



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The King
Appellant

and

Theodoros Tsalkos
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication certificate

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: Outline

2. Evidence of the complainant's previous representations to her mother of having been raped were adduced at trial under s 66 of the *Evidence Act 2008* (Vic) (**the EA**). The complainant's mother (**FR**) gave evidence of the distressed demeanour of the complainant when making her complaint (**CAB 134 [205]; AFM 9**).
3. The correct analysis for assessing the admissibility of distress evidence accompanying a complaint was set out by this Court in *Churchill* (2025) 99 ALJR 719, 725 [27]–[30] (**JBA Vol 4 Tab 16**). The distress evidence admitted in the Respondent's trial was relevant on the bases that (1) it could support the credit of the complainant if the jury found a causal connection between the distress and the making of the complaint and (2) as supporting the occurrence of the offending if the jury were to find a causal connection between the distress and the offending.
4. The prosecution relied on the distress evidence as a piece of indirect evidence that supported the charges relating to that sexual offending. The prosecutor also described FR's evidence as 'independent' in his closing address (**CAB 136 [213]; AFM 11**). That submission did not require or permit the Court below to revert to concepts of independent corroboration in considering the admissibility or permissible use of that evidence: *Churchill*, 729–730 [53].
5. The trial judge directed the jury that the prosecution had invited them to use the distress evidence as 'indirect evidence; that is, circumstantial evidence that supports its case that [AB] did not consent to the sexual penetration with the accused' and '[o]bviously you cannot use it as indirect evidence supporting the charges unless you are satisfied that she was distressed because of the alleged sexual offending and not some other reason' (**CAB 27–28**).
6. The majority of the Court of Appeal was wrong to conclude that the distress evidence was incapable of providing indirect support of the occurrence of the alleged sexual offences against AB (**CAB 96 [65]**). The reasoning of the primary judgment evinces four errors.

Error 1: The primary judgment made the same essential error identified in Churchill

7. The primary judgment considered that distress evidence could only be used as indirect, independent or circumstantial evidence supporting the complainant's testimony of the alleged offences if it met the requirements of corroboration at common law (**CAB 85–86 [21]–[24]**) as

set out in *Flannery* [1969] VR 586 (**JBA Vol 4 Tab 17**). It considered that each of the terms ‘indirect’, ‘independent’ and ‘circumstantial’ were interchangeable and meant the same as ‘corroborative’ (**CAB 83 [9]**). Consistently with that statement, the primary judgment used the terms ‘indirect’, ‘circumstantial’, ‘independent’, and ‘independent circumstantial’, interchangeably throughout the judgment (**CAB 83–87 [10], [15], [17], [18], [21] and [28]**).

8. In doing so, the primary judgment assimilated the common law rules of corroboration into the requirements of ss 55 and 137 of the EA and made the same essential error identified by this Court in *Churchill*, 727 [38]. While the characterisation of evidence as ‘independent’ was essential to the determination of the admissibility of evidence as ‘corroboration’ at common law (see *Churchill*, 727–728 [43]–[44]) the EA contains no reference to ‘independent evidence’ and the whole notion of corroboration of a complainant’s evidence has been abolished by s 164 of the EA: *Churchill*, 728–729 [49]. The majority of the Court of Appeal’s reliance on common law principles to analyse the admissibility and permissible use of the distress evidence was therefore unsound.

Error 2: Requiring causal link between offending and distress evidence to be established without regard to complaint evidence

9. The primary judgment was in error to hold that a trial judge must exclude from their consideration the content of the complaint when determining whether it is open for the jury to find a causal connection between distress observed at the time of the complaint and the offending (**CAB 84 [15]**). The content of a complaint of sexual offending is clearly relevant to assessing whether a complainant’s distress when making that complaint is causally linked to the alleged offending.
10. The rationale at common law for requiring a causal link to be established between distress and the alleged offending, without recourse to the content of the complaint, was the operation of the hearsay rule: *Papakosmas* (1999) 196 CLR 297, 309 (**JBA Vol 3 Tab 10**). That rationale no longer applies to complaint evidence admitted under s 66 of the EA.

Error 3: Incorporating a test of ‘intractable neutrality’ into the admissibility of the distress evidence

11. The primary judgment considered that evidence of distress, ‘as independent circumstantial evidence’, may be admitted for this purpose so long as it is not ‘intractably neutral’ as to its causal connection with the alleged offending (**CAB 87 [28]**).

12. The term ‘intractably neutral’ is not found in the EA. It is a term most commonly used in assessing whether post offence conduct or lies can be relied on as implied admissions of the charged offence as opposed to a lesser charge. However, the reasoning processes that a jury is required to undertake in relation to incriminating conduct is different to other pieces of circumstantial evidence, making the use of the term in this context inapposite.
13. Given the jury is permitted to use the distress evidence as indirect evidence of the offending, without first excluding all other reasonable explanations for the distress consistent with innocence, there is no basis for a trial judge to undertake an assessment of the intractable neutrality of the evidence to determine if it meets the test of relevance under s 55 of the EA, or assess its probative value under s 137 of the EA.

Error 4: No basis for distress evidence to be excluded under s 137 of the EA

14. The primary judgment was wrong to find that the probative value of the evidence was slight and would be outweighed by the danger of unfair prejudice, because of the existence of an alternative inference (**CAB 87–88 [30]**). The likelihood of the distress being caused by something other than the offending was a matter for the jury to determine after evaluating all of the evidence admitted in the respondent’s trial. The notion that the trial judge should undertake an assessment of the relative likelihood of the causes of the complainant’s distress is contrary to the requirement for the trial judge to take the evidence at its highest for the purpose of assessing its probative value: *IMM* (2016) 257 CLR 300, 313 (**JBA Vol 3 Tab 9**).
15. Taken at its highest, the evidence had significant probative value. In addition, there was no unfair prejudice caused by the admission of the evidence. The primary judgment was wrong to conclude that distress evidence accompanying a complaint is susceptible to being given more weight than it deserves. The respondent was protected from any risk the jury would speculate about the cause of the complainant’s distress by the general direction about indirect evidence (**CAB 16–17**), as well as the direction regarding the distress evidence (**CAB 26–28**).

Dated: 17 October 2025



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BRENDAN F. KISSANE

STEPHANIE CLANCY