

POCKET EVIDENCE LAW

by

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(Foley's List)

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INTRODUCTION

Pocket Evidence Law analyses the operation of uniform evidence law (UEL) in criminal proceedings in Victoria. It seeks to lighten the load on busy practitioners by identifying and concentrating on the “must read” cases on UEL. Most cases cited are decisions of the High Court of Australia (HCA) or the Victorian Supreme Court of Appeal (VSCA). Only if a particular point has not been covered by these courts, or there is conflicting authority in other UEL jurisdictions, are decisions of other intermediate appellate courts cited. Full citations are set out in the Table of Authorities at the end of the paper.

The paper adopts the structure of the Evidence Act 2008 (the Act) and the main focus is on Chapter 3 of the Act, which concerns the admissibility of evidence. The relevant sections of the Act are not reproduced, so read this paper with a copy of the Act at hand. References to sections and schedules and the Dictionary are to those in the Act unless otherwise indicated.

HISTORY

First, a little history about UEL, which is necessary if one is to appreciate: (a) the relevance of various Law Reform Commission reports in interpreting UEL; (b) the sources of case law on UEL; & (c) the need for caution in using that case law because of changes made to UEL over time, and some variations in UEL from one jurisdiction to another.

In 1979, the Federal Government asked the Australian Law Reform Commission (ALRC) to review the laws of evidence. The ALRC published an Interim Report in 1985 (ALRC 26) and the Final Report in 1987 (ALRC 38). In 1995, both the Federal and NSW governments finally passed Evidence Acts that were essentially uniform. These acts operated in Federal Courts and in courts in the A.C.T. and NSW. In 2001, Tasmania adopted UEL, but its Act has more variations than most. In 2004, Norfolk Island adopted UEL. In 2005, the ALRC published the Joint Report (ALRC 102) reviewing the performance of UEL over the previous decade and recommending certain changes. In 2006, the VLRC published a report on implementing UEL in Victoria. In 2008, Victoria enacted UEL, incorporating amendments recommended in ALRC 102. On 1.1.2009, the amendments recommended by ALRC 102 commenced operation in the Federal Courts and in the A.C.T and NSW. On 1.1.2010, our version of UEL commenced operation. In 2011, the A.C.T., rather than continuing to operate under federal UEL, enacted its own UEL. The Northern Territory also enacted UEL legislation in 2011, which commenced operation on 1.1.2013.

INTERPRETING UEL

UEL was intended to make substantial changes to the rules of evidence (*Papakosmas* at [10]). Reference to the common law in trying to interpret it may be unhelpful (*Papakosmos* at [8]; cf *PNJ* at [8-9]). The High Court has cautioned trial judges against using their discretionary powers under Part 3.11 of the Act to re-instate the common law rules of evidence (*Papakosmos* at [97]).

CHAPTER 1 – PRELIMINARY

S 2 - Commencement

Subject to the transitional provisions (Schedule 2 of the Act), the Act applies to “hearings” that commence on or after 1.1.2010, regardless of when the “proceedings” commenced (*Darmody* at [14-21]).

S 4 - Courts & proceedings to which Act applies

The Act applies to all proceedings in “Victorian courts”, a term given an expansive definition in the Dictionary. Bail hearings, however, are not constrained by the Act’s rules regarding the admissibility of evidence because of the combined operation of s 8 of the Act and s 8(e) of the *Bail Act 1977*. The Act only applies to sentencing hearings if the court directs (s 4(2), (3), (4)).

S 8 – Operation of Acts

By virtue of s 8, it is clear that the Act is not a code in that provisions of other Acts dealing with evidentiary issues continue to operate, e.g., s 464H of the *Crimes Act 1958* governing tape recordings of confessions. Nor does the Act attempt to deal comprehensively with every matter that might be considered part of evidence law, e.g., the rule in *Browne v Dunn* regarding “puttage”, which is only partially addressed by s 46.

The old *Evidence Act 1958* has been filleted and rebadged as the *Evidence (Miscellaneous Provisions) Act 1958* but it remains an important source of evidence law in Victoria.

Some significant evidentiary provisions have been inserted in the *Criminal Procedure Act 2009* (“CPA”), e.g., s 377 which permits evidence of complaint in child sex cases to be used as evidence of the truth of the complaint.

S 9 – Application of Common Law & Equity

While the Act is not a code, it does however displace the common law with respect to competence & compellability (s 12) and, most importantly, the admissibility of evidence (s 56(1)).

CHAPTER 2 – ADDUCING EVIDENCE

Chapter 2 is chiefly about procedure – how one “adduces” (ie, leads or tenders) evidence, the admissibility of which is determined by the application of the rules in Chapter 3. One should note that parties “adduce” evidence whereas witnesses “give” evidence (ALRC 38 at [59]). The party who is questioning a witness (whether in XN or XXN) is adducing the evidence at that point in time (ALRC 26 at [515]). Evidence which is adduced may or may not be admitted.

S 12 - Competence and compellability

The Act operates as a Code in relation to competence and compellability. S 12 is an inclusionary rule – in summary, everyone is presumed competent & therefore compellable. Ss 13 to 19 create exceptions to this general rule. Perhaps surprisingly, it is not a precondition for competence to give unsworn evidence that one understands the obligation to tell the truth: it is enough if one can understand the question(s) and give an answer that can be understood (s 13).

S 18 – Compellability of spouses & others in criminal proceedings generally

Under s 18, the spouse, de-facto partner, parent & child of an accused (“D”) are compellable by the prosecution (“P”) but they can seek exemption from giving evidence in toto or from giving evidence of a communication between D & the applicant.

The applicant must fit one of the relevant categories at the time they are required by the prosecution to give evidence (s 18). “Defacto partner” includes a homosexual partner. “Parent” and “child” are defined broadly in the Dictionary, e.g., a person “in loco parentis” could be considered a parent.

