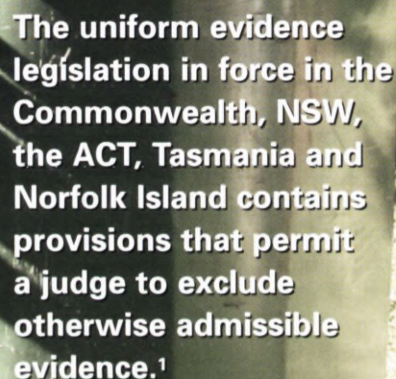
Assessing probative value against unfair prejudice – discretionary exclusions

By Miiko Kumar



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This article focuses on the discretionary exclusions in ss135 and 137 of the *Evidence Acts* (Acts). Other discretionary exclusions in the Acts include s90 (the discretion to exclude admissions) and s138 (confers discretion on a court to admit improperly or illegally obtained evidence).[2] The purpose of this article is to consider how a trial judge can assess 'probative value' against 'unfair prejudice' for the purpose of exercising discretion to exclude evidence under ss135 or 137. The uniform evidence legislation does not explain how such assessments should be made, nor did the recent inquiry into the Acts by the Australian Law Reform Commission (ALRC) recommend legislative clarification of these terms.[3] Instead, case law has interpreted these important statutory terms. The result is that the operation of the discretionary exclusions are restricted by the ability of the judge to assess the probative value of evidence against the danger of the evidence causing unfair prejudice.

DISCRETION TO EXCLUDE EVIDENCE

Section 135 confers on a court, in both civil and criminal proceedings, a discretion to exclude otherwise admissible evidence where the 'probative value' of the evidence is 'substantially outweighed by a danger that the evidence might be unfairly prejudicial to a party, or misleading or confusing, or cause or result in undue waste of time'.

Section 137 provides that a court must exclude prosecution evidence in criminal proceedings 'if its probative value is outweighed by the danger of unfair prejudice to the defendant'. This provision is a mandatory rule rather than a discretion to exclude.[4]

The discretion to exclude unfairly prejudicial evidence is not unique to the uniform evidence legislation. It was first referred to in the common law by the House of Lords in *Christie v R.*[5] The common law recognised the operation of such discretion in relation to criminal cases. However, the uniform evidence legislation also permits such discretion to operate in civil cases,[6] and in relation to evidence that is adduced by the accused.

ASSESSING 'PROBATIVE VALUE'

In exercising discretion under ss135 and 137, a judge considers the probative value of evidence. 'Probative value' is defined in the Dictionary to the Acts as:

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

This definition can be compared to the definition of 'relevant evidence' in s55(1), which provides:

> 'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.'

It is accepted law that the inclusion of the words 'if it were accepted' in s55 means that relevance is determined by a court on the assumption that the evidence is reliable and does not involve considerations of the prejudicial effect of evidence.[7]

Can a judge consider the reliability of the evidence in assessing probative value?

Two differences in the statutory definitions of 'probative value' and 'relevance' are apparent. First, 'probative value' means the 'extent' to which the evidence could affect the assessment of probability – that is, the degree of relevance. Second, the definition of relevance refers to evidence that, 'if it were accepted', could rationally affect the probability of the existence of a fact in issue. The definition of 'probative value' does not contain this qualification and therefore one view (expressed by McHugh J), is that a court does not assess probative value on the assumption that the evidence will be accepted – that is, the court can take into account matters that make the evidence unreliable and not credible when it assesses its probative value.

In its *Final Report on Evidence*, the ALRC stated that 'reliability of the evidence is an important consideration in assessing its probative value'.[8] McHugh J stated (as *dicta* only), in *Papakosmas v The Queen*, that an assessment of 'probative value' of evidence involves considerations of reliability. McHugh J based his observation on the differences between the definitions of relevance and probative value in the Acts.[9]

In a subsequent High Court case, Gaudron J expressed a different view: that the omission of the words 'if it were accepted' from the definition of 'probative value' is of 'no significance'.[10] Gaudron J stated that she would read the term into the dictionary definition of 'probative value'.

The NSW Court of Criminal Appeal (CCA) has settled this issue and 'is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility'.[11] In general, a judge would not consider the reliability or credibility of evidence to assess its probative value.

