THE FOG OF LAW

Section 137 of the *Evidence Act 2008*

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Part A: Background

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

> **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.

The Dictionary to the *EA*:

> **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…

Section 55(1) of the *EA*:

> 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

The ALRC Reports

ALRC Report 38 (1987)

- ***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.*

The Origins of the Dispute

vs

McHugh J

Papakosmas v The Queen
[1999] HCA 37; (1999) 196 CLR 297, 323 [86].

Gaudron J

Adam v The Queen
[2001] HCA 57; (2001) 207 CLR 96, 115 [60].

Part B:
IMM v The Queen [2016] HCA 14; (2016) 257 CLR 300

- Resolved the dispute between the NSW Court of Criminal Appeal in *R v Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228 and the Victorian Court of Appeal in *Dupas v The Queen* [2012] VSCA 328; (2012) 40 VR 182.

- **Majority** – French CJ, Kiefel, Bell and Keane JJ agreed with the NSW approach. Apart from the limiting (exceptional) case, **reliability is not relevant** when assessing probative value under s 137.

  - The evidence must be taken at its highest.

  - However, evidence can be "simply unconvincing" and of low probative value.

- **Dissents** – Gageler J, and (in a separate judgment) Nettle and Gordon JJ:

  - As a matter of statutory construction (and for Nettle and Gordon JJ in light of the common law), reliability is relevant when assessing probative value.

A Foggy Identification

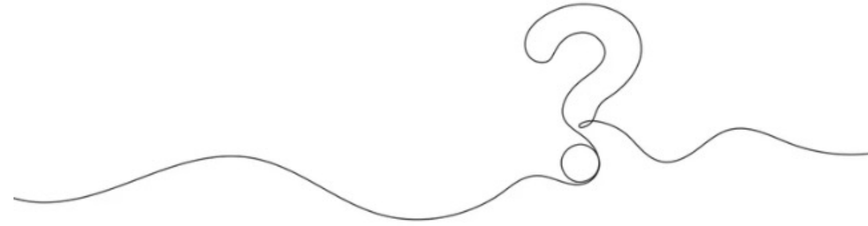
The Hon JD Heydon KC, writing extra-judicially:

- “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”.

Pearce J in *Tasmania v Farhat* [2017] TASSC 66; (2017) 29 Tas R 1, 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”.

Unresolved issues



- Is reliability relevant when considering the danger of **unfair prejudice**?
  - *IMM* at 317 [57], citing Basten J in *R v XY* [2013] NSWCCA 121; (2013) 84 NSWLR 36, 376-7 [48].
  - *R v Mundine* [2008] NSWCCA 55; 182 A Crim R 302, 310 [44] (Simpson J).
  - The warnings of Beale J in *Pocket Evidence*.
- What about the ***Haddara* fairness discretion**?
  - *Haddara v The Queen* [2014] VSCA 100; (2014) 43 VR 53.
- **Criticisms**
  - Jason Chin, Gary Edmund and Andrew Roberts, "Simply Unconvincing: The High Court on Probative Value and Reliability in the *Uniform Evidence Law*" (2022) 50(1) *Federal Law Review* 104.
  - The Hon Chris Maxwell AC, "Preventing Miscarriages of Justice: The Reliability of Forensic Evidence and the Role of the Trial Judge as Gatekeeper" (2019) 93 *Australian Law Journal* 642.
  - David Hamer, "The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*" (2017) 41 *Melbourne University Law Review* 689.

Part C: Categories of Evidence

A number of authorities have considered the admissibility pursuant to s 137 of particular categories of evidence. The categories include:

- a. Hearsay;
- b. Opinion;
- c. Admissions;
- d. Context;
- e. Identification;
- f. Credibility; and
- g. Character.

Beale J's *Pocket Evidence* lists these categories and the main authorities that have dealt with them.

Hearsay

- Many of the cases that deal with s 137 and hearsay also involve considerations of other categories of evidence:
  - s 97 (tendency);
  - s 65 (hearsay exception in criminal trials where maker unavailable); and
  - s 66 (hearsay exception in criminal trials if maker available).

R v Bauer [2018] HCA 40; (2018) 266 CLR 56

- *Bauer* deals with the admissibility of evidence pursuant to ss 97 and 66, as well as s 137.
- Facts.
- The Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)at [69] 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. (Emphasis added)

R v Bauer cont

- At [95] 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."

