HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

IMM APPELLANT

AND

THE QUEEN RESPONDENT

IMM v The Queen
[2016] HCA 14
14 April 2016
D12/2015

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Northern Territory made on 19 December 2014 and, in its place, order that:*

   (a) *the appeal be allowed;*

   (b) *the appellant's conviction on counts 2, 3 and 4 of the indictment be quashed; and*

   (c) *a new trial be had on counts 2, 3 and 4 of the indictment.*

On appeal from the Supreme Court of the Northern Territory

Representation

S J Odgers SC with K J Edwards for the appellant (instructed by Northern Territory Legal Aid Commission)

B W Walker SC with M W Nathan SC for the respondent (instructed by Director of Public Prosecutions (NT))

CATCHWORDS

IMM v The Queen

Evidence – Admissibility and relevance – *Evidence (National Uniform Legislation) Act* (NT), ss 97(1)(b), 137 – Where appellant charged with indecent dealing with child and sexual intercourse with child – Where tendency evidence given by complainant that appellant ran his hand up complainant's leg – Where evidence tendered of complaints made by complainant concerning appellant – Whether probative value of evidence assessed on assumption that jury would accept evidence – Whether trial judge should have regard to credibility of witness or reliability of evidence in assessing probative value of evidence – Whether evidence from complainant adduced to show accused's sexual interest can have significant probative value.

Words and phrases – "complaint evidence", "credibility", "danger of unfair prejudice", "probative value", "relevance", "reliability", "significant probative value", "tendency evidence".

Evidence (National Uniform Legislation) Act (NT), ss 55, 56, 65, 66, 97(1)(b), 101, 137.

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. After a trial in the Supreme Court of the Northern Territory, the appellant was found guilty of two counts of indecent dealing with a child and one count of sexual intercourse with a child under the age of 16 years. The complainant was the appellant's step-granddaughter. She alleged a course of sexual abuse which commenced when she was about four years old and continued until her grandmother and her step-grandfather separated in late 2010, when the complainant was 12 years old. The complainant's was the only direct evidence of the commission of the offences. Over objection from the defence, the prosecution was permitted to adduce certain "tendency evidence" and "complaint evidence".

2 The tendency evidence was given by the complainant and was that while the complainant and another girl were giving the appellant a back massage, he ran his hand up the complainant's leg. The trial judge (Blokland J) considered that the evidence was capable of showing that the appellant had a sexual interest in the complainant, and that there was a strong temporal nexus between this incident and the charged acts[1].

3 The trial judge ruled that the evidence had "significant probative value". Section 97(1)(b) of the *Evidence (National Uniform Legislation) Act* (NT) ("the Evidence Act") provides for evidence of this kind to be excepted from the "tendency rule", which would otherwise render the evidence inadmissible. Accordingly, the evidence was admitted. The jury were directed that if they found, on the basis of the tendency evidence, that the appellant had a sexual interest in the complainant and was willing to act on that sexual interest, that finding could be used in determining whether the appellant committed the offences charged.

4 The trial judge approached the task of assessing the probative value of the tendency evidence on the assumption that the jury would accept the evidence. In so doing, the trial judge did not have regard to factors such as the credibility of the complainant or the reliability of the evidence.

5 The complaint evidence was evidence of complaints made by the complainant concerning the appellant and was given by a friend of the complainant, and the complainant's aunt, grandmother and mother. There was an issue as to when the complaint was made by the complainant to her friend.

---

1 *R v IMM (No 3)* [2013] NTSC 45 at [10].

6 The trial judge applied[2] the exception to the hearsay rule, provided by s 66 of the Evidence Act, to this evidence. The appellant sought, unsuccessfully, to have the evidence excluded under s 137 of the Evidence Act, on the ground that its probative value was outweighed by the danger of unfair prejudice to him. The jury were directed that if they accepted the evidence of the complaints they could use the evidence of what was said in the complaints "as some evidence that an offence did occur". They were given certain other warnings.

7 The trial judge approached the question of the probative value of this evidence for the purposes of s 137 in the same way as she had for the purposes of s 97(1)(b). Her Honour assumed that the jury would accept the evidence and did not take into account factors such as credibility or reliability. Her Honour held that the evidence had probative value and did not create the prejudice to which s 137 refers[3].

8 An appeal from the appellant's conviction was dismissed by the Court of Criminal Appeal of the Northern Territory[4].

The Evidence Act

9 The Evidence Act is in substantially the same terms as legislation adopted by the Commonwealth[5] and by other States and Territories[6], and to that extent may be said to be uniform.

10 The structure of the Act generally follows the order in which issues as to evidence arise at trial. Chapter 3, which deals with the admissibility of evidence, commences in Pt 3.1 with the question of the relevance of evidence. Section 55(1) provides:

---

2 *R v IMM (No 2)* (2013) 234 A Crim R 225 at 231 [24].

3 *R v IMM (No 2)* (2013) 234 A Crim R 225 at 231-232 [27]-[31].

4 *IMM v The Queen* [2014] NTCCA 20 (Riley CJ, Kelly and Hiley JJ).

5 *Evidence Act* 1995 (Cth).

6 *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas); *Evidence Act* 2008 (Vic); and *Evidence Act* 2011 (ACT).

"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."

11 Section 56(1) provides that:

"Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding."

12 Certain exclusionary rules are stated in the Parts that follow, by which relevant evidence is rendered inadmissible. Part 3.2 deals with the hearsay rule, Pt 3.3 with the opinion rule, Pt 3.6 with the tendency and coincidence rules and Pt 3.7 with the credibility rule. Exceptions to the exclusionary rules are then provided.

13 Section 97(1) states the tendency rule and par (b) of sub-s (1) the exception to that rule:

"Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

…

(b) 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."

14 The "probative value" of evidence is defined in the Dictionary to the Evidence Act to mean:

"the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

15 A further restriction on the admissibility of tendency evidence is provided by s 101, which expressly applies to criminal proceedings and in addition to s 97. Section 101(2) provides that tendency evidence that is adduced by the prosecution cannot be used against the defendant "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant." For reasons which will later be explained, s 101(2) is not in issue on this appeal.

16 The Evidence Act makes provision[7] for the discretionary exclusion by the court of evidence in certain circumstances. For example, s 135, which applies to both civil and criminal proceedings, provides a discretion to exclude evidence if its probative value is outweighed by certain dangers that the evidence might present. Section 137, which applies to criminal proceedings, is expressed in terms of an evaluative judgment mandating exclusion[8]:

> "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 defendant."

17 Only limited provision is made in the Evidence Act for a court to take into account the reliability of evidence in connection with its admissibility. One of the matters to be taken into account by a trial judge under s 65(2)(c) and (d), in determining whether the hearsay rule is not to apply in the circumstance where the maker of the statement is not available to give evidence, is whether the representation in question was made in circumstances that make it highly probable (in the case of par (c)) or likely (in the case of par (d)) that "the representation is reliable". Similarly, s 85(2) requires consideration to be given as to whether the circumstances in which an admission was made were such as to "make it unlikely" that the truth of the admission was adversely affected.

18 Section 165, which appears in Ch 4 of the Evidence Act, is concerned with evidence which "may be unreliable". A non-exhaustive list is provided of evidence of this kind, including: hearsay evidence and admissions; identification evidence; evidence the reliability of which may be affected by factors such as ill-health; evidence from witnesses who are criminally concerned in the events giving rise to the proceeding; and evidence from prison informers. Section 165(2) provides that, on the request of a party, a judge is to warn the jury that such evidence may be unreliable and warn the jury of the need for caution in determining whether to accept it and the weight to be given to it.

The issues on the appeal

19 The arguments raised by the appellant on this appeal are directed principally to the exercise to be undertaken by a trial judge in determining the "probative value" of the evidence for the purposes of each of ss 97(1)(b) and 137.

---

7 *Evidence (National Uniform Legislation) Act* (NT), ss 90, 135, 136.

8 Section 138 of the *Evidence (National Uniform Legislation) Act* (NT) has a similar operation in relation to improperly or illegally obtained evidence.

The appellant contends that the trial judge ought not to have proceeded upon the assumption that the jury would accept the evidence in question when her Honour applied s 97(1)(b) to the tendency evidence and s 137 to the complaint evidence. The appellant submits that that assumption may be appropriate to the test of relevance for the purposes of s 55, but that is because the words "if it were accepted" appear there. Those words are omitted from the Dictionary definition of "probative value" and it is to be inferred that that omission was deliberate.

20 The appellant submits that, for the purposes of determining "probative value", an assessment of the "extent" to which evidence "could rationally affect the assessment of the probability of the existence of a fact in issue" must require the court to consider all matters that would rationally bear upon such an assessment by the tribunal of fact, here the jury. The court cannot be constrained in that assessment by assuming that the jury will assess the evidence in a particular way, which is to say, that the jury will accept it. Particularly is this so where there are reasons to doubt the credibility of a witness or the reliability of the evidence.

21 The appellant's argument in respect of the tendency evidence concerns only s 97(1)(b). No reliance is placed upon the further restriction found in s 101 on the admissibility of tendency evidence. That restriction does not appear to have been discussed at trial and counsel for the appellant conceded that it was not relied upon in argument before the Court of Criminal Appeal. Accordingly, s 101 is relevant on this appeal only as part of the scheme of the Act. The appellant's argument is that the tendency evidence does not pass the different, and perhaps somewhat less stringent, test of s 97(1)(b).

22 The appellant's argument proceeds that if the trial judge was wrong to apply the assumption that the jury would accept the tendency evidence, it would have been open for the court to conclude that the evidence did not have significant probative value, for the reason that the evidence was derived solely from the complainant, whose credibility was generally in issue. It follows that the application of the s 97(1)(b) test miscarried.

23 The appellant submits that the assessment of the probative value of the complaint evidence for the purposes of s 137 miscarried for the same reasons. If it is not assumed that the complaint evidence would be accepted by the jury, it would be open to a court, in assessing the extent of its probative value, to conclude that its value is low. Given the direct evidence from the complainant of the history of sexual abuse, which was admitted as "context evidence", the hearsay complaint evidence added little or nothing to this context. The general nature of the complaints means that, at its highest, the complaint evidence could only support the credibility of the complainant. It follows from the limited

purpose to which such evidence could be put that the evidence has limited probative value.

24 The low probative value of the evidence is outweighed by a risk of unfair prejudice to the appellant, the appellant submits, because the jury might use the complaint evidence to show that the appellant had a tendency to engage in sexual abuse. The appellant's submissions in this regard identify for the first time a danger of unfair prejudice. It was conceded that no argument of this kind was raised in the courts below.

25 The question whether the reliability of the evidence should be taken into account when assessing its probative value is also said by the appellant to reflect a policy concern which guided the formulation of the proposals of the Australian Law Reform Commission regarding evidence in criminal trials[9]. The appellant submits that s 137 provides a final, critical "safeguard" which is to be applied by a trial judge to minimise the risk of wrongful conviction. This was the view expressed by the Court of Appeal of the Supreme Court of Victoria in *Dupas v The Queen*[10], albeit by reference to the common law.

Decisions of intermediate appellate courts

26 In *R v Shamouil*[11], the Court of Criminal Appeal of the Supreme Court of New South Wales (Spigelman CJ, Simpson and Adams JJ) held that a trial judge, in determining the probative value of evidence according to the definition in the *Evidence Act* 1995 (NSW) ("the NSW Evidence Act") for the purposes of s 137 of that Act, should do so on the assumption that the jury will accept the evidence. A trial judge should not have regard to questions as to the credibility or reliability of the evidence. The Court of Criminal Appeal of the Northern Territory in this case agreed with this approach[12].

---

9 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 30-32 [58]-[60].

10 (2012) 40 VR 182 at 242 [226].

11 (2006) 66 NSWLR 228.

12 *IMM v The Queen* [2014] NTCCA 20 at [48].

27 In *R v Shamouil*, Spigelman CJ adopted[13] what was said by Gaudron J in *Adam v The Queen*[14]. Her Honour considered[15] that the definition of "probative value" in the Dictionary to the NSW Evidence Act must 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." Spigelman CJ observed[16] that this approach is consistent with the common law approach to exclusion of evidence under the "*Christie* discretion"[17]. A trial judge exercising that discretion did not, in assessing whether the probative value of the evidence is outweighed by its prejudicial effect, determine whether the jury should, or should not, accept the evidence. A trial judge did not consider the reliability of the evidence.

28 Spigelman CJ considered[18] that the words used in the definition of "probative value" in the NSW Evidence Act strongly indicated that the same approach was to be taken. The word "could" focused on the *capability* of the evidence to rationally affect the assessment of the probability of the existence of a fact. This involves what is *open* for the jury to conclude, not what they are *likely* to conclude. The test of "rationality" also directs attention to capability, rather than the weight to be given to the evidence.

29 In *Dupas v The Queen*, an enlarged Court of Appeal of the Supreme Court of Victoria (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA) declined to follow *R v Shamouil*. Subsequently, in *R v XY*[19] an enlarged Court of Criminal Appeal of the Supreme Court of New South Wales (Basten JA, Hoeben CJ at CL, Simpson, Blanch and Price JJ) maintained the approach adopted in *R v Shamouil*.

