The probative value of evidence

The High Court handed down its decision in IMM v The Queen [2016] HCA 14 on 14 April 2016. The appellant was seeking to overturn his conviction for indecent dealing and sexual intercourse with a child under the age of 16. At trial the prosecution was permitted, over objection, to adduce both complaint and tendency evidence. The trial judge determined the probative value of this evidence for the purposes of ss 97(1) and 137 of the Evidence Act on the assumption that the jury would accept the evidence and without taking into account factors such as reliability and credibility. The High Court held by majority that this was the correct approach. However the High Court further held that the tendency evidence had been wrongly admitted because it did not have ‘significant probative value’ within the meaning of s 97(1)(b) of the Evidence Act. Accordingly the appeal was allowed and a new trial ordered. In what follows, Stephen Odgers SC and Richard Lancaster SC each give their views on the implications and consequences of this important case.

Stephen Odgers SC on probative evidence after IMM v The Queen

The High Court has determined (by a 4:3 majority) that a trial judge, in assessing the ‘probative value’ of evidence for the purposes of a number of provisions in the Evidence Act (including s 97 and s 137), must proceed on the assumption that the evidence ‘is accepted’ (and thus is to be regarded as both credible and reliable) – just as is required when assessing relevance under s 55. However, close analysis of the majority judgment of French CJ, Kiefel, Bell and Keane JJ reveals that the making of such an assumption does not necessarily undercut the practical operation of those provisions.

First, it was noted that all evidence must pass the relevance threshold in s 55. The relevance test imports notions of rationality as the definition requires the evidence to be capable of ‘rationally affecting of the assessment of the probability of the existence of a fact in issue’. French CJ, Kiefel, Bell and Keane JJ stated at [39] that evidence may be so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.

Second, as regards s 137, it is of critical importance to appreciate the (limited) consequences of an assumption that the evidence of a witness is to be accepted as credible and reliable. Take the example of a witness who gives identification evidence. French CJ, Kiefel, Bell and Keane JJ stated at [50]:

It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all. The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.

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

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

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

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

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

As regards hearsay evidence, the approach taken in the majority judgment supports a similar analysis. Thus, it may be concluded that the requirement that it be assumed that the evidence will be accepted, that it is both credible and reliable, applies to the evidence of the out-of-court representation, not to the out-of-court representation itself. This conclusion is supported by the actual holding of the majority judgment in respect of hearsay complaint evidence. The High Court was required to address the question of whether evidence given by the complainant’s relatives of complaints made by the complainant in August 2011 (of sexual abuse committed on her by the appellant) should be excluded pursuant to s 137.

One of the arguments advanced on behalf of the appellant was that the probative value of the evidence was low because the complaints were not spontaneous and were made in response to leading questions, in circumstances where the complainant may have been motivated to distract attention from her own bad behaviour. The majority judgment held at [73]:

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

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

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

Section 97(1)(b) provides that ‘tendency evidence’ is not admissible unless ‘the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value’. The tendency evidence in IMM v The Queen, was evidence from the complainant of an incident.
where the appellant ‘ran his hand up my leg’, relevant to show a sexual interest in the complainant and thus a tendency to commit the offences charged (French CJ, Kiefel, Bell and Keane JJ at [61]). Presumably, the prosecution would contend that, as the evidence must be assumed to be accepted as credible and reliable for the purposes of assessing probative value under s 97(1)(b), it must be assumed that the appellant did in fact run his hand up the complainant’s leg and thereby show a sexual interest in the complainant, which would be ‘significant’ for the purposes of determining whether the appellant committed the offences charged. However, the majority judgment stated at [46]:

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

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

62 In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant’s account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant’s unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant’s account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant’s evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.

63 Evidence from a complainant adduced to show an accused’s sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant’s account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X’s account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

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

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

Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant’s submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant’s submission – that it is ‘well-established’ that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in Hoch v The Queen44 – should not be accepted.45 Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the ‘rational view ... inconsistent with the guilt of the accused’ test found in Hoch v The Queen.46 The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting. [footnotes not included]


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

[2016] (Winter) Bar News 38
As regards what Basten JA stated at [42]-[48], the key passage is at [47]:

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

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

49. … If a possibility of concoction at a level sufficient to affect the capacity of the evidence to bear significant probative value were to be identified, it would probably have been necessary to carry out a reasonably searching cross-examination on the voir dire. That did not happen. Thus, the reason why the trial judge did not consider the possibility of concoction in making his rulings, was that it was neither relied upon by counsel for the accused at trial, nor was it inherently necessary for the judge to consider such matters in assessing significant probative value.

