DEREK PERCY AND THE RULES OF EVIDENCE IN THE CORONERS COURT

The Victorian Supreme Court of Appeal in the recent decision of *Priest v West and Percy* considered the application of propensity or tendency evidence to coronial inquests. **By Nicki Mollard**

The *Coroners Act* 2008 (Vic) (*Coroners Act*) provides at s62(1) that a coroner holding an inquest is not bound by the rules of evidence, and may be informed in any manner that the coroner reasonably thinks fit. Section 62(3) states that neither the law of evidence at common law, nor the *Evidence Act* 2008 (Vic) (*Evidence Act*) generally applies to the Coroners Court.

The recent Court of Appeal decision in *Priest v West and Percy*[1] considered the admissibility of propensity evidence, and issues of witness reliability, compellability and self-incrimination in the Coroners Court, specifically in relation to "mentally impaired" Derek Percy. The Court of Appeal concluded that the inquisitorial nature of a coronial inquest, and the obligation to find "if possible" the cause of a reportable death[2], required the coroner to take an expansive view of the admissibility of evidence, and the compellability of witnesses.

Inquest into the death of Linda Stilwell

In 2009 Deputy State Coroner Iain West held an inquest investigating the cause and circumstances of the disappearance and death of Linda Stilwell. Linda was seven years old when she disappeared from Beaconsfield Parade, St Kilda in 1968. Her body has never been found.

Derek Percy was found to have been in the vicinity of Beaconsfield Parade, St Kilda at the time Linda disappeared, and is suspected of having abducted and murdered her. In 1970 Percy was found "not guilty by reason of insanity" of the mutilation and murder of 12-year-old girl Yvonne Tuohy. Percy is also suspected of the abduction, mutilation and murder of four other young children between 1965 and 1969.[3] Immediately prior to his death, Percy was incarcerated at Marngoneet Prison subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) having been refused both a minimum sentence (twice) and a transfer to Thomas Embling Psychiatric Hospital.

Coroner West's rulings

During the course of the inquest into Linda's disappearance and death, Coroner West ruled:

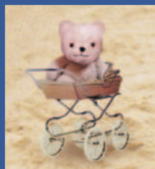
"Statements and reports relating to the disappearance and death of Yvonne Tuohy and the four other children Percy is suspected of killing, were irrelevant and therefore to be excluded" (the propensity ruling); and "He did not have to inform Percy that if he gave evidence at the inquest he would be given a certificate of immunity" (the compellability ruling) (as quoted in the yet to be published headnote in the Victorian Reports).

Mrs Priest, Linda Stilwell's mother, applied to the trial division of the Supreme Court of Victoria for judicial review of the coroner's two rulings. That application was dismissed[4] and Mrs Priest appealed to the Court of Appeal.

The Court of Appeal decision

The Court of Appeal held that both of Coroner West's rulings were incorrect at law. The statements and reports relating to the deaths of the five other children were relevant (as propensity evidence per Maxwell PA and

ILLUSTRATION **SONIA KRETSCHMAR**



> . . . the evidence sought to be produced, in relation to Percy's known and suspected involvement in the killing of other children, was not in fact propensity evidence . . .

Harper J[5], or as identification evidence per Tate JA[6]) and the coroner was obliged to inform Percy that if he had willingly given evidence at the reconvened inquest, he would have been given a certificate of immunity under s57(4) of the *Coroners Act*.

Propensity evidence

Propensity evidence, as it was known at common law, is now known as tendency evidence, and is regulated under s97 (and s101, in relation to criminal matters) of the *Evidence Act*.

At common law, however, the admissibility of propensity evidence was governed by the test in *Pfennig*'s case.[7] Evidence of prior (usually) criminal conduct, was not generally admissible at trial unless there was a "striking similarity" between the prior acts and the acts charged, and if the probative value of the prior conduct was such that there was "no rational view" of the evidence that was consistent with the innocence of the accused.[8] Where there was an innocent explanation for the propensity evidence, the prejudicial effect of introducing the prior conduct automatically outweighed its probative force thus removing any discretion on the part of the trial judge to admit the evidence.[9]

The prejudicial effect of past criminal conduct propensity evidence is apparent. As the majority said in *Pfennig*:

"Propensity evidence . . . has always been treated as evidence which . . . is likely to have a prejudicial effect . . . That is because the ordinary person naturally (a) thinks that a person who has an established propensity whenever opportunity arises has therefore yielded to the propensity in the circumstances of the particular case and (b) may ignore the possibility that persons of like propensity may have done the act complained of".[10]

Tendency evidence

In the *Evidence Act*, however, tendency evidence is excluded unless (i) the notice provisions have been complied with (s97(1)(a)), and (ii) the evidence has significant probative value (s97(1)(b)), and further, in a criminal matter, (iii) that the probative value substantially outweighs the prejudicial effect to the accused (s101(2)). The "no rational view" of the evidence test from *Pfennig*'s case, whilst having the potential to be of assistance, is no longer a binding test under the *Evidence Act*[11]. It has been replaced by the "balancing act" required by s101.