---

13 *R v Shamouil* (2006) 66 NSWLR 228 at 236 [53].

14 (2001) 207 CLR 96; [2001] HCA 57.

15 *Adam v The Queen* (2001) 207 CLR 96 at 115 [60].

16 *R v Shamouil* (2006) 66 NSWLR 228 at 236 [49]-[50].

17 As enunciated in *R v Christie* [1914] AC 545.

18 *R v Shamouil* (2006) 66 NSWLR 228 at 237 [60]-[62].

19 (2013) 84 NSWLR 363.

30 In *R v XY*, Basten JA added[20] that an assessment of the extent to which evidence could rationally affect the probability of the existence of a fact in issue, whilst being an evaluative judgment, is not a forecast of the weight that the jury are likely to give the evidence. Simpson J observed[21] that it is not ordinarily possible to determine the *actual* probative value of any piece of evidence until the trial is complete. Probative value is not used in that sense in the NSW Evidence Act, but rather in the sense of the *potential* of the evidence to have the relevant quality. It is predictive, as to what the jury *could* rationally make of it, when all the evidence is in.

31 Whilst the Court of Appeal in *Dupas v The Queen* did not follow *R v Shamouil* in one fundamental respect, it did agree[22] with Spigelman CJ's construction of the word "could" within the definition of "probative value"[23] and did not disagree with the assumption upon which an assessment of the probative value of evidence is to be undertaken, to the extent that the assumption concerns credibility. It observed[24] that, as was the case with the *Christie* discretion under the common law, the trial judge must assume that the jury will accept the witness as truthful.

32 The point of difference between *R v Shamouil* and *Dupas v The Queen* concerned whether a trial judge could take into account the reliability of the evidence in assessing its probative value. In *Dupas v The Queen* it was said that[25]:

> "The trial judge undertaking the balancing task [of s 137] is only obliged to assume that the jury will accept the evidence to be truthful but is not required to make an assumption that its reliability will be accepted."

---

20 *R v XY* (2013) 84 NSWLR 363 at 376 [44].

21 *R v XY* (2013) 84 NSWLR 363 at 400 [167].

22 *Dupas v The Queen* (2012) 40 VR 182 at 224 [163].

23 *R v Shamouil* (2006) 66 NSWLR 228 at 237 [61].

24 *Dupas v The Queen* (2012) 40 VR 182 at 224 [162], 230 [184].

25 *Dupas v The Queen* (2012) 40 VR 182 at 196 [63(c)].

33 The Court in *Dupas v The Queen* considered[26] that, under the *Christie* discretion, questions of reliability would be taken into account by the trial judge in determining what weight the jury could reasonably assign to the evidence, which the Court took to equate to what was "open to the jury to decide". The Court considered[27] that *R v Shamouil* misconceived the role of the judge under the common law test.

34 In *Dupas v The Queen* extensive reference was made to cases concerning the role of the judge exercising the common law *Christie* discretion in order to show that its exercise involved the judge considering the reliability of the evidence. This analysis has been criticised[28] on the basis that many of the cases referred to contain general statements which are ambiguous as to the sense in which "probative value" is used. It may be that the analysis pays insufficient regard to the statement in *Phillips v The Queen*[29] with respect to the admission of similar fact evidence under the common law. The Court observed that because the test is one of admissibility it is to be applied on the assumption that the proffered evidence would be accepted as true and the prosecution case (as revealed in the evidence given or in the depositions of witnesses to be called) may be accepted by the jury. In the event, it is not necessary to reconcile the statements in *R v Shamouil* and *Dupas v The Queen* respecting the role of the judge in applying common law discretions and exclusionary rules.

The "probative value" of evidence under the Evidence Act

35 The issue here concerning a trial judge's assessment of the probative value of the evidence in question arises in the context of a statute that was intended to make substantial changes to the common law rules of evidence. The statute's language is the primary source[30], not the pre-existing common law.

---

26 *Dupas v The Queen* (2012) 40 VR 182 at 224 [162].

27 *Dupas v The Queen* (2012) 40 VR 182 at 198 [68], 230 [185].

28 Heydon, "Is the Weight of Evidence Material to Its Admissibility?", (2014) 26 *Current Issues in Criminal Justice* 219 at 235.

29 (2006) 225 CLR 303 at 323-324 [63]; [2006] HCA 4.

30 *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10]; [1999] HCA 37; *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78].

36 Mention has been made earlier in these reasons of the structure of the Evidence Act and the fact that Ch 3, in dealing with the admissibility of evidence, follows the steps that are usually undertaken in the course of a trial. Questions that arise in connection with admissibility arise at the point when a piece of evidence is tendered, which is normally before all of the evidence is admitted and the witnesses examined, and therefore before the full picture has emerged. In a practical sense, a trial judge's ability to assess the place and weight of the evidence in question when a ruling on its admissibility is made will usually be limited. For the reasons which follow, it is to be inferred that the tests in question with respect to the admissibility of evidence under the Evidence Act acknowledge these limitations.

37 The first question, posed by Pt 3.1, is a threshold one for all evidence – whether it is relevant. Before that question may be answered, it is necessary to identify the purpose or purposes for which the evidence is tendered. The identification of its purpose may have important consequences, especially in areas such as opinion evidence[31] and tendency evidence.

38 By s 55, evidence is relevant if it "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding." There can be no doubt that the reference to the effect that the evidence "could" have on proof of a fact is a reference to the capability of the evidence to do so. The reference to its "rational" effect does not invite consideration of its veracity or the weight which might be accorded to it when findings come to be made by the ultimate finder of fact.

39 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.

---

31 *Evidence (National Uniform Legislation) Act* (NT), s 77.

40 Because evidence which is relevant has the capability to affect the assessment of the probability of the existence of a fact in issue, it is "probative". Therefore, evidence which is relevant according to s 55 and admissible under s 56 is, by definition, "probative". But neither s 55 nor s 56 requires that evidence be probative to a particular degree for it to be admissible. Evidence that is of only some, even slight, probative value will be prima facie admissible, just as it is at common law[32].

41 Relevant evidence is admissible under s 56 unless an exclusionary rule operates, the court is required to exclude evidence by a provision such as s 137, or a discretion provided by the Evidence Act to exclude evidence is exercised. The exceptions provided with respect to the exclusionary rules of the Evidence Act have the effect that if relevant evidence liable to be excluded comes within an exception, it may nevertheless retain its character as admissible. The condition to be met for the exception in s 97(1)(b) to apply is that the court must think that the evidence will "have significant probative value".

42 Both s 97(1)(b) and s 137 require an assessment of the probative value of the evidence tendered. As mentioned, the Dictionary definition of the "probative value" of evidence describes evidence which is probative in the same terms as how relevant evidence is described in s 55, namely evidence which "could rationally affect [...[33]] the assessment of the probability of the existence of a fact in issue".

43 The enquiry for the purposes of s 55 is whether the evidence is capable of the effect described at all. The enquiry for the purposes of determining the probative value of evidence is as to the extent of that possible effect. But the point is that in both cases the enquiry is essentially the same; it is as to how the evidence might affect findings of fact. An assessment of the extent of the probative value of the evidence takes that enquiry further, but it remains an enquiry as to the probative nature of the evidence.

44 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. The definition must be read in the

---

32 *Festa v The Queen* (2001) 208 CLR 593 at 599 [14]; [2001] HCA 72.

33 In s 55 the words "directly or indirectly" expressly qualify the words "could rationally affect", whereas these words are not included in the definition of "probative value". This is, for present purposes, of no significance.

context of the provision to which it is applied. For the purposes of s 97(1)(b), the enquiry is whether the probative value of the evidence may be regarded as "significant".

45 The use of the term "probative value" and the word "extent" in its definition rest upon the premise that relevant evidence can rationally affect the assessment of the probability of the existence of a fact in issue to different degrees. Taken by itself, the evidence may, if accepted, support an inference to a high degree of probability that the fact in issue exists. On the other hand, it may only, as in the case of circumstantial evidence, strengthen that inference, when considered in conjunction with other evidence. The evidence, if accepted, may establish a sufficient condition for the existence of the fact in issue or only a necessary condition. The ways in which evidence, if accepted, could affect the assessment of the probability of the existence of a fact in issue are various. Within the framework imposed by the statute and, in particular, the assumption that the evidence is accepted, the determination of probative value is a matter for the judge.

46 *Cross on Evidence* suggests[34] that a "significant" probative value is a probative value which is "important" or "of consequence". 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.

47 In comparison, the requisite probative value of the evidence is not spelled out in s 137. It requires the "probative value" of the evidence to be weighed against the danger of unfair prejudice to the defendant. This again requires 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.

48 It has been explained that the basic enquiry as to whether evidence "could rationally affect [...] the assessment of the probability of the existence of a fact in issue", which appears in both s 55 and the definition of "probative value" of evidence, is not altered by the further enquiry required by the definition as to the *extent* to which the evidence could have the effect stated. The assessment of *extent* does not import new and different considerations, such as might affect whether the evidence is accepted as credible or reliable.

---

34 *Cross on Evidence*, 10th Aust ed (2015) at 763 [21252].

49 The same construction must be given to the words "could rationally affect [...] the assessment of the probability of the existence of a fact in issue" where they appear in the definition of "probative value" as is given to those words in s 55. This requires an assessment of the capability of the evidence to have the stated effect. And because the question to which those words give rise remains the same for the passages of the definition of "probative value", that enquiry must be approached in the same way as s 55 requires: on the assumption that the jury will accept the evidence. The words "if it were accepted", which appear in s 55, should be understood also to qualify the evidence to which the Dictionary definition refers. It is an approach dictated by the language of the provisions and the nature of the task to be undertaken.

50 At a level of logic it is difficult to see how a trial judge could approach the question as to what the probative value of the evidence could be in any other way, for the reasons alluded to by Gaudron J in *Adam v The Queen*[35]. 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[36] 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.

51 At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility. As Simpson J pointed out in *R v XY*[37], the evidence will usually be tendered before the full picture can be seen. A determination of the weight to be given to the evidence, such as by reference to its credibility or reliability, will

---

35 (2001) 207 CLR 96 at 115 [60].

36 Heydon, "Is the Weight of Evidence Material to Its Admissibility?", (2014) 26 *Current Issues in Criminal Justice* 219 at 234.

37 (2013) 84 NSWLR 363 at 400 [167], [170].

depend not only on its place in the evidence as a whole, but on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other.

52 Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two – reliability and credibility – as *Dupas v The Queen* may imply. They are both subsumed in the jury's acceptance of the evidence.

53 The Evidence Act itself creates a difficulty in separating reliability from credibility. The definition of "credibility", which concerns both a person who has made a representation that has been admitted into evidence and a witness, includes the person's or witness's "ability to observe or remember facts and events" relevant to the representation or their evidence. These are matters which go to the reliability of the evidence.

54 The view expressed in *Dupas v The Queen*, which reserved a particular role for the trial judge with respect to the reliability of evidence, did not have its foundations in textual considerations of the Evidence Act, but rather in a policy attributed to the common law. The Evidence Act contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. The only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence, is provided by s 65(2)(c) and (d) and s 85. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury, albeit that a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.

55 In arguing that a trial judge should nevertheless consider the reliability of evidence for himself or herself, the appellant placed reliance on what was said by the Australian Law Reform Commission in its report on the proposed Evidence Bill 1987 (Cth)[38]. In that report the Commission expressed the view that "[t]he reliability of the evidence is an important consideration in assessing its probative value." This view was volunteered somewhat out of the context of the issues with which the Commission was there dealing, which concerned the use of

---

38 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 81 [146].

exclusionary discretions. Neither s 97(1)(b) nor s 137 fall into this category. In any event, a view of the Commission could hardly prevail over the language of the definition of "probative value" and the way in which it must be taken as intended to apply.

56 The appellant also placed weight on a statement made by McHugh J in *Papakosmas v The Queen*[39]. After referring to the definition of "probative value", his Honour said "[t]hat assessment, of course, would necessarily involve considerations of reliability." This appears to have been a comment in passing when dealing with a different issue – whether reliability played any part in the test of relevance[40]. It is not further explained. It is to be observed that the comment is made with reference to the importance of the probative value of the evidence to the exercise of the powers conferred in ss 135 and 137.

57 In *R v XY*, Basten JA spoke[41] of reliability being taken into account, but this was in the context of an assessment of the risk of prejudice under s 137, not as part of the assessment of the probative value of the evidence, which is the other side of the "weighing" exercise. In *R v Shamouil*, Spigelman CJ ventured[42] that there may be some limited circumstances in which credibility and reliability will be taken into account in determining probative value. His Honour referred in this regard to what had been said by Simpson J in *R v Cook*[43]. Her Honour there suggested that evidence that was obviously "preposterous" might be withheld from the jury.