If a witness has been excused from giving evidence under s 18 (e.g., a complainant in a domestic violence case), P may still be able adduce evidence of what the complainant has said before about the incident pursuant to one of the exceptions to the hearsay rule set out in s 65 (*Nicholls* at [21-22]).

S 20 – Comment on failure to give evidence

The trial judge may now comment on the failure to give evidence by D or a person excused from giving evidence under s 18. But such comment must not suggest that the failure to give evidence was because D was guilty or thought to be guilty (*RPS* at [18-21], *Azzopardi* at [53-56], *Miller* at [4], [30-39]). NSW authority indicates that permissible comment by a trial judge includes comment to the effect that D’s self-serving answers in a record of interview were not given on oath and not tested by cross examination (*Kovacs* at [42-43], *Wilson* (2005) at [7], [12]).

S 33 - Evidence given by Police Officers

Under certain circumstances, police may give evidence in chief by simply reading out their statements if made “soon after” the events described. “Soon after” might extend to days but not weeks after the events described (*Orchard v Spooner* at p119).

S 38 – Unfavourable witnesses

S 38 replaces the common law rule in relation to hostile witnesses. Its operation in conjunction with s 60 (a broad exception to the exclusionary hearsay rule) is arguably the most significant change effected by UEL. S 38 creates an exception to the rule in s 37 that a party may not normally ask leading questions of its own witness. The exception has the following elements:

- the evidence of the witness is “unfavourable” to the party or the witness is not making a genuine attempt to give evidence or the witness has made a prior inconsistent statement; &

- the Court gives leave to ask leading questions.

There is conflicting authority as to the meaning of “unfavourable” in this context. The narrow view is that the witness’ evidence must detract from the case of the party who called the witness: it cannot be merely neutral (*Hadgkiss v CFMEU* at [9]). The broad view is that unfavourable simply means “not favourable”, as opposed to “adverse” (*McRae* at [24]). ALRC 102, which was co-authored by the VLRC, favoured the broad view ([5.46]).

The court must have regard to certain criteria in deciding whether to grant leave to the party to cross examine its own witness (ss 38(6)(a),(b),192). It must also have regard to the “discretions” (ss 135, 137) to exclude otherwise admissible evidence.

P may seek an advance ruling as to whether leave will be granted to cross examine its own witness should the witness’ testimony prove unfavourable to P (s 192A; *McRae*) Indeed, it is no bar to P utilising s 38 that it expects that the witness’ testimony in response to non-leading questions will be unfavourable (*Adam* at [18-19], *Aslett* at [71], *McRae* at [20]). In *McRae*, P planned to compel two co-offenders who had already been dealt with to give evidence at D’s murder trial, if leave was given to P to cross examine them about their initial out of court statements which implicated D. Their later statements exonerated D. Curtain J ruled in advance that, if their answers to non-leading questions proved unfavourable to P, she would give leave to P to cross examine them under s 38 and that, pursuant to s 60, P would be able to rely on the initial statements as evidence of the truth of their contents. P was also permitted to tender the tape recordings of the initial out of court statements which comprised the co-offenders’ police interviews and a conversation between them intercepted by a listening device.

As regards the scope of cross examination that may be permitted under s 38, it is noteworthy that in the murder trial of *Bourbaud* ([8],[37]), Lasry J permitted P to cross examine two unfavourable prosecution witnesses, who had earlier pleaded guilty to assault charges arising from the fatal incident, about inconsistencies between the summary of facts on their pleas and their subsequent accounts of the incident.

The scope of cross examination under s 38 may be regulated by s 103 (*Anyang (Ruling No 1)* at [20]) which only permits cross examination as to credibility if it will “substantially affect” the assessment of the witness’ credibility.

The greater capacity of P under s 38 to cross examine its own unfavourable witnesses makes it more difficult for P to justifiably decline to call material witnesses (*Kanaan* at [84-85]).

S 42 – Leading Questions

D may be precluded from asking a prosecution witness leading questions in cross examination if the facts would be “better ascertained” by non-leading questions (s 42(3)).

CHAPTER 3 – ADMISSIBILITY OF EVIDENCE

The scheme of Chapter 3 involves an inclusionary rule (“Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding”: s 56(1)) followed by numerous exclusionary rules (eg, the rule excluding irrelevant evidence (s 56(2), the hearsay rule in s 59 and the opinion rule in s 76 etc) and exceptions to these exclusionary rules. Sometimes the exclusionary rules and the relevant exception appear in discrete sections: other times they are rolled up together in the one section (e.g. ss 97 & 98). Relevant evidence may “engage” several exclusionary rules: if it does, exceptions must be found for each exclusionary rule if the evidence is to be admissible (*Lithgow City Council v Jackson* at [19]), and it must survive the exercise of the discretions in Part 3.11.

Chapter 3 is divided into eleven parts, commencing appropriately with relevance.

PART 3.1 - RELEVANCE

S 55 – Relevant Evidence

Relevance is the key to applying the rules of evidence in Chapter 3 of the Act. If one is able to articulate the basis or, better still, bases on which a piece of evidence is relevant, one has done much of the work required for determining whether any exclusionary rules are engaged and, if so, whether any exceptions are available.

S 55 sets out the test for relevance. In short, the test is whether the evidence, if accepted, could logically make a fact in issue more or less likely, however slightly.

In s 55, “a fact in issue” refers to an ultimate fact in issue (Odgers (10th ed) at [1.3.80]) and is not limited to facts in issue that are disputed (ALRC 26 at [641]). One identifies the ultimate facts in issue by reference to the elements of: (a) the offence(s); (b) any mode of complicity relied upon by P; & (c) any defence(s) “open” to D.

