



# PRINCIPLES OF EVIDENCE IN CRIMINAL CASES

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# Extract: Principles of Evidence in Criminal Cases

## FOREWORD

The impact of the Evidence Act 2006 has been well recorded elsewhere. It was a milestone for the law of evidence in New Zealand both because of the controversial decision to codify the law, and because the codified law effected some important changes. My impression is that codification has been a success, and by making the law of evidence readily available, it has fostered a better understanding and application of the law.

From early on the appellate courts emphasised the need to focus on the text of the Act, and that has been an important step in making codification effective. That process of considering the Act on its own terms has been greatly aided by the various commentaries that are available. These primarily take a section by section approach to informing and assisting the reader on the relevant jurisprudence under the Act.

The present book is different, and welcome for that reason. It considers the various topics in a more traditional way, taking as its starting point the concept which underlies the particular statutory rule. As any New Zealand text now must, it recognises and comments upon how the Act deals with that topic, but it does so within a broader framework of principle and critique.

In her preface Elisabeth comments that an aim of the book is to explain not only how admissibility is controlled but why. The latter point is crucial to understanding evidence, and, in my view, to promoting consideration of whether the rules have got it right. An example is the topical area of what discreditable evidence a jury may hear about an accused. There is legitimate scope for debate. The rules need to be constantly reviewed to ensure that the premises which underlie them remain valid and acceptable. Texts such as this new one by Elisabeth, which have a focus on what underlies and justifies a rule, help ensure those debates are informed.

Elisabeth McDonald is already one of the authors of the *Act and Analysis* commentary, a text which has become a regular sight in New Zealand courtrooms. I welcome her latest addition to the literature on the law of evidence in New Zealand.

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## PREFACE

Nearly five years after the Evidence Act 2006 came into force, the significance of the reforms it enacted are apparent. Although some sections have given rise to a number of appellate decisions, in particular those dealing with previous consistent statements, propensity evidence, and improperly obtained evidence, the Act has in many ways met the Law Commission's goal: "To make the law of evidence as clear, simple and accessible as possible".

This is not to say that the law of evidence is clear and simple in all respects. Students of the subject still have to grapple with the tasks of identifying hearsay; articulating the difference between unfairly prejudicial evidence and compelling testimony for the prosecution; and, drawing distinctions between fact and opinion and credibility and truth.

To this array of challenges, the Act, despite its promise of limiting "limited use" rules, requires recognising the dividing line between veracity and accuracy, veracity and propensity, and propensity and what yet-to-be-finally-determined types of conduct may fall outside the definition of propensity. Add to this list the need to know when a collection of words is a "statement"; when a person who has taken the oath is a "witness"; when silence is probative; when a lie says something about a person's credibility and so on – and students, practitioners, and judges may well all ask: "what simplicity?"

Despite these on-going definitional debates, the Act has been instrumental in encouraging what the late Lord Cooke referred to as (in the context of hearsay) "going straight to basics". In 1989, before the Law Commission began their decade-long evidence law reform project, he, as President of the Court of Appeal, was of the view that the focus of admission should simply be relevance and reliability. These are now the two inquiries found in ss 7 and 8 of the Act – the sections, I argue in Chapter Two, which inform every admissibility decision. We will continue to have disagreements about what makes a piece of evidence relevant and reliable, but that is all that it is really necessary to argue about. It is hoped that any recommendations that flow from the Law Commission's five-yearly review under s 202 of the Act will stay true to this approach, and that some of the observations in this work will be of assistance to the Commission's process.

This book is intended to provide a structure and a starting point for those who are coming for the first time or after an absence to the law of evidence, as it applies in criminal proceedings, or for those who want to know more about how the Act has changed the rules they learnt during their law degree. Drawing on what I have learned from teaching evidence over a number of years, my aim has been to explain why the admission of evidence is controlled and in what ways. This provides the basis for considering the operation of the Act, which is analysed by reference to the purpose found in s 6 – "to help secure the just determination of proceedings". Of course "justice" is as contestable a concept as that of relevance or reliability. Recognising that admissibility decisions are ultimately a reflection of prevailing cultural and social constructs allows a debate not just about the rules but also

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PREFACE

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about how the rules are made, interpreted and applied, and by whom. The book also therefore encourages a critical contemporary analysis of the law of criminal evidence. In places, it draws on aspects of my writing that have been published elsewhere, including seminar papers prepared for the Institute of Judicial Studies.

It should now be apparent that this text is designed to complement the *Act and Analysis* work and the commentary in *Adams on Criminal Law*, both of which are regularly updated. It is hoped that this book will provide helpful context to the discussion of the provisions found in those publications and that practitioners and students will find the overview provided in this work, drawing on the issues that have emerged from five years of appellate case law, of assistance in their endeavours.

Completion of this book would not have been possible without much help. I am very grateful in particular to: my research assistant, the very talented and unflappable Holly Hill; Scott Optican for his thoughtful reviews of a number of the Chapters; Yvette Tinsley for her expertise on matters of experts in relation to Chapter 8; Richard Mahoney for his long-term willingness to engage in evidence law discussions with me; Justice Simon France for kindly agreeing to write the Foreword and for his encouragement over many years; Brigid Corcoran, Peter Adamson and Justice Grant Hammond at the Law Commission for permission to access archival material and to publish the Commission's research in Appendix 2; Ian McIntosh and Bridget Giblin at Thomson Reuters for their assistance and accommodating ways; and the patient and supportive Wayne, who continues to tolerate, among other things, my writing going on holiday with us.

Finally, I must acknowledge that I have been selective in the material I discuss and the matters I emphasise in this book. I bring my own perspective and experience to this analysis of the law of evidence. Subjectivity is apparent not only in the decisions I am bold enough to critique but also in the pages in which I record that critique. I am fortunate to have the opportunity to publish these thoughts and in so doing contribute in a modest way to the ongoing discussions about the appropriate development of the rules of evidence.

Elisabeth McDonald

1 May 2012

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#### 2.1 Introduction

The admission of relevant evidence reflects one of the generally-agreed central purposes of the trial process – to find the truth and reach a correct decision.<sup>1</sup> The law of evidence should operate to support the goal of accurate fact-finding so that as much relevant and reliable information as possible is placed before the fact-finder.<sup>2</sup> This may mean that relevant evidence is excluded in order to improve the quality of the truth-finding process or to give effect to important policy considerations,<sup>3</sup> but the reverse is not true; irrelevant

1 For a discussion of the contestable nature of truth see Antony Duff and others “Introduction: Towards a Normative Theory of the Criminal Trial” in Antony Duff and others (eds) *Trial on Trial: Volume One – Truth and Due Process* (Hart Publishing, Oregon, 2004) 1 at 19–28. In the Law Commission’s view the “primary purpose of the trial is the rational ascertainment of facts”: Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [38], and see further Chapter One at 1.2.1.

2 See Evidence Act 2006, s 6.

3 For example, fairness to the defendant in a criminal trial, see ss 27–30 of the Evidence Act 2006.

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evidence is never admissible. Evidence may be “conditionally” relevant, subject to further information,<sup>4</sup> but irrelevant evidence should never form part of the decision-making process.<sup>5</sup> Irrelevant evidence can never assist the fact-finder; it can only mislead and add to the cost of dispute resolution.

It is, therefore, an essential preliminary task of the judge in an adversarial trial process to determine the relevance of any piece of evidence. In relation to much of the information that will be offered for the fact-finder to consider, “mere” relevance will not be an issue worthy of any debate. However, even when it is clear that the evidence is relevant, the basis of its relevance may require the application of a specific admissibility rule. Where there is no specific admissibility rule that applies, the evidence may nevertheless be excluded if it is not sufficiently probative, given the time it will take to consider it, or with regard to its prejudicial effect.

In this Chapter, these essential admissibility considerations are discussed. First, what does relevance mean and how does the determination of relevance impact on matters of proof? Secondly, in which circumstances may relevant evidence be excluded due to insufficient probative value? These two fundamental inquiries to a large extent underpin the entire law of evidence. In the absence of any specific admissibility rules, whether legislated or at common law,<sup>6</sup> appropriate identification of relevance and probative value should deliver sufficiently robust admissibility decisions. On this analysis, specific admissibility rules merely provide further assistance in determining the probative value of a particular type of evidence. A good understanding of the factors to consider when making decisions about relevance and probative value should, therefore, lead to a good understanding, and sound application, of every specific admissibility rule.

