The Limits of the *Christie* Discretion

Part One: From *Christie*'s birth to *Hasler*

Give me a chance.

I cannot alter it.

Over a century ago at Westminster's Caxton Hall, Deputy Chairman Herbert Nield sentenced a man for the indecent assault of a five-year old. The prisoner had a seven year record of theft and burglary and had spent the balance of the year in gaol for 'common' assault of a female.[1] Nield, a member of parliament, was prompted by a prison doctor's statement that the prisoner was 'weak-minded' to ask whether he fell within the recently enacted *Mental Deficiency Act*.[2] The prisoner probably did, Nield was told (meaning that he could be institutionalised rather than punished), but no-one at the hearing knew if the Act was in force.[3] So, Nield sentenced him to nine months in prison. Told, 'I will be knocked about', Neild replied, 'No you will not'. 'Yes I will', said Albert Christie.[4]

Nield's response (quoted above[5]) to Christie's plea for mercy falls within a long-standing common law tradition, epitomised by Mansfield LCJ nearly 150 years before. Refusing to grant bail to politician John Wilkes following his outlawry, the Lord Chief Justice wrote:[6]

> *It is, indeed, in the discretion of the Court, to bail a person so circumstanced. But discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.*

The Supreme Court of the United Kingdom recently cited another line in the same judgment[7] to defend an unpopular decision of its own, ordering the continued suppression of the thoroughly outed identity of a celebrity father linked to a 'threesome'.[8]

Two decades about Mansfield LCJ, Sir Nash Grose rejected the role of discretion altogether in a particular part of the law: the rules of evidence. Ruling on a tenancy dispute, he dismissed a claim that a curial practice of relying on past judicial examinations of now incompetent persons had 'grown into law' and said:[9]

> *But it may be said that it is in this case wise and discreet to depart from the general rule of evidence… I dread that rules of evidence shall ever depend upon the discretion of Judges; I wish to find the rule laid down, and to abide by it.*

Albert Christie's appeal against his indecent assault conviction ultimately significantly qualified Grose J's (and perhaps Mansfield LCJ's) stance.

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[1] *Rex v Albert Christie*, Transcript of Shorthand Notes of Trial, County of Middlesex, Intermediate Session of the Peace, 17th September 1913, 21-22

[2] Ibd, 24.

[3] Ibid. The Act had received Royal Assent a month earlier on 13th August 1913. However, it did not come into force until 1st April 1914.

[4] Ibid.

[5] Ibid.

[6] *Rex v John Wilkes, esq.,* (1770) 98 ER 327, 334.

[7] 'fiat justitia, ruat caelum'[7] (let justice be done though the heavens fall): ibid, 347.

[8] *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [3].

[9] *The King v The Inhabitants of Eriswell* (1790) 100 ER 815, 818.

Just tell us fully what he said.

"That is the old man, mum, wot undone my knickers and tied my hands up and put his winkle up me back".

Did the prisoner make any reply to that?

He said "I am innocent".

On Friday 27th July 1913, three people converged on a section of the Winchester Road fields in Edmonton, North London just after 10.30am. Albert Christie, who a gardener had found 'crouching' on private property near the park, was being forcibly taken in the direction of some 'hollaring'. [10] Five-year old Frederick Butcher was being led back to the fields by his mother, shortly after he had returned home crying with his knickers hanging off, a piece of rag tied to his wrist and a halfpenny in his pocket.[11] When Constable William Crooks arrived, she told him 'my boys have been assaulted by a man'. He asked Butcher 'Which is the man?' and the child touched Christie's sleeve and said: 'That is the man.'[12]

At Christie's trial two weeks later, Nield made two key rulings. The first was to let Butcher testify, even though two magistrates had already deemed the boy too young to speak on oath.[13] The second was to allow both the boy's mother and the police constable to inform the jury what the boy had said on the field as he identified Christie.[14] Charlotte Butcher reported the exchange quoted above.[15] According to Crooks's notebook, Butcher said: [16]

> *He gave me a halfpenny, then he tied my hands together at the back of me, then he put a piece of rag round my mouth, then he took my trousers down and poked his winkle up my back.*

The notebook also recorded Christie's response: 'I am innocent. I have been asleep on the fields since 8 o'clock last night.'[17]

Nield's second ruling ultimately freed Christie. Three years earlier, England's new Court of Criminal Appeal held that out-of-court accusations of crimes were inadmissible hearsay unless they were adopted by the accused.[18] On Christie's appeal to the same court, Lord Chief Justice Rufus Isaacs held that this decision applied equally to Butcher's words, dismissing as legally and practically irrelevant the fact that Butcher had testified similarly before the jury.[19] This ruling troubled the National Society for the Protection of Children, which had funded Christie's prosecution and wrote to the Attorney-General, urging him to appeal:[20]

> *The matter is of vast importance to our Clients, as the Evidence which the Court decided as inadmissible is – and for long past has been – daily used in cases of this nature and is often the only evidence of identity that can been obtained.*

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[10] *Rex v Albert Christie*, Transcript of Shorthand Notes of Trial, County of Middlesex, Intermediate Session of the Peace, 7th August 1913, 9.
[11] Ibid, 2.
[12] Ibid, 10.
[13] Ibid, 6, citing *Children Act 1908* (UK), s. 30 ('evidence of child of tender years').
[14] Ibid, 8.
[15] Ibid.
[16] Ibid, 10.
[17] Ibid, 11.
[18] *R v Norton* [1910] 2 KB 496.
[19] *R v Christie*, The Times Law Reports, 17 November 1913.
[20] Letter from Messrs Church, Rackham & Co, 10th November 1913.

Although his own counsel candidly advised him that the Court of Appeal's ruling was correct,[21] Sir John Simon nevertheless certified the appeal to the House of Lords and personally argued it (albeit after announcing that no steps would be taken to implement Christie's punishment, regardless of the outcome.[22])

As it happens, Australia's own fairly young apex court had recently considered this same issue. In 1910's *R v Grills*, which has very similar facts to *Christie*, O'Connor J said:[23]

> *It is sometimes necessary in criminal cases to put before the jury evidence of a statement made in the presence of the accused in which there is an averment direct or indirect of the guilt of the accused, or of some fact or circumstance material to prove his guilt. A statement of that kind is tendered, not as having been made by the accused or authorized or assented to by him; it is admissible in evidence only as having been made or read in his presence. It is put forward, not as affording in itself any evidence that the facts stated are true, but to show what was the conduct of the accused on hearing it. On hearing the statement made or read he may admit, he may deny, he may correct, he may qualify its effect, he may remain silent—whatever course he takes his conduct on hearing the statement is the only fact which the evidence can establish.*

This logic led the High Court and the House of Lords independently to the same conclusion: that all statements made in the accused's presence are admissible for a non-hearsay purpose: to understand the accused's response to them.

