The fundamentals of admissibility: purpose, relevance and probative value

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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.[1] 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.[2] 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,[3] but the reverse is not true: irrelevant evidence is never admissible. Evidence may be "conditionally" relevant, subject to further information,[4] but irrelevant evidence should never form part of the decision making process.[5] 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 paper these essential admissibility considerations are discussed. First, what does relevance mean and how does the determination of relevance impact on matters of proof? Second, 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, 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.

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[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": New Zealand Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [38].

[2] See s 6 of the Evidence Act 2006.

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

[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.

Relevance and purpose

In order for evidence to be admissible it must be relevant. Relevance is, however, a relational concept.[6] 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 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 about the extent of their disposable income. The identification of purpose is therefore the essential prerequisite to determining relevance:[7]

> [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.

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.[8] 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).[9]

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 is not satisfied.

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

[7] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 100. See for example the admission of evidence about gang membership, which turns on purpose and probative value: *Hurinui v R* [2014] NZCA 290 at [16] – [20]; *R v CARC* [2014] NZHC 709 at [82] – [94]; *R v Katipa* [2017] NZHC 1066 at [78] ff. In *R v Leiv* [2017] NZHC 830 photographs of some of the defendants in gang regalia were admitted (at [30] ff).

[8] *R v Gwaze* [2010] NZSC 55, [2010] 3 NZLR 734 from [28] gives an example of this inquiry.

[9] 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.

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 use of the evidence in the decision making process is required.[10] There are fewer limited use rules under the Act than at common law, 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.[11] Evidence may therefore be admissible if used for one purpose but not if used for another.[12]

If there is no specific applicable admissibility rule then the evidence may be admitted if relevant for the purpose it is offered, subject to it also having sufficient probative value (the s 8 inquiry).[13] 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.[14] In most jurisdictions, especially those in which the law of evidence has been recently reviewed and substantially codified, the two inquiries are 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.[15] This is the situation in New Zealand.

A definition of relevance

Section 7 of the Evidence Act 2006 provides:

> 7 Fundamental principle that relevant evidence admissible
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> (1) All relevant evidence is admissible in a proceeding except evidence that is–
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> (a) inadmissible under this Act or any other Act; or
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> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.

[10] See for example *R v Chahil* [2010] NZCA 244 and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV7.06(1).
[11] New Zealand Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [C9]. See also *Keefe v R* [2014] NZCA 113 where propensity evidence admissible only for a limited purpose/use (self-defence).
[12] Graham B Roberts "Methodology in Evidence – Facts in Issue, Relevance and Purpose" (1993) 19 Monash University LR 68 at 80.
[13] For example, the admissibility of improperly obtained evidence in civil proceedings could be managed by reference to ss 7 and 8 – which is consistent with the approach of Elias CJ in *Marwood v Commissioner of Police* [2016] NZSC 139.
[14] Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 7 – 15.
[15] Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 3.

(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)),[16] but that relevant evidence may still be inadmissible or excluded under the Evidence Act 2006 or any other Act (which presumably should include secondary legislation such as rules and regulations).[17] If there are no specific admissibility rules that govern the particular evidence, it may be admitted subject to ss 7 and 8.[18]

It may also be the case that relevant evidence could be excluded under a residual discretion. In *Marwood v Commissioner of Police* the Supreme Court:

1. confirmed that evidence excluded for breach of the New Zealand Bill of Rights Act is evidence which may be excluded, even though relevant, "under any other Act" for the purposes of s 7(1)(b) of the Evidence Act;[19] but
2. left open whether there is a residual discretion to exclude evidence where its admission would be unfair (but s 30 of the Evidence Act does not apply).[20]

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

[16] See for example *Gore v R* [2015] NZCA 370 at [24 – [26]. Section 7 is the "first enquiry as regards admissibility": *Keil v Police* [2017] NZCA 430 at [19].

[17] But not the High Court Rules, for example – see s 5 of the Evidence Act 2006 and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV7.01.

[18] There was some debate about the role of s 7 with regard to ss 45 and 49 of the Act: see the Law Commission's suggested resolution in *The Second Review of the Evidence Act 2006* (R142, 2019) at [4.83] and [8.30].

[19] *Marwood v Commissioner of Police* [2016] NZSC 139 at [35] – [38] and [61]. The Law Commission has queried the Supreme Court's approach. It is considering whether the Evidence Act should contain an express provision dealing with the admissibility of improperly obtained evidence in civil proceedings in its Second Review of the Evidence Act 2006 (LC 2018 *Issues Paper* at [7.65] – [7.70]). This does not apparently address the broader residual discretion to prevent unfairness contemplated by the Court of Appeal in *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [52] which was a criminal proceeding.