## 2.2 Relevance and purpose

In order for evidence to be admissible, it must be relevant. Relevance is, however, a relational concept.<sup>7</sup> Relevance cannot be determined in a vacuum. For example, if a party to a case wanted to establish that the defendant was in the habit of eating lunch every weekday at noon at a particular café, would that be permitted? This depends on whether the information is relevant and the only answer to that question must be that, without more, we do not know. In order to make a decision about the relevance of that information we must first know why the party wants to offer it, and what is the purpose of offering it? How will the fact-finder use this information if permitted to consider it when making a decision?

There could be a number of reasons why the information could be relevant in any particular context. It might support the defendant’s alibi for the offence that he or she has been charged with, or, alternatively, place the defendant at the scene of a crime. In a civil context, it might help prove the source of the defendant’s illness from tainted food, or say something

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4 See s 14 of the Evidence Act 2006, for example, AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 51.

5 Bernard Robertson “Bain, Bayes and Basics: Relevance Under the Evidence Act 2006” (2010) 24 NZULR 167 at 176.

6 The extent to which common law admissibility rules survive the Evidence Act 2006 is discussed in Chapter One at 1.3.2.

7 “Relevance is not an inherent characteristic of any given item of evidence and relevance cannot be determined in the abstract”: Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [C9].

about the extent of his or her disposable income. The identification of purpose is, therefore, the essential prerequisite to determining relevance:<sup>8</sup>

“[A] witness’s assertion that the moon is made of green cheese would clearly be irrelevant (and consequently inadmissible) on the question of the molecular composition of the moon. However, this nursery rhyme declaration could be both relevant and admissible to prove that the witness has the power of speech or can speak English, if for some reason either of *those* issues was contested in the trial.”

### 2.2.1 How knowing purpose assists identification of specific admissibility rules

The inquiry into purpose and use does not only allow the determination of relevance. It also allows identification of any applicable specific admissibility rule that also needs to be satisfied.<sup>9</sup> For example, an out-of-court statement made by a person who is not a witness will require consideration of the exceptions to the rule against hearsay, but only if the statement is offered to prove its truth (that is, the *purpose* of offering the statement is to prove that it is true, rather than just that it was made).<sup>10</sup>

Of course, evidence may be relevant for more than one purpose and one of those purposes may require consideration of a specific admissibility rule that cannot be satisfied. In such a case (the use of one defendant’s statement in the case against a co-defendant, for example, or where the statement has not satisfied the hearsay rule), a suitable direction as to the permitted use of the evidence in the decision-making process is required.<sup>11</sup> As discussed in Chapter One, there are fewer limited use rules under the Act than at common law,<sup>12</sup> but this is reason to be aware of the potential for evidence to be used by the fact-finder for multiple purposes. This may mean that a jury needs to be directed as to the permitted use of the evidence or it might even lead to exclusion of the evidence if the risk of prejudice is too high.<sup>13</sup> Evidence may, therefore, be admissible if used for one purpose, but not if used for another.<sup>14</sup>

If there is no specific applicable admissibility rule, then the evidence may be admitted if relevant for the purpose for which it is offered, subject to it also having sufficient probative value. Historically, there have been differing views as to whether the inquiry into “sufficiency” (or the evidence’s lack of remoteness to the particular issue) should properly be part of the relevance determination.<sup>15</sup> In most jurisdictions, especially those in which the law of evidence has been recently reviewed and substantially codified, the two inquiries are

8 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 100 (original emphasis).

9 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 from [28] gives an example of this inquiry.

10 In *R v Rajamani* [2009] NZCA 225 at [15]; the statements made by the deceased to a number of witnesses were not treated as hearsay on the basis that they were being offered only to prove the deceased’s state of mind at the time. See further the discussion of the rule against hearsay in Chapter Four at 4.4.1(2).

11 See, for example, *R v Chabil* [2010] NZCA 244 and Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV7.05.

12 At 1.2.1.

13 Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [C9].

14 Graham B Roberts “Methodology in Evidence – Facts in Issue, Relevance and Purpose” (1993) 19 *Monash University LR* 68 at 80.

15 Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 7–15.



seen as separate. That is, the decision as to relevance *precedes* consideration of sufficient probative value. In this sense, relevance is a necessary but not determinative condition of admissibility.<sup>16</sup> This is the situation in New Zealand.

## 2.2.2 A definition of relevance

Section 7 of the Act provides:

### “7 Fundamental principle that relevant evidence admissible

- “(1) All relevant evidence is admissible in a proceeding except evidence that is—
- “(a) inadmissible under this Act or any other Act; or
  - “(b) excluded under this Act or any other Act.
- “(2) Evidence that is not relevant is not admissible in a proceeding.
- “(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.”

This section makes it clear that irrelevant evidence is simply inadmissible (s 7(2)) but that relevant evidence may still be inadmissible or excluded under the Evidence Act 2006 or any other Act (which includes secondary legislation such as rules and regulations).<sup>17</sup>

Section 7(3) contains the test for relevancy. This test can be applied once the purpose of offering the evidence has been identified. A mere “tendency” to prove or disprove “anything that is of consequence to the determination of the proceeding” is relevant and, therefore, not inadmissible under s 7(2).

Evidence of “anything of consequence” includes evidence of a wide range of matters. Evidence can be relevant even where it does not bear directly on the ultimate legal issues. A fact may be relevant to the admissibility of other evidence or to the weight to be given to particular pieces of evidence. For example, evidence offered to assist the fact-finder to evaluate the credibility (or “veracity”, to use the language of the Act) of a witness will not directly prove a fact in issue but will help the evaluation of the witness’s evidence which is relevant to a fact in issue. It must also be remembered that the decision about relevance is not the final admissibility decision. The evidence must be more helpful than the definition in s 7(3) suggests. It must also be probative. That this next step is fulfilled by s 8 of the Act has become clear as a result of appellate decisions.

### (1) “*Mere*” or “*logical*” relevance and the inquiry into “*sufficient relevance*”

The New Zealand Court of Appeal’s decision in *R v Smith*<sup>18</sup> has been cited as authority for the proposition that the test in s 7(3) sets a “low threshold”.<sup>19</sup> However, the Court of Appeal’s judgment does not include these words and the Court was instead contrasting s 7 with s 37 stating: “The ‘substantially helpful test’ creates a higher threshold than mere

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16 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 3.

17 Interpretation Act 1999, s 4. But not the High Court Rules; for example, see s 5 of the Evidence Act 2006 and Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV7.01.

18 *R v Smith* [2007] NZCA 400.

19 See, for example, *R v Neale* HC Auckland CRI-2007-004-3059, 16 September 2008 at [86].

relevance.”<sup>20</sup> Such “heightened relevance” tests are also found in s 25(1) (opinion evidence) and s 44(3) (sexual history evidence) of the Act.

The question that *Smith* left open is whether the s 7(3) test is one of “mere relevance” (a low threshold of simple logical relevance) or one of “sufficient relevance” (or “legal relevance”). In other words, is the test in s 7 one of both materiality *and* probative value, or just one of materiality (probative value being either a matter for the jury as a question of weight, or a matter for the judge in terms of the balancing exercise in s 8)?

A relevance standard that is just about materiality, or logical relevance, “is relatively undemanding and usually easily satisfied”.<sup>21</sup> Under such a test there is no quantum of relevance; it is either relevant or not and it is not appropriate to ask “*how* relevant is *x* to *y*”.

However, the test of “legal relevance” (championed by Wigmore),<sup>22</sup> unlike mere logical relevance, is “a ‘two-dimensional’ concept, introducing the dimension of quantum which merely logical relevance lacks.”<sup>23</sup> From this perspective, the first hurdle to admissibility is only satisfied by evidence with a “plus value” over and above logical relevance – it must be sufficiently probative as well.

Despite criticisms of a “legal relevance” standard, which had the tendency to obscure the reasons for exclusion,<sup>24</sup> the requirement of “sufficient” relevance or a lack of remoteness traditionally found favour in New Zealand jurisprudence,<sup>25</sup> as is apparent in the following extract:<sup>26</sup>

“[L]ack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection is *considered to be too remote*. Once it is regarded as a matter of degree, competing policy considerations can be taken into account. These include the desirability of shortening trials, avoiding emotive distractions of marginal significance, protecting the reputations of those not represented before the Courts and respecting the feelings of a deceased’s family. None of these matters would be determinative if the evidence in question were of significant probative value.”