Each court had to consider a further issue: the danger that the jury would rely on the complainant's statements independently of the accused's response. A majority of the High Court ruled there was no danger because the worthlessness of such statements on their own was obvious.[24] But Isaacs J characteristically dissented: [25]

> *In every such case there is obviously a possibility of unlawful prejudice to the accused, should the jury take into their consideration the unaccepted part of the statement. When I say "unaccepted part" I include in the case of a statement, extraneous statements which a prisoner cannot accept or deny, such as an alleged conversation between third persons, and which could not under any circumstances be in itself legal evidence against him on the main issue, but which must be admitted in the first instance as part of the statement so as to make the whole intelligible. Though no part of a direct accusation, it is almost equally dangerous, and more insidious, because it might go far in the minds of the jury and induce them to give credit to the accusing witness, and thus really determine the case in favour of the prosecution.*

It is worth stating clearly the two possible uses of out-of-court accusations made in the accused's presence:

- The **probative use** was to draw an inference from the <u>accused's response</u> as to the truth of what was said by the accuser (a non-hearsay use_
- The **prejudicial use** was to draw an inference from the <u>accuser's words</u> as to the truth of what was said by the accuser (a hearsay use)

Justice Isaacs's solution was for the judge to always tell the jury 'that they are not to consider this part at all, that they are not to weigh it, but to blot it out of their mental

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[21] A. S. Comyns Carr, *Case for the Consideration of the Attorney-General as to whether he should grant his certificate for an Appeal to the House of Lords under section 1(6) of the Criminal Appeal Act 1907*, 1st December 1913. The advice nevertheless found that the evidence of Butcher's words was admissible as relevant to his credibility, a point the House of Lords opted not to address.

[22] *The King v Christie* [1914] AC 545, 547 & 551.

[23] *R v Grills* [1910] HCA 68; (1910) 11 CLR 400, 418.

[24] Ibid, 412 (Griffiths CJ), 414-415 (Barton J) & 420-421 (O'Connor J).

[25] Ibid, 425-426.

vision'.[26] He added that '[a]ny other rule leaves it entirely to the discretion of the presiding Judge whether the prisoner shall be prejudiced or not'[27], unwittingly predicting the much more radical solution that would be proposed four years later by the House of Lords.

You have the child's story told by himself before you to-day, and the same story told, as it were, in answer to the Policeman's questions in the presence of the Defendant on the morning of the occurrence; and you will please treat that evidence and treat the evidence of the mother in so far as it relates to the child's statement of identification, of being corroborative evidence of what you have heard…

In 1914's *R v Christie*, the House of Lords unanimously affirmed Christie's acquittal because, unlike in *Grills*, the jury had been directed by Nield on how to use Butcher's words in the field, albeit wrongly (in the terms quoted above.[28]) Nevertheless, three of the four judgments also tackled the problem raised by Christie's counsel (Charles Dickens's most successful child, Henry): 'the danger… that the jury, however much they be warned by the judge, do in fact attach importance to it as evidence of the truth of the facts stated, and the prisoner is seriously prejudiced thereby.'[29] In a brief discussion, Lord Atkinson (with Lord Parker agreeing) simply wrote that not admitting such evidence unless and until there is a foundation for the jury to reasonably infer that it was adopted by the accused 'might be most prudent and proper… as a rule of practice'.[30]

The case's lasting significance rests on lengthier discussions by Lords Moulton and Reading (Rufus Isaacs, again, with whom Lord Dunedin agreed) in separate judgments about the relationship between practice and law. Both made the point that, although the common law rules of evidence (and, specifically, the hearsay rule) are identical in civil and criminal proceedings, 'there is a great difference in the practice.':[31]

> *There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials.*

Both lords rejected any rule that out-of-court accusations are inadmissible as a matter of law simply because they were not adopted by the accused. Rather, the 'exception' depended on the judgment of the trial judge. Lord John Fletcher Moulton said that:[32]

> *a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value.*

while Lord Reading's take skipped the prosecutorial middle man:[33]

> *If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial,*

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[26] Ibid, 426.
[27] Ibid.
[28] *Rex v Albert Christie*, Transcript of Shorthand Notes of Trial, County of Middlesex, Intermediate Session of the Peace, 7th August 1913, 19.
[29] *The King v Christie* [1914] AC 545, 549.
[30] Ibid, 555.
[31] Ibid, 564 (Lord Reading).
[32] Ibid, 560.
[33] Ibid, 565.

> *could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether.*

Viscount Haldane was content to state that 'In the opinions about to be delivered by Lord Atkinson, Lord Moulton, and Lord Reading the true view of the law appears to me to be expressed.'[34] The radical nature of these statements can be seen by comparing them to the High Court's judgment three-and-a-half years earlier in *Grills*, where this solution – the judge causing admissible evidence to be kept from the jury – was not even mooted by any of the judges.

But the Lords' statements are purest dicta. Not only had they all already held that Christie's conviction could not stand because of Nield's misdirection, but none of them applied their further observations to the evidence before them (i.e. where Christie's sole response to Butcher's accusations was 'I am innocent' and an alibi) and two of the six would have admitted Butcher's accusations on a separate basis (to support his in-court identification.[35]) Even though only Lord Reading purported to propose the evidence's actually exclusion, rather than a mere chat between judge and prosecutor, the common law eventually built on these soft foundations to the point where it is now not contentious that all trial judges in all criminal trials have a discretion to exclude some prejudicial evidence. The continuing point of controversy is the scope of what is now known as the *Christie* discretion.

'Have a go at me about my sex life, I lined the three girls up and raped them. One, two, three, one two three, one two, three'. **And tapped on the table with his finger each time he counted. He then said, *'It's medically proven that a bloke can't have nine screws in a row, but I did it'.* Then he raved on for a bit and I left ...**

It was just after 6pm on Saturday 22nd December 1984, seven decades after *Christie*. James Craze, a close friend of one of those 'three girls', Sharon, had just brought a cup of coffee to their step-father, James Hasler, only to be berated as described above.[36] Within two years, three prosecutions of Hasler for rape, one for each of his step-daughters, had separately failed.

The first two trials, held in October and November of 1985, concerned Sharon's two siblings and each ended in Hasler's acquittal, after Craze's testimony about what Hasler had said that Saturday night was excluded in both. In the second trial, for Hasler's alleged rape of Sharon's older sister Kelly, Shepherdson J explained that Craze's account:[37]

> *introduces evidence which, if accepted by the jury that it was made and true, would go to prove that he did indeed commit the offence of rape on the other two girls on three occasions. Now, I am unable to see as presently advised that the probative effect of that alleged admission so far as the charge involving Kelly is concerned is such that it far outweighs the prejudicial effect of the other evidence contained in it. That is evidence of the admissions of having raped the other two girls. In my view that evidence should be excluded.*

This test recalls a further statement by Lord Moulton in *Christie*:[38]

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[34] Ibid, 550.
[35] Ibid, 553-554 (Lord Atkinson).
[36] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 253.
[37] Ibid, 240.
[38] *The King v Christie* [1914] AC 545, 559.

> *The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where-the scruples of the tribunal in this respect are reasonable.*

However, while this test surely refers to prejudicial effect outweighing (i.e. 'be[ing] out of proportion to') probative value, Sherpherdson J's test in Hasler's trial reversed the formula.

As it happens, Shepherdson's test is now an express part of the evidence law of all but two Australian jurisdictions. Under the uniform evidence law, it is a condition for the use of evidence about the accused by a prosecutor, but only when it is adduced for a tendency or coincidence purpose.[39] By contrast, under South Australia's fairly new provision on evidence of 'discreditable' conduct bars the use of such evidence 'to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct' (the 'impermissible use') and it uses Shepherdson J's test to govern the admissibility of all other uses of such evidence, which:[40]

> *may be admitted for a use (the 'permissible use') other than the impermissible use if, and only if… the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant…'*

The South Australian provision is essentially an augmented version of the *Christie* discretion, weighed in favour of the accused in the case of evidence that discloses bad conduct ('…two, three') but is offered for some other reason ('one…).

