IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-085-001107
[2018] NZDC 4126

MINISTRY OF HEALTH

v

PHILLIP MORRIS (NEW ZEALAND) LIMITED

Date of Ruling:	5 March 2018
Appearances:	S Carter for the Prosecutor D Boldt and M Sumpter for the Defendant
Judgment:	5 March 2018

RULING 2 OF JUDGE P J BUTLER

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[1] This is an application by the prosecutor, under s 78(4)(a)(i) Criminal Procedure Act 2011, for a pre-trial admissibility hearing concerning certain evidence the defence proposes to call at trial, that is to say, a large portion of the brief of evidence of Dr Moira Gilchrist, a scientist with high level qualifications, who is indirectly connected with the defendant by way of employment.

[2] Section 78, ss (4)(a)(i) says:

> The Court may grant a pre-trial admissibility hearing if the Court is satisfied that:
>
> (a) It is more convenient to deal with the issues before the trial and –
>
> (i) The evidence raises a complex admissibility issue and the decision about whether it is admissible is likely to make a

> substantial difference to the overall conduct of the proceeding.

[3] The Crown application says that the Crown will challenge the admissibility of parts of Dr Gilchrist's evidence, on the grounds of relevance, and will maintain that challenge whether or not the application for a pre-trial hearing is granted today.

[4] Secondly, that the prosecution outlines the basis of its case in relation to the product HEETs, referring to the purposes of the legislation and canons of statutory interpretation, and says that the defence position cannot be supported.

[5] Thirdly, the prosecution contends that the defendant is really arguing for statutory relaxation of the current position and that if expert evidence is allowed this will turn the hearing into an opportunity for the defendant to advocate legislative change. The prosecution says that s 25(2) Evidence Act 2006 says that expert opinion evidence cannot be about the ultimate issue to be determined in the proceeding and that parts 1 and 3 of Dr Gilchrist's proposed brief are inadmissible, generally, on the grounds of relevance.

[6] In opposition to the Crown application the defence submits that there has been ample time allowed for the trial and that the prosecution, whatever the outcome of the current application, do not require Dr Gilchrist for cross-examination. The whole of her brief, as opposed to a truncated version, would only add minutes to the overall length of the trial, according to the defence.

[7] Section 78 does not apply where a party seeks to challenge, pre-trial, an opponent's evidence, only the evidence of their own witness. Further, the defence says that the whole of Dr Gilchrist's brief is relevant and admissible in relation to the issues at trial.

[8] Lastly, there is the point that there is no jury. The Judge will be easily able to determine relevance and allocate such weight to the evidence as is required.

[9] Ms Carter's pessimism about my decision is correct, in the sense that I decline the application for a pre-trial admissibility hearing, and the test at trial will be

relevance. The Judge can sift the evidence on that basis and the overall conduct of the proceeding is not likely to be affected, in a substantially different way, by the admission of the expert's brief as a whole. So I decline the application for a pre-trial hearing about that but, of course, the test of relevancy will be applied, throughout the trial, in relation to the whole of Dr Gilchrist's brief.

P J Butler
District Court Judge