Legal Research Foundation: The Evidence Act 2006 – 10 years On

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A Trans-Tasman Perspective

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Australia and New Zealand each undertook a comprehensive review of the law of evidence in the latter part of the last century which led, in Australia, to the enactment of the uniform evidence law ("UEL") by the Commonwealth[1] and New South Wales[2] and, in New Zealand, to the enactment of the *Evidence Act* 2006 (NZ) ("the NZ Act"). This year, New Zealand marks the 10th anniversary of the NZ Act. The position in Australia is less simply stated. Federal courts, Australian Capital Territory courts[3] and New South Wales courts have been applying the UEL for over 20 years. Tasmania[4], Victoria[5] and the Northern Territory[6] have since adopted the UEL[7].

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1 *Evidence Act* 1995 (Cth).

2 *Evidence Act* 1995 (NSW).

3 *Evidence Act* 1995 (Cth) applied to proceedings in courts in the ACT before the enactment of the *Evidence Act* 2011 (ACT).

4 *Evidence Act* 2001 (Tas).

5 *Evidence Act* 2008 (Vic).

6 *Evidence (National Uniform Legislation) Act* 2011 (NT).

7 The reference to the adoption of the UEL is for convenience - each of the Evidence Acts differs from the Commonwealth Act and from the other State and Territory Evidence Acts to varying degrees.

Queensland, Western Australia and South Australia continue to apply the common law supplemented by statute.

Both the Australian Law Reform Commission ("the ALRC") and the New Zealand Law Commission envisaged the draft evidence acts, which were appended to their Reports, would be enacted as codes[8]. Perhaps wisely, that intention was not carried into effect in the UEL or the NZ Act[9]. Nonetheless, each radically departs from the pre-existing law in important respects, providing comprehensively for the law on particular subjects, such as the tendency and coincidence rules in the UEL and the propensity rules in the NZ Act. As Winkelmann J has observed, the NZ Act required lawyers and judges to come to grips with legislation necessitating a new way of thinking, and for which little that had gone before would prepare them[10].

I think it fair to say that bench and bar alike in New South Wales were resistant to embracing the new way of thinking which the UEL, like the NZ Act, required. Writing in 2003, after the UEL had been the law in New South Wales for more than seven years,

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[8] ALRC, *Evidence*, Report 38 (1987) Appendix A cl 15(1); Law Commission (NZ), *Evidence*, Report 55 (August 1999), vol 1 at 3.

[9] See Heydon, "The non-uniformity of the "uniform" Evidence Acts and their effect on the general law", (2013) 2 *Journal of Civil Litigation and Practice* 169.

[10] *The Evidence Act 2006: Act & Analysis,* 2nd ed (2010) at v.

Spigelman CJ politely commented on the "occasional tendency to construe the [UEL] in the light of the pre-existing common law"[11]. My own recollection as a judge in the New South Wales Court of Criminal Appeal was not that occasional tendency as much as the tendency, up until 2003, for questions of admissibility at trial to have been argued and decided without any reference to the UEL.

On the eve of the 10th anniversary of the Commonwealth and New South Wales Acts, the ALRC, the New South Wales Law Reform Commission and the Victorian Law Reform Commission jointly undertook an inquiry into the operation of the UEL[12]. They engaged in a widespread process of consultation. In the result, a number of problems, some teething and some more substantial, were identified and recommendations made for amendments which have largely been adopted. There was no call for any major overhaul of the scheme which seen to be working satisfactorily[13].

One controversial area which the Commissions identified is the operation of s 38, which provides for the treatment of unfavourable witnesses:

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[11] *R v Ellis* (2003) 58 NSWLR 700 at 715 [70].

[12] ALRC, *Uniform Evidence Law*, Report 102 (2005); NSWLRC, *Uniform Evidence Law,* Report 112 (2005); VLRC, *Uniform Evidence Law*, Final Report (2005).

[13] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 17-18.

> "(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
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> (a) evidence given by the witness that is unfavourable to the party; or
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> (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
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> (c) whether the witness has, at any time, made a prior inconsistent statement."

From the perspective of the party calling a witness whose evidence is unfavourable, the provision is a boon; it is distinctly less onerous to obtain leave to cross-examine under s 38 than to establish the foundation for a declaration of hostility under the common law[14]. Evidence that is simply "not favourable" to the party is within s 38(1)(a)[15]. Moreover, the provision is not limited to circumstances in which the witness unexpectedly gives unfavourable evidence. Section 38 permits a party, commonly the prosecution, to call a witness known to be unfavourable, for the purpose of obtaining leave to cross-examine the witness and to get an inconsistent out-of-court statement into evidence.

