FOLEY'S LIST

The Fog of Law

Section 137 of the *Evidence Act 2008* (Vic)

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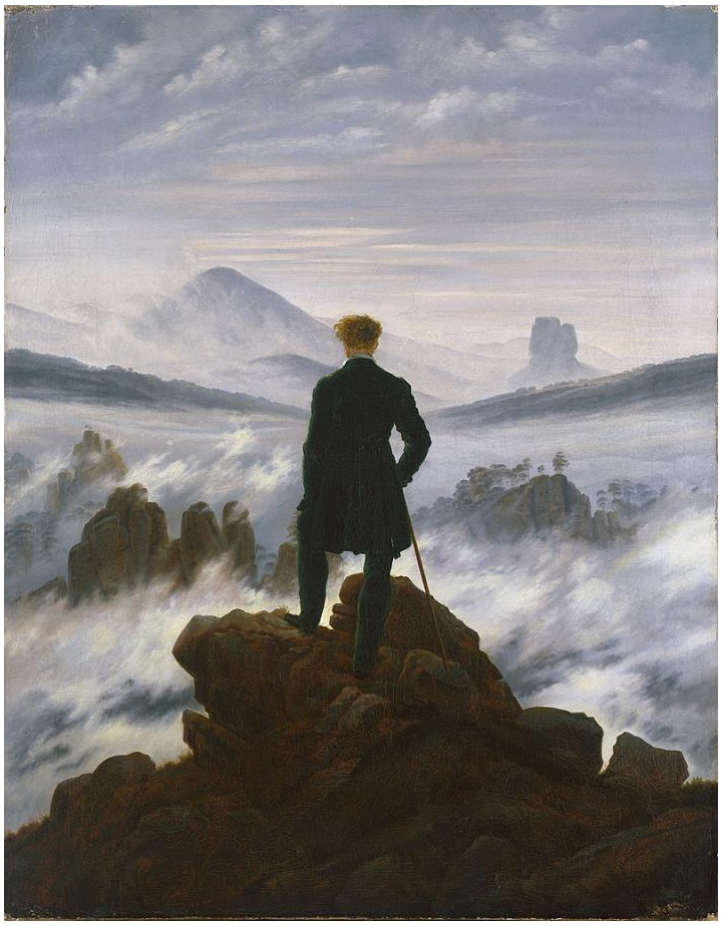
Foley's List February 2024 Criminal Law CPD Series

15 February 2024



Caspar David Friedrich, Wanderer above the Sea of Fog, c 1818

Part A: Background

1. Section 137 of the *Evidence Act 2008* (Vic) (***EA***) provides:

> **Exclusion of prejudicial evidence in criminal proceedings**
>
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

2. The Dictionary to the EA states that "**probative value** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

3. A few things to note from the outset:

   a. The first issue regarding admissibility is always ***relevance***;

      - Section 55(1) of the *EA* provides:

> The evidence that is relevant in a proceeding is evidence that, ***if it were accepted***, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding";[1]

   b. The onus rests on the accused person to raise s 137;[2]

   c. Section 137 is expressed in mandatory language;

      - **It is not a true discretion**, although it involves balancing competing considerations, and reasonable minds can differ;[3]

      - Notwithstanding that, appeals from interlocutory decisions will be governed by *House v King*[4] principles;[5]

      - For regular appeals, the Court must decide the issue for itself;[6]

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1 Our emphasis added.

2 *R v DG* [2010] VSCA 173; (2010) 28 VR 127, 138 [54] (Buchanan, Weinberg and Bongiorno JJA).

3 Ibid, 137 [46], 138 [51] (Buchanan, Weinberg and Bongiorno JJA). It can involve, in the words of Scalia J, asking "whether a particular line is longer than a particular rock is heavy". *See also R v Blick* [2000] NSWCCA 61; (2000) 111 A Crim R 326, 332-3 [19]-[20] (Sheller JA).

4 [1936] HCA 40; (1936) 55 CLR 499.

5 *Harlen v The King* [2023] VSCA 269, [65] (McLeish, Niall and Kennedy JJA); *Ebrahimi v The Queen* [2022] VSCA 65, [21] (Maxwell P, Sifris and Macaulay JJA). The correctness of this approach is not without doubt; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857, 865-6 [15]-[16] (Kiefel CJ, Gageler and Jagot JJ).

6 *Ebrahimi v The Queen* [2022] VSCA 65, [21] (Maxwell P, Sifris and Macaulay JJA), citing *McCartney v The Queen* [2012] VSCA 268; (2012) 38 VR 1, 10 [43]-[45] (Maxwell P, Neave JA and Coghlan AJA); *Lewis v The Queen* (2018) VSCA 40, [50] (Ferguson CJ, Weinberg JA and Kidd AJA).

d. The provision refers to the ***danger*** of unfair prejudice;

- The word "danger" connotes more than "a mere possibility", it requires a "real risk of unfair prejudice";[7]

e. The provision refers to ***unfair*** prejudice;

- Evidence is not unfairly prejudicial because it makes it more likely the accused person will be convicted.[8] In Beale J's words, the risk must be that the jury will "misuse or overvalue the impugned evidence";[9]

- As the High Court held in *R v Bauer*:[10]

> Despite textual differences between the expressions "prejudicial effect" in s 101, "unfairly prejudicial" in s 135 and "unfair prejudice" in s 137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way;[11]

- Not all unfair prejudice can be cured by directions:[12]

> [A]lthough criminal trials are generally conducted on the assumption that a jury will comply with the judge's directions, it is acknowledged in the authorities that warnings about propensity evidence are not always effective. A blind and unquestioning faith in the efficacy of judicial warnings would lead to the conclusion that severance should never be ordered on account of prejudice, because any prejudice at all could be overcome by judicial instruction. No one supposes that that is so;[13]

- The need to lead rebuttal evidence can cause unfair prejudice.[14]

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7 *Arico v The Queen* [2018] VSCA 135; (2018) 272 A Crim R 450, [78] (Maxwell ACJ and Weinberg J), citing *R v Lisoff* [1999] NSWCCA 364, [60] (Spigelman CJ, Newman and Sully JJ): "[i]t is not sufficient to establish that the complexity or nature of the evidence was such that it created the mere possibility that the jury could act in a particular way"

8 *Papakosmas v The Queen* [1999] HCA 37; (1999) 196 CLR 297 ("*Papakosmas*"), 324 [91] (McHugh J) citing *R v BD* (1997) 94 A Crim R 131, 139 (Hunt CJ at CL), and 325 [92] citing the ALRC.

9 *Pocket Evidence Law*, p 42.

10 [2018] HCA 40; (2018) 266 CLR 56.

11 Ibid, 93-4 [73] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

12 *R v TJB* [1998] 4 VR 621. See also *Patel v The Queen* [2012] HCA 29; (2012) 247 CLR 531, 562 [113] (French CJ, Hayne, Kiefel and Bell JJ), and *DPP (Vic) v Wise* [2016] VSCA 173, [70] (Warren CJ, Weinberg JA, Priest JA).

13 Ibid, 629-30 (Callaway JA). Over recent years there has been significant scholarship addressing the potential unfair prejudice of expert evidence, see Jason Chin, Haley Cullen and Beth Clarke, "The Prejudices of Expert Evidence" 48(2) *Monash University Law Review* 59. At 96, the authors conclude "directions are likely not nearly as effective as judges expect".

14 *Huges v DPP* [2013] VSCA 338; (2013) 238 A Crim R 345, 352 [20] (Priest JA).

The History

4. Section 137 of the *EA* is based on what was commonly known as the "*Christie* discretion", drawn from *R v Christie*.[15]

5. *Christie* concerned the admissibility of what is now known as complaint evidence from a child in an indecent assault case. Ultimately the conviction was quashed due to the failure to give a requisite direction on corroboration.

6. In *obiter*, Lord Moulton observed:

> The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for every one a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure…
>
> In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value.[16]

7. In considering a category of evidence that is admissible but would have a prejudicial effect out of proportion to its true evidential (probative) value, *Christie* sets the modern foundation for s 137 of the Uniform Evidence Acts.

8. Section 137 was first legislated in the Commonwealth jurisdiction (in 1995), then New South Wales (**NSW**) (also in 1995), and then in various other States and Territories. Victoria enacted the *EA* in 2008. It remains in the same form in all Uniform Evidence Act jurisdictions.

