, address only inadequately problem areas like computer records,[43] Maori custom,[44] and children's evidence in sexual abuse cases.[45]

58 Even the scope of the hearsay rule is problematic. Loevinger comments:

> [C]lassing all assertions made outside of a particular courtroom in a particular case as alike for any purpose is such a high order abstraction that the differences it ignores are vastly more important than the single adventitious similarity upon which it is based. It should be almost self-evident that there can be little utility in a class which is so broad as to include the prattling of a child and the mouthing of a drunk, the encyclical of a pope, a learned treatise, an encyclopedia article, a newspaper report, an unverified rumour from anonymous sources, an affidavit by a responsible citizen, a street corner remark, the judgment of a court, and innumerable other equally disparate sources of information.[46]

42 A case in point is R v Hovell [1986] 1 NZLR 500, discussed at length in Law Commission, Hearsay Evidence: an Options Paper (PP 10, 1989).

43 See Evidence Law Reform Committee, Report on Business Records and Computer Output (1987).

44 The Evidence Amendment Act (No 2) 1980 (which sets out the main statutory exceptions to the hearsay rule) makes only limited provision for admission of Maori custom. However, the Waitangi Tribunal is not bound by the rules of evidence and customarily considers hearsay evidence in claims before it.

45 The Evidence Amendment Act 1989 allows for videotaping of children's evidence in sexual abuse cases, but retains the right of cross-examination in various forms. Thus it does not provide an exception to the hearsay rule as such.

46 Loevinger, "Facts, Evidence and Legal Proof" (1950) 9 Western Reserve LR 154, 165-166.

On a broad reading, the hearsay rule encompasses, not only second-hand statements, but also inferences drawn from words and conduct.[47] It further encompasses, not only out-of-court statements made by third parties, but also previous statements of a testifying witness. These distinctions are conceptually difficult and have confusing practical consequences. For instance, the result of extending the rule to earlier statements of testifying witnesses is that a police officer's notes are not direct evidence of what happened although they are likely to be much better evidence than the later recollection and are commonly used to "refresh memory".[48] And evidence of an early complaint may be admitted to demonstrate a witness's credibility (for it is only "hearsay" if used to prove the truth of the statement in question) but must be ignored by the fact-finder when it comes to determining what actually happened.

59 In R v Baker [1989] 1 NZLR 738, where a broad interpretation was placed on the exception to the hearsay rule in respect of declarations as to state of mind, Cooke P said:

> A recent edition of a standard textbook with an extensive coverage of case law in various common law jurisdictions, Cross on Evidence (3rd Australian edition, 1986) p 729, includes the statement "No aspect of the hearsay rule seems free from doubt and controversy ...", a statement amply borne out in the nearly 300 pages devoted to the subject in that work. I venture to think that this is one of the major and more-or-less everyday areas of the common law where, although just results are no doubt usually managed in practice, the Courts have not succeeded in working out or articulating rules supplying deductive answers to practical problems. Certainty has not been achieved and the pursuit of it in formulae may be fruitless.[49]

Opinion evidence

60 The opinion evidence rule, while less prominently criticised, nonetheless in practice provides some of the more severe constraints on free enquiry. The rule precludes a witness drawing conclusions which might be classified as

47 See for instance Weinberg, "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne Univ LR 268.

48 In R v Mason [1988] 2 NZLR 61 the Court of Appeal explicitly endorsed the practice of reading directly from notes.

49 R v Baker [1989] 1 NZLR 738, 741.

"opinions" (or, at least, only allows them when they are inextricably linked with the facts on which they are based). Only "experts" can testify as to their opinion and even they cannot give evidence on matters of common knowledge, witness credibility, or the ultimate issues - since that is seen as usurping the fact-finder's function. Yet in ordinary life we customarily absorb a mixture of facts and opinion and make decisions based on these, and we commonly make use of expert advice to inform ourselves. While there may need to be some safeguards, it is legitimate to ask why the rule should be so restrictive. The result of the opinion rule is that it becomes necessary to determine whether a person is suitably qualified and knowledgeable to be an "expert", whether the subject in question is a sufficiently recognised branch of knowledge, and whether the evidence goes to credibility. These aspects of the opinion rule have recently caused particular problems in sexual abuse cases where the expert is a psychologist testifying about a child's condition.[50]

61 A more fundamental difficulty arises in distinguishing between "fact" and "opinion" as the law requires. The issues raised by philosophical sceptics indicate that the line between objectively true fact and subjective opinion is, at the least, a very narrow one.[51] And, as Thayer points out:

> In a sense all testimony to matters of fact is opinion evidence; ie it is conclusion from phenomena and mental impressions.[52]

To require a witness to formulate a recollection in terms of statements of fact may simply be confusing since it assumes the possibility of perfectly reproducing previously perceived occurrences. At the most, the distinction between fact and opinion is a matter of degree.

