WHERE DOES TRUTH LIE? THE CHALLENGES AND IMPERATIVES OF FACT-FINDING IN TRIAL, APPELLATE, CIVIL AND CRIMINAL COURTS AND INTERNATIONAL COMMISSIONS OF INQUIRY

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The author takes three instances to illustrate the difficult but essential task of fact-finding in formal decision-making. The first concerns the residual fact-finding responsibility of appellate courts when scrutinising fact-finding in primary civil proceedings, with an emphasis on incontrovertible facts. The second involves criminal appeals where the prosecution has presented a compelling case of circumstantial evidence, but a retrial may be required because of an unbalanced judicial direction. The third involves an international commission of inquiry on human rights where the state concerned refuses to cooperate yet demonstrates faulty testimony (later acknowledged) by a witness. Human decision-making is always subject to error, whether on the facts or the law. However, that risk cannot impede the imperatives of decision-making and of explaining relevant fact-finding in the most convincing way possible, so as to discharge the ultimate responsibility of reaching a reasoned decision.

I THE PROBLEM

Even before the Norman Conquest of England in 1066, there had been moves to replace the primitive systems of trial by ordeal and trial by battle with more rational procedures, designed to resolve the matter in contention by more acceptable means.[1] From these efforts eventually emerged forms of trial by jury.

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1 Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworths, 4th ed, 1948) 111–20; William Forsyth, *History of Trial by Jury* (Nabu Press, 2010). The survey of broad historical developments in English law does not presume to be comprehensive.

Eventually, that means of decision-making evolved from the participation of local people, who had some knowledge of the matter, to participation by disinterested persons from the locality who could reach a conclusion, acceptable to the community, based on testimony heard in a proceeding, thereby putting the dispute to an acceptable end.[2]

For the most part the verdicts of such juries were final. To guard against corruption and partiality of jurors, a system of review ('attaint') developed.[3] So did procedures for the ordering of new trials.[4] Only in the 19th century (in civil cases) and in the 20th century (in criminal cases) was a statutory 'appeal' provided against judgments based on jury verdicts.

A panel of jurors was sometimes also viewed in England and in its settler colonies as a possible guarantee against official oppression. However, ordinarily, the jury could be trusted to reach sensible conclusions on the evidence, having been instructed on the applicable law by a judge.

Normally juries gave no reasons for their decisions. Any reasons generally had to be inferred from the verdicts. Jury trials had the advantage of promoting finality in decision-making. The simplification of trial procedures was necessary to facilitate the lay elucidation of evidence that was essential if the dispute was to be understood by a jury. On the other hand, unreasoned jury verdicts sometimes gave rise to feelings of injustice. A small avenue for appeal was developed for the case where a verdict was classified as being one that is 'unreasonable, or cannot be supported having regard to the evidence'.[5] A desire for more predictable trials and more reasoned justice contributed to the decline in Australia, over the past 40 years, of jury trials in civil (and even criminal) disputes. Once reasoned justice was adopted as a goal, it became more attractive to permit detailed scrutiny of the outcome of trials. Appeals gave some parties, discontented with the verdict of the primary decision-maker, a greater opportunity to attack the conduct of the trial and the reasons offered by the trial judge to sustain its outcome, formalised in a judgment.

In the United States of America, provisions in the national *Constitution* protected jury trial from abolition or curtailment.[6] In Australia, constitutional provisions governing defined criminal trials have been read down almost to disappearing point.[7] Although some observers (mostly government officials) complained about so-called 'perverse' jury verdicts, a normal advantage of the system was that it allowed juries to do what was 'right' in the circumstances, not necessarily what the strict application of the law might have required. Many convicts sent from England to Australia in the early days of settlement escaped

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2 Plucknett, above n 1, 124.

3 Plucknett, above n 1, 126.

4 Plucknett, above n 1, 128–9.

5 *Criminal Appeal Act 1912* (NSW) s 6(1).

6 *United States Constitution* art III; *Bill of Rights*, amends VI, VII and XIV. In the United States, jury trial has been held available where any non-juvenile criminal prosecution carries a potential penalty of 6 months' custodial punishment and, in a federal civil case, where more than $20 is at issue: *Baldwin v New York*, 399 US 60, 73–4 (White J), 75–6 (Black J) (1970).

7 *Australian Constitution* s 80. See *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Re Colina; Ex parte Torney* (1999) 200 CLR 386.

hanging because a jury 'perversely' (contrary to the evidence) found that the property stolen by the accused was worth less than £2: then a criterion for hanging. Logic and reason occasionally have their limits, especially where the law is unjust or out of date, as it not infrequently is. Logical judges may have little leeway. Sensible juries could sometimes provide 'corrective' verdicts.

The sharp decline in jury trials in most common law countries in the late 20th century has increased the availability and utility of appeals. This has enhanced the examination of judicial reasons concerning factual conclusions when compared with the recorded testimony at trial. It has therefore turned the minds of judges and other decision-makers to the close examination of the testimony and the judicial processes of reasoning. It has also presented a number of questions as to:

- The way juries should reason in resolving conflicts in evidence in a trial[8] and what assistance a judge should give them for discharging that task;[9] and
- The way judges themselves should resolve contradictions and conflicts in evidence in a trial or where that function otherwise belongs to them (including where cultural considerations are relevant).[10]

Judges sitting in trial and appellate courts are not the only public officials who have obligations to reach factual conclusions in an acceptable way. Many of the strictures imposed by law on judges apply equally to members of the independent tribunals that now proliferate and statutory bodies (such as university councils) that are sometimes obliged to act in a judicial manner. Beyond such bodies where official enquiries – set up under statute – have duties to reach conclusions and make recommendations, they typically enjoy a wide discretion as to how they may proceed. Nevertheless, even they can now occasionally be pulled up when they have acted outside their legal remit or conducted themselves in a fashion that offends notions of fairness or rational decision-making.[11]

In the case of international commissions of inquiry, attention is commonly paid at the outset to defining the standard of proof applicable to proving facts that may give rise to serious conclusions: these may include any breaches of international law that appear to have been proved.[12] In practical terms, the

8 Hayley Bennett and G A Broe, 'The Neurobiology of Achieving a "Comfortable Satisfaction"' (2014) 26 *Judicial Officers' Bulletin* 65. Cf Robert M Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Penguin, 2017).

9 The usual standard of proof required in criminal trials is proof beyond reasonable doubt. Explaining this expression to criminal juries is permitted in some jurisdictions (eg, Canada) but forbidden in others on the basis that juries have been applying the formula for centuries and know what it means. In Australia, the common law forbids elaboration. However, in some jurisdictions, this approach has been modified by statute, see, eg, *Jury Directions Act 2015* (Vic) s 63. The judge can then seek to explain the expression.

10 Justice Emilios Kyrou, 'Judging in a Multicultural Society' [2015] (10) *Law Society of NSW Journal* 20–1.

11 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

12 See, eg, United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on*

sanction for improper, illogical and unpersuasive decision-making at this level is usually political. Complaints and criticisms are expressed in international meetings, in the media and in learned journals. They can have large political consequences.

I intend to describe three personal experiences in which I have been involved in making findings of fact: two as a judge and one as the chairman of a United Nations Commission of Inquiry ('COI'). The judicial instances will include one civil appeal and one criminal appeal. In each such instance, there were significant differences over the evidence, making it difficult (perhaps ultimately impossible) to be absolutely certain as to what happened in critical circumstances, from which serious legal and other consequences flowed. By reference to these three cases, I will explain how the ultimate conclusions were reached, the differences that arose on the way to those conclusions, and the aftermath, with a personal reflection on the outcomes.

By providing concrete illustrations of the three instances, and by examining the explanations afforded for their resolution, I will endeavour to throw light on the process of formal decision-making, including its inherent disputability. The practical dynamics of formal proceedings ultimately demand a conclusion. If possible, it should be one that will convince (or at least be understood by) those affected and those who have an interest. But is this always possible?

