

RE-THINKING EVIDENCE ACT 1906 (WA), SECTION 31A EVOLUTION, EXPERIENCE AND BACK TO BASICS

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Evidence Act 1906 (WA) (the 'Act'), section 31A ('section 31A') regulates the admissibility of propensity and relationship evidence in Western Australia. This article helps practitioners figure out whether a section 31A application will succeed or not based on two principles. The first principle is to work out the fact in issue and whether the section 31A evidence has the required connection with it. The second principle is whether the section 31A evidence only complements already suspect evidence. If the section 31A evidence does this, then it is likely inadmissible.

I INTRODUCTION

Section 31A was introduced to make it easier for the prosecution to adduce propensity or relationship evidence in sexual offences.¹ The context in which section 31A evidence was to be admitted was specific to where a Victim had to give evidence about different sexual offences on different dates. It was intended that section 31A would allow these different sexual offences to be joined in the one trial.

Like any statute, section 31A² raised questions about its boundaries. The case law experience shows that while categories of cases are useful two principles rationalise the application of section 31A. These two principles (noted above) cut across the cases regardless of whether they are a sex, drug or violent case. The analysis that follows uses the different categories of cases in the first instance, but will then gather them and analyse them under the first and second principle.

A rich body of case law has developed under section 31A. This also makes

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¹ Speech on the *Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004*, Western Australia, Parliamentary Debates, Legislative Assembly, 30 June 2004, at 4608.

² In other jurisdictions this legislation has been often described as the tendency or coincidence rule see Halsbury's Laws of Australia [195]-[870]. See for example *Evidence Act 1995* (Cth) s 97(1), *Evidence Act 2011* (ACT) s 97(1), *Evidence Act 1995* (NSW), s 97(1) and *Evidence Act 2008* (Vic) s 97(1).

it an opportune time to review those key cases.³

This article reviews:

- a. The evolution of section 31A, differences with the common law and the elements of section 31A;
- b. Key sex, violence and drug cases under section 31A;
- c. Comparing experiences between sex, violence and drug cases under section 31A;
- d. The strategic role of the section 32 of the Act, in defining the scope of section 31A.

II THE EVOLUTION OF SECTION 31A: ELEMENTS OF SECTION 31A AND THE POSITION AT COMMON LAW

A *The evolution of section 31A*

The WA Parliament assented to the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* (WA), on 9 November 2004. Twenty-eight days later on 7 December 2004 section 13 of the Amending Act inserted section 31A into the Act.

This amendment partly came about because the prosecution could not admit propensity evidence in sexual offences. Consequently, Victims had to give evidence on different dates about different offences, rather than in one trial.⁴ Further the introduction of section 31A was part of a wider package of reform related to the joinder of trials.⁵ Parliament intended that juries should hear about all the charges together rather than each charge in isolation.

Section 31A defined ‘propensity evidence’ and ‘relationship evidence’ separately. Propensity evidence included: similar fact evidence, evidence of the conduct of the Accused person, evidence of the character or reputation of the accused person, or a tendency that the Accused person has.⁶ Relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.⁷ For the ease of reference in this article, the term ‘section 31A evidence’ will be used in

³ Cf In the civil context in 1993 a review was conducted of propensity evidence decisions delivered by the High Court in Michael Gething, “Propensity Evidence in Civil Trials” (1993) 10 *Aust Bar Rev* 203.

⁴ Speech on the *Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004*, Western Australia, Parliamentary Debates, Legislative Assembly, 30 June 2004, at 4608.

⁵ *Evidence Act 1906* (WA), s 31A was introduced as part of a legislative package which included the *Criminal Procedure 2004* (WA), 133 which allows for the separation of trials of an indictment containing multiple charges. Further, when legislation is introduced as part of a legislative package, it must be interpreted in that light, see *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 726 which was referred to in *CC v Rayney* (2012) 42 WAR 498.

⁶ *Evidence Act 1906* (WA), s 31A(1)(a).

⁷ *Evidence Act 1906* (WA), s 31A(1)(b).

reference to the cases. Where necessary, whether the case involved propensity or relationship evidence, this will be specifically stated.

Roberts-Smith JA observed that the definition of ‘relationship evidence’ was wider than the definition at common law in 2005.⁸ One year later, Roberts-Smith JA made the same observation about ‘propensity evidence’.⁹ So, at first glance, section 31A was capable of a broader application than the common law. However there were safeguards against the overreach of section 31A. Those safeguards are found in tests the Courts have formulated over time.

B Elements of section 31A

The first test is whether the proposed evidence constitutes ‘propensity evidence’ or ‘relationship evidence’, or both.¹⁰

The second test is whether the evidence is relevant to the facts in issue. Put another way, evidence ‘*must be such as could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding*’.¹¹

The third test is that the evidence by itself or with other evidence has ‘*significant probative value*’.¹² ‘*Significant probative value*’ is evidence, which can “*rationally affect the assessment of the probability of the relevant fact in issue extent*”.¹³ ‘*Significant probative value*’ is something more than mere relevance but less than a substantial degree of relevance.¹⁴ It is probative value which is important or of consequence.¹⁵ Where the evidence has significant probative value it discounts the possibility of collusion, concoction or suggestion.¹⁶

The fourth test is a balancing exercise. The Court must consider whether a fair minded person would think the probative value compared to the degree of risk of an unfair trial means that the public interest prioritises adducing this evidence.¹⁷ This ‘risk’ is that a jury would reason that because the Accused previously behaved in a similar manner to the current charge, they are likely to have committed the current charge.¹⁸

⁸ *Donaldson v The State of WA* (2005) 31 WAR 122, 146 (Roberts-Smith JA).

⁹ *Di Lena v The State of WA* (2006) 165 A Crim R 482, 493 (Roberts-Smith JA).

¹⁰ *Evidence Act 1906* (WA), ss 31A(1)(a) and or 31A(1)(b).

¹¹ *Goldsmith v Sandilands* (2002) 76 ALJR 1024, [2] (Gleeson CJ)

¹² *Evidence Act 1906* (WA), s 31A(2)(a).

¹³ *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171,175 – 176 adopted in *Dair v The State of WA* (2008) 36 WAR 413, [61].

¹⁴ *Ibid.*

¹⁵ *Dair v The State of WA* (2008) 36 WAR 413, [61].

¹⁶ *Evidence Act 1906* (WA), s 31A(3).

¹⁷ *Evidence Act 1906* (WA), s 31A(2)(b).

¹⁸ *Donaldson v State of WA* (2005) 31 WAR 122, [130] (Roberts-Smith JA, with whom Wheeler JA and Miller AJA agreed).

C Differences with the common law

Apart from the definitions of propensity and relationship evidence under the common law, section 31A also changed the position at common law in two ways. The two changes were introduced to respond to two High Court decisions.