Again, it is worth stating clearly the two possible uses of Craze's testimony about Hasler's admissions about the other rapes:

- The **probative use** is to draw an inference from Hasler's alleged words that he admitted to raping Kelly (as one of the 'three girls') (a non-propensity/similar fact use)
- The **prejudicial use** is to draw an inference from Hasler's alleged words that he admitted to other rapes (the remaining two of the 'three girls') (a propensity/similar fact use)

Ahead of Hasler's third trial, the Attorney-General brought the question of the admissibility of Hasler's alleged admissions to the Court of Criminal Appeal (as a reference appeal from his second trial.) Because Shepherdson J had misstated the balance between probative value and prejudicial effect in Queensland (and, for that matter, in all Australian jurisdictions other than South Australia since 2011), the Court of Criminal Appeal unanimously held that Sherpherdson J had erred in his decision excluding the evidence.[41] Crucially, at the urging of Queensland's Director of Public Prosecutions, Des Sturgess, two judges in *Hasler* went further, holding that the *Christie* discretion didn't apply at all to Hasler's alleged admissions.

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[39] Uniform Evidence Law, s. 101(2).
[40] *Evidence Act 1929* (SA), s. 34P.
[41] Ibid, 246 (Connolly) J), 251-252 (Thomas J), 259 (de Jersey J).

[A]ccused then said *" Neighbour Mildred you don't know this woman through this woman people got to say I kill my first wife, she must go away."* Ayesha said she was not going. Accused then said *" If you can't go alive you got to go dead."*

In 1949, the Privy Council heard an appeal from British Guyana (in South America) concerning the admissibility of evidence of the possible poisoning of the accused's first wife in his prosecution for allegedly poisoning his second wife two years later.[42] The Privy Council broke new ground on similar fact evidence by holding that it can be admitted to rebut a possible defence of suicide or accident that the defence had not raised but 'the facts and circumstances… were consistent with innocent intention'.[43] However, the Council held that the evidence before it did not satisfy this test, as the notorious death of the accused's first wife (as the above testimony from a neighbour shows, a trope of his troubled relationship with his second wife[44]) made a repeat of the earlier alleged trick less likely.[45] Lord Herbert du Parcq added:[46]

> *[I]n all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge.*

This is clearly an application of the *Christie* discretion, this time directed to the (then) requirements of the similar fact rule, analysed as follows:

- The **probative use** is to draw an inference from the suspicious death of the accused's first wife that his second wife's death was unlikely to have been innocent (a 'rebuttal' use)
- The **prejudicial use** is to draw an inference from the suspicious death of the accused's first wife that he had a tendency to kill his wives (a 'tendency' use)

The Privy Council clearly considered the first of these uses so marginal that the jury would inevitably have opted for the second, illegitimate use. Interestingly, at the original admissibility hearing, the prosecutor alleged that the accused had told his second wife 'I will get rid of you as I got rid of my first wife',[47] which would raise similar issues to Hasler's alleged admission to Cruze. However, Lord du Parcq dismissed this as a live issue, noting that there was no evidence at trial that the accused actually said those words.[48]

Two decades later, Canada's Supreme Court drew on Lord du Parcq's words in resolving an equally vexed (but much more distant) question about the admissibility of real evidence obtained as the result of an inadmissible confession (in this case about the location of a

[42] *Noor Mohamed v The King* (British Guiana) [1948] UKPC 86.
[43] Ibid, 4.
[44] *Noor Mohamed v The King*, Record of Proceedings, In the Privy Council on Appeal from the Supreme Court of British Guiana, Evidence of M. James, 13th May 1947, 17.
[45] *Noor Mohamed v The King* (British Guiana) [1948] UKPC 86, 5.
[46] Ibid, 4.
[47] *Noor Mohamed v The King*, Record of Proceedings, In the Privy Council on Appeal from the Supreme Court of British Guiana, Evidence of M. James, 13th May 1947, Court Proceedings, 14th & 16th of May, 28.
[48] *Noor Mohamed v The King* (British Guiana) [1948] UKPC 86, 2.

murder weapon.) In 1970's *R v Wray*, Justice Ronald Martland, writing for a 6-3 majority, said:[49]

> *In my opinion, the recognition of a discretion to exclude admissible evidence, beyond the limited scope recognized in the Noor Mohamed case, is not warranted by authority, and would be undesirable. The admission of relevant admissible evidence of probative value should not be prevented, except within the very limited sphere recognized in that case…*

In his quote from *Noor Mohamed*, Martland J emphasized the words 'trifling weight', which he earlier paraphrased as 'trivial probative value'.[50]

Fifteen years later in *Hasler*, Justice Peter de Jersey cited the Canadian view on *Christie*, but stopped short of endorsing it:[51]

> *I hesitate to draw the very fine conclusion (contended for by the Director of Prosecutions) that the discretion never arose: it suffices in my view to say that because the evidence could not reasonably be regarded as of only relatively slight probative value, it was a clearly wrong discretionary judgment to exclude it.*

He demurred because of what he described as the 'not quite as extreme' language since stated by Stephen & Aickin JJ in *Bunning v Cross*:[52]

> *Perhaps the most common instance of such a discretion arising is when the evidence in question is of relatively slight probative value but is highly prejudicial to the accused.*

But Justice Peter Connolly cited the same passage from *Bunning v Cross* and said:[53]

> *So frequently is this the situation which is thought to call for the exercise of the discretion, that it is often stated as if the particular application were the whole content of the discretion.*

At first glance, this appears to be the same point as de Jersey J's. But while de Jersey J's apparent view was that Lord du Parcq's approach was an instance of the broader rule stated by Stephen & Aickin JJ, Connolly J's is that Stephen & Aickin's rule was an instance of Lord de Parcq's. So, where de Jersey J would sometimes countenance excluding evidence of more than 'trifling weight' if it was 'relatively… highly prejudicial', Connolly J would limit the judge's discretion to exclude evidence on any ground (whether because of prejudice or other unfairness) to evidence that was of 'trifling' weight.

Hence, Connolly J explained that Shepherdson J erred by applying the *Christie* discretion at all to Hasler's admission:[54]

> *The attempt to apply this principle to the present situation involves first asking whether a confession of relevant criminal behaviour, distinctly made and unquestionably voluntary can be described as insufficiently substantial, of trifling weight or of small probative value…. In my judgment a proper application of rules governing the admissibility of the evidence which was rejected in this case shows that it was of substantial probative value and relevance.*

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[49] *The Queen v. Wray*, [1971] SCR 272, 295.
[50] Ibid, 294.
[51] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 259 (emphasis added).
[52] Ibid, referring to *Bunning v Cross* (1978) 141 CLR 55, 65-66.
[53] Ibid 244.
[54] Ibid 244 & 246.

