IN PRAISE OF DOUBT

> Saint Thomas, the doubting Apostle,
> In the gospel caused scandal colossal,
> As he'd only believe
> What his eyes could perceive.
> What a silly (or was he?) old fossil.

I'm not much of a bible buff, but amongst the Apostles, my favourite is that sceptical evidence-based empiricist, Thomas. Like any competent tribunal of fact, Tom considered that the hearsay evidence he had received of the resurrection was, if not necessarily inadmissible, of only limited weight. Eventually (so the story goes) his doubts were laid to rest by direct evidence, when Jesus showed up in the flesh.

Not that St Thomas is the only uncertain voice in the gospels: St Paul conceded that we can only see through a glass darkly, echoing the plight of Plato's prisoners, left to infer worldly phenomena from the shadows flickering on the walls of the cave in which they were confined. The thing is, generally speaking, we just don't know.

Accordingly, I have grave doubts about certainty. This is a handy attitude for someone in our line of work.

I was once handed a certain loser of a case, the sort of case as it turned out that might only come along once in a career. The four stab wounds to the heart put the question of murderous intent beyond doubt. The issue of identity also appeared clear-cut, as my client had confessed to the crime. He claimed to me that he hadn't done it, but was quite unable to explain why he had told the police otherwise, so initially at least I didn't give his protestations of innocence much credence.

But, as they say, you never never know, so I fished about on the off-chance something might turn up. It did. Buried in the brief was a perfunctory statement by a junior detective mentioning an unidentifiable fingerprint on the blood-stained knife found under the victim's body. The tenor of the statement was unmistakeable: the fingerprint was too indistinct to be of forensic significance. Nevertheless, being of doubtful disposition, at the committal (yes, those were the days!) I called for the fingerprint examiner's file, and lo and behold, the unidentified fingerprint was not all that indistinct after all. In fact, it was clear enough to be reliably distinguished from the fingerprints of both the deceased victim and those of my client. It was unidentifiable not in the sense that it was merely a smudge, but in the sense that it belonged to a person unknown, someone, it could readily be inferred, who had handled the murder weapon when the blood of the deceased had still been wet.[1]

The investigating police, in the exercise of their discretion, had chosen not to include these highly salient matters in the brief provided to the Crown, whose case was that the accused had acted - as he had confessed to doing - alone. Ultimately, the confession was found to have been involuntary, unreliable and improperly obtained. There being no other cogent inculpatory evidence, a nolle prosequi was filed, and my client was released after just a couple of years on remand facing the prospect of mandatory life imprisonment.

That salutary experience made me certain of one thing: the fundamental importance of doubt in criminal practice. Doubt the lot of it: what the witnesses say, what the experts say, what the police say, what the Crown says, what your client says. When at trial the judge ventures a preliminary view, whether it be on a point of fact or a point of law, don't take His or Her Honour's word for it. Sceptically scrutinise. It may not win you many friends, but it will win you cases. If you are told on ostensibly good authority that the messiah has come, don't believe it (or for that matter, disbelieve

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[1] *R v Cotchilli* [2007] NTSC 52 at [5]

it): go and check it out. Be prepared - like Thomas was - to stick your finger in the fellow's gaping wound if that's what it takes to remove your doubts.

Sceptical scrutiny is not however a licence to indulge in speculation or conjecture at the expense of inferential evidentiary fact-finding. The recent negligence decision in *Fuller-Lyons v New South Wales* [2015] HCA 31 arose after the NSW Court of Appeal quashed a decision in favour of a severely injured child plaintiff who had fallen from a moving train through doors which had somehow been forced open. They did so on the basis, to borrow the language of the authorities dealing with circumstantial evidence in criminal law,[2] that the trial judge had not excluded all reasonable alternative hypotheses consistent with the defendant's innocence.

Although the case of the plaintiff (who of course bore the burden of proof) was in some respects clouded by doubt, in its unanimous judgment the High Court restored the trial judge's decision, holding that the alternative reasonable hypotheses considered and preferred by the intermediate appellate court were speculative, and not supported by evidence given at trial. Had those alternative hypotheses been canvassed at trial, perhaps a different result would have ensued. As the High Court tellingly found:

> It was… an error to reject the primary judge's inferential factual finding upon a view that [the plaintiff] had failed to exclude an hypothesis *that had not been explored in evidence* (emphasis added).[3]

To a criminal lawyer the result in *Fuller-Lyons* may seem at first blush rather surprising - a party with a burden of proof succeeded, notwithstanding the obvious uncertainties in that party's case. However, there is of course an important difference between the civil and criminal standards of proof,[4] and I do not suggest that this case heralds a change in the criminal law regarding the pathway to proof (or lack of proof) in circumstantial cases. Nevertheless, the challenge *Fuller-Lyons* poses for criminal defence lawyers, notwithstanding the fact that it is the Crown which alone bears the burden of proof, is whether at trial we should adduce evidence tending to raise doubt in circumstantial cases, to avoid having our proposed reasonable alternative hypotheses consistent with innocence dismissed as mere speculation.

So, to add to my long-held doubts about certainty, I've now got a few niggly doubts about doubt too.

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[2] *Peacock v The King* (1911) 13 CLR 619 at 634 per Griffith CJ; *Shepherd v The Queen* (1990) 170 CLR 573 at 578 per Deane J
[3] *Fuller-Lyons v New South Wales* [2015] HCA 31 at [36]
[4] As explained in *Luxton v Vines* (1952) 85 CLR 352 at 358