The first decision, *Hoch v R* (1988) 165 CLR 292 was delivered in 1988. Jonathon Hoch was a part time recreation officer in Brisbane employed to take care of young boys. Sadly, allegations emerged that he sexually assaulted two brothers and a third boy. Three counts were laid on one indictment and the Defence unsuccessfully tried to separate the counts. The High Court unanimously agreed that the three boys could have concocted their versions together (with one boy particularly hostile to Mr. Hoch). Thus, the evidence lacked the probative force to be admitted as similar fact evidence.¹⁹

By contrast, an assessment of the probative value of evidence under section 31A(3) disregards the possibility that the evidence may be the result of collusion, concoction or suggestion. This is a complete negation of *Hoch*.²⁰

Later on in 1995, McHugh J delivered the dissenting judgment in *Pfennig v R* (1995) 182 CLR 461. This case would lay the foundation for the fourth test under section 31A. Mr. Pfennig was accused of the murder of 10 year-old Michael Black. Michael's body was never found. While the murder happened on or about 18 January 1989, the trial happened 3 years after the event. There was no direct evidence connecting Mr. Pfennig to the crime. Part of the case against Mr. Pfennig was his involvement in the abduction and rape of another young boy called 'H' one year after the murder of Michael Black (the H evidence). The High Court considered whether the H evidence could be admitted in the trial for the murder of Michael Black.

All members of the High Court admitted the evidence, but for differing reasons. Mason CJ, Deane and Dawson JJ ruled that the H evidence was admissible because it was propensity or similar fact evidence. In their words '*for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty*'²¹. The majority applied the test used in *Hoch*.

McHugh J laid down a different test:

[t]he judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to

¹⁹ *Hoch v R* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ and at 304 per Brennan and Dawson JJ).

²⁰ See *PIM v State of WA* (2009) 40 WAR 489, [289] (Pullin JA).

²¹ *Pfennig v The Queen* (1995) 182 CLR 461, 481-2.

the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.²²

In time, McHugh J's test became the template of section 31A(2)(b), that is, the fourth test.

It is clear that section 31A diverged from the common law. Further, the genesis of section 31A came from the difficulties in hearing about multiple sexual offences in one trial. As the case study below will show, Parliament's will seeped into the Court's judgments. Most strikingly in 2005 the Court of Appeal dealt with a case where a step-father sexually offended against his two step-daughters. The step-father denied doing this. The Court held that the counts in the indictment should be cross-admissible against one another. The rationale for this was that this was '*(a)n example of the very type of case in which the legislature intended the jury to have the benefit of a full evidentiary familial picture*'.²³

We now turn to the first category of cases under section 31A: sexual offences.

III SEXUAL OFFENCES AND SECTION 31A

The prosecution of multiple sexual offences was the *raison d'être* for section 31A. Sexual offences, broadly speaking, can occur in the following ways:

First, when an Accused (adult or child) commits multiple sexual offences against multiple child victims.

Second, when an Accused (adult) commits one or more sexual offences against multiple adult victims.

Realistically, there are four possible arguments when it comes to these types of cases. First, the Prosecution is required to prove all the elements of the crime. This broadly involves commission of the sexual act, lack of consent in the case of adults, and negation of any defences. Second, in the case of sexual offences committed against adults, there may have been sexual intercourse between the Accused and Victim but it was consensual. Put another way, the Accused had honest and reasonable mistaken belief that he or she had consent to have sex²⁴ with the Victim. Third, to argue that the sexual offences occurred but that the Accused cannot be identified as responsible. Fourth, to argue that the sexual offences did not occur at all. This can include fabrication. These arguments define what is in issue. They define the facts in issue.

The case law review will show that the section 31A evidence provides a context in which sexual offending occurred. This context can link different

²² *Pfennig v The Queen* (1995) 182 CLR 461, 529.

²³ *VIM v The State of WA* (2005) 31 WAR 1,[168] (the Court).

²⁴ Cf *Criminal Code 1913* (WA), s 24.

Victim's together as people who had been caught up in a web of sexual offending. Sexual offending does not occur in an isolated vacuum but, rather as part of a deliberate course of conduct by persons with a paedophilic or unlawful sexual interest. At its core, this is the value of propensity and or relationship evidence in sexual offences under section 31A. At its core this value is great when juxtaposed with what is disputed. Going back to the basic concept of relevance, this is a need for the evidence to prove the facts in issue.

This value is best demonstrated in the first set of cases.

A *Multiple sexual offending against children as an adult or child*

Turning to this first subcategory are four representative cases:

- a. *VIM v State of WA* (2005) 31 WAR 1;
- b. *Donaldson v State of WA* (2005) 31 WAR 122;
- c. *APC v State of WA* [2012] WASCA 159;
- d. *Horsman v State of WA* (2008) 187 A Crim R 187.

The Court of Appeal in *VIM*, *Donaldson*, and *Horsman* admitted the evidence. However in *APC* the section 31A evidence was rejected. The first principle (i.e, identification of the facts in issue) will be used to explain the different decisions.

The facts in *VIM* and *Donaldson* were very similar: multiple sexual offences committed by the adult Appellants against multiple child victims. These two cases most closely resemble what happened in *Hoch* and are the very type of case that section 31A was enacted to address. In both cases the prosecution was successful in joining the sexual offences together to be tried on one indictment. Leading each charge against the other in each respective case was the section 31A evidence.

In *VIM*, the Appellant denied that the offences occurred. So the question was whether the offences could be proven beyond reasonable doubt.²⁵ Similarly in *Donaldson*, the fact in issue was unknown so Roberts-Smith JA concluded that:

This is a case in which the probative value of the evidence goes both to prove the offences actually occurred, as well as to rebut possible defences, such as innocent explanation or misunderstanding by a Victim about what happened, or fabrication by a Victim.²⁶

This is important to note. Under the first principle whether the section 31A evidence will be admitted is determined, in part, by the value of that evidence in comparison to the facts in issue. In turn this underpins the application of section 31A. So bearing the facts in issue in mind, the Court in *VIM* admitted the evidence as 'significantly probative' because (1) it was objectively

²⁵ *VIM v The State of WA* (2005) 31 WAR 1, [151].

²⁶ *Donaldson v The State of WA* (2005) 31 WAR 122,[149].

improbable that the Appellant VIM molested one Victim but not the other, (2) the grooming process for each Victim was similar, (3) once the offending came to light, (4) the Appellant wrote a letter of apology and, (5) there was an underlying unity to all of this evidence.²⁷ All of this proved one of the facts in issue: commission of the offence.

For very similar reasons, Roberts-Smith JA in *Donaldson*, held that leading the charges as cross-admissible relationship evidence had significant probative value because (1) it revealed an underlying unity or pattern of how the sexual assaults took place, (2) irrespective of what physical acts they individually involved and, (3) the evidence of one count was cross-admissible because it rebutted innocent or accidental touching.²⁸ Again this evidence proved the commission of the act and identification. Again, this evidence substantiated the facts in issue. Again, this demonstrates the first principle.