[20] *Marwood v Commissioner of Police* [2016] NZSC 139 at [32]. Cf *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [52] where the Court of Appeal considered that there was such a residual discretion, although it did not exercise it and *Dabous v R* [2014] NZCA 7 at [16].

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.

"Mere" or "logical" relevance and the inquiry into "sufficient relevance"

The New Zealand Court of Appeal's decision in *R v Smith*[21] has been cited as authority for the proposition that the test in s 7(3) sets a "low threshold".[22] 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 relevance."[23] 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."[24] 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),[25] unlike mere logical relevance, is "a 'two-dimensional' concept, introducing the dimension of quantum which merely logical relevance lacks."[26] 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,[27] the requirement of "sufficient" relevance or a lack of remoteness traditionally found favour in New Zealand jurisprudence,[28] as is apparent in the following extract:[29]

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[21] *R v Smith* [2007] NZCA 400.
[22] See for example *R v Neale* HC Auckland CRI-2007-004-003059, 16 September 2008 at [86].
[23] *R v Smith* [2007] NZCA 400 at [16].
[24] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 101.
[25] Australian Law Reform Commission *Evidence Reference Research Paper No 7: Relevance* (ALRC RP7, 1982) at 9.
[26] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 104.
[27] Andrew Choo "The Notion of Relevance and Defence Evidence" [1993] Crim LR 114 at 116.
[28] See *R v Baker* [1989] 1 NZLR 738 (CA) at 741.
[29] *R v Wilson* [1991] 2 NZLR 707 (HC) at 711 (emphasis added).

> [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."[30] 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 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.[31]

That ss 7 and 8 perform different functions was clarified by the Supreme Court in *Bain v R*[32] and *Wi v R*.[33] In *Wi* Tipping J, giving reasons for the Court, stated that s 7(3) does not set out an "exacting test":[34]

> … 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).[35] 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.

The role of logic, experience and knowledge: syllogistic reasoning

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[30] New Zealand Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [65].
[31] Subject, of course, to any other specific admissibility rules.
[32] *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.
[33] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.
[34] At [8] (emphasis added).
[35] See further *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [45].

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.[36] As relevance has historically been viewed as largely a matter of "logic and common sense",[37] it is the judge's own knowledge of human conduct that is relied on to resolve of relevance determinations - based on premises that may not always be articulated.[38]

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."[39]

The classic example of such syllogistic reasoning is:[40]

> 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 worldview of the decision-maker. Delisle, Stuart and Tanovich make the argument for the use of syllogistic reasoning in this way:[41]

> 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*

[36] Jenny McEwan "Reasoning, Relevance and Law Reform: the Influence or 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.
[37] *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.
[38] Christine Boyle "A Principled Approach to Relevance: the Cheshire Cat in Canada" in in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 111.
[39] DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at 25.
[40] See DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at 25; and Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 143.
[41] Ron Delisle, Don Stuart and David Tanovich *Evidence: Principles and Problems* (8th ed, Thomson, Ontario, 2007) at 140 (first emphasis added).

> *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.

Neil MacCormick's account of the judicial syllogism emphasises an important function of the role of logic in the law: syllogism gives structure to legal reasoning and determines the object of rhetorical thinking.[42]

Syllogistic reasoning was applied by the New Zealand Court of Appeal in *R v Alletson*.[43] 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:[44]

> 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.

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[42] *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005).

[43] *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."

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

> 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)

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 there was not "any logical connection between evidence of religiosity … and the likelihood of a person having those characteristics committing sexual offences", their Honours were rejecting the validity of the major premise and therefore the evidence was irrelevant for the purpose it was being offered.[45] By conducting a similar analysis the Court held that evidence of the home life of one of the complainants was also irrelevant:[46]

> 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

[45] 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."