This extract lists the kinds of matters that could be considered as part of the s 8 inquiry, rather than that undertaken under s 7(3). In the Law Commission’s view, “sufficient relevance compresses the separate issues of logical relevance and probative value and may not provide a clear standard for admissibility.”<sup>27</sup> Although prior to the Act issues of probative value were arguably wrapped up with the relevance test, the split between ss 7 and 8 in the Act indicates that two separate inquiries are required. Relevant evidence which

20 R v *Smith* [2007] NZCA 400 at [16].

21 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 101.

22 Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 9.

23 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 104.

24 Andrew Choo “The Notion of Relevance and Defence Evidence” [1993] Crim LR 114 at 116.

25 See R v *Baker* [1989] 1 NZLR 738 (CA) at 741.

26 R v *Wilson* [1991] 2 NZLR 707 (HC) at 711 (emphasis added).

27 Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [65].

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is insufficiently probative (or will needlessly prolong the proceeding) will be inadmissible, whereas evidence that meets both the relevance test and has sufficiently high probative value in the context of the case will be admitted.<sup>28</sup>

That ss 7 and 8 perform different functions was clarified by the Supreme Court in *Bain v R*<sup>29</sup> and *Wi v R*.<sup>30</sup> In *Wi*, Tipping J, giving reasons for the Court, stated that s 7(3) does not set out an “exacting test”.<sup>31</sup>

“The question is whether the evidence has some, that is *any*, probative tendency, not whether it has *sufficient* probative tendency. Evidence either has the necessary tendency or it does not. As Lord Steyn said in *R v A*:

‘[T]o be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue.’

“*The approach of the common law was not always consistent in this respect. That inconsistency has now been resolved by the Act.*”

This means that the evidence need only have some (mere) *logical* relevance to satisfy the definition in s 7(3).<sup>32</sup> It is s 8, with its focus on probative value, which provides the sufficiency or *legal* relevance test. The role of s 8 will be discussed further below, after the following consideration of how to apply a logical relevance test and some of the attending difficulties in doing so.

## 2.2.3 The role of logic, experience and knowledge: syllogistic reasoning

As mentioned earlier, relevance is not an inherent characteristic of any item of evidence but exists only as a relation between the evidence and a matter in issue. Whether the relationship exists may depend on either experience or science.<sup>33</sup> As relevance has historically been viewed as largely a matter of “logic and common sense”,<sup>34</sup> it is the judge’s own knowledge of human conduct that is relied on to resolve relevance determinations, based on premises that may not always be articulated.<sup>35</sup>

Decisions about relevance are sometimes thought to be helpfully guided by the use of (deductive) syllogistic reasoning – that is, where the piece of evidence is the minor premise (*x*), the conclusion helps solve an issue in the case (*y*), and the major premise is, or should be, a “proposition the truth of which is likely to be accepted by the person who has to draw the conclusion – in the case of a lawsuit, a reasonable person”.<sup>36</sup>

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28 Subject, of course, to any other specific admissibility rules.

29 *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [39]. See also Rosemary Pattenden “Case Commentaries: Judge, jury and the interpretation of real evidence – New Zealand” (2010) 14 E&P 67.

30 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

31 *Ibid* at [8] (emphasis added).

32 See further *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [45].

33 Jenny McEwan “Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication” in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 187 at 191.

34 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [25]; Grant Illingworth QC and Dr Don Mathias “The admissibility of hearsay statements and opinion evidence” in *Evidence Act 2006: Intensive* (NZLS, Wellington, 2007) 17 at 27.

35 Christine Boyle “A Principled Approach to Relevance: the Cheshire Cat in Canada” in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 111.

The classic example of such syllogistic reasoning is:<sup>37</sup>

All men are mortal (major premise).

Socrates is a man (minor premise).

Socrates is mortal (conclusion or deduction).

This technique illustrates the need for careful articulation of a background generalisation (or premise) where the relevance of the evidence is disputed. It also demonstrates the extent to which decisions about relevance (and degrees of relevance) depend on the knowledge, experience and world-view of the decision-maker. Delisle, Stuart and Tanovich make the argument for the use of syllogistic reasoning in this way:<sup>38</sup>

“We know that evidence is relevant if it has a tendency to make the proposition for which it is tendered more probable than that proposition would be without the evidence. For evidence to have any value there must be a premise, a generalization one makes, allowing the inference to be made. Borrowing from Professors Binder and Bergman, evidence that roses were in bloom, when tendered to prove that it was then springtime, has meaning only if we adopt the premise or generalization that roses usually bloom in the spring. *The tendency of evidence to prove a proposition, and hence its relevance, depends on the validity of the premise which links the evidence to the proposition.* The probative worth of the relevant evidence depends on the accuracy of the premise which supports the inference. Sometimes the premise will be indisputable, sometimes always true, sometimes often true and sometimes only rarely true. But a premise there must be. The next time someone says to you that the evidence is *clearly* relevant ask the proponent of the evidence to articulate for you what premise she is relying on. If she has no premise the evidence is irrelevant. If she has a premise you can debate with her the validity of the premise. What experience does she base it on? Is there contrary experience? Is the premise based on myth? Is the premise always true, sometimes or only rarely? These latter parameters do not affect relevance since relevance has a very low threshold but may affect the probative worth which may cause rejection of the evidence if the probative value is outweighed by competing considerations. Approaching discussions of relevance in this way may yield a more intelligent discussion than the often times typical exchange of conclusory opinions.”

36 DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [1.45].

37 See Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 143.

38 Ron Delisle, Don Stuart and David Tanovich *Evidence: Principles and Problems* (8th ed, Thomson, Ontario, 2007) at 140 (first emphasis added).

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Syllogistic reasoning was applied by the New Zealand Court of Appeal in *R v Alletson*.<sup>39</sup> The Court was asked to consider the admissibility of what would have previously been considered “good character” evidence about the appellant, James Alletson. To be admissible under the Act, the evidence to be given by an Anglican vicar needed to be substantially helpful to the assessment of the veracity of Alletson, or relevant as propensity (character) evidence. The Court discussed the evidence in terms of whether it could help establish the likelihood that Alletson did not commit the offence:<sup>40</sup>

“Accepting for the purpose of argument that the proposed evidence of Reverend Woodman was propensity evidence, the issue for determination would be whether it would have tended to prove anything of consequence at the trial: s 7(3) of the 2006 Act. We do not believe that it would. The jury would have been asked to adopt the following chain of reasoning: the appellant was a religious person in his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.

“While we accept that the evidence proves that the appellant was religious in his younger days (possibly at the time the offending occurred) and at that stage appeared to have a strong religious faith, we do not see this as tending to prove anything in issue in the present case. *We do not see any logical connection between evidence of religiosity and general good character and the likelihood of a person having those characteristics committing sexual offences.* In our view the chain of reasoning which the jury would be asked to follow is no more logical than the obviously impermissible chain of reasoning that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls. In those circumstances we see no error on the part of the Judge and no miscarriage arising from the Judge’s decision not to admit the evidence.”

Phrased as syllogistic reasoning, the relevance of Alletson being religious as a young man could be assessed as follows:

“The evidence at issue: Alletson was a religious person in his younger days (minor premise).

“An issue in the case (which the evidence helps resolve): Alletson is unlikely to have committed sexual offending against young girls (conclusion).”

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39 *R v Alletson* [2009] NZCA 205. Compare, however, the finding in *Alletson* to the view of the minority in *Gharbal v R* [2010] NZCA 45 at [30]: “In this case the proposed evidence that Mr Gharbal is polite and honest appears to have no relevance to his propensity for committing rape. That he is not the sort of person to commit rape is pure opinion evidence rather than showing negative propensity in the sense set out by the Supreme Court in *Wi*. I accept, however, that it is arguable that a person who is old fashioned and religious may be seen by some in the community as having a tendency to act in a morally correct manner (and therefore not rape someone). This evidence may have some slight relevance on the test in *Wi*. Likewise, that Mr Gharbal never acted inappropriately to another woman he encountered could have some relevance (although totally lacking in particularity, given that it is unknown if he was ever alone with the witness). This means that some portion of the proposed character evidence may have been relevant and could have been led.”

40 *Ibid* at [43] and [44] (emphasis added).

Therefore, in order for the evidence to be relevant, a reasonable person must accept the following statement as either being the truth or having sufficient validity:

“People who were religious in their younger days are less likely to commit sexual offending against young girls (major premise).”

