'Weighing Up Different Forms of Evidence — A View From the Court'

Justice Mark Weinberg — Victorian Court of Appeal[*]

1 Those who sit on administrative tribunals are constantly required to weigh evidence as they go about their task of reviewing decisions. Of course, tribunals are not courts. However, they often exercise powers which are judicial in nature.

2 Typically, tribunals are directed by the statutes by which they are constituted to avoid undue formality.[1] They are told that they are not bound by 'the rules of evidence'.[2] Indeed, they are told that they can inform themselves in any manner that they see fit.[3] Of course, expressions of that kind must be taken with a grain of salt. No one would suggest that tribunals, though entitled to inform themselves in any manner that they see fit, can decide cases arbitrarily. Although there are recorded examples of juries having come to their verdicts by the toss of a coin,[4] and even by consulting a Ouija board,[5] examples of that kind are, fortunately, both rare and extreme.

3 Many years ago, when I sat as a judge of the Federal Court, the bulk of the cases that came before me were migration matters. Some of them involved decisions of a body then known as the Migration Review Tribunal. The legislation that governed that body was highly prescriptive and complex. In many instances, little attention was given to the 'merits' of a claim, although the review process was described as 'merits review'.

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1 *Administrative Appeals Tribunal Act 1975* (Cth), s 33(1)(b) ('the AAT Act').

2 Ibid, 33(1)(c).

3 Ibid.

4 *Vaise v Delaval* (1785) 99 ER 44. See, generally, Murray Gleeson, 'The Secrecy of Jury Deliberations' (1996) 1(2) *Newcastle Law Review* 1; and Jill Hunter, 'Jury Deliberations and the Secrecy Rule: The Tail that Wags the Dog?' (2013) 35(4) *Sydney Law Review* 809.

5 *R v Young* (1995) 2 Cr App R 379. See, generally, Jeremy Gans, *The Ouija Board Jurors: Mystery, Mischief and Misery in the Jury System* (Waterside Press, 2017).

4 Other migration cases came from the Refugee Review Tribunal, a body which, of course, no longer exists. Rather, almost all migration matters are now dealt with by the Migration and Review Division of the Administrative Appeals Tribunal ('the AAT'). That Division engages in merits review from initial determinations by what is now known as the Department of Home Affairs ('the Department').

5 I have only a limited understanding of the procedures followed by the Migration and Review Division. I gather, however, that once a decision adverse to a claimant for a visa is made by a Delegate of the Minister, there may then be an opportunity for internal review, normally on the papers. The next step available to an aggrieved claimant is an application for merits review in the AAT.

6 I understand that the procedures followed within the Migration and Review Division are similar, in many respects, to those adopted by the Department. The applicant is invited to a hearing where the Member will interview him or her. The process is said to be basically inquisitorial. The applicant is, of course, entitled to procedural fairness, the content of which will vary depending upon the actual issue that presents itself.

7 While I was on the Federal Court, there was no National Disability Insurance Scheme, and accordingly, no review function in that area. I did sit on a number of veterans' entitlements and social security matters, and even one or two tax cases. However, the vast bulk of my work, whether by way of judicial review, or statutory appeal, was in the area of migration.

8 It is obvious that the role of a judge exercising supervisory jurisdiction over a body such as the AAT is far removed indeed from the task of the tribunal members. Tribunal members are expected to 'stand in the shoes'[6] of those whose decisions are subject to merits review. The process of review is by way of a de novo hearing. Self-evidently, that is a far cry from the extremely narrow role which judges play through judicial review, or those specific forms of statutory review embodied within the *Migration Act*.[7]

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6 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 299 [40], 306 [66] (Kirby J), and 324–5 [134] (Kiefel J).

7 See, generally, *Migration Act 1958* (Cth), s 467A.

9 Even from that narrow judicial perspective, it might be of interest to those present to consider how judges generally, and one judge in particular, go about the task of weighing evidence, particularly where the facts are actively in dispute.

10 In that regard, I thought I would divide my comments on this subject into three separate themes.

11 First, I propose to say something about the well-known debate as to the extent to which administrative tribunals, though not bound by the rules of evidence, and able to inform themselves as they see fit, ought still have regard to those rules.

