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An Appeal for Guidance

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Abstract
We look to the High Court to clarify the law where uncertainty exists and to resolve disputes in the law when differences arise. In other words, we look for leadership and guidance from the High Court. Should the High Court fail to provide leadership and guidance the law is left to flounder. This is precisely what is happening in Australia with the law on hearsay and the recognition of new hearsay exceptions. Simply stated -- the law is a mess. The recent decision of the High Court in Bannon v The Queen highlights the problem.

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OPINION

AN APPEAL FOR GUIDANCE

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We look to the High Court to clarify the law where uncertainty exists and to resolve disputes in the law when differences arise. In other words, we look for leadership and guidance from the High Court. Should the High Court fail to provide leadership and guidance the law is left to flounder. This is precisely what is happening in Australia with the law on hearsay and the recognition of new hearsay exceptions. Simply stated -- the law is a mess. The recent decision of the High Court in *Bannon v The Queen*[1] highlights the problem.

Bannon and a co-accused, Calder, were convicted of two counts of murder. The Crown presented its case in the alternative, either the defendants acted in concert in the killings, or one did the killings aided and abetted by the other. The defendants relied on the "cut-throat defence", each branding the other as the sole perpetrator of the murders.

The legal issue in the case concerned the use to be made of out-of-court statements by Calder to friends shortly after the murders. In her statements Calder used the singular "I" to describe how she killed the two. Bannon argued that this was an admission confirming that Calder was the sole perpetrator and that he was but an innocent bystander. Because Calder was a co-accused, Bannon was unable to call her as a witness. The trouble is that these out-of-court statements were being introduced for their truth and were hearsay. A hearsay exception needed to be found.

On appeal Bannon put forth three options. First, the Court was asked to admit these statements by applying the hearsay rule "flexibly". Second, the Court was asked to admit the statements using a principled approach, which would admit otherwise hearsay evidence where it was sufficiently "reliable" and "reasonably necessary". Third, the High Court was invited to expand the existing hearsay exception for declarations against interest to include declarations against penal interest. On the facts the Court found

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1 (1995) 70 ALJR 25.

that the statements made by Calder were not sufficiently reliable to fall within any of the potential hearsay exceptions posed. It is difficult to quibble with the Court's finding in this regard. What is so disappointing is that, although the Court discussed the three options, no guidance was forthcoming as to whether they were now acceptable in Australian law. One is left with a canvassing of the law without any conclusion.

The "flexibility" option was first raised by Mason CJ in *Walton v The Queen*[2]. He was of the view that "when the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule".[3] Essentially, this approach to hearsay looks to the reliability of the out-of-court statement as the key determinant; if the evidence is sufficiently reliable it is admissible, if not it is inadmissible. This view of the law, however, was not accepted by the majority in *Walton*, nor has it ever been endorsed by a majority in the High Court. In *Bannon*, Brennan CJ clearly rejected admissibility on the basis of "flexibility" and McHugh J had this to say:[4]

> Some writers have seen *Walton* and the statements in subsequent cases as signals that this Court is now willing to take a "more flexible approach to the hearsay rule, a willingness to apply it as a principle rather than as a strict rule". However, no case in this Court has decided that the law of hearsay is a principle rather than a rule with exceptions or that the rule is always subject to an exception in the case of evidence that is "reliable".

McHugh J then decided that it was not necessary to go on to decide whether such a flexible approach ought to be the law. The other four justices in *Bannon* did not address this issue at all. Therefore, the status of the "flexible" approach to hearsay remains uncertain.

The recognition of a hearsay exception for evidence that is both "reliable" and "reasonably necessary" too is based on principle rather than on rules. It produces a residual or "catchall" exception to be looked to should the evidence not fit into any of the established hearsay exceptions. The Supreme Court of Canada leads the way in development of this exception.[5] In a definitive statement on the law Lamer CJ wrote:[6]

> This court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity.

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2 (1989) 166 CLR 283.
3 Above n 2, at 293.
4 Above n 1, at 40.
5 See *R v Khan* (1990), 59 CCC (3d) 92 (SCC) and *R v Smith* (1992), 94 DLR (4th) 590 (SCC).
6 *R v Smith*, aobve n 5, at 603.

It is an approach also found in the United States Federal Rules of Evidence, Rule 803 (24). In *Bannon*, only the Chief Justice was clear as to where he stood on the law. He would not adopt the Canadian law. In his view, "It runs counter to the law of this country which treats hearsay as inadmissible unless it falls within a defined exception".[7] Yet, the Chief Justice was only speaking for himself and not for the Court. The acceptance or rejection of the "catchall" exception into Australian law was left unresolved.