Further, bearing in mind the legislative purpose of section 31A, it is no surprise that the evidence was admitted in *VIM* and *Donaldson*. Both cases defined the facts in issue widely. Both cases resulted in section 31A applying to more issues. Both cases are understood through the first principle.

Conversely, the decision to exclude the section 31A evidence in *APC* seems at odds with *VIM* and *Donaldson*. However *APC* can be explained by looking at the fact in issues compared to the section 31A evidence. This is the first principle at play.

In *APC* the Appellant allegedly offended against his siblings as a child and again later on when he was an adult against his own biological children. The Appellant faced twenty-eight charges for those offences committed against his children JAC, JPC, LRG and his stepchild TWC. The Appellant denied each allegation, argued that the allegations were fabricated and that there was no recent complaint. The prosecution had to prove that the sexual offences occurred and that it was the Appellant who committed them. The prosecution led the evidence of the Appellant's siblings PC and MC. These were uncharged sexual acts. This is the section 31A evidence that the Court of Appeal considered.

On appeal the Appellant argued that the evidence of PC and MC was wrongly admitted. Mazza JA (with whom Martin CJ agreed) held that the Appellant's acts as a child against his siblings occurred at a time when he could not possibly have grasped his sense of moral responsibility. The majority concluded that the evidence of PC and MC did not have significant probative value under section 31A.²⁹

Pullin JA disagreed and held that the evidence of PC and MC which occurred when the Appellant was a child:

²⁷ *VIM v The State of WA* (2005) 31 WAR 1, [160] – [162].

²⁸ *Donaldson v The State of WA* (2005) 31 WAR 122, [135], [149], and [177]-[182].

²⁹ *APC v The State of WA* [2012] WASC 159, [97] (Mazza JA).

... showed that the appellant did have a long-standing abnormal sexual interest in young children of both sexes in his own family. This was unusual, abnormal propensity behaviour. The propensity showed up when he was nearly 11, was still there when he was 16 and if the jury believed the Victims, then his propensity was still there when he was 29. The propensity did not show up between the ages of 16 and 29 because his opportunity to offend did not exist. The opportunity arose when he once again had young family children available to satisfy his urges. Such unusual abnormal behaviour had significant probative value.³⁰

The difference in the dissenting judgment of Pullin JA compared to the majority comes down to what was in issue at trial. The facts in issue were (1) prove the sexual offences occurred at all, and (2) that the Appellant committed this offence. Again, the first principle reconciles an apparently conflicting decision on a rational basis. To demonstrate this, reference is made to Pullin JA dissenting judgment. Respectfully, the dissenting judgment of Pullin JA is preferable for the following reasons.

First, the facts in issue were very wide. One of the issues was possible fabrication. By comparison, Roberts-Smith JA in *Donaldson* held that section 31A evidence was cross admissible because it rebutted fabrication.³¹ *Donaldson* related to charges being led as cross admissible. *Donaldson* involved multiple sexual offences against multiple victims. *APC* involved uncharged acts as the section 31A evidence but also multiple sexual victims. While both *APC* and *Donaldson* involved multiple sexual offences, the fact that the Appellant in *APC* had different tendencies at different ages is not sufficiently different to justify a departure from *Donaldson*. It is not just a tendency which is important but the passage of time. This is exactly the type of case section 31A was designed for and the evidence should have been admitted.

Second, the majority judgment could have applied the definition of 'relationship evidence'. On this note, Pullin JA provided the preferable approach. For Pullin JA, the proposed tendency evidence displayed an abnormal sexual interest in children over time. This is in keeping with the wide definition of 'relationship evidence' which states, inter alia, that it is evidence of attitude or conduct of a person 'over a period of time'.³² The Appellant's attitude over time demonstrated an sexual interest in children. Further, the Appellant's conduct was the same over time. It was more likely that the offences occurred rather than not. This last point proves one of the facts in issue: that the sexual offences occurred. This last point proved that the result in *APC* is best understood through the first principle prism, i.e. identify the facts in issue and work out whether the section 31A is sufficiently connected to this. This is

³⁰ *APC v The State of WA* [2012] WASCA 159, [18] (Pullin JA).

³¹ *Donaldson v The State of WA* (2005) 31 WAR 122, [149].

³² *Evidence Act 1906* (WA), s 31A(1).

nothing complex. It is a reminder of the fundamental rules of relevance.

Third, Pullin's JA preparedness to admit this evidence is in keeping with the legislative purpose of section 31A.

In addition to these three cases, the decision of *Horsman v State of WA*³³ is important. It is important because it shows how section 31A evidence is used when identification is disputed.³⁴ *Horsman* is best explained by the first and second principle.

Mr. Horsman exposed his penis in public on three different dates. Mr. Horsman disputed that he could be identified as responsible for the offences. Materially, in counts 2 and 3, Victims G and D made positive selections of Mr. Horsman during a digiboard interview. The prosecution argued that each charge was cross admissible against each other under section 31A to assist in proving identification.

Mr. Horsman was convicted and appealed. Buss JA³⁵ dismissed the appeal and found that there were striking similarities between each offence because each offence was close in time and space.³⁶ Accordingly, if there were convictions on Counts 2-3, then this could be used in Count 1 to prove identification – where there was no digiboard evidence. Compared to the other sex cases the facts in issue in *Horsman* was different, however, the result was not reached mysteriously but is explained logically in terms of the first principle. The Prosecution in *Horsman* was able to argue that the section 31A evidence supplemented the already strong case in Counts 2 and 3.³⁷ It was never elevated to a major role which replaced the direct evidence (as per the second principle).

All the decisions in this sub-category can be understood by identifying what was factually disputed. As *Horsman* alone disputed identification, the fact that it was a sex cases is less relevant. It is more relevant to work out what is disputed. This is the importance of the first principle.

This raises the question of when an Accused can ever argue section 31A does not apply to multiple sexual offences? The answer is that an Accused can do so in limited situations. This situation is where the Accused has an honest and reasonable, but mistaken, belief that they had consent to have sex with the Victim. The next set of cases show the different results were reached under section 31A depending on what was in issue. This is the first principle paradigm.

B *Multiple sexual offending against adults as an adult*

The importance of identifying the facts in issue at trial under section 31A is demonstrated clearly in the next two cases. Two decisions by two different

³³ *Horsman v State of WA* (2008) 187 A Crim R 187.

³⁴ *Ibid*, [11].

³⁵ With whom Martin CJ and Miller JA agreed.

³⁶ *Horsman v State of WA* (2008) 187 A Crim R 187 at [29].

³⁷ *Ibid*, [28].

Courts at first glance represent two conflicting irreconcilable approaches. However, once the factual issue was identified, the two apparently conflicting decisions are understandable.