II THE HORSE THAT CROSSED THE ROAD: A CIVIL APPEAL

The first case is unremarkable.[13] It arose in 2003 in an appeal in which I participated in the High Court of Australia. Because that Court is the highest constitutional and appellate court of Australia, the case was not only important to the parties. It was also important in laying down principles to guide trial judges throughout Australia on the processes of decision-making and appellate judges below the highest court, when they are called upon to resolve an argument that a trial judge has erred in the manner the decision was approached or the conclusion finally reached.

Ms Barbara Fox was injured in 1992 when a horse she was riding came into collision on a public road with a van driven by Ms Megan Percy. Ms Fox claimed damages for negligence in respect of Ms Percy's driving of her motor vehicle. The factual contest at the trial, in the appeal Court and then in the highest Court, was who had been on the wrong side of the road in a sharp bend at the critical moments prior to the collision. If the van was on the incorrect side, Ms Fox was entitled to recover money damages for her negligently inflicted injuries. If it was the horse ridden by Ms Fox, the van driver was probably not negligent and Ms Fox's recovery of damages would be denied. The trial judge in the District Court of New South Wales found against the van driver. The appellate Court reversed

Human Rights in the Democratic People's Republic of Korea, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 16 [67]–[68].

13 *Fox v Percy* (2003) 214 CLR 118.

that decision. The matter came to the High Court, when two Justices granted special leave to bring the matter to the third level of judicial decision.

In the days of my youth, when cases of this kind were normally decided by civil juries, it was extremely difficult (and rare) for the decision at trial to be appealed. However, because a trial judge, sitting without a jury, is obliged to explain the reasons for the decision, this necessarily exposes the process of reasoning to appellate scrutiny.[14] That reasoning was attacked in the Court of Appeal by the lawyers for Ms Percy. Because motor vehicles in Australia are obliged by law to carry insurance against the risk of negligently harming others, the real party at risk was an insurer. However, the proceedings followed the fiction that this was immaterial. The spotlight at all levels of the litigation was cast upon the conduct of the two women a few minutes before their lives intersected unexpectedly on a country road when the road presented an almost blind left-hand turn to the van, travelling downhill and obliged by law to adhere to the left side of the road.

The horse bearing Ms Fox was proceeding uphill. Excess speed was not a material consideration in the collision.[15] The impact with the horse brought the van to a sudden halt. An ambulance and the police were immediately summoned. On arrival, the police officer noticed features of the scene, and recorded a sketch in his notebook. It showed that the van had come to rest on its correct side of the road. It had left a 10 metre line of skid marks behind the van on the correct side of the centre of the road. This caused the constable to conclude that the vehicle had at all material times been on the correct side of the road. He said so to Ms Fox before she was taken to hospital by ambulance: 'It looks like you were in the wrong'.[16]

The policeman noticed, and recorded, the apparent presence of alcohol on Ms Fox's breath; that she 'refused to co-operate with Police in enquiries'; and that she had a body tattoo. A blood sample later taken at the hospital in consequence of the collision revealed that Ms Fox had 0.122 grams of alcohol per 100 millilitres of blood. The trial judge accepted that this 'would have affected her' in handling her horse.[17] However, on the basis of his impression of truthfulness on Ms Fox's part in giving her evidence at the trial, and a conclusion that the police officer had been unreasonably hostile towards Ms Fox, the judge accepted an expert traffic engineer's opinion that Ms Percy had, on the probabilities, driven onto the incorrect side of the road and caused the collision. He awarded Ms Fox a judgment of substantial damages.

When the appeal from the judgment for Ms Fox that followed these conclusions was taken to the Court of Appeal of New South Wales, that Court was obliged by its constituting statute to conduct the appeal 'by way of rehearing'.[18] It was entitled to draw inferences and make findings of fact.[19]

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14 *Pettitt v Dunkley* (1971) 1 NSWLR 376.

15 *Fox v Percy* (2003) 214 CLR 118, 120 [3] (Gleeson CJ, Gummow and Kirby JJ).

16 Ibid 121 [5] (Gleeson CJ, Gummow and Kirby JJ).

17 Ibid 121 [6]–[8] (Gleeson CJ, Gummow and Kirby JJ).

18 *Supreme Court Act 1970* (NSW) s 75A(5).

19 *Supreme Court Act 1970* (NSW) s 75A(6)(b).

However, appellate courts normally hear (and in this case heard) no further evidence. They perform their duties on the basis of the transcript recorded at the trial. They therefore do not ordinarily have available to them, directly, any personal judicial impression that may be given by witnesses as to the truthfulness or otherwise of what they are saying. They are confined to the record. This is why, for more than a century, appellate courts in England, Australia and elsewhere have repeatedly insisted on a rule of deference on the part of appellate judges in favour of the conclusion of trial judges who enjoy facilities that appellate judges do not.

Where a judge explains the reasoning to conclusion by reference to the impression of witnesses, this has, in the past, commonly been fatal to those who challenge trial conclusions based on such evidence in an appellate court. In a series of cases before the decision in Ms Fox's case, the High Court was insistent on this rule. It demanded that appellate courts show severe restraint because of the 'advantages' that trial judges enjoy from seeing witnesses and assessing their credibility. The Australian judicial authority on this point had even gone beyond the principles stated in earlier English cases. It had suggested that there were 'subtle influences of demeanour'[20] which experienced judges would call upon to differentiate truthfulness from falsehood. Obviously, appellate judges would ordinarily lack access to these indicia.

However, over time, a degree of scepticism and criticism came to be expressed by some Australian judges (including myself) in relation to this supposed special judicial capacity and advantage:[21]

- Appellate courts began to urge that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour';[22]
- Scientific evidence based on controlled experiments began to cast doubt on the suggested powers of trial judges (or other mortals) to discern the truth;[23] and
- Concern was increasingly expressed that the rule of extreme deference led to grave injustices, upholding poor and arbitrary judging, and a failure to conduct a real 'rehearing', as required by the Act of Parliament, expressing the functions of the appellate court.[24]

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20 *Jones v Hyde* (1989) 85 ALR 23, 27–8 (McHugh J).

21 Ibid 27 (McHugh J); *Abalos v Australian Postal Commission* (1990) 171 CLR 167, 179 (McHugh J); *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479, 482–3 (Deane and Dawson JJ).

22 *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co* (1924) 20 Ll L Rep 140, 152 (Atkin LJ) ('*The Palitana*'), quoted in *Fox v Percy* (2003) 214 CLR 118, 129 [20] (Gleeson CJ, Gummow and Kirby JJ).

23 *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ), citing evidence collected in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 348 (Samuels JA).

24 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, 330 [89]–[91] (Kirby J), citing *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207, 209–10 (Kirby P).

This was the importance for the Australian legal system of *Fox v Percy*.[25] It afforded an opportunity for the High Court to revisit the principles that should be applied in courts subject to its supervision. Repeatedly, in a number of cases, I had expressed my own serious reservations about the extreme deference rule.[26] The case of the collision of the van with the horse afforded the opportunity to recalibrate the approach to be applied not only in the instant appeal, but in all such appeals based on analogous evidentiary conclusions (of which there were many).[27]

In the end, the High Court was unanimous in upholding the decision of the Court of Appeal and rejecting the appeal by Ms Fox. Relevant to the reasoning of the Court on this point were the following considerations:

- There was incontrovertible evidence, in a contemporary document, that verified the police testimony as to the position of the van after, and immediately before, collision and the exact markings on the road of its skid marks. These skid marks were never satisfactorily explained by the trial judge, although they strongly undermined his conclusions;
- Reasoning from the objective facts, it was more likely that Ms Fox's horse might have strayed to the incorrect side of the road if not properly controlled, because this would involve no more than the horse cutting the corner without attention to the centre markings visible to, and understood by, humans but not by horses. Moreover, the van would readily hug the left-hand side of the road in descending the decline and the skid marks strongly suggested that this is exactly what it had done; and
- The high level of alcohol confirmed by the hospital blood test taken soon after the collision was at least consistent with a possibility that Ms Fox had exercised inadequate control over her horse to direct it to the outside left side of the road around the bend, thereby avoiding or reducing the risk of collision with oncoming traffic. The constable's notation of the smell of alcohol was not necessarily evidence of hostility to Ms Fox, although the reference to the tattoo did not seem material. Certainly, the constable was obliged by police regulations to make such notations of personal features and possibly material features. His immediate confrontation of Ms Fox with his asserted conclusion that she appeared to have been 'in the wrong' arguably fulfilled a due process requirement, rather than indicating an attitude of hostility.

