

COMMON LAW CRIMINAL PROCESS AND FORENSIC SCIENCE EVIDENCE 2016

OUTLINES: CLASSES 1-10

COURSE OVERVIEW

The narrow object of this course is to give you an understanding of the problems that have arisen in Australian courts with the use in criminal cases of expert forensic science evidence.

But this requires first an understanding of the sources of law in Australia, the nature of our criminal process and the evidentiary rules which in a general way define that process. Only with this background can you understand the problems that arise in applying these evidentiary rules to control the use of expert forensic science evidence in our criminal courts.

I am focusing on the use of expert forensic science evidence not only because the use of such evidence has been seriously questioned in recent reports in many common law jurisdictions around the world, but also because the use of such evidence raises interesting questions about the very nature of the common law criminal process as applied in Australia.

METHODOLOGY

The plan for 2016 is to run the course over 10 classes from Monday 19th to Friday 30th September. There are no classes over the weekend of the 24th - 25th. Outlines, powerpoint presentations and other materials will be assigned for each class and students are asked to read these before class (particularly the Outlines and powerpoint presentations). Classes will consist primarily of lectures based on the powerpoint presentations. Students are encouraged to ask questions during these lectures. In addition the outlines for each class contain questions and problems for discussion. These will be discussed by the class as a whole or in smaller groups.

David Caruso will join us during the second week and in the final 2 or 3 classes we will attempt a mock criminal trial where students will be assigned roles as counsel, witnesses and jurors. Pretrial issues relating to the admissibility and use of expert evidence will be argued and then a short trial

will be conducted before a judge (I will take the roles of judge) and jury. In this way the practical operation of common law process will be demonstrated together with the problems it faces with the reception of expert forensic evidence.

ASSESSMENT

The object of this course is to give you a broad understanding of the issues that arise in the presentation of expert forensic science evidence in common law courts rather than a full understanding of the many technical details of Australian Evidence Law. You will appreciate the extent of these technical details when you read extracts from my treatise *Australian Evidence*, which attempts to summarize the law in every Australian jurisdiction.

I understand that the course will be assessed by means of a 2000 word essay (in English), with a choice of questions reflecting some of the broader themes covered in the classes.

MATERIALS

All the materials referred to in this outline are available to you in electronic form.

Students should have access to the Commonwealth Evidence Act during classes as it will be constantly referred to when Australian evidential rules are being explained or applied.

CLASS 1

PART A: INTRODUCTION

Objects:

1. To give a brief introduction to the fundamentals of the Australian legal system and common law criminal process.
2. To illustrate briefly by reference to recent Australian cases the sorts of problems that have arise in the presentation of expert evidence in Australian Courts.

Assigned Reading:

Ligertwood: The Australian Legal System and Common Law Criminal Process: An Introductory Overview.

Edmond, Hamer, Ligertwood: Expert evidence after *Morgan, Wood and Gilham*. ('Mowogi article').

Chamberlain v R (No 2) (1983) 153 CLR 521 as summarized in the distributed document named 'Chamberlain v R'.

For group discussion

To illustrate the dynamics of a common law case and the role that expert evidence can play at trial we will discuss the case of *Chamberlain v R (No 2)* ("*Chamberlain case*") [1984] HCA 7; (1984) 153 CLR 521 (22 February 1984). *Chamberlain* is an iconic Australian case that concerned disputed expert evidence. Consider the crimes charged, and the facts and arguments in that case as they are summarized in the distributed document entitled '*Chamberlain v R*'. Note the control of the parties (prosecution and defence) in the conduct of the case. Note the obligation on the prosecution to tender sufficient evidence to convince the jury of the accused's guilt beyond reasonable doubt. Note the use by the prosecution of a 'guilty' story or narrative to explain the existence of the evidence before the court. What exactly was the prosecution's story or narrative? What was the defence's story or narrative? What evidence did the prosecution tender in support of its case? What expert evidence did it tender? How did it assist the prosecution case? How crucial was it to that case? To what extent did the defence's story influence the evidence tendered by the prosecution and influence the outcome of the case?