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[14] *McLellan v Bowyer* (1961) 106 CLR 95.

[15] *R v Souleyman* (1996) 40 NSWLR 712; *R v Lozano* [1997] NSWSC 237.

The extent to which the UEL changed the landscape of the criminal trial was illustrated in *Adam v The Queen*[16]. The trial judge gave leave to the prosecutor to cross-examine an unfavourable eye-witness to a fatal stabbing pursuant to s 38. The witness' statements to the police, which incriminated the accused, were received in evidence. Because the statements were admitted as relevant to the witness' credibility, they became available for a hearsay purpose under s 60 of the UEL[17]. At common law the impropriety of calling a witness who is known to be hostile for the purpose of getting before the jury a prior inconsistent statement arises because the statement is inadmissible to prove the facts asserted[18]. By contrast, under the UEL the statement is available as proof of the facts if it is admitted for another purpose[19]. The "credibility rule", which, as enacted, provided that evidence that is relevant only to a witness's credibility is not admissible[20], did not present an obstacle to the course adopted in *Adam* because it did not apply to evidence adduced in cross-examination that possessed "substantial probative value"[21]. In the result, the High Court held

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16 (2001) 207 CLR 96.

17 Section 60(1) of the UEL provides that the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

18 *Blewitt v The Queen* (1988) 62 ALJR 503 at 505.

19 *Adam v The Queen* (2001) 207 CLR 96 at 104 [19] per Gleeson CJ, McHugh, Kirby and Hayne JJ.

20 UEL, s102.

that the trial judge had not erred in granting leave under s 38(1) and admitting the witness's statements given to the police into evidence as proof of the facts asserted in them[22].

The Law Reform Commissions concluded that a guiding principle of the UEL - improvement in fact-finding - had been promoted by the operation of s 38 over the previous 10 years[23]. They rejected criticisms of the asserted unfairness occasioned by the interaction of s 38 with s 60, observing that the provision has made "a significant change in allowing highly relevant and probative evidence" to be received[24]. Nonetheless, the Commissions found that the literal application of the credibility rule in *Adam* produced an unsatisfactory outcome: the rule did not apply where evidence was relevant to credibility and to a fact in issue notwithstanding that the evidence was not admissible for the purpose of proving a fact in issue[25]. The UEL has been amended in line with the Commissions' recommendation to overcome this anomaly[26].

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[21] UEL, s 103.

[22] *Adam v The Queen* (2001) 207 CLR 96 at 109-110 per Gleeson CJ, McHugh, Kirby and Hayne JJ.

[23] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 137 [5.55].

[24] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 141 [5.68].

[25] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 394-398.

[26] Section 101A defines credibility evidence as evidence that is relevant only because it affects the assessment of the credibility of the witness or person or is relevant because it affects the

Footnote continues

Another potential problem which the Law Reform Commissions identified concerned the regime for the admission of hearsay in criminal proceedings. As enacted, s 65(2) of the UEL allowed the admission of a previous representation to prove the asserted fact in a case in which the maker was not available to give evidence, where the representation was[27]:

> (a) made under a duty to make that representation or to make representations of that kind; or
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> (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
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> (c) made in circumstances that make it highly probable that the representation is reliable; or
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> (d) against the interests of the person who made it at the time it was made.

In *R v Suteski*, the prosecution relied on (d) to tender a recording of an interview between a police officer and a co-offender who had pleaded guilty and who refused to give evidence at the trial[28]. The co-offender's statements incriminating the accused were received as evidence of the fact. The decision provoked criticisms which the Law Commissions considered justified[29]. They

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assessment of the credibility of the witness or person and for some other purpose for which it is not admissible, or cannot be used, because of a provision of Pts 3.2 to 3.6.

[27] UEL, s 65(2).

[28] (2002) 56 NSWLR 182.

[29] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 235 [8.41].

recommended the amendment of s 65(2)(d) to require not only that the representation be against the interests of the person who made it at the time it was made but also that it be made in circumstances that make it likely that the representation is reliable[30]. That recommendation has been acted upon by the enactment of s 65(2)(d)(ii).