When the Court stated that there was not “any logical connection between evidence of religiosity ... and the likelihood of a person having those characteristics committing sexual offences”, it was rejecting the validity of the major premise and, therefore, the evidence was irrelevant for the purpose it was being offered.<sup>41</sup> By conducting a similar analysis the Court held that evidence of the home life of one of the complainants was also irrelevant:<sup>42</sup>

“We do not accept that the evidence of the complainants’ home environment was substantially helpful in assessing their veracity. The idea that a child who is subject to strict discipline and violence is more likely to seek attention by making a false allegation of sexual misconduct against a neighbour than a child from a better family environment does not appear to us to be valid. We do not see how the jury would have been assisted by this evidence.”

In order for syllogistic reasoning to be a helpful tool in assessing relevance, it need not be a requirement that the major premise is true – just that it has sufficient validity in order for there to be a logical connection between the evidence and what it is being offered to help establish. To use the words of Delisle, Stuart and Tanovich again:<sup>43</sup>

“The probative worth of the relevant evidence depends on the accuracy of the premise which supports the inference. Sometimes the premise will be indisputable, sometimes always true, sometimes often true and sometimes only rarely true.”

In this way, syllogistic reasoning may be of assistance not just in relation to the decision about relevance (where the evidence would be inadmissible if the premise had no or very little validity) but also in relation to assessing the probative value and weight of the evidence.<sup>44</sup> When used in this way it is one tool that the fact-finder may use in order to resolve matters of proof. There are, however, other ways of dealing with facts, both pre-

41 See also *R v Evans* [2010] NZCA 340 at [18] where the prosecution identified “a significant logical flaw” in the evidence of the expert: “The premise was characterised as an unsophisticated and dated view of sexuality and sexual offending; the more so in a case which concerns alleged offending consisting of low-level touching by someone who was in their mid to late teens at the relevant time. The proposed evidence is based on an assumption that sexuality, even in a teenager, is fixed and constant so that it can safely be assumed that someone who is of a heterosexual orientation is unlikely to commit offences of the present kind. Motivation borne of curiosity or experimentation, to name but two possibilities, can be safely ignored.”

42 *R v Alletson* [2009] NZCA 205 at [30].

43 Ron Delisle, Don Stuart and David Tanovich *Evidence: Principles and Problems* (8th ed, Thomson, Ontario, 2007) at 140. Compare Jenny McEwan in *Evidence and the Adversarial Trial Process: the Modern Law* (2nd ed, Hart Publishing, Oxford, 1998) at 10, who argues that the weakness of inductive reasoning is that “syllogistic reasoning depends on the correctness of those initial premises which logically proceed to the conclusion” (emphasis added).

44 “[F]orc[ing] into prominence the assumptions or generalisations relied upon [allows] their persuasiveness to be tested. Where they appear too widely stated, weak, or in need of supporting evidence, remedial steps can then be taken to reformulate the inference, to develop rhetorical arguments or to find supporting evidence, respectively”: Donald Nicolson “Facing facts: the teaching of fact construction in university law schools” (1996-1997) 1 E & P 132 at 145. See also Andrew Palmer “Why and How to Teach proof” (2011) 33 Sydney LR 563.

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trial and during the decision-making process, which are favoured by evidence scholars.<sup>45</sup> In the next part of this Chapter the challenges inherent in a model of relevance assessment that relies on the life experience of judges is considered.

## (1) *Whose experience? Ways of addressing consistency in admissibility decisions*

Drawing factual inferences, as illustrated by the discussion of the case of *Alletson*, can be informed by common sense generalisations that allow conclusions about admissibility (in the case of judges) or sufficiency of proof (in the case of fact-finders). For example, the absence of particular conduct (such as writing about sexual abuse in a diary) “is rendered meaningful by comparison with what we think we, or other people, or reasonable people, would do in the same situation”.<sup>46</sup> However, common sense “is highly acculturated and differentially distributed”.<sup>47</sup> Judges and fact-finders bring to their relative tasks their own beliefs and assumptions about the world, which include prejudices as well as knowledge:<sup>48</sup>

“Personal experience, and the beliefs which go with it, are moulded by all of the major psycho-sociological variables: class, sex/gender, age, ethnicity, nationality, and religion. There is consequently much variation between differently-situated groups and individuals, and this has important implications for some of the generalizations available to fact-finders in legal proceedings.”

In *Cross on Evidence* it is acknowledged, in relation to syllogistic reasoning, that “the most appropriate way of stating the major premise may be controversial: this depends on one’s experience of human nature and the world”.<sup>49</sup> Feminists, examining the gendered operation of the rules of evidence, observe that decisions, especially ones about relevance and probative value “are inextricably intertwined with [the] identity and standpoint” of the decision maker.<sup>50</sup> William Twining also notes that:<sup>51</sup>

“In respect of any ... generalization one should not assume too readily that there is in fact a ‘cognitive consensus’ on the matter. The stock of knowledge in any society varies from group to group, from individual to individual and from time to time. Even when there is a widespread consensus, what passes as ‘conventional knowledge’ may be untrue, speculative or otherwise defective; moreover ‘common-sense generalizations’ tend not to be ‘purely factual’ – they often contain a strong mixture

45 In the context of this project, it is not intended to provide an overview of the work of William Twining or Bernard Robertson, among others, or to describe the task of Wigmorean charting. Those interested in learning more about other models of factual analysis may find it helpful to start with ch 4 of Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) and chs 3 and 4 in Terence Anderson, David Schum and William Twining *Analysis of Evidence* (2nd ed, Cambridge University Press, Cambridge, 2005).

46 Christine Boyle “A Principled Approach to Relevance: the Cheshire Cat in Canada” in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 106.

47 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 146.

48 Ibid at 147.

49 DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington 2005) at [1.45].

50 Mary Childs and Louise Ellison “Evidence Law and Feminism” in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (Cavendish, London, 2000) 1 at 6.

51 William Twining *Theories of Evidence: Bentham & Wigmore* (Weidenfeld and Nicolson, London, 1985) at 146.

of evaluation and prejudice, as illustrated by various kinds of social, national and racial stereotypes.”

To the extent that these observations are accepted, decisions about admissibility may well be inconsistent and indeterminate as it is by no means the case that all judges have the same life experience and cultural background.<sup>52</sup> In fact, there have been recent efforts across many jurisdictions to ensure that there is a far less homogenous judiciary than was historically the case.<sup>53</sup> One way to avoid inconsistent decision-making may well be to resort to a principled approach to drawing inferences and, therefore, determining relevance. Such an approach has been suggested by Christine Boyle,<sup>54</sup> who focuses on the need for a mindful evaluation of any assumptions being made with respect to decisions about relevance:<sup>55</sup>

“No matter how logical the structure of analysis, assumptions about raped women, homosexual men and criminal suspects may distort analysis of both relevance and weight, and thus call particular inferences (or their absence) into question ... Is there any way in which this inevitable common-sense component, which feeds into assessments of relevance whatever the legal test, can be disciplined by law or even by good habits of advocacy and judging? In other words, is it possible to develop any criteria for assessing the legitimacy of hypothetical probabilities?”

Boyle suggests that although the basic test of relevance is logical relevance, “it should be tempered by precedent ... critical self-consciousness and the rejection of discriminatory or overly speculative common sense”.<sup>56</sup> Explicit attention to possible counter-assumptions may take the form of expert evidence<sup>57</sup> or judicial directions<sup>58</sup> in some cases, although this, of course, requires judicial recognition that assumptions are contestable.<sup>59</sup>

One of Boyle’s other criteria for assessing relevance also has merit and may be easier to implement: her observation that “common-sense assumptions should reflect insights drawn from the law of evidence as a whole”,<sup>60</sup> that is, there should be more reference to appropriate

52 See the comments of Sian Elias, Chief Justice of New Zealand in “Justice for One Half of the Human Race? Responding to Mary Wollstonecraft’s Challenge”(Address to the Canadian Chapter of the International Association of Women Judges’ Conference, Vancouver, Canada, 10 May 2011): “Although it is ... controversial to say so, I am of the view that ... different perspectives cannot but impact on substantive outcomes in judging”: at 9.

53 Terence Etherton “Liberty, the archetype and diversity: a philosophy of judging” (2010) PL 727 at 740–746. The Law Commission has recently reaffirmed the desirability of diversity in *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, Wellington, 2012) at [3.29]–[3.33] and [3.38].