In *R v Shamouil*,[12] the Crown appealed against a trial judge's interlocutory ruling that excluded videotape evidence of a photo-board identification under s137. Shamouil was on trial for offences related to the shooting of Dawood. Dawood used a photo-board to identify Shamouil to the police. This identification was videotaped. A month later, Dawood provided police with a statement retracting his earlier identification. Dawood maintained this position on the *voir dire*. The trial judge determined the probative value of the evidence by referring to the general unreliability of identification evidence and the possibility of displacement effect. The trial judge excluded the videotape identification on the basis of his assessment of its probative value. The appeal court (Spigelman CJ with Simpson and Adams JJ agreeing), found that the trial judge incorrectly determined probative value (and also failed to identify any unfair prejudice). Spigelman CJ referred to the observations made by Gaudron J in *Adam* and held:

> 'In my opinion, the critical word in this regard is the word "could" in the definition of probative value as set out above, namely, "the extent to which the evidence could rationally affect the assessment ...". The focus on capability draws attention to what it is open for the tribunal of fact to conclude. It does not direct attention to what a tribunal of fact is likely to conclude. Evidence has "probative value", as defined, if it is capable of supporting a verdict of guilty.'[13]

Spigelman CJ further held:

> 'There will be circumstances.... where issues of credibility or reliability are such that it is possible for a court to

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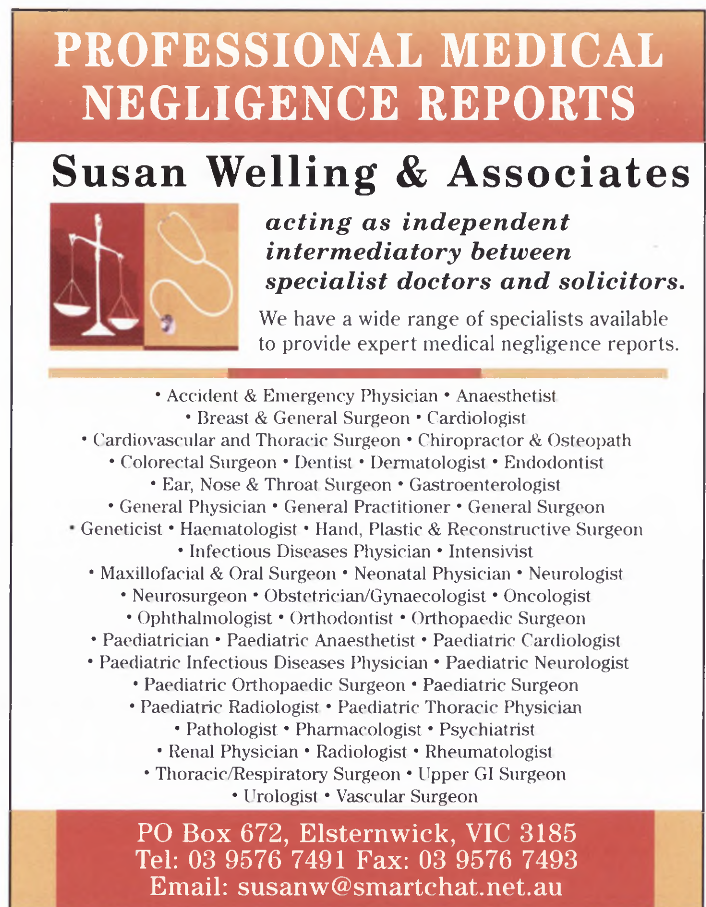

determine that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue. ...

To adopt any other approach would be to usurp for a trial judge critical aspects of the traditional role of a jury. In the case of evidence of critical significance, such a ruling by a trial judge would, in substance, be equivalent to directing a verdict of acquittal on the basis that the trial judge was of the view that a verdict of guilty would be unsafe and unsatisfactory. As the High Court said in that different, but not irrelevant, context in *Doney v The Queen* (1990) 171 CLR 207 at 275, this is not a permissible "basis for enlarging the powers of a trial judge at the expense of the traditional jury function". In my opinion, the same is true if a trial judge can determine the weight of evidence when applying s137.'[14]

In *Shamouil*, the NSW CCA found that the unreliability of the identification evidence was a matter that should be assessed by the jury. The CCA found that the unreliable nature of the evidence would not be a reason to exclude the evidence, nor did it amount to unfair prejudice.