In its current form s 65(2)(d) is still susceptible of producing surprising outcomes. In *Sio v The Queen*[31], decided a month ago, the accused and Filihia were jointly charged with murder arising out of a botched armed robbery. Filihia admitted to stabbing the deceased, stating in interviews with the police that the accused had put him up to the robbery and given him the knife. He was unwilling to give evidence at the accused's trial. The trial judge found that the representations made by Filihia in his interviews were against his interests and were made in circumstances that made it likely that the representations were reliable. The entirety of Filihia's interviews were admitted at the trial as evidence of the facts asserted.

Sio's appeal succeeded in the High Court. The Court was critical of the compendious approach adopted by the trial judge and the Court of Criminal Appeal to the various representations contained in the interviews. While the totality of Filihia's statements

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[30] ALRC, *Uniform Evidence Law*, Report 102 (2005) at 237 [8.51].

[31] [2016] HCA 32.

were against his interests, particular representations were apt to minimise his culpability and maximise that of the accused. The concern of the provision was said to be the identification of circumstances that, of themselves, warrant the conclusion that the representation is reliable notwithstanding its hearsay character[32]. It was sufficient to observe that Filihia's assertions that Sio had put him up to it and given him the knife necessarily raised a question mark as to reliability in circumstances in which Filihia was an accomplice. Nothing in the objective circumstances shifted the balance in favour of finding that the representation was likely reliable in relation to that asserted fact[33].

The operation of s 65(2)(d) remains surprising given that, had Filihia and Sio been jointly tried, none of Filihia's statements to the police would have been admissible against Sio[34]. In other respects, the UEL treats the defendant in criminal proceedings generously, permitting him or her to adduce first-hand hearsay subject only to the requirement of giving notice[35].

In two decisions made not long after the commencement of the UEL, the High Court construed its provisions excluding hearsay

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[32] *Sio v The Queen* [2016] HCA 32 at [71].

[33] *Sio v The Queen* [2016] HCA 32 at [73].

[34] UEL, s 83.

[35] UEL, s 65(8).

evidence strictly. The Law Reform Commissions considered that each decision was apt to frustrate the underlying policy of the scheme. Conformably with the Law Reform Commissions' recommendations, the UEL has been amended to overcome the effect of each decision. In the first, *Lee v The Queen*[36], a prosecution witness was cross-examined by leave on a prior inconsistent statement that he had made to the police. In the statement, the witness told the police that the accused had said to him, "I'm running because I fired two shots ... I did a job and the other guy was with me bailed out"[37]. The High Court said it was an error to leave the representations as evidence of the fact: while the witness intended to assert that he had done and seen various things, as set out in his statement, there was no basis for concluding that the witness intended to assert as a fact that the accused had "fired two shots", done "a job" or that the "other guy" had "bailed out"[38].

In the second decision, *Graham v The Queen*, the Court considered the scope of s 66(2) which, as enacted, allowed for the admission of a previous representation where the maker was available to give evidence if, when the representation was made, the occurrence of the asserted fact was "fresh in the memory"[39]. In

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[36] (1998) 195 CLR 594.

[37] (1998) 195 CLR 594 at 597 [6].

[38] (1998) 195 CLR 594 at 600 [23].

[39] (1998) 195 CLR 606.

question in *Graham* was the admission of evidence of a complaint made six years after the last of the acts of sexual molestation with which the accused was charged. The Court held that the temporal relationship with which the provision was concerned would very likely be measured in hours or days and not years[40].

The Law Reform Commissions' view, that neither *Lee* nor *Graham* accorded with the policy of the UEL, took into account the discussion in the ALRC's influential Interim Report on Evidence[41]:

> "Under existing law hearsay evidence that is admissible for a non-hearsay purpose is not excluded, but may not be used by the court as evidence of the facts stated. This involves the drawing of unrealistic distinctions. The issue is resolved by defining the hearsay rule as preventing the admissibility of hearsay evidence where it is relevant by reason only that it would affect the court's assessment of the facts intended to be asserted. This would have the effect that evidence relevant for a non-hearsay purpose – eg to prove a prior consistent or inconsistent statement, or to prove the basis of the expert's opinion – will be admissible also [as] evidence of the facts stated".

The Law Reform Commissions considered that the evident intent of the UEL is to do away with the "unrealistic distinction" by the provision of s 60[42], an intention that was not reflected in *Lee*.

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40 (1998) 195 CLR 606 at 608 [4] per Gaudron, Gummow and Hayne JJ.