54 Christine Boyle “A Principled Approach to Relevance: the Cheshire Cat in Canada” in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 95 and from 111.

55 Ibid at 111–112.

56 Ibid at 117.

57 See Chapter Eight at 8.4.1(3)(c) and Louise Ellison “Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases” (2005) 9 E&P 239.

58 See, for example, *R v D* [2008] EWCA Crim 2557, [2009] Crim LR 591 in which Latham LJ at [11] stated that a judge is “entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning”. See the discussion of the case in “Warning the jury of a rape myth” (2009) 13 E&P 154. In the New Zealand context, see judicial directions about children’s evidence in s 125; and *Taylor v R* [2010] NZCA 69 at [74]–[85].

59 Elisabeth McDonald and Yvette Tinsley “Evidence issues” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” To Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 371.



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precedents.<sup>61</sup> In Boyle's view there should be "reasonable consistency in the overall common sense of the law of evidence."<sup>62</sup> This call for consistency is explored in the next part, with reference to some admissibility decisions about a complainant's sexual experience.

(a) The admissibility of previous sexual experience: the need for a consistent approach

Elsewhere I have examined admissibility decisions about a complainant's previous sexual history by applying syllogistic reasoning to these decisions.<sup>63</sup> This exercise, which "force[d] into prominence the assumptions or generalisations relied upon",<sup>64</sup> exposed, in particular, over-reliance on contestable assumptions about male beliefs concerning women's sexual availability. These admissibility decisions operated, for example, to validate defendants' claims that they believed the complainants consented as they had been told that the complainants had consented to have sex with other people in the past.<sup>65</sup> Although the heightened relevance test in s 44 of the Act has been relatively effective in limiting the extent to which such evidence has been admitted, there are still cases in which evidence of the complainant's consensual sexual behaviour with people other than the defendant has been held to have "direct relevance" to the fact of consent or the defendant's belief in consent.<sup>66</sup>

Although it is not the case that a logical connection between previous sexual experience and consent is discovered in every case,<sup>67</sup> the fact that there are cases in which a logical connection is found raises a consistency concern. However, the focus here is not consistency of admission among such cases, but the refusal to admit evidence of an

60 Christine Boyle "A Principled Approach to Relevance: the Cheshire Cat in Canada" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 112.

61 Although the same piece of evidence, offered for the same purpose, may be relevant in some cases and not in others, so that there must always be a case-by-case analysis of relevance, as Zuckerman notes "past decisions can help to identify goals or policies which need to be pursued in the reception of evidence" (AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 52). I would go further and argue that past decisions should assist with what Boyle calls "self-consciously critical open-mindedness about fact-finding in context" (Christine Boyle "A Principled Approach to Relevance: the Cheshire Cat in Canada" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 117).

62 Christine Boyle "A Principled Approach to Relevance: the Cheshire Cat in Canada" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 113.

63 Elisabeth McDonald "The Relevance of Her Prior Sexual (Mis)Conduct to His Belief in Consent: Syllogistic Reasoning and Section 23A of the Evidence Act 1908" (1994) 10 *Women's Studies Journal* 41.

64 Donald Nicholson "Facing facts: the teaching of fact construction in university law schools" (1996-1997) 1 *E&P* 132 at 145; see also Terrence Anderson and William Twining *Analysis of Evidence: How to do things with facts* (Weidenfeld and Nicolson, London, 1991) at 67.

65 Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 *Crim LJ* 321.

66 See, for example, *Keegan v R* [2010] NZCA 247 at [63]: "[The complainant] was highly promiscuous and had been engaging in sexual activity for some time, including with older men. We formed the view that, in these circumstances, there were good prospects that an application under s 44 would have succeeded and that the material which emerged would likely be damaging to the complainant's account that the sexual activity with John Keegan was non-consensual." See also *R v Bourke* CA207/06, 15 August 2006, discussed in Chapter Five at 5.5.4.

67 See, for example, *W (CA247/10) v R* [2010] NZCA 561.

*absence* of sexual experience on the grounds that such evidence is irrelevant to the issue of consent. This issue has arisen in two recent decisions. In both cases the Court of Appeal held that evidence of the complainant's virginity prior to the alleged offending was irrelevant and inadmissible:<sup>68</sup>

“We are satisfied that the [trial] Judge was right to direct the jury to ignore the evidence of virginity. The evidence went to prior sexual experience, so was prima facie inadmissible under s 44 of the Evidence Act 2006. The premise of that section is that prior sexual experience, or the lack of it, says nothing about whether a complainant engaged in consensual sexual activity with a particular person in a particular setting.”

This is correct, but given that consent is to a person and not a set of circumstances, previous sexual experience should *always* be considered irrelevant to the issue of whether there was consent given on another occasion to a different person.<sup>69</sup> In this context there should be consistency of approach with regard to the drawing of logical inferences.<sup>70</sup>

The admissibility test under s 44(3) is, however, not one of “mere” relevance – it is a heightened relevance test and requires that the evidence is of “such direct relevance to facts in issue that it would be contrary to the interests of justice” to exclude it. This is another way of saying that the evidence needs to have sufficiently high probative value to outweigh its prejudicial (or unfair) effect on the proceedings – in this context, the effect on the complainant of having to answer questions about previous intimate relationships and the possibility that the fact-finder will make inappropriate assessments of credibility based on the complainant's sexual past.<sup>71</sup> In the absence of a specific admissibility rule these considerations could still form part of the admissibility decision by reference to probative effect. This inquiry has been codified in s 8 of the Act, and its operation is discussed in the following section.

### 2.3 Probative value versus prejudicial effect

Section 8 of the Evidence Act provides:

#### “8 General exclusion

- “(1) In any proceeding, the Judge must exclude the evidence if its probative value is outweighed by the risk that the evidence will —
- “(a) have an unfairly prejudicial effect on the proceeding; or
  - “(b) needlessly prolong the proceeding.
- “(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal

68 *Grace v R* [2011] NZCA 590 at [10]. In *Læf v R* [2011] NZCA 567 the Court stated at [16]: “C's prior sexual experience, or the lack of it, is not generally probative of whether she consented”.

69 Compare the outcome in these cases to those discussed in Charles Crinion “Adducing the Good Character of a Prosecution Witness” [2010] Crim LR 570.

70 The same point can be made comparing admissibility of previous sexual experience of a complainant with the previous sexual offending of a defendant, when both pieces of evidence are viewed as relevant to the issue of consent in the context of the alleged offending. See further Chapter One at 1.2.2(3).

71 See further Chapter Five at 5.5.4.

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proceeding, the Judge must take into account the right of the defendant to offer an effective defence.”

Section 8 should always be referred to even if there is also a specific admissibility rule which applies to the evidence at issue.<sup>72</sup> In particular, the inquiry into probative value that is required under s 8 will, if satisfied, mean that the evidence is of “sufficient” relevance or “legal” relevance, to use the previously discussed terminology. The interaction between ss 7 and 8 was noted by the Supreme Court in *Bain*.<sup>73</sup>

“While relevance determines ‘whether evidence could relate to an issue’, exclusion under s 8 is concerned with whether the connection between the evidence and proof is ‘worth the price to be paid by admitting it in evidence’ ...

“Even had our conclusion on relevance been that the evidence was reasonably capable of supporting proof of the existence of an inculpatory statement, we would be of the view that the disputed sounds should properly have been excluded in application of s 8(1). But, in considering the application of s 8(1), it is clear that the probative value of the evidence, when contrasted with its prejudicial effect, is slight. In our view the evidence falls short of being sufficiently probative for reasons already traversed in relation to relevance.”

The Court’s reference to “the price to be paid” for admission relates to the reason for the historical requirement for “legal” relevance – at some point the amount of evidence admitted must be limited by resources.<sup>74</sup> Even relevant evidence may be excluded if it is not of sufficient value to warrant referring it to the fact-finder. There are a number of reasons for limiting the amount of logically relevant evidence – including the timely administration of justice and the abilities of the human mind, given our “limited cognitive competence”.<sup>75</sup>

Of course the desire for timely dispute resolution should not dictate the amount of evidence admitted in all contexts. Where, as in New Zealand, the goal of the rules of evidence is the just determination of the proceedings,<sup>76</sup> the fairness of the process, and in particular fairness to the defendant in a criminal case, must be factored into any admissibility decision. Fairness to a defendant may point to either inclusion or exclusion of relevant evidence, depending on the evidence at issue and the impact (whether prejudicial effect or probative value) of that evidence. Fairness also must be taken into account in relation to the prosecution case and prosecution witnesses. The reference in s 8(1) to unfair prejudicial effect on the *proceeding* makes it clear that the prosecution may also seek to rely on the protections the general exclusionary rule offers.