1 *Wood v The State of WA [2005] WASCA 179*

Mr. Wood was a self-employed masseur who sexually offended against two different adult Victims. The Defence tried to have two different trials for each Victim. The trial court disagreed and held that the evidence of one Victim was admissible in the trial of the other. The Prosecution were required to assume that they had to prove the sexual offences occurred and that it was Mr. Wood who committed them.³⁸

The grounds of appeal did not agitate the question of whether the section 31A evidence was significantly probative. However, the Court made a number of observations regarding the scope of section 31A. In particular, the Court held that the evidence of one Victim was admissible with respect to the other Victim to prove that the acts occurred.³⁹

On its face, it seemed that the Court of Appeal had settled that section 31A would always apply where multiple sexual offences occurred. Later on however, the High Court would consider a similar factual situation as *Wood* but one where the Accused argued a narrower defence. As will be shown this narrowed the scope of section 31A and this decision is best explained under the first principle.

2 *Stubley v The State of WA (2011) 242 CLR 374*

In 2011, the High Court of Australia considered whether section 31A could apply in the trial of Mr. Stubley. Mr. Stubley had been a psychiatrist for most of his life. As part of his practice, he believed that having sexual relations with his clients helped their psychiatric welfare. Unsurprisingly, allegations of sexual offending arose. Eventually Mr. Stubley was indicted for 14 offences of sexual activity relating to the Victims, JG and CL. The prosecution notified Mr. Stubley that it intended to call other Victim's known as LB, MM and AW. These three Victims were also Mr. Stubley's patients. Each of them was to give evidence of indecent touching or sexual intercourse by Mr. Stubley which happened in his consulting rooms. No charges were laid in respect to the conduct against LB, MM and AW (uncharged acts).

At trial, Mr. Stubley admitted sexual intimacy with all of the Victims except for LB. In a way, Mr. Stubley argued that he had consensual sex with the Victims. Mr. Stubley also argued that the uncharged acts should be excluded.

³⁸ *Wood v The State of WA [2005] WASCA 179*, [18].

³⁹ *Wood v The State of WA [2005] WASCA 179*, [55] (Pullin JA with whom Roberts-Smith JA agreed,[24]).

Mr. Stublely was not successful either before the trial judge or the WA Court of Appeal. As time would tell, however, he would be successful before the High Court.

The majority in the High Court ruled that the Appellant's uncharged acts had no significant probative value. That evidence was not relevant to the issues of identification, lack of consent or an honest and reasonable, but mistaken, belief that Mr. Stublely had consent.⁴⁰ The section 31A evidence did not provide significant probative value in proving that each of the Victims did not give consent.⁴¹ This was because each of the Victims was an adult at the time and there was no proof that each laboured under a psychiatric condition which would vitiate their consent.⁴²

Further, the exclusion of Mr. Stublely's mistaken belief that he had consent was not assisted by the section 31A evidence.⁴³ This was because Mr. Stublely's propensity towards one Victim had no bearing on excluding his mistaken belief that the other Victim consented.⁴⁴

One of the issues is whether *Stublely* is an aberration in the otherwise coherent body of case law regarding sexual offences and applications under section 31A. After all, it is one of the rare cases where section 31A evidence was not admitted.⁴⁵ Ostensibly, the problem is more pronounced because *Wood* and *Stublely* both involved an Accused who offended against different adult Victims – the very type of case the legislature wanted to join together.

However, the section 31A evidence in *Stublely* fundamentally went to the issue of consent. The majority in *Stublely* rejected this section 31A evidence as significantly probative to prove lack of consent. Further, *Stublely* is distinguishable from the facts in *Hoch* and *Donaldson*. *Stublely* involved sexual adult offending, which afforded Mr. Stublely the ability to admit that sex had occurred but that he had consent to do so. This strategic ability is not available in cases of sexual offending against children.⁴⁶ This defence was not available in *Hoch* or *Donaldson*. Furthermore *Wood* was a case where the Defence did not say what the defence was and the Prosecution had to prove both that the act occurred and that Mr. Wood was the person responsible.⁴⁷ The Prosecution in *Wood* was able to cast the section 31A evidence widely which they were unable

⁴⁰ *Criminal Code 1913* (WA), s 24.

⁴¹ *Stublely v The State of WA* (2011) 242 CLR 374, [74].

⁴² *Ibid.*

⁴³ *Stublely v The State of WA* (2011) 242 CLR 374, [81].

⁴⁴ *Ibid.*

⁴⁵ Research reveals the only other case sex case being *APC v The State of WA* [2012] WASCA 159, which is dealt with above under IIIA.

⁴⁶ So in the case of sexual offences against children, for example, sexual penetration of a child under 13 years' of age, pursuant to *Criminal Code 1913* (WA), s 320(2), there is no question of mistaken consent as a defence under *Criminal Code 1913* (WA), s 24.

⁴⁷ *Wood v The State of WA* [2005] WASCA 179, [18].

to do in *Stubley*. This rationale explains why the section 31A evidence was admitted in *Stubley* but not in *Woods*.

The experiences of sexual offence cases under section 31A shows that identifying the facts in issues helps to rationalise the decisions made under section 31A. In many ways this is a call to return to basic concepts of relevance. Identifying the facts in issue under section 31A is not written into the words of the Act. However, it is not only sexual offences which show that identifying the facts in issue is important in understanding how section 31A operates. Drug cases also show the importance of signposting the facts in issue in a section 31A application.

IV DRUG OFFENCES AND SECTION 31A

Unlike sexual offences, section 31A was not specifically enacted to address propensity applications for drug cases.⁴⁸ Drug offences, broadly speaking, occur in two main ways. First, where a person possesses a specific amount of prohibited drugs from which it is argued that they intend to sell or supply those prohibited drugs to other persons. Second, where a person is involved in the active sale or supply of prohibited drugs over a period of time with a number of different people.

Another way of understanding how section 31A works in drugs cases is to look at the types of section 31A evidence being led. First, there are cases where prior convictions were led to show drug dealing. Second, there are cases where charges in an indictment were said to be cross admissible. Each count was admissible against the other because it showed a contextual relationship between an Accused and others, as part of a drug dealing enterprise.

Analysis revealed that in most cases the section 31A evidence provided rebuttal evidence or contextual background evidence. Further, while many of the decisions in this category describe propensity evidence⁴⁹ as a specific tendency to deal in drugs, in reality, the evidence was able to operate on simultaneous and different bases.

Section 31A evidence may have multiple bases for admissibility. In drug cases, the Court was often prepared to find that the section 31A evidence might also constitute relationship evidence or relevant circumstantial evidence.⁵⁰ For example, while 'propensity evidence' under section 31A shows a tendency on the Accused's part to deal in drugs, it can also show the Accused's relationship

⁴⁸ The common law has, of course, considered drug dealing, circumstantial evidence and propensity evidence in *Harriman v R* (1989) 167 CLR 590.

⁴⁹ Very often in the form of prior convictions.