In assessing relevance, one assumes the evidence will be accepted by the trier of fact (“if it were accepted”: s 55). There are conflicting views as to what that assumption involves when assessing the relevance of evidence of out of court statements (Odgers (10th ed) at [1.3.120]). The narrow view is that one merely assumes that the statement was made and considers whether the making of the statement, in the circumstances in which it was made, could logically make the existence of an ultimate fact in issue more or less likely (*Papakosmos* at [31] & [52]). The broad view is that one assumes that the statement was made and that what was asserted in it will be accepted by the trier of fact and then asks whether it logically makes the existence of an ultimate fact in issue more or less likely (*Adam* at [23]).

PART 3.2 - HEARSAY

Part 3.2 begins with the relevant exclusionary rule and is followed by numerous exceptions to that rule. The broadest exception is found in s 60 but that only comes into play where the relevant previous representation is admissible for a non hearsay purpose. The exceptions set out in ss 65 and 66 are the main gateways now for the admission of complaint evidence but, in that connection, s 108(3), which is concerned with credibility evidence in the form of prior consistent statements, is also an important provision.

S 59 – The hearsay rule – exclusion of hearsay evidence

S 59 is only engaged if evidence of the previous representation is adduced to prove the truth of a fact asserted in the representation by the representor (“R”).

The statutory hearsay rule is narrower than its common law equivalent because R must have intended to assert the fact or, more precisely, there must be reasonable grounds for supposing such an intention existed.

The word “representation” is used instead of “statement” because a person can assert something by conduct, for example, a gesture. “Representation” & “previous representation” are defined in the Dictionary.

S 60 – Exception – evidence relevant for a non-hearsay purpose

If evidence of a previous representation is admissible for a non hearsay purpose (e.g. complaint evidence adduced for a credibility purpose), it is admissible for a hearsay purpose, subject to any “limited use” order under s 136. As mentioned above, s 60 assumes particular importance when it operates in tandem with s 38.

S 62 – Restriction to “first hand” hearsay

There are several exceptions to the hearsay rule (relevantly, the exceptions created by ss 65, 66, 66A) in respect of first hand hearsay (“FHH”).

The test under the Act for FHH is whether the facts asserted by R were facts within R’s personal knowledge, that is, facts allegedly seen, heard or otherwise perceived by R (s 62(1)).

S 62(1) does not require the witness giving hearsay evidence of R’s previous representation to have heard (or otherwise perceived) the representation being made by R but this requirement, which most people would associate with the concept of FHH, is picked up by the wording of most of the exceptions (see, e.g., the opening words of ss 65(2) & 66(2) but cf s 65(3)).

S 65 – Exception – criminal proceedings if maker not available

There are actually seven different exceptions to the hearsay rule in s 65, each with their own criteria or elements. The exception under s 65(8), which has the least onerous criteria, is only available to D.

“Unavailability”

For all these exceptions in s 65, R must be “unavailable”, a term which is broadly defined (Dictionary, Pt 2, cl 4(1) (a) to (g)).

Darmody indicates the breadth of the term “unavailable”. A complainant in an assault case was in jail (sic) & refused to testify at D’s trial, though warned by the trial judge that he could be punished for contempt. He claimed he would be willing to testify when paroled, which he expected to occur in a few weeks. P sought an adjournment until after the complainant was paroled but D successfully opposed it. P then argued, successfully, that the complainant was unavailable under cl 4(1)(f) of Part 2 of the Dictionary and was given permission by the trial judge under s 65(3) to lead evidence of the complainant’s testimony at committal in which he

had sworn that his police statement was true and correct. D brought an interlocutory appeal but the VSCA upheld the trial judge's rulings.

Another example of "unavailability" is to be found in *Nicholls*. Beach J found that a complainant who was excused under s 18 from giving evidence against D (her defacto) was "unavailable" for the purposes of s 65.

The test of "unavailability" will not always be easy to satisfy. Both *Rossi* and *ZL* indicate that where a prosecution witness is claimed to be unavailable pursuant to cl 4(1)(e) – namely, P asserts that all reasonable steps have been taken to find the witness or secure his or her attendance but without success – the courts will demand proof of strenuous attempts to find the witness, especially where the witness is important to the prosecution case (*Rossi* at [26], *ZL* at [32]).

"The circumstances in which the previous representation was made"

In relation to the exceptions in s 65(2)(b), (c) & (d), there are conflicting views as to the circumstances which may be taken into account in determining whether the out of court representation is (b) "unlikely to be a fabrication", (c) "highly reliable" or (d) "reliable".

The narrow view is that only circumstances or events existing at the time of the representation may be taken into account (*Mankotia* at BC pp10-12). The broad view, which has the least support, is that all circumstances & events bearing on the reliability of the representation, whenever occurring, may be considered. The third or middle view, which has the most support, is that some prior or subsequent circumstances or events (such as other representations made by R) may be considered insofar as they bear on the circumstances that existed at the time the representation was made (*Azizi* at [46-50])

Notice requirements

There are written notice requirements if P or D plans to adduce hearsay evidence where R is unavailable (s 67) (*Azizi* at [32]). Notices serve at least two purposes – the other party can investigate whether R really is unavailable and, if so, gather evidence to challenge R's credibility and reliability at the hearing. The required contents of notices are set out in the regulations. A court may waive the notice requirements (s 67(4); *Darmody*).