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

> 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 *R v Katipa* Downs J expressly used syllogistic reasoning when considering an application to admit veracity evidence.[47] His Honour's judgment usefully shows that, while syllogistic reasoning may clearly show that evidence is not admissible (as in *R v Alletson*), it is not a complete answer even where there is a proper connection between the major and minor premise. Indeed, even with a valid chain of reasoning, courts will still need to exercise their judgment as to which items of evidence will be admissible on a particular point. Downs J considered that: a person with a history of dishonesty-related offences may be less likely to tell the truth during testimony (major premise); T has a history of dishonesty-related offences (minor premise); and T may be less likely to tell the truth during his testimony (about the defendant) (conclusion). On this basis Downs J admitted evidence of 11 previous convictions for dishonesty, did not admit evidence of two other convictions sought to be admitted as not obviously relating to dishonesty, did not admit Police intelligence records about T's actual and suspected dishonesty offending; and did not admit evidence of active dishonesty charges faced by T.[48]

While syllogistic reasoning is useful a tool to elucidate the links in the chain of reasoning establishing relevance, it is not formally required. To satisfy the test of relevance, s 7(3) requires only that the evidence have a "tendency" to prove or disprove a material proposition in the proceeding; it need not prove or disprove it absolutely. In particular, 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.[49] To use the words of Delisle, Stuart and Tanovich again:[50]

> 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. When used in this way it is one tool that the fact-finder may use in order to resolve matters of proof, but there are a number of other ways of dealing with facts.[51]

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[47] *R v Katipa* [2017] NZHC 2169 at [10].
[48] *R v Katipa* [2017] NZHC 2169 at [10]-[23].
[49] See William Young J in *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [122](c).
[50] 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).
[51] For example the work of Bernard Roberston, William Twining and Wigmorean charting discussed in Chapter 4 of Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010), at 166ff, and elsewhere.

It may also be the case that a polysyllogism may be of assistance when more than one logical step is needed to reach the desired conclusion. In such cases the conclusion of one syllogism supplies a premise of the next syllogism. For example:[52]

All men are mortal
Socrates is a man
Socrates is mortal

All mortals can die
Socrates is a mortal
Socrates can die

People who can die are not gods
Socrates can die
Socrates is not a god

Polysyllogisms may assist when there is seemingly missing proof – an absence which may be met by drawing an inference.

Probative value versus prejudicial effect

Section 8 of the Evidence Act 2006 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 proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

Section 8 should always be referred to,[53] even if there is also a specific admissibility rule which applies to the evidence at issue.[54] In order to overcome the final obstacle in s 8, it is necessary to:

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[52] RJ Alderset, S Clowney and JD Peterson "Logic for Law Students: How to Think Like a Lawyer" (2007) 69 U Pitt LR 1 at 9.

[53] *Hudson v R* [2010] NZCA 417 at [43]; *Keil v Police* [2017] NZCA 430 at [18]; *R v Kingi* [2017] NZCA 449 at [25]; *Ambler v R* [2018] NZCA 245 at [41]). See also New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 – Volume 2, 1999) at [C56]; New Zealand 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]. The Court of Appeal has recently expressed the view that there is no

1. Identify the probative value of the evidence;
2. Identify whether there is a risk the evidence will have an "unfairly prejudicial effect on the proceeding" (s 8(1)(a));
3. Identify whether there is a risk the evidence will "needlessly prolong the proceeding" (s 8(1)(b));
4. Consider whether any risk of "unfair prejudice" or "needlessly" prolonging the proceeding can be appropriately managed (eg by way of directions or the mode of presenting the evidence);
5. Determine whether the probative value of the evidence is outweighed by any (remaining) risk of an "unfairly prejudicial effect" on the proceeding, taking into account the right of the defendant to offer an effective defence.

While these matters should be addressed by counsel in advance of a trial, and could be the subject of pre-trial rulings where agreement is not reached, ultimately s 8 requires a trial judge to exclude any evidence that contravenes s 8.

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*:[55]

> 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.[56] 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 –

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special rule concerning the evidence of cellmate confessions – ss 7 and 8 will continue to govern such evidence, in line with *Hudson*: *Roigard v R* [2019] NZCA 8.

[54] There was debate about the role of s 8 with regard to ss 45 and 49 of the Act: see the Law Commission's suggested resolution in *The Second Review of the Evidence Act 2006* (R142, 2019) at [4.83] and [8.30]. Also the case of *Perry v R* [2018] NZCA 595 - not referred to in that Report.

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

[56] 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.

including the timely administration of justice and the abilities of the human mind, given our "limited cognitive competence".[57]

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,[58] 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.

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.[59] The types of considerations that help determine probative value, weight and reliability I suggest are the same,[60] although they may assume differing importance at various points in a proceeding. They include:

(i) The type of evidence – it is direct testimonial evidence from someone who was at the place where something relevance 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 it is being offered to prove or help establish – is its relevance based on a sound, uncontentious premise?

