HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

TREVOR JOHN GOLDSMITH APPELLANT

AND

MICHAEL DARREN SANDILANDS & ORS RESPONDENTS

Goldsmith v Sandilands [2002] HCA 31
8 August 2002
P91/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

M D Cole for the appellant (instructed by Terrace Law)

G T W Tannin with K E McDonald for the first, second and third respondents (instructed by Crown Solicitor for the State of Western Australia)

K N Allan for the fourth respondent (instructed by K N Allan)

CATCHWORDS

Goldsmith v Sandilands

Evidence – Admissibility – Negligence – Collateral facts – Credibility – Whether failure to allow appellant to reopen his case to adduce evidence in reply going to his credit constituted a miscarriage of justice.

Evidence – Evidence available only after close of appellant's case – Whether Commissioner erred in not allowing appellant to reopen his case to adduce such evidence – Whether miscarriage of justice in the circumstances.

1 GLEESON CJ. It sometimes happens, in the course of litigation, that counsel will start a hare. The response of the opposing counsel may be to pursue it. One of the duties of a trial judge is to control the proceedings, to exclude irrelevancy, and to maintain proper limits upon the extent to which the parties and their lawyers will be permitted to raise and investigate matters that are of only marginal significance.

2 The facts in issue in a civil action case emerge from the pleadings, which, in turn, are framed in the light of the legal principles governing the case. Facts relevant to facts in issue emerge from the particulars and the evidence. The function of particulars is not to expand the issues defined by the pleadings, but "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial"[1]. The function of evidence is to advance, or cut down, the case of a party in accordance with the rules of statute or common law that determine the nature of the information a court will receive. The primary rule of evidence is that a court will receive, and will only receive, evidence that is relevant to the issues as defined by the pleadings. Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding[2]. The general rule that relevant evidence will be received is qualified by other rules based upon considerations of justice, or practicality. One such qualification limits investigation of collateral matters.

3 Collateral facts were described by Latham CJ in *Piddington v Bennett and Wood Pty Ltd*[3] as "facts not constituting the matters directly in dispute between the parties". An example of a collateral fact is one affecting the credibility of a witness. As a general rule, itself subject to exceptions, a cross-examiner is bound by the answer to a question that goes only to credit. The cross-examiner is bound in the sense that he or she will not be permitted to lead evidence to contradict the answer of the witness. This rule is based on the desirability of avoiding a multiplicity of issues[4]. It is an example of the law's pragmatism. The adversarial system of civil litigation would collapse if the adversaries were permitted to lead evidence about every matter of contention that arises in the course of

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1 *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713 per Scott LJ.

2 This is the definition of relevance in the *Evidence Act* 1995 (NSW). It is not materially different from that given by Sir James Stephen in his *Digest of the Law of Evidence*, 5th ed (1887), Art 1 at 2, and adopted by McHugh J in *Palmer v The Queen* (1998) 193 CLR 1 at 24 [55], fn 54.

3 (1940) 63 CLR 533 at 546.

4 Heydon, *Cross on Evidence*, 6th Aust ed (2000) at 506.

proceedings. The case of *Piddington* provides a strong (and perhaps controversial) illustration of the rule. Dixon J, who was in the majority, characterised the evidence in question as having no tendency other than to discredit a particular witness[5]. It would not have been admissible if the witness had not given evidence. It could not be called to contradict the testimony of the witness. In *Palmer v The Queen*[6], McHugh J pointed out that it is sometimes difficult to maintain a rigid distinction between evidence which goes only to the credit of a witness, and evidence otherwise relevant to a fact in issue. Questions of degree arise, both as to relevance, and as to whether a fact is collateral[7]. And whether a fact has a bearing upon the credit of a witness will often depend upon exactly what the witness has represented to the court. The present case provides an example.

4 The appellant and the first respondent were, in June 1993, members of the police force in Western Australia. The appellant sued the respondents in negligence for damages for personal injuries, alleging that he had injured his back and neck while a passenger in a car being driven by the first respondent on 26 June 1993. It was part of the case for the respondents that the appellant's injuries had been suffered, not on 26 June 1993, but in the course of an indoor cricket match on 22 June 1993. In support of that allegation, the respondents relied upon admissions allegedly made by the appellant. It was part of the first respondent's case that, on 22 June 1993, the first respondent, by previous arrangement, had collected the appellant after a game of indoor cricket and that, as the appellant entered the car, he said: "I've stuffed my back … playing cricket." In due course, the first respondent gave evidence to that effect.

5 Thus, a fact in issue was whether the appellant had injured his back on 26 June 1993. A fact relevant to the fact in issue was whether the appellant had injured his back playing indoor cricket on 22 June 1993. (Proof that he had injured his back on 22 June did not establish that he had not also injured it on 26 June but, together with other evidence in the case, it could rationally affect the probabilities as to whether the events of 26 June were a cause of his injuries.) The evidence upon which the respondents relied to establish the fact relevant to the fact in issue included evidence of an admission by the appellant to the first respondent. The making of the admission was denied. However, it was not in dispute that the appellant was an indoor cricket player. He played indoor cricket at Strikers indoor cricket arena, which was situated at Belmont. He conceded that he might have played there on 22 June 1993.

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5 (1940) 63 CLR 533 at 553.

6 (1998) 193 CLR 1 at 24 [56].

7 Heydon, *Cross on Evidence*, 6th Aust ed (2000) at 506.

6 When the first respondent, in the course of his case, came to give evidence of the alleged admission, he was uncertain in his recollection about the location of the indoor cricket arena. He said he could not remember the name of the street. After stating that he was only guessing, he gave a brief description of the street. He said it was a short cul-de-sac. He said that, in the intervening years, he had once attempted to find the street. He went back to a street named President Street, but he could not be sure that was the street in which he had collected the appellant.

7 Bearing in mind the first respondent's uncertainty as to the location of the indoor cricket arena, of which trial counsel was presumably aware when he cross-examined the appellant, and which he must have known when he examined the first respondent, and bearing also in mind that there was only one Strikers indoor cricket arena, that it was in Belmont, and that the appellant was prepared to accept that he may have played there on 22 June 1993, it is surprising that trial counsel for the first respondent decided to embark upon an investigation of the precise location and physical surroundings of the indoor cricket arena at which the appellant played. It was a subject about which the appellant was prepared to concede all that mattered, and about which his own client professed no clear recollection. And any question as to the address of Strikers could presumably have been settled by looking at a telephone directory.

8 In cross-examining the appellant, counsel for the first respondent elicited admissions that the appellant was an indoor cricket player, that he used to play at Strikers at Belmont, and that he might have been playing cricket on 22 June 1993. That was all he needed. But he went further. He suggested to the appellant, without objection, that the arena was at President Street. The appellant agreed. The suggestion, he said, had rung a bell. But the suggestion was erroneous. President Street is not in Belmont; it is in Welshpool, which we were told is three kilometres from Belmont.

9 Having thus, in cross-examination, and without objection, put a misleading suggestion, and elicited from the appellant the erroneous information that Strikers was in President Street, counsel for the first respondent, again without objection, pursued the matter with his own client, when he called him as a witness. Despite the first respondent's protestations that he could not remember, and that he was only guessing, counsel pressed his client on the subject, and finally obtained from him some rather tentative evidence that President Street appeared to be, or was similar to, the street in which the indoor cricket arena from which he had collected the appellant was located. Counsel for the appellant cross-examined the first respondent on the subject. The cross-examination demonstrated what the first respondent had said in the first place: he was extremely uncertain as to the location of the arena. He agreed that there was no indoor cricket arena in President Street. He repeated that he was

guessing. It was put to him that Strikers was in Esther Street, Belmont. He said he had no idea.

10 The name and description of the street in which the indoor cricket arena was located was a collateral fact. It was a circumstantial detail relating to the evidence of the alleged admission. And, having regard to what the appellant had conceded in his evidence, it was of negligible significance. It is possible that, if there had been a dispute about whether the appellant had ever played indoor cricket, then the details about the location of the arena, if seriously in contest, might have had some real bearing on the credit of the first respondent. Even in that circumstance, it would have been collateral.

11 Trial judges have the power, and the duty, to control the pursuit of irrelevancies, or collateral matters. But it is understandable that a judge may be cautious about cutting off a line of examination or cross-examination where no objection is taken. Counsel usually know more about their respective cases than the judge, and it is sometimes unfair to compel them to indicate where questions are heading.

12 The opportunity for Commissioner Reynolds, who presided, to give this supposed issue its quietus, arose, not from an objection to a question, but from an application made by counsel. Counsel for the appellant, after cross-examining the first respondent, asked for leave to re-open his case by re-calling the appellant to prove the location of the Strikers indoor cricket arena, and by leading evidence about the differences between Esther Street, Belmont, and President Street, Welshpool. Commissioner Reynolds refused such leave. That refusal is the principal subject of the present appeal. (We were informed by all counsel that, under Western Australian practice, it is very unusual for a plaintiff to have a case in reply; hence the application to re-open.)

13 Commissioner Reynolds' ruling was correct. The circumstance that the subject of the location and surroundings of the indoor cricket arena at which the appellant was said by the first respondent to have been playing, and at which the appellant accepted he might have been playing, on 22 June 1993 was raised by counsel for the first respondent, did not mean that counsel for the appellant was entitled to pursue the subject to its conclusion. Presumably counsel for the first respondent was trying to make the first respondent's evidence as to the admission more credible by pressing for as much circumstantial detail as possible. And counsel for the appellant's cross-examination of the first respondent's evidence on the issue was aimed at attacking his credibility. Even if the evidence could reasonably have been regarded as bearing on the credit of the first respondent, the matter was collateral. Furthermore, having regard to the first respondent's disclaimers as to his recollection, the proposed further evidence did not even bear significantly on his credit. This is reflected in the ultimate reasons for judgment given by Commissioner Reynolds, who said:

> "Even if the [first respondent's] recollection in relation to the location of the cricket centre was shown to be wrong in any way then that would not necessarily mean his evidence of picking up the [appellant] from indoor cricket should be rejected. It should be noted that even the [appellant] could not give a detailed description of the surrounds of the cricket centre and the name of the street in which it was located."

14 There is no substance in the complaint made by the appellant.

15 There was argument as to a subsidiary matter concerning the evidence of a physiotherapist. I agree with what Callinan J has said about that.