This restrictive approach to 'probative value' was applied in *R v Sood*.[15] Sood was being prosecuted for Medicare fraud. At trial, the judge excluded evidence from a Health Insurance Commission (Medicare) officer, who had found a number of cash receipt books and cash receipts in two waste bins in Sood's medical clinic. The prosecution tendered that evidence for the purpose of inferring an admission by Sood – that she had placed the documents in the bins because she was conscious of her guilt of Medicare fraud. The trial judge excluded the evidence under s137 and found that the evidence was not strongly probative of the offences charged because 'the overwhelming inference is that she did so because she was afraid of being prosecuted for tax evasion'. The trial judge found that the probative value was outweighed by the danger of unfair prejudice because Sood would be forced to adduce evidence about her fears of being prosecuted for tax evasion as an explanation for the books being found in the bin.

The prosecution successfully appealed against this interlocutory ruling. In the NSWCCA, Latham J (Ipp JA and Fullerton J agreeing) reversed the trial judge's assessment of probative value and unfair prejudice.[16] Latham J held that an assessment of probative value means 'probative value in the crown case'.[17] Furthermore, the weight of the evidence sought to be adduced was not a legitimate factor in assessing probative value. The evidence is taken, at its highest,[18] and unreliability cannot be taken into account in assessing 'probative value'.[19] Latham J also held that 'it was no part of the trial judge's function in assessing probative value under s137 to have regard to competing explanations for the respondent's conduct, other than that upon which the crown relied', and her Honour rejected a submission that a trial judge may 'consider the plausibility of innocent explanations that arise on the evidence'.[20]

The approach by the NSWCCA is problematic for a number of reasons. First, the assessment of probative value 'in the crown case' does not appear in the statutory terms of s137. The decision appears to have inserted these words into s137. Second, the words of s137 do not specifically preclude the judge from having regard to competing inferences from the evidence. However, the NSWCCA interprets s137 to find that the trial judge cannot have regard to competing inferences available on the evidence. Third, the weight of evidence has been a legitimate factor in the exercise of the discretions at common law. The ALRC reported in relation to s137 that it 'proposed to retain this judicial discretion in its conventional form'[21] – meaning that the ALRC intended that s137 reflected discretionary exclusion at common law. The common law does refer to the weight of evidence to determine its probative value. For example, in the leading case of *R v Christie*, the judgments of the House of Lords refer to the weight of evidence.[22]

The decisions of *Shamouil* and *Sood* result in trial judges having a limited role when exercising discretion. The judge does not assess probative value but, rather, accepts how the prosecution says the evidence is probative. The judge's assessment of probative value for the purpose of ss135 and 137 does not take into account considerations of weight, reliability and/or credibility of the evidence. The judge can exclude evidence only if s/he finds unfair prejudice that outweighs the probative value of the evidence.

This is contrasted to the Tasmanian approach, which does take into account the reliability of evidence. In *DPP (Tas) v Lynch*,[23] the Tasmanian Court of Appeal considered the factors that reduced the reliability of identification evidence, when it assessed the probative value of such evidence in applying the discretion to exclude under s137.

ASSESSING 'UNFAIR PREJUDICE'

Sections 135 and 137 require a balancing of 'probative value' against 'unfair prejudice'. The term 'unfair prejudice' is not defined in the *Evidence Act*. In the *Interim Evidence Report*, the ALRC stated that:

'It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have.'[24]

In the *Interim Evidence Report*, the ALRC explained:

'By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.'[25]

McHugh J observed in *Papakosmas v The Queen*:

'Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted.

In *R v BD* (1997) 94 A Crim R 131 at 139, Hunt CJ at CL pointed out:

'The prejudice to which each of the sections [ss135, 136 and 137] refers is not that the evidence merely tends to establish the Crown case; it means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way.'[26]

McHugh J restricts the definition of unfair prejudice to the danger of the misuse of evidence by the trier of fact.[27] The discretion to exclude evidence, both at common law and in the statute, is based on a judicial mistrust of jurors, due to the risk that jurors will misuse evidence. This is contrasted to judicial assessments of probative value, which do not consider reliability and credibility of evidence, which are matters left for the jury.

Factors that make evidence unreliable or not credible do not equate to unfair prejudice, unless there is a danger of jury misusing the evidence. For example, the *Shamouil* case demonstrates that unreliability is not taken into account in assessing the evidence's probative value. The probative value of the evidence is to prove the identification. Discretionary exclusion would be permitted only if it can be established that the jury will use the identification in an impermissible way, that is, an unfair way.