Propensity evidence in the inquest

In *Priest v West and Percy*, counsel for Mrs Priest argued (at [48]) that reports and statements by police officers, a forensic pathologist and a psychologist relating to the involvement of Percy in the abduction, mutilation and deaths of the five other children showed a propensity (now tendency) for Percy to abduct and kill young children.

Coroner West (at [118]) excluded the reports and statements because they failed to demonstrate a "striking similarity" between the death of Yvonne Tuohy (which Percy has been proven at law to have caused) and the death of Linda Stilwell, in the absence of making an intermediary finding that Percy was responsible for the death of one of the other four children, three-year-old NSW toddler Simon Brook.

The reports and statements did reveal striking similarities between the mutilation and deaths of Yvonne Tuohy and Simon Brook (at [64]). Both children's bodies were mutilated in very similar ways (injuries to the genitals, very deep cuts to the throat and packing of the mouth with fabric and paper) (at [65]), which were also uncannily described in notebooks belonging to Percy, and forming part of the evidence at issue (at [79]).

As Linda Stilwell's body has never been found, no evidence of mutilation of her body exists, and Coroner West (at [83]) could not see the relevance (for ascertaining the cause of Linda's death) of the "striking similarity" between the deaths of Yvonne Tuohy and Simon Brook. Coroner West (at [88]) conceded that if Percy had been found to have killed Simon Brook, the evidence may have been admissible to show that Percy has a propensity to kill young children, but as Simon Brook's death did not occur in Victoria, his death was not a "reportable death" under the *Coroner's Act*, and an intermediary finding of Percy having caused Simon Brook's death was beyond Coroner West's role (at [123] and [130]).

The Court of Appeal on the propensity ruling

Tate JA found (at [123] and [130]) that the relevance of the reports and statements were not apparent to Coroner West because he mistakenly tested them against the proposition in *Pfennig*'s case that the statements were tendered as propensity (now tendency) evidence that would reveal striking similarities when related to what the coroner knew about the death of Linda Stilwell.

The relevance of the statements, according to Tate JA, did not depend on their classification as propensity evidence, but rather the statements revealed that Percy is a suspect in the abduction and deaths of four other children, and has killed a fifth child, and therefore that his presence at the scene of the disappearance of Linda Stilwell may not have been innocent (at [127]). In other words, the evidence sought to be produced, in relation to Percy's known and suspected involvement in the abduction and killing of other young children, was not in fact propensity evidence, but rather identification evidence.

The utility of the statements did not lie in establishing any propensity (or tendency) of Percy's to abduct, mutilate and murder young children, but to provide a logical and evidentiary foundation for characterising Percy's presence in St Kilda the day Linda disappeared as sinister and requiring investigation (at [125] and [127]).

Maxwell P and Harper J found (at [24]), consistent with the decision in *Pfennig*, that in spite of no striking similarity being proven in the *modus operandi* of the killings of Yvonne Tuohy and Linda Stilwell, the evidence relating to the abduction and killing of Yvonne Tuohy was nevertheless evidence of Percy's requisite disposition to abduct and kill young children and preparedness to act upon it. Their Honours listed a number of factors as relevant to this assessment and noted that many of them coincided with significant factors in *Pfennig*'s case.

Concluding remarks on propensity ruling

In the context of the inquisitorial character of a coronial inquest, and the coroner's obligation under ss67(1)(b) and 67(1)(c) of the *Coroner's Act* to pursue all reasonable lines of inquiry, the Court of Appeal ruled that the

reports and statements were relevant. The court was divided, however, as to whether the evidence was in fact properly characterised as propensity evidence and, if it was, whether it would have satisfied the *Pfennig* test for admissibility. Under the *Evidence Act*, and in the unlikely event of Percy being tried for the murder of Linda Stilwell, the question remains open whether the probative value of the evidence would be substantially outweighed by its prejudicial effect.

The compellability ruling

Coroner West ruled that Percy was not required to give evidence at the inquest because of concerns about the reliability of Percy's memory and issues of self-incrimination. He stated (at [141]):

". . . the abduction (of Linda Stilwell) occurred over 40 years ago and at a time when Percy may well have been of unsound mind, the mental illness he was subsequently found to suffer. I would not have a high level of confidence in these circumstances as to the reliability of the evidence given".

In making his ruling, the coroner considered two psychiatric reports, both from 1970, which described (at [155]) Percy's "amnesia" about killing Yvonne Tuohy as being "incomplete" and "being compounded of an unwillingness to admit to his deeds plus some degree of hysterical repression". The coroner did not make reference to more recent reports (written in 2002 and 2003) in which a third psychiatrist concluded that Percy was able to remember specific details of earlier events, including those that occurred a long time ago, showed no difficulties with either short-term or long-term memory and used an alleged incapacity to recall as an attempt to avoid admitting to events or even discussing them (at [77]).