Justice Jim Thomas likewise cited the Privy Council and Canadian Supreme Court judgments to observe that the *Christie* discretion:[55]

> *is an exceptional power exercisable in cases where fair play demands it. It must not be overlooked that the central plank of our system of evidence is that relevant evidence is admissible, and it is not to the point to complain that it may have secondary damaging effects upon the adversary's case or that it may also show something else which is not in issue.*

Accordingly, he stated three 'conclusions' about the discretion:[56]

> *(a) The exercise of the discretion is not a simple balancing function in which the judge decides whether the overall effect of the evidence is more prejudicial to the accused than it is beneficial to the Crown case.*
>
> *(b) Exclusion should occur only when the evidence in question is of relatively slight probative value and the prejudicial effect of its admission would be substantial.*
>
> *(c) In performing the balancing exercise, the only evidence that should be thrown into the "prejudice" scale is that which shows discreditable conduct other than those facts which directly tend to prove the offence itself. The "prejudice" cannot refer to the damage to the accused's case through direct proof of the offence. To speak of a "balancing" of prejudicial effect against probative value of such evidence is absurd, because the weight of each will be exactly the same.*

The second of these principles adopts *Wray*'s limit on the *Christie* direction.

I've been up for rape before and I got off that one and I'll get off this one too.

The ruling in Hasler's reference appeal of course did not affect his two acquittals. While his third charge was dismissed after the prosecution opted to wait until the reference appeal, After the prosecution later brought an ex officio indictment that now alleged three rapes of Sharon, perhaps to make better use of Craze's now admissible testimony ('one, two, three, one, two, three, one, two, three'.) However, the Supreme Court, observing that this chain of events 'smacks more of persecution than mere prosecution', permanently stayed the new charges.[57]

But Hasler was no one-off precedent. It has since been applied on multiple occasions by Queensland's Court of Appeal in judgments mostly penned by Thomas J. Two years after the reference appeal, he applied it to reject a regular appeal on the admissibility of a rape complainant's testimony that the accused said the above words immediately after the rape (combined with his defence of consent and cross-examination to establish the prior acquittal), which would attract a similar analysis to Hasler's statement to Craze.[58] A year later, he and Connolly J similarly rejected an appeal by a man charged and convicted of three instances of sex with his step-daughter concerning the admissibility of a prior statement of the complainant describing a lengthy history of sexual abuse, citing *Hasler* for the proposition that '[t]he existence of secondary prejudice is not of itself a reason for exclusion' and adding:[59]

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[55] Ibid 249.
[56] Ibid 251.
[57] *R v Hasler* [1986] 2 Qd R 411, 414.
[58] *R v Fraser* [1989] 1 Qd R 182, 182-183. See, similarly, *C v R* [2002] QCA 82, [14].
[59] *R v Siedofsky* [1989] 1 Qd R 655, 659.

> *Had there been a submission that part of the statement be excised, the defensibility of doing so could have been addressed, but even then it must be apparent that the circumstances of the first act of intercourse are an important part of the history of the relationship, and it would by no means follow that it should be excluded because it happens to be prejudicial. In the event the only submissions to the learned trial judge were that the statement should be all in or all out. I do not think that the additional prejudice in this part of the story would require its exclusion, and I do not think that the learned trial judge erred in admitting the statement into evidence.*

A more recent example is *Hasler*'s application to evidence that Dr Jayant Patel, in preparation of allegedly negligent surgery, improperly attempted to have a ventilator removed from another patient in order to allow the surgery to occur before he went on holiday. Justice Peter Lyons held:[60]

> *In Hasler, the evidence of the commission of the offence charged was inextricably intertwined with evidence of the commission of another offence. In that context, it was held that relevant evidence should be admitted, unless it is of relatively slight probative value, and the prejudicial effect of its admission would be substantial. That proposition is an instance of the exercise of the discretion to exclude otherwise admissible evidence, on the ground that it would be unfair to the accused.*
>
> *In my view, on the basis on which the Crown has put this evidence forward, it would not be unfair to admit this evidence. It appears to me to be of some probative value; and its "prejudicial" effect is in what it demonstrates about Dr Patel's motivation to perform the surgery on Mr Kemp at the time he performed it. While it also reflects on Dr Patel's attitude to proper procedures, it does not seem to me that that can sensibly be excluded.*

The view in Queensland that the *Christie* discretion is a species of the discretion to exclude unfair evidence preserved by s. 130 of the *Evidence Act 1977* was the basis for a ruling, one year after *Hasler*, that even the *Christie* discretion was not available at all to exclude defence evidence. In that case, the evidence was of the victim's alleged heroin dealing, adduced by the accused to explain why he confronted him about an alleged rape carrying a stick and beat him when he appeared to reach for something behind his bed.[61] Justice Thomas, citing the House of Lords' statement that 'if it comes to the forensic crunch … it must be law, not discretion that is in command', held that 'it is difficult to conclude that there is any exclusionary discretion to reject relevant evidence, other than' the narrow situation described in *Hasler*.[62]

But *Hasler* has had no discernible impact outside of Queensland. The judgment was brought down during the Australian Law Reform Commission's comprehensive review of the common law of evidence. The Commission's interim report a year earlier mentioned Canada's *Wray* formulation as one of five 'formulations' of the *Christie* discretion, but the test it drafted merely asked whether probative value was outweighed (or substantially outweighed) by the risk of unfair prejudice, with no minimum threshold of probative value.[63] A footnote in the Commission's final report, a year after Hasler, observed that this formulation 'exists under present law and its inclusion was not questioned in discussion or the Interim Report.'[64] The Commission's recommendations have since been adopted in all but three Australian jurisdictions. Five years after *Hasler*, the Canadian Supreme Court

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[60] *R v Patel* [2010] QSC 68, [58]-[59].
[61] *R v Masters* [1987] 2 Qd 272, 281.
[62] *R v Masters* [1987] 2 Qd 272, 274-275.
[63] *Evidence (Interim)* [1985] ALRC 26, [259] & Appendix A (draft Legislation), cl. 115.
[64] *Evidence* [1987] ALRC 38, Chapter 4, n52.

(without, of course, mentioning Queensland) withdrew its support for *Wray*, preferring a formulation from a 1982 similar fact case, *R v Sweitzer*, that 'admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission'.[65] Writing for seven judges in the Court's celebrated ruling on rape shield evidence, *R v Seaboyer*, Justice Beverley McLachlin (now the nation's Chief Justice) said:[66]

> *I am of the view that the more appropriate description of the general power of a judge to exclude relevant evidence on the ground of prejudice is that articulated in Sweitzer and generally accepted throughout the common law world. It may be noted that the English case from which the Wray formula was adopted has been superseded by more expansive formulae substantially in the language of Sweitzer.*

These developments suggest that *Hasler* was something of a historical accident, decided just as other jurisdictions shifted to a quite different view of *Christie*.