58 It would not seem to be necessary to resort to an assessment of the reliability of evidence of this quality for it to be excluded under s 137. For the reasons already given, evidence which is inherently incredible or fanciful or preposterous would not appear to meet the threshold requirement of relevance. If it were necessary, the court could also resort to the general discretion under which evidence which would cause or result in an undue waste of time may be rejected.

---

39 (1999) 196 CLR 297 at 323 [86].

40 See also *Papakosmas v The Queen* (1999) 196 CLR 297 at 323 [87].

41 *R v XY* (2013) 84 NSWLR 363 at 376-377 [48].

42 *R v Shamouil* (2006) 66 NSWLR 228 at 236 [56].

43 [2004] NSWCCA 52 at [43].

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.

The extent of the probative value of the evidence

The tendency evidence

60 The complainant gave evidence of an occasion which occurred shortly before the appellant and the complainant's grandmother separated. There is no suggestion that there was anything untoward about the activity being undertaken at the time. The complainant and a granddaughter of the appellant were giving the appellant a back massage, as he had requested. The appellant was lying face down on a bed. The complainant was standing next to the bed. The complainant said that the appellant "ran his hand up my leg". She was wearing shorts at the time, so his hand did not contact her skin. She said that she moved away.

61 It may be accepted for present purposes that the evidence was relevant as it was capable of showing that the appellant had a sexual interest in the complainant, as the trial judge ruled. This is not put in issue by the appellant. But s 97(1)(b) requires more. It requires that the evidence have significant probative value.

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

---

44 (1988) 165 CLR 292 at 296 per Mason CJ, Wilson and Gaudron JJ; [1988] HCA 50.

45 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.

46 See *R v Ellis* (2003) 58 NSWLR 700 at 714-718 [65]-[95].

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.

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.

64 For these reasons the tendency evidence given by the complainant did not qualify as having significant probative value and was not admissible under s 97(1)(b).

The complaint evidence

65 SS was a friend of the complainant. She gave evidence that the complainant rang her and told her that the complainant's grandparents had separated. The complainant was upset and crying and told SS that her step-grandfather had "touched me", which SS took to mean in the area of the complainant's vagina.

66 The principal issue concerning the probative value of this complaint concerned the time at which it was made. The prosecution case was that it was made in late 2010 or early 2011. The defence case was that it was made much later, after the complainant spoke to her mother about the appellant, which occurred in August 2011. It was accepted that the probative value of this evidence was affected by the time when it was made. It is not necessary to go into the reasons for that.

67 There does not seem to be any reason to doubt the view of the Court of Criminal Appeal, that the preponderance of the evidence points to the complaint having been made at the earlier time, as the complainant suggested[47]. In

---

47 *IMM v The Queen* [2014] NTCCA 20 at [5]-[6].

particular, evidence of events which occurred when the conversation took place enabled it to be placed in time.

68 The complaints to the complainant's family all occurred in August 2011. They commenced with a statement made to the complainant's aunt. The aunt had challenged the complainant about the complainant's recent conduct. The complainant responded by saying: "[t]he things you are trying to protect me from have already happened". When the complainant would not further expand upon this, the aunt asked "[w]as it [the appellant]?", to which the complainant replied "[y]es".

69 The complainant's grandmother was present when the conversation with the aunt took place. The grandmother said in evidence that the complainant, after answering the aunt's enquiry, said "that it had been happening since she [the complainant] was little".

70 The mother was not present when these discussions took place. The aunt rang her to advise what the complainant had been saying about the appellant. The mother spoke to the complainant when she returned home the next day. The mother asked "[h]ow long has this been going on for?" and the complainant replied "from when I was little, about four". The mother asked "[h]ow often did this go on?" and the complainant replied "every day". The complainant said "I was naked … he was naked" and "[h]e used to lay on top of me and squash me".

71 The appellant submitted that an assessment of the probative value of the evidence should have been restricted to its effect upon the complainant's credibility, which is to say by treating it as relevant to context, rather than as evidence that the offences took place. The appellant's submission is reminiscent of the view of the common law that, because of the hearsay rule, evidence of recent complaint could only be used for a purpose relating to the credibility of the complainant. It was pointed out in *Papakosmas v The Queen*[48] that the Evidence Act has changed that.

72 The Australian Law Reform Commission recommended that complaint evidence be received as evidence of the facts in issue[49] in certain circumstances. The concern of the common law with respect to hearsay evidence of this kind was its potential to be unreliable. Section 65 addresses this by requiring a judge

---

48 (1999) 196 CLR 297 at 309 [33].

49 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 383 [693].

to consider the reliability of evidence, when the maker is not called. When the maker is called, as in this case, s 66 requires that the act complained of be fresh in the memory of the maker of the statement.

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.

74 The trial judge held that the evidence did not create the prejudice to which s 137 referred[50]. Neither at trial nor in the Court of Criminal Appeal did the appellant suggest that there was a risk of the jury misusing the evidence or giving it more weight than it deserved, as he now seeks to do. In any event, it is difficult to see how the jury could misunderstand the use to which this evidence could be put. There is no reason to think that the jury would apply it as tendency evidence, when they have been directed that they may use it more directly.

Conclusion and orders

75 The grounds of appeal respecting the complaint evidence are not made out, but the ground alleging error in assessing the tendency evidence for probative value is. The result is that inadmissible tendency evidence was admitted. The trial miscarried.

76 The appeal should be allowed and the order of the Court of Criminal Appeal of the Northern Territory dismissing the appeal should be set aside. In lieu it should be ordered that the appeal against conviction be allowed, that the appellant's conviction be quashed, and that there be a new trial of the offences of which he was convicted.

---

50 *R v IMM (No 2)* (2013) 234 A Crim R 225 at 232 [30].

77 GAGELER J. The relationship between relevance and admissibility in the law of evidence, Sir Richard Eggleston wrote, is a subject which "abounds in ambiguities"[51]. The Uniform Evidence Acts have removed some of the ambiguities inherent in the common law's treatment of the subject. Some of those ambiguities have been replaced by statutory ambiguities. Conundrums of logic and experience have become conundrums of statutory construction.

78 Within the scheme of the Evidence Act[52], all evidence must be "relevant" in order to be admissible but not all evidence that is relevant is admissible[53]. Evidence is not admissible if it is excluded by or under a provision of the Evidence Act. Numerous provisions of the Evidence Act require or permit the exclusion of evidence, or limit its use, by reference to its "probative value"[54].

79 The conundrum of statutory construction at the heart of this appeal concerns the content of the definition of probative value in the dictionary of the Evidence Act, and the relationship between the statutory conception of probative value and the statutory conception of relevance.

80 Within the scheme of the Evidence Act, relevant evidence 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"[55]. According to the definition in the dictionary of the Evidence Act, the 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"[56].

81 The statutory assumption required by the words "if it were accepted" has the result that evidence must be assumed to be trustworthy for the purpose of determining whether or not the evidence is relevant according to the statutory definition in the dictionary of the Evidence Act. That is because, within the

---

51 Eggleston, "The Relationship between Relevance and Admissibility in the Law of Evidence", in Glass (ed), *Seminars on Evidence*, (1970) 53 at 54.

52 *Evidence (National Uniform Legislation) Act* (NT), materially identical to the *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas); *Evidence Act* 2008 (Vic); and *Evidence Act* 2011 (ACT).

53 Section 56.

54 Eg ss 97, 98, 101, 135, 137 and 138.

55 Section 55(1).

56 Dictionary, "probative value".

scheme of the Evidence Act, evidence that is "accepted"[57] is evidence which the tribunal of fact finds to be trustworthy.

82 Within the scheme of the Evidence Act, evidence that is trustworthy is evidence that is "reliable"[58], and an aspect of the reliability of all or part of the testimony of a witness is its "credibility". The latter term is defined in the dictionary of the Evidence Act so as to encompass not only the witness's truthfulness but also "the witness's ability to observe or remember facts and events"[59].

83 The statutory assumption required by the words "if it were accepted" therefore has the result that, where the tribunal of fact is a jury, a judge determining whether evidence is relevant is "neither required nor permitted ... to make some assessment of whether the jury would or might accept it"[60]. The judge is required instead to assume that the jury would find the evidence to be credible and otherwise reliable and to ask, on that assumption, whether the jury could rationally infer from the evidence that the existence of a fact in issue is more or less probable.

84 The particular conundrum of statutory construction at the heart of this appeal is whether the same assumption must be made for the purpose of determining probative value. Where the tribunal of fact is a jury, is a judge determining probative value required to assume that the jury would find the evidence to be credible and otherwise reliable and to assess, on that assumption, the extent to which the jury could rationally infer from the evidence that a fact in issue is more or less probable? Alternatively, is the judge required to examine whether the jury could rationally find evidence to be credible and otherwise reliable as a step in determining the extent to which the jury could rationally infer from the evidence that the fact in issue is more or less probable?

85 The underlying statutory ambiguity lies in the absence from the dictionary definition of probative value of an equivalent of the requirement contained in the statutory explanation of relevance that evidence must be assumed to be accepted. The ambiguity was shown up by countervailing statements of McHugh J in 1999 and Gaudron J in 2001. McHugh J thought that the omission was significant. He saw it as confirming that, within the scheme of the Uniform Evidence Acts, an assessment of probative value "necessarily involve[s] considerations of

---

57 Eg ss 111(2), 165(2)(c).

58 Eg ss 165, 174(1)(b).

59 Dictionary, "credibility".

60 *Adam v The Queen* (2001) 207 CLR 96 at 105 [22]; [2001] HCA 57.

reliability"[61]. Gaudron J thought that the omission was of no significance. Her view was that because "[a]s a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted", "the assumption that it will be accepted must be read into the dictionary definition"[62].

86 The ambiguity was noted but not resolved by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their joint review of the Evidence Act in 2005[63]. It was not addressed in subsequent extensive amendments[64].

87 Different approaches have since been taken by the New South Wales Court of Criminal Appeal and by the Victorian Court of Appeal. The approach of the New South Wales Court of Criminal Appeal has developed along lines broadly consistent with the view of Gaudron J that an assessment of the probative value of evidence must be made on the assumption that the evidence is reliable[65]. The approach of the Victorian Court of Appeal is broadly consistent with the view of McHugh J that an assessment of probative value necessarily involves considerations of reliability[66]. The Tasmanian Court of Criminal Appeal has adopted the approach of the New South Wales Court of Criminal Appeal[67]. The Northern Territory Court of Criminal Appeal in the decision now under appeal, although it questioned whether the two approaches are truly irreconcilable[68],

---

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

62 *Adam v The Queen* (2001) 207 CLR 96 at 115 [60].

63 Australian Law Reform Commission, Report No 102, New South Wales Law Reform Commission, Report No 112, Victorian Law Reform Commission, Final Report, *Uniform Evidence Law*, (2005) at 557-558 [16.16]-[16.22].

64 *Evidence Amendment Act* 2007 (NSW); *Evidence Amendment Act* 2008 (Cth).

65 *R v Shamouil* (2006) 66 NSWLR 228 at 237 [62]; *R v Mundine* (2008) 182 A Crim R 302 at 308-309 [32]-[33]; *DSJ v The Queen* (2012) 84 NSWLR 758 at 771 [56].

66 *Dupas v The Queen* (2012) 40 VR 182 at 222 [155]; *Velkoski v The Queen* (2014) 242 A Crim R 222 at 269 [179].

67 *KMJ v Tasmania* (2011) 20 Tas R 425 at 441 [34], 444 [42].

68 *IMM v The Queen* [2014] NTCCA 20 at [50].

found no error in the adoption by the trial judge of the approach of the New South Wales Court of Criminal Appeal[69].

88 While the difference between the two approaches is important, the extent of the difference should not be overstated. On neither approach is the judge in a jury trial required or even permitted to assess the weight which the jury can be expected ultimately to attach to the evidence. The judge does not usurp the fact-finding role of the jury. The judge does not anticipate how the jury is likely to perform that fact-finding role.

89 On neither approach is the judge required to do more than make an assessment of the extent to which the jury "could" rationally infer from the evidence that a fact in issue was more or less probable[70].

90 The word "could" in the dictionary definition of probative value is extremely important. What it indicates is that the judge has to make an assessment of the highest use to which the evidence is rationally capable of being put by the jury. The judge's assessment of probative value is an assessment of the maximum potential for the evidence rationally to affect the jury's assessment of the probability of the existence of a fact in issue. The judge has to ask: how much is the evidence rationally capable of contributing to the jury's assessment that the existence of that fact is more or less probable?

91 The difference between the two approaches concerns what is or can be involved in assessing the highest use to which the evidence is rationally capable of being put by the jury. On one approach, the reliability of the evidence must be taken as given. On the other approach, the reliability of the evidence forms part of the assessment. But on either approach, the assessment to be made by the judge remains an assessment of how much the evidence is rationally capable of contributing to the jury's assessment that the existence of a fact in issue is more or less probable.

92 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

---

69 *R v IMM (No 2)* (2013) 234 A Crim R 225 at 231-232 [29]; *R v IMM (No 3)* [2013] NTSC 45 at [10].