12 Secondly, I hope to identify a number of areas where the rules of evidence can provide useful guidance in weighing evidence when determining factual disputes.

13 Thirdly, I will say something about some of the techniques associated with fact finding that some judges have found useful in certain types of cases.

1. Tribunals and rules of evidence

14 It may surprise some of you to learn that there is actually a substantial body of scholarly writing on this subject, which repays careful consideration.[8]

15 A useful starting point may be to dissect just what we mean when we speak about 'rules of evidence'. Plainly, there are some rules that concern the admissibility of evidence. It is often assumed that this is all there is to the subject. That view is mistaken. A number of the rules of evidence regulate the manner in which 'material', or 'information', is to be presented to the relevant decision maker, normally a court. In addition, even in the context of courts alone, some rules of evidence stipulate how a decision maker (whether a judge alone, or jury) is to go about the task of finding facts.

16 Accordingly, merely to say, in broad terms, that a particular tribunal is not bound by the rules of evidence does not tell us very much. It does not provide an

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8 See, for example, Linda Pearson, 'Fact-Finding in Administrative Tribunals' in Linda Pearson et al (eds), *Administrative Law in a Changing State*: *Essays in Honour of Mark Aronson* (Bloomsbury Publishing, 2008) 301; and Neil Rees, 'Procedure and evidence in 'court substitute' tribunals' (2006) 28(1) *Australian Bar Review* 41.

answer to the question whether the tribunal in question is embargoed from applying, or even having regard to, those rules.

17 Tribunals are bound to afford procedural fairness. The obligation to do so is fundamental and overarching. Compliance with the duty to afford natural justice can go some of the way towards ensuring that a decision maker is not swamped by material of little probative value. In addition, the requirement that an aggrieved claimant be given the opportunity to address adverse material can assist in filtering out material of that kind.

18 Yet, the obligation to afford natural justice may not be sufficient to achieve that aim. It is worth remembering the celebrated dissent of Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*,[9] where his Honour made this very point:

> Some stress has been laid by the present respondents upon the provision that the Tribunal is not … 'bound by any rules of evidence.' Neither it is. But this does not mean that all the rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth.[10]

19 In *Pochi v Minister for Immigration and Ethnic Affairs*,[11] Brennan J, in his capacity as President of the AAT, cited that passage in *Bott*. However, it is important to note that his Honour did so in the context of a discussion of the evaluation of evidence, and not of its admissibility. He said:

> The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force' … to depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force …[12]

20 Of course, Evatt J's observation that the common law rules of evidence should be accorded appropriate respect might not receive the approval of lawyers today.

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9 (1933) 50 CLR 228 ('*Bott*').

10 Ibid 256.

11 (1979) 36 FLR 482.

12 Ibid 492.

Those common law rules were, even by that time, seen to be arbitrary, capricious, and inefficient.[13] Many of those rules were highly technical, and long past their use-by date. It has been suggested that one of the main reasons why, from the 1950s onwards, there developed a vast network of statutory administrative tribunals was because of the intractable shortcomings of the common law rules of evidence, as they then stood.

21 Clearly, a major factor in the decision to dispense, at least formally, with the rules of evidence, so far as administrative tribunals were concerned, was the need to avoid the technicality of those rules and the expense, inconvenience, and delay flowing from their application. Many tribunals are composed of a mixture of lawyers and non-lawyers. The very last thing that non-lawyer members should have to confront would be a set of unforgiving, and highly prescriptive, rules of a procedural nature. As well, lay parties who often appear before such tribunals ought to be freed from the need to adhere to a set of rules which, in some cases, does not accord with common sense.

22 The enactment by the Commonwealth in 1995 of the *Uniform Evidence Law*[14] brought about many changes to the 'supposedly helpful obstructionism' of the common law.[15] I shall focus later upon some of those changes, and what, if anything, they mean for fact finding before tribunals.

23 It is well accepted that tribunals can legitimately have regard to material which would never find its way into any court. So it is that hearsay, which would not fall within any recognised exception to the hearsay rule, can be received as part

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13 Justice Roger Giles, 'Dispensing with the Rules of Evidence' [1990] (Summer) *Bar News: Journal of the New South Wales Bar Association* 5.