9. Importantly, prior to the enactment of the Uniform Evidence Acts, the Australian Law Reform Commission (**ALRC**) conducted an extensive review on the law of evidence.

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[15] [1914] AC 545.

[16] Ibid, 559-60. See also Lord Redding at 565 regarding the practice of judges excluding evidence.

10. In its interim report in 1985 (ALRC Report 26), it stated:

> There is also in criminal proceedings the judicial discretion to exclude evidence, even if relevant, on the ground that its probative value is exceeded by its prejudicial value. The emphasis reflects the gravity of criminal proceedings and society's choice of preferring the risk of acquittal of the guilty to the risk of the conviction of the innocent.[17]

11. The ALRC further explained:

> **Probative Value and Prejudice Discretion**
>
> *Discretion Retained.* Under present law, a trial judge in criminal cases has a discretion to exclude evidence adduced by the prosecution if it is more prejudicial than probative. There are a number of uncertainties with this discretion. Some courts weigh the discretion against the exclusion of evidence, but the better view is that the trial judge should balance probative value and the danger of prejudice without any preconceptions—accused persons should be protected against evidence which is more prejudicial than probative. This will help to provide a fair trial by excluding evidence which, while relevant, may be misused by the tribunal of fact. There is some uncertainty over the meaning of 'prejudice'. But, clearly, it does not mean simply damage to the accused's case. It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have. It is proposed to retain this judicial discretion in its conventional form.[18]

12. In its final report in 1987 (ALRC Report 38) (which included the draft Evidence Bill as Appendix A), the ALRC stated as the first of its major recommendations:[19]

> ***Rules of admissibility.*** The legislation sets out the rules to control the admissibility of evidence. The primary rule is that if evidence is relevant, directly or indirectly to an issue in a case, it is admissible unless otherwise excluded. If it is not relevant, it is inadmissible. The legislation defines relevant evidence as evidence which, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue. It also articulates the discretion inherent in the different definitions of relevance presently used by including a residuary discretion to exclude evidence where its probative value is outweighed by the disadvantages of its admission - for example, time, cost, risk of confusion etc (the approach taken in the US Federal Rules.) The legislation sets out those other rules of admissibility which will operate to exclude evidence which is relevant to the issues in a case. They include, in criminal trials, the common law discretion to exclude prosecution evidence where its prejudicial effect outweighs its probative value is retained. The proposals build upon but rationalise and reform existing law.[20]

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17 At [60]. Citation omitted.

18 The Law Reform Commission, Evidence (Report 26 Interim, 1985) [957] (emphasis in original, citations omitted).

19 At [12]. Available online: https://www8.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1987/38.html

20 Citation omitted.

13. The ALRC further observed:

> ***Hearsay evidence and the exclusionary discretions.*** It was intended that the relevance discretion and, in criminal trials, the probative value/prejudice discretion, would apply to hearsay evidence which comes within the exceptions to the proposed hearsay rule. It was questioned whether this was achieved on the ground that the unreliability of the evidence offered is not a ground for exclusion under those discretions. *The Commission remains of the view that the court can and should consider the reliability of the evidence concerned in applying those discretions*…
>
> *The reliability of the evidence is an important consideration in assessing its probative value. In addition, the reliability of the evidence, if accepted, is relevant to other matters raised by the discretion - the risk of misleading the court, confusion and undue consumption of time*.[21]

14. It is evident that the purpose of s 137 was to preserve the *Christie* discretion in a different form, motivated by the need to protect against the risk of miscarriages of justice. The ALRC contemplated that judicial officers could and should consider the reliability of evidence when conducting the balancing exercise under s 137.

15. In 2005, the ALRC, together with the equivalent NSW and Victorian law reform bodies, published its Uniform Evidence Law Report (ALRC Report 102). The Report stated:

> A related question is whether reliability or credibility can be taken into account in balancing the probative value of evidence against the risk of unfair prejudice arising from admission. Consistent with the adversarial system and the policy underpinning the uniform Evidence Acts that parties should be able to 'produce the probative evidence that is available to them', the Commissions are of the view that questions of credibility and reliability should generally be left to be determined by the tribunal of fact. Factors affecting the reliability or credibility of evidence usually emerge during the course of the trial, particularly in cross-examination. *However, where the reliability or credibility of the evidence is such that its weight is likely to be overestimated by the tribunal of fact because of an inability to test the evidence by cross-examination or for some other reason, then these may be considerations relevant to the decision to exclude or limit the use of the evidence*.[22]

16. Notwithstanding the clear intention of the ALRC that issues of reliability could be considered when conducting the balancing exercise, in *IMM v The Queen*[23] the High Court took a different approach.

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[21] At [146]. Citation omitted. Our emphasis added.
[22] At [16.47]. Citations omitted. Our emphasis added.
[23] [2016] HCA 14; (2016) 257 CLR 300 ("*IMM*").

Part B: The Approach of the High Court in *IMM*

17. *IMM* was an appeal against conviction from the Supreme Court of the Northern Territory in relation to alleged sexual offending. Much of the judgment concerns the admissibility of "sexual interest" tendency evidence which is not relevant here (with the majority finding that the tendency evidence was inadmissible and the trial had miscarried, and ordering a re-trial).[24]

18. The judgment also resolved a long running debate between jurisdictions (NSW and Tasmania on the one hand,[25] and Victoria on the other[26]), as to whether a judicial officer, when assessing the probative value of evidence sought to be excluded under s 137 of the Unform Evidence Acts, could consider issues of *reliability*.

19. Both camps received from support from the *obiter dictum* of High Court judges:

    a. In *Papakosmas v The Queen*,[27] McHugh J had opined that an assessment of probative value "would necessarily involve considerations of reliability". This was, in part, because of the differences between the definitions of relevance and probative value in the Act (this became the Victorian approach); and

    b. In *Adam v The Queen*,[28] Gaudron J took the opposite view, stating that "[t]he omission from the dictionary definition of 'probative value' of the assumption that the evidence will be accepted is… of no significance", and it should be read in to the definition (this became the NSW and Tasmanian approach).

20. In NSW, under the leading case of *R v Shamouil,*[29] the Court of Criminal Appeal held that the definition of "probative value" under the Uniform Evidence Acts should have "read into it an assumption that a jury will accept the evidence in question because, as a practical matter, 'evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted'".[30] Accordingly, the question for

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[24] *IMM*, 318 [64], 320 [75]-[76]
[25] *R v Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228 ("*Shamouil*"); followed in *KMJ v Tasmania* [2011] TASCCA 7; (2011) 20 Tas R 425.
[26] *Dupas v The Queen* [2012] VSCA 328; (2012) 40 VR 182 ("*Dupas*").
[27] *Papakosmas* [1999] HCA 37; (1999) 196 CLR 297, 323 [86].
[28] *Adam v The Queen* [2001] HCA 57; (2001) 207 CLR 96, 115 [60].
[29] *Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228.
[30] *IMM*, 309 [26]-[27], citing *Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228.

the judicial officer when assessing probative value is what is *open* for the jury to conclude, not what they are *likely* to conclude.[31]

21. In Victoria, the Court of Appeal in *Dupas v The Queen*,[32] sitting as a bench of five (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA), declined to follow the NSW approach, indeed regarding it as "plainly wrong".[33] This position was underpinned by regarding s 137 as a critical "safeguard" to be applied by a trial judge to minimise the risk of wrongful convictions.[34] However, applying the approach from *Christie*, the Court of Appeal accepted that the judicial officer must assume that the jury would accept the witness as truthful (credibility).[35]

22. In *R v XY*,[36] the NSW Court of Criminal Appeal sat as a bench of five to consider its position in light of *Dupas*, and the majority maintained the approach from *Shamouil*.

23. Explaining the differences, David Hamer writes "[t]he NSWCCA had taken a pro-admissibility approach… while the VCSA favoured stronger trial judge regulation".[37]

24. In *IMM*, the majority of the High Court (French CJ, Kiefel, Bell and Keane JJ), influenced by the extra-judicial writings of the Hon JD Heydon KC, preferred the NSW and Tasmanian approach.[38] In a key paragraph the majority stated:

> The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence. This follows from the words "if it were accepted", which are expressed to qualify the assessment of the relevance of the evidence. This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether the evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact. There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.[39]

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31 Ibid, 309 [28].
32 *Dupas* (2012) 40 VR 182.
33 *IMM*, 310 [29].
34 Ibid, 308-9 [25], citing *Dupas* [2012] VSCA 328; (2012) 40 VR 182, 242 [226].
35 *IMM*, 310 [31].
36 [2013] NSWCCA 121; (2013) 84 NSWLR 363.
37 David Hamer, "The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*" 41 Melbourne University Law Review 689, 725.
38 *IMM*, 312 [39].
39 Ibid. Our emphasis added.