70 *R v Shamouil* (2006) 66 NSWLR 228 at 237 [61]; *Dupas v The Queen* (2012) 40 VR 182 at 224 [163].

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.

93 Once it is borne in mind that the judge's assessment concerns the highest use to which the evidence is capable of being put by the jury, it is difficult to see significance in the difference between the two approaches other than in an extreme case where the judge is able to determine at the time evidence is sought to be adduced that it would not be open to the jury rationally to find that evidence to be reliable. In most cases, including the leading cases in which the different approaches have been explained in New South Wales[71] and Victoria[72], the outcome would be the same on either approach. That was the burden of the comments made by Basten JA in *R v XY*[73], in which there is much force.

94 Having laboured the point that the difference between the competing approaches is not often likely to be of great consequence, I turn squarely to address the underlying issue of statutory construction. My conclusion, like that of Nettle and Gordon JJ, is that the view of McHugh J is to be preferred to the view of Gaudron J.

95 Unlike Nettle and Gordon JJ, I gain no assistance in reaching that conclusion from construing the Evidence Act against the background of the common law. As Spigelman CJ observed in *R v Ellis*[74] in a passage which was

---

71 *R v Shamouil* (2006) 66 NSWLR 228 at 229-230 [2]-[4], 238 [66]-[67].

72 *Dupas v The Queen* (2012) 40 VR 182 at 242-249 [229]-[241].

73 (2013) 84 NSWLR 363 at 375-381 [41]-[65].

74 (2003) 58 NSWLR 700 at 716-717 [78].

given prominence in the report of the joint review of the Uniform Evidence Acts in 2005[75]:

> "It is ... noteworthy that the Act provides a definition of 'probative value' ... Although the definition could well have been the same as at common law, the fact that such a term was defined at all suggests an intention to ensure consistency for purposes of the *Evidence Act* for the words, which appear in a number of different sections ... This suggests that the Act, even if substantially based on the common law, was intended to operate in accordance with its own terms."

The common law did not employ the concept of probative value with statutory precision, and the common law developed no general rule to the effect that reliability (in the sense now used in the Evidence Act) was or was not to be assumed in assessing probative value for all purposes of determining admissibility. For some purposes, such as determining the admissibility of tendency evidence or of coincidence evidence, it came to be established that the assessment of probative value was required to proceed on the assumption that the truth of the evidence would be accepted[76]. For other purposes, such as considering the discretion to exclude prosecution evidence, the probative value of which was outweighed by the risk of unfair prejudice to the accused, it has been acknowledged that considerations indicating evidence to be unreliable might on occasions be sufficient to deprive the evidence of probative value[77].

96 Together with Nettle and Gordon JJ, I consider the view of McHugh J – that an assessment of probative value necessarily involves considerations of reliability – to be a view that is compelled by the language, structure and evident design of the Evidence Act. To think of evidence that is relevant as evidence that has some probative value and to go on to think of probative value as a measure of the degree to which evidence is relevant is intuitively appealing. It is elegant; it has the attraction of symmetry. For many purposes, it may not be inaccurate. But it is not an exact fit for the conceptual framework which the statutory language erects. The statutory description of relevance requires making an assumption that evidence is reliable; the statutory definition of probative value does not provide for making that assumption. The conceptual framework which

---

75 Australian Law Reform Commission, Report No 102, New South Wales Law Reform Commission, Report No 112, Victorian Law Reform Commission, Final Report, *Uniform Evidence Law*, (2005) at 86 [3.30].

76 *Phillips v The Queen* (2006) 225 CLR 303 at 323 [63]; [2006] HCA 4 (explaining *Pfennig v The Queen* (1995) 182 CLR 461 at 485; [1995] HCA 7).

77 Eg *Alexander v The Queen* (1981) 145 CLR 395 at 433; [1981] HCA 17.

the statutory language erects therefore admits of the possibility that relevant evidence will lack probative value because it is not reliable.

97 The statutory language cannot be explained away as lacking in precision. The detailed reports of the Australian Law Reform Commission which laid out the Evidence Act's basic design recommended drawing a conceptual distinction between relevance and probative value. Those reports make clear that the statutory language chosen to explain those distinct concepts of relevance and probative value was chosen to implement a deliberate legislative design. The legislative design was that probative value would involve an assessment of reliability[78] and that relevance would not[79].

98 The foundation for the view of Gaudron J was the practical observation that evidence can rationally affect the probability of a fact in issue only if it is accepted. Although not universally correct (false denials, for example, can have probative value), the observation is generally correct. But it does not follow from the general correctness of the observation that the assumption that evidence will be accepted must be read into the dictionary definition of probative value. What the observation confirms is that an assessment of whether the evidence could be accepted must be treated as forming part of an assessment of the extent to which the jury could rationally infer from the evidence that a fact in issue was more or less probable. The true import of the observation is to reinforce the view of McHugh J.

99 Conscious that the statement I am about to make involves repetition, a judge assessing the probative value of testimony in a jury trial is always required to ask: how much is that testimony rationally capable of contributing to the jury's assessment that the existence of a fact in issue is more or less probable? Performance of that assessment necessitates identification of the fact in issue and of the steps by which it would be open to the jury to reason from the testimony to a conclusion that the existence of that fact is more or less probable. The result of the construction I prefer is that, where credibility of the testimony is raised as an issue going to the probative value of the testimony, the judge will have to ask as part of that assessment: would it be open to the jury, as a step in reasoning from the testimony to the conclusion that the existence of the fact in issue is more or less probable, rationally to find that the testimony is credible? If the answer to that question is that the jury could not rationally find that the testimony is

---

78 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 80-81 [146].

79 Australian Law Reform Commission, *Evidence*, Report No 26, (1985), vol 1 at 350-351 [641], vol 2 at 131-132 [58]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 70 [122], 71 [125].

credible, the testimony has no probative value. If the answer is that the jury could rationally find that the testimony is credible, the probative value of the testimony (like the probative value of testimony about which there is no issue of credibility) falls to be measured by reference to the highest use to which the jury could rationally put the testimony having found it to be credible.

100 It follows from my conclusion on the main issue of principle in the appeal that the trial judge and the Northern Territory Court of Criminal Appeal adopted the wrong approach to the assessment of probative value. It is necessary now to consider whether the application of the correct test could have resulted in the trial judge properly concluding that the tendency evidence and complaint evidence in the present case were inadmissible.

101 My resolution of that subsidiary issue differs from its resolution by Nettle and Gordon JJ, and leads me to agree with French CJ, Kiefel, Bell and Keane JJ that the tendency evidence was improperly admitted and that the complaint evidence was properly admitted.

102 Whether or not the tendency evidence was inadmissible turns on whether the condition of admissibility set out in s 97(1)(b) of the Evidence Act could be met. Adopting the correct approach to the assessment of probative value, was it open to the trial judge to think "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"?

103 To warrant the description of having "significant probative value", the capacity of the evidence to contribute to the proof or disproof of the existence of a fact in issue must be more than simply the capacity to make the existence of that fact more or less probable. To the extent that similes can help elucidate the statutory measure of "significant", the capacity of the evidence to contribute to the proof or disproof of the existence of the fact in issue does not need to be "substantial" but does need to be "important" or "of consequence"[80]. The significance of the probative value of the evidence falls to be gauged having regard to the issues which would arise for the consideration of the jury in reasoning that the evidence made a fact in issue more or less probable and having regard to other evidence bearing on the existence of that fact adduced or to be adduced by the party seeking to adduce the evidence.

104 The nature of tendency evidence adduced by the prosecution in a criminal trial is that it is evidence of another occasion or occasions on which the accused acted in a particular way. The evidence is adduced in order to provide a

---

80 *Lockyer* (1996) 89 A Crim R 457 at 459; *DSJ v The Queen* (2012) 84 NSWLR 758 at 771-772 [57]-[60].

foundation for an inference that the accused has or had a tendency to act in that way or to have a particular state of mind, the existence of which tendency makes it more probable that the accused acted in a particular way or had a particular state of mind at the time or in the circumstances of the alleged offence[81]. Tendency evidence is thus evidence the relevance of which lies in its capacity indirectly to affect the assessment of the probability of the existence of the fact in issue of the accused's action or state of mind at the time or in the circumstances of the alleged offence.

105 The tendency evidence in question in the present case – the testimony of the complainant about the "massage incident" – was evidence of that nature. The prosecution sought to adduce it in order to provide a foundation for an inference that the appellant had a sexual interest in the complainant on the basis that the existence of that sexual interest increased the probability that the appellant committed one or more of the sexual offences against the complainant with which he was charged.

106 The Northern Territory Court of Criminal Appeal was undoubtedly correct to proceed on the basis that there is no general rule that the uncorroborated tendency evidence of a complainant is inadmissible and to state that lack of corroboration is a matter of weight for the jury[82]. Provided the jury could rationally find the complainant to be credible, her tendency evidence was of some probative value: if the jury were to find the complainant to be credible, the evidence provided a basis on which the jury could go on rationally and indirectly to infer that there was an increased probability that the appellant committed one or more of the sexual offences against the complainant with which he was charged. The real question is whether that probative value was capable of warranting the label of significant.

107 The difficulty of concluding that the complainant's testimony about the massage incident was capable of having significant probative value was not just that the testimony was uncorroborated. Her testimony about the massage incident was uncorroborated within a context in which the credibility of the whole of her testimony was in issue. There was nothing to make her uncorroborated testimony about that incident more credible than her uncorroborated testimony about the occasions of the offences charged. There was no rational basis for the jury to accept one part of the complainant's testimony but to reject the other. The increased probability of the appellant having committed the offences which would follow from the jury accepting that part of the complainant's testimony which constituted tendency evidence could in

---

81 *Elomar v The Queen* (2014) 316 ALR 206 at 260 [253], 278 [360].

82 *IMM v The Queen* [2014] NTCCA 20 at [43]-[44].

those circumstances add nothing of consequence to the jury's assessment of that probability based on its consideration of that part of the complainant's testimony which constituted direct testimony about what the appellant in fact did on the occasions of the offences. The probative value of the tendency evidence could not be regarded as significant.

108 For that reason, in my view, the tendency evidence was improperly admitted in the present case, and application of the correct test of probative value could not have resulted in the tendency evidence having been properly admitted.

109 Whether or not the complaint evidence was properly admitted turns on the correctness of the result of the trial judge's application of the general rule in s 137 that "[i]n 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 defendant". The rule requires the judge in a jury trial to ask: (1) How much does this evidence contribute to the prosecution case that the existence of a fact in issue is more or less probable? (2) How much does the same evidence give rise to a danger of unfair prejudice to the accused? (3) Does (1) outweigh (2)? Unless application of s 137 is to be a zero sum game, the danger to the accused measured in (2) must lie in something other than the contribution to the prosecution case measured in (1)[83].

110 The conclusion that the application of the correct test of probative value could have resulted in the complaint evidence in the present case not being admitted, in my view, faces two insurmountable difficulties. The first is that the trial judge's exclusion of considerations of credibility could only have made a difference to the trial judge's evaluation of probative value in the extreme case of the trial judge concluding that the complaint evidence was so incredible that it could not be accepted by the jury. The appellant made no submission that this was such a case.

111 The second is that the assessment of both probative value and unfair prejudice was necessarily performed by the trial judge at the time the evidence was sought to be adduced by the prosecution on the basis of the material then available to the judge and having regard to the submissions then made to the judge. There was simply nothing before the trial judge to indicate that the complaint evidence gave rise to a danger of unfair prejudice. The trial judge found that there was none. Any error of the trial judge in her evaluation of the probative value of the evidence could therefore have made no difference to the correctness of her decision not to exclude the evidence.

112 I agree with the orders proposed by French CJ, Kiefel, Bell and Keane JJ.

---

83 Cf *Festa v The Queen* (2001) 208 CLR 593 at 603 [22]; [2001] HCA 72.

113 NETTLE AND GORDON JJ. This appeal concerns the admissibility of evidence as tendency evidence under s 97 of the *Evidence (National Uniform Legislation) Act* (NT) ("the Act") and the exclusion of evidence under s 137 of the Act. It raises the question of whether a judge should have regard to the credibility and reliability of evidence in determining its probative value for the purposes of ss 97 and 137 of the Act. For the reasons which follow, that question should be answered yes.

114 Before proceeding further, it is important to be clear about what is meant by "credibility" and "reliability" in this context. At common law, a distinction was ordinarily drawn between the two concepts[84]. The credibility of a witness was commonly understood as meaning the "truthfulness" of the witness – whether the witness genuinely believed that he or she was telling the truth. Reliability, on the other hand, referred to the ability of the witness accurately to discern and relay the truth as to an event, including the witness's ability to observe and remember facts. For example, if an event occurred a long time ago, that might affect the reliability of the witness because it is generally accepted that memory is prone to fade over time. Credibility and reliability are used in those senses throughout these reasons.