Evidence of character

62 The admissibility of character evidence is subject to a number of technical distinctions. These are illustrated by the statement in Cross on Evidence:

> It is always necessary to consider the distinctions between evidence of good character and of bad; evidence of disposition, of reputation, of record, and of discreditable conduct; evidence going to the issue and evidence only going to credit; and whether

50 See, for instance, R v B (an accused) [1987] 1 NZLR 362.

51 See para 35.

52 Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), p 524.

> the evidence is to be lead in chief, to be the subject of cross-examination, or to be adduced in rebuttal.[53]

Evidence of bad character of an accused, for instance, is not generally admissible to prove guilt, the rationale being that, even if relevant, it would tend to mislead the fact-finder as to its conclusiveness, or to prejudice the fact-finder against the accused. Yet, character evidence impugning the credibility of the accused is admissible when the accused puts her or his character in issue or attacks the credibility of prosecution witnesses. An exception is also made in relation to evidence of previous similar conduct (including previous convictions). This is admissible against the accused if the judge finds it sufficiently probative of the issues in the case as to outweigh the prejudice it may cause.[54] When and how often "similar fact" evidence should be treated differently from other evidence of bad character is something which may be questioned.[55]

Confessions

63 The law of confessions also raises important issues which are inadequately addressed by the law. Even the concept of "confession" is vague and confusing. For instance, does it encompass apparently exculpatory statements which can be used to inculpate the accused (indicating a lie or evasion of the questions put)?[56] The law does not give a clear answer. The policies behind the rules about confessions are also unsettled. The common law rule is that confessions are excluded if they can be shown to be "involuntary" - but it has never been clear whether this is predominantly to control police conduct or to ensure the truth of the statement. Consequently it is not certain how far the standard should be taken. For instance, as Zuckerman asks:

> Should impropriety on the part of a person in authority matter? Should it matter that the inducement formed only part of the suspect's reason for confessing? Who should be regarded as a person in authority? Does it matter that the admission was

53 Cross on Evidence (7th UK ed, 1990), p 312.

54 Director of Public Prosecutions v Boardman [1975] AC 421, 445 - and for civil cases see somewhat similarly the judgment in Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] Ch 119.

55 Zuckerman, "Similar Fact Evidence", Principles of Criminal Evidence (1989), pp 227-231.

56 See Cross on Evidence (4th New Zealand ed, 1989) pp 546, 547.

> in fact true? Questions such as these could receive a satisfactory answer only if we have a principle as well as a rule, and only if we know the purpose of the rule, its policy and its place in our system of criminal justice.[57]

In New Zealand s 20 of the Evidence Act 1908 gives statutory support to the truth-finding policy since it allows even confessions made after a promise, threat or other inducement to be admitted where the judge is satisfied that the means by which the confession was obtained "were not in fact likely to cause an untrue admission of guilt to be made". However, the provision is ambiguous in several respects. It has been suggested, for instance, that it only applies to some types of confessions.[58]

Relevance

64 Even the general principle of relevance, while largely accepted in our law, is sometimes accorded a meaning which goes beyond logical relevance. In R v Baker Cooke P said:

> At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards.[59]

65 No doubt, as in the above case, judges may find it convenient to use the term "sufficient relevance" as an alternative to sufficient probative value (or weight). When, however, "sufficient relevance" is used as a legal concept it must be distinguished from the principle of relevance, or logical probative effect, which Thayer espoused.[60] Expressed as a legal concept, sufficient relevance compresses the separate issues of logical relevance and probative value and may not provide a clear standard for admissibility. On the Thayerite view, it is preferable to avoid treating admissibility in terms of sufficient relevance. Conceptually, this suggests that it is better to treat logical relevance as the basic test for admissibility, subject only to the possibility of exclusion on identified policy grounds. That approach may also have the advantage of requiring the court to address the principle upon which the evidence is to be excluded.