41 ALRC, *Evidence*, Report 26 (Interim) (1985), vol 1 at [685].

42 ALRC, *Uniform Evidence Law,* Report 102 (2005) at 214-215 [7.106].

The section has been amended by the inclusion of s 60(2) which provides that it applies whether or not the person who made the representation had personal knowledge of the asserted fact. Necessary balance in the case of criminal proceedings is addressed by the inclusion of s 60(3) which provides that the section does not apply in a criminal proceeding to evidence of an admission.

The inquiry received a number of submissions that were critical of *Graham*. Taking into account psychological research relating to memory, the Law Reform Commissions concluded that s 66(2) should be amended to make clear that whether a memory is "fresh" is to be determined by reference to factors in addition to the interval between the event and the making of the representation[43]. Section 66(2A) has since been inserted into the UEL. It provides that in determining whether the occurrence of the asserted fact was fresh in the memory of the person, the court may take into account all matters that it considers are relevant to the question including:

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

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[43] ALRC, *Uniform Evidence Law,* Report 102 (2005) at 255 [8.119].

Evidence of a complaint made years after the event may now be received under s 66(2A) as evidence of the truth of the asserted facts.

Perhaps no issue arises with such frequency, or presents more difficulty for trial judges, than the admission of evidence tending to reveal that the accused has engaged in discreditable conduct on occasions that are not the subject of charge. The UEL and the NZ Act each depart from the stringency of the common law in dealing with evidence of this description but in ways that differ markedly.

The UEL excludes evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, 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 ("the tendency rule")[44]. The UEL excludes evidence that two or more events occurred 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 ("the coincidence rule")[45]. Evidence that is not admissible to prove a matter by

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[44] UEL, s 97(1).

[45] UEL, s 98(1).

tendency or coincidence reasoning must not be used to prove that matter, even if the evidence is relevant for another purpose[46].

Importantly, evidence within the tendency or coincidence rules may be adduced if, relevantly, the court thinks that the evidence will have "significant probative value", either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence[47]. In the case of tendency evidence or coincidence evidence about a defendant adduced by the prosecution, s 101(2) further conditions admissibility upon the court finding that the probative value of the evidence *substantially* outweighs any prejudicial effect it may have on the defendant.

By contrast, s 43 of the NZ Act adopts a less demanding test for the admission of "propensity" evidence in criminal proceedings. The Court of Appeal noted in *R v Healy* that, contrary to the Law Commission's draft which required the probative value to be substantial, s 43(1) simply requires that the probative value of the evidence outweigh its prejudicial effect[48]. It noted the previous uncertainty which attended the admissibility of evidence of this kind,

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[46] UEL, s 95(1).

[47] UEL, ss 97(1)(b), 98(1)(b).

[48] [2007] NZCA 451 at [39].

saying that s 43 of the NZ Act offered the opportunity of a clean slate and one that "should be grasped"[49].

The NZ experience, at least in one respect, mirrors the English experience: s 101 of the *Criminal Justice Act* 2003 (UK) was enacted, contrary to the recommendation of the English Law Commission, without a requirement that evidence of bad character possess "substantial" probative value[50].

Professor Tapper considers that, before the enactment of the *Criminal Justice Act* 2003 (UK), the common law was undergoing a re-balancing in favour of the interests of victims against those of the accused[51]. He instances the statement of the principle by Lord Mackay of Clashfern LC in *Director of Public Prosecutions v P*:

> "[T]he essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime."[52]

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[49] [2007] NZCA 451 at [54].

[50] The Law Commission (England and Wales), *Evidence of Bad Character in Criminal Proceedings*, Law Comm No 273, (2001) at 4-5. "Substantial" probative value is required where evidence is tendered in connection with an important matter in issue between a defendant and a co-defendant under s 101(1)(e).

[51] Tapper, *Cross and Tapper on Evidence*, 11th ed (2007) at 403-416 referring to *Director of Public Prosecutions v P* [1991] 2 AC 447; *R v H* [1995] 2 AC 596; *R v Z* [2000] 2 AC 483.

[52] [1991] 2 AC 447 at 460.

I note the New Zealand Law Commission's view that the "apocalyptic fears" respecting the operation of the English scheme have not been realised[53]. The Law Commission considers the more liberal approach to the admission of propensity evidence under the NZ Act has operated smoothly and "produced the right results"[54].