14 *Evidence Act 1995* (Cth).

15 John MacArthur Maguire, *Evidence: Common Sense and Common Law* (Foundation Press, 1947) 10–11.

of the process of administrative decision making.[16] Just the same, in extreme cases, the obligation to afford procedural fairness might require the rejection of some such material.

24 Much the same can be said of some forms of opinion evidence, the reliability of which has not been properly established, and may be of dubious probative value.

25 The rule of thumb generally applicable at the stage of admissibility of evidence is whether the material sought to be relied upon meets an acceptable standard of relevance. It is not whether, on its own, that material establishes or controverts a fact or facts in issue.

26 In 1990, Justice Roger Giles, speaking extra-judicially, commented that, in his view, although tribunals were not bound by some of the traditional rules of evidence, they were bound by others.[17] For example, he thought that the AAT should apply those rules concerning the incidence of the burden of proof.[18]

27 Justice Giles also argued that tribunals should recognise, and give effect to, the privilege against self-incrimination. This was a common law right, although also often treated as simply a rule of evidence. In his view, the privilege should be enforced unless legislatively abrogated, and in clear terms. The same could be said of what was known as legal professional privilege. Equally, public interest privilege had to be maintained. The same could be said of 'without prejudice' privilege. He also argued that issue estoppel, and res judicata, both of which were sometimes regarded as rules of evidence, applied to tribunals.[19]

28 Justice Giles commented upon the requirement that tribunals afford procedural fairness in the conduct of proceedings. He noted that, in some cases, natural justice might even entail a right to cross-examine a witness whose evidence

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16 The majority judgment in *Bott* makes this clear. Hearsay which is logically probative is admissible before tribunals irrespective of whether it would be admissible in courts of law. Of course, the logical weakness of hearsay evidence may make it too insubstantial in some cases to persuade a tribunal of the truth of serious allegations.

17 Justice Giles, 'Dispensing with the Rules of Evidence' (above n 13), 8.

18 *McDonald v Director-General of Social Security* (1983) 1 FCR 354, 356 (Woodward J).

19 That view has been both supported and rejected in subsequent case law. See generally, Justice Giles, 'Dispensing with the Rules of Evidence' (above n 13), 12 n 82.

was adverse to a claim.[20]

29 More recently, the Federal Court has determined,[21] that certain common law doctrines, such as those embodied within what is known as the rule in *Browne v Dunn*,[22] and the principles concerning the standard of proof as set out in *Briginshaw v Briginshaw*,[23] while not applicable to tribunals in any formal sense, might still have some application under the ambit of procedural fairness.[24]

30 In preparing for this talk, I had occasion to read a helpful paper,[25] which was somewhat critical of a then-recent decision in the Federal Court. The case was *Rus v Comcare*.[26] It concerned a claim for compensation by a widow in respect of the death of her husband. The issue was whether the AAT had erred in its treatment of a highly contentious piece of evidence which, arguably, offended against both the hearsay rule, and the rule against opinion evidence.

31 The primary fact in issue in *Rus* was whether the deceased had been a Commonwealth employee. The AAT had rejected the widow's claim on the basis that this pivotal fact had not been established. She sought review of that decision under s 44 of the AAT Act, which of course is confined to appeals on points of law. The Court proceeded on the basis that a failure to have regard to relevant material could give rise to jurisdictional error, since it would demonstrate the failure to perform the statutory task imposed upon the decision maker. Jurisdictional error could, in turn, constitute appealable error under s 44. The issue to be resolved was whether the AAT had ignored relevant material by not admitting hearsay evidence, of a lay opinion, to establish an employment relationship.

32 In the Federal Court, the AAT's decision was overturned, it being held that jurisdictional error had been established by ignoring this 'evidence'.

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20 Justice Giles, 'Dispensing with the Rules of Evidence' (above n 13), 13.

21 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 ('*Sullivan*').

22 (1894) 6 R 67, 70.

23 (1938) 60 CLR 336, 347 (Latham CJ), 361–2 (Dixon J).

24 *Sullivan* (2014) 226 FCR 555, 595–6 [157]–[159] (Flick and Perry JJ).