That is not to say that Queensland's lone limit on the *Christie* discretion is either defunct, wrong or bad. In 1975, Australia's Mark Weinberg, then a recent recipient of the Vinerian Scholarship and writing in Canada's *McGill Law Journal*, criticized both *Christie* and *Wray* for their poor treatment of precedent, but marked the importance of the issues the latter raised about the role of discretion in evidence law:[67]

> *The judgments in Wray's case raise many fascinating and important questions. What is meant by the concept of a "judicial discretion" to exclude evidence? How does such a discretion differ from a rule of law of an exclusionary nature? Does an analysis of "relevance" assist discussion of these questions? Is there a sound historical and legal basis for the exercise of an exclusionary discretion in criminal cases? What are the principles on which courts purport to act in exercising this discretion? What underlying factors do the courts take into account without necessarily giving them full expression? What role ought the law of evidence and adjective law in general to play in the trial process?*

Referring to the *Wray* majority view as the 'modified 'scales'' test, Weinberg detailed its consistency with several earlier Australian decisions and observed:[68]

> *In practice the dominant criteria in determining whether to exclude an item of evidence have been its probative value, its truth, its reliability. Martland J. was approaching this point in Wray's case when he insisted that the discretion could not come into play unless the evidence was gravely prejudicial, of tenuous admissibility and of trifling weight. Even in respect of improperly obtained evidence it remains true that truth and reliability have been the most significant factors in most cases. There are only a handful of cases where evidence of substantial probative value has been excluded pursuant to the discretion.*

Echoing Grose J nearly two centuries earlier, he concludes that 'this is as it should be': [69]

> *The view of the majority in Wray's case is greatly to be preferred to that of the dissentients, notwithstanding some flaws of reasoning in the judgment of Martland J. The judicial discretion to exclude relevant evidence ought to be as narrowly confined as possible.*

But this begs the question: what exactly are those confines?

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[65] *Sweitzer v. The Queen*, [1982] 1 SCR 949, 953.
[66] *R. v. Seaboyer; R. v. Gayme*, [1991] 2 SCR 577, 611.
[67] M Weinberg, 'The Judicial Discretion to Exclude Relevant Evidence' (1975) 21 *McGill LJ* 1, 6.
[68] Ibid 38.
[69] Ibid 39 & 41.

Part Two: From *Hasler* to Krista's death

INDEMNITY

I, Paul John Clauson, Minister for Justice and Attorney-General and Minister for Corrective Services for the State of Queensland, do hereby undertake that, subject to the performance of the condition set out hereunder, no prosecution on indictment will be brought or continued against Colin Brian Stevens of 243 Kingston Road, Woodridge in the said state in respect of any act done by him and referred to in a one page written statement dated the fourth day of March, 1988 signed by him on each page and witnessed by Mr. G. Kerwin, justice of the peace, and I do hereby indemnify the said Colin Brian Stevens accordingly.

CONDITION

That the said Colin Brian Stevens shall attend and give evidence in court wherever and whenever required by a prosecuting authority of the said state in proceedings in which any information set out in the said statement is relevant.

Queensland's appeal judges had the opportunity to rule on the outer limits of the *Christie* discretion four years after *Hasler* in another reference appeal (albeit with none of the three *Hasler* judges on that particular bench.) In *R v McLean & Funk*, the trial judge had excluded evidence of Colin Stevens, an alleged accomplice to an armed robbery who had been indemnified in the above terms.[70] According to Justice Bill Carter, 'the said statement':[71]

> *was highly probative of the accused McLean's involvement in the two offences charged in the indictment. If accepted by a jury as credible and reliable evidence, it, together with the other evidence referred to, might well have persuaded a jury beyond reasonable doubt to conclude that the accused was guilty of the offences with which he was charged.*

The trial judge had excluded the evidence because the indemnity, together with the risk of prosecution on other charges or for perjury, meant that 'it does seem to me that a person in Stevens's position is, to a large extent, locked into his version of events at the time that he makes the statement to the authorities', something he held was a 'material factor' to consider in exercising discretion as to admissibility.[72]

At the reference appeal, the Attorney-General asked the Supreme Court to hold that the sole general grounds for exclusionary discretion are the *Christie* discretion (as confined in *Hasler*) and the discretion to exclude illegally or improperly obtained evidence.[73] In a partly dissenting judgment, Carter J upheld this submission citing two broad considerations:[74]

> *Assessing credit is the function of any fact finding tribunal and in a criminal trial the performance of that function belongs to the jury and any attempt by a trial judge to usurp it is to distort the separation of functions vested in judge and jury in such a trial….*
>
> *To recognise the existence of a judicial discretion to exclude evidence from an indemnified witness, which is admissible and which has probative value, on the ground that it may be unreliable, might very well be seen as an indirect attempt by the court to review the executive action of the Attorney in granting an indemnity in a particular case.*

[70] *R v McLean & Funk ex parte Attorney-General* [1991] 1 Qd 231, 248.
[71] Ibid 249.
[72] Ibid 248.
[73] Ibid 241.
[74] Ibid 249.

While the majority disagreed, Carter J's analysis has lately been vindicated by two High Court decisions. In 2015's *Police v Dunstall*, the High Court overturned the exclusion of a breath analysis certificate that was made irrebuttable by the combination of a statutory presumption and a doctor's failure to properly take a blood sample, holding that the sole applications discretions were the *Christie* and public policy discretions and that any residual discretion could not apply to 'critical' evidence:[75]

> *Where the evidence that is sought to be excluded is critical to the prosecution case and the basis of exclusion is said to be that admission of the evidence would render the trial unfair, the remedy lies in determining whether the circumstances justify a permanent stay and not in circumventing that inquiry by the exclusion of the evidence in the exercise of a "general unfairness discretion".*

In 2016's *IMM v R*, a narrow majority of the Court ruled that the uniform evidence legislation's versions of the *Christie* and public policy discretions do not permit an assessment of credibility or reliability:[76]

> *The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence… This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether the evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact.*

So, it seems reasonable to assume that the two propositions Carter J put in 1991 describe the current common law in Queensland. If correct, the means that the many uncertainties raised by the majority's reasons in *IMM* – namely, the application of these discretions to identification evidence, complaint evidence and tendency evidence – are also present in the common law. The application of *Hasler* to these topics is yet to be addressed in Queensland.[77]

In this paper, I'll steer clear of those uncertainties in favour of a closer consideration of the application of the *Christie* discretion to admissions, the main context in which *Hasler* has been applied. It is a topic that the High Court did not address in *Dunstall* or *IMM*, but which was recently considered at length in New South Wales.

Yeah do you remember what you used to do to me

Yeah fuckin oath and I wouldn't mind doing it again...haha

Alright then

It was Thursday 25th August 2011, 98 years and one month after Frederick Butcher identified Albert Christie in the Winchester Road fields. This present day equivalent of a field accusation of sexual abuse is the so-called 'pretext' phone call. Seated beside caller in the above conversation was a police officer who held a warrant to secretly record the call.[78] The call's recipient, referred to in the appeal as XY, was a friend of her mother's de facto, who

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[75] *Police v Dunstall* [2015] HCA 26, [48].
[76] *IMM v The Queen* [2016] HCA 14, [39].
[77] For an application of Hasler to expert evidence, another type of evidence whose status is unclear after IMM, see *R v Sica* [2012] QSC 430.
[78] *R v XY* [2013] NSWCCA 121, [184].

she had last spoken to when she was eight, when (she said) he repeatedly sexually abused her.

This evidence is a useful test of the scope of *Christie* in several ways. The case for exclusion is narrower than in *Christie* itself, as the complainant's accusation is in vague terms and occurred years after the alleged offence, while XY's response is clearly more incriminatory than Albert Christie's 'I am innocent'. As well, the concern about prejudice in *Christie* – that the jury might use the complainant's words for their forbidden hearsay purpose - wasn't present in NSW, because such as use is permitted in these circumstances by the uniform evidence law.[79] On the other hand, in contrast to Hasler's unprompted statements about rape, the impact of XY's admission is clearly affected the fact it is a response to a very vague statement by the complainant, a vagueness that both lowers the admission's probative value ('Yeah fuckin' oath' to what?) and heightens its prejudicial effect ('I wouldn't mind doing' what 'again'?) As in both *Christie* and *Hasler*, there is no concern that the admission was illegally or improperly obtained, or indeed was the product of any police misconduct.