The New South Wales Court of Criminal Appeal was more circumspect than its New Zealand counterpart in viewing the tendency and coincidence rules under the UEL as a clean slate. The prevailing view for a number of years was that the common law test enunciated by the High Court in *Pfennig v The Queen*[55] should be applied to the admission of tendency and coincidence evidence[56]. The *Pfennig* test requires the trial judge to apply the same test to tendency and coincidence evidence as the jury applies when dealing with circumstantial evidence: the evidence will be inadmissible if there is a rational view of the evidence that is inconsistent with the guilt of the accused. One consequence of the application of that

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53 Law Commission (NZ), *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) at 66 [4.29].

54 Letter from the President of the Law Commission to the Hon Simon Power, Minister responsible for the Law Commission, 1 April 2010 at 2 [9].

55 (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane and Dawson JJ.

56 *R v Lock* (1997) 91 A Crim R 356; *R v AH* (1997) 42 NSWLR 702; *R v Fordham* (1997) 98 A Crim R 359.

test, as explained in *Hoch v The Queen*[57], is that in any case in which there exists the possibility of joint concoction, similar fact evidence is inadmissible.

The *Pfennig* test has been widely criticised for its stringency. The Australian jurisdictions in which the common law of evidence has been maintained have each legislated to overcome its application[58]. The New South Wales Court of Criminal Appeal was constituted by a bench of five judges in 2003, in *R v Ellis*, to determine whether the *Pfennig* test applied to the admission of coincidence and tendency evidence[59]. It was held that the statutory regime for these kinds of evidence evinced an intention to cover the field to the exclusion of the common law principles that previously applied[60]. The Court recognised that the "no rational view" test enunciated in *Pfennig* is inconsistent with s 101(2) of the UEL, which requires the court to balance probative value against prejudicial effect. In this respect, McHugh J's dissenting reasons in *Pfennig* are apt[61]:

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[57] (1988) 165 CLR 292 at 296-297 per Mason CJ, Wilson and Gaudron JJ.

[58] *Evidence Act* 1977 (Q), s 132A; *Evidence Act* 1929 (SA), s 34P; *Evidence Act* 1906 (WA), s 31A.

[59] *R v Ellis* (2003) 58 NSWLR 700.

[60] *R v Ellis* (2003) 58 NSWLR 700 at 716 [74] per Spigelman CJ.

[61] *R v Ellis* (2003) 58 NSWLR 700 at 718 [91] per Spigelman CJ citing (1995) 182 CLR 461 at 516.

> "If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed – at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect."

The grant of special leave to appeal to the High Court in *Ellis* was revoked[62].

In determining whether to admit tendency and coincidence evidence or whether to exclude evidence under the discretionary or mandatory exclusions, the court is required to assess the probative value of evidence. "Probative value" is defined in the Dictionary to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". This wording has echoes of s 55, which provides that "evidence that is relevant to 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". A question that has occasioned difficulty is whether the trial judge is required to form a view about the credibility and/or reliability of evidence in assessing its probative value.

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[62] [2004] HCA Trans 488.

This question was considered recently in *IMM v The Queen*[63]. This was an appeal from the Full Court of the Supreme Court of the Northern Territory which upheld the trial judge's determinations (i) to admit certain tendency evidence and (ii) not to exclude evidence of complaint under s 137 of the UEL. That section requires the court to refuse to admit evidence adduced by the prosecutor if the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.

IMM was convicted of sexual offences against his step-granddaughter, a child under the age of 16 years. The complainant's evidence was the only direct evidence of the offences. Over objection, the prosecution adduced tendency evidence and evidence of complaint. The tendency evidence consisted of the complainant's account of an uncharged occasion when the appellant had run his hand up her leg. The trial judge assessed the tendency evidence upon the assumption that the jury would accept it. Her Honour adopted the same assumption in determining whether the probative value of the evidence of complaint was outweighed by the danger of unfair prejudice.

The trial judge's approach accorded with the analysis of the New South Wales Court of Criminal Appeal in *R v Shamouil*[64], which

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[63] (2016) 90 ALJR 529.

[64] (2006) 66 NSWLR 228.

held that it is not the function of the trial judge, in assessing probative value, to take into account factors going to the credibility or reliability. By contrast, the Court of Appeal of Victoria has held that the trial judge is only obliged to assume that the jury will accept the evidence as truthful but is not required to make an assumption that its reliability will be accepted[65].