25 Nicholas Cardaci, '*Rus v Comcare*: The Rules of Evidence in the AAT' (2017) 19 *University of Notre Dame Australia Law Review*, Article 7 ('Rules of Evidence in the AAT').

26 [2017] FCA 239 ('*Rus*').

33 The author of the paper to which I refer recognised that the AAT can admit any evidence that is relevant, including hearsay. However, he also noted observations to the effect that the rules of evidence ought not be completely disregarded on questions of fairness to the parties.[27] Plainly, only evidence that has probative value should be received. Equally plainly, he considered the rules of evidence can provide guidance to a tribunal in weighing evidence, once it has been admitted.

34 In *VCA and Australian Prudential Regulation Authority*,[28] Deputy President Forgie and Member Fice helpfully stated:

> The fact that we may inform ourselves on any matter in such manner as we think fit does not mean that we should do so without setting some boundaries. Section 33(1)(c) [of the AAT Act] provides that we are 'not bound by the rules of evidence' but not being bound by them is a very different matter from not being able to have regard to them. We do have regard to them for they often provide clear guidance as to the clear manner in which the Tribunal should inform itself. That guidance may be important in distinguishing between evidence that may be regarded as carrying sufficient weight to be relied on, and so safe, from that which is not.[29]

35 In *Rus*, the Federal Court concluded that the various out of court statements by the deceased, Mr Rus, as to his own belief regarding his status as a Commonwealth employee, ought to have been received, and given appropriate consideration, despite their character as both hearsay and opinion evidence.[30]

36 The author of the paper criticised the Federal Court decision, not so much because he disagreed with its having reversed the AAT, but rather because the judgment had, in his view, failed adequately to identify the circumstances in which evidence of this kind warranted being admitted, and given weight. He observed that *Rus* contained little in depth discussion of the rules of evidence, or the reasons for applying, or not applying, them.

37 That criticism was, perhaps, somewhat unfair. A judgment written by a court

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27 Nicholas Cardaci, 'Rules of Evidence in the AAT' (above n 25), 3.

28 [2008] AATA 580.

29 Ibid [231] (citations omitted).

30 Not only was this lay opinion, but it also went to the ultimate issue for determination, and at common law, would not have been admissible for that reason as well.

at first instance is not, and should not be expected to be, a textbook discussion of any particular subject. It should determine, as concisely as possible, the question in issue, and leave the broader and more conceptual analysis to the appellate courts. Nonetheless, the facts in *Rus* provide a useful vehicle for considering the extent to which, at least the principles underlying the rules of evidence, should be invoked by the AAT in resolving factual disputes of the kind in question.[31]

2. *Rules of evidence as guides to weighing competing factual contentions*

38 In my day, law students were imbued with the notion that courts, and particularly appellate courts, dealt mainly with questions of law, and that facts were of secondary importance. That view was, of course, entirely incorrect then. It is even more mistaken now.

39 Almost everything that courts do (and the same applies to tribunals) involves the far more difficult task of making findings of fact. The notion of a 'finding' is, itself, something of a misconception. What we are primarily doing is attempting to reconstruct the past. That necessarily entails some form of conjecture, albeit, one would hope, rational reconstruction infused with common sense.

40 A useful discussion of the centrality of fact ascertainment as the key to what courts actually do is that of Judge Jerome Frank, a great American jurist who wrote in the middle of last century. In his classic book, *Courts on Trial – Myth and Reality in American Justice*,[32] Frank observed that the key role played by trial courts was fact finding, and that the search for certainty in legal rules was essentially a myth and pointless exercise.

41 Frank found it difficult to express himself in non-pejorative language. Perhaps for that reason, his work was not universally acclaimed. Anyone prepared

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31 A similar debate exists in relation to VCAT, and the extent to which the provisions of the *Evidence Act 2008* (Vic) apply to such proceedings. See, for example, *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 188 [32]–[34] (Osborn JA, Beach JA agreeing at 196 [61]). In *Rodriguez v Telstra Corporation Ltd* (2002) 66 ALD 579, [25], Kiefel J observed that decisions in tribunals should not be made without evidence having probative force to support them. In addition, tribunals should not base their conclusions on their own views of matters which require evidence.