25. Further:

> The assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, *be taken at its highest*.[40]

26. However, as will be explained below, the majority also said that "the circumstances surrounding the evidence may indicate that its highest level is not very high at all".[41]

27. In conclusion, the majority held (apart from in the limiting case) there must be an assumption made that the jury will accept the evidence, which subsumes both reliability and credibility.[42]

The Foggy Identification Example

28. The Hon JD Heydon KC, writing extra-judicially,[43] said:

> Even if the evidence is to be accepted in the sense of being taken at its highest level, the circumstances surrounding the evidence may indicate that its highest level is not very high at all. One example would be an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified and whose racial background differed from that of the person identified. Is it right to say: 'Well, it is an identification, and we must take it at its highest — as high as any other identification'? Or should we say: 'It is an identification, but rather a weak one?' A very weak identification at its highest is not equivalent to a very strong identification — only a very weak one. From that point of view it does not matter whether one takes the Victorian approach, which would seek to isolate and evaluate in detail particular weaknesses in the evidence, or the New South Wales approach, which takes inherently unconvincing evidence at its highest, but treats it only as weak because it is inherently unconvincing.[44]

29. This analysis was cited with approval by majority in *IMM* (French CJ, Kiefel, Bell and Keane JJ):

> *It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all.* The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). *On another*

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[40] Ibid, 313 [44]. Our emphasis added.
[41] *IMM*, 314-5 [50].
[42] Ibid, 315 [52].
[43] J D Heydon, "Is the Weight of Evidence Material to Its Admissibility?", (2014) Vol 26, *Current Issues in Criminal Justice* 219.
[44] Ibid, 234.

> *approach, it is an identification, but a weak one because it is simply unconvincing*. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.[45]

30. This raises some questions. Why is such evidence unconvincing? According to whom? According to what standards? Why does this approach not require an assessment of reliability to be made by the judicial officer?[46]

The Dissents in *IMM*

31. In dissent, Gageler J held that the issue was one of statutory construction.[47] However, he observed that on either view of the debate the judge was not to usurp the fact-finding role of the jury,[48] and in most cases the outcome would be the same on either approach.[49]

32. Gageler J stated:

> The difference between the two approaches, and the narrowness of the difference between them, can be illuminated by considering an example used by the parties to the appeal to illustrate their competing arguments. The example was of identification evidence given by a witness whose observation was made very briefly in foggy conditions and in bad light. The parties agreed that the probative value of the identification evidence would be high if assessed on the assumption that the evidence would be accepted. It was submitted for the appellant, however, that the probative value of the identification evidence would be low if that assumption were not made. I cannot agree. The question on which the judge's assessment of the probative value of the identification evidence would turn in the example in the absence of the assumption would be whether the jury could rationally find the identification evidence to be reliable. If not, the evidence would be of no probative value. If so, the evidence would remain of high probative value. It would not matter that the obvious weaknesses in the evidence gave rise to a real prospect that the jury would ultimately not accept the witness's identification. Short of being so extreme as to allow the judge to determine at the time that the evidence was sought to be adduced that it would be irrational for the jury to accept the evidence, the weaknesses would not bear on its probative value.[50]

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[45] *IMM*, 314-5 [50]. Our emphasis added. Citation omitted.

[46] In *Tasmania v Farhat* [2017] TASSC 66; (2017) 29 Tas R 1, Pearce J stated at 14 [41]:

> I confess to some difficulty in resolving the proper approach to the evidence in light of the identification example given by the majority in *IMM*. Identification evidence is unconvincing but that is because it is unreliable.

[47] *IMM*, 321 [79].

[48] Ibid, 323 [88].

[49] Ibid, 324 [93].

[50] Ibid, 324 [92].

33. Gageler J agreed with McHugh J in *Papakosmas* that an assessment of probative value necessarily involves considerations of reliability, and that was a view "compelled by the language structure and evident design of the Evidence Act".[51] Gageler J observed that "[t]he conceptual framework which the statutory language erects therefore admits of the possibility that relevant evidence will lack probative value because it is not reliable".[52] Further, it was clear from the ALRC reports that there was a conceptual distinction between relevance and probative value, and the statutory language was a "deliberate legislative design".[53]

34. However, Gageler J did not agree with Nettle and Gordon JJ (also in dissent) that the background of the common law provided assistance on the issue.[54]

35. Nettle and Gordon JJ also preferred the approach of McHugh J in *Papakosmas*, relying on the clear statutory language used in the Act.[55] Their Honours also emphasised the ALRC reports,[56] and unlike Gageler J gave weight to the common law background which pointed to considerations of credibility and reliability being taken into account.[57] Their Honours observed:

> Such an assessment [of potentially unreliable evidence] is not in any sense a usurpation of the jury's function. It is the discharge of the long recognised duty of a trial judge to exclude evidence that, because of its nature or inherent frailties, could cause a jury to act irrationally either in the sense of attributing greater weight to the evidence than it is rationally capable of bearing or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.[58]

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[51] Ibid, 325 [96].
[52] Ibid, 326 [96].
[53] Ibid, 326 [97].
[54] Ibid, 325 [95].
[55] Ibid, 337 [140].
[56] Ibid, 338-9 [142]-[143].
[57] Ibid, 339 [144]. See also 345 [158].
[58] Ibid, 346 [161].

Principles from *IMM* – how to conduct the balancing exercise

36. **The limiting case**: It is important to remember that, on the majority approach from *IMM*, there is a "limiting case" (an exception) where a judicial officer is able to properly find that the evidence is so flawed that it would be *irrational* for the jury to accept it. Such evidence would fail to meet the threshold of relevance.

37. **The evidence must be taken at its highest**: In the vast majority of cases, when assessing probative value, issues of reliability[59] will be a matter for the jury. The judicial officer is to assume "the evidence is accepted".[60]

38. As held by Ferguson CJ, Niall and Weinberg JJA in *Hague v The Queen*:[61]

> *IMM* established that the assessment of probative value must be approached in the same way as the assessment of relevance, that is, on the assumption that the jury will accept the evidence. This court held that the judge had erred by treating the 'inherent contradictions' and 'internal inconsistencies' between [a witness's] successive statements to police as relevant to the probative value of the evidence for the purpose of the evaluative task in s 137 of the *Evidence Act*. That was erroneous because those matters went to the credibility and reliability of the evidence, the very matters which the majority in *IMM* said must be assumed for the purpose of the s 137 assessment.[62]

39. **An assessment of probative value requires considering all the evidence**: The judicial officer must consider probative value in context of other evidence.[63]

40. **Notwithstanding the presumption of reliability, evidence can be "simply unconvincing" and of low probative value**: It is also clear from *IMM* that, when assessing probative value – even assuming matters of credibility and reliability – the probative value of a piece of evidence might not be high (and therefore is more likely to be excluded pursuant to s 137 when conducting the balancing exercise).

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[59] The Dictionary of the EA defines credibility as including issues of reliability:
> **credibility** of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation;
> **credibility** of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

[60] *IMM*, 313-4 [45] (French CJ, Kiefel, Bell and Keane JJ).

[61] [2019] VSCA 218 ("*Hague*").

[62] Ibid, [95].

[63] Ibid, [14]. See also *Aytugrul v The Queen* [2012] HCA 15; (2012) 247 CLR 170, 185-6 [30] (French CJ, Hayne, Crennan and Bell JJ), and *IMM*, 313-4 [45] (French CJ, Kiefel, Bell and Keane JJ).

