12. *Betfair* [2012] HCA 12 at [127].
13. *Betfair* [2012] HCA 12 at [123].
14. *Betfair* [2012] HCA 12 at [64].
15. *Betfair* [2012] HCA 12 at [65].
16. *Sportsbet* [2012] HCA 13 at [10] – [12].
17. *Sportsbet* [2012] HCA 13 at [14]. Compare Heydon J at [41].
18. *Sportsbet* [2012] HCA 13 at [41].
19. This time including Kiefel J; Heydon J agreeing and providing similar reasoning.
20. *Sportsbet* [2012] HCA 13 at [17].
21. *Sportsbet* [2012] HCA 13 at [20].
22. *Sportsbet* [2012] HCA 13 at [23] to [24]. The plurality commented that Perram J at first instance appeared to base his decision in favour of Sportsbet on inferences that there was an intention that the TAB and NSW on-course bookmakers would be insulated from the economic effects of the conditional fee: (2010) 186 FCR 226 at [101].
23. *Sportsbet* [2012] HCA 13 at [27].
24. *Sportsbet* [2012] HCA 13 per the plurality at [27] and per Heydon J at [44].
25. *Sportsbet* [2012] HCA 13 per the plurality at [32] and per Heydon J at [50].

Correction

In the Recent Developments section of the Autumn 2012 edition of *Bar News*, bylines for articles by Benjamin Jacobs ('Expert evidence', pp.18–19) and Catherine Gleeson ('Restitution, illegality and assignment', pp.31–33) were omitted.

This error occurred during the production process and *Bar News* apologises to Ben and Catherine.

DNA evidence

Laura Thomas reports on *Aytugrul v The Queen* (2012) 286 ALR 441; [2012] HCA 15

The appellant was convicted of murder. The prosecution case at trial was circumstantial. It included DNA evidence from analysis of a hair found on the deceased's thumbnail. The hair was subjected to mitochondrial DNA testing. An expert called by the prosecution gave evidence that the appellant could have been the donor of the hair and that one in 1,600 people in the general population would be expected to share that DNA profile (the frequency ratio). She then gave evidence that this equated to an exclusion probability of 99.9 percent (the exclusion percentage). That is, 99.9 percent of the population would not be expected to have that DNA profile.

The appellant argued on appeal that the evidence expressed as an exclusion percentage should not have been admitted. It was submitted that s 137 of the *Evidence Act 1995* (NSW) requires courts to refuse to admit DNA evidence expressed as an exclusion percentage because its probative value is outweighed by danger of unfair prejudice to the accused. In the alternative, it was submitted that the only proper exercise of the discretion under s 135 of the Evidence Act was to refuse to admit the evidence.[1]

By majority (Simpson and Fullerton JJ), the New South Wales Court of Criminal Appeal denied Aytugrul's appeal. McClellan CJ at CL dissented. His Honour surveyed academic literature on the presentation of DNA evidence and held that the trial judge should not have admitted evidence of the exclusion percentage because it 'invited a subconscious 'rounding-up' to 100'[2] and 'the Crown should not have the advantage of the 'subliminal impact' of statistics to enhance the probative value of the evidence.'[3] His Honour found that the trial judge's warnings were not sufficient because the 'exclusion percentage figures were too compelling.'[4] Due to their 'potential to overwhelm the jury' his Honour would have ordered a new trial.[5]

The High Court unanimously dismissed Aytugrul's appeal. The plurality (French CJ, Hayne, Crennan and Bell JJ) held that a New South Wales court could not take judicial notice of research on the persuasive power of different forms of expressing DNA statistics. The evidence did not fall within s 144 of the Evidence

Act, which provides that proof is not required about knowledge that is not reasonably open to question and is common knowledge or capable of verification by reference to a document the authority of which cannot reasonably be questioned. The plurality noted that:

> No proof was attempted…of the facts and opinions which were put forward (by reference to the published articles)… Yet that was the basis on which it was asserted that a general rule should be established to the effect that evidence of exclusion percentages is *always* inadmissible.[6]

The plurality concluded that 'a court cannot adopt such a general rule based only on the court's own researches suggesting the existence of a body of skilled opinion that would support it.'[7]

The plurality considered the appellant's submission that evidence of the exclusion percentage could not add anything of substance to the frequency ratio and thus was of minimal incremental probative value, such that a court should refuse to admit it if there was any risk of the jury giving it more weight than it deserved. The plurality reasoned that:

> Given the mathematical equivalence of the two statements, there may be some doubt about the validity of approaching the application of [ss 135 and 137 of the Evidence Act] on the basis that there were two distinct pieces of evidence… and given that the exclusion percentage and the frequency ratio were no more than different ways of expressing the one statistical statement, the probative value of the exclusion percentage was necessarily *the same* as that of the frequency ratio.[8]