⁵⁰ i.e. the evidence which may, for example, show the relationship between a Complainant and an Accused *Shaw v R* (1952) 85 CLR 365, 377-8. In WA in the context of drugs, see *Beverland v State of WA* [2009] WASCA 2, [1] (McLure JA as she then was) and fraud see *Ferris v State of WA* [2009] WASCA 54, [63] (Martin CJ who admitted the evidence as relationship evidence).

to other drug dealers over a period of time. The next group of cases develops this last point. Again, it does so by working out what is in dispute - the first principle. Again, it is a call to return to fundamental concepts of relevance.

A *Prior convictions for drug dealing*

The prosecution has successfully led the Accused's prior convictions to show a propensity to deal in drugs in several cases. There are four cases worth reviewing:

- a. *Atherton v The State of WA* [2009] WASCA 148;
- b. *Beverland v State of WA* [2009] WASCA 2⁵¹;
- c. *Preston v The State of WA* [2012] WASCA 64; and,
- d. *Bennett v The State of WA* [2012] WASCA 70.

However, the Court of Appeal in *Buiks v The State of WA* (2008) A Crim R 362, dismissed the prior conviction that the prosecution attempted to lead under section 31A. The reason why the section 31A was rejected in this case and not others is due to what was being disputed. Another example of the first principle at work.

In *Atherton*, *Beverland* and *Preston*, the fact in issue whether the Accused possessed the prohibited drug.⁵² In *Atherton*, there was an additional question of whether the Accused intended to sell or supply the drug.⁵³ In *Bennett*, the Accused admitted possession but disputed that he intended to sell or supply.⁵⁴

The facts for *Atherton*, *Preston*, *Beverland* and *Bennett* were similar: a person possessed a certain amount of drugs with intent to sell or supply and the prosecution adduced a conviction(s) for drug dealing. The conviction for the drug dealing could have happened ten years prior to the events in the trial, or at around the same time, or in between the dates of the alleged offending. The rulings in each case applied similar principles to admit the section 31A evidence:

- a. The prior conviction acted as relevant circumstantial evidence for the charges at trial, which was admissible in its own right;⁵⁵
- b. The prior conviction revealed a specific tendency to deal in drugs;⁵⁶
- c. The prior conviction negated any innocent association that the

⁵¹ The author discloses that he was junior counsel for the prosecution in the trial.

⁵² *Atherton v The State of WA* [2009] WASCA 148, [92]; *Beverland v State of WA* [2009] WASCA 2, [21]; *Preston v The State of WA* [2012] WASCA 64, [47].

⁵³ *Atherton v The State of WA* [2009] WASCA 148, [92].

⁵⁴ *Bennett v State of WA* [2012] WASCA 70, [13].

⁵⁵ *Atherton v The State of WA* [2009] WASCA 148, [12], [95]; *Beverland v State of WA* [2009] WASCA 2, [30]-[42].

⁵⁶ *Preston v The State of WA* [2012] WASCA 64m [54] *Atherton v The State of WA* [2009] WASCA 148, [12], [95]; *Bennett v The State of WA* [2012] WASCA 70, [39], [73] and [139].

Accused had to the drugs, the subject of the trial;⁵⁷

- d. The fact that the prior conviction for drug dealing (which was not the subject of the trial) had occurred a long time ago does not render it inadmissible. For example, a 10 year old drug dealing conviction does not automatically render it inadmissible.⁵⁸

Turning then to *Buiks*, the first principle explains why the section 31A evidence in that case was rejected.

Applying the first principle, the facts in issue was whether Mr. Buiks intended to sell or supply cannabis on a long term basis or was he simply a minor player. In terms of the first principle, Mr. Buiks argued that he was guilty of an offence but not one alleged by the prosecution. Despite his argument, Mr. Buiks was convicted. However Mr. Buiks was successful on appeal and his success is best understood in terms of the first principle.

Buss JA agreed that the prior conviction had no significant probative value for two main reasons. First, the prior conviction merely established that Mr. Buiks had a very limited, peripheral and short-term involvement in the cultivation of cannabis as an aider. In contrast the trial charges related to a long-term involvement where Mr. Buiks was a principal.⁵⁹ Second, Mr. Buiks admitted to cutting or clipping up cannabis: thus an offence was committed, but not the one on the indictment.⁶⁰ The section 31A evidence was not admitted.⁶¹

Because the Defence in *Buiks* argued that Mr. Buiks was guilty of other offences but not the ones contained on the indictment, they cast the facts in issue narrowly. This applied a first principle understanding to maximum effect. By contrast, in *Atherton*, *Beverland* and *Preston*, the Prosecution still had to prove the major element of possession. In *Bennett*, the Prosecution still had to prove that the Accused intended to sell or supply. So, what was at issue was still broader in these cases than what was in issue at *Buiks*. In this way, the first principle reconciles the different decisions reached. In this way, practitioners should be wary off litigating all the issues.

Thinking about cases in this way rationalises what at first appears to be inconsistent results under section 31A. Thinking about cases in this way reminds practitioners of the need to remember fundamental concepts of

⁵⁷ *Atherton v The State of WA* [2009] WASCA 148, [12], [95]; *Bennett v The State of WA* [2012] WASCA 70, [34] referring to *Preston v The State of WA* [2012] WASCA 64.

⁵⁸ *Atherton v The State of WA* [2009] WASCA 148, [316]; *Preston v The State of WA* [2012] WASCA 64, [57]; *Bennett v The State of WA* [2012] WASCA 70, [34].

⁵⁹ *Buiks v The State of WA* (2008) A Crim R 36, [53].

⁶⁰ *Buiks v The State of WA* (2008) A Crim R 36, [55].

⁶¹ Miller JA agreed with Buss JA (383 [84]) but Murray AJA dissented. Murray AJA, however, only dissented on whether there was a substantial miscarriage of justice; otherwise finding that the prior conviction had no significant probative value and was inadmissible at [149].

relevance.

But *Atherton*, *Beverland*, *Bennett* and *Preston* are not the only examples where section 31A was used in drug cases. The next set of cases are situations where an Accused allegedly distributed drugs over a period of time to a number of people. As those cases will show, section 31A operated in a similar way to *Atherton*, *Beverland*, *Bennett* and *Preston* because of what was in issue at trial. This demonstrates the practical benefit of the first principle for practitioners.

B Cross-admissible charges or uncharged acts

Drug dealing often involves nefarious networks of trading in the supply of illicit substances over a period of time. They are like modern businesses. Phone calls and mobile phone text messages are critical tools of the trade. The Court of Appeal dealt with at least three cases:

- a. *Noto v The State of WA* [2006] WASCA 278; (2006) 168 A Crim R 457;
- b. *Upton v The State of WA* [2008] WASCA 54; and
- c. *Mansell v The State of WA* [2009] WASCA 140.