Unresolved issues from *IMM*

41. Does reliability affect the other side of the weighing exercise?

    a. In *IMM*, the majority appeared to accept (or at least did not criticise) the approach of Basten J in *XY* that reliability can be taken into account when making an assessment of the risk of unfair prejudice under s 137;[64]

    b. See also *R v Mundine*:[65]

> Although it is not open to a court performing the balancing exercise set by s 137 to take into account, on the assessment of probative value questions of the weight of the evidence, that is not so when assessing the issue of asserted "unfair prejudice";[66]

    c. Odgers regards this as a "moot question";[67]

    d. In *Pocket Evidence Law*, Beale J is sceptical of this approach; it is hard to reconcile with the evident policy of the Act, and would seem to pay lip service to the principle of taking the evidence at its highest when applying s 137.[68]

42. It remains unsettled as to whether reliability can be considered by a judicial officer when applying the *Haddara* discretion.[69] In *Haddara*, Redlich and Weinberg JJA held there subsists "a broad common law discretion to exclude evidence which is unfair to an accused".[70] While s 137 of the EA can be seen to have replaced the *Christie* discretion, the general common law discretion remains.[71] In dissent, Priest JA held that s 138 of the EA (on improperly and unlawfully obtained evidence) had abrogated the common law discretion.[72]

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64 *IMM*, 317 [57].
65 [2008] NSWCCA 55; 182 A Crim R 302.
66 Ibid, 310 [44] (Simpson J, McClellan CJ agreeing at [1] and Grove J agreeing at [2]).
67 Stephen Odgers, *Uniform Evidence Law* (18th Ed), p 1374 [EA.137.150].
68 Page 42.
69 *Haddara v The Queen* [2014] VSCA 100; (2014) 43 VR 53.
70 Ibid, 58 [14].
71 Ibid, 77 [70].
72 Ibid, 104 [170].

Criticisms of *IMM*

43. Since *IMM* there have been a number of articles published that have been critical of the majority's approach, and warning of the potential deleterious consequences.

44. Some examples include:

    a. Jason Chin, Gary Edmund and Andrew Roberts, "Simply Unconvincing: The High Court on Probative Value and Reliability in the *Uniform Evidence Law*":[73]

        - The authors state "the extent to which the convincingness of evidence can be distinguished from its reliability is conceptually dubious and, more importantly, unlikely to assist legal practitioners".[74] This has led to "a degree of incoherence in the jurisprudence";[75]

        - The article considers almost four years of post-*IMM* jurisprudence and authors argue that "[b]arring the use of reliability as a means of understanding probative value in favour of an approach involving the inchoate notion of evidential convincingness has produced confusion and inconsistency";[76]

    b. The Hon Chris Maxwell AC (former President of the Court of Appeal who was on the Court in *Dupas*), "Preventing Miscarriages of Justice: The Reliability of Forensic Evidence and the Role of the Trial Judge as Gatekeeper":[77]

        - This article focusses on issues of expert evidence and argues that *IMM* has resulted in a trial judge being unable to perform the role as "gatekeeper", resulting in the urgent need for legislative intervention;

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[73] (2022) 50(1) *Federal Law Review* 104.
[74] Ibid, 5.
[75] Ibid, 22.
[76] Ibid, 36.
[77] (2019) 93 *Australian Law Journal* 642. See also Gary Edmund, "Icarus and the Evidence Act: Section 137, Probative Value and Taking Forensic Science Evidence at its Highest" (2017) 41 *Melbourne University Law Review* 106. See also Jason Chin, Haley Cullen and Beth Clarke, "The Prejudices of Expert Evidence" 48(2) *Monash University Law Review* 59.

c. David Hamer, "The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*":[78]

- This article considers the background to the dispute in *IMM*, and concludes:

> [T]he majority judgment is confusing and seemingly self-contradictory. The trial judge should assume the challenged evidence is truthful and reliable and take it as complete proof of the facts stated, but then, in certain situations, for unstated reasons, the challenged evidence may be taken to provide only weak support for the facts stated…
>
> [I]t is unfortunate that the majority failed to make their reasoning clearer. In several respects the minority approach is preferable. The trial judge should consider the probative value that could reasonably be attributed to the evidence and take the evidence at its highest. This is a simpler structure within which relevant considerations can be brought to account, including any epistemic advantages of the jury. This approach avoids the unworkable absoluteness of the majority's complete-proof principle, and is more consistent with the language of the UEL.[79]

Part C: Categories of Evidence

45. Many authorities have considered different categories of evidence and how they intersect with s 137. *Pocket Evidence Law* provides a useful summary of the main categories and lists the main authorities for each category.[80]

46. The categories include:

a. Hearsay;

b. Opinion;

c. Admissions;

d. Context;

e. Identification;

f. Credibility; and

g. Character.

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[78] (2017) 41 *Melbourne University Law Review* 689.
[79] Ibid, 725-6.
[80] *Pocket Evidence Law*, p 40.

Hearsay

47. Many of the cases that deal with s 137 and hearsay also involve considerations of other categories of evidence such as s 97 (tendency) or particular exceptions to the hearsay rule, such as s 65 (hearsay exception in criminal trials where maker unavailable) and s 66 (hearsay exception in criminal trials where maker available).

R v Bauer [2018] HCA 40; (2018) 266 CLR 56 – s 97 and s 66

48. The accused was found guilty and convicted of 18 charges of sexual offences committed against the complainant, his foster daughter. It was a single complainant case. The Crown had given notice that it would rely on tendency evidence of charged and uncharged acts pursuant to s 97 of the *EA*. The trial judge ruled that the tendency evidence was admissible on the basis that it showed the accused had an ongoing sexual interest in the complainant and there was a pattern of conduct that the accused engaged in to fulfil that sexual interest.

49. The Crown also sought to lead complaint evidence pursuant to s 66 of *EA* where the complainant had a conversation with a school friend to whom the complainant disclosed that she had been sexually assaulted. The trial judge admitted the evidence pursuant to s 66.

50. The Court of Appeal allowed an appeal on the basis, amongst other things, that the trial judge erred in admitting the tendency evidence and in admitting the complaint evidence.

51. The High Court reversed the Court of Appeal decision, finding that the tendency evidence had significant probative value and was not excluded by s 137. The complaint evidence was admissible under s 66 and its prejudicial effect did not outweigh the probative value.

52. The High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) referred to *IMM* and discussed the issue of when evidence was not open to be accepted:

> As was established in *IMM*, that is [assessing probative value is] a determination to be undertaken taking the evidence at its highest. Accordingly, **unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence**, the determination of probative value

> excludes consideration of credibility and reliability. Subject to that exception, the risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and, therefore, is an assessment which must be left to the jury.[81]

53. Their Honours observed that it is not for the trial judge to say what probative value the jury should give to a piece of evidence, but only what probative value the jury acting rationally and properly directed *could* give to the evidence: "…unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value of the evidence must be assessed, for the purposes of s 137, at its highest."[82]

Papakosmas v The Queen [1999] HCA 37; (1999) 196 CLR 297

54. The appellant and complainant worked together and were both present at a Christmas party held by their employer. The appellant was accused of forcing the complainant to have sexual intercourse with her. The fact of sexual intercourse was not disputed by the appellant, but he said that it was consensual. Shortly after the alleged incident, the complainant was seen by a work colleague crying. The colleague asked the complainant what was wrong and the complainant said that she had been raped by the appellant. The complainant repeated that to another colleague shortly after and that colleague's evidence was that the complainant was crying uncontrollably and appeared very distressed. The issue was whether the complaint evidence was admissible pursuant to s 66.

55. McHugh J said: "[e]vidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted."[83] McHugh J also cited the ALRC Interim Report on "unfair prejudice":

> By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that **appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action** may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.[84]

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[81] *R v Bauer* [2018] HCA 40; (2018) 266 CLR 56, 91 [69].
[82] Ibid 103 [95].
[83] *Papakosmas v The Queen* [1999] HCA 37; (1999) 196 CLR 297, 325 [91].
[84] Ibid 325 [92]. Our emphasis added.

Bray (a pseudonym) v The Queen [2014] VSCA 276; (2014) 46 VR 623

56. The accused was charged with sexual offences against the complainant. The complainant had made a statement to police and given evidence at the committal, where she was cross-examined. However, the complainant died before she could give evidence at the trial. The prosecution sought to lead her evidence pursuant to s 65 of the *EA*. The trial judge allowed the prosecution to lead the evidence and rejected the objection of the accused that the evidence ought to be excluded under s 137. The complainant was cross-examined at committal, but not about the issue of consent, which the accused was seeking to raise at trial.