PART B: FACT DISCOVERY

Object:

To emphasise the importance of factual rectitude and explain the concept of fact discovery through a consideration of evidence used by counsel and fact-finders in common law courts. To demonstrate a rigorous approach to that concept through inferential charting. To consider whether common law

proof can be conceptualized mathematically and if not what place mathematical probabilities may have in determining common law proof.

Assigned Reading:

Ligertwood, Lecture 1 Basics pp 1-5, 11-13.

Ligertwood and Edmond: Australian Evidence 5th Ed (AE 5): Chapter 1, Paras [1.1]-[1.13], [1.16]-[1.20], [1.24], [1.28]-[1.31], [1.35]-[1.36], [1.39]-[1.41], [1.43]-[1.45].

AE 5 Chapter 2, [2.67]-[2.69], [2.71]-[2.72], [2.77]-[2.79].

Chamberlain v The Queen (No 2) (1983) 153 CLR 521 as summarized in document '*Chamberlain v R*'.

For Group Discussion

1. Attempt to summarise the evidence in *Chamberlain* in the form of a broad inferential chart seeking support of the prosecution theory. For the evidence use the summary of evidence contained in the document '*Chamberlain v R*'.

For an introduction to, and a simple example of, inferential charting see Australian Evidence 5th Ed paras [1.8] – [1.11]; see also at paras [2.77] – [2.79] where *Chamberlain* is roughly charted.

Do you think this charting has any practical use? Or is it simply an academic exercise?

(We will use this method to organise the evidence in *R v Barton*, which is the case students will conduct in the last classes of the course).

2. D is charged with having raped V in a Beijing suburb. He denies involvement. V cannot identify D. The following evidence is gathered and tendered at trial to identify D as the person who committed the rape: Semen found on the victim is used to conduct a DNA analysis and is compared with an analysis of DNA provided in a blood sample from D. Witnesses authenticate the samples used for analysis and scientists experienced in

carrying out DNA analysis testify to carrying out tests in accordance with an approved system. The analysis is presented in statistical terms to the court. It is said that the samples match and that the chances of a random match are a million to one. This is explained in terms of a likelihood ratio: that it is a million times more likely that the sample came from the accused rather than from a randomly selected member of the Chinese population.

Do you think this evidence should be presented to a lay trier of fact (judge or jury) in this way? What logical difference do the statistics make to the probability that it was D who raped V? Is this evidence alone enough to satisfy the criminal standard of proof? If not should the judge withdraw the case from the jury?

Would your answers be different if the chances of a random match are a billion to one?

CLASS 2

PART A: ADVERSARIAL PROOF.

Object

To explain the basics of the common law adversarial trial.

Assigned Reading

AE 5 Chapter 2, [2.4]-[2.14], [2.39], [2.45]-[2.48], [2.49]-[2.54].

Ligertwood: The Australian Legal System and Common Law Criminal Process: An Introductory Overview.

Ligertwood: Lecture 3 Adversary Process.

AE 5 Chapter 6, [6.1]-[6.4], [6.8]-[6.9], [6.21], [6.29]-[6.35], [6.47].

Wells, 'The Ethical Obligations of the Advocate.'

Howie, 'The Duties of the Prosecutor.'

For group discussion

Isolation of those elements essential to the accusatorial trial and discussion of the essential assumptions made by the adversarial presentation of evidence.

What is the role of counsel within the adversarial accusatorial trial? What ethical limits are there upon counsel within the common law adversarial trial? Are these obligations the same for prosecution and defence lawyers? If not why not? Consider the following questions:

Can counsel ethically defend an accused who has confessed to a crime?

What obligations lie upon the prosecutor to divulge to an accused the evidence to be tendered against him or her prior to trial?

Can a prosecutor legally or ethically tender expert evidence known to be unreliable or at least known to be unsupported by empirical evidence?