16 The appeal should be dismissed with costs.

17 McHUGH J. This appeal gives rise to two issues. The first involves the rule that speaking generally a party to litigation cannot call evidence to rebut an opponent's evidence about the existence of a fact collateral to the issues in the case. The appellant, the unsuccessful plaintiff in a negligence action, claims that the trial judge erred in refusing to permit him to re-open his case to lead evidence to rebut the first defendant's description of part of a street where the plaintiff was alleged to have made a damaging admission. If the trial judge erred, the second issue in the appeal is whether the error caused a miscarriage of justice.

18 The appeal is brought from an order of the Full Court of Western Australia dismissing the plaintiff's appeal against a judgment of Commissioner Reynolds sitting in the District Court of that State. The Commissioner had dismissed the plaintiff's action for damages for personal injury. The Commissioner held that the plaintiff had not suffered injury in the way that he claimed.

The material facts

19 At all material times, the plaintiff and the first defendant were policemen. The plaintiff claimed that on 26 June 1993 he suffered injury because of the first defendant's negligent driving. The plaintiff alleged that the injury occurred during a high-speed chase in which the first defendant was the driver and the plaintiff a passenger. The first defendant denied that the plaintiff had suffered injury because of his driving on 26 June 1993 or on any other day. He claimed that the plaintiff probably suffered his injury three nights earlier while playing indoor cricket. The first defendant testified that on 22 June 1993 he had driven to an indoor cricket centre and picked up the plaintiff. The first defendant said that, when the plaintiff got into the car, he complained that he had hurt his back or neck while playing cricket at the centre.

20 In cross-examination, the plaintiff denied that he had told the first defendant that he had hurt his back while playing cricket. He agreed that he had played cricket at Strikers indoor cricket centre ("Strikers") and conceded that he might have played there on 22 June 1993. Counsel for the first defendant put to the plaintiff, and the plaintiff agreed, that Strikers was situated in President Street. This was incorrect. President Street is in Welshpool, about three kilometres from Belmont where the cricket centre is located. Why counsel for the first defendant wanted to make the address of Strikers an issue in the case is a mystery. It added nothing to his case.

21 In evidence, the first defendant said that, some days before 22 June 1993, the plaintiff told him that he would be playing indoor cricket on 22 June and asked him to pick the plaintiff up at about 9pm from an address that was "somewhere south of the river". He had written the address down, but now could not "remember where it was". The first defendant gave a brief description of features of the street. He then said:

> "I have been back to a street since that time. The street that I went back to was President Street. It appears to be the street, or similar to the street, which I went to but I cannot say 100 per cent that, yes, it was. It appears to be."

22 In cross-examination, the first defendant said that he remembered that "there were some bollards at the end of this street". Shown a sketch, the first defendant said that there "were some bollards around the end of this cul-de-sac area" and that they were "white". He said that he was not "entirely sure" that President Street was the place where he had been on 22 June 1993. He said that he did not know whether that was the street, but it looked the same. He could not "recall the premises" and conceded that there was no indoor cricket centre in President Street when he had gone out there with his counsel two or three weeks before the trial had commenced in April 1998. Asked how he selected President Street, he said that he knew the street was in the area. One night he "patrolled around those streets, found a street that looked familiar and that's how it was selected". He agreed that, from the evidence he had heard, Strikers was in Belmont and that President Street was in Welshpool, which was about three kilometres from Belmont. However, the first defendant said that he could not say whether it was Strikers that he "went to" that night. Asked whether Strikers was in Esther Street, Belmont, the first defendant said that he had "no idea".

23 During cross-examination, counsel for the plaintiff also sought to question the first defendant concerning photographs of President Street, taken a few weeks before. However, the Commissioner disallowed such questions on the ground that the photographs had been taken five years after the event.

24 A little later, counsel for the plaintiff said that he proposed to cross-examine the first defendant on some recent photographs of Esther Street, Belmont where Strikers was located. The object of putting the photographs to the first defendant was "to see if that helps refresh his memory". Counsel for the plaintiff said that the first defendant "could look at these photographs and it may well be … his position will change in relation to the matter". The plaintiff's counsel also applied for leave to re-open his case to call the plaintiff who had taken the photographs of Esther Street.

25 The Commissioner rejected the use of photographs of Esther Street. He said "the reasons I expressed in relation to the previous set of photographs apply equally in relation to this set of photographs". The Commissioner also rejected the plaintiff's application to re-open his case, saying:

> "It seems to me that this is a matter that was raised during the course of the evidence of the plaintiff on the previous occasion. If I was to accede to a request to have witnesses recalled to give evidence on matters that have already been the subject of evidence, then I would be recalling

> people perhaps frequently to the point of delaying the conclusion of the hearing.
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> …
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> The matter has already been the subject of some evidence. If it was going to be pursued, there was an earlier time to do it rather than now."

26 Later, the Commissioner rejected a further application by the plaintiff's counsel to re-open the plaintiff's case to call the plaintiff and other witnesses including a physiotherapist who had not been available to give evidence before the plaintiff's case had closed. In ruling against the application to re-call the plaintiff, the Commissioner said:

> "The issue of the location of Strikers was put to the plaintiff during the course of his cross-examination by Mr Robbins.
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> … the plaintiff didn't make any clear concession that Strikers was in President Street. He agreed that it could be. That's the extent of it. In any event, the point is that the location of Strikers was an evidentiary point during the cross-examination of the plaintiff. It's my view that that having been the subject of evidence, the matter was raised, the plaintiff's case was closed subsequent to the matter being raised and my view is that we have reached a stage where that's the end of it."

27 Against the evidentiary background, this statement suggests that the Commissioner refused to exercise his discretion to allow the plaintiff to be re-called to testify concerning Strikers because:

- the location of Strikers was not a fact in issue but only of evidentiary significance;
- the plaintiff knew from his cross-examination that the first defendant claimed that on 22 June 1993 a conversation had occurred outside a cricket centre in President Street;
- the plaintiff knew from his cross-examination that the first defendant claimed that in that conversation the plaintiff had said that he had hurt his back while playing cricket; and
- the plaintiff had closed his case, without calling evidence concerning the location of Strikers or further dealing with the matter, although "the matter was raised" during his case.

28 The Full Court thought that the Commissioner erred in not allowing the plaintiff to re-open his case. Templeman J (with whose judgment Pidgeon and Ipp JJ agreed) said:

> "If [the first defendant's] evidence about collecting the [plaintiff] from a street which resembled President Street in Welshpool could be controverted by proving that the configuration of that street was significantly different from Esther Street, Belmont, doubt might be cast also on [the first defendant's] evidence about the admission then said to have been made by the [plaintiff] as to injuring his neck or back."

29 However, although the Full Court held that the Commissioner erred in not allowing the plaintiff to re-open his case, it held that no miscarriage of justice had occurred. Templeman J said that it was "fanciful to suppose that the outcome of the trial would have been different if the [plaintiff] had given evidence about the location of Strikers".

Collateral facts

30 At the trial, neither party paid attention to whether evidence from or on behalf of the plaintiff concerning the configuration of Esther Street was admissible to rebut the defendant's evidence. The parties seemed to have assumed that it was admissible. So did the learned Commissioner. The Full Court also thought the evidence of the plaintiff concerning the location of Strikers was admissible. Templeman J said that the Commissioner was clearly right in holding that "the matter under consideration was 'a key evidentiary issue'". Templeman J also thought that leave to call the evidence should have been given. His Honour said the plaintiff's application "was not, strictly, an application to re-open his case, but to call evidence in rebuttal in relation to an issue which had taken him by surprise". But in my opinion, the evidence that the plaintiff sought to lead concerning Esther Street was not admissible in rebuttal or in his case, if it was re-opened. The evidence was relevant only to a collateral fact and not to a fact in issue or a fact relevant to a fact in issue. Nor did it come within any of the exceptions to the rule that a witness' evidence concerning a collateral matter is final and cannot be contradicted by other evidence.

31 Under the common law rules of evidence, evidence is generally admissible only if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact[8]. Whether a fact is a fact in issue depends upon the pleadings and particulars of each party's case. The facts in issue reflect the material facts that constitute the claimant's cause of action – which may be

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8 Stephen, *Digest of the Law of Evidence*, 5th ed (1887), Art 1 at 2; *Palmer v The Queen* (1998) 193 CLR 1 at 24 [55].

defined as the set of facts to which the law attaches the legal consequences that the claimant asserts[9]. The facts in issue also include those material facts that provide any justification or excuse for, or a defence to, the cause of action.

32 Evidence concerning collateral facts – facts that are not facts in issue or facts relevant to a fact in issue – is not generally admissible. But that rule has some notable exceptions. The best known is that a witness may be cross-examined about facts affecting his or her credit or credibility. As I pointed out in *Palmer v The Queen*[10], logically there is no distinction, so far as relevance is concerned, between the credibility of a witness and the facts to which the witness deposes. The reliability of oral testimony cannot be separated from the credibility of its deponent. But the common law has generally refused to act on the basis that there is no distinction between the credibility of a witness and the facts to which the witness testifies. Because the common law regards answers to questions on credit or credibility as going to collateral issues, in most cases the opposing party cannot tender evidence to contradict those answers[11].

33 But there are exceptions to the rule that ordinarily a witness' answer on a collateral matter is final and cannot be contradicted. Thus, the opposing party may tender evidence to contradict answers relating to the credit of a witness where the witness' answer denies that he or she had been convicted of a crime[12] – at all events if it is a crime affecting the veracity of the witness[13]. And a witness' answer is not final if it denies that the witness has made a previous inconsistent statement[14].

34 There are other exceptions to the general rule that evidence must be relevant to a fact in issue or a fact relevant to a fact in issue. One exception is that the finality rule concerning collateral matters does not prevent a witness being contradicted as to facts that are immediately connected with the facts in issue or facts relevant to the facts in issue[15]. Thus, whether *the opportunity* to

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9 cf Wigmore, *Evidence*, Tillers rev (1983), vol 1, §1.

10 (1998) 193 CLR 1 at 24 [56].

11 *R v Cargill* [1913] 2 KB 271.

12 *Clifford v Clifford* [1961] 1 WLR 1274 at 1276; [1961] 3 All ER 231 at 232.

13 *Bugg v Day* (1949) 79 CLR 442 at 467.