57 Zuckerman, "Evidence", [1982] All ER - Annual Review 126, 136.

58 Cross on Evidence (4th New Zealand ed), pp 545, 546.

59 See note 49 at 741.

60 Thayer, note 52, pp 266, 530.

66 Trautman contends that a legal concept of relevance is a device for excluding evidence which is unfairly prejudicial, misleading or time-wasting by comparison with its real worth.[61] On his analysis, even where the terminology of "sufficient relevance" is not used, judges, on occasion, treat evidence as "irrelevant" when the real issue relates to these other aspects. The recent case of R v Georgeson[62] is of interest in this regard. The accused had sought to adduce remote evidence as to the likelihood of the complainant's homosexuality. The reason the majority judges gave for excluding the evidence was that it was both "irrelevant" and "misleading" in being "calculated to add a spurious air of truth to the accused's statement". The second reason suggests that the Court was concerned that the jury might place completely inappropriate weight on the evidence. The advantage of explicitly identifying a separate policy basis for excluding logically relevant evidence is that it requires the court to consider the crucial issue of how far the jury should be trusted to assess the probative value of relevant evidence.

67 The common law recognises a discretion to exclude logically relevant evidence whose probative value is outweighed by its prejudicial effect to the accused.[63] If the concept of "sufficient relevance" is employed to the same end, this makes it difficult to understand and apply the separate principles of relevance, on the one hand, and misleading or prejudicial effect, on the other.

THE LAW ADOPTS A NARROW APPROACH TO PROCEDURAL RIGHTS

68 Although the law of evidence contains safeguards in relation to rights of the accused, it can be criticised as inadequately protecting these rights.

69 We have already raised the question whether the rights of the accused at the time information is obtained are always best protected through the law of evidence.[64] As an example, the Judges' Rules establish some standards of conduct for police in questioning suspects, but these are not directly supervised by the courts. Indeed, it is not uncommon for evidence to be tendered in court which has been

61 Trautman, "Logical or Legal Relevancy - A Conflict in Theory" (1952) 5 Vand LR 385.

62 Unreported, Court of Appeal, 31 May 1990, CA 4/90.

63 Compare s 18 Evidence Amendment Act (No 2) 1980 which in respect of hearsay evidence extends the discretion to civil jury trials (but also limits it to criminal cases with a jury).

64 Para 19.

obtained in breach of the Rules.[65] Although the court has a discretion to exclude unfairly obtained evidence when the matter comes to trial, exclusion in practice tends to occur only in extreme cases.[66] We have suggested that the primary focus when dealing with problems relating to the investigation of crime might be upon establishing appropriate safeguards at the investigation stage. The videotaping of confessions, recently introduced in certain police stations, is highly desirable in the interests both of the accused and the police. However this does not obviate the need to have procedural standards - and to consider what evidential rules are necessary to supplement them.

70 It can also be argued that rigid rules of evidence, under the guise of protecting an accused's rights, sometimes exclude evidence that should be admissible. The hearsay rule is an example. One justification which tends to be offered for not instituting reform of the rule is that the accused's right of confrontation would be prejudiced. But it is questionable whether that right should invariably be a basis for excluding evidence which is clearly valuable to the court's truth-finding function and could not otherwise be obtained (and, indeed, the exceptions already made to the hearsay rule indicate the sheer impracticality of adhering rigidly to the hearsay rule).

71 Generally, it may be questioned whether the rights of the parties fully to present and defend their case are adequately served by rules of evidence which exclude substantial categories of evidence. To revert to the previous example, the hearsay rule, even with all its exceptions, excludes potentially worthwhile evidence from the fact-finder - evidence which may be very important to a party's presentation of his or her case. The opinion rule also prevents possibly useful evidence coming before the fact-finder and so inhibits the presentation of a party's case. As Loevinger points out:

> [I]t must be recognized that the exclusionary rules do have certain practical consequences that are usually not taken into account in discussions of them. Being rules of exclusion that restrict the evidence that can be offered and received, they tend to handicap the party who has the burden of proof and to assist the party who does not have the burden of proof on any issue.[67]

65 R v Admore [1989] 2 NZLR 210 and R v Fatu [1989] 3 NZLR 419 are two relatively recent cases.

66 As in R v Hartley [1978] 2 NZLR 199 where the accused was brought back to New Zealand from Melbourne and interrogated at length by the police without a warning being given until a late stage.