Broadly speaking, *Noto* and *Upton* had similar facts: an Accused with a designated role in a group of people who collectively sourced, supplied and distributed drugs over a period of time.⁶² *Mansell* was slightly different. In *Mansell* the Accused possessed a significant amount of prohibited drugs at one point in time and sold or supplied to others at different times.⁶³

Turning to *Noto*, *Upton*, and *Mansell* the question was whether the Accused possessed the prohibited drug and, if they did, whether they intended to sell or supply them. The prosecution had to prove every element of the offence.⁶⁴ In each case the facts in issue were wide. In each case the Court admitted the section 31A evidence. Between the three decisions, there were some common bases for the admissibility of the section 31A evidence.

The common bases for the section 31A evidence was that it:

- a. Negated any suggestion that the parties to the drug transactions were innocently caught up in an unfortunate web of drug offending⁶⁵;
- b. Increased the probability that the Accused knew about the

⁶² *Noto v The State of WA* (2006) 168 A Crim R 457; and *Upton v The State of WA* [2008] WASCA 54.

⁶³ *Mansell v The State of WA* [2009] WASCA 140.

⁶⁴ In a charge of possession of a prohibited drug with intent to sell or supply, the elements being (1) identification (2) possession and (3) an intent to sell or supply, see *Misuse of Drugs Act 1981* (WA), s 6(1)(a).

⁶⁵ *Upton v The State of WA* [2008] WASCA 54, [59]; *Noto v The State of WA* (2006) 168 A Crim R 457, [13]-[14].

- prohibited drugs and thus could prove possession⁶⁶;
- c. Demonstrated that the Accused had a tendency to sell or supply drugs at a certain period of time, which they also had at a later or earlier time⁶⁷; and
 - d. Showed the events in their true context as circumstantially relevant evidence.⁶⁸

This last aspect demonstrates that section 31A evidence can be admitted on a different basis so long as it is relevant. This reminds practitioners the importance of the fundamental rules of relevance: evidence must be probative of the facts in issue. This is in essence the first principle.

None of these cases are particularly remarkable, revelatory or revolutionary. They confirm a seductive analysis being used by the Courts when it comes to section 31A: identify what is in issue and then work out if the section 31A evidence is 'significantly probative'. While there are the four tests⁶⁹ that the Courts have formulated over time, this analysis explains the Court's judgments on section 31A evidence in drugs cases. It is the same reasoning used in sex cases.

This is the fundamental reasoning in the rules of relevance.

Further, as this case review has shown, the defences in drug and sex cases often required the prosecution to prove all the elements in drug cases. Subsequently section 31A could apply to more issues. By contrast violence offences involve narrower defences. As the next set of cases will show section 31A applied to less issues and was not admitted.

V VIOLENCE OFFENCES AND SECTION 31A

The Court of Appeal has decided whether section 31A evidence could be admitted in three violence cases. In all three cases, the section 31A evidence was dismissed.

⁶⁶ *Noto v The State of WA* (2006) 168 A Crim R 457, 467,458; *Upton v The State of WA* [2008] WASCA 54, [59]; *Mansell v The State of WA* [2009] WASCA 140, [41].

⁶⁷ *Noto v The State of WA* [(2006) 168 A Crim R 457, [42] *Mansell v The State of WA* [2009] WASCA 140, [33]; *Upton v The State of WA* [2008] WASCA 54, [60].

⁶⁸ *Noto v The State of WA* (2006) 168 A Crim R 457, 465 and 467; *Upton v The State of WA* [2008] WASCA 54,[67]-[68] (per Steytler P who found the intercepted calls admissible under the common law as contextual or background evidence and so far as it amounted to propensity or relationship evidence, also satisfied section 31A.

⁶⁹ The four tests are stated above. However, for ease of reference the tests are summarised again. The first test is whether the proposed evidence constitutes 'propensity evidence' or 'relationship evidence', or both. The second test is whether the evidence is relevant to the facts in issue. The third test is that the evidence by itself or with other evidence has '*significant probative value*'. The fourth test is a balancing exercise. The Court must consider whether a fair minded person would think the probative value compared to the degree of risk of an unfair trial means that the public interest prioritises adducing this evidence.

In one case the Accused disputed that he was the person responsible (the identification category).⁷⁰ In the two other cases, the Accused admitted to the violent act but argued that the act was lawful (the unlawfulness category).⁷¹ At work in all three cases are both the first and second principles.

A Identification category

In *Dair v The State of WA* (2008) 36 WAR 413 Mr. Dair tried to break into Mr. Yap's car. Mr Yap's car was parked in the Northbridge Library Car Park. Off duty police officer Giocas chased Mr. Dair and identified himself as an off duty police officer. Mr. Dair then stabbed Officer Giocas in the neck. Four witnesses came forward. However, none of the witnesses positively identified Mr. Dair.

The prosecution also led evidence of implied admissions of guilt made by Mr. Dair to Mr. Chapula and Mr. Dair's father, respectively. These admissions were recorded on telephone calls. Mr. Dair also admitted the offences to Mr. Strachan – a person with whom he used amphetamines.

Finally, the prosecution led evidence of three prior convictions which happened before the stabbing, in addition to one conviction which happened after the stabbing. The prosecution argued that the convictions showed that Mr. Dair had a tendency to use violence when stealing cars. The conviction evidence was admitted as propensity evidence under section 31A.

The question at trial was whether Mr. Dair was the person who stabbed Officer Giocas in the neck. There was no dispute regarding the other elements (ie that there was injury caused of a certain type). The defence was narrow and specific.

On appeal, inter alia, it was argued that the propensity conviction evidence should not have been admitted.

Each of the three judgements delivered a different position on this issue. Of the three judgments, Steytler P's decision on what constitutes 'significant probative value' has been subsequently applied.⁷²

Steytler P held that the convictions had significant probative value but that the convictions would not be admitted by a fair-minded person.⁷³ For Steytler P it was significant that the witnesses had picked out (albeit tentatively) a man who belonged to a class of persons who stole cars and were prepared to use violence in order to evade arrest. This made it more likely that these witnesses had picked the right man and this was significantly probative.⁷⁴

However, the section 31A evidence was excluded because the witness

⁷⁰ *Dair v The State of WA* (2008) 36 WAR 413.

⁷¹ *Ninyette v The State of WA* [2012] WASCA 184 and *Daniels v State of WA* [2012] WASCA 213.

⁷² Most notably the High Court in *Stubley v The State of WA* (2011) 242 CLR 374, [11]-[12].

⁷³ *Dair v The State of WA* (2008) 36 WAR 413, [70]-[72], [79] and [94].

⁷⁴ *Dair v The State of WA* (2008) 36 WAR 413, [72].