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72 *Hudson v R* [2010] NZCA 417 at [43]. See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Volume 2, 1999) at [C56]; Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [7.55] citing *Pfennig v R (No 2)* [1995] HCA 7, (1995) 182 CLR 461 at 528; and *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [2] and [41].

73 *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [62] and [66] (references omitted).

74 AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 48; Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 33.

75 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 102.

76 See s 6 of the Evidence Act 2006 and the discussion in Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV6.01.

### 2.3.1 The inquiry into probative value

The probative value of a piece of evidence is, in essence, its weight – although decisions of weight are for the fact-finder as a matter of proof, and only rarely for the judge as a matter of admissibility.<sup>77</sup> The types of considerations that help determine probative value, weight and reliability are arguably the same,<sup>78</sup> although they may assume differing importance at various points in a proceeding. They include:

- (i) The type of evidence – is it direct testimonial evidence from someone who was at the place where something relevant occurred? If it is hearsay evidence (a statement made by someone who will not be cross-examined at trial), is it first or second-hand hearsay? Is it documentary evidence, for example, the record of a defendant's previous convictions? Is it identification evidence? Is it an admission?
- (ii) The characteristics of the witness giving the evidence (their accuracy, reliability and trustworthiness). If they observed something that occurred, how good is their eyesight? Do they have any reason to lie or withhold other information? Have they previously been convicted of perjury?
- (iii) The strength of the logical connection between the evidence and what is being offered to prove or help establish – is its relevance based on a sound, uncontentious premise?

These considerations are, of course, all contestable in themselves, depending on the particular context. Evidence of an admission (a statement against interest) may be presumed to be very reliable and compelling – and, therefore, highly probative – unless it becomes apparent that the person making the admission was under serious duress at the time. The earlier discussion has also exposed the contestability of relevance decisions, and decisions about the *strength* of an inference to be drawn from someone's conduct, for example, are no less controversial. One person's belief about the validity of a premise may well differ dramatically from another's. As with the relevance inquiry, decisions about the relative probative value and weight of a piece of evidence will not invariably be consistent, or able to withstand sustained scrutiny. Therefore, as with decisions as to relevance, determinations of probative value (as part of the admissibility inquiry) should be accompanied by a clear articulation of the matters that have been considered important. In this way it will be possible for a party to sensibly challenge the basis of the decision they disagree with, or accept the validity of the reasoning offered.

<sup>77</sup> See further Adrian Keane *The Modern Law of Evidence* (6th ed, Oxford University Press, Oxford, 2006) at 31.

<sup>78</sup> This claim is made with one caveat: although assessments of the weight of the evidence that are made by the fact-finder may well include the extent to which a piece of evidence is supported or contradicted by other evidence (leading perhaps to discounting the evidence entirely), this should not, in most cases, be part of the admissibility inquiry into probative value. This is both practical and principled. At the time an admissibility decision is made, it may yet be unclear to what extent there is other supporting or conflicting evidence. Further, it may be that the evidence is the only piece of evidence that supports the defence's theory of the case. The fact that there is no other supporting evidence should not of itself be determinative of probative value.

## 2.3.2 Identifying illegitimate prejudice

The probative value of the evidence must be considered in relation to its prejudicial effect; s 8 provides that the probative value of the evidence cannot be outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceedings. If it does so, it must be excluded.

Unfair prejudice may arise in a number of ways but one of the main focuses of the inquiry is whether the fact-finder, especially the jury, will use the evidence in an illegitimate way; or indeed, draw illegitimate inferences from *how* the evidence is presented (such as when a witness gives evidence via video link from outside the courtroom). This may include the risk the jury will give more weight to the evidence than it is deserving of;<sup>79</sup> speculate inappropriately about the meaning or significance of the evidence,<sup>80</sup> or be misled by the evidence.<sup>81</sup> The evidence may also unfairly predispose the fact-finder against the defendant,<sup>82</sup> for example, where the evidence is graphic and unpleasant.<sup>83</sup>

Illegitimate prejudice may also impact on the prosecution's case if there is defence evidence that poses an unacceptable risk of jury confusion<sup>84</sup> or impacts on the ability of prosecution witnesses to give their best evidence. This could occur through the substance of the questions being asked in cross-examination, or the nature of them. In relation to an unfair questioning process, s 95 of the Act, which introduced a bar on a defendant in a sexual case from questioning a complainant in person, has taken away the need for a judge to control prejudicial effect on the witness (or procedural unfairness) in that specific context.<sup>85</sup>

When undertaking the balancing exercise required by s 8, reference to other evidence in the case may occur.<sup>86</sup> This is most likely when the fact-finder can consider other admissible evidence in order to resolve an issue in the case.<sup>87</sup> However, sometimes the existence of other evidence will not diminish the significant probative value of the evidence in dispute.

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79 See *R v Bain* [2009] NZCA 1 at [207]. That is, the tendency of the evidence to persuade the jury to convict for reasons other than its logical force – see Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 49: “evidence that tends to appeal to the fact-finder’s sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base its decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than it would otherwise require.” See also DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [13.15].

80 In *Howell v R* [2012] NZCA 140 the lack of a proper evidential foundation for the prosecutor’s closing comments about the defendant’s lack of ability to cope and that he suffered from bi-polar disorder meant there was a real potential for the jury to fill in the gaps with inappropriate reasoning (at [34]).

81 See further Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV8.02.

82 This is specifically referred to in s 43(4)(a) of the Act, in relation to the admissibility rule for what was previously considered “similar fact” evidence. See also the discussion of *R v Moffat* [2009] NZCA 437, [2010] 1 NZLR 701 in Chapter Five at 5.5.2(2).

83 For arguments about gratuitous graphic evidence often occurring in relation to post-mortem photographs, see Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV8.02; *R v Cho* HC Auckland CRI-2007-090-979, 5 September 2008; *R v Smail* HC Christchurch CRI-2009-009-8464, 16 October 2009. However, unfair prejudice can also result from offering insufficiently relevant pictures of a victim prior to the receiving of the fatal injuries: *R v Rajamani* HC Auckland CRI-2005-004-001-2, 19 December 2005 at [61].

84 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [48].

85 See Chapter Three at 3.4.5(2).

86 See *Hudson v R* [2010] NZCA 417 at [44].

This was the case in *R v Weatherston* with regard to the photographic evidence of the many stab wounds inflicted as a result, the defendant claimed, of provocation by the victim, his ex-girlfriend:<sup>88</sup>

“[I]t is clear that the Crown should be able to place the photographs in evidence. The photographs are highly relevant to the issues at trial. That there may be other similar evidence or that the evidence could be presented in another form does not diminish their relevance. As [the trial Judge] said, the jury is entitled to the best evidence of the nature and extent of the injuries. Diagrams and words are not an adequate substitute ... We accept the Crown’s submission that it has selected the photographs carefully to minimise as much as possible the prejudicial effect.”

Making an assessment of whether the fact-finder may use the relevant evidence in an inappropriate way will no doubt require judges to call on their own sense of disgust or outrage when viewing or hearing the evidence in dispute. Judges who have been appointed to the bench after many years as criminal barristers may have stronger intestinal fortitude than many members of a jury – in which case, how will they really know how 12 relative strangers will react? Or for that matter, how do judges know, or reasonably suspect, that the jury will place inappropriate weight on a piece of evidence, to such an extent that jury directions will be ineffective? Again, this is a decision for which judges must rely on their own knowledge and life experience – which may be very different life experience from that of the fact-finders in the particular case.<sup>89</sup> Are judges more likely to be overly-paternalistic when keeping evidence from the jury, or too robust – believing that the jury can be guided in its decision-making through directions and its own sense of fairness?