Can a prosecutor address the jury to suggest facts beyond the evidence presented at the trial?

What is the role of the judge within the adversarial accusatorial trial? Where a judge sits with a jury? And where without a jury? Can a trier of fact use knowledge obtained outside the courtroom to decide a case? Where a judge has pre-existing knowledge relevant to the case what are his or her ethical obligations?

PART B: FORMS OF EVIDENCE: TESTIMONY AND OTHER EVIDENCE

Object

To explain the general nature and scope of evidential rules and to distinguish between the various forms of evidence. To explain the need for documentary and real evidence to be authenticated as relevant to justify tender. To explain the nature and extent of the common law hearsay rule and its effect on the tender of documents.

Assigned reading

Ligertwood: Lecture 4: Forms of evidence: Documentary and Real Evidence.
Ligertwood: Lecture 7: The Hearsay Rule.

AE 5 Chapter 7, [7.1]-[7.26].

AE 5 Chapter 8, [8.1]-[8.2], [8.9], [8.29]-[8.30].

Fitzgerald v The Queen [2014] HCA 28.

For group discussion

Authentication

1. D is charged with assaulting V with a hammer. D pleads not guilty. Counsel has available for tender a bloodstained hammer alleged to have been used in the crime. What sort of authenticating evidence will be required if counsel wishes to tender the hammer (1) to establish that the weapon used in the assault was a hammer? and (2) to establish that it was the accused who had used that hammer?

2. Assume the issue in the above case is not whether V was assaulted with a hammer but whether it was D who carried out the assault. Evidence establishes that at the time of the crime it was dark and the attacker was masked. The hammer was later found near the scene of the crime. Analysis establishes DNA in blood on the hammer as matching V. A very small trace of DNA on the hammer is shown by analysis to match D. There is no other evidence connecting D with the crime. The prosecution is aware that D works as a 'hammer packer' at the factory which made the hammer in question and evidence (of the packing process and expert evidence on the transfer of DNA) suggests that although it is possible D's DNA could have been transferred in the packing process through blood or saliva, that is 'extremely unlikely'.

Is there sufficient evidence to connect D with the assault on D beyond reasonable doubt? Is there sufficient evidence to compel D to testify by way of defence? If so, could failure to testify provide evidence enabling the jury to convict?

Cf *Fitzgerald v The Queen* [2014] HCA 28.

Hearsay

For the purpose of discussion assume that the common law hearsay rule is defined as follows: ‘Evidence of a previous **statement** made by a person is not admissible to prove the existence of a **fact asserted** in that statement.’

The CEA defines hearsay in s 59 as follows: ‘Evidence of a previous **representation** made by a person is not admissible to prove the existence of **a fact that it can reasonably be supposed that the person intended to assert** by the representation.’

Before considering the problems below consider whether the rationale of the hearsay rule remains a valid justification for it?

1. D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night-club with the victim shortly before the sexual assault is alleged to have occurred. Can W be called at trial to testify to what X told her without infringing the hearsay rule at CL or under CEA. If X had written to W explaining what he saw could X’s letter be tendered at trial without infringing the hearsay rule at CL or under CEA?
2. P writes to W telling him that the handbrake on W’s car is not working. Can that letter be tendered to prove that the handbrake was defective without infringing the hearsay rule? Can it be tendered without infringing the hearsay rule to prove that W had been warned by P that the handbrake was not working?
3. W had bought a video cassette recorder and written down its serial number on a document. Can that document be tendered to identify the video bought by W without infringing the hearsay rule at CL or under CEA.
4. Can a boarding pass in the name of David Caruso used for travel on a particular flight be tendered to prove that David Caruso traveled on that flight without infringing the common law hearsay rule? Would your answer be different if ss 69-71 of the CEA applied?
5. Can a written contract signed by both parties be tendered to prove the contract and its terms without infringing the common law hearsay rule?