14 *Crowley v Page* (1837) 7 Car & P 789 [173 ER 344]. The admissibility of such statements is now governed by legislation based on ss 4 and 5 of the *Criminal Procedure Act* 1865 (UK).

15 Starkie, *Law of Evidence*, 3rd ed (1842), vol 1 at 190.

observe a relevant fact is or is not a collateral matter, the practice of the common law courts has been to admit evidence that shows that a witness did not have an opportunity to make the observation[16]. Common law judges have taken the view that the opportunity to observe an event is so closely connected with the observation that it should not be regarded as a collateral matter falling within the finality rule. So ordinarily a party may contradict an opposing witness' evidence concerning the time, place and lighting of, and distance from, the scene of an event, if the event is itself relevant.

35 Other exceptions to the finality rule are that a party may prove that a witness is biased[17] or has been corrupted[18] or that his or her evidence is unreliable because of a physical or mental condition[19] or that the witness cannot be believed upon his or her oath[20]. In *Lowery v The Queen*[21], the Judicial Committee of the Privy Council went so far as to hold that psychiatric evidence was admissible to prove that Lowery's character was such that the co-accused's version of a killing was the more probable version.

36 Another exception to the finality rule is that sometimes a party may be permitted to tender evidence that a witness has made an earlier statement that is consistent with the witness' evidence. If the evidence of a witness concerning a material fact is attacked on the ground that the witness has recently invented or reconstructed the evidence, the party calling the witness may tender evidence proving a previous consistent statement of the witness[22].

37 Speaking generally, however, evidence concerning collateral matters cannot be contradicted. The rationale for the common law distinguishing between evidence concerning the issue and evidence concerning collateral matters is not rooted in logic, but in policy[23]. In *Toohey v Metropolitan Police*

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16 cf *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 547 per Latham CJ.

17 *Thomas v David* (1836) 7 Car & P 350 [173 ER 156].

18 *Attorney-General v Hitchcock* (1847) 1 Ex 91 at 100 [154 ER 38 at 42]; *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 545.

19 *Toohey v Metropolitan Police Commissioner* [1965] AC 595.

20 *R v Hemp* (1833) 5 Car & P 468 [172 ER 1057]; *R v Richardson* [1969] 1 QB 299.

21 [1974] AC 85.

22 *The Nominal Defendant v Clements* (1960) 104 CLR 476.

23 *Palmer v The Queen* (1998) 193 CLR 1 at 22 [52].

Commissioner[24], Lord Pearce said that "[m]any controversies which might … obliquely throw some light on the issues must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them". The Full Court of the Federal Court has said that the finality rule concerning evidence on collateral matters "is based primarily upon the need to confine the trial process and secondarily upon notions of fairness to the witness"[25].

38 The need for finality of answers on collateral matters is greatest when those matters go to facts that discredit the witness. In *Attorney-General v Hitchcock*[26], Mr Baron Alderson referred to "the inconvenience that would arise from the witness being called upon to answer to particular acts of his life, which he might have been able to explain, if he had had reasonable notice to do so". His Lordship said[27] that it would only be "justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues".

39 Despite the longevity of the finality rule, it has increasingly come to be regarded more as a flexible standard than a fixed rule of law[28]. Starke J recognised this in *Piddington v Bennett and Wood Pty Ltd*[29] when he said that the finality rule was "a rule of convenience, and not of principle". Similarly, in *Natta v Canham*[30], the Full Court of the Federal Court said that the rule should be regarded "as a well-established guide to the exercise of judicial regulation of the litigation process". In *Natta*, the Full Court held that, where a person claimed that she had been injured in a car accident, evidence was admissible to contradict her denial that she had asked another person to stage a car accident so that she could claim compensation. The Full Court said[31] that "[a] trial judge should not be precluded from determining in an appropriate case that the matter on which a

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24 [1965] AC 595 at 607.

25 *Natta v Canham* (1991) 32 FCR 282 at 298.

26 (1847) 1 Ex 91 at 103 [154 ER 38 at 44].

27 (1847) 1 Ex 91 at 104 [154 ER 38 at 44].

28 *Palmer v The Queen* (1998) 193 CLR 1 at 23 [53].

29 (1940) 63 CLR 533 at 551 citing Christian J in *R v Burke* (1858) 8 Cox CC 44 at 53.

30 (1991) 32 FCR 282 at 298.

31 (1991) 32 FCR 282 at 300.

witness' credit is tested is sufficiently relevant to that credit as it bears upon issues in the case that such evidence may be admitted".

40 The need for flexibility in applying the finality rule is supported by the difficulty that courts often find in determining whether the evidence concerns a collateral matter or a fact in issue or a fact relevant to a fact in issue. A well-known example is *Piddington v Bennett and Wood Pty Ltd*[32] where this Court divided 3-2 in holding that the defendant could not call evidence that indirectly tended to prove that a witness was not at the scene of an accident. In cross-examination, the witness had said that he was at the scene because he had just been to a nearby bank probably to draw out or pay in money on behalf of a Major Jarvie. This Court held that the bank manager could not give evidence that on that day there had been no transactions on Major Jarvie's account. Latham CJ, dissenting, said[33] that the evidence was admissible because "whether he went to the bank or not for Major Jarvie was accordingly a fact which had a bearing upon the probability or improbability of the truth of his evidence as to his presence at the place of the accident". Starke J, also dissenting, said[34] that it was not denied that whether the witness was present was a fact relevant to a fact in issue. His Honour held[35] that it was not necessary that the absence of the witness be proved directly; it could "be proved indirectly, that is, inferred from other facts". In contrast, Dixon J said[36] that the bank manager's evidence had "no natural tendency to show that [the witness] was absent from the scene of the accident. All it does is to discredit the account he gave under cross-examination". Evatt J said[37] that the evidence "went merely to prove that [the witness'] general recollection or memory or credibility was not to be relied upon". And McTiernan J said[38] that the evidence "could discredit the witness, but it was incapable of contradicting any fact upon which proof of the opportunity which the witness had of observing the accident depended".

41 English courts have also had difficulty in distinguishing between facts that are in issue or relevant to an issue and facts that are collateral to the issue. In

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32 (1940) 63 CLR 533.

33 (1940) 63 CLR 533 at 547.

34 (1940) 63 CLR 533 at 551.

35 (1940) 63 CLR 533 at 552.

36 (1940) 63 CLR 533 at 553.

37 (1940) 63 CLR 533 at 560.

38 (1940) 63 CLR 533 at 567.

Busby[39], the English Court of Appeal recognised the difficulty saying[40] that "[i]t is not always easy to determine when a question relates to facts which are collateral only, and therefore to be treated as final, and when it is relevant to the issue which has to be tried". In *Busby*, police officers gave evidence of admissions by the accused that he had committed burglaries. The officers denied that they had fabricated the admissions or that they had threatened a witness whom they had interviewed while making inquiries concerning the burglaries. The Court of Appeal held that the trial judge had wrongly rejected evidence given by the witness that the officers had threatened him. The Court held, wrongly in my opinion, that the threat went to a fact in issue – whether the officers concerned "were prepared to go to improper lengths in order to secure the accused's conviction"[41]. With respect, it seems impossible to justify this decision if the distinction between collateral facts and facts in issue is to be maintained. Whether the officers had threatened the witness threw no direct light on whether the accused had made the admissions. The evidence simply showed that they were of bad character and willing to break the law. Moreover, the decision is irreconcilable with *Harris v Tippett*[42], which held that evidence could not be called to contradict the denial of a witness that he had tried to dissuade a witness for the other side from giving evidence. Cases in the English courts since *Busby* also appear to have blurred the distinction between collateral facts and facts in issue[43].

The Commissioner did not err in refusing to permit the plaintiff to re-open his case

42 In my opinion, the Commissioner did not err in refusing to permit the plaintiff to re-open his case. The evidence that the plaintiff wished to call concerning Esther Street was not admissible. It did not tend to prove that the plaintiff had not told the first defendant that he had hurt his back or neck while playing cricket. Evidence that proved that the plaintiff had made no such admission was unquestionably admissible. But evidence that the first defendant was wrong in asserting that the cricket centre's street had "some bollards around the end of this cul-de-sac area" and that they were "white" did not prove that the plaintiff had not said that he injured his back or neck while playing cricket. The

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39 (1981) 75 Cr App R 79.

40 (1981) 75 Cr App R 79 at 82.

41 (1981) 75 Cr App R 79 at 82.

42 (1811) 2 Camp 637 [170 ER 1277].

43 *Marsh* (1985) 83 Cr App R 165; *R v Knightsbridge Crown Court; Ex parte Goonatilleke* [1986] QB 1; *Chandu Nagrecha* [1997] 2 Cr App R 401.

evidence concerning the physical features of Esther Street could only discredit the first defendant's recollection or assertion of those physical features. It could not prove or disprove any fact relevant to a fact in issue.

43 The evidence that the plaintiff wished to call was further removed from the issues in the case than the evidence rejected by this Court in *Piddington.* Like the evidence in that case, the Esther Street evidence did not go to a fact in issue or a fact relevant to a fact in issue. At best it discredited part of the first defendant's evidence. Nor did the evidence that the plaintiff wished to call point so powerfully to the first defendant's account of the admission being false that it should be admitted by a flexible application of the finality rule. Unlike the evidence considered by the Full Court of the Federal Court in *Natta*[44], evidence that the first defendant was wrong in his description of parts of Esther Street did not strongly support the plaintiff's case that he had not made the alleged admission. In *Natta*, on the other hand, evidence that the plaintiff had previously suggested faking a car accident strongly supported the first defendant's case that the present claim had been faked.

44 Accordingly, the evidence concerning Esther Street was inadmissible. The Commissioner did not err in refusing to allow the plaintiff to call this evidence.

The physiotherapy evidence

45 I am inclined to think that, although it was a discretionary matter, the Commissioner did err in refusing to allow the plaintiff to call the physiotherapist. The physiotherapist's evidence would tend to prove that the collision in which the plaintiff was involved had not aggravated any injury that he had. And there appears to be no good reason why the plaintiff's application to call this evidence should have been rejected. But even if the Commissioner erred, that evidence would not have affected the result of the trial because the Commissioner found that the collision was not relevant to the plaintiff's condition.

Order

46 The appeal should be dismissed with costs.

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44 (1991) 32 FCR 282.