32 (Princeton University Press, 1949) ('*Courts on Trial*').

to entitle a chapter of a serious work 'Are Judges Human?' is scarcely likely to endear himself to his judicial brethren.

42 Surprisingly for an American judge, Frank was an ardent critic of the jury system. He noted that Sir William Blackstone, who, it must be said, was something of a bête noire of Frank's, had called the jury 'the glory of the English law'.[33] Even Thomas Jefferson, who detested Blackstone, agreed with Sir William on that one point.[34]

43 Frank argued that we should cease to make what he called 'Fourth of July Speeches' about the glorious jury system. Rather, we should not conceal what he regarded as the many intractable defects associated with trial by jury.

44 As Frank noted, in almost all jury trials, and particularly criminal jury trials, the jury simply renders a general verdict. Yet, according to Frank, underlying all this was a process whereby juries were able to produce the result which they desired, in favour of one party or another, with the facts being found in such a way as to reach that result. Frank went even further. He argued that jurors are neither able, nor do they even attempt to follow the instructions of the court. They merely determine what they think to be a 'fair result' and bring in a general verdict accordingly, thereby concealing what they have done. In Frank's view, the judge's instructions to the jury might just as well never have been given. Juries do not determine the 'facts', but rather the rights and duties of the parties, as they wish them to be.

45 Frank castigated lawyers who repudiated this form of realism which he termed 'fact-scepticism'. In his words, those lawyers were 'deluded'.

46 I could go on and recount more of what Frank had to say about how courts go about determining facts. He noted that decisions in cases which had taken weeks to try were sometimes reversed upon appeal merely because a particular phrase, or

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33 Sir William Blackstone, *Commentaries on the Laws of England in Four Books, Volume 2* [1753], Chapter XXIII.

34 Sir Louis Blom-Cooper QC, 'Judge and Jury, or Judge Alone: The Lund Lecture delivered to the British Academy of Forensic Sciences at the Royal College of Physicians, 22 October 2003' (2004) 44(1) *Medicine, Science and the Law* 6, 6.

even word, entirely meaningless to the jury, had been included in, or excluded from, the charge.[35]

47 Worse than that, Frank considered that the task given to jurors was made all the more difficult by the way in which they received information, in the form of evidence. That was, in part, because the evidence was not presented all at once, or in an orderly fashion. Jurors were supposed to keep their minds in suspense until all the evidence was in.

48 Frank would say that many of the same difficulties confront tribunals. He would argue that what we profess to say about how courts go about their business does not square with observable courtroom reality. As regards jurors, he would go even further and argue that jurors, in general, try the lawyers, rather than their clients. Frank referred to the description of the jury as 'twelve men chosen to decide who has the better lawyer'.[36]

49 Accepting that at least some of Frank's views can properly be described as hyperbole, or rhetoric, his thoughts should not be dismissed out of hand. Prejudice has always been called 'the 13th juror', and none of us are immune from prejudice. We need to do our best to recognise that fact, and minimise its role in our decision making.

50 When dealing with factual disputes before tribunals, it must be recognised that the search for the truth (if that is what it be) is circumscribed by a lack of time, the need for efficiency, and important questions of public policy. It must also be recognised that, overwhelmingly, people act upon information that would never pass muster in a court in their everyday lives. Hearsay is a good example.

51 If I had the time, I would be happy to engage with questions such as whether juries really are, as is often asserted, better at finding facts than judges. This is not the occasion for that particular discussion. Rather, I will turn to the question whether we, as judges, can do better when we weigh up evidence, and come to factual conclusions.

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35 See, for a recent example from the Court of Appeal, *Huynh v The Queen* [2020] VCSA 222.

36 Judge Jerome Frank, *Courts on Trial* (above n 32), 122.

52 Because we come from differing social, economic, and political backgrounds, it is all the more important, when we come to decision making, that we stick as closely as possible to basic principles.

53 There is body of literature available which analyses, for example, how members of the former Refugee Review Tribunal went about the task of assessing the credibility of claimants.[37] Most cases that came before that particular body turned on such questions. For all I know, that is still the case in the AAT.

