IMM v The Queen [2016] HCA 14: The High Court rules on "probative value"

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Case: *IMM v The Queen* [2016] HCA 14

Snapshot of article: The High Court has finally resolved the conflicting stances of the NSWCCA and VSCA regarding "probative value". The 4-3 majority held that the assessment of probative value must be approached on the assumption that the jury will accept the evidence and that the credibility or reliability of evidence cannot be considered when assessing probative value.

Three key points of *IMM v The Queen [2016] HCA 14*:

i) The High Court has held that, under the *Evidence Act*, the assessment of probative value must be approached on the assumption that the jury will accept the evidence.

ii) The Majority also held that the credibility or reliability of evidence cannot be considered when assessing probative value.

iii) Importantly, the High Court noted that evidence taken at its highest can still be "weak" and "unconvincing".

Introduction

In *IMM v The Queen* [2016] HCA 14 (*IMM*) the High Court held by a 4-3 majority (the majority)[1] that a trial judge, when assessing the "probative value" of evidence under the *Evidence Act*,[2] must presume that the evidence "is accepted" and is therefore credible and reliable. In their dissenting judgments, Nettle, Gordon and Gageler JJ disagreed and considered that an assessment of probative value necessarily involves considerations of reliability.[3]

Tendency evidence adduced at trial (s 97(1)(b))

At the trial the appellant was found guilty of two counts of indecent dealing with a child and one count of sexual intercourse with his stepgrandaughter. The complainant's evidence was the only direct evidence given of the charged offences. Despite objections, the prosecution was allowed to adduce certain "tendency evidence" and "complaint evidence".

The tendency evidence was given by the complainant. Her evidence 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 ruled that the tendency evidence was admissible because it had "significant probative value". Importantly, 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 and factors such as the credibility of the complainant or the reliability of the evidence were not considered.

Complaint evidence adduced at trial (s 137)

The complaint evidence in issue was evidence of complaints made by the complainant about the appellant to a friend. There was an issue as to when the complainant made the complaint to her friend. The defence unsuccessfully objected to the admissibility of the evidence under section 137, arguing that the probative value of the evidence was outweighed by the danger of its unfair prejudice to the appellant. The trial judge approached the question of probative value under s 137 in the same way as she had regarding the tendency evidence. Her Honour assumed that the jury would accept the evidence and did not take into account factors such as credibility or reliability.

Issue on appeal: how to assess "probative value"

The appellant argued that the trial judge should not have assumed that the jury would accept the evidence in question when considering the probative value of the evidence under section 97(1)(b) and section 137. It was further submitted that determining "probative value" must require the court to consider all matters that a tribunal of fact would, which in *IMM* was a jury. Accordingly, the appellant argued that a court cannot be constrained by assuming that

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[1] French CJ, Kiefel, Bell and Keane JJ delivered a joint majority judgment at [1] – [76]. Gageler J delivered an individual dissenting judgment at [77] to [112]. Nettle and Gordon JJ delivered a joint dissenting judgment at [113] to [188].

[2] IMM is an appeal from the Court of the Criminal Appeal of the Northern Territory and therefore concerns the Evidence (National Uniform Legislation) Act (NT). However, since the Evidence Act is uniform legislation, reference is made simply to the Evidence Act. All section numbers quoted in the article refer to the Evidence Act unless otherwise specified.

[3] See IMM at [96] and [113].

the jury will accept the evidence, especially when there are reasons to doubt the credibility of a witness or the reliability of the evidence.

The appellant submitted that the tendency evidence and complaint evidence did not have significant probative value because the evidence was derived solely from the complainant, whose credibility was generally in issue.

The New South Wales approach to "probative value" prior to *IMM*

The New South Wales Court of Criminal Appeal (NSWCCA) and the Victorian Court of Appeal (VSCA) have taken conflicting stances on how to assess "probative value".[4]

R v Shamouil (*Shamouil*)[5] is the main New South Wales authority where the NSWCCA (Spigelman CJ, Simpson and Adams JJ) held that a trial judge determining the probative value of evidence for the purpose of section 137 should do so on the assumption that the jury will accept the evidence and should not consider the reliability of the evidence.

In *Shamouil*, Spigelman CJ adopted what Gaudron J said in *Adam v The Queen*[6]. Her Honour considered that the definition of "probative value" in the *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."[7] In *Shamouil*, Spigelman CJ noted that this approach is consistent with the common law approach to the exclusion of evidence under the "*Christie* discretion",[8] where 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; nor did the trial judge consider the reliability of the evidence.[9] Spigelman CJ concluded that the words used in the definition of "probative value" in the *Evidence Act* strongly indicated that the same approach be taken.[10]

The Victorian approach to "probative value" prior to *IMM*

In *Dupas v The Queen* (*Dupas*)[11] an enlarged VSCA (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA) declined to follow *Shamouil*. In *Dupas* the VSCA observed that a trial judge must assume that the jury will accept the witness as truthful. The point of difference between *Shamouil* and *Dupas* is that the VSCA held that a trial judge could take into account the reliability of the evidence in assessing its probative value.[12]

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[4] For a detailed discussion of the New South Wales line of authority on "probative value" see my blog post on www.venicecrime.com regarding Tully v The Queen [2016] ACTCA 4: http://venicecrime.com/2016/06/09/tully-v-the-queen-actca-4-tendency-and-probative-value-under-evidence-act-summary-of-the-nsw-position/

[5] R v Shamouil (2006) 66 NSWLR 228 ('Shamouil')

[6] (2001) 207 CLR 96; [2001] HCA 57.