Unfair Prejudice

If prosecution hearsay evidence is admissible under s 65, D may nonetheless seek exclusion of the evidence under s137. It may be submitted that because R is unavailable to be cross examined, the evidence will not be properly tested and the jury, despite directions by the trial judge, may overvalue the evidence. While each case has to be assessed on its own facts, such submissions have been rejected by the VSCA in *Darmody* and *BB & QN*, both cases where D had an opportunity to cross examine R, the complainant, at committal. In *BB & QN*, Bongiorno JA said at [21] that:

“Whilst the inability to cross-examine a witness at trial is a factor to be taken into account in determining whether the admission of evidence taken in an earlier proceeding will lead to unfair prejudice to an accused, it can never be determinative. Its weight on that issue in any particular case must take into account the legislative intent expressed in s 65(3) that the hearsay rule is not to apply to such evidence and the fact that the trial judge can always accompany its admission with appropriate directions to the jury.” (footnotes omitted)

S 66 – Exception – criminal proceedings if maker available

“Available”

This exception only applies if R is available to give evidence about an asserted fact. If R does not fit one of the statutory categories of “unavailability” (Dictionary, Pt 2, cl 4(1)(a) to (f)), R is deemed to be available to give evidence about the “asserted fact(s)” (Dictionary, Pt 2, cl 4(2)).

In *Singh* ([15]), the complainant, R, was treated as “available” to give evidence about the fact asserted in her proximate complaint to her son (namely, that she had been raped by a taxi driver), even though she subsequently had no recollection of the alleged rape, having been intoxicated at the time of the taxi ride. Evidence of her complaint to her son was admitted under s 66.

A complainant will be treated as available to give evidence about a fact asserted in an out of court complaint even if s/he makes no mention of the complaint in giving evidence and/or there is a disjunct between the content of the complaint and the complainant’s viva voce evidence. In *Miller* ([48-51]), where the complainant gave no evidence of having complained, the complaint evidence given by her sister was held to be admissible under s 66 even though the gist of the complaint evidence was an allegation that D had touched her whereas her viva voce evidence was that D had penetrated her.

“Fresh in the memory”

This exception to the hearsay rule requires the occurrence of the asserted fact to have been “fresh” in R’s memory when the representation was made (s 66(2)). The passage of time is now only one consideration re freshness (s 66(2A), inserted after ALRC 102). In *LMD* at [22-25], the VSCA held that two complaints made by C between 7 to 11 years after the alleged molestation by her uncle were fresh complaints, notwithstanding the fact that C was very young (aged 7 or 8) when first molested. In *XY* [2010], the NSWCCA held at [105] that a complaint of sexual abuse made 4 years after the event in question passed the test of “freshness.”

In *ISJ* at [49], the VSCA, discussing *XY* [2010], flagged their intention, when an appropriate case arises, to consider whether enough emphasis is being given to the temporal aspect in the test of “fresh in the memory:” In *Stark* at [80], Redlich JA re-iterated this concern.

S 66(3) limits the operation of s 66(2) by wholly or partially shutting out “proofs” of evidence, formal (eg police statements) or informal. In *Esposito* at p34, answers in a record of interview were treated as an informal “proof” of evidence caught by the qualification in s 66(3) because the suspect said repeatedly that what he was telling police was evidence he would be prepared to give against D.

S 66A – Exception – contemporaneous statements about a person’s health etc

This exception (which, prior to the amendments following ALRC 102, was located in s 72) is particularly useful where a party wishes to adduce evidence of a person’s declarations of

intention to ground an inference that they acted on that statement of intent. ALRC 102 at [8.158 – 8.174] indicates that the courts have to date refrained from a broad construction of this exception because of its potential to undermine the utility of the exclusionary hearsay rule.

PART 3.3 - OPINION

Part 3.3 contains one exclusionary rule (s 76) and, relevantly, three exceptions to that rule (ss 77,78,79). To paraphrase s 76, an opinion about a fact is not admissible to prove the fact. The three relevant exceptions are for certain lay opinions (s 78), expert opinions (s 79) and opinions (lay or expert) which are admissible for another purpose (s 77: cf s 60). As indicated in the notes to s 76, there are more exceptions to the opinion rule elsewhere in the Act.

Opinion evidence, like any other evidence, must first pass the test of relevance. If the observed & assumed facts on which an opinion is based are not proved by admissible evidence, it will fail that test. If the facts proved are dissimilar to the facts assumed, but not too dissimilar, the evidence might be relevant but the weight of the opinion could be significantly reduced.

S 80 expressly abolishes the common law exclusionary rules known as the ultimate issue and common knowledge rules but this does not open the floodgates. The exceptions to the opinion rule control the inflow of opinion evidence, along with the “discretions” in Part 3.11 of the Act.

There is much greater scope under the Act for adducing evidence from experts on the impact of sexual abuse on child development and behavior (ss 79(2), 108C): see *MA* [2013].

There is also scope now for the defence to adduce opinion evidence as to the dangers associated with identification evidence (*Dupas* [2012]), *Smith* (2000))

S 76 - The opinion rule

The elements of the exclusionary rule created by s 76 are: (i) the evidence is an opinion; & (ii) it is relied upon to prove a fact asserted in the opinion.

“Opinion” is not defined in the Act. Wigmore’s definition of an “opinion” is quoted in ALRC 102 at [9.2], that is, “an inference drawn or to be drawn from observed & communicable data”. This definition was utilized without criticism in the recent High Court decision of *Lithgow City Council v Jackson* at [10]. ALRC 102 at [9.2] also speaks of an opinion as “a conclusion, usually judgmental or debatable, reasoned from facts.”

Statements of fact and opinion form a continuum. It is not always easy to distinguish one from the other (eg “That’s the man I saw”). If a statement is not an opinion, the opinion rule is not engaged.

S 78 – Exception – lay opinions

The elements of the exception created by s 78 are: (i) the witness’ opinion is based on what he or she saw, heard or perceived about a matter or event; & (ii) admission of the witness’ opinion is necessary to understand his or her perception.

Examples of opinion evidence covered by this exception include opinions as to age, sobriety and speed. A striking example of the breadth of s 78 is *Harvey*, a sexual assault case. The witness gave evidence that when she entered D's office, she saw the complainant standing near D who had what the witness described as "a look of like sexual gratification – that's the best way I can express it." The NSWCCA held this evidence was admissible pursuant to s 78.