67 Loevinger, note 46, at 172.

THE LAW IS INEFFICIENT AND CONFUSING

72 Another criticism of the law is that it is both inefficient and confusing. Rather than reducing the time spent in considering evidence of relatively low value, the proliferation of complex rules and exceptions to rules has a considerable potential to introduce unnecessary complexity and lengthen the trial. The judge must make difficult decisions, often without adequate time for consideration, about how the law applies to the item in question. Jurors are also expected to carry out difficult intellectual feats in dealing with evidence. For example, hearsay evidence may be admissible to establish the state of mind but may have to be disregarded as direct evidence of the truth of the fact stated.[68]

73 Indeed, it may be suggested that, if a meticulous approach is adopted to the law of evidence, the result is to stretch out, confuse and break up the proceedings unreasonably.

THE LAW FUNCTIONS LARGELY BECAUSE IT IS AVOIDED AND IGNORED

74 It has been commented that the only reason our evidence law functions reasonably well is because it is largely overlooked or ignored.[69] In civil cases, especially, hearsay evidence customarily is admitted simply because it is not objected to, and the distinction between fact and opinion evidence is not rigidly observed. In criminal cases, greater attention is paid to the rules, but even so many of the rules are not rigidly enforced:

> Slight reflection will show that remarkably little of the testimony that passes unchallenged in ordinary proceedings is actually wholly free from the taint of recognizable "hearsay". No one could possibly know from anything but a hearsay source the answer to such questions as: "Who is your father?," "How old are you?" and "Where were you born?" (Incidentally, while such information might be secured under the "pedigree exception" to the hearsay rule, the answers are very seldom given in a form which would qualify under the technical requirements of the exception.)[70]

75 Where the law is invoked as a basis for excluding evidence, the courts have sometimes found ways of enabling

68 Walton v R (1989) 84 ALR 59.

69 For instance Canadian Law Reform Commission, Report on Evidence (1975).

70 Loevinger, note 46, pp 166-167. The statutory formulation of the pedigree exception in s 11 of the Evidence Amendment Act (No 2) 1980 does not significantly alter the common law rule.

important evidence to be considered. The extension of the state of mind exception to the hearsay rule in R v Baker has already been mentioned.[71] Another example is the use of the judicial notice provisions in the Evidence Act, in particular s 42 which in very broad terms allows reference to be made to standard works of general literature.[72] Among other things, this provision has provided a useful vehicle for overcoming the hearsay rule to enable Waitangi Tribunal decisions to be used in later court proceedings as evidence of the facts found.[73]

76 Although this approach may lead to worthwhile results in particular cases, it also means the law is unevenly and unpredictably applied. And it raises questions about the value of the law itself.

QUESTION

Does the law of evidence work well or badly in practice? Is it in need of major reform? What are the specific problems?

71 Para 59.

72 The provision, rather confusingly treating judicial notice as a matter of evidence, states that:

> All Courts and persons acting judicially may, in matters of public history, literature, science or art, refer, for the purposes of evidence to such published books, maps or charts as such Courts or persons consider to be of authority on the subjects to which they respectively relate.

73 Te Runanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641.

VI

Conclusion: The Codification Option

77 A primary purpose of the evidence reference is "to make the law as clear, simple and accessible as is practicable".[74] The reference provides an opportunity to take stock of the way our law has developed and, where necessary, to make a fresh start. In the previous chapter, we have suggested that there is a need to break out of the complexity and incoherence which over the years the sheer number of cases and a technical approach to the rules of evidence have created. There are also indications that the courts will be receptive to a more principled, less technical approach.[75] Our reference requires us to consider codification; and in the light of all the matters we have discussed in this paper we have reached the provisional conclusion that codification is the only way to achieve truly comprehensive reform.

78 The papers following this one will proceed on the basis that the codification option should be adopted. The next paper will deal with the aims and methodology of codification and will include the early provisions for a draft code as well as a draft scheme of topics to be covered.[76] After that a paper will follow applying the codification option to reform of the hearsay rule.

QUESTION

Is there a need for an evidence code?

74 See also s 5(1)(d) of the Law Commission Act 1985, setting out as one of the functions of the Commission:

> To advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.

75 See, for instance in relation to the hearsay rule, the statement of Cooke P in R v Baker [1989] 1 NZLR 738 quoted in para 64 above - and also the comments of Mason CJ in Walton v R [1989] 63 ALJR 226, 229 and Casey J in R v Smith [1989] 3 NZLR 405.

76 Law Commission, Evidence Law: Codification (NZLC PP14, 1991), the companion paper to this paper.

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