54 Credibility findings are derived from a variety of different sources. That fact needs to be acknowledged. Once an adverse finding of that kind is made by a tribunal, it is extraordinarily difficult to challenge it on review.

55 In that regard, the rules of evidence, at least in their present form, can provide something of a foundation which promotes consistency of approach in decision making. Sadly, findings as to credibility are all too often based upon matters of impression, which are ephemeral, and lack rationality. These include demeanour, which we now know to be far less reliable as an indicator of truthfulness than was once thought to be the case. The celebrated author, and former politician, Jeffrey Archer, was thought by many who observed him testify in his defamation proceeding to have given impressive and truthful evidence. In fact, of course, as we later discovered, his evidence was a tissue of lies.[38]

56 Assessment of credibility is particularly difficult in a multicultural environment, where language, and the nuances of behaviour, may have many different connotations.

57 Of course, the concept of credibility is somewhat fluid. The rules of evidence do not adequately provide a base for distinguishing between character (that is, past behaviour), and credibility at large. The Dictionary to the *Evidence Act* provides a

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37 See, generally, Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?' (1998) 5(2) *Australian Journal of Administrative Law* 78; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15(3) *International Journal of Refugee Law* 377; and Douglas McDonald-Norman, 'Young's 'Fact finding made easy' in Refugee Law: A Former Practitioner's Perspective' (2018) 92(5) *Australian Law Journal* 349.

38 See, generally, *R v Archer* [2002] EWCA Crim 1996.

non-exhaustive definition of credibility, which includes the ability to observe, or remember, past facts and events.

58 An administrative tribunal is very much at large when it comes to receiving evidence that supports, or detracts from, an applicant's credibility as a witness. By way of contrast, the *Evidence Act* generally sets its face against evidence of that kind. For example, prior consistent statements cannot ordinarily be led to bolster the credibility of a witness. Yet, such evidence might tell in favour of reliability, just as evidence of prior inconsistent statements could tell against that conclusion.

59 Of course, rules of evidence designed for the conduct of adversarial hearings do not necessarily fit the pattern for inquisitorial proceedings. That does not mean that the experience of the courts in dealing with matters of credibility generally should play no role in tribunal thinking on these issues.

60 For example, the search for supporting evidence, formerly described as 'corroboration', must surely play an important role in weighing evidence that is in dispute. So too is what might be termed 'inherent plausibility', which may be nothing more than common sense and experience. There are a number of categories of evidence that would be regarded as inherently unreliable. Some forms of hearsay, particularly second-hand oral hearsay, recounted years after the event, should ordinarily carry little or no weight. Bare statements of opinion, particularly non-expert opinion, and especially those based, in part, on hearsay, have no place in rational decision making.

61 The dangers associated with mistaken identification are now well known. They call for special warnings in criminal trials, but if an issue of that kind arises before a tribunal, there is every reason why such evidence should either be put entirely to one side, or given little weight.

62 Tribunals need to be particularly aware of the deficiencies associated with what sometimes passes for expert evidence. Putting DNA to one side, it can now be seen that many kinds of traditional scientific evidence have been accorded far too much weight by the courts. In some cases, they should be viewed as 'junk science'. I have recently spoken on this subject in relation to fields such as forensic

odontology, tyre marks, tool marks, handwriting analysis, facial recognition evidence, gait analysis, and fibre analysis.[39] It may surprise you to know that even fingerprint evidence, once considered infallible and the 'gold standard' of scientific reliability, has recently been shown to be imperfect, and subject to highly subjective assessment.

63 Tribunals will often be confronted with what is sometimes described as 'soft science'. Psychological reports of questionable pedigree, and content,[40] purport to present objectively verifiable data when, in truth, what is being put forward is little more than arrant nonsense. Common lawyers, who are experienced in the area, view some medical reports with scepticism, as indeed they should. On occasion, what is presented as science is, in fact, barracking for the side that has paid for the production of the report.

64 A useful paper dealing with how courts and tribunals should go about the task of fact finding is to be found in Justice Peter Young's 'Fact finding made easy', written in 2006.[41] The author comments, as I have earlier done, that fact finding is actually a very difficult matter. He observes that there is no magic formula that renders the process easy.