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

[8] As enunciated in R v Christie [1914] AC 545 and now reflected in s 137 of the Evidence Act.

[9] IMM at [27].

[10] *Shamouil* at 237 [60] – [62].

[11] (2012) 40 VR 182.

[12] Dupas at 196 [63(c)].

Relevance of the evidence is the first consideration

When considering the admissibility of evidence a trial judge must first consider the relevance of the evidence under s 55 of the *Evidence Act*.

Relevant evidence is assumed to be accepted by the jury

When considering the admissibility of evidence, a trial judge must first consider the relevance of the evidence under s 55.

Section 55, which defines 'relevance', makes reference to the effect that evidence "could rationally" have on a proof of fact. In *IMM* the majority noted at [38] that "could" refers to the capability of evidence to do so and the term "rationally" does not require consideration of the truthfulness or accuracy of the evidence.

The majority concluded at [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."

Relevant evidence is "probative"

The majority held that relevant evidence is "probative" because "evidence which is relevant has the capability to affect the assessment of the probability of the existence of a fact in issue."[13] The majority emphasised that neither s 55 or s 56 requires that evidence be probative to a particular degree for it to be admissible.

Exclusion of relevant evidence

Evidence which is relevant is admissible under s 56 unless an exclusionary rule or a discretion to exclude evidence applies. *IMM* concerned the admission of tendency evidence and complaint evidence. Even if that evidence was relevant and admissible under s 56, it could still be excluded under s 137 if its probative value is outweighed by the danger of unfair prejudice to the accused.

[13] IMM at [40].

When assessing "probative value" it is assumed the jury will accept the evidence

In the *Evidence Act*, both section 55 and the Dictionary definition of "probative value" include the words "could rationally affect […] the assessment of the probability of the existence of a fact in issue". The majority held at [49] that "[the] same construction must be given to those words" and that probative value "must be approached in the same way as s 55 requires: on the assumption that the jury will accept the evidence".

Reliability or credibility is not considered when assessing "probative value"

The High Court noted that a judge cannot practically undertake the assessment of actual probative value at the point of assessing admissibility. It was further observed that the determination of the weight to be given to evidence by reference to credibility or reliability "will 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".[14]

Accordingly, the majority concluded at [52] that when assessing admissibility, if the jury is taken to accept the evidence "they will be taken to accept it completely in proof of the facts stated" and "no question as to credibility … [nor] the reliability of the evidence can arise … as *Dupas v The Queen* may imply."

Evidence accepted at its highest may still be weak and unconvincing

The majority emphasised at [50] that this approach "does not distort a finding as to the real probative value of the evidence" and that the "circumstances surrounding the evidence may indicate that its highest level is not very high at all." In *IMM* the court used the example of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. The High Court held that it is possible to say that it is an identification but a "weak one because it is simply unconvincing."[15]

The court also emphasised that evidence which is "inherently incredible or fanciful or preposterous" would not appear to meet the threshold requirement of relevance.[16]

Concoction and the application of the test in s 101(2)

Section 101(2) of the *Evidence Act* states that tendency or coincidence evidence adduced by the prosecution cannot be used against an accused unless the probative value substantially outweighs any prejudicial effect it may have on the accused. The majority stated the following about the application of the test in s 101(2) in the context of alleged joint concoction: "[t]he 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."[17]

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[14] IMM at [51].
[15] IMM at [50].
[16] IMM at [58].
[17] IMM at [59].

Evidence of an accused's sexual interest in a complainant has limited, if any, probative value

The majority stated at [62] to [63]:

> "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.
>
> 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."

However, the Court noted that in cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met.[18]

Probative value of complaint evidence

In *IMM* complaint evidence was tendered for the purpose of proving the acts charged. When assessing the probative value of the complaint evidence, the High Court considered the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint. The majority concluded that the probative value of such complaint evidence was "potentially significant".[19]

Conclusion

The High Court has finally resolved the conflicting stances of the NSWCCA and VSCA on how to assess "probative value". There are three key elements to the High Court's decision. Firstly, that the assessment of probative value must be approached on the assumption that the jury will accept the evidence. Secondly, that the credibility or reliability of evidence cannot be considered when assessing probative value. Thirdly, the majority emphasised that "inherently incredible or fanciful or preposterous" evidence would not meet the threshold requirement of relevance and that evidence taken at its highest can still be "weak" and "unconvincing".

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[18] IMM at [62].
[19] IMM at [73].