

Chapter 39

Is the Weight of Evidence Material to its Admissibility?*

“I do not think really that probative value is ever a question for the judge to decide conclusively. At all events I am not able to call to mind any conditions in which it would be”.¹

Introduction

It is a great honour to have been asked to deliver this Memorial Lecture. Paul Byrne was an exceptionally able defence lawyer—in his day and generation one of the ablest criminal lawyers in the country. I had some involvement with him at both the start and the end of his career. At the start he had a deep interest in the law relating to identification evidence at a time when its acute problems were coming under close scrutiny. It was on that subject that he worked for his Master’s degree. The discrimination and precision he showed then reflected themselves later in his efforts for those clients fortunate enough to engage his services, especially in High Court appeals. His relatively early death was a great loss to the Bar.

The classical division between the functions of judge and jury

Was Dixon CJ’s statement forming the epigraph to this lecture correct? Is it correct now? He was not of course referring to those questions of fact which judges decide in jury trials in the light of evidence *after* it has been admitted.² Instead, Dixon CJ was concerned with the question whether a judicial conclusion about the probative value of tendered evidence was ever material to the judge’s consideration of whether to admit it or reject it. His statement reflects the classical division of functions between judge and jury. That decision requires a separation of two questions. The first question is: “Is this evidence admissible?” That question is left exclusively to the judge. The second question is: “Is this evidence, which is admissible and has been admitted, evidence of sufficient weight to act on in resolving the controversy being tried?” That question is for the jury, not the judge. The issue to be raised in this lecture is whether that classical division is breaking down.

* Paul Byrne SC Memorial Lecture, University of Sydney Law School, 15 October 2014. Previously published in (2014) 26 *Current Issues in Criminal Justice* 219.

1 *Wendo v The Queen* (1963) 109 CLR 559 at 562 per Dixon CJ.

2 They are often called questions of law: JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown & Co, 1898) p 202.

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