Unfair prejudice could arise where evidence that is admitted for one purpose has an alternative, unfair use. For example, photographs of the deceased may be relevant to prove the cause of death, but could trigger an emotive response from the jury. Unfair prejudice could also arise where evidence permits the jury to adopt an illegitimate form of reasoning. For example, evidence admitted to prove bad character (to rebut good character evidence) could be used on a tendency basis.

Unfair prejudice may arise from procedural considerations. For example, if a previous representation is admitted for its hearsay purpose, an opposing party may not be able to cross-examine the maker of the representation and is therefore prevented from properly challenging its reliability.

More than a mere possibility of unfair prejudice

Section 137 cannot be utilised to exclude evidence on the ground that there is a 'mere possibility' that the evidence may create unfair prejudice. There must be a real risk of unfair prejudice. In *R v Lisoff*,[28] Lisoff was one of three defendants on trial for assault. The identification of Lisoff depended upon DNA evidence taken from his clothing. The defence challenged the integrity of this evidence, and the trial judge excluded the evidence under s137 because of its complexity. The trial judge considered that there was a '*real danger* that the fact-finders might be unduly swayed by the "scientific" nature of the evidence to make a decision on an improper basis'. The Crown, unable to proceed with a prosecution without the evidence, appealed. The appeal was successful, the NSW CCA holding that the trial judge had incorrectly excluded the evidence. The Court found:

'In our opinion, by applying to the statutory formula – "the danger of unfair prejudice" – a test of mere possibility, his Honour erred in law. Section 137 requires a real risk of unfair prejudice to the defendant by reason of the admission of the evidence complained of. It is not sufficient to establish that the complexity or nature of the evidence was such that it created the mere possibility that the jury could act in a particular way. His Honour applied the wrong test.'

Does the inability to cross-examine create unfair prejudice?

This question has arisen in the context of hearsay evidence, where the maker of the previous representation is unavailable for cross-examination. The issue is whether ss135 or 137 excludes the hearsay evidence because of the unfair prejudice caused by the inability to cross-examine the maker of the hearsay statement.

As to procedural unfairness, McHugh J has adopted a narrow approach and observed that procedural disadvantages are not necessarily grounds for 'unfair prejudice'. In *Papakosmas*, McHugh J said:

'Some recent decisions suggest that the term "unfair prejudice" may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act. …am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given >>

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sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons.'[29]

The inability to cross-examine in *Ordukaya v Hicks*[30] was not considered itself the cause of unfair prejudice. In *Ordukaya v Hicks*, the plaintiff unsuccessfully sued a 92-year-old defendant for negligence in respect of a paving step. The defendant was insured. Cooper DCJ found that the defendant was unable to attend to give evidence (it was not reasonably practicable) and a statutory declaration made by the insured was admitted into evidence through a hearsay exception.[31] The plaintiff was unsuccesful in excluding the evidence under under s135 on the basis that the plaintiff was denied the opportunity to cross-examine the 92 year old.

The Court of Appeal upheld the judge's decision, and found that the statutory declaration was rightly admitted into evidence. The lack of cross-examination could bear on the weight given to the document, but it did not justify exclusion of the evidence based on the inability to cross-examine the maker.[32] This decision was cited with approval in *R v Suteski*,[33] where Wood CJ at CL held that each decision would depend on its particular facts.[34]

Can unfair prejudice arise from the response to evidence?

In *R v Sood*, the trial judge concluded that 'the effect of raising the alternative hypothesis would be to inflict very substantial unfair prejudice on the accused', as Sood would have to adduce evidence suggesting that she had engaged in criminal activity (tax evasion), other than that charged, to explain the receipt books being found in the bin. The NSW CCA found that it was not open to the judge to find that the defence would be compelled to introduce the evidence.[35] The Court held that the danger of unfair prejudice could not arise from the response that the defendant is compelled to make. Further, the Court also held that it was not open to the judge to conclude that appropriate directions could not cure the unfair prejudice.