The facts

115 The appellant was charged with the following four offences which it was alleged he committed on his step-granddaughter ("the complainant"):

(1) On or about 12 June 2002, indecent dealing with a child under 16 (touching the child's vagina while the child was in the bath, when the child was aged about four);

(2) Between 1 January 2004 and 13 June 2004, indecent dealing with a child under 16 (rubbing his penis on the outside of the child's vagina, when the child was aged about five);

(3) Between 1 December 2004 and 31 January 2005, sexual intercourse with a child under 16 (performing cunnilingus on the child, when the child was aged about six);

(4) On 2 November 2009, indecent dealing with a child under 16 (rubbing his penis on the outside of the child's vagina, when the child was aged about 11).

---

84 See *Dupas v The Queen* (2012) 40 VR 182 at 253-255 [260]-[266]; *R v XY* (2013) 84 NSWLR 363 at 377 [49] per Basten JA.

116 Following a trial in the Supreme Court of the Northern Territory, the appellant was found not guilty of count 1 but guilty of the other counts.

Context evidence

117 The events leading up to the trial began when the complainant made a complaint to family members in August 2011 and the police were informed. The police conducted interviews with the complainant on 31 August 2011, 3 September 2011 and 27 January 2012. The first two interviews were admitted as part of the complainant's evidence at the trial.

118 The Crown alleged that the charged acts occurred during a continuing course of sexual abuse (during occasions when the appellant had access to the complainant) beginning when the complainant was about four years old and continuing until the end of the relationship between the appellant and the complainant's grandmother, when the complainant was 12 years old. The complainant's evidence of that history of sexual abuse was admitted, without objection, as "context evidence" and the jury were directed as to the limited way that context evidence might be used.

Tendency evidence

119 In the police interview conducted on 31 August 2011, the complainant stated that, sometime after the last of the charged incidents, she and another girl were giving the appellant a back massage and "[the appellant] ran his hand up my leg" ("the massage incident").

120 The massage incident evidence was admitted, over objection, as tendency evidence under s 97 of the Act, to establish that the appellant had a sexual interest in the complainant and was prepared to act on it. In making the determination to admit the evidence of the massage incident as tendency evidence under s 97 of the Act, the judge considered that she was bound to assume that the evidence would be accepted. Her Honour ruled that, if accepted, it was capable of showing the appellant's inappropriate sexual interest in, and lack of inhibition regarding sexual conduct with, the complainant which had a strong temporal nexus to the charged acts. The judge also ruled that, assuming the evidence were accepted, its probative value would not be unfairly prejudicial and, consequently, that it should not be excluded under s 135; and that, assuming the evidence were accepted, its probative value would outweigh the risk of unfair prejudice and, consequently, that it should not be excluded under s 137[85].

---

85 *R v IMM (No 3)* [2013] NTSC 45 at [10].

121 The judge explained to the jury that the Crown's purpose in leading the massage incident evidence was to prove that the appellant had a sexual interest in the complainant. She directed the jury that, if they accepted beyond reasonable doubt that the massage incident occurred and that it showed that the appellant was sexually interested in and attracted to the complainant, and was willing to act on that attraction, they could use that finding in determining whether the appellant committed the offences charged. The judge also warned the jury that the massage incident evidence could not alone prove guilt, that they could not substitute the massage incident evidence for the evidence of the offences charged, and that they must not allow the massage incident evidence to close their minds against the appellant or to cause them to pay less attention to the other evidence.

122 On appeal, the Court of Criminal Appeal of the Northern Territory[86] affirmed the judge's ruling that the massage incident evidence possessed the capacity to demonstrate that the appellant had a sexual interest in the complainant, and that it had a strong temporal nexus with the charged acts. Their Honours rejected the appellant's contention that, because the massage incident evidence was uncorroborated, it lacked sufficient probative value to be admissible under s 97. The Court of Criminal Appeal stated that there is no general rule that evidence which comes solely from a complainant lacks sufficient probative value to be admitted under s 97, and that the lack of corroboration was a matter of weight for the jury and not of admissibility.

123 The Court of Criminal Appeal also endorsed the approach taken in *R v Shamouil*[87] to the interpretation of s 97. Their Honours rejected the appellant's contention that, because it is established that a judge must not admit evidence as coincidence evidence under s 98 where there is a real possibility of mutual concoction, it is apparent that s 97 equally requires a judge to consider the credibility and reliability of evidence sought to be adduced under s 97 of the Act. The Court of Criminal Appeal stated that, although the *Shamouil* interpretation of s 97 allows for circumstances where the credibility or reliability of evidence is such that a judge can determine it would not be open to a jury to regard the evidence as having any probative value, the exclusion of evidence on that basis is distinct from the question of whether evidence sought to be adduced as coincidence evidence is affected by a real possibility of mutual concoction. And that was so, it was said, even though a risk of mutual concoction necessarily affects the probative value of the evidence. Their Honours further observed that, in any event, there were no credibility issues affecting the probative value of the

---

86 *IMM v The Queen* [2014] NTCCA 20.

87 (2006) 66 NSWLR 228.

massage incident evidence, for the reason that the appellant had not advanced any basis to suppose that the complainant's evidence concerning the massage incident was any less credible than the remainder of her evidence. Their Honours also affirmed that the admission of the massage incident evidence under s 97 did not involve any danger of unfair prejudice so as to warrant exclusion under s 137.

Complaint evidence

124 In addition to the evidence admitted as tendency evidence, the Crown adduced "complaint evidence" from several witnesses:

(1) SS (the complainant's friend): the complainant told her that the appellant "touched me";

(2) SW (the complainant's aunt): the complainant told her "The things you are trying to protect me from have already happened"; when SW asked the complainant "Was it [the appellant]?", the complainant replied "Yes";

(3) SC (the complainant's grandmother): when SW asked if "[the appellant] had been touching her, this is when ... [the complainant] told [SW] that it had been happening since she was little";

(4) KW (the complainant's mother): when KW asked the complainant "How long has this been going on for?", the complainant replied "from when I was little, about four"; when KW asked the complainant "How often did this go on?", the complainant replied "every day"; the complainant said "I was naked ... he was naked" and "He used to lay on top of me and squash me".

125 The complaint evidence was admitted, over objection, under s 66 of the Act. The judge held that the complaints made to SS and KW and the complainant's distressed demeanour described by those witnesses qualified for admission under s 66 of the Act on the basis that the subject of the complaints was likely to be clear in the complainant's memory at the time the complaints were made. Her Honour ruled that the complaint to KW was to be viewed in the context of what was said to SW and SC the night before. The judge also ruled that the complaint evidence was not misleading or confusing and therefore should not be excluded under s 135. The judge further ruled that, assuming the complaint evidence were accepted, as was mandated by *Shamouil*, it would not be productive of the kind of prejudice to which s 137 is directed, namely, a real risk that the evidence would be misused or divert jurors from their task in spite of directions.

126 No application was made for the judge to limit the use of the complaint evidence pursuant to s 136 of the Act.

127 The judge directed the jury that it was a matter for them whether a complaint was made, when it was made and what its contents were. Her Honour told them that, if they were satisfied that the complaint evidence was substantially to the effect that the appellant had engaged in sexual misconduct with the complainant, they were entitled to use the complaint evidence as some evidence that the offences occurred; and, if they did use it as evidence of the offences charged, the weight they gave it was a matter for them. The judge directed the jury that they were also entitled to consider the distress of the complainant but that they should bear in mind the possibility that it could have been caused by some other factor. In accordance with s 165, the judge also gave the jury a reliability warning.

128 On appeal, the Court of Criminal Appeal affirmed the judge's ruling that the prejudicial effect of the complaint evidence could not have outweighed its probative value. The Court of Criminal Appeal was of the view that the preponderance of evidence supported the complaint to SS being made first, and that the complaint evidence had significant probative value. Their Honours said that the disclosures to KW were referable to the counts on the indictment, both as general disclosures of sexual misconduct and as including details consistent with individual charges. Their Honours stated that the complaint to KW had further significant probative value in view of the detail of the complaint and KW's evidence of the complainant's significant distress at the time of the complaint.

129 The Court of Criminal Appeal further held that the judge made no error in not limiting the use of the complaint evidence, because the use of complaint evidence under s 66 is not contingent on specificity. Any lack of specificity is a matter of weight for the jury. The Court of Criminal Appeal considered that, although it was possible that complaints of a general nature were referable to uncharged acts as opposed to charged acts, that did not prevent the jury from using those complaints as "some evidence"[88] that the charged offences occurred. The Court of Criminal Appeal rejected the appellant's contention that there was a danger that the jury would use the complaint evidence as tendency evidence, and thus that the judge should have directed the jury: that they could not use the complaint evidence in that fashion unless satisfied beyond reasonable doubt that it showed that the appellant was sexually interested in and attracted to the complainant, and was willing to act on that attraction; that it could not alone prove guilt; that it was not permissible to substitute it for the evidence of the offences charged; and that the jury must not allow it to close their minds against the appellant or to cause them to pay less attention to the other evidence. The Court of Criminal Appeal considered that it would have been apparent to the jury

---

88 *IMM v The Queen* [2014] NTCCA 20 at [35] per Kelly J (Riley CJ agreeing at [1], Hiley J agreeing at [54]).

that the tendency evidence directions which the judge gave them concerning the massage incident evidence applied equally to the complaint evidence.

Relevant provisions

130 Section 56 of the Act provides that, except as otherwise provided by the Act, evidence that is relevant in a proceeding is admissible in the proceeding and evidence that is not relevant in a proceeding is inadmissible.

131 Section 55(1) provides that 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." (emphasis added)

132 The tendency rule is set out in s 97 of the Act. Section 97(1) provides that:

> "Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) 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*." (emphasis added)

133 "Probative value" of evidence is defined in the Dictionary to the Act as meaning:

> "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

134 Section 101 provides, inter alia, that in a criminal proceeding, tendency or coincidence evidence about a defendant that is adduced by the prosecution cannot be used against the defendant unless:

> "the *probative value* of the evidence substantially outweighs any prejudicial effect it may have on the defendant." (emphasis added)

135 Section 135 relevantly provides that the court *may* refuse to admit evidence:

> "if its *probative value* is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party". (emphasis added)

136 Section 137 provides that 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 defendant." (emphasis added)

Relevance and probative value

137 As will be apparent from the provisions just referred to, the definition of "evidence that is relevant" in s 55 of the Act is expressly premised on the assumption that the evidence will be accepted. Consequently, the question which s 55 poses is whether, *assuming the evidence is accepted*, it *could* rationally affect the assessment of the probability of the existence of a fact in issue; or more precisely, whether, *assuming the evidence is accepted*, it would have the capacity rationally to affect the assessment of the probability of the existence of a fact in issue.

138 By contrast, the test of admissibility in s 97 is not expressly premised on any such assumption. In terms, the question which it poses is whether *the court thinks* that the evidence *will* have significant "probative value" or, more precisely, whether *the court thinks* that the evidence *will* to a significant extent have the capacity rationally to affect the assessment of the probability of the existence of a fact in issue.

139 Since s 55 is expressly premised on the assumption that the evidence will be accepted, it is plain that the determination of the relevance of evidence in accordance with s 55 does not involve any assessment of whether a jury would or might accept the evidence[89]. By contrast, unless such an assumption is to be read into s 97, the plain and ordinary meaning of the words of s 97 is that s 97 does not assume that the evidence will be accepted. If so, the determination of whether the court thinks that the evidence will have the capacity rationally to affect the assessment of the probability of the existence of a fact in issue to a significant extent is a determination that must be made without making any

---

89 *Adam v The Queen* (2001) 207 CLR 96 at 105 [22] per Gleeson CJ, McHugh, Kirby and Hayne JJ; [2001] HCA 57.

assumptions about whether the evidence will be accepted, and, therefore, it is a determination that logically depends, among other things, on the court's assessment of the reliability of the evidence or, more accurately in the case of trial by jury, the court's assessment of the degree of reliability which it would be open to the jury rationally to attribute to the evidence.

140 In *Papakosmas v The Queen*[90] McHugh J observed that, for the purposes of s 137, the definition of "probative value" would "necessarily involve considerations of reliability". In contrast, in *Adam v The Queen*[91], Gaudron J postulated (without reference to *Papakosmas*) that it was necessary to read the definition of "probative value" as if it included an assumption that the evidence would be accepted:

> "As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition."

With respect, the view expressed by McHugh J in *Papakosmas* is logically to be preferred. Evidence cannot affect the assessment of the probability of the existence of a fact in issue unless the evidence is rationally capable of being accepted. Hence, to determine whether evidence has the capacity rationally to affect the assessment of the probability of the existence of a fact in issue requires a determination of whether the evidence is rationally capable of acceptance. And for the court to determine whether it thinks that evidence is rationally capable of acceptance requires the court, among other things, to determine whether it thinks that the degree of reliability which it would be open to the jury rationally to attribute to the evidence is such that it will be open to the jury rationally to accept the evidence. It follows that, according to ordinary principles of statutory construction, there is no warrant for reading s 97 or the definition of "probative value" in the Dictionary to the Act as involving an assumption that evidence will be accepted[92].

---

90 (1999) 196 CLR 297 at 323 [86]; [1999] HCA 37.