The inquiries into probative value and prejudicial effect are, after all, aimed at the same goal – the just determination of proceedings, or, in the criminal context, “the dispensing of justice”.<sup>90</sup> To some, justice dictates that a fair trial for a defendant in a criminal proceeding should be the primary goal, so that evidence should be excluded when there is a risk of unfairness – not just when the prejudicial effect outweighs the probative value.<sup>91</sup> To others, justice requires something more like free proof,<sup>92</sup> where the fact-finder is also provided with the information to enable them to appropriately weigh up the information they are given.<sup>93</sup>

“A more effective way of combating prejudice would be to bring into the open the scope of prejudice created by evidence of past criminal record and strive to persuade juries that the principles of criminal justice, which require resisting prejudice, reflect

87 See further Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV8.02(1)(a).

88 *R v Weatherston* [2009] NZCA 267 at [29]–[30].

89 DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [3.2].

90 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 587.

91 Don Mathias “The Accused’s Right to a Fair Trial: Absolute or Limitable?” [2005] NZL Rev 217.

92 See further Chapter Five at 5.2.2.

93 AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 245. It should be noted here that lay assessors in a number of civil law jurisdictions know of the defendant’s previous convictions before they reach a verdict as there is no distinction between the hearing as to guilt and the sentencing phase: see, for example, discussion of Swedish criminal procedure in Elisabeth McDonald and Yvette Tinsley *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 501.

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their own perceptions of justice. If members of the jury are made to understand this, they would be better able to resist the temptation of convicting because of the accused's bad character."

## 2.3.3 Needless prolonging of the proceedings

Section 8 also allows the weighing of probative value against the extent to which the evidence will *needlessly* prolong the proceeding – that is, does the evidence make a significant contribution to what is already known to justify the use of time in hearing and considering it? The need to limit evidence because of time constraints should be a relatively simple criterion to apply. This inquiry could be used to restrict the number of witnesses;<sup>94</sup> to restrict the amount of questioning on a particular point; to limit the amount of evidence; or, to achieve any other goal that finds its basis in time restrictions – for example, whether a witness must travel and thereby delay the trial in order to give evidence in person as opposed to telephone or video link.<sup>95</sup> The focus of the inquiry should be on the qualifier "needlessly";<sup>96</sup> especially in criminal proceedings when dealing with evidence offered by the defendant, or evidence that is relevant to their theory of the case or their defence.<sup>97</sup>

## 2.3.4 Fairness to the defendant

Section 8(2) requires the judge to take into account the "right of the defendant [in a criminal proceeding] to offer an effective defence" when undertaking the balancing test in s 8(1)(a).<sup>98</sup> Although s 8(2) would not require admission of evidence when its unfairly prejudicial effect on the proceeding clearly outweighs its probative effect, where there is a close decision, s 8(2) might mean a judge would be more inclined to admit evidence offered by the defence or exclude evidence offered by the prosecution. Some argue that s 8(2) does not give adequate weight to the fair trial rights of a defendant, as the section seemingly allows admission of evidence when the probative value and prejudicial effect of the evidence are in equilibrium.<sup>99</sup> It is suggested, however, that it is in such cases that s 8(2) should operate to exclude the (problematic) evidence unless adequate directions can be given.

## 2.3.5 Is a meaningful balancing possible?

The requirement to balance probative value against prejudicial effect is not without critics, as it is observed that there is no common unit to which both concepts can be reduced.<sup>100</sup> Colin Tapper argues that one concept exists in the "realm of emotion, and the other in that

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94 See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV8.05 discussing the need to limit the number of "character" witnesses who would give similar, repetitive evidence.

95 See *R v Foreman (No 17)* HC Napier CRI-2006-041-1363, 21 May 2008 at [10].

96 *R v Bain* [2008] NZCA 585 at [30]: "[I]he appellant's evidence contains what on the Crown case are admissions as to circumstantial facts that are material to its case. In some instances, there is other evidence available to the Crown which covers all or some of the same ground, but that does not detract from the relevance of the evidence. Nor does it justify the invocation of s 8(1)(b) of the Act."

97 See *Davidson v R* [2008] NZCA 410 in which the whole of a complainant's first videotape was not played at trial, even though the defence wish to draw attention to later inconsistencies. The Court of Appeal held that this was an incorrect application of s 8(1)(b); see also Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 8–9.

98 This inquiry reflects s 25(a) and (e) of the New Zealand Bill of Rights Act 1990.

99 See Don Mathias "Probative value, illegitimate prejudice and the accused's right to a fair trial" (2005) 29 *Crim LJ* 8 at 20.

of logic” and if prejudicial effect means the risk that the fact-finder will give it greater (or illegitimate) weight than its true value, then the process is meaningless as:<sup>101</sup>

“[if] there is no difference between the true value of a piece of evidence and its probative force, there is nothing left to balance since the probative force of the evidence has already been taken into account in determining whether there is any prejudicial effect at all.”

Aside from whether a meaningful balancing exercise can be undertaken, there may also be little difference between the investigation into logical relevance and the identification of prejudice. One explanation of prejudice has been stated the following way:<sup>102</sup>

“Prejudice, in the evidentiary context, means the drawing of an inference ... along an impermissible chain of reasoning – not one of logic, commonsense and experience, but one of hunch, gut-reaction and lack of logic. It is the reaching of a conclusion for the wrong reason and whether that conclusion is ‘right’ or ‘wrong’ is quite immaterial.”

As discussed above, however, decisions about relevance may well be based on “hunch” and “gut-reaction” and when exposed as such should render the evidence irrelevant. Identification of sufficient relevance, like prejudice, depends on the issues raised, the arguments advanced and the means of proof available.<sup>103</sup>

If there is no significant difference between the inquiry into probative value and prejudicial effect,<sup>104</sup> such that talking of a balancing exercise is disingenuous, there certainly must still be an identification of the probative value of the evidence under the rubric of the s 8 analysis. This investigation should also identify any illegitimate prejudice – which may lead to exclusion of the evidence. There will invariably be debate as to when the existence of prejudice should lead to exclusion, but this is a different concern from the efficacy of a “balancing” exercise.

The value of a legislated rule such as s 8, which requires consideration of probative value and prejudicial effect in relation to *all* admissibility decisions, is that it encourages transparent decisions about “legal” relevance – and the consequent sensible articulation of the reasons for excluding, or admitting, certain pieces of evidence. To use the words of Roberts and Zuckerman, a two-stage test may well avoid the use of “a conveniently

100 See the discussion in respect of s 43 in Richard Mahoney “Evidence” [2010] NZL Rev 433 at 441–442: “What is easy to forget, but never should be forgotten, is that in adopting the admissibility test of probative value outweighing prejudicial effect, the Act is employing nothing more than a *metaphor*. Apples and oranges can actually be weighed against each other on a real-life scale, but there is no equivalent available for probative value and prejudicial effect. Thus the metaphor enshrined in [the] s 43(1) [balancing test] does more harm than good if it instils a complacency that there is any real substance in the weighing up process or that completion of that process has somehow taken care of the prejudicial effect that *continues undiminished* after negative propensity evidence has been admitted.”

101 Colin Tapper “The Law of Evidence and the Rule of Law” (2009) 68 CLJ 67 at 72 (footnote 22).

102 Alan W Mewett “Editorial: Prejudicing an Accused” (1992) 34 Crim LQ 385.

103 See Colin Tapper’s discussion of the judgment of McHugh J in *Pfennig v R* (No 2) [1995] HCA 7, (1995) 182 CLR 461 at 509 in “Dissimilar Views of Similar Facts” (1995) 111 LQR 381 at 384.

104 “[T]he two elements, probative value and prejudicial effect, tend to overlap rather than being discrete items that can be contrasted”: Don Mathias “Probative value, illegitimate prejudice and the accused’s right to a fair trial” (2005) 29 Crim LJ 8 at 19.



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capacious conceptual dustbin into which rejected evidence can be tossed without any further explanation for its exclusion”.<sup>105</sup>

In New Zealand, the codification of a relevance inquiry, and a general exclusionary rule,<sup>106</sup> has encouraged clear and principled thinking about contestable evidence. The Supreme Court has provided leadership in this regard by analysing admissibility decisions in terms of purpose, relevance and probative value. Evidence has been excluded on the grounds of irrelevance, and the Court has demonstrated how the inquiry into purpose allows identification of the applicable admissibility rule. Not everyone will agree with the outcome of this process,<sup>107</sup> but the “going straight to basics”<sup>108</sup> approach, to use the words of Lord Cooke, has much to commend it in terms of transparent decision-making.

## 2.3.6 Reference to s 8 after considering a specific admissibility rule: some examples

### (1) *Propensity evidence about a defendant in a criminal proceeding*

Even though s 8 must always be the final inquiry before determining admissibility, there has been some debate about whether this is necessary when the specific admissibility rule contains an inquiry into prejudicial effect.