47 KIRBY J. This appeal[45] concerns the procedures followed in a civil trial in the District Court of Western Australia. In that trial, Mr Trevor Goldsmith (the appellant) lost his claim for damages for personal injury against Constable Michael Sandilands (the first respondent), the State of Western Australia (the second respondent), the Commissioner of Police of Western Australia (the third respondent) and the State Government Insurance Commission (the fourth respondent).

Relevant evidence is wrongly excluded from a trial

48 The appellant's case at trial was that he had suffered a serious injury to his cervical spine on the night of 25-26 June 1993 in the course of his service as a police constable. The injury was said to have happened whilst he was a passenger in a police vehicle driven by Constable Sandilands and insured by the fourth respondent. The respondents' case was ultimately that the cause of any disabilities suffered by the appellant was an injury that he had sustained whilst playing a game of indoor cricket on 22 June 1993, ie three days before the high speed chase to which the appellant attributed them. The Commissioner of the District Court, having heard much evidence of lay and expert medical witnesses, over nine days or so in April and July 1998, made adverse findings about the credibility of the appellant. He preferred the truthfulness of Constable Sandilands who had given evidence that the appellant had made an admission to him about the indoor cricket injury which the appellant denied[46].

49 Ordinarily, that would have been an end of the matter. Every day, trial courts throughout Australia must resolve contested issues of fact and conflicting testimony. By repeated decision of this Court[47], appellate courts in this country are cautioned against interfering with decisions of the tribunal of fact in matters such as this[48], save in very limited circumstances where the conclusion reached is incompatible with evidence that is objectively demonstrated, has been reached by

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45 From a judgment of the Full Court of the Supreme Court of Western Australia: *Goldsmith v Sandilands* [2000] WASCA 18.

46 *Goldsmith v Sandilands* unreported, District Court of Western Australia, 21 October 1998 at 70-71 per Commissioner Reynolds.

47 eg *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

48 eg *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 91-92 [54]; *Rosenberg v Percival* (2001) 205 CLR 434 at 442 [17], 448 [43], 488-489 [164], 505 [222]-[223].

an erroneous process of reasoning or is otherwise "glaringly improbable"[49]. Reasons of legal authority support this rule of appellate restraint. So do reasons of legal policy that recognise the problematic nature of eliciting objective truth in any trial setting, the several advantages enjoyed by trial judges over appellate judges in matters of fact finding and the need to bring contested questions to finality, given the costs and other disadvantages of appeals and retrials and the burdens which litigation places upon the parties, witnesses and the courts.

50 The appellant acknowledged all of the foregoing. However, he submitted that a threshold mistake had occurred in the conduct of the trial. He argued that the primary decision-maker had erred in two important respects with the result that the appellant had been denied the opportunity of rebutting the critical evidence of Constable Sandilands. In support of his argument, the appellant relied upon two critical findings made by the Full Court. These were that the primary decision-maker had erred in the exercise of his discretion at trial in refusing to permit the appellant to reopen his case, or otherwise to adduce evidence in rebuttal:

(1) to respond to the evidence given by Constable Sandilands concerning the location of the indoor cricket facility at which that witness had said that he had called for the appellant in a police car and the appellant had allegedly complained about injuring himself in the immediately preceding game of indoor cricket; and

(2) to respond to a late amendment to the defence of the first three respondents, made after the trial had commenced, contending that if (as those respondents denied) the appellant had suffered any injury in a motor vehicle incident this had occurred in a subsequent motor vehicle incident during a high speed chase on 10 April 1995 – but not the one for which the appellant had sued[50]. In this respect, the appellant had sought to call his physiotherapist who had been treating him both before and after the alleged supervening incident. That witness was not immediately available during the appellant's case but was available before the trial was concluded. The appellant had sought leave to reopen his evidence to call the physiotherapist as a witness. However, the Commissioner of the District Court refused to grant such leave both when the request was first made and later when it was renewed before the end of the trial.

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49 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in Liq)* (1999) 73 ALJR 306 at 332 [93]; 160 ALR 588 at 621-622.

50 [2000] WASCA 18 at [38].

51 In the Full Court, Templeman J (who gave the leading judgment) concluded that, in both of the foregoing respects, the Commissioner had erred. The discretion to refuse leave to the appellant to call the relevant evidence had miscarried on both occasions[51]. No notice of contention was filed in this Court by any of the respondents challenging these conclusions of the Full Court. In any case, in my opinion each of the conclusions reached by the Full Court was correct for the reasons given. The fate of the appeal to this Court must therefore be determined on that footing. The question is what follows?

Applicable principles governing appellate consequences

52 *Evidence in reply or rebuttal*: Subject to any applicable legislation (and none was suggested in this case)[52], three general legal principles govern the resolution of the issues argued in this appeal. The first involves a reminder that the trial process in an Australian court involves adherence to the principle of procedural fairness. Whether this is inherent in the Constitution that creates, or envisages, the integrated Judicature of the nation or whether it is a rule of the common law matters not for present purposes[53]. In different parts of Australia and in different courts, statutes, court rules and local practice and tradition have influenced the conduct of trials and the procedures observed in them. However, the obligation to accord procedures fair to both sides, and to be impartial as between them, are common requirements of the trial process in courts everywhere in this country.

53 In some Australian jurisdictions[54] a party in the position of the appellant has a case in reply which follows the close of the respondent's case. That party is entitled, in reply, to call evidence that arises directly in answer to any evidence that may have been called by that party's opponents. There, evidence in reply is not tendered during an opponent's case but is marked for identification and

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51 [2000] WASCA 18 at [35]-[37], [47]-[52].

52 There are statutory provisions in Western Australia relevant to rebuttal evidence in criminal trials: *Criminal Code* (WA), s 636A(3); cf *Justices Act* 1902 (WA), s 141.

53 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-487, 501-502; McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235.

54 Notably in New South Wales: Ritchie, *Supreme Court Procedure New South Wales* at [34.6.4], "Reply": the evidence in reply is conventionally confined to cases where the party has been misled or taken by surprise in respect of matters contained in the other party's case. See also at [34.6.5], "Reopening".

tendered only in the party's own case, either in chief or (where applicable) in reply.

54 In most parts of Australia (and specifically in Western Australia where the present trial was conducted[55]) this procedure is not followed. There, each party has its own case. Each is expected, in that case, to tender the entirety of its evidence. Any evidence that is not tendered during the party's case can then only be received if that party is given leave by the court to reopen its case and to tender items of evidence that were earlier overlooked or that only became relevant as a result of the conduct of the opponent's case.

55 The differences between these procedures, which are substantially the products of legal history or local legislation, court rules and practices, should not be exaggerated. Each of them is designed to ensure that a party normally presents all of its evidence before its opponent is called upon to respond. Each restricts late additions to the evidence where it could have the effect of surprising an opponent, foreclosing its opportunities to respond and extending needlessly the length of a trial and the pursuit of side issues of limited relevance to the matters for decision[56].

56 In criminal trials throughout Australia, the common law restrains the Crown from "splitting its case"[57] and calling a witness after the close of the defence case. However, even in criminal trials, where the risks of procedural injustice are large and their consequences most serious, this Court has resisted the notion of a "rigid formula". It has done so having regard to the almost infinite variety of difficulties that can arise in a trial. Accordingly, the law has recognised that the judge retains a discretion to permit the prosecution to adduce evidence in reply, although it has insisted that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all of its evidence before the accused is obliged to present his or her

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55 Seaman, *Civil Procedure Western Australia* at [34.5.17]; cf Williams, *Civil Procedure Victoria* at [49.01], [49.01.75].

56 cf *Attorney-General v Hitchcock* (1847) 1 Ex 91 at 105 [154 ER 38 at 44] cited New South Wales Law Reform Commission, *Working Paper on the Course of the Trial* (1978) at [8.1]; cf "A Note as to the Rules Relating to the Admission of Further Evidence", (1942) 15 *Australian Law Journal* 338 at 341; Roberts, *Evidence: Proof and Practice* (1998) at 375.

57 *Shaw v The Queen* (1952) 85 CLR 365; *Niven v The Queen* (1968) 118 CLR 513 at 516; *R v Chin* (1985) 157 CLR 671 at 685; Andrews, "Re-opening the case for the prosecution", (1991) 107 *Law Quarterly Review* 577 at 586; Aronson and Hunter, *Litigation: Evidence and Procedure*, 6th ed (1998) at 984.

defence[58]. The strict rule can be adapted *ex improviso*. This means no more than "unexpectedly" or "suddenly" but in circumstances "which no human ingenuity can foresee"[59].

57 The reasons that exist in criminal trials to sustain such an "extremely strict rule"[60] do not exist, at least to the same degree, in civil trials in Australia. Subject to any exceptions provided by or under statute, it is fundamental that the criminal trial is accusatorial in character[61]. But civil trials are adversarial and not accusatorial in character. Moreover, in most parts of Australia, civil trials are today normally conducted by a judicial officer sitting alone, without a jury[62]. In such a trial greater latitude is reserved to the trial judge, where leave is necessary, to permit a party to adduce evidence in reply or rebuttal and to admit such evidence, if appropriate, upon condition that an issue that is reopened should be properly but economically explored to conclusion, with both sides having a fair facility to place relevant evidence (especially documentary evidence) before the court before the end of the trial.

58 The guiding principle for the grant or refusal of leave to call evidence in response to the evidence of another party, where this is sought by a party, is, ultimately, what the justice of the case – including procedural fairness – requires. That principle should not become unduly entangled in precedents or procedural rules.

59 Whilst efficiency and economy in the conduct of civil trials are important requirements of the contemporary trial process, those objectives are valid only as they contribute to just outcomes[63]. Once the trial process is under way, rigidity should be avoided, certainly at a time before the evidence has been closed and before the decision foreshadowed or announced. To exclude relevant evidence during a trial, in response to evidence tendered by another party in its case, simply because it could, or should, have been adduced earlier may, in particular

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58 *Shaw* (1952) 85 CLR 365 at 378-379; Aronson and Hunter, *Litigation: Evidence and Procedure*, 6th ed (1998) at 988.

59 *Shaw* (1952) 85 CLR 365 at 379; cf *R v Frost* (1839) 9 Car & P 129 at 159 [173 ER 771 at 784].

60 *Shaw* (1952) 85 CLR 365 at 378.

61 *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[28], 656 [111].