91 (2001) 207 CLR 96 at 115 [60].

92 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548-549 [37]-[40] per French CJ, Crennan and Bell JJ; [2014] HCA 9.

The Australian Law Reform Commission reports

141 That conclusion is fortified by reference to the Australian Law Reform Commission ("the Commission") reports preceding the enactment of the Act[93]. The Commission proposed the definition of "probative value" in the form in which it was finally enacted[94] and emphasised that reliability is an important consideration in assessing probative value[95]:

> "The Commission remains of the view that the court can and should consider the reliability of the evidence concerned in applying those discretions. The Bill does not refer to the 'unreliability of the evidence' but it refers to the probative value of the evidence. ... [T]he judge can take account of the fact that the plaintiff's evidence is hearsay as that will go to the probative value of the plaintiff's evidence. The judge can also look to the surrounding circumstances in which the statement was made to the plaintiff and other matters going to the reliability of the evidence, such as how recently after the event the statement was made, whether the person who made the statement had an interest or not in the matters referred to and whether the circumstances placed some obligation on the person who made the statement to tell the truth. *The reliability of the evidence is an important consideration in assessing its probative value*." (emphasis added)

142 That passage of the Commission's report is illuminating because it was written in response to a private submission that suggested that the discretionary

---

93 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985); Australian Law Reform Commission, *Evidence*, Report No 38, (1987); *Interpretation Act* (NT), s 62B(1), (2)(b).

94 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 2, Appendix A, cl 3.

95 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 80-81 [146]. See also Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 217 [395] where the Commission discussed factors rendering reputation evidence of "doubtful probative value" and referred to the possibility that that might be so because of hearsay, rumour or a source of uncertain trustworthiness (none of which would be relevant if the credibility and reliability of the evidence were assumed); Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 2, Appendix C at 207 [143] where the Commission said in respect of evidence alleged to have been fabricated: "Reliability goes to weight, but an unreliable confession is of low probative value, which may be outweighed by 'prejudice'."

exclusions in the published draft legislation could not accommodate considerations of reliability[96]. The fact that the Commission considered that the draft definition of "probative value" made clear that the assessment of probative value involves questions of reliability in a sense that includes both reliability and credibility is a significant indicator that the definition was enacted in that form to achieve what the Commission considered to be its effect[97].

143 It may be noted that the Commission was there referring to the meaning of "probative value" in the context of discretionary exclusions which were later enacted in the form of ss 135 and 137. There was no reference in that passage of the Commission's report to s 97. But "probative value" has the same meaning in s 97 as it does in ss 135 and 137 (and ss 98, 101, 138 and 190). In addition to the general precept that, in the absence of contrary intention, it is assumed that words are used consistently throughout a statute[98], the Act expressly provides that the definitions contained in the Dictionary to the Act apply throughout the Act[99]. It is unlikely that the omission from the definition of "probative value" of the assumption that evidence would be accepted was a drafting oversight or otherwise than calculated to ensure that, in assessing probative value, the court would have regard to reliability. The plain and ordinary meaning of the definition is that no such assumption is to be made, and the Commission's report confirms that.

The common law background

144 That construction of "probative value" also derives support from the common law background against which the Act was enacted[100]. Although the

---

96 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 80 [146] fn 44.

97 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 622-623 per Viscount Dilhorne.

98 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; [1975] HCA 41; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 150 [4.6]; *BD* (1997) 94 A Crim R 131 at 139 per Hunt CJ at CL; *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78] per Spigelman CJ (Sully J agreeing at 719 [101], O'Keefe J agreeing at 719 [102], Hidden and Buddin JJ agreeing at 719 [103]).

99 *Evidence (National Uniform Legislation) Act* (NT), s 3(1).

100 See *Pfennig v The Queen* (1995) 182 CLR 461 at 475-485 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7; *Dupas* (2012) 40 VR 182 at 198-219 [69]-[142].

Act was designed to make substantial changes to the common law of evidence[101], s 9 of the Act expressly provides that the Act does not affect the common law of evidence except so far as the Act provides otherwise expressly or by necessary intendment. Consequently, members of this Court have accepted that the common law may provide guidance in the interpretation of the Act[102]. To the extent that there is any ambiguity in the definition of "probative value" in the Act[103], the common law background points in favour of an interpretation of "probative value" which allows for considerations of credibility and reliability to be taken into account.

145 The phrase "probative value" appears to have entered the judicial lexicon during the mid-twentieth century[104] and, although at first used only sparingly, was thereafter increasingly deployed in contexts which connoted a holistic assessment of the character or quality of the evidence, unrestrained by any assumption that the evidence was reliable or credible.

146 For instance, in *Myers v Director of Public Prosecutions*[105], members of the House of Lords described the "probative value" of a document as dependent, to a large degree, on the likelihood of its contents being correct, accurate and true. In *Jackson v The Queen*[106], this Court held that in determining the "probative value" of an admission, it was necessary to look at "all the

---

101 *Evidence (National Uniform Legislation) Act* (NT), s 2A; *Papakosmas* (1999) 196 CLR 297 at 302 [10], 310 [38]-[40] per Gleeson CJ and Hayne J, 312 [46] per Gaudron and Kirby JJ, 324 [88] per McHugh J.

102 *Papakosmas* (1999) 196 CLR 297 at 313 [51] per Gaudron and Kirby JJ.

103 Cf *Ellis* (2003) 58 NSWLR 700 at 716-717 [78] per Spigelman CJ (Sully J agreeing at 719 [101], O'Keefe J agreeing at 719 [102], Hidden and Buddin JJ agreeing at 719 [103]).

104 There are, however, rare examples of earlier usage of the phrase. See, eg, *Pickup v Thames Insurance Co* (1878) 3 QBD 594 at 598; *Muse v Arlington Hotel Co* 68 F 637 at 645 (1895); *Golden Reward Min Co v Buxton Min Co* 97 F 413 at 417 (8th Cir 1899); *In re Joseph* (1927) 8 CBR 187 at 187; *Wilkie v Wilkie* [1928] NZLR 406 at 407; *McKay v The King* (1935) 54 CLR 1 at 7 per Starke J; [1935] HCA 70; *Walker v Walker* (1937) 57 CLR 630 at 635 per Starke J, 638 per Evatt J; [1937] HCA 44.

105 [1965] AC 1001 at 1027 per Lord Morris of Borth-y-Gest; see also at 1022 per Lord Reid.

106 (1962) 108 CLR 591 at 596; [1962] HCA 49.

circumstances surrounding the making of it which tend to show either that it can *safely be relied upon* or that it would be unwise to do so" (emphasis added). The Court remarked[107]:

> "It would for example be clearly permissible to show that, at the time a person confessed to the commission of a crime, he was drunk or insane or had made it as the result of fear or under some other form of pressure and to base upon that evidence an argument that the confession had little or no probative value."

Similarly, in *R v Swaffield*[108], Brennan CJ and Kirby J made clear that considerations of the reliability of a confession or admission were paramount to assessing its "probative force".

147 Reliability and credibility were also relevant to assessing the probative value of identification evidence at common law. In *Alexander v The Queen*[109], Mason J considered the operation of the *Christie* discretion[110] in relation to identification evidence. His Honour referred to evidence of an initial identification that was later retracted as an example of identification evidence of which "its probative value is so slight as to make it valueless"[111]. That observation bespeaks the lack of credibility and reliability resulting from retraction. A similar assessment was undertaken by Kirby J in *Festa v The Queen*[112], where his Honour observed that unreliable identification evidence was "'virtually valueless' in terms of probative weight".

148 Most significantly for present purposes, the assessment of the probative value of similar fact evidence at common law plainly involved considerations of reliability and credibility. In *Hoch v The Queen*[113], this Court assessed

---

107 (1962) 108 CLR 591 at 596.

108 (1998) 192 CLR 159 at 167-170 [10]-[11] per Brennan CJ, 209-210 [124]-[127] per Kirby J; [1998] HCA 1.

109 (1981) 145 CLR 395; [1981] HCA 17.

110 See *R v Christie* [1914] AC 545.

111 (1981) 145 CLR 395 at 433.

112 (2001) 208 CLR 593 at 644 [169]; [2001] HCA 72.

113 (1988) 165 CLR 292 at 295 per Mason CJ, Wilson and Gaudron JJ, 303 per Brennan and Dawson JJ; [1988] HCA 50.

"probative value" as turning on an assessment of whether it was likely that the witnesses were telling the truth. To the same effect, in *Pfennig v The Queen*[114] the plurality observed that, in the context of the judge's exercise of the exclusionary discretion to reject evidence where its prejudicial effect outweighs its probative value, the probative value of evidence is lower where the evidence was disputed or where other evidence did not corroborate the witness's assertion that a particular event occurred. In the Canadian case of *R v B (CR)*[115], which was discussed with approval in *Pfennig*[116], the trial judge's task in assessing probative value was described by the Supreme Court of Canada as follows[117]:

> "First [the trial judge] has to assess not only the relevance but also the weight of the disputed evidence, *although the latter task is normally one for the jury*. Second, [the trial judge] must somehow amalgamate relevance and weight to arrive at 'probative value'." (emphasis added)

Shamouil, *Dupas* and *XY*

149 In this case, a considerable part of the argument was directed to perceived differences of opinion between intermediate appellate courts as to whether reliability and credibility are relevant to the assessment of probative value under the uniform evidence legislation. In *Shamouil*[118], the Court of Criminal Appeal of the Supreme Court of New South Wales held in favour of what has been described as a "restrictive" approach to the circumstances in which issues of reliability and credibility may be taken into account under s 137 of the *Evidence Act* 1995 (NSW). Spigelman CJ, who delivered the leading judgment, stated that, ordinarily, questions of credibility and reliability are questions for the jury and so may not be taken into account for the purposes of s 137[119]. He added that there are circumstances where issues of credibility and reliability are such that

---

114 (1995) 182 CLR 461 at 482 per Mason CJ, Deane and Dawson JJ.

115 [1990] 1 SCR 717.

116 (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson JJ.

117 [1990] 1 SCR 717 at 733-734 per Dickson CJ, Wilson, L'Heureux-Dubé, Gonthier and McLachlin JJ.

118 (2006) 66 NSWLR 228 at 237 [60] per Spigelman CJ (Simpson J agreeing at 240 [81], Adams J agreeing at 240 [82]). See also *XY* (2013) 84 NSWLR 363 at 371 [25], 375 [44] per Basten JA; *R v IMM (No 2)* (2013) 234 A Crim R 225 at 232 [30].

119 (2006) 66 NSWLR 228 at 237-238 [63]-[64].

the court may say that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of a fact in issue; and, in that limited sense, considerations of reliability are involved[120]. But, his Honour said, it was only in that limited sense that McHugh J's observations in *Papakosmas*[121] about considerations of reliability have any application[122].

150 In *Dupas v The Queen*[123], the Court of Appeal of the Supreme Court of Victoria interpreted Spigelman CJ's construction of s 137 as meaning that, in determining whether evidence should be excluded under s 137, a judge is bound to assume that evidence will be accepted. The Victorian Court of Appeal criticised that construction as based upon a misapprehension of the role of the judge under the common law test from which s 137 is derived[124] and, consequently, as being too restrictive. It held that upon a proper construction of s 137, although a judge is to assume that the truthfulness of evidence would be accepted, the judge need not assume that the evidence would be regarded as reliable[125]. Rather, the judge is required to make some assessment of the reliability of the evidence in order to determine the weight which the jury, acting reasonably, could give to the evidence, and then to balance that against the risk that the jury may give the evidence disproportionate weight[126].

151 Subsequent to *Dupas*, the Court of Criminal Appeal of the Supreme Court of New South Wales revisited the construction of s 137 in *R v XY*[127]. According to the headnote to the authorised report of that case, the Court of Criminal Appeal held by majority that s 137 of the *Evidence Act* 1995 (NSW) does not require an assessment of the credibility, reliability or weight of evidence; those

---

120 (2006) 66 NSWLR 228 at 237-238 [63].

121 (1999) 196 CLR 297 at 323 [86].

122 (2006) 66 NSWLR 228 at 237-238 [63].

123 (2012) 40 VR 182 at 234 [196].

124 (2012) 40 VR 182 at 230 [185].

125 (2012) 40 VR 182 at 196 [63(c)], 230 [184].

126 (2012) 40 VR 182 at 197 [63(d)].

127 (2013) 84 NSWLR 363.

being matters to be left to the jury if the evidence is admitted[128]. It is apparent from the body of the report, however, that that is not what was held.

152 Basten JA, who delivered the leading judgment, posited that *Dupas* had misinterpreted *Shamouil* as concluding, inflexibly and without qualification, that the weight of evidence is irrelevant to its exclusion under s 137. As his Honour observed, the statutory definition of "credibility" when applied to a witness includes both credibility in the common law sense of truthfulness (which is to say whether the witness genuinely believes that he or she is telling the truth) and reliability (which includes the witness's ability to observe and remember facts). It was, however, possible, Basten JA said, that, when Spigelman CJ referred to "credibility" in *Shamouil*, his Honour was referring to credibility only in the more limited common law sense of truthfulness, and thus should not be taken as stating that a judge must assume that the evidence is reliable. Further, as Basten JA observed, to suggest that Spigelman CJ rejected as inappropriate any reference to the weight of evidence would be to mischaracterise the weighing exercise in which Spigelman CJ in fact engaged[129].

