Implications of *IMM v The Queen* [2016] HCA 14

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The High Court has determined (by a 4:3 majority) that a trial judge, in assessing the "probative value" of evidence for the purposes of a number of provisions in the *Evidence Act* (including s 97 and s 137), must proceed on the assumption that the evidence "is accepted" (and thus is to be regarded as both credible and reliable) – just as is required when assessing relevance under s 55.

However, close analysis of the majority judgment of French CJ, Kiefel, Bell and Keane JJ reveals that the making of such an assumption does *not* necessarily undercut the practical operation of those provisions.

First, it was noted that all evidence must pass the relevance threshold in s 55. The relevance test imports notions of rationality as the definition requires the evidence to be capable of "rationally affecting of the assessment of the probability of the existence of a fact in issue". French CJ, Kiefel, Bell and Keane JJ stated at [39] that evidence may be

> 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.

Second, as regards s 137, it is of critical importance to appreciate the (limited) consequences of an assumption that the evidence of a witness is to be accepted as credible and reliable.

Take the example of a witness who gives identification evidence. French CJ, Kiefel, Bell and Keane JJ stated at [50]:

> 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 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.

As Heydon put it in his article, "Is the Weight of Evidence Material to Its Admissibility?" (2014) 26 *Current Issues in Criminal Justice* 219 at 234, the evidence is "inherently unconvincing", with the consequence that, even "taken at its highest",

the probative value of the evidence is low.

It is possible to explain the approach taken in the majority judgment as follows. Assume the witness testifies: "I identify [the accused] as the offender". For the purposes of determining the probative value of that evidence in the context of s 137, the evidence of the witness is to be accepted as credible and reliable. However, the evidence may be seen as evidence of an opinion ("in my opinion, the accused person is the offender"). Accordingly, it is to be assumed that the witness is being truthful when he or she testifies that this opinion is held and is reliably recounting the content of the opinion (thus, probative value may not be assessed on the basis that the witness actually holds a different opinion). This does *not* mean that the opinion itself must be assumed to be reliable. Other evidence, including "the circumstances surrounding the evidence" of the witness, may indicate that it has low probative value.

The example given by Heydon is one where the probative value of the identification evidence is low because the circumstances in which the observation of the offender was made show that the subsequent identification (the opinion itself) is "weak" and "unconvincing" and, accordingly, of low probative value. It would necessarily follow that another example would be where the circumstances in which the (first) identification of the accused as the offender also render that identification "weak" and "unconvincing" and, accordingly, of low probative value (for example, where there was a high level of "suggestion" that the accused was the offender).

The logic of this analysis would carry through to consideration of expert evidence in the context of s 137 (and, indeed, s 135). When an expert asserts an opinion, the assessment of the probative value of that evidence requires an assumption that the expert is being truthful regarding the content of the opinion and is reliably recounting the content of the opinion. However, it does not require an assumption that the opinion itself is "reliable", in the sense that the opinion may be relied upon as correct. When assessing the probative value of evidence from an expert that the accused "matched" an offender seen in a surveillance video, there is no requirement that it be assumed that the expert is correct (that is, that the accused and the offender are the same person). The court is permitted to consider factors bearing on the cogency of that opinion in determining the extent to which a rational fact-finder could regard the evidence as affecting the probability of the existence of a fact in issue.

Thus, in particular, a court may take into account whether or not the validity of the propositions upon which the opinion is based has been demonstrated. Where an expert asserts a match between certain evidence and a particular individual or source, a court applying s 137 may consider such matters as the validity of the methods by which data was obtained and compared, the nature of the expert's qualifications, and the extent to which the process of reasoning involved in forming the opinion has been disclosed. Of course, a conclusion that evidence of an expert opinion has low probative value does not mean that it must be excluded pursuant to s 137. That will only be required where that probative value is "outweighed by [a] danger of unfair prejudice to the defendant".

As regards hearsay evidence, the approach taken in the majority judgment supports a similar analysis. Thus, it may be concluded that the requirement that it be assumed that the evidence will be accepted, that it is both credible and reliable, applies to the

evidence of the out-of-court representation, not to the out-of-court representation itself. This conclusion is supported by the actual holding of the majority judgment in respect of hearsay complaint evidence. The High Court was required to address the question of whether evidence given by the complainant's relatives of complaints made by the complainant in August 2011 (of sexual abuse committed on her by the appellant) should be excluded pursuant to s 137. One of the arguments advanced on behalf of the appellant was that the probative value of the evidence was low because the complaints were not spontaneous and were made in response to leading questions, in circumstances where the complainant may have been motivated to distract attention from her own bad behaviour. The majority judgment held at [73]:

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant.