6. Can a letter addressed to Andrew Ligertwood and signed by David Caruso threatening to burn down Andrew Ligertwood's house unless he pays him \$20,000 be tendered to prove this threat was made by Caruso without infringing the common law hearsay rule?
7. On the basis of conversations with the victim of asbestos poisoning about the victim's contact with asbestos whilst employed by the defendant a doctor testifies that in his opinion it was this contact that caused the poisoning. Is the doctor's opinion admissible?
8. Can an unsigned letter addressed to a man accused of theft found on the floor of a room from which a painting had been stolen be tendered at common law to establish that the accused had been in the room without infringing the common law hearsay rule? Would your answer be different if s 59 of the CEA applied?
9. Can emails sent to the accused's email address asking that drugs be supplied be tendered to prove that the accused was carrying on a business for the illegal supply of drugs without infringing the common law hearsay rule. Would your answer be different if s 59 of the CEA applied?
10. Can evidence be given that the experienced owner of a sailing boat carefully conducted a safety check before boarding with his wife and family be given to prove the seaworthiness of the boat without infringing the common law hearsay rule? Would your answer be different if s 59 of the CEA applied?

CLASS 3: TESTIMONY

Object

The object of this class is to explain those common law evidentiary rules which define the process by which parties present the oral testimony of their witnesses to the court. Witnesses must formally promise to testify truthfully, testify from memory, not testify to out of court statements they may have made about events, testify in chief in response to non-leading questions and be prepared to answer leading questions in cross-examination seeking evidence about the events in issue and/or seeking to discredit them. But, for

practical reasons, limits exist in pursuing matters of credibility beyond cross-examination.

Assigned reading

Ligertwood Lecture 4 Testimony in Chief

Ligertwood Lecture 5 Cross-examination

(Concentrate on understanding the rules as explained in the lectures. Only go to the following full text if you need more detail

AE 5 Chapter 7 paras [7.27], [7.76]-[7.93], [7.115]-[7.152], [7.155]-[7.158].)

For group discussion

Leading questions

When you entered the room did you see the accused pointing a gun at the victim?

Is this a leading question? Why? If so how should counsel question the witness to obtain this evidence?

Attacking your own witness: Hostile and Adverse witnesses

When called to testify your witness's testimony is contrary to the proof you took from her prior to the trial. Can you cross-examine her at common law (CL) to reveal her prior statement? If you can is that statement admissible evidence of the facts asserted in the prior statement?

How is the situation different if s 38 CEA applies?

Refreshing memory (and hearsay)

Observing a hit and run accident W dictates the registration number of the car involved to her friend Y who writes down the number. When asked the number at trial W says she can't remember it and wishes to refer to Y's document containing the number or otherwise tender it in evidence to prove the number. Can she do this at CL? If W had memorized the number before coming to court and this had been discovered would your answer be different? Is the position different if W had seen Y write down the number and saw it was written down correctly?

Recent invention

In XXE defence counsel suggests that the victim of an assault suffered amnesia immediately following the assault and is just making up her testimony. Following XXE can counsel for the prosecution tender, at CL or under s 108(3)(b) CEA, evidence that prior to trial the victim had made a statement consistent with her testimony?

Finality of answers in XXE.

In XXE the defence puts it to a witness (W) to a crime that she has a grudge against the accused, that her evidence is untrue, and in fact she was not present at the crime at the time in question. W denies these suggestions and says she definitely was present because she had just visited her aunt who lives in the same street.

At common law, can counsel for the prosecution reopen its case to call the aunt to establish (1) that W did not visit her on the day in question and (2) to establish that she was present when W and the accused had an argument in which the accused said he never wanted to see W again and W said, 'You'll pay for this.' Would your answers be different under s 106 CEA?

CLASS 4: EXPERT EVIDENCE: EVIDENTIAL RULES

Object:

To emphasise that expert evidence is accommodated within the general rules of evidence except insofar as it is evidence of opinion. While other witnesses are not permitted to give opinions because it is the role of the trier of fact to draw inferences from facts, experts are, in theory, permitted to testify as to opinions where these will assist the trier of fact in reaching a more reliable decision.