Conveniently, as part of the dispute between NSW and Victoria on the meaning of probative value under the uniform evidence law, a five judge bench of the NSW Court of Criminal Appeal gave XY's words close consideration, almost a century after *Christie*. At trial, Anne Quirk DCJ excluded the evidence, casting doubts about the probative value of XY's words as follows:[80]

> *(1) …"the circumstances of the conversation may have adversely affected the truth of that response and, therefore, make the admission of the evidence unfair".*
>
> *(2) "Although the Crown submits that the accused was 'fully aware' to whom he was speaking at the time he made the 'admission' sought to be relied upon, I am not satisfied that he was so aware in the first conversation in which the alleged admission was made"*
>
> *(3) There was background noise to the telephone call suggesting "distractions" and "a confused situation ... as evidenced by the early responses of the accused, and the very vague proposition notionally adopted by the accused".*
>
> *(4) The voice of the complainant would have changed over the nine years since they last communicated and "would not have been recognisable to the accused" and "the accused did not recognise her name or her voice".*
>
> *(5)… "the truth of the alleged admission may have been adversely affected by the manner in which it was obtained, that is, a proposition which is vague, put in circumstances where assumed knowledge by the accused cannot be safely assumed and, therefore, it would be unfair if it were admitted".*

Justice John Basten summarised the potential doubts about the probative value of XY's words as follows:[81]

> *in the present case there are a number of possible inferences to be drawn from the recorded conversations. Those on which the prosecution relied… that his response -*
>
> *(a) was made after he had identified who the complainant was;*
>
> *(b) involved a realisation that she was referring to sexual activities between them, and*

[79] See *Evidence Act 1995* (NSW), ss. 60 & 81(2).
[80] *R v XY* [2013] NSWCCA 121, [17].
[81] Ibid [67].

(c) involved acceptance of the occurrence 'of such activities.

Other available inferences were, for example, that:

(d) the respondent had not correctly identified the complainant;

(e) whether he had or not, he guessed she was referring to sexual activities and gave a jocular response, and

(f) even if there had been some form of acceptance of her suggestion, because no particular activities had been identified, his admission could not support any particular count in the indictment.

Justice Reg Blanch (with Clifton Hoeben CJ agreeing) identified the prejudice raised by the latter readings as indicating, 'the character of the respondent as someone prepared to engage in opportunistic casual sexual encounters.'[82]

The fullest discussions of probative value came from two judges at opposite ends of the schism that was resolved by the High Court in *IMM*. Justice Derek Price, who favoured the Victorian approach of taking 'reliability' into account, held:[83]

> *An examination of the first recorded conversation is required in order to ascertain the inference that the evidence itself is capable of supporting…. the highest inference the evidence is capable of supporting is that the respondent acknowledged he had engaged in sexual misconduct with the complainant when she was in high school. It is not a general admission of sexual misconduct with her. All of the charges upon which the respondent is to be tried are alleged to have occurred when the complainant was eight years old. I do not consider that if the jury drew this inference that the probative value of the evidence would be significant.*

Justice Simpson, who championed the NSW approach of assuming that the evidence would be 'accepted', held:[84]

> *That value depends entirely upon the interpretation that jury puts upon the evidence - that is, the inferences they draw from what the respondent said, in the context of the whole of the prosecution case. The task of this Court… is to assume an interpretation most favourable to the prosecution - that is, that the respondent acknowledged having had some sexual engagement with the complainant. Having regard to the specific evidence of the period during which he had contact with the family, that would include fixing the time of the conduct he acknowledged within the timeframe of the indictment.*

All of the Court of Criminal Appeal characterised the difference between these two approaches as whether or not the calculation of probative value is affected by the presence of alternative inferences to the one urged by the prosecution. This issue remains unsettled under the uniform evidence law. The High Court did not discuss *XY* at all in *IMM* and Hoeben CJ (who favoured Simpson J's view on the broader dispute) agreed with Blanch JA that the *XY*'s evidence was correctly excluded. Queensland's courts are yet to consider this question.

[82] Ibid [185].
[83] Ibid [216] & [218].
[84] Ibid [126].

I don't know how it started, we were just in Mum's room and Jim said to me that he – *he hinted that he was having sex with Kelly and that she was a pretty good root.* Those were about his words.

Did he say that on just one occasion?

No, several.

The analysis of XY's words (so far – there'll be more on prejudicial effect in the next section) is similar to Hasler's words to Craze:

- the **probative use** was to draw an inference from XY's words that he admitted to having (and desiring) sex with the caller (a non-propensity/similar fact use)
- the **prejudicial use** was to draw an inference from XY's words that he admitted to a tendency to have casual sex with anyone (a propensity/similar fact use)

XY and *Hasler* both involve what might have been admissions to the offence charged ('one…', 'Yeah fuckin oath') and/or other misconduct ('…two, three', 'I wouldn't mind doing it again') or neither ('It's medically proven that a bloke can't have nine screws in a row, but I did it', '…haha'.)

In its reference appeal, the Queensland Court of Criminal Appeal's analysis of Hasler's words was as follows:[85]

> *In my judgment a proper application of rules governing the admissibility of the evidence which was rejected in this case shows that it was of substantial probative value and relevance.* (Connolly J)
>
> *It is capable of a number of interpretations including an outright admission that he raped all three of the daughters of his de facto wife, and also including the possibility that it was merely a sarcastic statement concerning the allegations being made against him…. [T]he evidence of Mr. Craze as to the accused's statement to him should have been admitted. Its weight was of course a matter for the jury.* (Thomas J)
>
> *In my opinion, the alleged confession to Craze could be regarded by a properly instructed jury as amounting to a full confession in relation to the first count. The weight to be attributed to the evidence would of course be a matter for the jury. But I would not conclude that the evidence, with relation to the first count, had only "slight" or "trifling" probative value… Its potential probative value was in my view substantial* (de Jersey J)

The simple point to make about the Queensland Court's analysis is that it is… simple. Only one judge, Thomas J, discusses the alternative inferences that could be drawn, and he does not mention those inferences his later conclusion that the evidence is admissible. Justice Connolly and de Jersey J, although surely aware of this argument, do not refer to it.

To be sure, there are other differences between *Hasler* (a reference appeal deciding whether or not the evidence has more than 'sight' probative value) and *XY* (an interlocutory appeal deciding whether the evidence's probative value outweighs its prejudicial effect.) But the question that divided the *XY* court is clearly relevant to the question of whether the evidence's probative value was 'slight' or 'substantial'. At Hasler's trial, Shepherdson J, who excluded the evidence analysed its probative value as follows:[86]

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[85] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 246, 248, 254.
[86] Ibid 254.

> *This particular passage in Craze's statement attributes to the accused admissions of having raped the two girls not one but three times. One after the other on the one occasion. It is inconsistent and diametrically opposed with what the police say he said [sil –did], as the he was charged with one count of raping Kelly].*

whereas the Court of Criminal Appeal was unmoved by this problem. This suggests that the *Hasler* court unanimously (albeit only implicitly) adopted Simpson J's later (express) approach in *XY* – alternative interpretations of evidence (to the one favoured by the prosecution) should simply be ignored by the trial judge when exercising the discretion to exclude – when it comes to assessing whether the probative value of a piece of evidence is 'slight' or 'substantial'. Such an approach dramatically reduces, if not entirely removes, the applicability of the *Christie* discretion to admissions.