As a result of this decision of the High Court, including in the joint reasons in which Gleeson CJ, Gummow J and I gave the reasons of the plurality in the

25 (2003) 214 CLR 118. The principal reasons in *Fox v Percy* were written by Gleeson CJ, Gummow J and myself, at 119–33. The other participating Justices, McHugh and Callinan JJ, reached the same ultimate conclusion in separate reasons, at 133–50 (McHugh J), 150–68 (Callinan J).

26 See, eg, *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, 330 [89]–[90] (Kirby J).

27 See, eg, *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 380 (Kirby J), 402–5 (Callinan J); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 329 (French CJ); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 365 (French CJ and Kiefel J), 381 (Heydon, Crennan and Bell JJ).

Court,[28] a change appears to have occurred both in reasoning by judges at trials and in intermediate appellate courts. Now, deference to the judicial impression of witnesses is a last consideration, after exhausting any relevant contemporaneous evidence and analysis of the inherent logic of the proved facts. Technology may sometimes come to the aid of the law and the courts. Whilst not all document trails are clear and some can present the contrary problem of information overload, the endless contemporary stream of emails and records of text messages, phone location records and other empirical testimony make it less usual or necessary for judges and decision-makers now to have to rest their conclusions on the fragile foundation of human assessment of truthfulness, based on witness appearances. In my opinion, *Fox v Percy* represented a desirable and timely change in the appellate instruction about the processes of judicial visual, aural or impressionistic reasoning about contested facts. Analysis of the detailed evidence and the logic of the circumstances will normally be preferable to reliance on judicial impressions, unless the judge has no other way to decide between the evidence presented by the parties or otherwise proved at the trial.

III THE INTERSTATE MURDER: A CRIMINAL APPEAL

The second case[29] involves a criminal appeal brought by Mr Jean Eric Gassy, a resident of Sydney, against his conviction of the murder in Adelaide of Dr Margaret Tobin, the Director of Mental Health for South Australia. Here, the conflict was not between contradictory evidence about the same facts so much as the assessment of circumstantial evidence and whether it could prove the guilt of Mr Gassy – to the requisite criminal standard of proof – and whether the accused had received a lawful and fair trial of the issues presented for decision at trial and on appeal.

Mr Gassy represented himself in argument before the High Court. By majority,[30] he enjoyed an unusual victory.

In 1997, Dr Tobin had played a role in events leading to the de-registration of Mr Gassy as a medical practitioner (psychiatrist) in New South Wales. Earlier, in 1993, she had expressed concerns to the authorities in that State about his mental condition. Her concerns were ultimately upheld. After Mr Gassy's de-registration, Dr Tobin moved to South Australia to take up her new position in that State. Her death came years later when she was shot four times while leaving an elevator on the eighth floor of a building in Adelaide housing her office.

The Crown case at the trial was that Mr Gassy had driven rapidly to Adelaide, committed the homicide, and then returned immediately to Sydney. But he had allegedly left a trail of evidence linking him to the murder. There was no satisfactory CCTV footage, or other direct identification evidence, to establish irrefutably Mr Gassy's involvement in the homicide and his guilt of Dr Tobin's

28 *Fox v Percy* (2003) 214 CLR 118, 130–2 (Gleeson CJ, Gummow and Kirby JJ).
29 *Gassy v The Queen* (2008) 236 CLR 293.
30 Ibid 308 [38] (Gummow and Hayne JJ), 326 [109] (Kirby J), the dissenting Justices were Crennan and Kiefel JJ, at 341 [156].

murder. Nor did Dr Tobin, who survived the attack for a short time, identify her attacker or mention Mr Gassy's name before she died. To find Mr Gassy guilty, the jury were obliged to rely on circumstantial evidence to conclude that the Crown had proved Mr Gassy's guilt beyond reasonable doubt. The trial judge so instructed the jury.

The circumstantial evidence in the case was undeniably very strong. It included the collection of evidence by a police forensic investigation that commenced immediately following Dr Tobin's death. The police investigation was painstaking and highly professional. Following the murder, Mr Gassy was identified by police as an immediate potential suspect. Enquiries were made at, and about, an interstate venue in Brisbane, Queensland, where Dr Tobin had addressed a conference a short time before her murder. It also involved checks at garages and motels on the main direct road between Sydney and Adelaide in the days immediately before and after the shooting. The Brisbane evidence strongly suggested that Mr Gassy had registered as a guest at a motel near the Brisbane conference venue. The motel staff picked him immediately from a collection of police photographs. Additionally, a gun shop in Brisbane identified Mr Gassy from police photographs as a person who had ordered a slide for a particular pistol at the time of the Brisbane conference. This slide was a part of the pistol necessary for firing. The motel register in Brisbane also revealed a guest who had used a factious name and address similar to that used at a motel on the road to Adelaide where, it was postulated, Mr Gassy had later stayed for sleep on his fateful journey.

The original motel registration form, held by the hotel reception outside Adelaide, also matched a carbon copy of hotel registration documents found in a white bag retrieved from a rubbish dump at a town on the road from Adelaide to Sydney where it was postulated Mr Gassy had purchased fuel for his vehicle. Such a white bag had been discarded by a man who had used the fictitious address and who had paid in cash at the motel, and who answered to the general description of Mr Gassy. CCTV film taken at a service station in the town between Adelaide and Sydney was not sufficiently clear to confirm, with certainty, the identity of Mr Gassy. But the person shown in the film was clearly seen to deposit a white bag in a rubbish bin, answering to the description of the bag later recovered from the rubbish dump. It was from such a white bag, found at the dump, that police retrieved the carbon copy of the original motel registration form. Police established that a vehicle had been hired by a person matching the appearance of Mr Gassy who used a similar false identity and also paid in cash. Moreover, the vehicle allegedly used by this person revealed a total mileage, during the hire, equivalent to the mileage of a return journey between Sydney and Adelaide.

Mr Gassy was tried, found guilty and convicted at his trial in the Supreme Court of South Australia in Adelaide. In his first appeal, his primary complaint against his conviction was a technical one. Although he had appeared for himself at his trial, he had asked the trial judge for permission to allow a barrister to represent him during a particular legal procedure within the trial. That application had been refused by the trial judge. Mr Gassy also complained about the

suggested lack of balance in the trial judge's directions to the jury when they returned after a long deliberation, seeking additional guidance and directions from the trial judge. The judge's further direction included an expression by the judge of a factual conclusion that Mr Gassy 'must have been carrying a pistol' in Brisbane and 'must have gone' to Adelaide for the reason of killing Dr Tobin.[31] These were opinions about factual conclusions that lay at the heart of the Crown case. They were at the heart of the jury's decision, to be reached after a fair and accurate summing up by the trial judge. Following the conclusion of Mr Gassy's trial and his conviction, he appealed to the Court of Criminal Appeal of South Australia. By majority, that Court rejected his appeal and confirmed his conviction.[32] By special leave, Mr Gassy then appealed to the High Court.