The object of this class is to explain how expert evidence is accommodated within other evidentiary rules and to explain critically in the context of seeking rectitude the scope at common law and under the Uniform Evidence Acts of the rules permitting expert opinion evidence.

Assigned reading

Ligertwood L 6 Expert Evidence.

Lander, Expert Evidence.

AE 5 Chapter 7, [7.37]-[7.41] (observational inferences); [7.43]-[7.56] (expert opinions and threshold tests for admissibility); [7.65]-[7.66] (establishing admissibility/assistance); [7.67]-[7.68], [7.71] (form of assistance – assumptions and hearsay).

CEA ss 76-80.

Smith v R (2001) 206 CLR 650.

For Group Discussion

1. The common law courts have used three different tests in determining whether an expert has sufficient expert knowledge to testify – liberal relevancy, general acceptance amongst experts, and reliability of the field of knowledge. Explain the difference between these tests and the various arguments for and against each test.
2. W is called to testify that he recognized his brother as one of a number of men committing a robbery. Evidence of fact or opinion? If of opinion how is its reception justified?
3. W is called to identify a man he saw for the first time when the man was committing a robbery. Evidence of fact or opinion? If of opinion how is its reception justified?
4. W, an experienced police officer, is called to identify a man pictured on a CCTV committing a robbery. W has never previously seen or known the accused but has watched home movies of the accused and compared these images carefully with the image of the man on the CCTV, which W has also watched many times. He is willing to testify that he is 100% sure that the image on the CCTV is of the accused. Is this evidence relevant? (consider s 55 UEL and the majority judgment in *Smith v R*) Is it evidence of fact or opinion? (see the judgment of Kirby J in *Smith v R* and of the court in *Honeysett* at [21]). If of opinion can its reception be justified? (Consider ss 76, 78 and 79 UEL and the judgment of Kirby J in *Smith v R*). Should the evidence be excluded as more prejudicial than probative under s 137 CEA?

5. A CCTV captures images of a crime being committed but the images of the culprit are very blurred. The prosecution wishes to call an expert to testify that he has mapped and compared the structural features of the face on the video with the structural features of the face of the accused and is prepared to testify that the features are in all respects similar. Is this evidence relevant? (see *Honeysett* at [25]) Is it evidence of fact or opinion? What arguments can be made for excluding it as more prejudicial than probative under s 137 CEA?

6. A shoe-print expert is called to testify that he has compared the soles of shoes given to him by the police and belonging to the accused with photographs of shoe prints in sand at the scene of the crime taken by the police. These prints are the only shoe prints found on a beach next to the victim of a fatal stabbing. The expert testifies that the sole of one of the shoes has a defect which is replicated in the photographed print. He testifies that in his opinion the prints were made by the shoes belonging to the accused. Is this opinion admissible? What sort of evidence could the expert adduce to establish the reliability of his opinion? How far does the expert's evidence alone go towards implicating the accused in the fatal stabbing? Could his evidence establish beyond reasonable doubt that the accused stabbed the victim.

7. On the basis of conversations with the victim of asbestos poisoning about the victim's contact with asbestos whilst employed by the defendant a doctor testifies that in his opinion it was this contact that caused the poisoning. Is the doctor's opinion admissible? Can the doctor use epidemiological studies done by other researchers to support his opinion?

Class 5: EXPRESSING EXPERT FORENSIC EVIDENCE

Object

The general object of this class is to suggest that some problems with forensic evidence can be overcome if forensic scientists are more transparent and modest and impartial in the claims they make about the probative value of their evidence. More transparent and impartial presentation puts the jury into a position where it is able more accurately to assess the probative value of the forensic evidence in applying the criminal standard of proof.

A specific issue that has recently concerned forensic scientists is how they should be entitled to express the strength of their opinions of identity. To say that forensic samples ‘could have’ originated with material connected with the accused does not take into account the degree to which the expert regards that as being the likely explanation. Forensic scientists argue that a likelihood ratio better expresses this degree. In this seminar we will consider problems arising from this and other (mathematical and otherwise) expressions of the strength of forensic evidence in the light of the common law’s non-mathematical approach to the high standard of proof in criminal cases.