62 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in Liq)* (1999) 73 ALJR 306 at 328 [88]; 160 ALR 588 at 617.

63 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, 171-172.

circumstances, deny the party tendering such evidence the fair opportunity to present its case. It may render that party unjustly hostage to the defective perception, imagination and industry of its legal representatives. This is why a large discretion is reserved to the trial judge in civil trials to admit or reject evidence in rebuttal or reply. In an appeal, the exercise of the judge's discretion in such matters is subject to the usual restraints upon appellate disturbance of discretionary decisions[64].

60 *Error and miscarriage of justice*: The second principle, also one of procedural fairness, concerns the consequence that follows where the appellate court considers that the discretion at trial has miscarried. Given that in every trial many rulings on the admission of evidence must be made, some insignificant and others of great importance, it is not every incorrect decision upon such a matter that will attract an appellate order for a retrial. To adopt such a rule would be unduly inflexible. It would permit technical slips of little or no consequence to overwhelm substantive merit, ignoring the mistakes and imperfections to which any human system of justice is prone.

61 Commonly, legislation or rules of court will involve the requirement, both in criminal[65] and civil appeals[66], that an error in a ruling on evidence must produce a miscarriage of justice or substantial wrong before appellate intervention is warranted. Within such limits, the ordering of a new trial for any such error is a discretionary remedy. It follows that it is not every erroneous ruling permitting evidence to be received, or excluding it, that will justify an order setting aside the judgment entered at trial and ordering a new trial.

62 Specifically in the context of decisions affecting the reception of evidence relevant to the evaluation of the credibility of a witness, a rule of vigilance has been adopted by appellate courts. The foundation for this rule is an appreciation of the fact that decisions about credibility are often complex ones in which the decision-maker must take into account a variety of evidentiary indicators pointing respectively to acceptance or rejection of the contested testimony. Until the evidence at the trial is concluded and the last word spoken in argument, our legal system requires the decision-maker to keep an open mind about the significance of particular evidence as it may cast light on the truthfulness or falsehood of the assertions of a party or other witness[67]. In the well-known

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64 *House v The King* (1936) 55 CLR 499 at 504-505.

65 eg *Niven v The Queen* (1968) 118 CLR 513 at 516.

66 *Balenzuela v De Gail* (1959) 101 CLR 226.

67 *Jones v National Coal Board* [1957] 2 QB 55.

words of Denning LJ, "[n]o cause is lost until the judge has found it so; and he cannot find it without a fair trial"[68].

63 However, even in such a matter the common law retains its sense of proportion. It is not every departure from procedural fairness concerning the reception or rejection of evidence relevant to the credibility of a party or witness that will entitle the aggrieved party to a new trial. In *Stead v State Government Insurance Commission*[69], this Court pointed to the cases where established error in this regard would not warrant an order for a retrial. However, it also emphasised that it "is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference" where the issue is whether the testimony of a particular witness would be accepted[70].

64 In *Stead*, this Court set a very high standard where credibility was the issue. When evidence relevant to that point has been erroneously excluded the only basis for refusing a retrial is where the appellate court can affirmatively conclude that the error "could have had no bearing on the outcome of the trial of an issue of fact"[71]. The reason for this stringent rule is that the law accepts that credibility assessment can sometimes be crucial to the outcome of a case – as it was in this case. And the final conclusion on whether or not a witness is to be believed may depend upon evaluating all of the relevant testimony viewed in relation to all of the evidence in the case.

65 *Credibility and collateral evidence*: The third principle governs the extent to which a party will be entitled to cross-examine a witness as to credit and to adduce evidence to show that the witness has been untruthful in some aspect of the evidence which he or she has given.

66 In some Australian jurisdictions where the *Uniform Evidence Acts* apply, this subject is now governed by statutory provisions that control the admission of evidence relevant to credibility[72] and that limit cross-examination as to credibility[73]. These provisions followed reports of the Australian Law Reform

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68 [1957] 2 QB 55 at 67.

69 (1986) 161 CLR 141.

70 (1986) 161 CLR 141 at 145. The passage is set out in the reasons of Callinan J at [106].

71 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146.

72 eg *Evidence Act* 1995 (Cth), s 102.

73 eg *Evidence Act* 1995 (Cth), s 103.

Commission that were critical of the common law as it had developed on this subject[74].

67 The Australian Law Reform Commission concluded that the law in question was full of inconsistencies, uncertainties and other defects[75]. This conclusion is, with respect, fully warranted if regard is had to the analysis of the decision of this Court in *Piddington v Bennett and Wood Pty Ltd*[76], set out in the reasons of Callinan J[77]. There this Court was closely divided. The judges in the majority did not express a single or consistent principle for holding that the evidence in question in that case was inadmissible. The dissenting opinions are highly persuasive. The majority severally express themselves in terms that permit exceptions and qualifications to the principles that they respectively accept[78]. At least in some circumstances, where a witness has "garnished his

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74 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985), vol 1 at 226 [409], 450-451 [794], 456 [800], 467 [817]-[818]; Australian Law Reform Commission, *Evidence*, Report No 38 (1987) at 102-106 [179]-[181]; see also at 175-176 setting out the draft Evidence Bill, cll 94-96.

75 In its Interim Report, *Evidence*, Report No 26 (1985), vol 1 at 226 [409] the Australian Law Reform Commission referred to *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 and to criticisms of it. It said:

> "McCormick used the label 'linchpin' for the particular kind of collateral fact asserted by the witness to which independent contradicting evidence should be admitted despite the rule. It may be that the rule itself should disappear in favour of direct judicial application of a test balancing probative value and disadvantages."

The reference is to McCormick, *Handbook of the Law of Evidence* (1954). In its final Report, the Commission, on this as on other topics, opted for a rule with stated exceptions rather than for a general judicial discretion.

76 (1940) 63 CLR 533.

77 Reasons of Callinan J at [97]-[102].

78 See especially Evatt J's acceptance, in *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 558, that in cases of an undefined "special character" a witness' testimony about the scene of an accident might be received in contradiction to other evidence; see also Callinan J at [99]; cf note on *Natta v Canham* (1991) 32 FCR 282, (1992) 66 *Australian Law Journal* 377.

account … with associated details designed to give verisimilitude"[79] to that witness' evidence, a power in the trial judge is recognised to permit a subject, opened up by evidence on one side, to be answered by the other so as to preserve both the actuality and appearance of even-handed justice.

68 In *Natta v Canham*[80], before the *Evidence Act* came into force in federal courts, the Full Court of the Federal Court, after referring to *Piddington*, said, correctly in my view:

> "[T]he court is not bound [by *Piddington*] to the view that the exclusionary rule is absolute or that the categories of exceptions to it are closed. It is a rule of practice related to the proper management of litigation. A trial judge should not be precluded from determining in an appropriate case that the matter on which a witness' credit is tested is sufficiently relevant to that credit as it bears upon issues in the case that such evidence may be admitted."

69 To similar effect the Australian Law Reform Commission, in its Interim Report on *Evidence*, remarked[81]:

> "Evidence relevant to credibility will have minimal probative value unless it relates to specific conduct in substantially similar situations. In addition, it suffers from the same disadvantages as other character evidence – the dangers of misestimation and prejudice …
>
> The existing rule limiting investigation of such matters to cross-examination may be justified by the desire to keep trials within manageable limits by avoiding detailed investigation of collateral issues. But, on the other hand, such an inflexible limitation may result in the court being misled. Often the answer may be rebutted easily, with limited interruption of the trial. Moreover, specific conduct evidence of this particular kind is likely to be relatively uncommon, so that it could be adduced without significant problems."

70 This general approach was continued into the Law Reform Commission's final Report on the subject[82]. It is reflected in the legislation that followed. In

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79 *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 558 citing the reasons of the Supreme Court of New South Wales which had itself been divided: Jordan CJ and Halse Rogers J, Bavin J dissenting.

80 (1991) 32 FCR 282 at 300. See also *R v Livingstone* [1987] 1 Qd R 38.

81 *Evidence*, Interim Report No 26 (1985), vol 1 at 467 [817]-[818].

82 *Evidence*, Report No 38 (1987) at 105 [180].

my view, the eventual provision of the legislation also reflects the common law of Australia as relevant to the present appeal. The primary rule is that evidence that relates only to the credibility of a witness is not admissible to prove that the evidence of the witness should or should not be accepted. However, there are exceptions designed to balance the need for restrictions to prevent trials pursuing collateral or peripheral credibility issues and the need for flexibility to meet unexpected or exceptional evidence that is received in the trial and that a party should be allowed to meet and rebut so as to preserve the actuality and appearance of even-handed justice. Relevantly to the present case, an exception permits evidence in reply or rebuttal in a civil trial that has a substantial probative value in the particular case. This would include evidence that tends to prove that the witness knowingly or recklessly spoke falsely when under an obligation to tell the truth.

The appellant's submissions in this Court

71 The appellant submitted that the refusal of the Commissioner of the District Court to allow him to adduce testimony in respect of the two aspects of the evidence mentioned earlier in these reasons was fundamentally unfair and had caused the trial of his action to miscarry. Accordingly, there should be a new trial in which he would be afforded a fair opportunity to meet the distracting assertions of the respondents that his disabilities were caused by injuries different from those received in the impugned events of the night of 25-26 June 1993. In my view, the appellant's main submissions were by no means insubstantial. They were as follows:

1. Both of the alternative incidents relied on by the respondents had been raised by them belatedly – and in particular the attempt to implicate the supervening car chase of 10 April 1995. This put the appellant at a disadvantage in the presentation of what, from his point of view, had been a comparatively straightforward case. In meeting the respondents' attempts to blame other incidents, the appellant said that he should have been given a fair opportunity to reply, but had not been. Originally, the appellant had complained that the conduct of the trial by the Commissioner had been biased against him. Whilst this ground of appeal was not before this Court (having been rejected in the Full Court[83]) there were resonances of it in the appellant's complaint about the refusals of the Commissioner to give him a fair opportunity to meet the respondents' case that suggested that, at trial, the Commissioner had not given him a "fair go".

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83 [2000] WASCA 18 at [205]-[208].