The focus of this discussion has been s 43(1) of the Act,<sup>109</sup> which provides that propensity evidence offered by the prosecution about a defendant in a criminal proceeding is only admissible “if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant”.

There are two differences between s 43(1) and s 8. First, the focus in s 43 is on the impact of prejudice on the *defendant*, whereas s 8 requires evaluation of the prejudicial effect on the *proceeding*, therefore, prejudice to other witnesses and the prosecution case can be taken into account.<sup>110</sup> Secondly, where the probative value and prejudicial effect are equal, prejudicial effect will not *outweigh* the probative value, therefore the evidence would not require exclusion under s 8(1)(a). However, the same evidence should be excluded under s 43(1).

In *Mabomed v R*,<sup>111</sup> the minority of the Supreme Court expressed the view, while noting the difference in the persuasive burden, “that there is little or no practical difference between the s 8 and s 43 balancing tests”.<sup>112</sup> However, there remains a need to consider s 8, even

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105 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 107.

106 Section 8 is an exclusionary *rule*, not an exclusionary discretion: see Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [20] and Chapter One at 1.2.2(1).

107 As Paul Roberts and Adrian Zuckerman (*Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) eloquently observe at 588: “Fine-grained analysis of the facts of individual cases coupled with contextual, and necessarily somewhat speculative, evaluations of potential prejudice might conceivably lead reasonable minds to divergent conclusions.”

108 *R v Baker* [1989] 1 NZLR 738 (CA) at 741. See also Casey J in *R v Smith* [1989] 3 NZLR 405 (CA) at 410.

109 The issue has primarily been discussed in the context of evaluating admissibility decisions that were made only with regard to ss 7 and 8 as opposed to s 43.

110 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV41.02(6).

111 *Mabomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

112 *Ibid* at [67].

when a decision has been made under s 43, or any other section, as it requires consideration of fairness in the round. The view expressed by the Supreme Court in *Morgan v R*, in the context of the evidence from a hostile witness, should be noted in this regard:<sup>113</sup>

“Parliament has legislated to make previous statements of a hostile witness admissible as proof of their contents without adoption, presumably on the basis that the witness will be subject to cross-examination. The reality of that premise may differ from case to case. Parliament’s policy decision should not be undermined by too ready a resort to s 8. It certainly should not be undermined on any generic basis. The ultimate question will always be whether the evidence is unfairly prejudicial *in all the particular circumstances of the case*, of which opportunity for realistic cross-examination will always be important.”

### (2) *Hearsay evidence*

In the context of hearsay evidence,<sup>114</sup> s 8 remains an important consideration even after the inquiries into unavailability and reliability required by s 18 have been made. It is s 8 that allows consideration of the impact of a lack of cross-examination of the maker of the hearsay statement, as well as the significance of any conflicting or supporting evidence. Neither of these matters, which may well be of some importance, are easily accommodated by the s 18 inquiry into the circumstances relating to the making of the hearsay statement.

If the hearsay evidence is a “business record”, the exception for admitting such statements in s 19 does not expressly refer to a reliability inquiry. In such cases, s 8 will have a more important role to fulfil, as the analysis of the probative value (sufficient relevance) of the evidence will be very similar to an inquiry into whether the evidence is sufficiently reliable. The significance of the inability to cross-examine the maker will then form part of the consideration of potential prejudicial effect (either to the prosecution or the defence).

### (3) *Evidence of veracity*

With veracity evidence,<sup>115</sup> the relevant inquiry is likely to be s 8(1)(b) as it is this aspect of the exclusionary rule that has, along with s 37, assumed the role previously fulfilled by the collateral issues rule.<sup>116</sup> The same may be said of propensity (previously “good character”) evidence about persons other than the defendant in a criminal proceeding; although such evidence is permissible under s 40, it may well not be sufficiently probative in many cases. Section 6(e) of the Act also reinforces the importance of controlling the amount of evidence that is admitted to help establish a particular point. It may also be the case that repetitive evidence about a witness’s veracity will fail to meet the substantial helpfulness requirement in s 37.

### (4) *Propensity evidence about a complainant in a sexual case*

Section 44 governs the admissibility of evidence about the sexual experience of a complainant in a sexual case.<sup>117</sup> The admissibility rule is that such evidence must be “of such direct relevance to facts in issue ... that it would be contrary to the interests of justice”

113 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [41] (emphasis added).

114 See further Chapter Four at 4.4.2.

115 See further Chapter Five at 5.2.1.

116 See further Chapter Five at 5.4.1(4).

117 See further Chapter Five at 5.5.4.

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to exclude it (s 44(3)). The section does not, therefore, specifically refer to fair trial issues with regard to the complainant or other prosecution witnesses – that is, not to be exposed to unnecessarily distressing and embarrassing questions. This is where s 8(1)(a) may still have a role to play with its focus on the prejudicial effect on the *proceeding* – given that a distressed complainant is unlikely to give their best evidence.

## 2.4 The role of warnings

Even when the evidence has been held to have sufficient probative value in the context of the case, there may still be a need for a direction to be given to the jury as to its appropriate use during the fact-finding process – or a trial judge sitting alone may self-direct on matters of weight. The use of judicial directions warning a jury against illegitimate reasoning could well allow the admission of evidence under s 8, even where some potential prejudicial effect has been identified.<sup>118</sup> Trial judges should instruct juries in accordance with the principles enshrined in ss 7 and 8:<sup>119</sup>

“[I]f the application of the balancing test ... leads to the admission of a significant quantity of prejudicial material, that will not by itself lead to a miscarriage of justice. It is the responsibility of the Judge to direct the jury so as to focus the jury on the probative value of the evidence, and to ensure that it is not used in an illegitimately prejudicial way. Clearly, the greater the volume of the prejudicial material, the more onerous the task for the trial Judge in framing appropriate directions to the jury on prejudice.”

Other directions or warnings may be given when specific admissibility rules are satisfied, for example, when hearsay evidence (s 122) or visual identification evidence (s 126) is admitted. The content and scope of those warnings is discussed in the Chapter that considers the particular admissibility provision.

## 2.5 The weight of the evidence

As discussed in Chapter One, once evidence has been admitted, the weight, or probative value, accorded to that evidence is a matter for the fact-finder. The judge’s role in assessing probative value, or “sufficient” relevance, is one of admissibility and a question of law. The ultimate weight accorded to the evidence is a question of fact.<sup>120</sup> Weight, like relevance, is a question of degree. Evidence may have minimal probative value in relation to the facts in issue or may be virtually conclusive proof of them. The fact-finder may also place different weight on the evidence than the judge did when making the admissibility decision. This may be because of their different world-view or because they are in a position to consider all the evidence at the same time and, therefore, factor in the existence of supporting or contradictory evidence into their assessment of weight.

## 2.6 Summary

There are at least three essential steps required for every admissibility decision. There may well be more if a specific admissibility rule also applies to the evidence in question, although

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118 See *Mussa v R* [2010] NZCA 123.

119 *Hudson v R* [2010] NZCA 417 at [44] (while taking care not to usurp the jury’s role as fact-finder).

120 Adrian Keane *The Modern Law of Evidence* (6th ed, Oxford University Press, Oxford, 2006) at 31.

specific rules primarily operate to give more directive content to the fundamental inquires of relevance and probative value.

The steps in an admissibility inquiry, once the evidence at issue is identified, are:

- (1) Identify the purpose of offering the evidence.
- (2) Ask whether the evidence is relevant for this purpose. Apply the definition in s 7(3). It may be useful to construct a syllogism to clarify the underlying premise and to assess its validity.
- (3) If the evidence is relevant and no other specific admissibility rules apply, undertake the balancing exercise in s 8. Consider the probative value the evidence has for the purpose for which it is being offered (the nature of the evidence, the strength of the logical connection and any factors relating to the witness). Identify the risk of any illegitimate prejudicial effect on the proceedings – will the fact-finder give the evidence undue weight, be confused or misled by the evidence or be predisposed to favour one side to the dispute? Will the admission of the evidence needlessly prolong the proceeding?

If there is a specific admissibility rule, s 8 will again need to be considered once that rule is satisfied. A warning may be required in relation to the appropriate use or weight of the evidence. It is then the role of fact-finders to use the evidence in the way they see fit as part of the decision-making process they adopt.

The following chart may prove a helpful reminder of these steps.

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