50. Given the manner in which the evidence unfolded, the absence of reference to the possibility of concoction in the assessment of admissibility was unsurprising. On any view, it revealed no error on the part of the trial judge.

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

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

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

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

Summary

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

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

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

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

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

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

(a) tendency evidence emanating solely from a compliantant is unlikely to have that character; and

(b) the existence of alternative explanations for both tendency and coincidence evidence will bear on the assessment of whether the evidence has that characteristic (so that, for example, while a ‘possibility’ of joint concoction or contamination will not deprive such evidence of probative value, that does not mean that such a risk is immaterial to the determination of whether the evidence has significance).

7. Appellate review of the requirement of ‘significant probative value’ in s 97(1)(b) is not subject to limitations.

IMM v The Queen: a response from Richard Lancaster SC

The decision of the High Court in IMM v The Queen [2016] HCA 14 addresses fundamental questions about the laws of evidence and the proof of facts in civil and criminal trials under the uniform Evidence Acts. The court unanimously allowed the appeal against conviction and ordered a new trial on three charges of child sexual assault, but there was a significant underlying difference of opinion about the applicable principles. While there are historical examples of our ultimate appellate court determining important questions by a narrow majority, the first arresting feature of the decision is that the court divided 4:3 on an issue so basal as whether the reliability and credibility of a witness can be taken into account when a judge measures the probative value of the evidence of that witness. The probative value of evidence is, of course, a central integer in various provisions regulating the admissibility of evidence, including the tendency rule (s 97), the coincidence rule (s 98), the restrictions additional to those rules in criminal cases (s 101), and the general discretions to exclude evidence (ss 135 and 137).

In this note, I make some observations about the decision and add comments in response to the paper of Stephen Odgers SC published first in InBrief on 20 April 2016 and again in this issue of Bar News.

Principles

The statements of principle by what I will call the majority (French CJ, Kiefel, Bell and Keane JJ) are clear:

- The question of relevance under s 55 is to be determined by a trial judge on the assumption that the jury (or judge as fact finder) accepts the evidence, as the terms of s 55 expressly require. The judge determining relevance need not and may not consider whether the evidence is credible or whether it is reliable – ‘the only question is whether it has the capability, rationally, to affect findings of fact’ (at [39]). The veracity or weight that might be accorded to the evidence does not arise (at [38]).

- Relevant evidence is, by definition, ‘probative’ because it has the capability to affect the assessment of the probability of the existence of a fact in issue and it is prima facie admissible even if the probative value of the evidence is slight (at [40]).

- The assessment of the probative value of evidence (for the purposes of provisions such as those considered directly in IMM v The Queen, which were ss 97(1)(b) and 137 but, oddly, not s 101) requires the possible use to which the evidence might be put to be taken at its highest (at
Richard Lancaster SC, ‘IMM v The Queen: a response’

[44]). The significance of the probative value – that is, the significance of ‘the extent to which the evidence could rationally affect the assessment of the probability of a fact in issues’ – depends on the nature of the fact in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts (at [46]).

- Evidence has ‘significant’ probative value if it is important or of consequence, that is, ‘the evidence must be influential in the context of fact-finding’ (at [46]).

- The words ‘if it were accepted’, which appear in s 55, should be understood also to qualify the evidence to which the Dictionary definition of ‘probative value’ refers (at [49]). Accordingly, the assessment of probative value requires the same approach as s 55, that is, an assumption that the jury will accept the evidence, taken at its highest (at [49]-[50]). It follows that ‘no question as to credibility of the evidence, or the witness giving it, can arise’ and that ‘no question as to the reliability of the evidence can arise’, those matters being ‘subsumed in the jury’s acceptance of the evidence’ (at [52]).

Mr Odgers refers to the required assumption that the evidence is accepted and adds ‘and thus is to be regarded as both credible and reliable’. I do not agree with his observation, which seems directly contrary to the majority’s indication that questions of reliability and credibility do not arise if the required assumption is made. Whether or not the distinction much affects the practical operation of these provisions, it is a real distinction in principle: on the majority’s approach, probative value is detached from questions of the reliability and credibility of the particular witness and it is assumed that the evidence is accepted; as Mr Odgers summarizes it, ‘probative value continues to depend upon the evidence of a particular witness, who is assumed to be credible and reliable. As the Victorian Court of Appeal said in Derwish v The Queen [2016] VSCA 72 at [75], IMM v The Queen applies to ss 97, 98, 101(2) and 137 ‘so that reliability is not to be taken into account when considering probative value’. There are four matters in the majority reasons on which I would comment. Considerations of space do not permit me to address, in this note, the detail of the reasons of Gageler J or of Nettle and Gordon JJ, who concluded (contrary to the majority’s reasons at [49]-[52]) that an assessment of probative value under the Evidence Act necessarily involves considerations of reliability (at [96] and [139]-[140]).