In *Smith* (2001), a case in which the High Court decided that evidence of two police officers identifying D from CCTV footage of a bank robbery was irrelevant (because their minimal prior dealings with D made them no better equipped than the jury to say whether it was him in the footage), Kirby J treated the evidence as relevant opinion evidence caught by the exclusionary opinion rule in s 76. He then turned to consider the exception for lay opinion evidence under s 78. He said that ALRC 26 "makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses". In his opinion, the words "matter or event" in s 78(a) referred to the bank robbery (which the police did not witness), not stills from the CCTV footage. ALRC 102 at [9.14] noted that Kirby J's analysis has attracted criticism but the ALRC did not reject it or recommend any change to s 78. The High Court in the recent case of *Lithgow City Council v Jackson* endorsed Kirby J's analysis at [41], thus significantly limiting the scope of the exception in s 78.

S 79 – Exception – opinions based on specialised knowledge

The elements of the exception created by s 79 are: (i) the witness possesses specialised knowledge; (ii) the witness acquired that knowledge through training, study or experience; & (iii) the witness' opinion is wholly or substantially based on that knowledge.

In *Makita (Australia) Pty Ltd v Sprowle*, a case in which a woman sued her employer after injuring herself at work on what her expert (a physicist) asserted was an unacceptably slippery stair, Heydon JA, discussing s 79, said at [85]:

"In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

This analysis was endorsed by the plurality in the High Court case of *Dasreef Pty Ltd v Hawchar* at [37].

“Specialised knowledge”

The parameters of “specialised knowledge” are unclear. “Knowledge” is more than subjective belief or unsupported speculation (*Tang* at [138]). “Specialized knowledge” is more than ordinary or common knowledge (*Velevski* at [82] per Gaudron J). Neither is reliability enough: Spigelman CJ remarked in *Tang* at [137] that “the focus of attention must be on the words “specialised knowledge,” not on the introduction of an extraneous idea such as “reliability.””

Nonetheless, “specialised knowledge” is a broad concept, as perhaps best indicated by the cases dealing with ad hoc “experts”, for example, voice identification cases where witnesses (eg police, interpreters) opine as to the identity of speakers heard on telephone intercepts or listening devices, based on repeated listening to the tapes and comparison with undisputed recordings of D’s voice (eg in a record of interview) (*Leung & Wong; Li*).

The recent High Court decision of *Dasreef Pty Ltd v Hawchar* indicates the care which must be taken in determining whether a witness, who may be an expert in some areas, possesses specialized knowledge with regard to the relevant issue. In that case, an expert who was a chartered chemist, chartered professional engineer, and retired senior lecturer in chemical engineering and industrial chemistry was permitted at trial to give an opinion as to the amount of silica dust that a worker was likely to have inhaled in the course of his work: the High Court held his expertise did not extend to making such calculations.

“Wholly or substantially” based on specialised knowledge

“Substantially” is not defined. In the draft Bill included in ALRC 26, the proposed wording in the draft provision (cl 68) was “wholly or partly” which was changed to “wholly or substantially” in the draft Bill included with ALRC 38 (cl 67) but the meaning to be given to “substantially” was not discussed in ALRC 38 (cf [151]) or in ALRC 102. “Substantially” must mean more than “partly” but it is unclear whether it means “mainly” or “predominantly.” OED definitions of “substantially” include “in the main” & “strongly.” It may be that the juxtaposition of “substantially” & “wholly” in s 79 implies that “substantially” in s 79 means “predominantly” or “in the main”: this was the view of the Federal Court in *Commissioner for Superannuation v Scott* with regard to the phrase “wholly or substantially dependent” in superannuation legislation.

The High Court in *Dasreef Pty Ltd v Hawchar* at [41-42] indicated that the requirement that the opinion be wholly or substantially based on specialized knowledge does not import a “basis rule” into Part 3.3 of the Act (that is, a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence) but, if a proper factual foundation is not laid for the opinion evidence, the opinion will be irrelevant.

PART 3.4 - ADMISSIONS

“Admission” is defined in the Dictionary. The weight of authority favours the view that an “admission”, as defined by the Act, includes a statement which, on its face, may appear exculpatory but actually inculpates D (eg a false alibi) (*Esposito* ; cf *GH* per Spender J)

Four major exclusionary rules relevant to admissions are to be found in ss 84, 85, 137 & 138. In summary, these rules exclude any admission which:

- may have been “influenced by” violent, oppressive, inhuman or degrading (“V.O.I.D.”) conduct (s 84);
- is possibly unreliable and was made to or in the presence of an investigating official or “caused” by a person capable of influencing D’s prosecution (s 85(a));
- is more prejudicial than probative (s 137);
- was illegally or improperly obtained and public policy considerations favour exclusion (s 138).

S 90 also gives a court a discretionary power to exclude evidence of an admission which it would be unfair to use against D (*EM*). Whether the admission is unreliable bears upon the issue of unfairness (*Weaven (Ruling No 1)* at [38])

S 84 – Exclusion of admissions influenced by violence and certain other conduct.

When s 84 is properly raised (s 84(2)), the onus is on P to establish, on the balance of probabilities (s 142), that the making of the admission was not “influenced by” V.O.I.D. conduct (or the threat thereof) towards D or another. The conduct in question need not have been carried out by the police. “Influenced by” connotes a minimal causative link (Odgers (10th ed) p408, [1.3.5020]).

The precise boundaries of “oppressive conduct” are unclear. It is not limited to physical or threatened physical conduct but includes psychological pressure (*Higgins* (2007)). Unlike the common law notion of “oppression”, it is not necessary for D’s will to be ‘overborne’ in order for the admission to be inadmissible under s 84 (*Ul-Haque*, [119]).