65 The first obstacle to discovering truth, if that is indeed one of the objectives to be achieved, lies in the limited nature of the material chosen by the parties to be placed before the decision maker. The author puts forward three basic skills to be followed in weighing evidence:

1. Decision makers should not intervene excessively, but rather sit back and listen;

2. Decision makers should closely observe the demeanour of witnesses; and

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39 Justice Mark Weinberg, 'Juries, Judges, and Junk Science — Expert Evidence on Trial' (Symposium Paper, Australian Academy of Science and Australian Academy of Law Joint Symposium, 19 August 2020).

40 Just this week, I dealt with a case in which a psychologist provided a report stating that the offender in question suffered from 'Persistent Complex Bereavement Disorder' because he was so greatly upset at the termination of his marriage. The judge who sentenced the offender expressed scepticism at the use of this description, which went beyond the bounds of DSM-5. See generally, *Hardwick (a pseudonym) v The Queen* [2020] VSCA 227.

41 P W Young, 'Fact finding made easy' (2006) 80(7) *Australian Law Journal* 454.

3. Although the rules of evidence were developed over centuries, and designed for use with lay jurors in mind, those rules were based on experience, and intended to exclude from consideration material that would have a tendency to produce false answers.

66 More particularly, Justice Young points to some leading cases that should provide guidance to decision makers, whether courts or tribunals, in weighing evidence. He refers to the rule in *Jones v Dunkel*,[42] as well as what he terms '*Jones v Dunkel* extended'[43] as meeting that description. He also supports the operation of the rule in *Browne v Dunn*, as well as the rule in *Connor v Blacktown District Hospital*[44] (which holds that evidence of a general practice in a business or government department can lead to the conclusion that the practice was followed in the instant case).

67 Justice Young also draws attention to a series of factors that may raise doubts as to the accuracy of evidence given by a witness as to his or her observations. These include the significance of the event, the period over which it was observed, observation conditions, whether the witness was under stress at the time, and the witness' capacity, so far as memory was concerned. Importantly, contemporaneous reliable documents and external factors are likely to be better indicators of credibility than matters such as the demeanour of the witness. With regard to demeanour, a witness may appear evasive without, in fact, being so. Similarly, a witness may appear to be wholly credible, and yet prove to be unreliable, or even dishonest, in the face of objective evidence that cannot be ignored.[45]

68 Justice Young refers to Sir Richard Eggleston's classic text, *Evidence, Proof and Probability*.[46] Sir Richard observed that when deciding whether the evidence of a witness was truthful and reliable, regard should be had to:

- The inherent consistency of the story;
- The consistency with other witnesses;

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42 (1959) 101 CLR 298.

43 P W Young, 'Fact finding made easy' (above n 41), 455.

44 [1971] 1 NSWLR 713.

45 *Pell v The Queen* (2020) 94 ALJR 394.

46 (Weidenfeld & Nicolson, 2nd ed, 1978).

- The 'credit' of the witness;
- The demeanour of the witness; and
- The inherent probability or improbability of the evidence.[47]

69 As a general rule, contemporaneous documents written well before there was any dispute between the parties will provide the best indication of where the truth lies. Any statements produced in consultation with lawyers should be viewed with caution, because they are likely to have been 'filtered', even though there is no suggestion of dishonesty.

70 Finally, in this regard, inferences from primary facts should be approached with caution. Cross-examination along the lines of 'why didn't you include what you have now said in your original statement?' is, of course, legitimate, but should not be carried too far. Much will depend upon the importance of the omitted material.

71 Self-evidently, the fact that a witness has lied about one matter, or embellished his or her evidence, does not necessarily mean that everything said by that witness should be rejected, though it may be a pointer towards that conclusion. Nor does the fact that a witness appears biased, or has a powerful motive to lie. Nonetheless, these are all matters that must be taken into account, and given due weight.

72 Some 200 years ago, a mischievous lawyer classified 'unreliable witnesses' into 'simple liars, damned liars, and experts'. That observation may have spawned the later variation 'there are liars, damn liars, and statistics'. It has even been said that an expert witness armed with statistics makes up a lethal cocktail.