57. Santamaria JA (with whom Maxwell P and Weinberg JA agreed) outlined:

> The fact that it is proposed, in a criminal proceeding, to lead hearsay evidence in the form of a previous representation made in the course of giving evidence in another proceeding will commonly raise the danger of unfair prejudice within the meaning of s 137 of the Act. However, in engaging in the balancing exercise under that section, it must be remembered that s 65(3) is a provision specifically directed to criminal proceedings. It stipulates that one or other of two conditions must be satisfied for admissibility: either (a) the defendant in the criminal proceeding cross-examined the person who made the previous representation, or (b) the defendant had a reasonable opportunity to do so. In each case, the three step analysis contained in s 137 must be carried out. This means, first, an assessment of probative value, next an assessment of the danger of unfair prejudice, and lastly, the weighing process. **The fact that a defendant chose not to avail himself or herself of the opportunity to cross-examine the maker of a representation cannot, by itself, mean that the evidence must be excluded. Such a principle would subvert the policy of the Act as manifested in the statutory exceptions to the hearsay rule**.[85]

58. The applicant in *Bray* ultimately had his conviction overturned. This was due to the verdict being unsafe and unsatisfactory because of the unreliability of the complainant's evidence.[86] However, even when overturning the conviction, the Court of Appeal dismissed a ground of appeal in respect of s 137 and said that nothing arose between the original ruling and the trial which changed the determination of that issue. The Court said that the probative value of the evidence still outweighed the danger of unfair prejudice.[87]

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[85] *Bray (a pseudonym) v The Queen* [2014] VSCA 276; (2014) 46 VR 623, [70]. Our emphasis added.
[86] *Omot v The Queen* [2016] VSCA 24.
[87] Ibid, [16].

Snyder v The Queen [2021] VSCA 96

59. The applicant was charged with a number of sexual offences against a single complainant. The complainant, 'EW' suicided in 2019 and was 14 to 15 years old at the time of the alleged offending. Before her death, EW gave two statements to police in May and June 2018. EW was cross-examined at the committal at length. At issue was whether the complainant had 'false memories' of being assaulted.

60. There was expert evidence that there was a high probability that the complainant's memory had been contaminated or influenced by information that she had read, including about the applicant. The prosecution sought to rely on s 65 to have EW's evidence admitted and the applicant objected pursuant to s 137, as well as the *Haddara* discretion. The trial judge ruled that the evidence was admissible and the applicant sought leave to appeal that ruling.

61. Priest, Kyrou and Kaye JJA dismissed the interlocutory appeal. In discussing the probative value of the evidence, their Honours outlined:

> We do not accept the contention advanced by the applicant's counsel to the effect that, because of background circumstances that impinge on the accuracy of her memory, the evidence of EW's representations is of limited probative value. That contention is, we consider, at odds with *IMM*, in which, as we have said, it was made clear that the assessment of the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue requires that the possible use to which the evidence might be put be taken at its highest. The caveat to that proposition — that the circumstances surrounding the evidence may indicate that if the probative value of the evidence, at its highest level, is not very high — is applicable to the particular circumstances of the witness and to his or her perception of the matter to which the evidence relates. Thus, a purported identification briefly in foggy conditions in bad light is inherently unreliable, so that, taken at its highest, the probative value of that evidence is not very high at all.
>
> There was nothing in the circumstances in which they occurred which may have adversely affected EW's perception of relevant events. She provided detailed representations concerning sexual activity in which she was directly involved. Thus, taken at its highest, the probative value of her representations is high. Issues relating to the quality and nature of her memory are directed to the reliability (and possibly credibility) of EW's representations, and are not the kind of circumstances recognised in *IMM* — an observation made very briefly in foggy conditions and in bad light — that would compel a conclusion that the probative value of the evidence is weak.[88]

[88] Citations omitted.

62. In *Pocket Evidence Law*, Beale J argues that *Snyder* demonstrates that matters that primarily bear upon a witness's veracity are "off limits"; the take away message from *Snyder* is that circumstances that possibly affect a witness's perception of events can be considered but not circumstances that affect a witness's memory.[89]

63. There seems to be a tension between *Snyder* and *Bauer*. As outlined above, the High Court said at [69] in *Bauer* that "unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability". In *Snyder*, there was expert evidence opining that there was a high probability that material the complainant read about the accused and unrelated cases had been incorporated into her subsequent memories, and that it was more probable than not that many of the events contaminated the complainant's evidence.[90] The issues with the complainant's evidence in *Snyder* seem to be the types of issues that would mean that a jury could not rationally accept the evidence and thus the evidence has scant probative value. However, this aspect of *Bauer* was not specifically discussed in the Court of Appeal's decision in *Snyder*.

64. Other cases that have considered s 65 and s 137:

    a. *R v Darmody* [2010] VSCA 41; (2010) 25 VR 209;

    b. *DP v BB & QN* [2010] VSCA 211; (2010) 29 VR 110;

    c. *ISJ v The Queen* [2012] VSCA 321; (2012) 38 VR 23;

    d. *Asling v The Queen* [2018] VSCA 132;

    e. *Bufton v The Queen* [2019] VSCA 96;

    f. *Thomas v Director of Public Prosecutions* [2021] VSCA 269;

    g. *Huici v The King* [2023] VSCA 5.

65. *Singh v The Queen* [2011] VSCA 263; (2011) 33 VR 1 also considered s 66 and s 137.

66. *Schaenker v The Queen* [2018] VSCA 94 looked at s 60 and s 137.

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[89] *Pocket Evidence Law*, p 41.
[90] *Snyder v The Queen* [2021] VSCA 96 [30], [31].

Opinion

67. A number of authorities have considered the role that s 137 plays in respect of opinion evidence.

Aytugrul v The Queen [2012] HCA 15; (2012) 247 CLR 170

68. In a murder trial, expert evidence was given about the analysis of mitochondrial DNA of a hair found on the deceased's thumbnail which was consistent with the accused. The evidence considered how common the DNA profile found in the hair was in the community. The results were expressed in two ways: that one in 1,600 people in the general population would be expected to share the DNA profile that was found in the hair (a frequency ratio), and that 99.9 percent of people would not be expected to have a DNA profile matching that of the hair (an exclusion percentage). The accused objected to the admission of the exclusion percentage, including on the basis of s 137.

69. French CJ, Hayne, Crennan and Bell JJ said "…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."[91]

70. The appellant had argued that 99.9% would be rounded up by the jury to 100% and this would mean the evidence would be given more weight than was warranted. However, French CJ, Hayne, Crennan and Bell JJ rejected that argument and observed that the jury would be given an explanation about how the exclusion percentage had been derived from the frequency ratio, which had to be taken into account when assessing any unfair prejudice.[92] Their Honours said that "[i]n assessing the danger of unfair prejudice to a defendant, regard must be had to the whole of the evidence that is to be given, particularly by the witness to whose evidence objection is taken."[93]

71. Heydon J also ruled that the evidence was admissible. That was because the appellant had conceded that the "frequency estimate" was admissible, and detailed

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[91] *Aytugrul v The Queen* [2012] HCA 15; (2012) 247 CLR 170, 185 [28].
[92] Ibid,185-6 [30].
[93] Ibid.

evidence was given about how the "exclusion percentage" evidence was derived from the "frequency estimate" and about how they had identical significance.[94] His Honour said that once it was accepted that the frequency ratio evidence was admissible, the exclusion percentage evidence did not create a danger of unfair prejudice.[95]

Tuite v The Queen [2015] VSCA 148; (2015) 49 VR 196

72. The accused was charged with aggravated burglary, rape, indecent assault and intentionally causing injury. Expert evidence was to be called at the trial about the analysis of DNA samples from the crime scene. The DNA evidence was presented in the form of a likelihood ratio. The ratios had been calculated using a recently-developed analytical method, known as STRmix, which was introduced into Victoria in March 2013.

73. The accused challenged the admissibility of the proposed DNA evidence on the basis that the new methodology had not been shown to be sufficiently reliable for use in criminal trials; it was largely untested and had not been generally accepted by the forensic science community. The trial judge admitted the evidence and the accused sought leave to appeal against the ruling.

74. Dismissing the appeal, the Court of Appeal said that s 79 of the *Evidence Act* left no room for reading in a test of evidentiary reliability as a condition of admissibility.[96] Instead, the test of evidentiary reliability for expert evidence is to be determined as part of the assessment which the Court undertakes under s 137 (at [10] and [82]).

75. *Tuite* does not sit well with *IMM*, which requires the assumption of credibility and reliability when assessing the probative value of evidence. Beale J in *Pocket Evidence Law* says that the consequences in respect of the application of s 137 to expert opinion is unclear. However, citing *Xie v The Queen*,[97] Beale J says that *IMM* left open the possibility of considering reliability issues when assessing the "danger of unfair prejudice".