The appellant's argument in *IMM* drew on the absence of the words "if it were accepted" in the definition of probative value in the Dictionary in contrast with the definition of relevant evidence in s 55. The argument received support from an obiter remark by McHugh J in *Papakosmas v The Queen*[66]. His Honour rejected the submission advanced in that case that considerations of reliability inform the determination of whether evidence is relevant. He went on to say with reference to the definition of "probative value" that "of course, [that] would necessarily involve considerations of reliability"[67].

The contrary view was expressed by Gaudron J in *Adam* also in obiter remarks[68]:

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

66 (1999) 196 CLR 297 at 323 [86] per McHugh J.

67 (1999) 196 CLR 297 at 323 [86] per McHugh J.

68 (2001) 207 CLR 96 at 115 [60].

> "The omission from the dictionary definition of 'probative value' of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted."

The Court was closely divided in *IMM*. The majority agreed with the logic of Gaudron J's statement[69]. Because evidence which is relevant has the capacity to affect the assessment of the probability of the existence of a fact in issue, the evidence is "probative". The inquiry for the purposes of s 55 is whether the evidence is capable of the affecting that assessment at all. The inquiry for the purposes of determining probative value of evidence is as to the *extent* that evidence *could* rationally affect the assessment of a fact in issue. That assessment requires that the possible use to which the evidence might be put be taken at its highest.

Heydon points out that the difference in the two approaches will often be semantic. He instances an identification made very briefly in foggy conditions and bad light by a witness who does not know the person identified. On one approach, the trial judge starts by considering that, taken at its highest, the evidence is as high as any other identification, and he or she looks for particular weaknesses, which include an assessment of the credibility and reliability of the witness. On the other approach, the trial judge does

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[69] (2016) 90 ALJR 529 at 539 [50] per French CJ, Kiefel, Bell and Keane JJ.

not undertake such an assessment but he or she assesses the identification as a weak one, because it is simply unconvincing[70]. The majority in *IMM* held that it is the latter approach that the UEL requires[71]. The facts in *Shamouil* illustrate where in practice the difference in approach bites. In *Shamouil*, the victim of a shooting identified the accused's photograph from among 20 photographs and stated that "one hundred per cent its him"[72]. The trial judge excluded the evidence based upon an assessment that the witness had lied or made inexplicable mistakes about significant matters[73]. As noted, the Court of Criminal Appeal held the evidence was wrongly excluded.

It has become common on the trial of an accused for sexual offences for the joinder of counts involving more than one complainant, reflecting the UEL's less stringent test for "cross-admissibility". As the Victorian Court of Appeal recently said

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

[71] *IMM v The Queen* (2016) 90 ALJR 529 at 539 [50] per French CJ, Kiefel, Bell and Keane JJ.

[72] (2006) 66 NSWLR 228 at 231 [10] per Spigelman CJ (Simpson and Adams JJ agreeing).

[73] (2006) 66 NSWLR 228 at 233 [26] Spigelman CJ (Simpson and Adams JJ agreeing).

of the common law rules governing the admission of similar fact evidence[74]:

> "This high threshold meant that, in many cases, juries were left to consider the evidence concerning each alleged victim in isolation, without ever being made aware of the fact that allegations of a similar kind had been made by other complainants. Such cases often involved allegations that went back many years, and sometimes came down to a consideration of oath against oath. The result, in a great many cases, was a series of acquittals, whereas, had the evidence been made available, the outcome would almost certainly have been different."

It remains that nice questions concerning the admissibility of evidence of uncharged sexual misconduct arise under the UEL. The prevailing view is that evidence of misconduct (whether constituting an offence or otherwise) adduced to place a complainant's allegations in context is not caught by the tendency or coincidence rules[75]. It may be that evidence adduced for that purpose is not caught by the credibility rule[76]. The admission of evidence of this kind ("relationship evidence" or "context evidence") is controversial[77]. The line, if any, between evidence that is adduced to put an allegation in context and evidence adduced to prove a

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[74] *Velkoski v The Queen* (2014) 242 A Crim R 222 at 233 [31].

[75] *R v AH* (1997) 42 NSWLR 702; *Velkoski v The Queen* (2014) 242 A Crim R 222.

[76] Evidence Act, s 102.

[77] *Gipp v The Queen* (1998) 194 CLR 106.

tendency to act in a particular way or to have a particular state of mind will often be a fine one[78].