73 If anyone doubts the dangers of misusing what appears to be scientifically based objectivity, I would recommend that you study the career of Professor Sir Roy Meadow, a highly respected authority on child abuse in England, but an utterly hopeless statistician. In the celebrated case of *R v Sally Clark* in 1999, he gave

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47 Ibid 1557.

evidence that led to her being convicted of the murder of her first two children.[48] They were initially diagnosed as sudden infant death syndrome ('SIDS') cases, known as 'cot death'.

74 The defence called a number of doctors who declared the cause of both deaths as unclear. Professor Meadow produced figures taken from some form of probability theory which suggested that a risk of a single child the same age as one of the deceased dying of SIDS was one in 8,543 live births.[49] To calculate the same fate befalling two children from the same family, he simply multiplied that figure by itself.[50] That gave a chance of about one in 73 million that two such natural SIDS cases would occur.[51] Put another way, taking the total population of the United Kingdom into account, such an event would occur by chance only once every 100 years.[52]

75 Any statistician worth his or her salt would know that this form of reasoning was highly problematic. The calculation would not hold unless the two events (deaths) were entirely independent of each other, with no risk of connection. Professor Meadow had failed to adjust his figures for genetic or hereditary propensity. The true result, if that task had been gone about correctly, would have been that a double SIDS death would occur in England every 18 months.[53]

76 The use of compounding probabilities as a mode of reasoning, in a somewhat different setting, was discussed by the High Court in the recent Pell case. That

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48 In *R v Clark* [2000] EWCA Crim 54, Ms Clark brought an appeal against her convictions on a number of grounds, including on a ground that the figures cited in Professor Meadow's evidence were erroneous, and that the judge had failed to warn the jury against the 'prosecutor's fallacy' in relation to the figures cited. In dismissing her appeal, the England and Wales Court of Appeal held that none of the matters raised under cover of that ground affected the safety of the convictions. In particular, it was noted that while there was some substance to the appellant's complaint as to the trial judge's failure to warn the jury against the 'prosecutor's fallacy', that error did not render the convictions unsafe. Three years later, in *R v Clark* [2003] EWCA Crim 1020, following a referral from the Criminal Cases Review Commission, Ms Clark's convictions were set aside as being unsafe, albeit on the basis of fresh evidence of which both the prosecution and defence were unaware at the trial.

49 *R v Clark* [2000] EWCA Crim 54, [118].

50 Ibid [114].

51 Ibid [114]–[115].

52 Ibid [115].

53 Stephen Watkins, 'Conviction by Mathematical Error? Doctors and Lawyers Should Get Probability Theory Right' (2000) 320(7226) *British Medical Journal* 2, 3.

exercise is one that repays careful consideration.

3. Techniques of fact finding that judges have found useful

77 The starting point, in my view, is of course the need to be thoroughly familiar not just with the issues in dispute, but also the totality of the evidence that is presented. I, and many of my colleagues, find that a chronology, or timeline, can be particularly helpful in reducing the complexity of factual disputes.

78 Justice Young recommended the creation of what he termed 'a primitive spreadsheet' of the evidence, setting out in tabular form the names of the witnesses on the left, giving a transcript or affidavit reference in the next column, and a brief resume of the evidence in the third column.[54]

79 There is nothing wrong with discussing a case that is before you with a colleague. Indeed, there is much to commend that course. In my Court, which is, of course, an appellate body, I regularly do so, and not just with the other members of the bench who are listed to hear the matter.

80 Some judges routinely seem to base their findings on matters of credibility, rather than having regard to the evidence as a whole. If they are doing so in order to render their judgments 'appeal proof', I need hardly say that this is improper. Moreover, it is likely to be ineffectual.

81 A judge should give his or her reasons for decision honestly and completely, and without concern as to the possibility of an appeal. The same is true of a decision by the AAT. The reasons for that decision should expose the path of reasoning followed, but should, as far as possible, be succinct and to the point.

82 The very fact that reasons must be given, which set out the process by which the evidence has been weighed, provides not just a useful form of self-discipline, but an intrinsic corrective in the assessment process itself.

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54 P W Young, 'Fact finding made easy' (above n 41), 457.