Relevance

The first matter is not much more than cavilling, with respect, with the expression of a sentence in [39] in which it is said that there may 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’ and thereby would not meet the criterion of relevance. The application of the statutory assumption does seem odd when applied to incredible evidence, but the terms of s 55 are explicit and provide for a criterion of relevance of evidence ‘if it were accepted’. Nevertheless, it may readily be accepted that incredible evidence is not relevant because, even if one applies the statutory assumption, the incredible or preposterous fact could not rationally affect the assessment of the probability of the existence of a fact in issue.

The example of an identification

The second topic concerns an example created by the Hon J D Heydon AC QC, the utility of which is acknowledged by its repetition in each of the judgments in IMM v The Queen, which posits ‘an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified’. The majority states that the correct approach to assessing its probative value is to accept that it is an identification (being relevant and probative to some degree) but that it is a weak identification because ‘it is simply unconvincing’ (at [50]).

As I understand it, this means that when taken at its highest the identification evidence has low probative value because, putting aside the reliability and credibility of the person giving the evidence, the identification had characteristics that diminished the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue (being whether the person identified was at that place at that time). In other words, quite apart from the truthfulness, eyesight, attention span, memory or ability to report of the particular witness making the identification (that is, without any consideration of his or her reliability or credibility) the identification has a lower probative value than an identification made in good conditions.

Likewise, in my view, the measurement of the probative value of the tendency evidence in IMM v The Queen in the application of the majority’s principles was to be undertaken with the complainant out of view. It was irrelevant that her evidence was uncorroborated, or that the jury might in due course decide that her account was not credible, or that there appeared to be no basis for distinguishing between different parts of her evidence so far as credibility and reliability was concerned. The probative value of the evidence was, on the principles stated...
by the majority, to be determined separately and initially. In that assessment, reasonable people might arrive at different conclusions about the extent to which the (necessarily accepted) fact that the appellant ran his hand up the complainant’s leg during the granddaughters’ massage (whether considered by itself or with other evidence) increased the probability that the appellant had, on a subsequent occasion, done the acts the subject of the charged sexual assaults. Rationally it could affect that assessment, the s 97 question was whether the extent to which it did so was ‘significant’.

Mr Odgers suggests an analysis by which (i) evidence of an identification may be treated as evidence of an opinion about the identification, (ii) applying the majority reasons, they require an assumption that the opinion is honestly held and recounted reliably, but (iii) that this ‘does not mean that the opinion itself must be assumed to be reliable’. I cannot agree with either premise, or with the conclusion. Identification evidence is not opinion evidence (it is a separately defined and regulated type of direct evidence: see Part 3.9 and the Dictionary to the Evidence Act) and, even if it were, the majority’s statements of principle require an assumption that the evidence is accepted, not that it is accepted in some respects but not in other respects, such that it leaves open the opportunity to attack (at the point of admissibility) the reliability of what is, on the suggested analysis, the underlying identification.

Accordingly, in my view, Mr Odgers’ analysis cannot legitimately be extended to and applied in the context of objections to expert evidence under ss 135 and 137, as he suggests. On the contrary, it is difficult to see how the majority’s statements of principle provide any hope to objecting counsel keen to contend that a discretionary exclusion of the evidence should occur because the probative value of the evidence is low having regard to matters adversely affecting the ‘cogency’ and ‘qualifications’ of the particular expert.

Application of principles

The third matter in the majority reasons on which I comment arises when the majority turn to the application of ss 97(1) and 137 to the facts in the case at [60], addressing the tendency evidence first. The evidence in question was that the complainant had said that, on a previous (and uncharged) occasion, she and another granddaughter of the appellant were giving the appellant a back massage at his request, during which the appellant ‘ran his hand up my leg’. At trial, that evidence went to the jury on the basis that it was tendency evidence adduced to establish that the appellant had a sexual interest in the complainant (as each judgment in the High Court records: at [61], [105] and [120], noting that Nettle and Gordon JJ add ‘and was prepared to act on it’). The appellant did not dispute that the evidence was relevant.