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

- *Papakosmas* considers complaint evidence pursuant to s 66.
- Facts.
- At [91], McHugh J said: "[e]vidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted."
- At [92], McHugh J also cited the ALRC on "unfair prejudice":

> In its Interim Report, the Australian Law Reform Commission explained:
>
> > 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. (Emphasis added)

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

- *Bray* considers s 65 and s 137
- Facts.
- 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**. (Emphasis added)

Snyder v The Queen [2021] VSCA 96

- *Snyder* considered s 65 and s 137.
- Facts.
- In discussing the probative value of the evidence, Priest, Kyrou and Kaye JJA outlined at [62] and [63]:

> 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.**
>
> (Emphasis added)

Hearsay cases and s 137 – take aways

- Beale J in *Pocket Evidence* argues that *Snyder* demonstrates that matters that primarily bear upon a witness's veracity are "off limits". Beale J writes that the take away 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.
- *Snyder* paras [62] and [63] appear to be in tension with *Bauer* paras [69] and [95]. This aspect of *Bauer* was not specifically considered in the Court of Appeal's judgment in *Snyder*.

Opinion

- A number of cases have considered the intersection between opinion evidence (usually expert opinion) and s 137.
- Some of the cases discussed here were decided before *IMM*, but the way in which they dealt with s 137 is generally still relevant.

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

- Facts.
- At [28], 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."
- 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 warranted. However, at [30] French CJ, Hayne, Crennan and Bell JJ rejected that argument; 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. Their Honours said at"[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."
- Heydon J at [75] and [76] also said that the evidence was admissible because the "exclusion percentage" was derived from the "frequency ratio" and because the frequency ratio was accepted, there was no danger of unfair prejudice in respect of the exclusion percentage.

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

- Facts
- The Court of Appeal (Maxwell ACJ, Redlich and Weinberg JJA) said that s 79 of the Evidence Act left no room for reading in a test of evidentiary reliability as a condition of admissibility. 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]).
- *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 says that what this means in respect of the application of s 137 to expert opinion is unclear. However, Beale J, citing *Xie v The Queen* at [301] says that *IMM* left open the possibility of considering reliability issues when assessing the "danger of unfair prejudice".

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

- Facts.
- At [51], the Court (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."
- 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: at [54] and [55]
- Importantly, the Court discussed the unfair prejudice of the "CSI Effect" 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.": at [70]

Volpe v The Queen [2020] VSCA 268

- Facts.
- The Court of Appeal (Priest, T Forrest and Weinberg JJA) outlined that the evidence was not that the shoe actually left the impression, but that it could have left the impression (at [38]).
- 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 which is of slight probative value will not have its quality or strength enhanced simply because it is important to the prosecution case" (at [70])
- The Court ruled that the evidence ought to have been excluded because the probative value was slight and there was a real risk that the evidence might be used by the jury as proving more than it was capable of doing. 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.

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

- Facts.
- The Court (Warren CJ, Weinberg and Priest JJA) said (at [55]):

  Adopting the approach described by Heydon, and seemingly endorsed by the majority in *IMM*, [the victim'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.

- The Court said (at [56], [84] and [97]) that the probative value was scant, and the risk of unfair prejudice outweighed any probative value.

R v Dickman [2017] HCA 24; (2017) 261 CLR 601

- Facts.
- At [44] and [45], the 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.
- The Court said at [48]:

  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.

Wilson (a pseudonym) v The Queen [2022] VSCA 261

- Facts.
- 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. While the applicant would want to expose the integrity of the identification evidence, 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: at [105]
- There was also a risk that the jury would give the evidence undue weight (at [124]) and the combined risks in the case were so forceful that no directions could adequately guard against them, because the jury would be asked to put out of their mind evidence which had influenced the officer in making the identification (at [134]). This left the applicant in an "invidious, almost impossible, forensic position" (at [135]).

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

- Facts.
- The Court (Priest AP, Niall and Kaye JJA) considered the High Court's approach in IMM and the "foggy night" example: said "[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.**" (at [55]). (Emphasis added.)
- Importantly, at [85] 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 qualifications on the evidence".
- 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.

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

- The Court concluded at [104]:

  > 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.

- Major issue was that the ”surrounding circumstances” of being shown the photograph and going on Facebook were unknown.
- 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 direction that could be made about the circumstances of the identification. On that basis, the probative value outweighed the unfair prejudice.

Identification – Take Aways

- 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. In particular, in *Moreno* the Court of Appeal grapples with the difficulty. 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.