The reference to an earlier complaint was a complaint made to a friend of the complainant. In regarding as material to the assessment of the probative value of the evidence of the complaints made to the relatives the "evident distress of the complainant" and the timing of the earlier complaint, it is apparent that the majority were not proceeding on the assumption that the content of the complaints made to the complainant's relatives were credible and reliable. The presence of evident distress was seen to increase the probative value of the complaints, according to the reasoning that it would be rationally open to regard them as more credible and reliable by reason of that evidence distress (or, to put it more accurately, the distress increased the extent to which the evidence of complaint could rationally affect the jury's assessment of the probability that the appellant had committed sexual offences against the complainant). The timing of the earlier complaint tended to undercut the argument that the complaints to the relatives were less credible because they were the result of leading questions, given that they were consistent with the earlier complaint made to the friend. While the evidence of the relatives regarding the making of the complaints to them was assumed to be accepted as both credible and reliable, the assessment of the probative value of the complaints themselves did not involve any such assumption.

Third, in respect of the admissibility of tendency (and coincidence) evidence, it is important to focus carefully on the nature of the fact(s) in issue to which the evidence is relevant and whether the evidence may have significance or importance in establishing that fact or those facts.

Section 97(1)(b) provides that "tendency evidence" is not admissible unless "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value". The tendency evidence in *IMM v The Queen* was evidence from the complainant of an incident where the appellant "ran his hand up my leg", relevant to show a sexual interest in the complainant and thus a tendency to commit the offences charged (French CJ, Kiefel, Bell and Keane JJ at [61]). Presumably, the prosecution would contend that, as the evidence must be assumed to be accepted as credible and reliable for the purposes of assessing probative value under s 97(1)(b), it must be assumed that the appellant did in fact run his hand up the

complainant’s leg and thereby show a sexual interest in the complainant, which would be “significant” for the purposes of determining whether the appellant committed the offences charged. However, the majority judgment stated at [46]:

> The significance of the probative value of the tendency evidence under s 97(1)(b) must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. So understood, the evidence must be influential in the context of fact-finding.

Then the majority judgment concluded at [62]-[63]:

> 62 In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.
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> 63 Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

Thus, French CJ, Kiefel, Bell and Keane JJ considered that the applicable “fact in issue” was not whether or not the charged offences were committed but whether the complainant’s account of the commission of those charged offences was both truthful and reliable. When assessing the capacity of the tendency evidence to increase the probability that this account was credible, the fact that it came from the complainant was of critical importance in determining whether the evidence had significant probative value. Notwithstanding the assumptions required when assessing probative value, the evidence lacked significance or importance in establishing that her account of the charged acts was true because it came from the complainant, was unsupported by a source independent of her and there was no feature of her account which gave it “significant probative value”.

As regards the operation of s 98 and s 101, these were discussed in the majority judgment at [59]:

> Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant's submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant's submission – that it is "well-established" that under the identical test in s 98(1)(b) the possibility of joint concoction may

> deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen*[44] – should not be accepted.[45] Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the "rational view ... inconsistent with the guilt of the accused" test found in *Hoch v The Queen*.[46] The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting. [footnotes not included]

Footnote 45 reads: "See the discussion in *McIntosh v The Queen* [2015] NSWCCA 184 at [42]-[48] per Basten JA, [172] per Hidden J agreeing, [176] per Wilson J agreeing".

In *Hoch v The Queen* [1988] HCA 50, 165 CLR 292, the High Court held in respect of the common law that similar fact evidence whose probative value "lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred" will not be admissible if there is "a possibility of joint concoction" because there will in consequence be "a rational view of the evidence that is inconsistent with the guilt of the accused" (Mason CJ, Wilson and Gaudron JJ at 296). Subsequent authority has extended that analysis beyond the possibility of joint concoction to the possibility of contamination. As Basten JA stated in McIntosh at [36], such an analysis "is not consistent with the language of the *Evidence Act*".

As regards what Basten JA stated at [42]-[48], the key passage is at [47]:

> Whilst, in determining probative value as a question of capability to affect the assessment of a fact in issue, the court is not required to disregard inherent implausibility, on the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury. Accordingly, the suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted.