Assigned reading

Bennett v R [2005] SASC 167.

Edmond, Tangen and Thompson, ‘A guide to interpreting forensic testimony: Scientific approaches to fingerprint evidence’ (2014) 13

Law Probability and Risk 1–25.

Atkins v R [2009] EWCA 1876.

Fitzgerald v The Queen [2014] HCA 28

Science and Justice Editorial: ‘Expressing evaluative opinions: A position statement.’

Ligertwood, ‘*Forensic Science Expressions and Legal Proof*’.

Ligertwood & Edmond: *Expressing evaluative forensic science opinions in a court of law*.

Aytugrul v R [2012] HCA 15.

Ligertwood, *Can DNA Alone Convict?*

R v Lindsay [2013] SASCFC 95.

Problems for Discussion

1. D is charged with breaking into premises and stealing money from a metal box. Forensic examiners find fingerprints on the metal box and a fingerprint expert reports that ‘on close comparison I concluded that the fingerprints found are identical to the fingerprints of the accused’. This report is part of the evidence disclosed to the accused during committal proceedings. At trial the expert simply testifies in the terms above. Counsel for the defence does not challenge the admissibility of this evidence but in cross-examination asks the expert exactly how he reached his conclusion. He explains in general terms how he looked for similar features but cannot recall the

particular features relied upon, and when asked to produce images of the relevant fingerprints and explain these features he says that the images he used have been lost. The accused is convicted. On the basis of the reasoning in *Bennett* [2005] SASC 167 can the appeal succeed? Do you agree with how the fingerprint evidence in *Bennett* was presented and expressed? Do you agree with the reasoning in *Bennett* or is it just a decision driven by the exact facts of that case?

2. Are decisions in cases such as *Atkins*, *Bennett* and *Aytugrul* just further examples of judicial faith in adversarial process and examples of how judges prefer (are obliged?) to decide cases on their individual facts and circumstances?

3. Can mathematical expressions of forensic evidence be reconciled with common law notions of proof? Or is any reconciliation just avoiding the inevitable conclusion that proof must evolve into a mathematical notion – at least in some cases?

4. When an expert is asked whether DNA material found on a murder weapon and matched to the accused could have been transferred through transfer from a co-accused whose involvement in the crime is beyond dispute, the expert answers that such transfer is possible but ‘very unlikely’. What problems arose in *Fitzgerald v The Queen* through a DNA expert being allowed to testify in such terms?

Class 6: EXPERT FORENSIC EVIDENCE AND ADVERSARIAL PROCESS

Object:

Growing evidence gathered by innocence projects suggests that too much unreliable forensic evidence is being admitted. Recent reports also suggest that most forensic evidence has no rigorous scientific justification nor is it justified by empirical testing. In this seminar we will consider whether the adversarial presentation of expert forensic evidence is an appropriate process for determining the reliability of expert forensic evidence and whether more stringent admissibility rules or other reforms can ensure this reliability.

Assigned reading

AE 5 Ch 7, [7.63] – [7.64] (procedural aspects/adversarial presentation); [7.74]-[7.75] (trier of fact ultimately decides on admissible evidence).

Atkins v R [2009] EWCA 1876.

Edmond & San Roque, 'The Cool Crucible' (2012) 24 *Current Issues Crim Just* 51.

Edmond, 'What Lawyers Should Know About FS' (2015) 36 *Adelaide Law Rev* 33

Edmond et al 'How to XE Forensic Scientists' (2014) 39 *Aust Bar Rev* 174.

Edmond et al, 'Model Forensic Science' (DRAFT).

Hand, 'Expert Evidence' (1901-2) 15 *Harvard Law Rev* 40.