Other Queensland ruling are consistent with this approach. In *Hasler* itself, Sherpherdson J rejected a further alleged admission by Hasler, quoted above, [87] this time sourced from Sharon rather than her friend Cruze. While Hasler's words on this occasion expressly concerned only Kelly, the difficulty was that their alleged context was his planned rape of Sharon (specifically, by saying to her, 'Well, I'll just get it off Kelly then. You're better than Kelly. I'd rather root you any time.'[88]) This contextual evidence has a similar analysis:

- The **probative use** is to draw an inference from Hasler's alleged words prior to raping Sharon that he raped Kelly (a non-propensity/similar fact use)
- The **prejudicial use** is to draw an inference from Hasler's alleged words prior to raping Sharon that he raped Sharon) (a propensity/similar fact use)

Rather than excluding Sharon's evidence of Hasler's admission altogether, Shepherdson J only barred her from describing the alleged context. On appeal, de Jersey J noted an (unlikely) alternative reading of Hasler's alleged admission to Sharon:[89]

> *We were urged on Hasler's behalf that the evidence was properly excluded, because it amounted to no more than boastful conduct. Another contrary interpretation was of course open.*

but again he did not refer to this alternative interpretation when determining that the evidence had significant probative value, and nor did either other judge; Thomas J simply concluded that 'circumstances of the making of those admissions formed an inextricable part of that evidence and should not have been excluded', 'similarly' to the alleged admission to Craze.[90] None of the Court of Criminal Appeal observed any significance in how Hasler's admission to Craze was obviously more likely to have been a joke than Hasler's alleged admission to Sharon.

Likewise, in holding admissible in 1989 a rambling set of remarks made by an accused at his doorstep in response to an allegation that he had been having sex with his step-daughter (e.g. 'If I didn't give it to Kerri she would be going out with all her boyfriends getting it.'), Thomas J (with Connolly J agreeing) wrote:[91]

> *It is not necessary to embark upon a minute analysis of this evidence. It is true that taking each sentence in isolation one can say that it does not necessarily amount to an*

[87] Ibid 255.
[88] Ibid 248.
[89] Ibid 255.
[90] Ibid 252.
[91] *R v Siedofsky* [1989] 1 Qd R 655, 660.

> *admission of the girl's allegation of sexual intercourse, or that it fails to amount to an explicit assertion of "giving it" to Kerri, and that there is a certain ambiguity in the use of the vernacular. I am content to say that this particular response was admissible… The learned trial judge gave appropriate directions as to the use to which it could be put, fairly pointing out the possibility of other interpretations.*

The upshot of this combination of *Dunstall*, *Hasler*, *IMM & XY* – i.e. the restriction of the general unfairness discretion to *Christie* and public policy (at least for 'critical evidence'); the restriction of the *Christie* discretion to evidence of 'slight' probative value; and the restriction of probative value to considerations other than reliability, and the inclusion of alternative interpretations in questions of reliability – is to remove any plausible basis for challenging the admissibility of ambiguous but prejudicial admissions. Hence, the problem addressed by the NSW Court of Criminal Appeal in XY's case is no quandary at all in Queensland, as even the most ambiguous admissions will be treated in Queensland as having (at least) more than slight probative value and, hence, outside the scope of the *Christie* discretion, and (at least for critical evidence, and absent state impropriety or unfairness) any discretionary exclusion at all. The size of this gap in discretionary exclusion depends on how common it is for non-state admissions to be both ambiguous and prejudicial. Whether this gap is a problem depends on whether you view such prejudice as potentially leading to miscarriages of justice.

When did this happen anyway

When I was eight years old you just admitted it

Eight years old

Yes I was eight years old at the time

Eight years old

Remember you used to tell me I was bad and I was the bad one but now I'm older now I know that you're the bad one

- when you were in high school man not not eight years old

In *Hasler*, Connolly J said:[92]

> *I am conscious that two judges of this court of considerable experience in this area have rejected this evidence and it is therefore with diffidence that I express the view that there was no basis in law on which the confessional statements could properly have been excluded. What is, it seems to me, occurring is that attention is being focused on the question of prejudice to the accused person as if that were the dominant consideration. In truth it is not.*

His view is vindicated by the past decade of discussion of discretionary exclusion under the uniform evidence legislation, which has focussed entirely on the meaning of probative value and not at all on the meaning of prejudicial effect.

But it is not the approach taken overseas. When the English Law Commission proposed altering the rules on bad character evidence, it defined prejudice as follows:[93]

> *evidence carries a risk of prejudice to a defendant where—*

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[92] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 246.
[93] The Law Commission, *Evidence of Bad Character in Criminal Proceedings*, October 2001, 'Criminal Evidence Bill', p. 10.

> *(a) there is a risk that the court or jury would attach undue weight to the evidence, or*
>
> *(b) the nature of the matters with which the evidence deals is such as to give rise to a risk that the court or jury would find the defendant guilty without being satisfied that he was.*

This language – and the terminology the Law Commission adopted ('reasoning prejudice' and 'moral prejudice') – is drawn from an Australian article by Andrew Palmer[94] about the High Court's similar fact jurisprudence and has since been adopted in Canada and New Zealand.[95]

The distinction provides a useful way to understand Thomas J's criticism in *Hasler* of some instances of prejudice:[96]

> *If prejudice arising from strict proof of the case were to go into the "prejudice" scale, then the additional prejudicial effect would always tip the scales and the evidence would never be admissible.*

Evidence lawyers are used to pointing out that the evidence law 'prejudice' jargon refers, not to harm to the accused (which, of course, is identical to probative value in the prosecution case), but rather of harm to the fairness of the trial (usually to the accused's detriment.) However, Thomas J's point about prejudice is likely to be a different one: that even some forms of 'unfair' prejudice are ultimately harmless. Consider, for instance, the analysis of Hasler's 'one, two three' statement to Cruze:

- The **probative use** was to draw an inference from Hasler's alleged words that he admitted to raping Kelly (as one of the 'three girls') (a non-propensity/similar fact use)
- The **prejudicial use** was to draw an inference from Hasler's alleged words that he admitted to other rapes (the remaining two of the 'three girls') (a propensity/similar fact use)

The prejudicial use in this situation is moral prejudice. But this prejudice only arises if the jury accepts the probative value of Hasler's admissions to the other two rapes ('one, two') which inevitably means accepting the probative value of the rape charged ('three'). The risk that the jury will convict Hasler whether or not he is guilty only arises when the jury accepts evidence that would readily permit them to convict Hasler of the offence charged.