The plurality emphasised that the risk of unfair prejudice must be assessed having regard to the whole of the evidence, particularly the evidence of the witness to which objection is taken. In this case, the relationship between the frequency ratio and the exclusion percentage was explained, and warnings were given. The majority concluded that, while there may be cases where evidence of exclusion percentages may warrant close consideration of the application of ss 135 and 137, in this case the impugned evidence was 'in no sense *unfairly* prejudicial, or misleading or confusing.'[9]

Like the plurality, Heydon J held that McClellan CJ at CL should not have relied upon the academic articles unless that material was received through an expert witness. Heydon J said that 'the appellant appeared to be urging the creation of a legal rule, in the sense of a hitherto unsuspected construction of s 137.'[10] Thus the material could be considered evidence of 'legislative facts…which help the court to determine what a common law rule should be or how a statute should be constructed.'[11]

Like the plurality, Heydon J held that McClellan CJ at CL should not have relied upon the academic articles unless that material was received through an expert witness.

Heydon J accepted that 'legislative facts can legitimately be derived by analysing factual material not tendered in evidence either at trial or on appeal' but said that the 'appellant did not make clear how this Court could take the expert material into account.'[12] His Honour considered the possibility that s 144 of the Evidence Act does not apply to legislative facts, but concluded that '[i]f it does not, and the common law position continues, it is unlikely that the material was sufficiently uncontroversial for judicial notice to be taken of it.'[13] This was because:

> …the level of technical sophistication involved in the material on which the appellant relied is so great that it would not be satisfactory for this Court to take it into account without the assistance of expert witnesses who had been cross-examined.[14]

Heydon J also gave detailed reasons for distinguishing two cases relied upon by the appellant, including *Old Chief v United States*,[15] in which the Supreme Court of the United States accepted that 'probative value' in Rule 403 of the Federal Rules of Evidence means 'marginal probative value relative to the other evidence in the case.' The appellant submitted that this approach to ss 135 and 137 warranted rejection of prejudicial evidence when other less prejudicial evidence of the same or greater probative value was available (in the present case, the result would be to admit the evidence of the frequency ratio but reject evidence of the exclusion percentage).

Among other reasons, Heydon J stated that a problem with the appellant's argument regarding *Old Chief* was the 'highly questionable' contention that 'even though two statements may be understood to contain the same content, they are still two discrete items of evidence.'[16] That exercise was characterised by his Honour as 'slicing up evidence.'

Endnotes

1. Section 135 of the Evidence Act allows a court to refuse to admit evidence if its probative value is substantially outweighed by danger that the evidence might be unfairly prejudicial, misleading or confusing, or result in undue waste of time.
2. (2010) 205 A Crim R 157; [2010] NSWCCA 272 at [99].
3. Ibid at [98].
4. Ibid at [99].
5. Ibid at [121].
6. (2012) 286 ALR 441; [2012] HCA 15 at [22]. Emphasis in original.
7. Ibid.
8. Ibid at [27]-[28]. Emphasis in original.
9. Ibid at [24]. Emphasis in original.
10. Ibid at [71].
11. Ibid.
12. Ibid at [71]-[72].
13. Ibid at [73].
14. Ibid at [74].
15. (1997) 519 US 172.
16. Ibid at [64].

Rape in marriage

Caroline Dobraszczyk reports on *PGA v The Queen* [2012] HCA 21

This case deals with the highly interesting and controversial issue as to whether the 'rape in marriage' defence was ever part of the common law of Australia.

On 5 July 2010 the appellant was charged for trial in the District Court of South Australia with numerous offences including two counts of rape contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) ('CLC Act'). Both offences were alleged to have occurred in 1963. The issue for the High Court was whether the appellant was correct in his argument that he cannot be guilty of the rape of his wife, given that they were married at the time of the alleged offences, and that his wife had given her consent to sexual intercourse as a result of the marriage contract. This concept of 'marital exemption' was argued to be part of the common law at the time.

The majority, French CJ, Gummow, Hayne, Crennan and Kiefel JJ, held that if the 'marital exemption' was ever part of the common law of Australia it had ceased to be so by the time of the enactment in 1935 of s 48 of the CLC Act.[1]

The majority considered what is meant by the term 'common law' and 'the common law of Australia.' In relation to 'the common law', they referred to the *Native Title Act Case*.[2] They noted that the term 'common law' is not only 'a body of law created and defined by the courts of the past, but also as a body of law the content of which, having been declared by the courts at a particular time, might be developed thereafter and be declared to be different.'[3] In relation to 'the common law of Australia', the majority noted that the 'common law' which was received in South Australia in 1836 did not include the jurisdiction with respect to matrimonial causes which in England was exercised by the ecclesiastical courts.[4] At [28] they referred to *Skelton v Collins*[5] where Windeyer J discussed the reception of the doctrines and principles of the common law in Australia as follows:

> To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts. ... In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory.

It is interesting to note that the main source of the appellant's argument was based on a particular passage in *The History of the Pleas of the Crown*, being the extra judicial writings of Sir Matthew Hale, chief justice of the Court of King's Bench (1671–1676), first published in