The assessment of "significant probative value" in the determination of the admissibility of evidence proffered for a tendency or coincidence purpose has thrown up another difference of views between the intermediate appellate courts. In *R v PWD*[79], the New South Wales Court of Criminal Appeal allowed an appeal by the Director of Public Prosecutions[80] against the trial judge's ruling that evidence did not meet the "significant probative value" threshold. The accused, a school principal, was charged with sexual offences that were alleged to have been committed against four male students between 1977 and 1992. The prosecution proposed to adduce the evidence of each complainant, and two further witnesses, in support of each count in the indictment as demonstrating the accused's tendency to have a sexual interest in young male students and to engage in sexual activities with them.

The trial judge considered that the evidence lacked significant probative value because the sexual acts, and the surrounding circumstances, were so varied that proof of one did not make "more likely to a significant extent" the occurrence of the charged act. The

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[78] *HML v The Queen* (2008) 235 CLR 334.

[79] (2010) 205 A Crim R 75.

[80] *Criminal Appeal Act* 1912 (NSW), s 5F(2) and (3A).

Court of Criminal Appeal said that it was an error to reason that tendency evidence must itself show a tendency to commit acts that are closely similar to the acts constituting the crime with which the accused is charged[81]. The Court held that all that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the charged offence[82]. The institutional setting in that case was said to have facilitated the accused's tendency in that it was a place where, under the guise of offering solace to boys who were vulnerable, he was able to engage in his sexual tendency[83].

The Court of Appeal of Victoria considers that the approach currently taken in New South Wales goes too far in lowering the threshold to the admission of tendency and coincidence evidence[84]. In the view of the Victorian Court, the removal of a requirement of similarity, or commonality of features, does not give effect to the UEL's requirement that the evidence possess "significant probative value"[85]. The Victorian Court acknowledges that the UEL does not

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81 *R v PWD* (2010) 205 A Crim R 75 at 87 [64] per Beazley JA (Buddin J and Barr AJ agreeing).

82 *R v PWD* (2010) 205 A Crim R 75 at 88 [65] Beazley JA (Buddin J and Barr AJ agreeing) citing *R v Ford* (2009) 201 A Crim R 451 at 485 [125].

83 *R v PWD* (2010) 205 A Crim R 75 at 91 [81].

84 *Velkoski v The Queen* (2014) 242 A Crim R 222 at 265 [164].

85 *Velkoski v The Queen* (2014) 242 A Crim R 222 at 265 [164].

import the common law test of "striking similarity". Nonetheless, their Honours hold that it remains apposite to assess whether the proffered evidence reveals "underlying unity", a "pattern of conduct", "modus operandi", or such similarity as logically and cogently implies that the particular features of the previous acts makes the occurrence of the act to be proved more likely[86]. Special leave to appeal has been granted by the High Court in a matter which is said to raise the suggested differences in approach in the admission of tendency evidence.

Heydon, who is, among many accomplishments, the highly respected author of the Australian edition of *Cross on Evidence*, counts the UEL in his list of the five great Australian legal disasters of the late 20th century[87]. He points out that before 1995 the law was untidy and in parts irrational but he contends that it worked and was widely understood by the profession. Apart from disputed confessions, Heydon recalls disputes about the admissibility of evidence caused little trouble and consumed little time[88]. By contrast, the lengthy provisions of the UEL understood against a

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[86] *Velkoski v The Queen* (2014) 242 A Crim R 222 at 266-267 [171].

[87] Heydon, *Five Great Australian Legal Disasters of the Late Twentieth Century*, Speech delivered at the Union Club Great Issues Dinner, 21 March 2013.

[88] Heydon, *Five Great Australian Legal Disasters of the Late Twentieth Century*, Speech delivered at the Union Club Great Issues Dinner, 21 March 2013 at 18.

background of the ALRC's Interim and Final Reports and successive drafts by the Commonwealth and New South Wales have opened up vast fields "for long and indecisive debate about admissibility" wasting the court's time and the parties' money[89].

Those of us who share with Heydon a visceral distrust of all things Benthamite were guarded in response to the UEL. Twenty years later, generally its provisions have come to be well-understood and work well. To this I would except the provisions governing tendency and coincidence evidence, the interpretation and application of which illustrate Heydon's worst fears. Nonetheless, it must be acknowledged that the common law's similar fact evidence rule is hardly a model of rationality or sound policy.

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[89] Heydon, *Five Great Australian Legal Disasters of the Late Twentieth Century*, Speech delivered at the Union Club Great Issues Dinner, 21 March 2013 at 19.