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[94] Ibid, 203-4 [75]-[76].
[95] Ibid.
[96] *Tuite v The Queen* [2015] VSCA 148; (2015) 49 VR 196; 217 [70]; 218 [76] (Maxwell ACJ, Redlich and Weinberg JJA).
[97] [2021] NSWCCA 1, [301].

DPP v Wise (a pseudonym) [2016] VSCA 173

76. The accused was charged with rape of "MA". The accused and MA were guests at a barbecue. MA and his girlfriend, Ms "VL" were the first guests to arrive. The barbecue went into the night and the attendees drank a large quantity of alcohol. At about 1.30 am, MA's girlfriend Ms VL had sex with MA's brother "MP" in the bathroom of the house. When this was discovered, MA became violent and had to be physically restrained by at least three men, including the accused. The trial judge described it as "a great deal of physical activity involved in attending to his restraint". MA was told to go and "sleep it off". He said that he woke up later feeling a blanket being pulled off him and that the accused had pulled down his pants and performed fellatio on him.

77. MA's underpants were seized and forensically analysed. A DNA sample was taken from the inside front panel and towards the centre of this area, saliva was detected on the inside front panel of the underwear which was also submitted for DNA analysis. The first sample on the inside front panel had DNA from three contributors including the accused, Ms VL and MA. The human saliva sample only had MA's DNA present.

78. The trial judge refused to admit the DNA evidence. In refusing leave to appeal, the Court of Appeal (Warren CJ, Weinberg and Priest JJA) said "[i]n providing that probative value is to be weighed against the danger of unfair prejudice … s 137 does require that the evidence be taken at its highest in the effect it could achieve on the assessment of the probability of the existence of the facts in issue."[98]

79. In considering the probative value of the evidence, the Court said that at its highest the evidence was that the accused's DNA was found in a mixture of DNA from MA and Ms VL. Given this, it would not be open to a jury to conclude that the accused's DNA was deposited on or near MA's penis due to fellatio. The evidence of the accused's DNA being present in the underwear could not establish more than that MA had come into contact with the accused or with some other person or object that had come into contact with the accused.[99]

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[98] *DPP v Wise (a pseudonym)* [2016] VSCA 173, [51].
[99] Ibid, [54]-[55].

80. Importantly, the Court discussed the potential unfair prejudice of the "CSI Effect"[100] and said that despite the DNA evidence having little or no probative value, "[b]y virtue of its scientific pedigree, however, a jury will likely regard it as being cloaked in an unwarranted mantle of legitimacy — no matter the directions of a trial judge and give it weight that it simply does not deserve. The danger of unfair prejudice is thus marked, and any legitimate probative value is, at best, small."

Volpe v The Queen [2020] VSCA 268

81. The accused was charged with murder. A number of impressions, including what looked like shoe imprints, were found close to the body of the deceased. These were examined by a crime scene examiner, Sgt Kohlmann, who took photographs and plaster casts of the impressions. The police seized a right, size 11 women's running shoe from a wooden stand in the hallway of the accused's house (the matching left shoe was not located). A DNA sample taken from the shoe rendered a mixed, partial DNA profile with three contributors, including the accused. Sgt Kohlmann examined the shoe and performed various tests. The accused objected to the evidence of his opinion that the shoe could have made an impression near the body, but the evidence was admitted.

82. The accused was convicted and appealed to the Court of Appeal, which allowed the appeal on the basis that the evidence should have been excluded pursuant to s 137.

83. The Court of Appeal (Priest, T Forrest and Weinberg JJA) observed that Sgt Kohlmann's evidence was not that the shoe actually left the impression, but that it *could have* left the impression.[101] Their Honours also found that the trial judge conflated the notion of probative value with the importance of the evidence to the prosecution case – but these are distinct concepts. The Court said: "[t]he mere fact that a piece of evidence is important to the prosecution case, because it is the only evidence on a topic, cannot imbue the evidence with probative value. Evidence

[100] Ibid, [70]. See also *Lang v The Queen* [2023] HCA 29; (2023) 97 ALJR 758, [17] (Kiefel CJ and Gageler J):

> The prejudicial effect which might in an appropriate case be required to be weighed against the probative value of an expert opinion has properly been recognised to be capable of including a risk that a jury might give the opinion more weight than it deserves by reason of a perception of the status of the expert - the so-called "white coat effect" - or by reason of difficulty in assessing information of a technical nature.

[101] *Volpe v The Queen* [2020] VSCA 268 [38].

which is of slight probative value will not have its quality or strength enhanced simply because it is important to the prosecution case."[102]

84. The Court ruled that the evidence ought to have been excluded because the probative value was slight[103] and there was a real risk that the evidence might be used by the jury as proving more than it was capable of doing.[104] At its highest the evidence just showed that the accused had access to a shoe that might have left the impression near the body of the deceased.

85. Other authorities that have considered opinion evidence and s 137:

    a. *R v DG* (2010) 28 VR 127; [2010] VSCA 173;

    b. *Aytugrul v The Queen* (2012) 247 CLR 170;

    c. *MA v R* (2013) 40 VR 564; [2013] VSCA 20;

    d. *Meade v The Queen* [2015] VSCA 171;

    e. *DPP v Paulino* (2017) 54 VR 109; [2017] VSCA 38;

    f. *Ramaros v The Queen* [2018] VSCA 143;

    g. *Vyater v The Queen* [2020] VSCA 32;

    h. *Xie v The Queen* [2021] NSWCCA 1.

Admissions

Ebrahimi v The Queen [2022] VSCA 65

86. The accused was charged with rape, assault and related offending, as well as a charge of perverting the course of justice on the basis of an offer of payment to the complainant to withdraw the allegations. The Crown wanted to rely on the offer of payment as incriminating conduct. The accused objected to that evidence, amongst other things, on the basis of s 137 and argued that the reason for the offer of payment was not an admission of guilt, but that it was because he wanted to be released from remand. The accused argued that leading the evidence of payment was unfairly

[102] Ibid, [70].
[103] Ibid, [71].
[104] Ibid, [74].

prejudicial because it would leave him in a position where he would have to reveal to the jury that he was in custody on remand.

87. The Court of Appeal (Maxwell P, Sifris and Macaulay JJA) said that the probative value of the evidence was high, once it was accepted that a properly instructed jury could be satisfied that the conduct amounted to an implied admission of guilt (incriminating conduct).[105] In respect of the unfair prejudice, the Court said the trial judge was correct that the unfairness would only come about if the accused chose to lead the evidence of being on remand.[106] The Court agreed with the trial judge who said this was no different to accused persons often having to make difficult decisions in choosing how to run a case and that any danger of unfair prejudice could be addressed by directions.[107]

88. Another authority that considers admissions and s 137 is *WK v The Queen* [2011] VSCA 345; (2011) 33 VR 516.

Context

Daniels (a pseudonym) v The Queen [2016] VSCA 291

89. The accused was charged with offences relating to two sisters and was convicted at two separate trials (one for each sister). The prosecution was allowed to lead evidence of text messages between the complainants which contained allegations of sexual assault. The trial judge had admitted that evidence, but limited its use pursuant to s 136 to be used as context evidence. The trial judge gave directions about the limitation on use and also redacted some of the messages.

90. The Court of Appeal (Beach, Kaye and McLeish JJA) said that the probative value of the evidence was high[108] (and the judge's limiting of how the evidence could be used meant that the unfair prejudice was "meaningfully reduced").[109]

[105] *Ebrahimi v The Queen* [2022] VSCA 65 [37].
[106] Ibid, [45].
[107] Ibid.
[108] *Daniels (a pseudonym) v The Queen* [2016] VSCA 291, [36]-[40].
[109] Ibid, [35].

Aleski (a pseudonym) v The Queen [2020] VSCA 124

91. The accused was charged with sexual offences against a single complainant. Some uncharged acts were admitted as tendency evidence. Another uncharged act, of lifting the complainant's skirt with his legs, was not admitted as tendency evidence but instead admitted as context or relationship evidence. The trial judge said that the evidence might be seen as part of a narrative which showed a progression of interest in the complainant. The accused was convicted and appealed to the Court of Appeal.