The decision in *Sood* is contrasted to in *R v Cook*,[36] where the Court concluded that evidence of flight relied upon to show consciousness of guilt should be excluded under s137 because 'the nature of the evidence he would have to adduce in order to meet the flight evidence' would have a clear prejudicial effect.[37]

In another case, the NSW CCA held that the late service by the prosecution of expert evidence caused unfair prejudice and was therefore excluded under s137.[38]

CONCLUSION

The uniform evidence legislation has made significant changes to the law of evidence. The operation of the discretions to exclude evidence has been one area that has required judicial interpretation of fundamental statutory terms. In NSW, the approach to assessing 'probative value' and 'unfair prejudice' has taken a restrictive approach. While assessing 'unfair prejudice' has been relatively uncontroversial, the approach to the assessment of 'probative value' has received differing views. The issue appears to have been resolved in NSW, which differs from the approach in Tasmania. It will be interesting to see how the law develops in this area in Victoria, once the uniform evidence legislation comes into operation in that state. ■

Notes: **1** *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas) and *Evidence Act 2004* (NI). The uniform legislation has also been passed in Victoria; *Evidence Act 2008* (Vic). The Victorian Act has not yet commenced, the latest it can commence is 1 January 2010. **2** Section 90 applies in criminal proceedings, while s138 applies in civil and criminal proceedings. **3** Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, 'Uniform Evidence Law' (ALRC Report No. 102, NSWLRC Report 112, VLRC Final Report, 2005). The recommendations of ALRC 102 have been implemented by amendments to the various Evidence Acts. **4** The mandatory nature of the section was recognised by the Court of Criminal Appeal in *R v Blick* (2000) 111 A Crim R 326 at [19] – [20] per Sheller JA. One of the recommendations arising from ALRC 102 was to clarify the mandatory nature of s137 by amending the heading in the Act from 'Discretions to exclude evidence' to read 'Discretionary and mandatory exclusions'; Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, 'Uniform Evidence Law' (ALRC Report No. 102, NSWLRC Report 112, VLRC Final Report, Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, 2005. The Evidence Acts now include this amendment. **5** [1914] AC 545. **6** Under the common law, the discretion to exclude evidence in civil cases is exercised by the judge's assessment of whether evidence has 'sufficient relevance'. **7** See *Adam v The Queen* (2001) 207 CLR 96 per Gleeson CJ, McHugh, Kirby and Hayne JJ at [22] and *Papakosmas v The Queen* (1999) 196 CLR 297 per McHugh J [81] and [87]. **8** *Evidence Final Report* (No. 38) (1987) at para 146. This report contained the draft Evidence Bill. **9** *Papakosmas v the Queen* (1999) 196 CLR 297 at [86]. **10** *Adam v The Queen* (2001) 207 CLR 96 at [60], Gaudron J dissented in this case (the majority judgment did not deal with this issue). **11** *R v Shamouil* (2006) 66 NSWLR 228 per Spigelman CJ at [60]. **12** (2006) 66 NSWLR 228. **13** At [61]. **14** At [63] - [64]. **15** [2007] NSWCCA 214. It has also been applied in *R v Mundine* [2008] NSWCCA 55. **16** Special leave to appeal to the High Court was refused on 16 November 2007 on the basis that the appeal was on an interlocutory ruling. **17** At [27]. **18** At [38]. **19** At [36]. **20** At [40]. **21** ALRC 26 vol1 para 957. **22** See note 4, Lord Moulton at 560 and Lord Reading at 564. **23** (2006) 155 A Crim R 327. **24** ALRC 26, vol 1, para 957. **25** ALRC 26, vol 1, Para 644. **26** *Papakosmas v The Queen* (1999) 196 CLR 297 at [91] – [93]. **27** This approach has been applied in subsequent cases, see for example, *Ainsworth v Burden* [2005] NSWCA 174 at [99]. **28** [1999] NSWCCA 364. **29** At [93]. **30** [2000] NSWCA 180. **31** Section 64 of the Act. **32** At [38] – [39]. **33** (2002) 56 NSWLR 182. **34** [126] –[127]. This approach was applied in *Galvin v The Queen* [2006] NSWCCA 66 at [40]. In *Ainsworth v Burden* [2005] NSWCA 174 at [105], the NSW Court of Appeal recognised that there was conflicting authority in this area, but did not resolve it. **35** At [50]. **36** [2004] NSWCCA 52. **37** per Simpson J at [48]. **38** *Haoui v The Queen* [2008] NSWCCA 209.

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