However, this passage needs to be understood in context. At [49]-[50], Basten JA stated:

> 49. … If a possibility of concoction at a level sufficient to affect the capacity of the evidence to bear significant probative value were to be identified, it would probably have been necessary to carry out a reasonably searching cross-examination on the *voir dire*. That did not happen. Thus, the reason why the trial judge did not consider the possibility of concoction in making his rulings, was that it was neither relied upon by counsel for the accused at trial, nor was it inherently necessary for the judge to consider such matters in assessing significant probative value.
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> 50. Given the manner in which the evidence unfolded, the absence of reference to the possibility of concoction in the assessment of admissibility was unsurprising. On any view, it revealed no error on the part of the trial judge.

It is apparent that Basten JA did not hold that a possibility of concoction is immaterial to the question of whether the evidence has significant probative value. Rather, a mere possibility of this could not support a conclusion that the evidence lacks significant probative value. However, if the probability of concoction reached a particular "level sufficient to affect the capacity of the evidence to bear significant probative value", then it would be appropriate to take it into account. The majority judgment in *IMM* did not take a different view. It only rejected the proposition that "the possibility of joint concoction may deprive evidence of probative value".

Presumably, in assessing whether the evidence has "significant probative value" for the purposes of s 98(1)(b), a similar approach to that adopted under s 97(1)(b) would be required. The significance of the probative value of the coincidence evidence "must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts" (French CJ, Kiefel, Bell and Keane JJ at [46]). The "evidence must be influential in the context of fact-finding".

Coincidence evidence is sought to be used "to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally". It may be that some degree of risk of joint concoction or contamination will have the consequence that the evidence will have a limited capacity to rationally affect the probability that the complainant's account of a charged offence is true. In those circumstances, the evidence would lack significance or importance in establishing those facts. Alternatively, while s 101(2) does not require the exclusion of either tendency evidence or coincidence evidence on the (common law) basis that there is a rational view of the evidence inconsistent with the guilt of the accused, it would be open to conclude that the probative value of coincidence evidence is reduced where the circumstances reveal such a risk of joint concoction or contamination as to negate a contention that "it is improbable that the events occurred coincidentally".

One final observation should be made about the approach of the majority judgment to the question of whether the tendency evidence met the requirements of s 97(1)(b). The majority judgment held that the evidence "did not qualify as having significant probative value and was not admissible under s 97(1)(b)". The majority appear to have determined the question for themselves. In terms of appellate review, the majority did not apply *House v The King* limitations. Neither the language of the provisions itself ("the court thinks that the evidence will … have significant probative value"), nor intermediate appellate authority that appellate review of this provision is limited by *House v The King* criteria, prevented the majority from deciding the matter for itself.

<u>Summary</u>

1. Evidence that is inherently incredible, fanciful or preposterous will not be relevant.

2. The making of an assumption that evidence "is accepted" (and thus accepted as

both credible and reliable) in assessing the "probative value" of the evidence does not necessarily undercut the practical operation of those provisions in the *Evidence Act* which require such an assessment. Close attention must be paid to what is involved in assessing the probative value of evidence on the assumption that the evidence "is accepted".

3. When assessing identification evidence, the circumstances in which the observation of the offender was made, or in which the accused was identified, may show that the identification of the accused has low probative value.

4. Similarly, when assessing expert opinion evidence, there is no requirement that it be assumed that the opinion is correct - the court in determining the extent to which a rational fact-finder could regard the evidence as affecting the probability of the existence of a fact in issue is permitted to consider such matters as whether or not the validity of the propositions upon which the opinion is based has been demonstrated.

5. Equally, when assessing the probative value of hearsay evidence, the requirement that it be assumed that the evidence will be accepted applies to *the evidence of* the out-of-court representation, not to the out-of-court representation itself, with the consequence that the surrounding circumstances or the inherent characteristics of that representation may support a conclusion that the evidence has low probative value.

6. When assessing whether tendency evidence or coincidence evidence has "significant probative value", there must be a focus on the nature of the fact(s) in issue to which the evidence is relevant and whether the evidence may have significance or importance in establishing that fact or those facts. In particular:

> (a) tendency evidence emanating solely from a complainant is unlikely to have that character; and
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> (b) the existence of alternative explanations for both tendency and coincidence evidence will bear on the assessment of whether the evidence has that character (so that, for example, while a "possibility" of joint concoction or contamination will not deprive such evidence of probative value, that does not mean that such a risk is immaterial to the determination of whether the evidence has significance).

7. Appellate review of the requirement of "significant probative value" in s 97(1)(b) may not be subject to *House v The King* limitations.