92. The Court of Appeal (Maxwell P, Niall and Weinberg JJA) outlined that the evidence itself, compared to the other tendency evidence that had been admitted, was benign[110] and it had some, but not great, probative value.[111] However, the Court of Appeal did not agree that the danger of unfair prejudice to the accused, that the jury might misuse the evidence as tendency evidence, outweighed its probative value. This was because any unfair prejudice was addressed by directions and the submissions made by counsel for the accused when he identified inconsistencies in the evidence and argued that the act was immature and far removed from the alleged offending.[112]

93. Another authority that considers context evidence and s 137 is *Director of Public Prosecutions (Vic) v Martin* [2016] VSCA 219; (2016) 261 A Crim R 538.

Identification

Bayley v The Queen [2016] VSCA 160; (2016) 260 A Crim R 1

94. The accused was charged and convicted of the murder of Jill Meagher. Whilst serving a sentence for that offending, he was convicted in three separate trials of rape and other offences against three female complainants. He appealed against the convictions in the first and third trials.

95. The complainant in the first trial had seen a missing person's page for Jill Meagher on Facebook and was flicking through it when she saw a picture of Adrian Bayley and said that she knew immediately that this was the person who had raped her. She

[110] *Aleski (a pseudonym) v The Queen* [2020] VSCA 124, [64].
[111] Ibid, [65].
[112] Ibid, [66].

called Crime Stoppers after seeing the photograph on Facebook. At the time she made the call she was aware of media that Ms Meagher's body had been found and she knew from Facebook that Adrian Bayley had been arrested for the rape and murder of Ms Meagher. Later, she identified Bayley from a photoboard that contained 12 pictures. The complainant agreed that she had seen Bayley's face in the media a number of times, from the time of her Facebook identification up until she identified him on the photoboard. At the time she identified him from the photoboard, she knew that Bayley had been charged with the offences against Ms Meagher, as well as offences against her.

96. Bayley argued, amongst other things, that in the first trial the judge erred in permitting Facebook identification evidence and subsequent photoboard identification to be led. At the time, the complainant knew that the accused had been charged with the rape and murder of Jill Meagher. He argued that the evidence's probative value was outweighed by the danger of unfair prejudice. The Court of Appeal allowed the appeal in respect of the first trial and said that the identification evidence was admitted in error.

97. The Court (Warren CJ, Weinberg and Priest JJA) said:

> Adopting the approach described by Heydon, and seemingly endorsed by the majority in *IMM*, [the complainant's] purported identification from Facebook was, in our view, not merely weak, but 'simply unconvincing'. Moreover, given the circumstances of the Facebook identification and the publicity surrounding the applicant's known involvement in the Jill Meagher case, the later photo board identification was virtually of no probative value whatever.[113]

98. The Court said that the probative value was scant,[114] and the risk of unfair prejudice outweighed any probative value.[115]

<u>*R v Dickman* [2017] HCA 24; (2017) 261 CLR 601</u>

99. The accused was charged with intentionally causing serious injury and making a threat to kill. The complainant described his attacker as an "old man" with a long beard and ponytail who was wearing an "army" style of jacket. The complainant had identified the accused from a photoboard containing pictures of eleven men,

[113] *Bayley v The Queen* [2016] VSCA 160; (2016) 260 A Crim R 1, 12 [55].
[114] Ibid, [61].
[115] Ibid, [56], [84] and [97].

including Dickman, around two years after the alleged offending. Not long after the offending, the complainant had identified another person as being the assailant from a photoboard which did not contain an image of Dickman. That person had an alibi, so was excluded. The complainant had also misidentified from photoboards other persons he said were involved. The complainant had later been informed that his original identification of the "old man" was mistaken. The trial judge admitted the photoboard evidence of the complainant identifying Dickman.

100. Dickman appealed to the Court of Appeal which found that the trial judge ought to have excluded the identification on the basis of s 137. The Crown appealed that decision to the High Court and the High Court reversed the decision of the Court of Appeal.

101. The High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) discussed that despite the probative value of the evidence being low, this did not require its exclusion unless the probative value was outweighed by the danger of unfair prejudice. The Court of Appeal only referred to the unfair prejudice being the "seductive quality" of identification evidence. However, that seductive quality meant that the jury must be warned on the dangers of convicting on identification evidence where its reliability is disputed.[116]

102. The Court said:

> Unfair prejudice may be occasioned because evidence has some quality which is thought to give it more weight in the jury's assessment than it warrants or because it is apt to invite the jury to draw an inference about some matter which would ordinarily be excluded from evidence. The "rogues' gallery" effect of picture identification evidence creates a risk of the latter kind because the appearance of some photographs kept by the police may invite the jury to infer that the accused has a criminal record.[117]

103. However, the Court found that the trial judge's conclusion that the danger of unfair prejudice was minimal and could adequately be addressed by directions was justified. There was no error in the trial judge admitting the identification evidence. The limitations of the identification of Dickman were apparent in the trial.[118]

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[116] *R v Dickman* [2017] HCA 24; (2017) 261 CLR 601, 615 [44]-[45].
[117] Ibid, 616 [48].
[118] Ibid 619, [57].

104. The applicant was charged with a co-accused named Perry for a number of offences, including the aggravated offence of intentionally exposing an emergency worker to risk by driving. The Crown sought to lead evidence of a police officer's identification of the applicant and the applicant objected.

105. The officer's evidence was that he saw the driver, alleged to be the applicant, during the alleged offending. Other officers had collected CCTV footage and the officer had viewed stills from the footage. After the incident he went back to the station and checked the system for records of known associates of Perry. The system displayed a list of names, the first being the applicant's name. The officer didn't look at the others as they were either women or already known to him. The system included a photograph of the applicant as one of Perry's associates. That photograph was of the applicant in the custody of corrections. Looking at that photograph, the officer said he identified the applicant.

106. The Court of Appeal (McLeish and Kennedy JJA and Kidd AJA) held that the evidence ought to have been excluded pursuant to s 137 as the danger of unfair prejudice outweighed the probative value.[119] While the applicant would want to challenge the identification evidence at trial, in order to do so effectively he had to expose that the identification was made in circumstances where the officer knew that the applicant was a criminal associate of the co-offender and the officer knew that the applicant had been in custody.

107. The Court said that this evidence was highly prejudicial for the applicant and was apt to invite the jury to engage in impermissible "guilt by association" reasoning.[120]

108. This unfair prejudice could not be remedied by putting before the jury a sanitised version of events that resulted in the officer's identification.[121]

109. There was also a risk that the jury would give the evidence undue weight[122] and the combined risks in the case were so forceful that no directions could adequately guard

[119] *Wilson (a pseudonym) v The Queen* [2022] VSCA 261, [105].
[120] Ibid, [117].
[121] Ibid, [125].
[122] Ibid, [127].

against them, because the jury would be asked to put out of their mind evidence which had influenced the officer in making the identification.[123] This left the applicant in an "invidious, almost impossible, forensic position".[124]

Moreno (a pseudonym) v The King [2023] VSCA 98

110. The accused was charged with murder and aggravated burglary arising from a single incident. The deceased was sitting on a chair watching television at the home of his friend, Christian Rubini. Also present were Lorenzo Tigani and Rubini's father, Mario. Rubini sold drugs from the home and from time to time people came there to buy them.

111. The entry to the house was a wooden front door and security door. The occupants of the house heard a knock on the door and Rubini opened it, leaving the security door closed. Rubini saw several people, including a man whose face was partially covered, holding a gun. Those outside wanted to enter the unit so Rubini tried to close the door, and Tigani ran to the door to help him close it. A number of shots were fired through a glass window pane next to the door and one of the bullets penetrated the deceased's skull. He died from the wound later that night.

112. The applicant was charged with murder and his co-offenders were charged with aggravated burglary.

113. There was another incident where Tigani, together with a person known as "Taki" were victims of an alleged attempted armed robbery. They were trying to purchase cannabis from two men, one of whom pulled a gun on them and tried to rob them. There was a scuffle in which the two offenders were stabbed and they ran away without completing the robbery. The Crown alleged that the accused and a co-offender, Hammoud, had committed the attempted armed robbery.

114. Tigani had initially told police that he did not recognise the person holding the gun outside the house. After he spoke to police, he was looking at photos on Facebook and Taki showed him photos of the accused and Taki said that he was the shooter. The Crown sought to lead identification or recognition evidence from Tigani and

[123] Ibid, [134].
[124] Ibid, [135].

Moreno objected. The trial judge admitted the evidence and Moreno sought leave to appeal against that ruling.