Strachan was either going to be credible or not regardless of the section 31A evidence.⁷⁵ Directions were not enough to overcome the risk of unfairness because the convictions only placed Mr. Dair in a class of potential offenders. The second principle is whether the section 31A evidence is a major part of the case and complements already suspect evidence. If the section 31A evidence does this, then it is likely inadmissible. Viewed through this prism Steytler P's decision is rational and logical. For Steytler P there was a valid concern that the jury would be exposed to generalised prejudicial section 31A evidence. So while the section 31A evidence was of importance or consequence it was taking on too large a role. The Strachan evidence stood on its own without the need for section 31A evidence. Thus, if the second principle applies the section 31A evidence would not be used in this case.

What Steytler P's judgment does is to demonstrate the second principle at work. Up until *Dair* was decided, it seemed that section 31A evidence would easily be admitted. At first glance, *Dair* seemed like the bump in an otherwise smooth road. However, by viewing *Dair* via the second principle the decision is no different to other decisions on section 31A. That is, the section 31A evidence ought to supplement the case without being the primary piece of evidence where the case is already weak. The section 31A evidence in *Dair* supplemented the Strachan evidence when it did not need to. The Strachan evidence stood on its own. Seen through this lens, *Dair* is reconcilable with sex and violence cases on section 31A.

More of this will be expanded on below in a comparison between sex, drug and violence cases.

Moving to the next two cases they too, like *Dair*, rejected the section 31A evidence. That being said, because of what was in dispute, they are very different cases to *Dair*. This is where the first principle is most useful to explain the results reached.

B Unlawfulness cases

The Court of Appeal has twice considered how prior convictions can be used where the Accused argued self-defence/defence of another in the face of violence. The two cases are:

- a. *Ninyette v The State of WA* [2012] WASCA 184; and
- b. *Daniels v State of WA* [2012] WASCA 213.

Both cases shared some similar facts: (1) an act of violence admitted by the Accused, and (2) an explanation of self-defence/defence of another, and, (3) the prosecution leading a prior conviction of violence which involved the same Victim, others or which reveals a specific modus operandi. Generally speaking,

⁷⁵ *Dair v The State of WA* (2008) 36 WAR 413, [94].

the Court did not admit a prior conviction where it only shows an Accused has a violent tendency.⁷⁶

Daniels and *Ninnette* make the point that just because a person has a tendency towards violence does not mean they will be violent to a specific person. This is something which the common law has already recognised.⁷⁷ Rather, it is important to identify what is in issue at trial because that may be motivated by different underlying dynamics. To make this point, in *Daniels*, Ms. Daniel's prior conviction of assaulting the same deceased had significant probative value.⁷⁸ Crucially, Buss JA found that this evidence explained the relationship between Ms Daniels and the deceased. In turn, this provided a proper context for the jury when they considered the unlawful killing such that it would have been admitted.⁷⁹

Both *Daniels* and *Ninnette* demonstrate the first principle. In violence cases the violent act is often admitted whereas the reason why it is committed is disputed. This is what is in issue. It is important to work this out before applying for section 31A evidence in violence cases.

Viewed by themselves *Dair*, *Ninnette* and *Daniels* reached the same result: rejection of section 31A evidence. However viewed against the majority of other decisions the three decisions are at odds. To explain why they are not at odds it is useful compare sex, violence and drug experiences under section 31A via the first and second principles.

VI COMPARISONS OF SEX, VIOLENCE AND DRUG CASES UNDER SECTION 31A

The Court's preparedness to admit section 31A in sex and drug cases but not for violent cases can be partly explained by the other evidence that is used to prove guilt. This is essential for the practitioner to understand in deciding in a section 31A application. In sex and drug cases, there is usually direct evidence to prove guilt, for example admissions, the Victim's recognition of the Accused and forensics. Accordingly, in sex and drug cases the section 31A evidence provides a context in which the offending took place. For example, in drug cases, an Accused who deals in drugs at one point in time is likely to still be involved in that drug dealing business at a later point in time. When this evidence is combined with other direct evidence⁸⁰ (e.g, telephone intercept material), the prior conviction evidence is usually admitted under section 31A.

⁷⁶ *Ninnette v The State of WA* [2012] WASCA 184, [29] and *Daniels v State of WA* [2012] WASCA 213, [85]-[90].

⁷⁷ *Pfennig v The Queen* (1995) 182 CLR 461,480 (Mason CJ, Deane and Dawson JJ).

⁷⁸ *Daniels v State of WA* [2012] WASCA 213, [85]-[90].

⁷⁹ *Ibid*, [86].

⁸⁰ As is required under section 31A(2)(a) which states, inter alia, that the evidence is significantly probative "having regard to other evidence adduced".

Similarly in sex cases, the prosecution case typically consists of a Victim giving evidence about the offence. On some occasions there is also forensic evidence. Further, it is important to remember that the inability to join charges in sex cases was part of the legislative purpose of section 31A. Unsurprisingly, there is a preference to admit section 31A evidence in sex cases.

However, in violent cases, the other evidence used to prove the case is often identification evidence (e.g. digiboard evidence⁸¹). As it stands, identification evidence carries its own warnings and directions to a jury given its seductive dangers.⁸² In violence cases, the section 31A evidence may be boosted to a major part of the prosecution case to bolster identification evidence (which is already suspect). The section 31A evidence takes on too large a role, making it undesirable or prejudicial to admit. This last proposition stands apart from any wording contained in section 31A and is deciphered from the tapestry of cases under section 31A. This is the second principle: section 31A evidence cannot supplement already weak evidence.

Support for this comes from England. The House of Lords in *Director of Public Prosecutions (UK) v P* [1991] 2 AC 447 considered that similar fact evidence proving identification should be subject to a higher standard of admissibility.⁸³ Lord Mackay of Clashfern LC observed that:

Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary.

Lord Mackay qualified that this ‘signature or other special feature’ was not necessary in cases where similar fact evidence was used to prove commission of the offence.⁸⁴

In Western Australia, the only two cases (one sex and one violence) which considered section 31A evidence where identification was disputed, both observed that other jurisdictions have not adopted the English test of a ‘signature or other special feature’.⁸⁵ The first case of *Horsman* involved sexual allegations. The Court in *Horsman* admitted the evidence because it was similar fact evidence.⁸⁶ The other case was *Dair*, which involved violence and did not admit the evidence. The reason why the similar fact evidence was admitted in *Horsman* was because it was already strikingly similar – it must be remembered

⁸¹ Of the type described in *Winmar and Hussein v State of WA* (2007) 35 WAR 159.

⁸² The general warning where identification evidence forms the primary part of the prosecution case being subject to a judicial warning: *Domican v R* (1992) 173 CLR 55.

⁸³ *Director of Public Prosecutions (UK) v P* [1991] 2 AC 447, 462.

⁸⁴ *Ibid.*

⁸⁵ *Horsman v State of WA* (2008) 187 A Crim R 565, 576 and *Dair v State of WA* (2008) 35 WAR 413, [52]-[53].