Likewise, fifteen years later, Thomas JA analysed admissions (some recorded) made by the accused in a murder case, specifically ones that included him planning future killings of people he thought were paedophiles:[97]

> *I do not see any compelling reason why the learned trial judge should have insisted that such statements be edited out of these confessions. They were an intrinsic part of the confession. The appellant made his statements in a way that showed the killing of Mr Furey to have been a part of a wider pattern or mindset. It will be remembered that the defence's ultimate submission on the recorded interview was to concede that it had been made, but to contend that what he had said was exaggeration or bravado. The additional statements present a bigger picture and make the central admission more credible. I do not consider that fair play here demands that the appellant be protected from his own boast that he is a paedophile-killer, and that Mr Furey's death was to be followed by*

[94] A Palmer, "The Scope of the Similar Fact Rule" (1994) 16 Adel LR 161, 169.
[95] *R v Handy* [2002] 2 SCR 908, [83]; *Evidence Act 2006* (NZ), s. 43(4).
[96] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 251.
[97] *R v Pettigrew* [2001] QCA 468, [30].

> *others. This was not a gratuitous addition that might reasonably be excluded as adding little to the essential confession and as causing unfair damage in the process.*

The prejudicial use here is reasoning prejudice, i.e. that the jury may too readily see the accused's claims about killing paedophiles as genuine, rather than bombast, a familiar issue in confessions cases. But the addition of the accused's plans to kill others in the future adds no further danger to the accused. Like Hasler's statements about the rapes, they don't add moral prejudice and nor do they add further reasoning prejudice; rather, the 'bigger picture' makes it easier to place the admissions about the past killing in a fair light to the accused (and, for that matter, to the prosecution.) Hence, Thomas JA's refusal to countenance excluding them using the *Christie* discretion. By contrast, he held that additional evidence from the recipient of these admissions that the accused tried to arrange a social security fraud when they first met:[98]

> *was of relatively light weight, both in relation to its probative value and to its potentially prejudicial effect. It lacked the commonly found vice of revealing a tendency or disposition to commit the crime in question. Whilst I think that it would have been open to his Honour to have excluded this particular evidence, I cannot say that his Honour erred in permitting the evidence to be led.*

The exclusion of evidence that only adds a slight prejudice is only justified when the evidence only adds slight probative value.

But this analysis does not for all admissions. Consider XY's words, including his remarks later in the conversation with the complainant, quoted above.[99] Applying the Law Commission's distinction to them, there is both:

- **reasoning prejudice**: the risk that the jury will too readily treat them ('yeah fuckin' oath') as a confession of wrongdoing with an eight-year-old
- **moral prejudice**: the risk that the jury will regard the accused's explanation of those words later in the conversation – that he thought he was speaking to a high school student he had sex with ('when you were in high school man') and wanted to have sex with again ('and I wouldn't mind doing it again') – as a reason to find him guilty of child sexual abuse without being satisfied that he was guilty of the charged offence.

Crucially, these two types of prejudice arise in different ways. While the reasoning prejudice risks the jury too readily reading the words as an admission to child rape, the moral prejudice arises from reading the words 'innocently' as a genuine misunderstanding of who the accused was talking to. The moral prejudice does not arise from 'strict proof of the case' (i.e. the prosecution case) but rather from the defence's response to that strict proof. It is even possible to imagine the jury initially being willing to give the accused the benefit of the doubt on these words, but then deciding that the accused is therefore a dangerous person who shouldn't be given that benefit. To limit the *Christie* discretion to evidence of 'slight probative value' in such a case means that the accused will receive no protection against a genuine risk of unfair prejudice. While 'fair play… demands that the appellant be protected from his own boast'[100] in the case of unprompted admissions, the situation is not so simple where the words were prompted ones, indeed with the state playing a role.

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[98] Ibid [24].
[99] *R v XY* [2013] NSWCCA 121, [184].
[100] *R v Pettigrew* [2001] QCA 468, [30].

I'm talking about your two daughters.

Oh yeah, okay, Karen and Krista.

Yeah.

Yeah.

Now I don't give a fuck why you killed 'em, don't get me wrong there, that's not my concern here. My concern is, is to make sure that it doesn't come bite you in the ass, that again it's gonna affect everybody else.

It was Thursday 9th June 2005, three years after Nelson Hart's twin eight-year olds drowned in his care at Gander Lake in central Newfoundland. Although he had told police that he had woken from an epileptic seizure to see Krista floating in the lake and his other daughter missing, he now told the unnamed 'boss' of Steph Sauve how he had killed them.[101] Since February, Sauve had showered Hart with gifts and veiled threats as the latter participated in a series of mysterious and sometimes violence-tinged errands for Sauve's organisation. The following Monday police arrested Hart, revealing that he was yet another victim of Canada's 'Mr Big' sting, which had recently been transplanted to Australia. Hart was convicted of murder the same year that Australia's High Court endorsed the scheme.[102]

Ruling in Hart's case, a century (and a month of two) after *Christie*, the Supreme Court of Canada withdrew its earlier support for 'Mr Big' stings. Writing for the majority, Michael Moldaver J observed that '[a]dmitting these confessions raises the spectre of moral and reasoning prejudice'[103] and that:[104]

> *Experience in Canada and elsewhere teaches that wrongful convictions are often traceable to evidence that is either unreliable or prejudicial. When the two combine, they make for a potent mix — and the risk of a wrongful conviction increases accordingly. Wrongful convictions are a blight on our justice system and we must take reasonable steps to prevent them before they occur.*

Much like XY's possible admissions about a different 8-year-old, the accused in a Mr Big operation is forced to rely on his own willingness to engage in criminality to explain why he made a damningly false confession. The Canadian Supreme Court's response was to create a new rule of evidence:[105]

> *that where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility will be overcome where the Crown can establish, on balance, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission.*

The Court goes on to make it clear that admissibility will depend on corroboration of the accused's confession, such as the evidence that recently sustained Brett Cowan's conviction

[101] *R. v. Hart*, 2012 NLCA 61, [209].
[102] *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v the Queen* [2007] HCA 39.
[103] *R v Hart* [2014] 2 SCR 544, [106].
[104] Ibid [8].
[105] Ibid [10].

for the murder of Daniel Morcombe.[106] Obviously, Canada's new rule entirely dispenses with Queensland's current (and Canada's former) adherence to the limitation of the *Christie* discretion to evidence of 'slight probative value' and any semblance of the bar on considerations of credibility and reliability recently endorsed by Australia's High Court.

That brings my journey into history and case analysis to my short conclusion: that Canada's notion of 'a potent mix' of moral and reasoning prejudice is a useful concept to consider in current Australia debates about the limits of the *Christie* discretion. There are powerful arguments both ways as to whether *Christie* should be limited to evidence of 'slight probative value' (as in *Hasler*) or by assuming the credibility and reliability of the evidence (as in *McLean* and *IMM*.) But I argue that these arguments are at their weakest when it comes to evidence where two different types of prejudice interact to the accused's detriment. Examples, in my view, include XY's words (as arguably acknowledged by a majority of the NSW Court of Criminal Appeal in that case), the identification evidence in Victoria's *Dupas* decision (where the accused's argument that the identification was unreliable required him to argue that the eyewitness had been affected by seeing him identified as a serial killer on television)[107] and Hasler's statement to Craze. In the latter instance, Hasler's words strike me as readily explicable as black humour, but only if you assume (as was, of course, the case) that he was facing multiple accusations of child sexual abuse at the time he said them. To refuse to consider the dangers of this 'potent mix' of prejudices on the basis that those words, if you ignore the potential for sarcasm, were of more than slight probative value, is to invite, rather than avoid, 'a blight on our justice system'.

[106] *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87, [87].
[107] See *Dupas v The Queen* [2012] VSCA 328.