Before the High Court, the Crown argued that, even if there were errors in the trial judge's interlocutory ruling and supplementary directions, they were ultimately not determinative because of the compelling strength of the combined circumstantial evidence tendered against Mr Gassy. The prosecution case relied on numerous pieces of objective evidence (not all of which I have mentioned or elaborated). The prosecution contended that this evidence demonstrated Mr Gassy's guilt beyond reasonable doubt. They therefore invoked the 'proviso' which authorises the appellate court, whilst identifying technical errors at the trial, to confirm a conviction because such errors had not caused any actual miscarriage of justice in the result, effectively because the evidence against Mr Gassy was so powerful and convincing.[33]

Two Justices of the High Court (Crennan and Kiefel JJ) upheld the prosecution's submission. However, three Justices (Gummow and Hayne JJ and myself, in separate reasons) concluded otherwise.[34]

Under South Australian law (and indeed under the common form of criminal appeal legislation applicable at the time in most jurisdictions that derived their criminal law and procedure from England), the 'proviso' is a provision that applies and is designed to discourage success in appeals by prisoners who are judged clearly guilty on the evidence but who can point to technical errors or slips arising in the course of their trial.[35]

Gummow and Hayne JJ rejected this argument by the Crown on the basis that, in a case of circumstantial evidence such as Mr Gassy's, it was crucial that the jury should not be misled by a direction strongly favourable to the Crown about the way in which the jury should reason to their verdict. I had sympathy for that approach. However, I also had some understanding for the view expressed by the two dissenting Justices in the High Court. This was because I concluded that:

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31 *Gassy v The Queen* (2008) 236 CLR 293, 298 [8] (Gummow and Hayne JJ), 308 [37] (Kirby J).

32 *R v Gassy [No 3]* (2005) 93 SASR 454, 545 [369] (Bleby and White JJ), Debelle J dissented at 472 [30].

33 *Criminal Law Consolidation Act 1935* (SA) s 353; cf *Weiss v The Queen* (2005) 224 CLR 300.

34 *Gassy v The Queen* (2008) 236 CLR 293, 295–308 [1]–[38] (Gummow and Hayne JJ), 308–26 [39]–[109] (Kirby J), 326–41 [110]–[156] (Crennan and Kiefel JJ). But cf *Perara-Cathcart v The Queen* (2017) 91 ALJR 411, 431 [108] (Nettle J).

35 The relevant 'proviso' appears in the *Criminal Law Consolidation Act 1935* (SA) s 353.

> In the large canvas of [Mr Gassy's] trial, I am not convinced that this error alone would justify relief. Nor, in terms of its consequences, would it attract an argument based on the suggested category of 'fundamental' departures from the hypothesis of a fair trial.[36]

The conclusion in my reasons took me back to analysing closely the prosecution's contention that 'no substantial miscarriage of justice … ha[d] actually occurred'.[37] This was because, for me, the factual testimony presented against Mr Gassy at the trial, whilst circumstantial, was so overwhelming in proof of his guilt as to be compelling. This, in turn, took me through all of the factual evidence that I have already mentioned (and more). This illustrates the way in which appellate judges can sometimes become embroiled in detailed assessment of the testimony given at a trial (and the inferences that arise from that testimony) in discharging their distinct and separate duties, imposed upon the appellate court, to resolve evidentiary questions. I made it clear that the 'mosaic of evidence' presented in the prosecution case was extremely strong:

> Individually, the elements in the mosaic might be questioned or doubted. However, when placed together and in relation to each other, the resulting case was in my view powerful … I am brought to the conclusion that the present case is a borderline one … Definitely, it is at the cusp.[38]

During their deliberations, the jury in the trial had sent a message, asking the judge to explain what was meant by the expression 'beyond reasonable doubt'. In Australia, under the common law rule applicable in South Australia and most Australian jurisdictions,[39] juries had to be told that these words were well-known and of long standing and that the jury must give them their ordinary meaning. With the benefit of this somewhat opaque direction, the jury continued their deliberations.

To the question, where did the truth lie in the criminal prosecution of Mr Gassy at his trial, the answer overwhelmingly favoured the prosecution case. However, that answer to that question, on its own, was insufficient to sustain his conviction. This was because of a number of legal requirements that presented other, and different, questions before the overall issue of proof of guilt could be treated as determinative.

First, the Australian system of criminal justice, like that of England, is accusatorial in its essential character. It is not simply adversarial and it is not inquisitorial. The onus of proof of guilt normally remains on the prosecution throughout the trial. The accused does not have to prove his or her innocence. Secondly, the proof of an accused's guilt must be established to a very high standard, namely, beyond reasonable doubt. Probability or comfortable satisfaction are not enough. Yet absolute certainty is not required. That would be too strong a burden to cast on the prosecution. Thirdly, the accused person is ordinarily entitled to have the issue of guilt decided by a jury of 12 citizens who have been correctly instructed about the law. Although appellate judges have a

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36 *Gassy v The Queen* (2008) 236 CLR 293, 315 [64]. This was a category recognised as disentitling the Crown from relying on the 'proviso'.

37 Ibid 326 [108].

38 Ibid 321 [90]–[91].

39 *Green v The Queen* (1971) 126 CLR 28.

reserve role to play under the proviso, it is a serious step to take away the right to trial by jury where, because of a material misdirection on the facts or the law, a trial has contained legal inaccuracies or serious procedural unfairness.

In my reasons in the *Gassy* case, I tried to explain how I resolved the quandary presented by the division amongst my other colleagues in the Court (2:2). I could not respond that it was just too difficult. Or that I could not make up my mind. Or that there were arguments both ways and describe, to some degree, my mental processes. It was my duty to endeavour to reach a decision. Not only was this important for Mr Gassy, facing the possibility of confirmation of his conviction and a very long prison sentence. It was also important for the community concerned about a brutal homicide of a public official happening in its midst and also, possibly, about the costs and other burdens of a lengthy second trial. This is what I said:

> The trial had reached a critical point and the judge was perfectly correct to attempt to save it. However, that endeavour could not be at the cost of [surrendering] manifest impartiality and neutrality and a fair presentation to the jury of [Mr Gassy's] case. … For the judge to give the jury a clear and firm reminder of the prosecution case, at that critical point, without equally reminding the jury of [Mr Gassy's] main arguments, placed [him] at a very great disadvantage. Not least was this important because, from the duration and announced difficulties of the jury's deliberations, it is apparent that Mr Gassy had succeeded with some or all of them in at least some of his criticisms of the prosecution case. … The reasons for manifest judicial impartiality and neutrality derive from the very nature of the judicial function and the purposes of a public criminal trial. They are reflected in fundamental principles of human rights as expressed in international law. They have been repeatedly stated in the reasons of this and other courts. They were well explained by [the dissenting judge] in the [appellate] court below.[40]

In the result, I favoured ordering a new trial. In the end, a fresh assessment of fact-finding by the High Court as to where truth lay in the case, was not an available 'cure' for the defects in the direction to the jury and the conduct of the trial. Whilst this would be inconvenient and expensive for the community, Mr Gassy was facing a confirmed conviction and a sentence of imprisonment for life. I therefore joined in the orders of the High Court quashing the conviction that rested on the first verdict and ordering a retrial.

There is a postscript to this case. Mr Gassy was retried in Adelaide before a new jury and a different trial judge. Once again, he was found guilty and convicted. A further appeal was brought by him but dismissed by the Court of Criminal Appeal of South Australia. Another application was made for special leave to appeal to the High Court.[41] That application (which raised different objections) was rejected. Interestingly, the first jury deliberated for one and a half days.[42] The second jury took only three hours to reach their guilty verdict. The prosecution case in both trials was basically the same, namely a combination of the circumstantial evidence pointing to the guilt of Mr Gassy, especially:

40 *Gassy v The Queen* (2008) 236 CLR 293, 322–3 [95]–[97] (citations omitted).

41 *Gassy v The Queen* [2010] HCASL 189 (22 September 2010).

42 *Gassy v The Queen* (2008) 236 CLR 293, 322 [92]–[94] (Kirby J).

1. Evidence suggesting that Mr Gassy had travelled to Adelaide at the critical time;
2. Evidence suggesting that he had been involved with a handgun of the relevant type;
3. Evidence suggesting his earlier presence in Brisbane where Dr Tobin was lecturing;
4. Evidence indicating an opportunity to kill Dr Tobin in Adelaide; and
5. Evidence providing a motive to kill Dr Tobin.