The Court of Appeal ruled (at [166] and [174]) that the coroner was to take into account the most recent medical evidence of Percy's memory (short term and long term). The failure to do so was a failure to take into account a salient fact that gave vital shape and substance to the issue of Percy's reliability.

Compellability and self-incrimination

Section 55(2)(c) of the *Coroners Act* gives the coroner the power to order a witness to answer questions. A witness can object to giving evidence on the ground that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law. The coroner must then determine whether or not there are reasonable grounds for the objection, but can nevertheless compel the witness to give evidence under s57(4) if the interests of justice require. If the witness is either compelled to give evidence, or voluntarily gives evidence, a coroner must, under s57(5), give the witness a certificate of immunity. The scope of the certificate of immunity includes protection against both direct and derivative use of any statements made, or documents provided, at the inquest (s57(7)). The certificate of immunity scheme under the *Coroners Act* is not dissimilar to that under s128 of the *Evidence Act*.

Counsel for Percy objected to Percy giving evidence at the inquest on the ground that the evidence would tend to incriminate him. Coroner West accepted (at [139]) that the objection was made on reasonable grounds, and (at [141]) did not require Percy to give evidence. The coroner also did not inform Percy that if he voluntarily gave evidence he would be given a certificate of immunity, nor did he tell him the effect of a certificate (at [142]).

The Court of Appeal ruled (at [151] and [174]) that the coroner was obliged under s57(3) of the *Coroners Act* to inform Percy that if he gave evidence willingly he would be given a certificate of immunity, and this is a pre-condition of the power under s57(4) of the *Coroners Act* to require him to give evidence.

Maxwell and Harper J (at [11]) said further (and beyond the grounds of appeal) that the failure to require Percy to give evidence would constitute constructive failure to exercise the investigative jurisdiction conferred on the coroner.

Conclusion

The inquest was ordered to be reconvened, the propensity evidence to be received, and Percy to be informed that he may give evidence willingly, and that if he is required to give evidence, he will be granted a certificate of immunity.

The coroner holding an inquest is expressly not bound by the rules of evidence (s62(1) of the *Coroners Act*); the coroner may be informed ". . . in any manner that the coroner reasonably thinks fit". However, the following interpretation of s62 of the *Coroners Act* by the majority of the Court of Appeal (Maxwell P and Harper J), and the Court of Appeal's orders that the evidence be received, puts that section in some context:

"While undoubtedly giving the coroner (appropriately) broad scope to shape and direct an investigation, these provisions emphasise Parliament's intention that the coroner should not be constrained in carrying it out" (at [6]).

". . . the coroner's obligation when investigating a death to find if possible the cause of death make it obligatory for the coroner to pursue all reasonable lines of inquiry" (at [4]).

"It is precisely because the coroner must do everything possible to determine the cause and circumstances of the death that Parliament has removed all inhibitions on the collection and consideration of material which may assist in that task. Parliament has, in particular, exempted the coroner's processes from the rules which limit the admissibility of evidence in court proceedings.

"Far from justifying a narrow view of the scope of an investigation, these provisions oblige the coroner to take an expansive or inclusive approach, in our view" (at [6]).

The expectation that the coroner, a tribunal of fact with an inquisitorial role, will take an expansive approach to the admissibility of evidence, may also be of relevance in other inquisitorial tribunals where the decision maker is not compelled to follow the laws of evidence, for example in the guardianship list at VCAT, the AAT and the Refugee Review Tribunal.

Afterword

Derek Percy denied any involvement in the death of Linda Stilwell at a coronial hearing at his hospital bedside four days before he died on 24 July 2013. ●

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1. *Priest v West and Percy* [2012] VSCA 327.
2. S62(1) *Coroners Act* 2008 (Vic).
3. *Priest v West and Percy* at [34]. Percy has also been linked with the disappearance of the Beaumont Children; see for example "Child killer Derek Percy could face new questions over the death of Linda Stilwell, 7", Mark Dunn, Paul Anderson, *Herald Sun*, 5 June 2013.
4. *Priest v Deputy State Coroner & Anor* [2010] VSC 449 Ross J.
5. *Priest v West and Percy* at [23].
6. Note 5 above at [126].
7. *Pfennig v The Queen* (1995) 182 CLR 461.
8. Note 7 above, p485; see also *HML v The Queen* (2008) 235 CLR 334.
9. Evidence in Sexual Assault Proceedings, Chapter 27 ALRC at 27.190.
10. *Pfennig v The Queen* (1995) 182 CLR 461at [72] per Mason CJ, Deane and Dawson JJ.
11. *R v Ellis* [2003] NSWCCA 319 (Court of Criminal Appeal, NSW) Per Spigelman CJ at [89]: "The reasoning in *Pfennig* applied the 'no rational explanation' test to a common law principle that probative value outweighs prejudicial effect. That reasoning is, in my opinion, inapplicable to a statutory test that probative value substantially outweighs prejudicial effect."