153 The other members of the Court in *XY* were Hoeben CJ at CL, Simpson, Blanch and Price JJ. Blanch and Price JJ did not find it necessary to decide whether credibility and reliability should be taken into account under s 137. In passing, Blanch J recorded his interpretation of *Shamouil* as being that it is "not desirable" for the court to undertake an investigation into the weight of evidence based on credibility or reliability, because to do so would usurp the function of the jury[130]. Price J, however, stated that enabling a judge to consider questions of credibility, reliability and weight would be likely to enhance the prospects of a fair trial[131]. Only Hoeben CJ at CL and Simpson J concluded that questions of credibility, reliability and weight play no part in the assessment of probative value with respect to s 137[132]. Even then, Hoeben CJ at CL also said that he agreed with part of what Basten JA had said about s 137[133].

---

128 (2013) 84 NSWLR 363 at 364.

129 (2013) 84 NSWLR 363 at 377 [49].

130 (2013) 84 NSWLR 363 at 405 [197].

131 (2013) 84 NSWLR 363 at 408 [224].

132 (2013) 84 NSWLR 363 at 385 [86] per Hoeben CJ at CL, 401 [175] per Simpson J.

133 (2013) 84 NSWLR 363 at 385 [86].

154 Whether *Shamouil* had the effect attributed to it in *Dupas* is debatable. As Basten JA suggested in *XY*, it may be that the differences between *Shamouil* and *Dupas* are essentially only semantic. *Shamouil* defined the relevance of reliability to the decision to exclude evidence under s 137 in terms of whether evidence is so unreliable that it would not be open to the jury to conclude that it could rationally affect the assessment of the probability of the existence of the fact in issue[134]. *Dupas* answered the question in functionally not dissimilar terms of the weight which the jury, acting reasonably, could give to the evidence (as opposed to the weight which the jury would or will give to the evidence)[135]. With respect, there is force in Basten JA's observation in *XY*[136] that the results under either formulation may be much the same. Even so, however, it now remains for this Court to decide the point of whether a judge should have regard to the reliability of evidence for the purposes of s 137 of the Act.

Assessment of reliability under s 137

155 For the reasons earlier set out, although the evident purpose of s 137 is to replace the common law *Christie* discretion with a statutory exclusion of evidence of which the probative value is outweighed by unfair prejudice, there is little reason to suppose that the provision has the purpose of excluding consideration of the reliability of the evidence in the determination of its weight in comparison to its prejudicial effect.

156 In *XY*[137], Simpson J referred to difficulties which she feared would attend the assessment of reliability under s 137 because the decision whether to admit or exclude evidence under that provision must sometimes be made at a point in the trial at which the judge has an incomplete or imperfect understanding of the evidence to be led. Similar concerns were later echoed in a learned article on the subject by the Hon J D Heydon AC QC[138]. But, as Price J knowingly observed in *XY*[139], more often than not the assessment of probative value is made on the basis of depositions without the need to call witnesses and, where the depositions are

---

134 (2006) 66 NSWLR 228 at 237 [61].

135 (2012) 40 VR 182 at 197 [63(d)].

136 (2013) 84 NSWLR 363 at 378 [53].

137 (2013) 84 NSWLR 363 at 400 [170]-[171].

138 Heydon, "Is the Weight of Evidence Material to its Admissibility?", (2014) 26 *Current Issues in Criminal Justice* 219 at 227-229.

139 (2013) 84 NSWLR 363 at 408 [224].

insufficient to resolve the point, it is possible for a witness to be cross-examined on a voir dire to enable the judge to make an assessment of the probative value of the witness's evidence. As was noted by all members of this Court in *Hoch*[140], such procedures were commonplace under the common law. And, as many trial judges will know, they were not productive of insurmountable or ordinarily undue difficulties. It should not be any different under s 137. Such procedures are provided for in the Act[141] and the Act envisages that the admissibility of evidence may need to be determined proleptically with reference to evidence yet to be adduced[142]. In view of the critical importance of s 137 in ensuring that an accused receives a fair trial[143], such difficulties as might attend those procedures are insufficient to adopt a construction of s 137 that excludes consideration of the reliability of evidence.

157 In *XY*[144] Simpson J reasoned that for a judge to take the reliability of evidence into account for the purposes of s 137 would be to usurp the function of the jury to determine the reliability of evidence. In this case, counsel for the respondent pressed that reasoning in support of the respondent's contention that s 137 excludes judicial consideration of reliability. But, with respect, it is a misconception of the traditional division between the functions of judge and jury to suppose that it denies the judge any role in the assessment of reliability.

158 Common law rules of evidence developed out of a desire to keep from the jury that which a preliminary judicial assessment may determine to be so unreliable or lacking in credibility that it has minimal capacity to bear on the facts in issue[145]. Most of the common law rules of admissibility and discretionary exclusion of evidence thus proceed upon the basis that, in determining whether there is "a prima facie reason for admitting the evidence", it is for the judge to make preliminary findings of fact and an assessment of

---

140 (1988) 165 CLR 292 at 297 per Mason CJ, Wilson and Gaudron JJ, 303-304 per Brennan and Dawson JJ.

141 *Evidence (National Uniform Legislation) Act* (NT), ss 189, 192A.

142 See, eg, *Evidence (National Uniform Legislation) Act* (NT), ss 57, 98(1)(b).

143 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 529 [957].

144 (2013) 84 NSWLR 363 at 400 [167].

145 See Heydon, "Is the Weight of Evidence Material to its Admissibility?", (2014) 26 *Current Issues in Criminal Justice* 219 at 221-222.

reliability and credibility[146]. This Court has recognised that, under the common law exclusionary discretions, a trial judge's preliminary assessment of reliability can result in the exclusion of evidence from the jury's consideration[147].

159 Similarly under the Act, the rules of admissibility and exclusion are based on the understanding that some evidence may be so unreliable as to have minimal capacity to bear on the facts. Just as at common law, so too under the Act it is recognised that particular categories of evidence – including hearsay evidence[148], identification evidence[149] and evidence of bad character (of an accused or witness)[150] – can be and sometimes are so unreliable as to make the evidence unsuitable for the jury's consideration.

160 At common law, the established categories of exclusion are grounded in accrued corporate judicial knowledge and experience of the inherent potential for unreliability of evidence of that kind. Likewise, under the Act, the point of Ch 3 and its structure is to repose responsibility in the judge for enforcing the statutory rules of admissibility and exclusion in a manner calculated to withhold otherwise relevant evidence from the jury's consideration of reliability. That necessitates a judicial preliminary assessment of criteria going to reliability in order to determine whether the evidence has the capacity sufficiently to affect the jury's rational assessment of the probability of the existence of a fact in issue or whether it is so lacking in reliability that it should be excluded.

161 Such an assessment 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

---

146 *Wendo v The Queen* (1963) 109 CLR 559 at 573 per Taylor and Owen JJ; [1963] HCA 19.

147 *Swaffield* (1998) 192 CLR 159 at 167-170 [10]-[11] per Brennan CJ, 209-210 [124]-[127] per Kirby J.

148 *Evidence (National Uniform Legislation) Act* (NT), s 59. See also Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 370 [675].

149 *Evidence (National Uniform Legislation) Act* (NT), ss 114, 115. See also Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 229 [415], 232 [417], 234-240 [421].

150 *Evidence (National Uniform Legislation) Act* (NT), ss 97, 98, 104, 112. See also Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 217 [394], 221-224 [403].

is rationally capable of bearing or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.

Assessment of reliability under s 97

162 Inasmuch as s 97 of the Act entails a test of whether the subject evidence would have significant probative value, it involves an assessment of the probative value which is functionally identical to the assessment of probative value required by s 137. As has been noted[151], it is to be assumed that the term "probative value" has the same meaning wherever it appears in the Act. Logically, it follows that, just as the assessment of probative value of evidence for the purposes of s 137 entails an assessment of the probative value which it would be open to a jury rationally to attribute to the evidence, so does the assessment of the probative value of evidence for the purposes of s 97. Just as s 137 involves a consideration of the reliability of evidence (in the common law sense of the witness's ability to hear and see the matters the subject of his or her evidence), so does s 97.

Assessment of credibility under ss 97 and 137

163 In *Dupas*[152], the Victorian Court of Appeal held that, upon its proper construction, s 137 did not contemplate a judge undertaking any assessment of a witness's credibility. It reached that view on the basis of a survey of the authorities relating to the common law *Christie* discretion and a perception that s 137 does not have the purpose of significantly altering the basis of exclusion of evidence of which the probative value is exceeded by unfair prejudice[153]. The authorities so surveyed included Hunt CJ at CL's influential judgment in *Carusi*[154], in which it was said that the *Christie* discretion does not permit the judge in assessing the probative value of evidence to determine whether or not the evidence should be accepted, and thus that the judge can only exclude the evidence if, taken at its highest, its probative value is outweighed by its prejudicial effect. Reference was also made to the decision of the Appeal Division of the Supreme Court of Victoria in *Rozenes v Beljajev*[155], in which it was stated that while the reliability of identification evidence was a matter to

---

151 See above at [143].

152 (2012) 40 VR 182 at 196 [63(c)], 230 [184].

153 (2012) 40 VR 182 at 196 [63(a), (b)].

154 (1997) 92 A Crim R 52 at 65-66 (Newman and Ireland JJ agreeing at 74).

155 [1995] 1 VR 533 at 560.

which the trial judge might properly have regard, the credibility of a witness was a question solely for the jury. Consistently with the view that s 137 did not relevantly alter that state of affairs, *Dupas*[156] held that in undertaking the balancing exercise ordained by s 137 the trial judge is required to assume that the jury would find the evidence to be truthful.

164 In this case, counsel for the appellant did not seek to gainsay that interpretation of the *Christie* discretion. He contended, however, that, whatever the position at common law, ultimately the position under ss 97 and 137 must be determined according to the terms of the provisions[157]. He submitted that, upon their proper construction, each plainly contemplates that the judge should have regard to the credibility of evidence (just as much as to its reliability) in determining the weight it would be open to the jury rationally to give to the evidence, and thus that the judge should have regard to the credibility of evidence (just as much as to its reliability) in determining whether the probative value of it is sufficiently exceeded by unfair prejudicial effect as to warrant exclusion. In counsel's submission, once it is accepted, as he contended it should be, that ss 97 and 137 contemplate that the reliability of evidence is a relevant consideration in the sense already described, there is no logical or other legitimate reason to suppose that each provision does not equally contemplate credibility as a relevant consideration in the sense already described. In short, credibility is just as capable as reliability of bearing on the probative value of evidence and it would impose an artificial, undesirable and ultimately unjust restriction on the exercise of the powers afforded by ss 97 and 137 to read down those provisions so as to exclude the consideration of credibility.

165 That submission should be accepted. As will be explained, both ss 97 and 137 should be construed such that both credibility and reliability are relevant considerations in determining whether evidence is of such probative value as not to be outweighed by the danger of unfair prejudice to the defendant. It is convenient to begin with s 97.

166 At common law, the criterion of admissibility of similar fact coincidence or tendency evidence was that its probative force clearly transcended its prejudicial effect. It was considered that evidence of that kind had probative value only if it bore no rational explanation other than the happening of the

---

156 (2012) 40 VR 182 at 196 [63(c)].

157 See also *Papakosmas* (1999) 196 CLR 297 at 302 [10] per Gleeson CJ and Hayne J.

events in issue[158]. Accordingly, its admissibility depended not only on similarity but also on the non-existence of "a cause common to the witnesses"[159]. It followed that, if there were a real danger that witnesses had combined to concoct the evidence, the probative value of it was regarded as so much depreciated that the jury would be tempted to give it a weight which it did not deserve. Consequently, the possibility of a conspiracy to concoct such evidence was something which a trial judge needed to consider when the admissibility of the evidence fell for determination. The judge was required to make an initial assessment of matters which the jury might ultimately have to decide. It was only when and if the evidence were then admitted that its probative value became a matter for the jury.

167 The test for the admissibility of evidence of that kind under s 97 of the Act is no longer as strict as it was at common law. Subject to s 101, it is enough to render such evidence admissible as tendency evidence that it has significant probative value either by itself or in conjunction with other evidence adduced or to be adduced[160]. But, at least in the case of similar fact tendency evidence, it is clear that it remains necessary for a trial judge to make an assessment of the possibility of conspiracy to concoct the evidence[161] and so for the judge to make an initial assessment of matters which the jury might ultimately have to decide.