“Inhuman conduct” is conduct contrary to the human rights recognised in the International Covenant on Civil and Political Rights. “Degrading conduct” is conduct which involves significant humiliation (Odgers (10th ed), p408, [1.3.5020]).

S 85 – Criminal proceedings - reliability of admissions made by accused

S 85 deals with possibly unreliable admissions made to investigating officials or persons capable of influencing the prosecution (s 85(1)(a) & (b)).

Despite the absence of a provision equivalent to s 84(2), D must discharge an evidential burden that there is a real issue as to the reliability of the admission before s 85 is engaged (*FMJ*, [48]). S 85(3) lists some matters that bear on the question of reliability.

In relation to s 85(1)(a), ‘investigating official’ is defined in the Dictionary and specifically excludes a police officer engaged in covert investigations under the orders of a superior.

In relation to s 85(1)(b), the Act does not define who is a person “capable of influencing the decision whether a prosecution should be brought or continued” (herein called “a person of influence”). The concept is obviously broader than investigators as they are covered by s 85(1)(a). Complainants will in most cases fit the description (*Lieske; TJJ*) Whether others qualify, such as a parent of a young complainant (*FMJ* at [40]), is likely to depend on the

degree of influence in each case. D must also show that he or she “knew or reasonably believed” that the individual who caused the admission to be made was a person of influence: in *FMJ*, the mother of the complainant held herself out to D as capable of influencing whether the prosecution was instigated.

Under s 85(1)(b), there must also be a causal link between the conduct of the person of influence and the making of the admission by D, a link more substantial than that required under s 85(1)(a).

PART 3.6 - TENDENCY AND COINCIDENCE

Tendency and Coincidence (T&C) evidence must, by itself or in combination with other evidence, have significant probative value to be admissible (s 97(1)(b) & s 98(1)(b)). If the T&C evidence is adduced by P, its probative value must also substantially outweigh its prejudicial effect (s 101) unless it is led in rebuttal of T&C evidence adduced by D (s 101(3) & (4)).

The T&C rules in Part 3.6 of the Act are purpose based: evidence which discloses other misconduct but is led for a non T&C purpose (eg relationship evidence adduced only for context: *WFS* at [38]) is not T&C evidence.

One event is capable of establishing a tendency (*CEG*) but two or more events are required for coincidence evidence (s 98).

It will usually be P which seeks to adduce T&C evidence but D may wish to do so at times, for example, where he or she relies on self defence and wants to adduce evidence that the victim had a tendency to be aggressive.

Assessing probative value

According to the Dictionary, “[p]robative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.” In *Dupas*, a bench of five of the VSCA decided unanimously (see especially [63]) that, when assessing probative value, one assumes credibility (i.e., that the witness is honest) but not reliability (i.e., that the witness is accurate). In other words, the risk of mistake is a relevant consideration. Although *Dupas* was concerned with assessing probative value for the purpose of applying s 137 of the Act, the VSCA indicated that this approach to assessing the probative value of evidence applies wherever that term appears in the Act (that is, ss 97, 98, 101, 135, 137, 138) (*Dupas* at [153 - 174]). This broad approach to assessing probative value may be contrasted with the narrow approach followed in NSW (*XY [2013]*, *DSJ*, *Shamouil*), Tasmania (*KMJ*) and previously followed in Victoria (*KRI [2011]* at [53], *PG* at [62] & [76]), namely, that one assumes both the credibility and reliability of the evidence, unless no reasonable jury could accept the evidence. In *Dupas* (see especially [63]), the VSCA considered the narrow approach to be plainly wrong and predicated on a mistaken view of the common law. In *XY [2013]*, the NSWCCA considered *Dupas* but four of the five justices decided to adhere to the narrow approach. It will be interesting to see what the High Court eventually makes of the different approaches to assessing probative value.

Contamination

Contamination is an issue which usually falls for consideration in multi complainant sex cases. If D contends that various prosecution witnesses have not made their statements independently of one another, the trial judge should consider whether there is “a real chance” of joint concoction or innocent infection (“contamination”) when assessing the probative value of T&C evidence (*BSJ* at [21-22], *DR* at [81], *PNJ* at [26]&[29]). If P fails to negate the real chance of contamination (*BP* at [110-111]), the evidence is regarded as not having significant probative value.

The NSWCCA decision in *AE* suggests it is not difficult to have T&C evidence excluded because of the risk of contamination but, since *AE*, both the VSCA (*BSJ* at [27-28], *DR* at [76] to [81], *KRI* [2011] at [33] & [56]) and the NSWCCA (*BP*, [110]; *FB*, [35]) have emphasized the need for a real (as opposed to speculative) chance of contamination to justify exclusion. If D discharges an evidential burden in relation to the existence of real chance of contamination, the burden of proof is on P to negate the chance of contamination (*BP* at [110], *OGD (No 2)* at [74]) on the balance of probabilities (s 142)

“Significant probative value”

It has been said that there is no single test for determining whether coincidence evidence has significant probative value (*PNJ* at [12]), and the same might be said in relation to tendency evidence, but the focus is invariably and understandably on whether there is a sufficient degree of similarity between the T&C evidence, on the one hand, and the offence in question and/or its surrounding circumstances, on the other. This is consistent with the approach taken by the ALRC in reports 26, 38 & 102.

It has been held on a number of occasions that a lesser degree of similarity may suffice for tendency evidence (*Middendorp* [2012] at [20], *PWD* at [79]). It is noteworthy that the proposal in ALRC 26 & 38 that “substantial and relevant similarity” be required before tendency evidence be admitted was not implemented by the legislature (*Middendorp* [2012] at [20]).