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

[58] See s 6 of the Evidence Act 2006 and the discussion in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV6.01.

[59] See further Adrian Keane *The Modern Law of Evidence* (6th ed, Oxford University Press, Oxford, 2006) at 31.

[60] This claim is made with one caveat: although assessments of the weight of the evidence which 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.

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.[61]

In *R v Hoggart*, the Court of Appeal considered what factors make up the inquiry into probative value for the purposes of the balancing exercise in s 8:[62]

> [73] Before turning to the proposed evidence, it is necessary to consider at the level of principle the matters that can properly be considered in the balancing exercise.
> In assessing the probative value of evidence for the purposes of admissibility, can the credibility of the witness and the reliability of the evidence be considered, or must it be taken at its highest on the assumption the jury will accept the evidence? Can delay be relevant in assessing the reliability of the evidence or any unfair prejudice that might be occasioned by its admission or must it be dealt with by judicial direction rather than exclusion?

After considering academic commentary and local and overseas jurisprudence, the Court concluded (in the context of considering the extent to which delay in making a statement impacts on probative value):

> [80] … In our view, the assessment of the probative value of the evidence is not always confined to consideration of how strongly its content (assuming it is accepted by the fact finder and taken at its highest) supports the inference sought to be drawn from it and the importance of that inference to prove the elements of the charge. In exceptional cases, where the evidence is incapable of bearing any significant weight because of serious and obvious concerns about its reliability or the credibility of the witness, this can properly be taken account of in the balancing exercise.

[61] For example, the clear reasoning advanced by the High Court judge was able to be challenged by the prosecution in *R v Derrick-Hardie* [2012] NZCA 316 at [10] ff.
[62] [2019] NZCA 89.

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 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 the *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 is it deserving of;[63] speculate inappropriately about the meaning or significance of the evidence,[64] or be misled by the evidence.[65] The evidence may also unfairly predispose the fact-finder against the defendant,[66] (for example where the evidence is graphic and unpleasant),[67] or allow the jury to jump to an "illegitimate conclusion".[68]

Application of the balancing test of s 8(1)(a) will be a highly contextual exercise based on: (a) the specific facts of the proceeding and the nature of the issues in dispute; (b) the specific role played by the challenged material in a party's presentation of evidence; and (c) the particular claim of unfair prejudice alleged by the party opposing admission of the challenged proof. For example, in the murder trial of *Heenan v R* the Court of Appeal ruled that, in the context of the Crown case, extensive proof offered by the

[63] 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].

[64] 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]). See also *KN (CA120/2013) v R* [2014] NZCA 233 at [49] regarding the lack of expert evidence to support the Crown's submission in closing that sexually abused children are more likely to sexually abuse others. Compare *H (CA515/2013) v R* [2014] NZCA 124 regarding reference to the impact of the defendant's ADHD.

[65] See further Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV8.03.

[66] 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.

[67] Arguments about gratuitous graphic evidence often occurs in relation to post-mortem photographs: see Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV8.06(1)(d); *R v Cho* HC Auckland CRI-2007-090-979, 5 September 2008; *R v Smail* HC Christchurch CRI-2009-009-8464,16 October 2009. See also the discussion of "dismemberment evidence" in *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [28] and criticism of the mode of admission by Scott Optican "Evidence" [2015] NZ L Rev 473 at 477. However unfair prejudice can also result from offering insufficiently relevant pictures of a victim prior to the receiving the fatal injuries: *R v Rajamani* HC Auckland CRI-2005-004-001-002, 19 December 2005 at [61].

[68] *Henning v R* [2012] NZCA 301 at [17].

prosecution of the defendant's tendency to be aggressive while intoxicated — and then to feign memory loss of his subsequent violent acts — carried little if any probative value as either propensity evidence admissible under s 43 or veracity evidence admissible under s 37.[69] Quashing the defendant's conviction owing to a miscarriage of justice, the Court stated that the evidence — which served mainly "to blacken Mr Heenan's character" — should have been excluded pursuant to s 8(1)(a).[70]

To similar effect is *Hiriaki v R*, a case involving serious violence inflicted by the defendant on his cousin's boyfriend.[71] In *Hiriaki* the prosecution offered evidence to attack the veracity of a defence witness (the defendant's partner) that revealed a history of assaults on her by the accused. However, as Simon France J observed, the limited probative value of the evidence — to suggest that the witness had lied because she was afraid of the defendant — was "heavily outweighed"[72] by the "overwhelmingly prejudicial" introduction of evidence that:[73]

> Mr Hiriaki was a violent person who had assaulted his girlfriend, had been the subject of police callouts, was the subject of a protection order and was a person who instilled fear in his partner.