2. The appellant established that on 11 August 1993 Constable Sandilands had signed a statutory declaration in relation to the incident of June 1993. This affirmed the high speed chase, that the appellant was the passenger and Constable Sandilands the driver, that the vehicles had negotiated several sharp U turns and that the attempt of the offender to ram the police vehicle had required him to take evasive action in the vehicle in which he and the appellant were travelling. No mention was made in that statement about an earlier admission of an alleged injury to the appellant whilst playing indoor cricket. The first written statement that mentioned this complaint was dated 15 January 1997. However, by that time Constable Sandilands was under the (erroneous) impression that he might be personally liable in respect of the appellant's claim. The appellant suggested that this mistake had given Constable Sandilands a personal motive to attempt to deflect any blame for the appellant's disabilities from Constable Sandilands' driving to the supposed indoor cricket injury which, at all times, the appellant denied and proof of which depended upon admissions said to have been made by the appellant to Constable Sandilands and two other police officers, Detective Sergeants Harmer and Cross.

3. The evidence about the appellant's alleged admission to Constable Sandilands was, it was suggested, easy to assert and difficult to refute. Accordingly, the only way that a party in the position of the appellant had to test, and to ultimately rebut, the allegation was to scrutinise with care the evidence which the accuser provided in elaboration of his assertion. If such evidence could be shown to be false, it would give rise to a question as to why the witness had attempted to "gild the lily". It would open all of Constable Sandilands' testimony to much closer scrutiny. If he would lie in respect of one aspect of the accusation the question was posed: was the entire story concocted? Only if the premise could be established would the appellant have a chance to shift the Commissioner's inclination to believe Constable Sandilands. Acceptance of his evidence as truthful was, as both the Commissioner and the Full Court acknowledged, a "key finding" on the part of the Commissioner[84]. Yet upon that finding the appellant was denied the chance either of tendering relevant evidence or of pressing his arguments based upon what that evidence would have proved. As such evidence was addressed to the credibility of Constable Sandilands, it was impossible to say how its reception might have affected the Commissioner's ultimate process of decision-making. He had effectively tied the appellant's hands and the only remedy was a retrial at which the two identified errors would be avoided.

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84 [2000] WASCA 18 at [189].

4. Various other features of the excluded evidence were mentioned – including the way in which the appellant had been taken by surprise at the trial, the misleading way the location of the indoor cricket venue had been put to witnesses in questioning and, so far as that location was concerned, the way in which its features, although objectively insignificant, assumed an importance because of the elaborations proffered by Constable Sandilands which the appellant claimed he was entitled to test and refute. According to the appellant, this was a more natural and logical way to judge the truthfulness of what Constable Sandilands had said – rather than relying on the discredited assumption that credibility, or lack of it, could be determined by the appearance and demeanour of a witness giving evidence in the artificial circumstances of a trial[85].

No miscarriage is shown requiring retrial

72 I have acknowledged that the arguments of the appellant are far from meritless. Indeed, for my part I regard the case as a borderline one. However, this Court is only entitled to interfere in the Full Court's judgment if it is convinced that an error has occurred in that court. In my view, the correct application of the three legal principles to which I have referred supports the conclusion of the Full Court.

73 The appellant should have had the opportunity to reopen his case before the end of the trial, and to adduce the evidence which he proffered to rebut the descriptions of the indoor cricket venue and the motor vehicle chase of April 1995, rendered significant in the respondents' cases without adequate or proper notice before the trial. To the extent that he was denied that opportunity, the appellant has suffered an injustice. Yet the question remains whether the Full Court erred in deciding that this injustice, such as it was, was not of a degree that caused the trial to miscarry or such as to have the necessary bearing on the outcome of the trial or the crucial issue of fact in the trial.

74 No error of this degree has been shown. The Full Court's decision should therefore be confirmed. My reasons for coming to that conclusion are as follows:

1. It is first necessary to put out of account one of the two grievances of the appellant – that concerning the suggested relevance of the second car chase of April 1995. This can be done having regard to the clear way that the Commissioner dealt with that subject. In respect of the evidence of the physiotherapist about the condition of the appellant in April 1995, this would only be relevant if the Commissioner had treated that event as

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85 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in Liq)* (1999) 73 ALJR 306 at 328 [88]; 160 ALR 588 at 617.

having some causative or other significance. This he might have done by using it as an element to disbelieve the appellant on another point or to attribute to the car chase of April 1995 an importance that the appellant contested. However, as the Full Court pointed out[86], the Commissioner specifically rejected the relevance of the April 1995 incident. He said:

> "While the motor vehicle accident on 10 April 1995 was a significant event it probably only exacerbated the plaintiff's symptoms for some period of time. I am satisfied that he continued to experience the same sort of symptoms after 10 April 1995 as he did before then. I find that his spinal condition after this accident and now is unlikely to be solely related to this accident."

2. When this incident is therefore put out of account – as I think it should be – this leaves the refusal to allow the appellant, by evidence, to rebut the descriptions by Constable Sandilands of the venue of the indoor cricket facility outside which the appellant was alleged to have made his damaging admission. Whilst the precise way that the rebutting evidence might have influenced the primary decision-maker can never be known, because it was excluded, that is not the test. The issue is not whether the Commissioner could have been persuaded to change his mind about the issue of credibility but rather whether objectively such a change of opinion might *possibly* have followed if such evidence had been admitted. A number of considerations accumulate to suggest that, in the circumstances of this case, it would be unreasonable to conclude that a change of decision on credibility might have been reached:

- Constable Sandilands was himself uncertain, and said so, about the precise address of the indoor cricket facility. The details of the address had been introduced in large part by questions asked by his trial counsel.

- What was ultimately crucial was whether the appellant's admission was made or not. As such, the exact address where the alleged admission was made was not critical to that point. Even if the introduction of the place and its features was false, and intended to add verisimilitude, that fact of itself would not necessarily establish that the actual evidence of the admission was false. Honest people sometimes elaborate their testimony, especially if mistakenly led into doing so in a trial by questions from their legal representatives.

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86 [2000] WASCA 18 at [52].

- The absence of reference to the alleged admission by the appellant from the police report signed by Constable Sandilands in August 1993 was comparatively unimportant. That report was substantially addressed to the criminal features of the chase in the police car and not, as such, to the injury to the appellant.

- The Commissioner of the District Court placed no reliance on the specific features of the street in which the indoor cricket venue allegedly existed. In this sense the case was different from *Stead*[87]. There a major cause for justifiable complaint was that the primary judge, despite earlier indications to the contrary, had relied explicitly on evidence that a party had not had a fair opportunity to answer.

- The evidence of Constable Sandilands did not stand alone. It was supported by the evidence of Detective Sergeants Harmer and Cross. They also deposed that the appellant had made admissions to them of an indoor cricket injury. It is true that Detective Sergeant Harmer had spoken of his evidence in this regard being the product of an "inference". However in its context, this was merely a cautious way of saying that this was how the witness understood the appellant, piecing together a conversation that would not have been of any real importance to Detective Sergeant Harmer at the time. Neither of the Detective Sergeants Harmer or Cross was affected in any direct way by the evidence concerning the address of the indoor cricket facility. To overcome their evidence, the appellant had, in effect, to postulate a conspiracy among them with Constable Sandilands to protect the latter's position. As neither of the Detective Sergeants Harmer or Cross were ever at any personal risk, nor believed they were at risk in the matter, it is difficult to accept the thesis of such deliberate falsehood against a person who was at the time a fellow officer. It is not an impossible proposition – but it requires a very damning view of the evidence of those officers which the Commissioner did not accept[88]. As such, the propounded evidence would not therefore have helped the appellant to overcome the impact of the

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87 (1986) 161 CLR 141 at 145-146.

88 In reaching this conclusion I have not fallen victim to the attitude attributed to some Australian judges in criminal trials criticised in Presser, "Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence", (2001) 25 *Melbourne University Law Review* 757 at 778.

> testimony of the other two officers which was accepted by the Commissioner and confirmed that of Constable Sandilands. The appellant relied on the decision of this Court in *McKinney v The Queen*[89] to establish that the evidence of the three police officers was inherently suspect. However, that case was concerned with the special dangers to a criminal accused vulnerable when in police custody. It has no application, as such, to a case like the present one involving work colleagues, where there was no similar vulnerability to false police testimony.

Conclusion and order

75 When to the actual evidence of police officers Sandilands, Harmer and Cross is added the weight that is properly to be accorded to the intuitive, unexplainable impressions of the Commissioner upon the entire testimony of the trial which he analysed at considerable length, it cannot be said that the Full Court erred in not concluding that the exclusions of evidence ordered at trial caused the trial to miscarry or occasioned a relevant miscarriage in the Commissioner's ultimate decision.

76 The appeal should therefore be dismissed with costs.

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89 (1991) 171 CLR 468.

77 HAYNE J. I agree that this appeal should be dismissed. For the reasons given by other members of the Court, there was no miscarriage of justice that would warrant a new trial.

78 The facts that give rise to this appeal are not unusual. They are sufficiently described in the reasons of other members of the Court and I need not repeat them. The course of events at trial, again sufficiently described elsewhere, may, however, be thought to have departed from the ordinary in some respects.

79 The appellant claimed that he had been injured at work. The respondents not only denied that it was in the course of his employment that he had suffered the injury of which he complained, they went so far as to contend that he had suffered it playing indoor cricket. This the respondents sought to establish by adducing evidence of what was said to amount to an admission made by the appellant in conversation with the first respondent. In the ordinary course of events it would be expected that the respondents, in cross-examining the appellant, would put to him the content of the alleged admission and, if he did not distinctly admit that he had said the words alleged, put sufficient of the circumstances to identify the occasion when it was said to have been made[90]. If the appellant denied making the admission it would be expected that the respondents would call evidence of its making from a person who heard the words spoken – in this case, the first respondent. Where this case took an unusual turn at trial was that counsel for the first respondent, when cross-examining the appellant, had put to him that the admission was made outside an indoor cricket centre and gave as the address of that centre an entirely wrong address. The appellant, incorrectly, agreed that the address given could be the address of the relevant centre.

80 In his evidence in chief, the first respondent gave evidence, without objection, of some physical features of the area where the alleged confession was made. He was cross-examined on that evidence and it eventually emerged that the address of the indoor cricket centre to which the appellant had assented in his evidence was wrong. After the first respondent had given evidence, counsel for the appellant sought leave to recall his client to give further evidence about the location of the indoor cricket centre. That leave was refused and, in my view, rightly refused.