115. The Court (Priest AP, Niall and Kaye JJA) considered the High Court's approach in *IMM* and the "foggy night" example: "[i]t may not be easy to discern the demarcation between matters of reliability (which must be ignored) and the identification of circumstances surrounding the evidence that render it 'simply unconvincing'. **That difficulty is particularly acute in the context of identification evidence**".[125]

116. The Court also discussed that "in considering the probative value of evidence, at least insofar as identification evidence is concerned, it is legitimate, and necessary, to take into account the *quality* of the evidence, and that to do so does not breach the injunction in *IMM* that reliability and credibility must be put to one side."[126]

117. The Court also said:

> Although it is important not to treat the 'foggy night' example as if it were a rule against which other examples must be tested and the organising principle that differentiates it from other matters affecting the reliability of the evidence is perhaps not easy to articulate, some observations may elucidate the nature of the qualification. First, the foggy night example is concerned with limitations on the observation, rather than on a later representation of what was observed. Second, the limitations form an integral part of understanding what the evidence, taken at its highest, is capable of conveying. Third, the limitations are an inherent feature or aspect of the observation that do not depend on the reliability of the person as a witness.[127]

118. The Court outlined that *IMM* and *Dickman* both make plain that "s 137 does not require a court to treat as equally probative identification evidence based on an unhurried observation made in clear conditions at close quarters and a fleeting observation of a partially masked person in dim light".[128]

119. Importantly, the Court observed that "[t]here is a difference between taking evidence at its highest, and taking a portion of evidence out of context and giving it a meaning that it cannot reasonably bear when regard is had to any inherent or internal

[125] *Moreno (a pseudonym) v The King* [2023] VSCA 98, [55]. Our emphasis added.
[126] Ibid, [56]. Emphasis in original.
[127] Ibid, [57].
[128] Ibid, [80].

qualifications on the evidence". Those limitations resulted in the Tigani's recognition evidence being poor and its probative value low in light of:

(1) on his own account he had no prior association with or knowledge of the applicant apart from the incident of 23 June;

(2) the opportunity for observation on 18 July was, again on his own account, limited (albeit he says sufficient);

(3) the evidence (at its highest) about his perception on the night was that he suspected that the person he saw was the same person who had attempted to rob him; and

(4) he was later shown a photograph in a context where there was plainly the risk of displacement and suggestion, and which caused him to move from suspicion to apparent certainty.[129]

120. The Court considered the displacement effect and said that "[g]enerally, the risk of displacement goes to the probative value of the evidence rather than prejudice, however there will be prejudice if by reason of the facts an accused person is restricted in his or her ability to point to a factual foundation for the submission".[130]

121. The Court concluded:

> In our opinion the prejudice to the applicant is substantial. We do not consider that the risks of suggestion and displacement, which will not be capable of being fully exposed in the evidence, can be adequately ameliorated by judicial direction. The inability to effectively and comprehensively expose the dangers lurking in the evidence generates a special prejudice which cannot adequately be guarded against by judicial warning or direction. In those circumstances, the risk of unfair prejudice clearly outweighs the probative value of the evidence, which, as we have indicated, is low.[131]

122. In this case, the Court said the unfair prejudice was high because there was no evidence available as to what photograph was shown by Taki to Tigani and the circumstances in which it was shown to him. This meant that Moreno could not properly expose the dangers of the evidence and there was no judicial warning or

[129] Ibid, [85].
[130] Ibid, [103].
[131] Ibid, [104].

direction that could be made about the circumstances of the identification. On that basis, the probative value outweighed the unfair prejudice.

123. Other authorities that have considered identification evidence and s 137:

    a. *THD v The Queen* [2010] VSCA 115; (2010) 200 A Crim R 106;

    b. *DPP v DJC* [2012] VSCA 132;

    c. *McCartney v The Queen* [2012] VSCA 268; (2012) 38 VR 1;

    d. *Dupas v The Queen* [2012] VSCA 328; (2012) 40 VR 182;

    e. *Peterson* (a pseudonym) v The Queen [2014] VSCA 111;

    f. *DPP v Hague* [2018] VSCA 39;

    g. *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224.

124. The identification cases are important to read closely as they provide practical examples of how courts have dealt with *IMM* and issues about the surrounding circumstances. It is also interesting to compare how the courts have dealt with hearsay evidence and identification evidence post *IMM*. On its face, it appears that hearsay and identification evidence have been treated differently in that more hearsay evidence has been admitted despite issues with the evidence or unfair prejudice, compared to identification evidence. This shows the flaw with the approach posited in *IMM*, unclear lines are drawn by the courts as to what is unreliable or what is simply unconvincing.

Credibility

MA v The Queen [2013] VSCA 20; (2013) 40 VR 564

125. The accused was convicted of seven charges that arose out of sexual assaults of his daughter. The Crown called a psychiatrist at the trial to give expert evidence about the failure of the complainant to cry out during the assaults when others were in the vicinity, the failure of the complainant's mother to accept the truth of the complaint and the fact that the complainant maintained an ongoing relationship with her father for many years after the alleged assaults. The Court of Appeal said that the evidence

about the complainant's behaviour and her mother's failure to accept the truth of the complaint was credibility evidence that fell within s 108C of the *Evidence Act*.

126. Osborn JA said that the evidence simply provided an informed context in which the whole of the complainant's evidence as to her reaction and subsequent conduct could be assessed.[132] He said that a different view might result in respect of expert evidence as to the specific reactions of an alleged victim of sexual abuse.

127. Redlich and Whelan JJA agreed the evidence was admissible, but outlined that if the expert had gone further and given an opinion concerning the complainant's actual behaviour or reaction, then the trial judge had an obligation to consider s 137 (though it did not arise in this case).[133]

128. Another authority that considers credibility evidence and s 137 is *Abbas v The Queen* [2022] VSCA 39.

Character

Huges (a pseudonym) v The Queen [2013] VSCA 338; (2013) 238 A Crim R;

129. The accused was charged with 17 charges of sexual offending against his two biological daughters, KJ and LJ. He sought leave to appeal his convictions. At trial, he gave evidence and said that he never hit KJ and that he was not "into" pornography. The trial judge found that this meant that the accused had raised good character. Accordingly, the prosecutor was permitted by the trial judge to introduce uncharged acts that the accused had assaulted and raped KJ in the United States, that he had assaulted KJ immediately before he and his wife separated, that KJ constantly feared being assaulted and that his computer contained downloaded pornography. The Court (Priest JA, Coghlan JA and Lasry AJA concurring) allowed the appeal.

130. Priest JA said that the accused's evidence did not put his character in issue. It was merely a denial of the allegations of particular conduct alleged against him. There

[132] *MA v The Queen* [2013] VSCA 20; (2013) 40 VR 564, 583 [88]. This was applied in *Woods (a pseudonym) v The Queen* [2021] VSCA 105, [109]-[110] (Kaye and Niall JJA).
[133] Ibid, 586 [100].

was no conscious decision to intentionally or deliberately adduce positive character.[134]

131. Priest JA said that, even if good character evidence had been intentionally elicited, the cross-examination on the topic should not have been permitted. The supposed good character evidence was relatively benign and evidence of a violent rape when the accused's daughter was eight years old was grossly prejudicial. The probative value was clearly outweighed by the unfair prejudice and the trial judge did not appear to consider the question of unfairness caused to the accused.[135]

Conclusion

132. David Hamer, in "The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*",[136] concludes:

> [T]he persistent difficulties with evidence exclusion are the product of complex, sometimes conflicting, policy goals and interests. It may be more efficient for the trial judge to take a relatively hands-off approach to admissibility, particularly if the trial judge is no better placed to assess probative value than the jury. However, this would be an abdication of the trial judge's responsibilities to ensure a fair and accurate trial. For the trial judge to exclude evidence too readily may infringe the right of the jury, as community representatives, to participate in criminal justice. But for the trial judge to allow evidence of slight probative value to unduly sway the jury would fail to adequately respect the accused's interest in avoiding wrongful conviction.[137]

133. It remains to be seen if *IMM* will stand the test of time. Certainly there has been significant criticism of the approach of the majority. Until the High Court changes tack, or Parliament intervenes, it is clear that s 137 of the Uniform Evidence Acts will continue to be a source of significant confusion and complexity.

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[134] *Huges (a pseudonym) v The Queen* [2013] VSCA 338; (2013) 238 A Crim R 345, 353 [23].
[135] Ibid, 355-6 [31]-[33].
[136] (2017) 41 *Melbourne University Law Review* 689.
[137] Ibid, 726.