Holding that s 8(1)(a) required the evidence to be excluded; the Court of Appeal quashed the defendant's conviction and ordered a new trial.

In *Leslie v R* the Court of Appeal was of the view that the answers by a suspected co-conspirator (Cording) to text messages sent by police officers impersonating the appellant (Leslie) were irrelevant as not being indicative of any past dealings, but were only reactive to fictitious police texts.[74] The Court of Appeal concluded that even if the texts were relevant they were inadmissible under s 8 (at [29]):

> It would be a challenge for the jury to separate Ms Cording's responses from the police fiction of Ms Leslie's involvement in the impersonated texts. It would be hard to dispel a false impression that Ms Leslie had a role in getting Ms Cording to come to Blenheim. Even if directions were given by the trial Judge, it would be a challenge for any juror to fairly weigh Ms Cording's texts as circumstantial evidence, bearing in mind that they are responding to false messages. It would be impossible to fairly assess them against the allegations of involvement in the transaction the previous day. Ms Leslie's ability to conduct an effective defence would be diminished in that there will be more pressure on her to give evidence to explain her position. She might be forced to give evidence on the basis of a police engendered fiction. That would be unfair.

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[69] *Heenan v R* [2013] NZCA 220.

[70] At [66]. See similarly *Evans v R* [2014] NZCA 103 at [44] (excluding under s 8(1)(a) evidence of a co-defendant's unwanted sexual advances to a third party as having low probative value in a sexual assault and kidnapping case and tending merely "to blacken [the co-defendant's] character in the eyes of the jury …").

[71] *Hiriaki v R* [2013] NZCA 419.

[72] At [29].

[73] At [27].

[74] [2018] NZCA 224 at [28].

In *R (CA129/2017) v R* the Court of Appeal considered that evidence of a complainant's self-harming behaviour and suicide attempt had been properly admitted at the trial of R, who was charged with multiple counts of sexual offending against the complainant and her twin sister.[75] The Court of Appeal discussed the prejudicial effect of the evidence (which was viewed as relevant to the complainant's behaviour after the alleged offending) and concluded (at [35]) that any risk of unfair prejudice had been adequately met with judicial direction (at [33]). Further, in the context of the overall trial it was only a minor piece of "a very prejudicial picture painted by the admitted facts".[76]

Illegitimate prejudice may also impact on the prosecution's case – if there is defence evidence that poses an unacceptable risk of jury confusion or distraction,[77] 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 unfair questioning process, s 95 of the Act, which introduced a bar on a defendant in a sexual case 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.

When undertaking the balancing exercise required by s 8, reference to other evidence in the case may occur.[78] This is most likely when the fact-finder can consider other admissible evidence in order to resolve an issue in the case. However, sometimes the existence of other evidence will not diminish the significant probative value of the evidence in dispute. 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:[79]

> [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.

Needless prolonging of the proceedings

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[75] [2018] NZCA 235.

[76] See also *R (CA158/2018) v R* [2018] NZCA 529 at [18].

[77] *R v Gwaze* [2010] NZSC 55, [2010] 3 NZLR 734 at [48]; *Black v R* [2012] NZCA 482 at [310]. "It can be argued that the exclusion of such highly relevant and important evidence would have an unfairly prejudicial effect on the proceedings so far as the Crown is concerned, because exclusion of the evidence would mean the end of the proceeding in respect of that charge": *K (CA332/2014) v R* [2014] NZCA 393 at [30].

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

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

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;[80] 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 by telephone or video link.[81] The focus of the inquiry should be on the qualifier "needlessly",[82] 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.[83]

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).[84] 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.[85] It is suggested, however, that it is in such cases s 8(2) should operate to exclude the (problematic) evidence unless adequate directions can be given.

In *K (CA332/2014) v R*, the Court of Appeal stated:[86]

> It is now well-established that, where the Court has determined that a provision in the Act renders evidence admissible that would otherwise be inadmissible, that fact alone will not be sufficient to bring s 8(2) into play, even if it affects the manner in which the defendant is able to offer an effective defence. The section

[80] See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV8.04 discussing the need to limit the number of "character" witnesses who would give similar, repetitive evidence.
[81] See *R v Foreman (No 17)* HC Napier CRI-2006-041-1363, 21 May 2008 at [10].
[82] *R v Bain* [2008] NZCA 585 at [30]: "[T]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."
[83] 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 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.
[84] This inquiry reflects ss 25(a) and 25(e) of the New Zealand Bill of Rights Act 1990.
[85] See Don Mathias "The Accused's Right to a Fair Trial: Absolute or Limitable?" [2005] NZL Rev 217.
[86] [2014] NZCA 393 at [28].