168 There is also no logical reason to accept that such an assessment should be confined to the risk of concoction. The probative value of particular evidence may be just as much affected by a lack of credibility arising *aliunde*. To take an example cited in argument, it may be that for one reason or another it appears to a trial judge that a witness's account is so utterly incredible that it would not be open to the jury, acting rationally, to regard the evidence of it as having

---

158 *Sutton v The Queen* (1984) 152 CLR 528 at 563, 564 per Dawson J; [1984] HCA 5; *Hoch* (1988) 165 CLR 292 at 296 per Mason CJ, Wilson and Gaudron JJ; *Harriman v The Queen* (1989) 167 CLR 590 at 602 per Dawson J; [1989] HCA 50; *Pfennig* (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson JJ.

159 *Director of Public Prosecutions v Boardman* [1975] AC 421 at 444 per Lord Wilberforce.

160 *Evidence (National Uniform Legislation) Act* (NT), s 97(1)(b).

161 *AE v The Queen* [2008] NSWCCA 52 at [44]; *PNJ v Director of Public Prosecutions* (2010) 27 VR 146 at 153 [28]; *Murdoch (A Pseudonym) v The Queen* (2013) 40 VR 451 at 454 [4] per Redlich and Coghlan JJA, 474 [95] per Priest JA; *Velkoski v The Queen* (2014) 242 A Crim R 222 at 267 [173(c), (d)].

significant probative value. Indeed, that was recognised by Spigelman CJ in *Shamouil*[162], albeit in the context of his Honour's consideration of s 137.

169 As already observed, "probative value" has the same meaning in each provision. If evidence may be excluded under s 137 on the basis that it would not be open to the jury to accord it any probative value, it should follow that evidence may also be excluded under s 97 on the basis that it would not be open to the jury, acting rationally, to regard it as having significant probative value. The objective of ensuring a fair trial is opposed to a construction of s 97 which would arbitrarily limit the process of assessment of probative value by excluding consideration of an aspect of probative value. Given the special dangers which attach to tendency evidence[163], logic and fairness dictate a construction of s 97, consistent with the plain and ordinary meaning of the words of the provision, which enables the judge to make a preliminary estimate of all aspects of credibility of evidence sought to be tendered as tendency evidence as part of the process of determining its probative value.

170 Of course, s 137 is not restricted to evidence which would otherwise be admissible under s 97. It applies equally to evidence which would otherwise be admissible under other provisions of the Act; and, because of s 101, it may be that s 137 is more likely to be invoked in relation to evidence admissible under other provisions of the Act[164]. The notions of probative value and prejudice contemplated in s 137 are protean and apply discriminatingly according to the nature of the evidence in question. So, at one level, it does not necessarily follow from the fact that there are special dangers which dictate a construction of s 97 that requires an assessment of credibility that s 137 necessitates an assessment of credibility in relation to evidence admissible under provisions other than s 97.

171 In truth, however, the special dangers which warrant the exclusion of tendency evidence under s 97 unless it is judged to be of significant probative value are a corollary of the more general statutory precept that warrants the exclusion under s 137 of evidence of which the probative value is judged to be outweighed by the danger of unfair prejudice. In each case, the concern is to ensure that evidence which might induce a jury to reason impermissibly to a conclusion of guilt is excluded unless the evidence is conceived to be of such probative value that, despite its prejudicial effect, it is just to admit it. In each case the assessment of the probative value that it would be open to the jury to

---

162 (2006) 66 NSWLR 228 at 237-238 [63].

163 *Pfennig* (1995) 182 CLR 461 at 536 per McHugh J.

164 Cf *R v Dupas (No 2)* (2005) 12 VR 601 at 627-628 [83] per Nettle JA; *Dupas* (2012) 40 VR 182 at 217 [136].

attribute to the evidence is the essence of the admissibility or exclusion of the evidence. And thus, in each case, because both credibility and reliability are logically critical to the assessment of the probative value open to be attributed to evidence, logic and fairness dictate a construction of the legislation – consistent with the plain and ordinary meaning of the provisions and the extrinsic materials – which permits of the consideration of both credibility and reliability in the assessment of probative value.

172 There being no compelling reason to depart from the natural and ordinary construction of the words of ss 97 and 137, it should be concluded that, in determining whether evidence is to be admitted or excluded under either provision, a trial judge should have regard to both the reliability of the evidence (in the sense of the witness's ability to hear and see the matters the subject of his or her evidence) and the credibility of the evidence (in the sense of whether the witness is stating what the witness honestly believes to be the truth). In light of that consideration, the judge should determine the weight which a jury, acting rationally, could give to the evidence and, therefore, the extent to which that evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Admission of tendency evidence

173 Given that construction of s 97, it is apparent that the trial judge in this case erred by proceeding upon the assumption that the tendency evidence would be accepted and thus upon the assumption that she should not have regard to the credibility and reliability of the evidence in determining its admissibility under s 97.

174 Significantly, however, the appellant's complaint about the judge's approach to s 97 is not that the tendency evidence was so lacking in credibility (in the sense of the witness not telling what she honestly believed to be the truth) or reliability (in the sense which includes the witness's ability to see and hear the matters the subject of the evidence) that it was not open for the jury to regard it as rationally affecting the probability of the commission of the charged offences. Rather, it is that the tendency evidence lacked probative value because it derived solely from the complainant.

175 Counsel for the appellant invoked the observation of Howie J in *Qualtieri v The Queen*[165] that, in order to meet the test of admissibility under s 97, evidence of sexual interest in the complainant will "usually be found outside of the complainant's evidence, such as in a letter written by the accused to the

---

165 (2006) 171 A Crim R 463 at 494 [118] (Latham J agreeing at 495 [124]).

complainant or some other act of the accused that shows a sexual interest in the complainant or children generally". In counsel's submission, reliance on the complainant's own evidence of uncharged sexual acts to establish a sexual interest in the complainant which supposedly added to the probability of the truth of the complainant's testimony regarding the charged acts involved "bootstrap reasoning" and so the evidence should have been excluded.

176 That submission should be rejected. As Heydon J demonstrated in *HML v The Queen*[166] with respect to the analogous though not identical considerations which govern the admissibility of evidence of uncharged acts under common law, the combination of such evidence with evidence of charged sexual acts may serve to establish the existence of a sexual attraction and willingness to act upon it which eliminates doubts that might have attended evidence of the charged acts standing alone. What must be considered is the contribution which the evidence of the uncharged sexual acts might make, if accepted, to whether the sexual acts to be proved are rendered more likely to have occurred[167].

177 Admittedly, at common law, it was sometimes said that evidence of uncharged acts was not admissible as tendency evidence unless the uncharged acts had "unusual features" or bore "striking similarities" to the charged acts[168]. But under the Act the evidence need simply have significant probative value[169]. Thus, under the Act, evidence has been found to have significant probative value despite a lack of striking similarity where, for some other reason, the uncharged acts establish a particular *modus operandi* or other underlying unity[170].

178 Here, on one view of the matter, the uncharged act of the appellant running his hand up the complainant's leg during the course of the massage incident was an essentially different kind of sexual act from each of the charged sexual acts except, perhaps, the first. But evidence of uncharged sexual acts is

---

166 (2008) 235 CLR 334 at 427 [280]; [2008] HCA 16.

167 *JLS v The Queen* (2010) 28 VR 328 at 336-337 [24]-[26] per Redlich JA (Mandie JA agreeing at 340 [37], Bongiorno JA agreeing at 340 [38]).

168 *Hoch* (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ; cf *Pfennig* (1995) 182 CLR 461 at 482 per Mason CJ, Deane and Dawson JJ.

169 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 at 70-71 [82] per Sackville J (Whitlam J agreeing at 53 [1], Mansfield J agreeing at 75 [108]); *R v Ford* (2009) 201 A Crim R 451 at 485 [126] per Campbell JA.

170 See, eg, *R v Fletcher* (2005) 156 A Crim R 308 at 324 [67] per Simpson J (McClellan CJ at CL agreeing at 310 [1]).

capable of having significant probative value in the proof of charged sexual acts even where the uncharged sexual acts and the charged sexual acts are of essentially different kinds[171]. Such may be the nature of one human being's sexual attraction to another, and the likelihood that a sexual attraction is fulfilled or sought to be fulfilled on different occasions by different sexual acts of different kinds, that evidence of uncharged sexual acts, although different from the charged sexual acts, has the capacity to show that the alleged offender had an ongoing sexual attraction to the complainant and endeavoured to gratify it in a variety of ways. And thus where, as here, the evidence of the uncharged acts taken with the evidence of the charged acts is capable of establishing that the accused sought to gratify his sexual attraction to the complainant in a variety of ways on different occasions, in circumstances where he might have been interrupted or detected by others close by, it is capable of having significant probative value[172].

179 Granted that the massage incident was alleged to have occurred after the last of the charged offences, it was not too remote in time as to be incapable of supporting the hypothesis that the appellant had a continuing sexual attraction to the complainant which he sought to gratify by a variety of sexual acts on different occasions in circumstances where he might have been interrupted or detected by others close by. It was capable of being regarded as having significant probative value[173].

180 As the judge noted, the evidence of the massage incident may have been weakened by the fact that the incident went unobserved by the other person present at the time. But overall, given the incident was alleged to have occurred during the period of the alleged continuing course of sexual abuse, and given that the complainant's evidence of the massage incident was unencumbered by significant questions of credibility or reliability, it would have been open to the judge to find that the evidence was of significant probative value as that phrase is properly to be understood. That is to say that it had a significant capacity rationally to affect a jury's assessment of the appellant's sexual interest in the complainant and his willingness to act on that interest around the very time that it

---

171 *R v Smith* (2008) 190 A Crim R 8 at 11-13 [10]-[19] per Blanch J (McClellan CJ at CL agreeing at 9 [1], Hislop J agreeing at 14 [26]).

172 *HML* (2008) 235 CLR 334 at 430 [287] per Heydon J; cf *KRM v The Queen* (2001) 206 CLR 221 at 244-245 [66] per Gummow and Callinan JJ; [2001] HCA 11; see also *JLS* (2010) 28 VR 328 at 338 [30].

173 *R v Hopper* [2005] VSCA 214 at [79]-[88]; *JLS* (2010) 28 VR 328 at 337-338 [29].

was alleged that he *did* act on that interest by committing the final of the charged acts.

181 Assuming, therefore, as this Court must for the purposes of this aspect of the appeal, that there is no issue about the application of ss 101 and 137, it follows that there was no reason to exclude the evidence of the massage incident. That ground of appeal should be rejected.

Admission of complaint evidence

182 The admission of the complaint evidence involves different considerations because it was contended that the complaint evidence should have been excluded under s 137. In light of what has been said about the proper construction of s 137, it follows that the judge erred in the application of s 137 by assuming that the complaint evidence would be accepted and, therefore, by failing to have regard to the credibility and reliability of the evidence in determining whether it was of such probative value as not to be outweighed by the danger of unfair prejudice to the appellant.

183 It is also at least possible that, if the judge had taken the credibility and reliability of the evidence into account in determining whether the probative value of it was outweighed by the danger of unfair prejudice to the appellant, her Honour would have come to a different view. Indeed she acknowledged that "there is ample material available to challenge the weight to be attached to the [complaint evidence]"[174].

184 Among the considerations which would have been relevant to that assessment were that the initial complaint was not made until after the appellant had separated from the complainant's grandmother in late 2010, the first complaint to SW was made when the complainant was in trouble, and at least some of that complaint was in response to leading questions. On one view of SS's account, the complaint was made after the complainant had complained to her aunt, grandmother and mother in August 2011. Although there was objective evidence which supported the conclusion that the complaint to SS was made before any complaint to family members, SS said that, when the complainant complained to her, the complainant's grandmother and the appellant had already broken up and the complainant told her that she had already told her mother. Evidently, that was contrary to the complainant's version of events, which was that the first complaint she made was to SS, that SS recommended that the complainant tell her mother, and that it was only after that that she first told her aunt and grandmother.

---

174 *IMM (No 2)* (2013) 234 A Crim R 225 at 230 [21].

185 Further, the charged offences were alleged to have occurred between 2002 and 2009, and yet the first complaint was said not to have been made until October or November 2010. While it might be that some of the alleged course of sexual offending was still fresh in the mind of the complainant in October or November 2010, it is at least questionable that the specific offences which were alleged to have been committed between 2002 and 2005 were still fresh in the mind of the complainant by that time. The same applies, but possibly with added strength, in relation to the complaints to SW, SC and KW, which were said not to have been made until August 2011.

186 At all events, it cannot be said that the judge's failure to take the credibility and reliability of the complaint evidence into account in assessing its probative value did not result in the appellant thereby being deprived of a chance of acquittal, or thus in a miscarriage of justice[175].

187 Given that conclusion, it is unnecessary to consider the ground of appeal regarding the directions attaching to the complaint evidence.

Conclusion

188 The appeal should be allowed and the judgment of the Court of Criminal Appeal should be set aside. In lieu, it should be ordered that the appeal to that Court should be allowed, that the conviction on counts 2, 3 and 4 be quashed and that a new trial be had.

---

175 *Stanoevski v The Queen* (2001) 202 CLR 115 at 131-132 [67] per Hayne J; [2001] HCA 4.