⁸⁶ *Horsman v State of WA* (2008) 187 A Crim R 565, 576.

that at least under the common law it has been held that the more strikingly similar propensity evidence is, the more likely it will be admitted.⁸⁷ Importantly in *Horsman* there was already strong digiboard identification evidence for some of the charges- unlike in *Dair*. Put another way, the strikingly similar fact evidence in *Horsman* was admissible 'having regard to other evidence adduced'.⁸⁸

The fact that there is one sex and one violence case is telling. It demonstrates the second principle cutting across the case categories.

Further, as noted at the beginning of this article, the High Court admitted the uncharged act of Mr. Pfennig in his murder trial. Mr. Pfennig also disputed that he could not be identified. McHugh's J judgment became the basis of the fourth test under section 31A. The fourth test is where the Court must consider whether a fair minded person would think the probative value compared to the degree of risk of an unfair trial means that the public interest prioritises adducing this evidence. It is somewhat ironic then that while this part of the judgment became a basis for section 31A and the decision itself admitted the evidence, the same result was not reached in *Dair*. The conviction propensity evidence in *Dair* was more factually similar to the trial charge than the discreditable act that Mr. Pfennig participated in, compared to his trial charge. Arguably, had *Pfennig* been decided today under section 31A, then the evidence would not be admissible.

Dair and *Horsman* exemplify the first and second principle at work. Comparison between the cases also shows the importance of defining the factual issues being contested. Exactly what constitutes the factual issues can be defined by the Defence. This leads to the next subject.

VII THE STRATEGIC ROLE OF EVIDENCE ACT 1906 (WA), SECTION 32 IN DEFINING THE SCOPE OF SECTION 31A

In Western Australia⁸⁹ section 32 of the Act states:

An accused person, either personally or by his counsel or solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence.

This section is a strategic device⁹⁰ available to the Defence. Section 32 has the

⁸⁷ *Pfennig v The Queen* (1995) 182 CLR 461, 483 per Mason CJ, Deane and Dawson JJ.

⁸⁸ *Evidence Act 1906* (WA), s 31A(2)(a).

⁸⁹ This provision has interstate equivalents. See for example the *Evidence Act 1995* (Cth) ss 184 and 191, *Criminal Code 1899* (Qld) s 644, *Evidence Act 1906* (ACT) s 32, *Evidence Act 2001* (Tas) ss 184 and 191, *Criminal Code 1983* (NT) s 379 and *Evidence Act 2008* (Vic) ss 184 and 191.

⁹⁰ For a brief discussion of the common law and the equivalents to the *Evidence Act 1906* (WA), section 32, see *Stubley v The State of WA* (2011) 242 CLR 374, [144]-[150] (Heydon J).

potential to narrow the issues. In the context of this discussion, an Accused who admits certain elements of the offence limits the scope of section 31A. Aside from section 32, the Defence can also argue matters in opening without making an admission under section 32.

Take the example of *Stubley*. Mr. Stubley admitted he had had consensual sexual relations with some of his Victims. This did not constitute a formal admission under the *Evidence Act 1906* (WA), section 32.⁹¹ Nonetheless, it limited the overall scope of section 31A, which resulted in the proposed section 31A being inadmissible. The section 31A evidence was not relevant to consent. By contrast, is the similar case of *Wood v The State of WA*.⁹² Mr. Wood stated no defence and put the prosecution to full proof.⁹³ It would have been open for Mr. Wood to argue that the sexual acts occurred consensually. Mr. Wood could have limited section 31A. But for whatever reason Mr. Wood did not⁹⁴, and the section 31A evidence was admitted.

It is not only sex cases where making concessions under section 32 can assist. In *Buiks*⁹⁵ Mr. Buiks admitted to cutting or clipping up cannabis. Mr. Buiks argued that an offence was committed but not the one the prosecution alleged.⁹⁶ The section 31A evidence was inadmissible.⁹⁷ This is especially persuasive when it is considered that this is the only drug case where section 31A was inadmissible. By contrast is *Noto*, *Upton* and *Mansell* where the prosecution had to prove every element. The section 31A evidence was admitted because it went to a number of issues.⁹⁸

These examples show that concessions made either formally under section 32, or by way of an oral defence can limit the scope of section 31A. That being said, the prosecution is not bound to accept a section 32 admission and the wording plays a crucial role in its acceptance.⁹⁹ Consequently this analysis under section 32 shows the importance of identifying what the facts in issue

⁹¹ *Stubley v The State of WA* (2011) 242 CLR 374, [63] (Gummow, Crennan, Kiefel and Bell JJ).

⁹² See also *AJ v State of WA* (2007) A Crim R 247, [19] where the Defence was to put the Prosecution to full proof and the majority ruled the propensity/relationship evidence admissible 265 [37] per Buss JA.

⁹³ *Wood v The State of WA* [2005] WASCA 179, [6].

⁹⁴ This is no criticism of Mr. Wood.

⁹⁵ *Buiks v The State of WA*(2008) A Crim R 362

⁹⁶ *Buiks v The State of WA*(2008) A Crim R 362, 377[55]

⁹⁷ *Buiks v The State of WA*(2008) A Crim R 362, 377, [56]. Miller JA agreed with Buss JA (383 [84]) but Murray AJA dissented. Murray AJA however only dissented on whether there was a substantial miscarriage of justice otherwise finding that the prior conviction had no significant probative value and was inadmissible otherwise (395[149]).

⁹⁸ *Noto v The State of WA*(2006) 168 A Crim R 457, 465, [32] and 467[42]; *Upton v The State of WA*[2008] WASCA 54 per Steytler P (with whom McLure JA as she then was and Pullin JA at [67]-[68]) found the intercepted calls admissible under the common law as contextual or background evidence and so far as it amounted to propensity or relationship evidence also satisfied section 31A.

⁹⁹ *Stubley v The State of WA* (2011) 242 CLR 374, [150] (Heydon J).

actually is, i.e, the first principle.

VIII CONCLUSION

It has been ten years since section 31A was enacted. In those ten years the WA Court of Appeal has set down useful principles regarding the scope of section 31A. At its core are the two principles argued by this article. From those two principles have evolved a number of subsidiary principles.

1. Defining the facts in issue relative to the proposed use of section 31A evidence.

Accordingly admitting some factual elements of the offence can reduce the reach of section 31A.

Further by looking at what is in issue if the section 31A evidence is admissible on another basis then this can short cut the process. This evolutionary experience goes back to fundamental principles of relevance which existed before section 31A.

2. The elevation of section 31A as almost major proof that the Accused was the person present and who committed the offence, will often result in the case being inadmissible. This is the case when the other evidence supporting the case is suspect (eg identification evidence).

The case law under section 31A reminds practitioners of fundamental concepts of relevance. The Defence, through making factual concessions can limit the scope of section 31A. The Prosecution, by considering the other evidence available to prove guilt and the type of case being prosecuted can select the most appropriate cases where 31A evidence will be admitted.