Problems for Discussion

1. Carefully read the case of *Atkins*. What reliance was placed by the court on the availability of cross-examinations and on the efficacy of jury directions in reaching its decision in that case? Is this case just a decision 'on the facts'? Or can important generalizations be drawn from it about the admissibility of forensic evidence in other cases?
2. What procedural reforms could be made to the adversarial trial to meet the criticisms of its effectiveness in determining the reliability of forensic science evidence?
3. Do you agree with Learned Hand's argument that in the end judges and jurors are not in a position to determine the sufficient reliability of expert forensic evidence and that courts should appoint appropriate experts to make this determination?
4. Does the ultimate solution to the problems facing courts with assessing the reliability of forensic evidence lie in there being more control and regulation of forensic examinations and the way the results of these examinations are presented to the court by prosecutors and forensic scientists?

CLASS 7: THE PROBLEMS ILLUSTRATED: FACIAL AND BODY MAPPING

(Instead of a formal class it is proposed to illustrate these problems through having students arguing for and against the admissibility of the expert evidence sought to be tendered in the *R v Barton* scenario.)

Object

With video surveillance now an accepted method of crime detection Australian courts have been inundated with 'expert' evidence identifying suspects pictured on surveillance cameras. The materials below provide the leading cases to show how judges in Australia deal with the problems of admissibility and proof that arise from this evidence.

It is proposed that designated students use these materials to argue for and against the opinion and expert evidence to be led in *R v Barton*.

Assigned Reading

Tang [2006] NSWCCA 167

Atkins [2009] EWCA Crim 1876

Morgan [2011] NSWCCA 257

Dastagir [2013] SASC 26

Honeysett v The Queen (2014) 253 CLR 122 (copy in Class 4 Materials).

Tuite v The Queen [2015] VSCA 148 (copy in class 4 Materials).

Edmond, Biber, Kemp and Porter, Law's Looking Glass

Edmond, Kemp, Porter, Hamer, Burton, Biber and San Roque, *Atkins v The Emperor*: the 'cautious' use of unreliable 'expert' opinion.

Edmond and San Roque, Quasi-justice: Ad hoc expertise and identification evidence.

Problems for discussion

(Rather than dealing with these problems separately I would prefer these issues to be raised in the context of arguments for and against the admissibility of the expert evidence in *Barton v R*.)

1. Consider again the case of *Atkins*. What criticisms do Edmond et al make of the decision in that case. Were the possible unreliabilities inherent in the expert forensic evidence canvassed with sufficient care in that case? Despite the XXE and directions of what relevance was the expert evidence given the absence of any scientific theory or empirical evidence underlying his

opinion under the Bromby Scale?

2. Consider the approach to facial and body mapping evidence taken in the Australian cases. Does their approach meet some of the objections to the admissibility of the facial mapping opinion evidence in *Atkins*?

3. As a matter of strict law is s 79 wide enough to exclude expert evidence of facial mapping and body mapping altogether? If not should trial judges exclude the evidence in exercise of s 137? Cf *Tuite v The Queen* [2015] VSCA 148.

CLASSES 8-10: MOCK TRIAL: R v BARTON

Object

To demonstrate the common law adversarial accusatory trial in practice; to emphasise the adversarial presentation of evidence through the calling and questioning witnesses, the role of the judge and the importance of oral testimony in the application of the criminal standard of proof by the jury.

The trial consists of two parts:

1. Preliminary consideration of the extent to which the ‘expert’ evidence is admissible (to be dealt with in Class 7).
2. The trial proper: is the presented evidence sufficient to find the accused guilty beyond reasonable doubt?

Students will be allotted roles as counsel, witnesses and jury-persons.

Materials

The following further readings from the book **Essays in Advocacy** may assist students in performing their allocated roles at trial:

- Chapter 17: Sofronoff, Opening a Trial
- Chapter 18: Kimber, Evidence in Chief
- Chapter 22: Hinton, Cross-Examination
- Chapter 23: David, Closing Addresses.

Andrew Ligertwood,
September 2016.