The least radical of the options was for the High Court to expand declarations against interest to include statements against penal interest. Here too the justices, after various musings on the issue, refused to provide a definite answer.

Justice McHugh justified the Court's inaction on a number of grounds. First, he stated, "Whether or not the principle should be adopted in Australia is a decision that should only be made when it is necessary to do so to dispose of a case before the Court".[8] Why? The issue was raised on appeal. It was a question of law that needed clarification. Even if on these facts the exception did not apply, the profession and judges need to know whether in law the exception exists. Why wait until another case winds its way up to the High Court in order to decide the issue? Secondly, Justice McHugh observed that "recent legislative activity in this field provides a sound reason for this Court proceeding cautiously when invited to alter the settled rule against hearsay evidence".[9] Once again, why? The hearsay rule is not fixed, rather it is permeated by exceptions most of which are judge made. The hearsay exception for declarations against interest is a perfect example. It is a creation of the common law. Moreover, the recent legislative activity to which Justice McHugh referred expanded the hearsay exception to include declarations against penal interest -- precisely what the High Court was asked to do in *Bannon*.[10]

Bannon should be contrasted to the Supreme Court of Canada's decision in *Regina v O'Brien*[11]. In *O'Brien*, the Supreme Court of Canada created a new hearsay exception for declarations against penal interest. The Court looked more to principle than to precedent and swept away the arbitrary distinction between declarations against pecuniary and proprietary interest, which were recognised under the law, and declarations against penal interest, which were not. Dickson J (as he then was) succinctly stated, "A person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook".[12]

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7 *Bannon*, above n 1, at 29.
8 *Bannon*, above n 1, at 45.
9 *Bannon*, above n 1, at 46.
10 See Commonwealth Evidence Act (1995), s 65 (2) (d) and s 65 (7) (b). See also Rule 804 (3) of the Federal Rules of Evidence, which apply in the Federal Courts in the United States.
11 (1977) 76 DLR (3d) 513.
12 *Regina v O'Brien* (1977) 76 DLR (3d) 513 at 518 (SCC).

The reluctance to expand declarations against interest to include penal statements has always rested on concern about false confessions and the ease with which such declarations could be made. In *Bannon*, Chief Justice Brennan expressed the view that without limitations false confessions would "bedevil" criminal trials. The Supreme Court of Canada was alive to this concern. The Court stipulated the following criteria before a declaration against penal interest would be admissible:[13]

1) The declaration would have to be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result.
2) The vulnerability to penal consequences would have to be not remote.
3) The declaration sought to be given in evidence must be considered in its totality. If upon the whole tenor the weight is in favour of the declarant, it is not against his interest.
4) In a doubtful case a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused.
5) The declarant would have to be unavailable by reasons of death, insanity, grave illness which prevents the giving of testimony.

These are stringent requirements and go a long way to ensure the necessary reliability of the declaration thus making it admissible. More significantly, the experience in Canada since its recognition 20 years ago belies the concern that this hearsay exception will flood the courts with false confessions -- the flood has not occurred.

O'Brien stands in such marked contrast to *Bannon*. The cases were so similar, but dealt with in markedly different ways. In *O'Brien* the Supreme Court of Canada ruled, as in *Bannon*, that on the facts the sought for declaration against penal interest was not admissible. Nevertheless the Supreme Court, unlike the High Court, went on to address the broader legal issue raised. The Supreme Court of Canada also spoke in one clear voice -- a unanimous judgment of nine justices. In Bannon, the High Court is speaking with too many voices. This is a fundamental problem that besets the High Court. The justices, for the most part, proceed as individuals with little attempt at consensus building. In a given case the result is a multitude of judgments with no clear voice as to what the law is or is not. *Bannon* is a perfect example, four judgments were given by the six justices and the result is no clear answers.

13 The Supreme Court of Canada in a subsequent decision, *Lucier v The Queen (1982) 132* DLR *(3d) 244 (SCC)* outlined these criteria. The Court also ruled that declarations against penal interest were admissible to exculpate an accused but not to inculpate an accused.

Hearsay reform is not an easy issue. This is not to say that the Court must necessarily find new exceptions or go on to reform the law. But a decision, one way or the other, needs to be made. The High Court needs to speak with a clear voice, otherwise the law will continue to flounder, which is a disservice to us all.