81 What the first respondent had said in evidence about the physical features of the area where the admission was said to have been made did not bear directly on whether the appellant had made that admission, and it was not relevant to any fact in issue in the case. The fact that the appellant allowed evidence about the

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90 *Evidence Act* 1906 (WA), s 21.

physical features of the place of the alleged admission to be led from the first respondent in evidence in chief did not make the evidence relevant to any issue in the case. To demonstrate that the evidence about the physical features of the area was wrong would demonstrate only that the first respondent was not a reliable witness on that matter. A conclusion about his reliability in this aspect of his evidence might be thought to bear upon whether *other* evidence he had given should be believed. But to pursue the accuracy of what had been said about the address of the centre, or about the physical features of the area, beyond whatever point the cross-examination of the first respondent took it, would have been to pursue a collateral issue. Accordingly, leave to recall the appellant to give evidence contradicting the evidence the first respondent had given about these matters was rightly refused.

82 It is as well, however, to say something further about the decision in *Piddington v Bennett and Wood Pty Ltd*[91]. The division of opinion in *Piddington* reveals that the distinction between evidence going to an issue and evidence going only to credit (or, I would add, any other collateral issue) may not always be clear cut. And what is said in the reasons in *Piddington* must, as always, be understood in the context of the facts and circumstances of the case. Hence, I would not understand Dixon J to be intending by his reference to "one indivisible activity, journey or transaction"[92] to formulate any test of general application. Similarly, his Honour's reference[93] to the tendency of the evidence to discredit the witness making the *question* of the admissibility of the evidence important, must be understood as a comment on the importance of the question of admissibility in deciding whether a retrial should be had, not a suggestion that the evidence was important to the resolution of the issues at the trial. This is not to deny, however, the importance or continued applicability of the general principle which was in issue and applied in *Piddington* – that evidence should not be received on matters collateral to the issues in a proceeding.

83 That rule, although difficult of application, remains important to the proper trial of proceedings. It may be, as McHugh J said in *Palmer v The Queen*[94], that the distinction between evidence relevant to credit and evidence relevant to a fact in issue is not only indistinct and unhelpful but is rooted only in the need to prevent trials being burdened with side issues, not in logic. At the least, the application of the distinction will sometimes be very difficult. In this case, however, the evidence that had been given about the address or the

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91 (1940) 63 CLR 533.

92 (1940) 63 CLR 533 at 554.

93 (1940) 63 CLR 533 at 553.

94 (1998) 193 CLR 1 at 22 [51]-[52].

appearance of the area where the alleged confession was made related only to the credit of the witness, not to any fact in issue.

84 As to the other issue agitated by the appellant, concerning the trial judge's refusal to permit him to call a physiotherapist to give evidence about the effect, or lack of effect, another incident may have had on his condition, I agree with Callinan J.

85 CALLINAN J. The principal question which this appeal raises is whether a refusal by a trial judge to allow a plaintiff to adduce evidence after the closure of his case on matters going only to his credit resulted in a miscarriage of justice such as to require a retrial.

The facts

86 The appellant, a policeman who was a passenger in a police pursuit car being driven by the first respondent, was injured in the course of a car chase at high speed on 26 June 1993. His case was that, by reason of the negligent driving of the first respondent, he was so jolted in the car that he suffered injuries to his back and neck.

87 The respondents' case was that the appellant suffered no injuries on the occasion alleged: that such disabilities as may have been troubling him at the time of trial were attributable to other events: possibly an incident in a swimming pool some years earlier; a motor car collision in April 1995; or, more likely, a strain or injury suffered during an indoor cricket match on 22 June 1993. As to the last matter, there was evidence against the appellant from the first respondent, who claimed that, on 22 June 1993, after he had called for the appellant at an indoor cricket centre, the appellant had told him that he had just hurt himself while playing indoor cricket.

The earlier proceedings

88 In essence, the appellant contends that he was denied a fair trial of the action that he brought for damages for negligence in the District Court of Western Australia by two rulings of the Commissioner (Commissioner Reynolds) who tried the action.

89 During cross-examination, the first respondent's counsel had suggested to the appellant, misleadingly, as it turned out, so far as its address was concerned, that the first respondent had collected him at an indoor cricket centre in Perth. The appellant assented to the address that was put to him. The topic was not raised again in re-examination. In chief, the first respondent gave evidence of the address of the cricket centre and some of the physical features according with what had been put to the appellant in cross-examination. The first respondent was cross-examined at some length about these matters. In fact, it became apparent that the cricket centre was at a different address from the address put to the appellant and sworn to by the first respondent. The appellant sought to put to the first respondent in cross-examination photographs of the correct location that had been taken some years after 1993, with a view to establishing that physical features described by the first respondent did not exist at the correct address. Commissioner Reynolds upheld an objection to the cross-examination because the photographs did not represent the location at the relevant time. On the

rejection of the photographs, counsel for the appellant made an application to recall the appellant. The Commissioner then ruled as follows:

> "The Commissioner: It seems to me that this is a matter that was raised during the course of the evidence of the [appellant] on the previous occasion. If I was to accede to a request to have witnesses recalled to give evidence on matters that have already been the subject of evidence, then I would be recalling people perhaps frequently to the point of delaying the conclusion of the hearing.
>
> Cole, MR: But, sir –
>
> The Commissioner: The hearing has already been part heard on one occasion and I'm not going to engage in any conduct that may put it in a similar situation again but in any event, that's not the reason. The matter has already been the subject of some evidence. If it was going to be pursued, there was an earlier time to do it rather than now."

The Commissioner also refused leave for the appellant to re-open his case to call a physiotherapist who had, fortuitously, examined him immediately before and after the other suggested occasion of the appellant's injuries, the subsequent motor car collision, and who had only become available to give evidence after the appellant closed his case.

90 In dismissing the appellant's action, Commissioner Reynolds made a number of findings on credibility adverse to the appellant. One of these, which he was to refer to as "a key evidentiary issue", was the appellant's denial of the making of any admission of the sustaining of an injury during the indoor cricket match. Templeman J (with whom Pidgeon and Ipp JJ agreed) in the Full Court accepted that the issue was a key one. His Honour said this of it:

> "The Commissioner accepted that the matter under consideration was 'a key evidentiary issue'. Clearly it was: at least at that stage of the trial. If Constable Sandilands' evidence about collecting the appellant from a street which resembled President Street in Welshpool could be controverted by proving that the configuration of that street was significantly different from Esther Street, Belmont, doubt might be cast also on his evidence about the admission then said to have been made by the appellant as to injuring his neck or back."

91 Templeman J was of the opinion that the Commissioner erred in refusing the appellant's application, but that the appellant suffered no injustice as a result of the refusal. His Honour's reasons for this conclusion were expressed as follows:

> "Here, of course, the Commissioner's finding as to the course of the pursuit did depend to a substantial degree on the credibility of Constable

> Sandilands. In these circumstances, I return to the question whether the appellant suffered any prejudice as a result of the Commissioner's refusal to allow him to give evidence about the location of the Strikers indoor cricket centre.
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> As I have noted above, it might be said that if this evidence had been given, Constable Sandilands' evidence about collecting the appellant might have been controverted: thus casting doubt on his evidence about the admission said to have been made by the appellant about a cricket injury.
>
> It is true that the Commissioner referred to this matter as 'a key evidentiary issue'. At that stage of the trial, it was a fair observation. But it was early days. The Commissioner had not then heard from Constable Sandilands, whose evidence was tested in an extensive cross-examination. Nor had the Commissioner heard evidence from the two police officers who said the appellant had spoken of his cricket injury.
>
> The Commissioner was entitled to form a favourable view of Constable Sandilands' credibility. And he was entitled to accept the evidence of the other police witnesses. I think it fanciful to suppose that the outcome of the trial would have been different if the appellant had given evidence about the location of Strikers.
>
> In short, although I accept that the Commissioner's discretion miscarried, I am not persuaded that he 'failed to use or palpably misuse[d] his advantage', or acted on evidence which was 'incontrovertibly established' or 'glaringly improbable': to quote from *Devries'* case[95]."

92 There is no question that the fact of the alleged admission itself was unambiguously put to the appellant. It should also be kept in mind that this, the making of the admission, was the key issue. After identifying the relevant date, 22 June 1993, and "Strikers" (the indoor cricket centre) as the venue, counsel for the first respondent asked these questions:

> "Robbins, MR: And you got in the car, I put to you, and you said, 'I've stuffed my back or my neck playing cricket –'?
>
> Witness: No.
>
> Robbins, MR: As you put the seat belt on?

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95 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ.

Witness: No. I did not say that at all.

Robbins, MR: And you rotated your left arm and your left shoulder as you did so –?

Witness: No.

Robbins, MR: In the manner that I'm doing now –?

Witness: Sir, I have said I haven't –

Robbins, MR: In rotation?

Witness: I have no recollection of Constable Sandilands being at Strikers indoor cricket and picking me up as you say he did. If I can't recall him being there, how can I –

The Commissioner: Can I just interrupt for a minute?

Witness: I'm sorry.

The Commissioner: The reason why I didn't interrupt before was because the question now is focused on what occurred when you got in the car. It goes to what is alleged to have been said. That's the focus of it so all I would ask you, Mr Goldsmith, is just try and focus your attention [on] what is being put to you about what has allegedly been said by you?

Witness: Sir.

The Commissioner: Never mind Strikers?

Witness: Sir.

Robbins, MR: Did you say anything about your back or your neck –?

Witness: No.

Robbins, MR: From playing cricket?

Witness: No."

93 A question arises whether the first respondent, by pursuing in his case the collateral matter as to the features of the location of the cricket centre, elevated it to one of such important circumstantial detail as to make it an issue which the appellant should have been entitled to, but was not permitted to address by adducing further evidence. I put the matter in that way because the appellant does not contend in this Court that the Commissioner erred in rejecting his

cross-examination on the photographs and as to the physical features of the correct address of the cricket centre.

94 The respondents contend that nothing in the end turned upon the rejection of the appellant's application to re-open his case. They submitted that, although the Commissioner was unable to reach a conclusion as to the location of the cricket centre, it was sufficient that he was satisfied that an admission of the kind alleged had been made in the vicinity of a cricket centre from which the first respondent had collected the appellant on a date in about June 1993.