The question of admissibility thus raised by the tendency rule was whether the evidence of the conduct of the accused on a previous occasion, which was tendered to prove that (in the words of s 97) he had a tendency ‘to act in a particular way, or to have a particular state of mind’, namely a sexual interest in the complainant, had ‘significant probative value’.

The majority reasons at [62]–[63] are the reasons for the appeal being allowed and deserve particular attention. At [62], it is held that ‘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’. That statement is unexpected because the probative value of the evidence of the earlier incident (and the purpose of the evidence and the basis of its admissibility) was as evidence of a tendency of the accused. If the event occurred and the tendency existed, rationally that made more likely the occurrence of a later incident in which the accused also acted on the sexual interest he had in the complainant. As the majority had earlier said in their statements of principle, credibility and reliability do not arise in an assessment of probative value, so the probative value of the evidence surely did not have anything to do with the complainant’s credibility. The significance of the probative value of the evidence was instead, it seems to me, to be measured by the extent to which, and the way in which, the earlier incident indicated a type and degree of sexual interest (and willingness to act on it) that made it more likely that the appellant did the charged acts. Whether the jury would actually accept or reject the complainant’s account of the earlier incident and/or the charged acts was a subsequent matter for the jury, not a question to be considered at the point of admissibility.

In a similar vein, the majority reasons at [63] read as though the tendency in question is that of the complainant to give an accurate account of events in which she has been involved. However, the relevant tendency in this case was not the ‘tendency’ of the complainant to give a true or accurate account of past events (putting aside the question whether evidence tendered for that purpose could ever truly be regarded as tendency evidence). It was, as had previously been identified in the majority reasons, the tendency of the accused to have a sexual interest in the complainant. In effect, the majority at [63] hold the evidence to be inadmissible because there was
no, even incremental, contribution to the determination of the truthfulness of the complainant’s account of the charged acts arising from the complainant’s account of the earlier incident. In my respectful view, that analysis replicates the very thing that the majority’s statements of principle disavows, namely taking into account the reliability or credibility of the complainant’s evidence for the purposes of admissibility.

Mr Odgers also considers the effect, upon admissibility, of a possibility that the relevant evidence has been concocted. He concludes that the majority reasons allow that if the possibility of concoction is sufficiently high, then it would be appropriate to take that into account for the purposes of determining whether the evidence had significant probative value. Mr Odgers also considers that the majority ‘only rejected the proposition that ‘the possibility of joint concoction may deprive evidence of probative value’. In my respectful view, the majority reasons had no such limited intention or effect and, I would add, nor did the reasons of Basten JA in *McIntosh v The Queen* [2015] NSWCCA 184 at [47]–[50] to which Mr Odgers also refers.

My fourth comment on the majority reasons also arises in respect of the reasons at [63]. Even if one adopts the perspective that the ‘fact’ in issue to which the tendency evidence went is the truthfulness of the complainant’s account of events, I dispute that an uncorroborated account by a complainant of an earlier uncharged act can never, rationally, have a material (or significant) effect upon the probability that the complainant’s uncorroborated account of the subsequent charged acts is true. Each case will turn on its own facts and circumstances. There may in some cases be nothing in the record that allows the credibility or reliability of a complainant’s evidence about different events to be disaggregated and regarded differently. The majority considered *IMM v The Queen* to be such a case, but of course that finding about the admissibility of the evidence in that case does not have precedential effect. In most cases, credibility and reliability are not once and for all assessments. For example, there is a line of authority in criminal appeal courts in which the court refuses to set aside allegedly inconsistent verdicts of a jury notwithstanding that the only evidence going to each of the charges is the uncorroborated evidence of a complainant, one recent discussion of these principles being *CH v R* [2014] NSWCCA 119 at [143]–[150]. In my view, that is entirely to be expected and is consistent with trial experience - the finder of fact may well have a reasonable and rational basis on which to accept the evidence of a witness about some things, but not about others. It may turn on something as fleeting and untranscribable as the way the witness / complainant recounts each incident. On the facts in *IMM v the Queen*, perhaps a jury could rationally have considered that the complainant’s allegation, about an earlier incident in the presence of another person who was theoretically available to be called to confirm or deny the event, affected the veracity of the evidence about that event, whereas no such consideration affected evidence of the charged acts. In any case, if it be assumed that the evidence of the massage incident were accepted, the significance of the probative value of the evidence lay in the extent to which it made it more likely that the accused subsequently did the charged acts, which also involved a physical manifestation of his sexual interest in the complainant.