Different decision-makers sometimes view the same evidence in contested trials in different ways. The task of reasoning to a conclusion is neither automatic nor mechanical. It may be affected by perceiving the same evidence in ways different from the perception of others. Such differing perceptions can be affected by the attitudes and values of individual decision-makers. This is so, however much the law must operate upon assumptions of pure rationality, logical reasoning and compliance with legal directions. The most that the formal judicial process can provide is a close and reasoned analysis of the recorded evidence and argument, a scrutiny of the legal accuracy and fairness on the trial judge's part in the proceedings, and an explanation by appellate judges of the processes they have followed in discharging their reconsideration of the trial and the application of the legal principles binding on them.

IV A KOREAN WITNESS WHO RECANTED: AN INTERNATIONAL COMMISSION OF INQUIRY

My third illustration comes from a process of decision-making outside the familiar environment of courts and tribunals in Australia.

In 2013, the United Nations Human Rights Council ('HRC') established a COI to investigate, and report on, alleged human rights abuses in the Democratic People's Republic of Korea (North Korea) ('DPRK').[43] In May 2013, along with two colleagues, I was appointed a member of the COI and as its chairman. The inquiry followed many years of disturbing reports about North Korea. Although a member state of the United Nations since 1993, DPRK had not cooperated with the United Nations human rights machinery. It had not permitted access to their country by successive special rapporteurs appointed by the HRC to visit and investigate reported human rights abuses. It had not invited the High

43 United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Situation of Human Rights in the Democratic People's Republic of Korea*, HRC Res 22/13, 22nd sess, Agenda Item 4, UN Doc A/HRC/RES/22/13 (9 April 2013). The report is United Nations Human Rights Council, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/63 (7 February 2014). See M D Kirby and Rebecca LaForgia, 'Fact-Finding and Report Writing by UN Human Rights Mandate Holders' (2018) 39 *Adelaide Law Review* (forthcoming); Jawoon Kim and Alan Bloomfield, 'Argumentation, Impact, and Normative Change: Responsibility to Protect after the Commission of Inquiry Report into Human Rights in North Korea' (2017) 9 *Global Responsibility to Protect* 173.

Commissioner for Human Rights ('HCHR') to visit. Effectively, it had closed its borders, only allowing a trickle of tourists who were kept under close watch and restricted in their movements. DPRK is commonly referred to as a 'hermit kingdom'.

Getting up to date, accurate and representative evidence to respond to the nine-point mandate of the COI's inquiry was bound to be extremely difficult. As expected by the COI, the government of DPRK, through its mission in Geneva, ignored requests from the COI to permit members of the COI and staff to visit the country. It maintained that stance throughout the COI's inquiry. In the end, and before its public release, a draft report was transmitted electronically through the Geneva embassy of North Korea to the Supreme Leader of DPRK (Kim Jong-un), with a warning that he might himself personally be accountable for crimes against humanity found in the report. This too was ignored. However, DPRK was certainly aware of the inquiry and reports. It regularly denounced the COI, its members and their findings. When it criticised the inquiry and its procedures, the members and the United Nations, I offered to travel to Pyongyang to explain their report and to answer questions. This offer was also ignored.

Faced with such intransigence, the COI came to recognise the great value of the compulsory procedure of subpoena (literally, 'under the power'), developed in national legal systems to ensure that parties, persons and records relevant to a proceeding are brought by those subject to them before those with the responsibility of decision. The COI did not enjoy that facility. Whilst the HRC strongly and repeatedly urged DPRK to cooperate with the COI, its injunctions fell on deaf ears. Yet, obviously, such want of cooperation could not, of itself, prevent the COI from discharging its mandate, any more than a national court or inquiry would abandon its duties in the face of non-cooperation.

The three members of the COI came from differing cultural and legal traditions. Two (Mr Marzuki Darusman of Indonesia and Ms Sonja Biserko of Serbia) derived from countries that follow the civil law traditions, ultimately traced to the legal systems of France and Germany. My own experience had been exclusively in jurisdictions of the common law tradition, whose laws derive ultimately from England. Most United Nations inquiries are carried out by professors and public officials selected from civilian countries constituting the majority of the member states of the United Nations.

The COI on DPRK gave a great deal of attention, at the threshold, to the methodology that it should adopt to overcome (as far as possible) the hostility and non-cooperation of the subject country. The COI was not itself a court or tribunal. It was not authorised to prosecute, still less to arraign, or to determine the guilt of DPRK, its institutions or named officials. The object of UN COIs in the area of human rights is to be 'effective tools to draw out facts necessary for wider accountability efforts'.[44] Self-evidently, all such inquiries must themselves

44 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2011/634 (12 October 2011) [25]; *Promotion and Protection of Human Rights: Impunity: Report of the Secretary-General*, 62nd sess, Provisional Agenda Item 17, UN Doc E/CN.4/2006/89 (15 February 2006) [42]. See also Geoffrey Palmer, 'Reform of UN Inquiries' in

conform to United Nations human rights law. This means that they must accord natural justice (due process) to those who are the subjects of the inquiry, and protection to those who give testimony and may, for that reason, be at risk. The COI on DPRK took these obligations seriously.

The methodology adopted by the COI on DPRK included:

1. Advertising publicly to invite witnesses to identify complaints about which they could testify and offer testimony;
2. Conducting public hearings to receive such testimony so far as could be safely procured in public (with other evidence received in private);
3. Filming and recording such public testimony and placing it online, accompanied by written transcripts in relevant languages;
4. Inviting national and international media to attend and cover the testimony and to draw it to global attention;
5. Producing a report written in simple, accessible language;
6. Indicating clearly in the report the findings made by the COI and the evidence upon which such findings was based;
7. Providing a draft of the report to the nations most immediately concerned, with an invitation to correct, or comment on, factual and legal conclusions;
8. Publishing with the report any such comments (comments were received and published from China and attached as an annex to the report); and
9. Engaging with media in all forms to promote knowledge of – and to secure understanding of and support for – the COI's conclusions and recommendations.

The COI was aware that false testimony by witnesses could potentially damage the credibility of its findings. Therefore, it took care to limit the witnesses to those who, on preliminary interview by the COI's secretariat, offered evidence that was relevant to the COI's mandate, and appeared honest and trustworthy. The COI also secured agreement from the Government of the Republic of Korea (South Korea) ('ROK'), exceptionally, to permit DPRK to send representatives or advocates, or to engage lawyers, who could make submissions on its behalf and, with permission of the COI, make submissions and ask questions of other witnesses. This offer was communicated to DPRK but ignored. In giving testimony, witnesses were examined in the manner of 'examination-in-chief'. This course permitted the witnesses to give their testimony in a generally chronological way, in their own language, and in a fashion that was comfortable to them. It gathered evidence by non-leading questions asked by a Commissioner. The COI did not cross-examine witnesses unless it considered this course to be essential to clarify apparent inconsistencies or to address doubts raised in the minds of COI members concerning the

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Suzannah Linton, Gerry Simpson and William A Schabas (eds), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S Clark* (Brill, 2015) 597.

evidence. The 'non-leading' mode of examination allowed witnesses to speak for themselves. It afforded the COI a mass of compelling evidence relevant to its mandate in language that was vivid, direct and generally convincing to the COI.

The testimony procured by the COI was subsequently organised under the headings of the nine-point mandate received by the COI from the HRC. In each case, analysis in the report of the issues and the overall effect of the testimony was supplemented and illustrated by many short extracts from the transcripts. These passages added vigour to the report which second person chronicles might have lacked. Part of the power of the report of the COI on DPRK derives from the care devoted by the members, and the secretariat, to providing a readable text. The object was to ensure that the conclusions and recommendations grew naturally and logically out of the preceding passages of testimony, evidentiary extracts, recommendations and analysis.