In deciding whether the similarities are sufficient, the VSCA has relied heavily on the test formulated under the old law, namely, whether there is a “common modus operandi”, “pattern of conduct” or “underlying unity” disclosed by the evidence (*CGL* at [29-30]). Whether the standard is satisfied in a given case is no easy question and reasonable minds can differ as to the answer. “Underlying unity” is a vague concept and attempts to pin it down (*RJP* at [46]) have not eliminated uncertainty.

While the VSCA has consistently said that it is not necessary to show “striking” similarities (e.g., *CW* at [22], *CGL* at [28 -29]), it virtually set the bar as high in some of its early T&C decisions by insisting on “remarkable,” “unusual” or “distinctive” features in the evidence: commonplace instances of sexual abuse of minors were not regarded as passing the test (*CGL* at [31], *PNJ* at [22], *NAM* at [10] & [13], *GBF* at [29] & [32]). Subsequent decisions have watered down this requirement (*PG*, [69 - 71]; *NAM*, [27]; *GBF*, [27]; *JLS*, [13]; *KRI* [2011], [58]; *RHB*, [18]; *DR*, [88]). They have done so in a variety of ways. In some cases, they have expressly disclaimed the necessity of such features (*RHB* at [18]). In other cases, they have applied a different and less demanding notion of what constitute remarkable, distinctive or unusual features: instead of assessing what is unusual by reference to the spectrum of deviant behaviour, as was the approach in *CGL* & *PNJ*, more recent cases appear to assess it against

the spectrum of behaviour generally (*RHB* at [18], *DR* at [88-89]). Seeming inconsistencies between earlier and later decisions of the VSCA have been downplayed by dicta to the effect that each case falls to be determined on its own facts and only limited assistance can be gained from a comparison of one case with another (*RHB* at [18], *KRI* [2011] at [58], *DR* at [58]). In summary, there appears to have been a considerable shift by the VSCA in the direction of admissibility of T&C evidence led by P.

When determining whether coincidence evidence adduced by P has significant probative value, *DSJ* (especially at [78-82]) says that a court should have regard to whether any competing hypotheses consistent with innocence emerge from the coincidence evidence. This however is not a throwback to the *Pfennig* test: *DSJ* (especially at [9] & [81]) makes it clear that P does not have to establish that its hypothesis is the only reasonable hypothesis or even that its hypothesis is more probable than the alternative hypothesis suggested by D (*DSJ* at [10]).

Prejudice

In applying s 101(2), a judge must weigh the probative value of evidence against the risk of prejudice, that is, the risk that the jury may misuse or overvalue the evidence. In *Dupas*, the notion of prejudice was considered in the context of s 137. At [175], the VSCA said:

“The *Evidence Act* does not define the term ‘unfair prejudice’. Consistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt ‘an illegitimate form of reasoning’ or ‘misjudge’ the weight to be given to particular evidence. An inability to test the reliability of evidence may carry with it the danger of such misjudgment. Evidence is not unfairly prejudicial because it inculcates the accused.”

In *Papakosmos*, McHugh J at [92] cited an oft quoted passage from ALRC 26 ([644]) which vividly describes prejudice of the first kind (illegitimate reasoning):

“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.”

In assessing prejudice, regard must be had to the directions that may be given to the jury to ameliorate the risk. As a general rule, it is to be assumed that juries will follow directions (*Dupas* at [114] & [177])

Notice requirements

Finally, reasonable written notice has to be given if a party wishes to rely on T&C evidence. Provision of a proper notice is “no minor matter”: *Andelman* at [73]. The Evidence

Regulations 2009 (reg 7) stipulate the matters that must be addressed in a notice. The Court may waive the notice requirement: s 100.

On Appeal

The principles in *House* apply to an interlocutory appeal against a ruling made under Part 3.6 (*KJM (No2)*, [9-14]): in other words, the issue is whether or not the trial judge fell into error or made a decision that was not reasonably open. Whether that is also the case on a conviction appeal remains to be determined. In *Dibbs* at [78-80], the VSCA indicated a strong preference for not applying *House* principles on a conviction appeal but it did not have to decide the point. In *McCartney*, a conviction appeal challenging a ruling under s 137, a section which has much in common with s 101, the VSCA held that, where the facts are not in dispute, *House* did not apply.

PART 3.7 - CREDIBILITY

S 101A – Credibility evidence

Credibility is broadly defined in the Dictionary (Part 2). It is not limited to a person's veracity: it includes reliability of perception and recollection (*Dupas* at [261-265]). Further, credibility evidence may be evidence that undermines or bolsters a person's credibility. But the mere fact that the evidence in question impacts upon a person's credibility does not make it credibility evidence under s 101A. If such evidence is relevant and admissible for a purpose other than the assessment of a person's credibility, it is not credibility evidence as defined in s 101A and, consequently, Part 3.7 of the Act is not engaged.

Note the reference in s 101A to "other person." At trial, credibility can be an issue not only in relation to a witness but also in relation to a non-witness, i.e., the maker of a previous representation who is not called but whose previous representation is admitted into evidence (e.g. under an exception to the hearsay rule).

"Credibility evidence" as defined by s 101A is regulated by the exclusionary rules and exceptions in Division 2 of Part 3.7 (ss 102 to 108) if it relates to the credibility of a witness & by the exclusionary rules & exceptions in Division 3 of Part 3.7 (ss 108A to 108B) if the evidence relates to the credibility of a non-witness who made an admissible previous representation. The exclusionary rules and exceptions in Division 3 mirror those in Division 2.

S 102 – The Credibility Rule

S 102 excludes credibility evidence in relation to a witness at the trial. Credibility evidence can come in various forms. Some forms, which were permitted by the common law, have been displaced by Part 3.7 of the Act. In *BA* at [21-25], the VSCA found that Part 3.7, and, in particular, s 102, overturned the common law rule which permitted a defence witness to give evidence that a prosecution witness' reputation for lying was such that he would not believe him on his oath.