95 The detail of the location of the cricket centre was a collateral matter. The first respondent was entitled to cross-examine the appellant about it if it went to credit, as I think it did. Within the normal ambit of re-examination the appellant would have been entitled to give evidence about it at that stage had he wished. The occasion for doing so did not, however, arise because of his assent in cross-examination to the address put to him and his inability to confirm or deny the physical features that the address possessed. The argument of the parties really betrays a misunderstanding of the proper course of a trial and the distinction between what a witness may be asked in chief and what he may be asked in cross-examination. All that a plaintiff need do, and ordinarily should be confined to doing, in chief, is prove his case. A cross-examiner is given much greater latitude. Subject to some statutory and other inhibitions which it is unnecessary to discuss here, a cross-examiner may ask about any matters reasonably going to a witness' credit. Ordinarily, however, the cross-examiner will be bound by the witness' answer. That means that he must accept it. He should not in his case be permitted to go into evidence, as counsel for the first respondent did here, of details of a matter going to credit only, with a view to contradicting the answers that he has received in cross-examination. Furthermore, at that point there was no dispute on the evidence as to the address (to which the appellant had assented) or, indeed, as to any physical aspects of it, because the appellant's response in cross-examination had been simply that he was unable to recall these. The proper course for the appellant would have been to object to the first respondent's evidence about them. Whether he had objected or not, he should, however, have been permitted to cross-examine about them as matters going to the first respondent's credit in the same way as the first respondent had cross-examined the appellant about them. And there seems to be no good reason why the photographs should not have been allowed to be shown to the first respondent, for him to accept or to reject on grounds of subsequent alteration of the scene or otherwise. But, as I have already pointed out, these are not the appellant's complaints.

96 It may not always be easy to distinguish between collateral and primary issues, as reference to authority will show; but the distinction remains one that the courts must make; otherwise, there will be potential for a miscarriage of justice or unnecessary prolongation of trials.

97 Reference was made in argument to *Piddington v Bennett and Wood Pty Ltd*[96]. In that case, a witness for the plaintiff who had suffered injuries in a motor accident gave evidence that he had been in a particular street from which he had observed the accident. In cross-examination, the witness asserted that he had been "doing a message" for another person at a bank a block or two away from the place of the accident. The defendant then called the manager of the bank to give evidence that there had been no operations on the day of the accident on the account of the person for whom the witness claimed to be undertaking the message. An authenticated copy of the relevant bank account was produced by the bank manager. The jury found for the defendant and the verdict was affirmed by the Full Court of the Supreme Court of New South Wales. On appeal, this Court (Dixon, Evatt and McTiernan JJ; Latham CJ and Starke J dissenting) held that the bank manager's evidence was inadmissible and its reception was more than an immaterial error not reasonably capable of affecting the verdict of the jury. It is right to say, however, that even among the majority there was not a universal approach to the question of the admissibility of evidence of the type adduced by the bank manager. Dixon J said[97] that the bank manager's evidence proved no more than that the witness had not paid money into or withdrawn money from the relevant account: it had no natural tendency to show that the witness was absent from the scene of the accident. All that it did was to discredit the account that the witness gave under cross-examination of his movements before the time of the accident: the tendency of the evidence to discredit the witness might make the question of the admissibility of the evidence important, but it did not make the evidence admissible.

98 With respect, I would have thought that if the admissibility of the evidence was a matter of importance, then that fact itself might provide an indication that, subject to questions of form, the evidence was likely to be of importance to the issues and admissible. Dixon J went on to suggest[98] that it would only be if the witness' movements before the accident were part of "one indivisible activity, journey or transaction" that the evidence might displace or disprove any part of it so as to displace the whole and therefore be admissible.

99 Evatt J did not propound a test of indivisible or divisible activity. His Honour put the matter this way[99]:

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96 (1940) 63 CLR 533.

97 (1940) 63 CLR 533 at 553.

98 (1940) 63 CLR 533 at 554.

99 (1940) 63 CLR 533 at 558.

> "There may be cases where, by reason of some closely related incident of a somewhat special character, a witness of an accident volunteers a positive explanation of his presence at the scene of the accident, and where direct contradiction of such alleged incident and such alleged explanation is permissible despite the inevitable delay caused by such an extension of the ordinary scope of the investigation. Such evidence may be admissible upon the ground that the fact of the presence of the witness at the scene of the accident is deemed to be a fact relevant to the issue, and that it cannot reasonably be dissociated from the incident, event or circumstance by which he has explained his being an eye-witness.
>
> Under special conditions such as the above, it may possibly be said that the particular witness has 'garnished his account of the relevant facts with associated details designed to give verisimilitude' – to quote from one of the judgments in the Supreme Court."

What occurred in this case does bear a slight resemblance to special conditions of the kind to which Evatt J referred. Here, the first respondent's counsel, in the form of examination in chief, did press the first respondent to garnish his account of the occasion of the admission by eliciting associated details designed to give it verisimilitude. Such a garniture should not normally be allowed to be given. Here it was, and, as I have said, the Commissioner should have allowed the appellant an opportunity to deal with it even though it was not what I would describe, to adopt the language of Evatt J, as a matter closely related to the alleged admission and of a special character bearing upon it.

100 The other member of the majority, McTiernan J, confined himself to the facts of the case without stating a general principle in relation to admissibility of evidence of the kind in question. His Honour said, not, with respect, convincingly, that the evidence could throw no light whatever on the question whether the witness had seen the accident or not: it could discredit the witness but it was incapable of contradicting any fact upon which proof of the opportunity which the witness had of observing the accident depended[100].

101 On the other hand, Latham CJ, dissenting, said this[101]:

> "It is always permissible to give evidence as to the facts which are in issue between the parties and as to facts relevant to the facts which are in issue. When a witness describes himself as an eyewitness of events constituting the facts which are in issue, his presence and capacity to observe those events are facts relevant to the facts in issue. No witness

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100 (1940) 63 CLR 533 at 567.

101 (1940) 63 CLR 533 at 545.

> would be permitted to go into the box and simply to depose that certain events happened at a certain time and place without saying that he was then and there present, and observed the events."

But, as his Honour later points out, the evidence must be "evidence of a fact which is capable of affording a reasonable presumption as to the matter which is in dispute between the parties"[102]. His Honour went on to adopt a statement by Lord Watson in *Managers of the Metropolitan Asylum District v Hill*[103]:

> "In order to entitle [the witness] to give such evidence [of collateral facts], he must, in the first instance, satisfy the court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute".

102 Starke J, also in dissent, pointed out that the rule denying any right to call evidence to contradict a witness on credit was a rule of convenience and not of principle, and that it did not apply to cases in which the collateral matter brought the witness into a special connexion with a party or the subject of the proceedings[104]. His Honour thought that that test was satisfied in *Piddington*: the evidence of the bank manager established a fact, slight in itself, but which later with others might afford a solid basis for inferring that the witness was not present at the accident. It was the relative unimportance of the bank manager's evidence, in the opinion of Starke J, that led his Honour to conclude that it was unlikely to have affected the verdict of the jury.

103 It follows that questions of degree will always be involved in deciding whether collateral evidence should be admitted. The test propounded by Dixon J of indivisibility is a narrow one and substantially more so than any of the tests applied by the other members of the Court in *Piddington*. The admissibility or otherwise of collateral evidence and evidence in turn to contradict that collateral evidence might also be influenced by the fact that the person giving it is a party.

104 In this case, in my opinion, the circumstantial details given in evidence in chief by the first respondent should not have been received. They constituted a garniture designed to give verisimilitude to the first respondent's account. The evidence did not satisfy any of the tests propounded in *Piddington*. But, although the appellant did not object as he should have done, he should not have been denied the opportunity to cross-examine the first respondent about the physical condition of the address of the cricket centre.

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102 (1940) 63 CLR 533 at 546.

103 (1882) 47 LT 29 at 35.

104 (1940) 63 CLR 533 at 551.

105 To some extent, therefore, the trial did miscarry procedurally but not in the way in which the appellant's grounds of appeal are framed. Whether that miscarriage resulted in a miscarriage of justice is, however, another matter.

106 In *Stead v State Government Insurance Commission*, this Court said[105]:

> "[N]ot every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
>
> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact[106]. However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial."

107 Having regard to the appellant's assent to the address in cross-examination, his abstention from dealing with the address and its physical aspect in re-examination, and his failure to object to the "garniture" offered in chief by the first respondent, I do not think that the Commissioner erred in refusing leave to allow a re-opening, even though he should have permitted cross-examination by the appellant. But even if the appellant should have been permitted to re-open his case, I consider that the outcome would not have been different. I am of this opinion because there was no issue that the appellant played cricket at "Strikers" in June 1993, wherever it was located. The

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105 (1986) 161 CLR 141 at 145-146.

106 Supreme Court Rules (SA), O 58, rr 6 and 14.

Commissioner did not regard the location as a matter of significance to the main issue or to credit. He was, in any event, unable to make a finding about the location on the evidence adduced. Notwithstanding that the appellant was denied an opportunity to re-open his case, he could still make the forensic point at trial, and on appeal, that the first respondent's evidence differed from what he had put in cross-examination of the appellant. Unfortunately for the appellant, however, there were numerous other important respects in which his credit was found wanting.

108 Notwithstanding the unusual course which was followed in this case, I am unable to conclude that it constituted, on the particular facts of the case and the findings at first instance, such a departure from proper procedure and natural justice as to warrant a new trial. In short, I do not think that either the reception of the first respondent's evidence as to the details or the denial to the appellant of the opportunity to contradict those details of the address could reasonably have affected the decision of the Commissioner either as to the appellant's credit or the outcome of the case itself[107].

109 Nothing turns in the event, in my opinion, upon the other error made by the Commissioner. He did err in not allowing the appellant to call the physiotherapist to prove that the collision in which the appellant was involved had not caused or exacerbated, to any appreciable degree, any injury that the appellant may have suffered before the collision. Furthermore, the Commissioner gave no satisfactory reason why the appellant should not be permitted to call such evidence. That the trial might last a little longer was certainly not a sufficient reason to deny the appellant an opportunity to call the evidence. But, once again, reception of that evidence could not reasonably have affected the outcome or, indeed, the appellant's credit on the substantial issues because the Commissioner found in favour of the appellant that the collision was of no relevance to the appellant's physical condition.

110 I would dismiss the appeal with costs.

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107 cf *Piddington* (1940) 63 CLR 533 at 561 per Evatt J.