To the criticisms of the report later expressed by DPRK, and of what it called the 'self-selected' character of the witnesses, the COI repeatedly responded with appeals to permit COI members to visit the country to conduct a transparent investigation among a wider pool of witnesses and on the spot. These appeals were also ignored. Moreover, the testimony of more than 80 oral witnesses (taken and recorded in Seoul, Tokyo, London and Washington DC) was placed online. It is still available on the internet. This means that people everywhere throughout the world (except in the DPRK) can view and hear the witnesses for themselves, read the transcripts of their testimony, and reach their own conclusions as to their truthfulness, balance and representativity.[45]

The objections, and then the alternating 'charm offensive' and bullying tactics adopted by DPRK following publication of the COI report, are all recorded online. Sharp but respectful exchanges between the DPRK Ambassador at the United Nations and I are also captured online (and are available on the internet). These allow both the political actors and the general international audience to evaluate the COI's report. Certainly in the first instance, the political actors in the organs of the United Nations indicated their conclusions by overwhelming votes endorsing the report, recorded successively in the HRC, in the General Assembly and even in the Security Council of the United Nations. In the Security Council, by a procedural resolution not subject to the veto,[46] the human rights situation in DPRK was added to the agenda of the Council by a two-thirds majority (11:4) with two abstentions; and two against. Two Permanent Members of the Security Council, China and the Russian Federation, on a show of hands, voted against placing the subject of North Korea on the Security Council's agenda. But their vote did not stop that happening.

One substantive matter, on which the concurring decision of the Permanent Members of the Security Council would be essential to validity, concerned the COI's recommendation that the case of North Korea should be referred to the

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45 See generally Michael Kirby, 'The UN Report on North Korea: How the United Nations Met the Common Law' (2015) 27 *Judicial Officers' Bulletin* 69 for the methodology of the COI; United Nations Human Rights Council, *DPRK – COI: Public Hearings (Programs, Videos, Transcripts)* <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx>.

46 *Charter of the United Nations* art 27(2).

International Criminal Court so that prosecutorial decisions might be made, and if so decided, trials conducted to render those ultimately found guilty of grave crimes accountable before the people of Korea and the international community.[47] That substantive resolution has not, so far, been voted on by the Security Council.[48]

Under the Security Council's procedural resolution of December 2014, the issues of human rights in DPRK remained on the agenda of the Council for three years at least. Hopefully, a time will arrive when a consensus will be formed that at least the gravest findings on the part of the COI should be fully considered by a prosecutor with appropriate powers to initiate action. Under international law, where a nation state fails to ensure accountability for grave human rights crimes, the other members of the international community, in the United Nations, have a 'responsibility to protect' those who are left unprotected by their country of nationality.[49]

In reaching its conclusions, the COI explained the origins of its mandate,[50] its methodology[51] and the interpretation that it took of its mandate as well as its methods of work.[52] Specifically, the COI described the standard of proof that it applied to accepting the testimony of witnesses and in deriving conclusions from that testimony so as to respond to its mandate.[53] On the issue of differentiating probative from non-probative evidence, the COI said:

> Consistent with the practice of other United Nations fact-finding bodies, the Commission employed a 'reasonable grounds' standard of proof in making factual determinations on individual cases, incidents and patterns of state conduct. These factual determinations provided the basis for the legal qualification of incidents and patterns of conduct as human rights violations and, where appropriate, crimes against humanity. … There are 'reasonable grounds' establishing that an incident or pattern of conduct has occurred when the Commission is satisfied that it has obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or pattern of conduct has occurred. This standard of proof is lower than the standard required in criminal proceedings to sustain an indictment, but is

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47 United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 370 [1225(a)].

48 On 11 December 2017, by another procedural vote with which China and the Russian Federation disagreed, a session of the Security Council was held, inter alia, to consider human rights in North Korea: United Nations Security Council, *The Situation in the Democratic People's Republic of Korea*, 8130th mtg, S/PV.8130 (11 December 2017).

49 United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 363–5 [1204]–[1210]. See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008).

50 United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 5–6 [6]–[12].

51 Ibid 10–15 [28]–[62].

52 Ibid 6–8 [13]–[20].

53 Ibid 15–18 [63]–[78].

> sufficiently high to call for further investigations into the incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution. The findings of the Commission appearing in this report must be understood as being based on the 'reasonable grounds' standard of proof, even when the full expression ('reasonable grounds establishing') is not necessarily expressed throughout the text of this report.[54]

After the publication of the COI report, and the action of the three organs of the United Nations after they had received it, an event occurred which the DPRK used in an attempt to destroy the credibility of the COI report and its processes. In January 2015, the DPRK released a video film concerning a witness who had given evidence before the COI and who had subsequently taken part in conferences and meetings recounting his alleged experiences when escaping from DPRK. Shin Dong-hyuk ('Shin') was an articulate, engaging young man whose story about how he had escaped from DPRK was unique, in that he claimed that he had fled from the highest security detention camp in DPRK, reserved for the most dangerous political detainees and their families.

Shin's story was not only recorded in the transcript of the COI. It was the subject of an earlier best-selling book by Blaine Harden, a United States journalist.[55] A filmed image later released by DPRK showed a person, later confirmed to be Shin's father, who stated that Shin's testimony and account of his experiences were false, that he was given to falsehood, and that he should return to DPRK and seek forgiveness for his falsehoods. Shin subsequently acknowledged that his critic was indeed his father and that parts of his story in the book (and hence of his testimony to like effect before the COI) were not factually correct, including in relation to his being detained in Camp 14, the age he was at the time he was allegedly tortured, and the alleged circumstances by which he had escaped. Three other witnesses had been identified by DPRK who were claimed to have made false allegations against their homeland. However, Shin was the only one of these who gave evidence to the COI in its public hearings. Because Shin had been prominent in the international media reports which preceded and accompanied the COI hearings, he was called first amongst the witnesses who gave oral evidence at the public hearing to the COI in Seoul.

The question thus becomes to what extent the entire report of the COI, its conclusions and recommendations, are damaged or undermined by the exaggerations acknowledged by Shin and the possibility that other witnesses, not yet identified or acknowledged may have similarly falsified or exaggerated their testimony? DPRK has asserted that the entire COI report on human rights in their country has collapsed. It has called for the United Nations to make an apology to DPRK and to rescind its condemnatory resolutions against DPRK.

Some support for the DPRK criticisms was later voiced by an assistant professor of political science in Singapore (Dr Jiyoung Song) in an article

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54 Ibid 16 [67]–[68].

55 Blaine Harden, *Escape from Camp 14: One Man's Remarkable Odyssey from North Korea to Freedom in the West* (Penguin, 2013).

'Unreliable Witnesses' published in August 2015.[56] In her article, Dr Song referred to a practice of: paying North Korean refugees for interviews about their human rights experiences (fees said to be up to $US200/hour were mentioned); receiving second hand accounts without adequately checking for reliability; allowing witnesses to change their names allegedly to protect their families from retaliation but thereby making objective scrutiny and follow-up more difficult; using 'older white male interviewers' to collect testimony who are not native Korean speakers and who could not detect nuances in witness evidence; receiving testimony through interpreters; paying insufficient attention to gender, age and social status considerations; and failing adequately to follow up inconsistencies possibly derived from perceived self-advantage.

Dr Song concluded:

> In my 16 years of studying North Korean refugees, I have experienced numerous inconsistent stories, intentional omission [sic] and lies. I have also witnessed some involved in fraud and other illicit activities. In one case the breach of trust was so significant that I could not continue research. It affected my professional capacity to analyse and deliver credible stories in an ethical manner but also had a deep impact on personal trust I invested in the human subjects I sincerely cared about.[57]

Any person who has been involved in the gathering and examination of testimony, received in connection with serious proceedings before courts, tribunals or inquiries, designed to elicit the truth about significant and potentially disturbing subjects, knows that the process is full of difficulty and far from perfect. Each of the members of the COI on DPRK had extensive experience, gained over many years, in receiving, scrutinising and evaluating evidence. I did, appearing successively as a clerk, lawyer and advocate in courts over 16 years, and then as a judge and inquiry commissioner in Australia over 34 years. I had earlier held other United Nations offices that involved gathering testimony, evaluating it and reaching and expressing conclusions.[58]

Long experience is not a guarantee of infallibility. As already pointed out, I have long been sceptical about the claimed capacity of judges to differentiate truth from falsehood based on their impression of witnesses. Commissioner Marzuki Darusman likewise had long experience in the law and in the courts in Indonesia, including as Prosecutor-General and Attorney-General of that country. These posts, and daily legal practice of the law, would have given him an experience similar to my own. Commissioner Sonja Biserko also had long engagement with civil society organisations addressing the intensely disturbing

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56 Jiyoung Song, 'Unreliable Witnesses: The Challenge of Separating Truth from Fiction When it Comes to North Korea' on Australian National University, *Asia and The Pacific Policy Society* (2 August 2015) <https://www.policyforum.net/unreliable-witnesses/>.