> requires the Court to weigh the probative value of the evidence, and balance it against any unfairly prejudicial effect that it may have on the proceeding. In this context the word "unfairly" has been interpreted as meaning "illegitimate".

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,[87] 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.[88] Second, 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 *Mahomed v R*,[89] 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."[90] However, there remains a need to consider s 8, even when a decision has been made under s 43, or any other section, as it requires consideration of fairness in the round.[91] 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:[92]

> 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

[87] 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.
[88] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV41.02(5).
[89] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
[90] Ibid at [67].
[91] See *Tatana v R* [2017] NZCA 64 at [18].
[92] *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [41] (emphasis added). See also *Tangiora v R* [2019] NZCA 115 at [32]ff.

> 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, 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).

In *Adams v R* the Court of Appeal concluded that, once hearsay was admissible pursuant to the s 18 test of reasonably assured reliability, the inability of the prosecution to cross-examine the maker of a hearsay statement offered by the defence would not pose any "risk of unfair prejudice to the Crown"[93] Moreover, the Court held that the evidence should be admitted "in order to allow the [defendant] to offer an effective defence".[94]

By contrast — although consistent with the policies underlying the provision — in *Clasen v Police* the High Court cited s 8(2) to reverse the conviction of a defendant in an offensive behaviour case based on the prosecution's offer of a hearsay statement identifying him as the perpetrator.[95] The statement was held admissible as a matter of law under s 18. Nonetheless, Venning J stressed that "[i]dentification was crucial to the case against the [defendant]" and, in the particular circumstances of the proceeding, "[c]ross-examination alone could have exposed the unreliability of the complainant's identification" for the jury.[96] Accordingly, while clearly relevant, the Court held that the hearsay evidence should have been excluded under the balancing exercise mandated by s 8(1)(a) and (2). Similarly in *Reynolds v R*, which concerned a charge of burglary, the Court of Appeal again excluded otherwise admissible visual identification evidence after applying section 8.[97]

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[93] *Adams v R [*2012] NZCA 386 at [51].
[94] At [52].
[95] *Clasen v Police* HC Auckland CRI-2011-404-108, 7 July 2011.
[96] At [17].
[97] *Reynolds v R* [2017] NZCA 61

(3) Evidence of veracity

With veracity evidence, 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. 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. 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 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 have a role to play with its focus on the prejudicial effect on the *proceedings* – given that a distressed complainant is unlikely to give their best evidence.

In *R v J (CA 693/2017)* the Court of Appeal found that the prosecutor's questions in examination-in-chief allowed the complainant to make a statement that showed her in a good light, and amounted to evidence that unfairly bolstered her credibility.[98]

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 though some potential prejudicial effect has been identified.[99] Trial judges should instruct juries in accordance with the principles enshrined in ss 7 and 8:[100]

> [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

[98] [2018] NZCA 343 at [58].

[99] See *Mussa v R* [2010] NZCA 123. A warning can also be significant in rare cases where jurors have looked at material in the court room which was not offered in evidence: see *Kitson v R* [2014] NZCA 634 at [25] and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315.

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

> 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.

Similarly in *Kumar v R* the Court of Appeal observed:[101]

> The trial Judge has a discretion as to whether or not to discharge a jury after a witness has disclosed illegitimate prejudicial material. Any decision will turn on the Judge's perception of how the trial process has proceeded to that point, and the likely effect on the jury of the evidence. An assessment has to be made whether a direction can cure the danger of illegitimate prejudice. An appellate court will not interfere lightly with the exercise of this discretion. It is often the case that a direction can remedy the prejudice. The Judge's direction may be adequate when it is made, but sometimes late developments in the trial will require the Judge to take further steps. There will be occasions when the prejudice is so severe that it is not possible for it to be remedied at all.

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.

Summary

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 it is being offered (the nature of the evidence, the strength of the logical connection and any factors relating to the witness) and identify the risk of any illegitimate prejudicial effect on the proceedings.

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.

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

[101] [2014] NZCA 58 at [26].