57 Ibid.

58 For example, as a member of the International Labour Organisation Fact-Finding and Conciliation Commission on Freedom of Association's Inquiry into South Africa (1991–92); as United Nations Special Representative of the Secretary-General for Human Rights in Cambodia (1993–96); and as a member of the United Nations Development Programme Global Commission on HIV and the Law, which produced the 'HIV and the Law: Risks, Rights & Health' (Global Commission on HIV and the Law, July 2012).

evidence of communal hatred, violence and alleged genocide in countries of the former Yugoslavia, including her own country, Serbia.

Each of the Commissioners in the COI on DPRK was aware that witnesses can sometimes be fraudulent and dishonest, occasionally irresponsible and exaggerated, and not uncommonly confused and forgetful. However, decision-makers with the responsibility to undertake an inquiry (including for the United Nations) and to reach conclusions cannot allow the imperfections of human nature and decision-maker capacity to paralyse them. Nor can they permit the possibility that they have sometimes been deceived by a witness to dominate their reaction to the testimony of witnesses generally, as Dr Song appears to have done. To allow disappointment with one witness or even a number of witnesses to destroy one's faith in the investigatory process as such is to allow one's personal sense of pride and self-importance (or even outrage at cases of deception) to overcome the duty to press on and to reach and explain reasoned conclusions in an inquiry that is objectively significant. Especially so because, as Dr Song acknowledged, 'there is no doubt that the North Korean regime has violated serious human rights'.[59] If this is so, members of a United Nations inquiry, established by the HRC, did not have the luxury to walk away from their duty nor to exaggerate the occasional dangers. Nor to allow personal ego or pride to overcome their professional fact-finding obligations.

In the case of the COI on DPRK, each of the Commissioners, at the time of embarking on their duties, made a solemn undertaking before the HCHR (Ms Navi Pillay) that they would act with integrity, impartiality, independence and professionalism.[60] Subsequently, this undertaking was reduced to writing, signed and deposited with the President of the HRC. Further, before any witness was asked questions at a public hearing by a member of the COI, he or she would request the witness to declare publicly that the evidence that they would provide to the COI would be the truth. The witnesses so declared. Similar procedures were followed in respect of witnesses interviewed privately.

Further considerations need to be noted in light of Dr Song's article. It is important that scholars working in places where free criticism of officials is possible should not lend credence to the strategy of DPRK which is to attack witnesses and independent investigators who faithfully record evidence of grave abuse:[61]

- No monies were paid to witnesses who appeared before the COI on DPRK in order to induce them to give their evidence. In the normal way, compensation or reimbursement was usually provided, generally by civil

59 Song, above n 56.

60 These are qualities identified in the Bangalore Principles of Judicial Conduct, which were adopted by the United Nations Economic and Social Council in *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st plen mtg, Agenda Item 14(c), UN Doc E/RES/26/23 (27 July 2006) annex ('Bangalore Principles of Judicial Conduct'). See Judicial Integrity Group, 'Commentary on the Bangalore Principles of Judicial Conduct' (United Nations Office on Drugs and Crime, September 2007).

61 Steven Borowiec, 'North Korea's New Tactic: Discredit Those Who Report Human-Rights Abuses', *YaleGlobal* (online), 24 March 2015 <https://yaleglobal.yale.edu/content/north-koreas-new-tactic-discredit-those-who-report-human-rights-abuses>.

society organisations whom the witnesses had come to trust, to cover transport and accommodation where needed. Most such witnesses have faced difficulties in re-establishing their lives in new countries. Most would not otherwise have the funds to travel to, or appear before, a body such as the COI. There is nothing unusual or reprehensible in any of these arrangements;

- DPRK would not allow the COI access to its own territory despite repeated requests. The COI could not therefore go to places in North Korea where it might investigate relevant matters for itself, on the ground. It was obliged to invite testimony, including from escapees and experts – all of whom resided outside DPRK. There was no difficulty in securing testimony in response to the COI's invitation. There are more than 30,000 escapees who now live in ROK (South Korea). In the end, gathering evidence had to be terminated in order to ensure compliance with the tight deadline for report by early 2014 required of the COI by the HRC;
- The reliability of most escapees from DPRK can be considered against the fact that very few escapees have decided to return to DPRK and very few nationals of ROK have ever sought sanctuary in the North;
- Several of the witnesses before the COI gave evidence that effectively corroborated the testimony of others. In particular, evidence concerning: detention camps in DPRK; starvation and lack of food; restrictions on travel and movement; controls over access to media and the internet; harsh treatment for returnees coming from China, especially for religious adherents; and totalitarian presentation of propaganda uniformly supporting the regime in DPRK, all came in similar terms from the mouths of several witnesses who were not acquainted with the other witnesses offering like testimony;
- Testimony was filmed, transcribed and (where it was received in public hearings) is available online. Exceptions were provided for witnesses whom the COI regarded as likely to be endangered if they gave evidence in public. Most of the evidence is exposed to the assessment of people everywhere as well as to experts and functionaries of DPRK in a most transparent way;
- Satellite images of DPRK available to the COI confirm what appear to be the buildings of detention camps following the general lines of the oral testimony given by witnesses. This is so despite DPRK's denial of the existence of any such camps. Moreover, by way of contrast with images of ROK, China and Japan, these satellite images demonstrate the continuing bleak physical, economic and humanitarian situation in DPRK;
- Opportunities were given to DPRK, in respect of testimony gathered in ROK, to appoint lawyers (or other representatives) to safeguard their interests and, with leave, to ask questions of all witnesses. Their refusal to accept this possibility makes it unpersuasive now for DPRK to rely on

any alleged imperfections of some of the evidence to which it is the main contributor by its total lack of cooperation;

- The COI report did not simply accept and present or summarise the claims of witnesses. The Commissioners were assisted by a skilled secretariat, whose members were themselves independent of the UN organs and agencies, including the Office of the HCHR. Members of the secretariat provided advice and analysis concerning witnesses and their testimony and their relevance to mandate issues. However, they accepted, as they were bound to do, that the Commissioners had the right and duty to have the last word on all matters in the COI report. Some parts of individual testimony of witnesses were not included in the COI report because the COI was unsure as to their reliability. For example, an account suggesting the performance of non-consensual medical experiments in DPRK was not included for that reason. Similarly, the COI ultimately rejected witness suggestions of the commission of the international crime of genocide, because of the view that it took as to the state of the evidence before it and the legal requirements for proving 'genocide' under the current terms of international law.[62] Although some witnesses on religious persecution argued for a finding of genocide, the COI did not accept their contention. It acknowledged the radical reduction of the population of religious adherents in DPRK in recent decades. It expressed some sympathy for a broader definition of 'genocide' than was available to the COI under present international law. However, it postponed any finding of genocide affecting religious minorities because the relevant evidence was 'difficult or impossible to [gather] without access to the relevant archives of the DPRK'.[63] Care was observed, both in conducting confidential interviews and in undertaking the public hearings, to pose questions in such a way as to extract only first-hand information known to the speaker. It was not necessary to its conclusions for the COI to rely on second-hand or purely hearsay accounts;
- Whilst it is true that cultural considerations are relevant to testimony received through interpreters, this is an inescapable feature of collecting evidence in multicultural and multilingual societies, including those from which each of the Commissioners and most members of the COI secretariat derived. There is nothing peculiar or special to the DPRK in this regard. Many of the conclusions reached by the COI are similar to those earlier, and subsequently, recorded by Korean civil society organisations in South Korea that conducted their interviews in the Korean language, with complaints questioned by Korean native speakers.

62 United Nations Human Rights Council Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 350–1 [1155]–[1159].

63 Ibid 351 [1159].

On the issue of gender, the COI adopted a practice of ensuring, so far as possible, that female witnesses were interviewed confidentially by female investigators. Most of the female witnesses in the public hearings of the COI were questioned primarily by Commissioner Sonja Biserko in the first instance; and

- Finally, so far as the evidence of Shin Dong-hyuk is concerned, adjustment can be readily made for his partial recantation and the withdrawal of his testimony that he had been detained in Camp 14 (as well as certain other evidence he had given about his parents). That still left evidence by Shin that was entirely believable, reliable and corroborated by other witnesses. In any case, the quotations from Shin's testimony, actually contained in the COI report, are relatively few. Those recorded verbatim are mostly immaterial to the point of his recantation. None of the other persons named as unreliable by Dr Song gave public evidence to the COI or were relied on by the COI or its secretariat.

In the big picture of human rights violations in DPRK, found to be 'systematic, widespread and gross',[64] extending over many years, and affecting millions of people, the subtraction of part of the testimony of one witness, Shin Dong-hyuk, has no consequence for the overall impact of the witness testimony received by the COI on DPRK. It does not require withdrawal of a single conclusion or recommendation of the COI. Any more than, in municipal jurisdiction, conclusions and recommendations of a large and significant inquiry would have to be withdrawn or disbelieved in their entirety because it was later found that part of the testimony of one witness was false, careless or exaggerated in particular respects.

Reflecting on the recantation by Shin, Blaine Harden wrote in August 2015, in language that I find convincing:

> If there's one truth to be gleaned from … memoirs [of escapees from DPRK], it is about the centrality of lying … For me … it is a haunting issue. Shin Dong-hyuk, the subject of my 2012 book, 'Escape From Camp 14', misled me for seven years about some details of his life in North Korea's gulag. When I asked him why he had done it, he said the complete truth was simply too painful. He chose to tell me (and human rights groups and UN investigators) an expurgated story, which he wore as body armor for life in the free world. It protected him from trauma he was unwilling to relive. It hid behaviour he was ashamed to disclose. He had no idea, he said, that the precise details of his life would ever be considered important. Shin's experience in North Korea was particularly gruesome. His body is covered with scars from repeated torture. He's stunted from malnutrition. As a young teen, he betrayed his mother and brother, causing their execution. Psychologists agree that victims of such severe trauma almost always tell stories that are fragmented, self-protective and intermittently untrue. But Shin's relationship to the truth is not completely foreign to other defectors now writing memoirs … Some skepticism, then, is probably in order for readers coming fresh to memoirs about North Korea. But for what it's worth, I believe these books. They are consistent with a recent UN investigation that found overwhelming evidence that crimes against humanity are being committed in North Korea. For a journalist who has spent hundreds of

64 Ibid 365 [1211].

> hours interviewing defectors, these memoirs ring true about North Korea's culture of cruelty and lies.[65]

V CONCLUSIONS

Scientists, mathematicians and statisticians search for truthful and reliable data. To the extent that they can work with incontestable facts, unwavering digital numbers and symbols, objective observations and their decisions are rendered safer. The uncomfortable elements of human imperfection can, to that extent at least, be avoided.

In resolving disputes and contests over what has happened in the past, or what is happening now, in individual countries or elsewhere in the world, it is usually not so easy to delete the human element.[66] Decision-makers work with imperfect materials. But these are the materials that make up our societies and our world. Where the issue presented for decision is straightforward, in a simple civil case, the question of where truth lies can usually be pursued by the decision-maker, applying well-worn rules to come to a conclusion that is probably an objectively correct description of what happened in contested circumstances. The obligation to give reasons subjects the decision-maker to discipline. It subjects the conclusion to subsequent analysis and review. High courts of law may have the last word for legal purposes. But in a free society, that does not prevent other citizens from continuing to question the official decision and possibly to demand fresh analysis and further consideration.[67]

Where a case involves criminal charges, and potential punishment with loss of liberty, reputation and other humiliations and burdens, the simplistic question 'where does truth lie?' may be complicated because of other considerations. In such a case, the risk of error on the part of the decision-maker is even more unacceptable. Hence error must be more carefully guarded against.

In a multifaceted inquiry at an international level, it is true that there are serious dangers of fraudulent, false, exaggerated, confused and unreliable testimony, sometimes affected by the consequences of psychological trauma, political motivations or even idealistic aspirations. Yet in this case, as in national formal decision-making, the decision-maker does not have the luxury of walking away. He or she must do the best that is possible in the circumstances to unveil

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65 Blaine Harden, 'Can We Believe All the Horrors Described by North Korean Escapees?', *The Washington Post* (online), 6 August 2015 <https://www.washingtonpost.com/opinions/can-we-believe-all-the-horrors-described-by-north-korean-escapees/2015/08/05/228b057e-1910-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.6ce0838a68e4>. This conclusion is consistent with explanations in the literature on decision-making.

66 Cf Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press, 2016).

67 This occurred in Australia following the death of an infant Azaria Chamberlain, allegedly taken by a dingo (wild dog), which was the subject of several cases and ultimately a Royal Commission that cleared the mother of a charge of murder: see *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521. Questioning of confirmed convictions of murder sometimes lead to reopening of the case and conclusion that the original court conclusion was unsafe or wrong, see *Mallard v The Queen* (2005) 224 CLR 397.

the truth. A measure of care and scepticism about the sources of the evidence used is usually appropriate. Certainly, caution should be used in accepting the testimony of witnesses generally. Decision-makers need to be made aware of the neurobiology of decision-making and what it means to have a 'feeling' of 'actual persuasion' or a belief that a conclusion can be classified as 'beyond reasonable doubt'.[68]

Similarly, the decision-maker needs to be aware of cultural considerations that can influence the way evidence is given when it comes through the medium of a different language or culture,[69] or where it is gathered without facilities available in other settings. We now know how some evidence, given with assurance and certainty, can be erroneous simply because of the operation on our fallible human recollection of unconscious psychological factors such as expectations, interests, hopes and desires.[70]

Formal decision-making in a court, tribunal or a commission of inquiry involves a process that has many uncertain and some missing points of reference. Yet the journey must still be undertaken, and it must be completed if important questions are to be brought to a conclusion. Those engaged in that process must have clear eyes and an honest objective to come to the right destination. Because of our human weaknesses, we will all sometimes fail in the journey. However, that risk does not release us from the obligation to pursue the place where truth lies.

According to Scripture, when Pontius Pilate was told by Jesus that he had come into the world to bear witness unto the truth, the Roman Governor asked the question: 'What is truth?'[71] He did not stay for an answer, but he immediately declared to the angry crowd: 'I find in him no fault at all'. Yet instead of sticking to his own conclusion, he attempted a dishonest compromise by offering up a murderer, only to find that the rabble was not to be appeased. So he felt forced to proceed to a gravely unjust decision.

In decision-making of the kind surveyed in this article, based on the personal experiences of the author, the discovery of truth is not scientific. However, recording and explaining it can sometimes help to prevent, or correct, an injustice in a civil case or bring to a conclusion a criminal accusation. On the global stage, truth can shine the light of knowledge on a country or place where grave wrongs occur. Truth alone is insufficient for justice to be done. But without truth, injustice may go unnoticed and unrepaired. That is why, despite all the risks, human beings and their institutions stubbornly search for the truth. The fact that

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68 Bennett and Broe, above n 8, 67–8.

69 Kyrou, above n 10. Justice Kyrou raises a number of novel questions and offers suggestions. See also Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 21; Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review* 144; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Rights* 391.

70 For observations on the dangers of identification evidence, see, eg, *Domican v the Queen* (1992) 173 CLR 555.

71 *The Holy Bible*, John 18:38.

it may sometimes be very difficult to discover, and that we may not be absolutely certain that we have done so, is not an excuse for giving up the effort to explain and describe the destination at which we have arrived so that others may assess our procedures, test our conclusions and evaluate our integrity.