S 103 – Cross examination as to credibility

Under the s 103 exception to the credibility rule, the evidence to be adduced in the cross examination of a witness must be capable of “substantially” affecting the assessment of the witness’ credibility, which is a change from the common law.

In determining whether a question may be asked pursuant to s 103, the trial judge must assume that the witness will answer the question in a way most favourable to the questioner (*Beattie*).

S 104 – Further Protections – Cross examination as to credibility

The exclusionary rule contained in the opening words of s 104 prohibits the adducing of credibility evidence in cross examination of D. There are several exceptions set out in s 104. Pursuant to s 104(3), P may cross examine D about prior inconsistent statements made by him or her; about D’s “bias or motive to be untruthful” (which refers to some interest over and above the particular interest that every D has in the outcome of proceedings); & about D’s inability to have observed or recalled matters about which he or she has given evidence. There is a further “catch all” exception in s 104(2), namely, P may cross examine D about matters bearing on D’s credibility (eg prior convictions) if leave is given.

Pursuant to s 104, the discretion to grant leave is only enlivened if D has adduced (and had admitted) evidence which has certain qualities. The evidence must impugn the veracity of P’s witness (s 104(1)(a)) and it must relate solely or mainly to the witness’ credibility (s 104(1)(b)), for example, evidence that P’s witness has a prior conviction for a dishonesty offence. Further, the evidence must not concern the witness’ conduct regarding the events for which D is on trial (eg if the witness impugned was a co-offender, D will not have thrown away his “shield” by adducing evidence of that co-offender’s dishonest conduct in the course of the alleged joint criminal enterprise.) Nor will D have thrown away his shield if he adduces evidence of the witness’ conduct in the investigation of the alleged offence (e.g. D gives evidence that the Informant “planted” evidence during the investigation)(s 104(5)(b)). If the pre-conditions for a grant of leave exist, the trial judge may (not must) grant leave.

It should be stressed that evidence having these qualities must be admitted as a precondition to a grant of leave: the mere fact that D’s counsel puts questions to a prosecution witness impugning his or her veracity is not enough if the witness rejects the imputation (Odgers (10th ed), [1.3.7940], fn36), which is a major change from the old law (s 399(5)(b) of the *Crimes Act 1958* (Vic)).

S 106 – Exception – Rebutting denials by other evidence

Suppose a party cross-examines a witness about a matter which is relevant and admissible only on a credibility basis. The witness denies the assertion(s) put to him. Prima facie, the credibility rule prevents the party from leading evidence from another witness to contradict the witness. If, however, the matter comes under one of the five heads set out in s 106(2), the most important of which are antecedents and prior inconsistent statements, the party may lead “rebuttal” evidence as of right, provided there was adequate “puttage” to the witness about the matter (s 106(1)(a) & (b)). If none of the five heads in s 106(2) are applicable, the party may seek leave to adduce rebuttal evidence. The fact that leave may be given is a significant departure from the old finality rule.

S 108 – Exception – re-establishing credibility

A party may wish to re-establish or bolster the credibility of its witness (W1) during re-examination of W1 and/or through another witness (W2). In the former case, the credibility rule does not apply to evidence adduced in re-examination of W1: see s 108(1), though s 39, which regulates the scope of re-examination, must be borne in mind. In the latter case, the party may adduce from W2 evidence a prior consistent statement of W1 if the preconditions of s 108(3) are satisfied. S 108(3)(b) is an important gateway for the admissibility of complaint evidence. If, as often happens in sex cases, D suggests (or will suggest), expressly or impliedly, that the complainant has fabricated or reconstructed the allegations, s 108(3) can be a means of P obtaining leave to adduce evidence of complaint for a credibility purpose and, once admitted for a credibility purpose under s 108(3), P can then rely on the complaint evidence for a hearsay purpose pursuant to s 60 (*Pavitt* at [92-110]) unless a limiting order is made under s 136 (*ISJ* at [57-67]).

S 108C Exception – Evidence of persons with specialized knowledge

In sex cases, attacks on the complainant’s credibility may be based on mistaken assumptions as to how victims of sexual abuse commonly behave. In *MA* [2013], the prosecution was able to neutralize such an attack using expert evidence admitted under s 108C (see also s 388 of the Criminal Procedure Act 2009).

PART 3.8 - CHARACTER

S 110 – Evidence about character of an accused

A major change under UEL is that a person’s character is not treated as indivisible. Thus, if D leads evidence of his good character in a particular respect (eg that he or she has a reputation for honesty), P is not entitled under UEL to lead evidence that he is of bad character in other respects (eg D has multiple priors for offences involving violence) (s 110(3); *Zurita* at [19]).

PART 3.9 - IDENTIFICATION EVIDENCE

Part 3.9 deals with identification evidence. As explained in greater detail below, “identification evidence” is defined to include visual and non- visual identifications (eg voice identification). But only visual identifications are subject to any exclusionary rules in Part 3.9 (see ss 115 & 116) whereas both visual and non-visual identifications “engage” s 116, which deals with jury directions when identity is in dispute.

Under the common law, an ID parade was not a precondition to the admissibility of visual identification evidence whereas under UEL, it is a precondition unless an exception applies.

Definitions

Three terms require careful consideration– “identification evidence”, “visual identification evidence” & “picture identification evidence”. Only if the evidence in question is correctly categorised can one know which sections of Part 3.9 are engaged.

“Identification Evidence”

The lengthy definition of “identification evidence” in the Dictionary covers in-court & out-of-court identifications. Though any summary of the definition has the potential to mislead, the following might serve as an aide memoire. Identification evidence is:

- an assertion by a witness (or a report thereof);
- that D (or someone resembling D) was in the “wrong place” (ie at or near the scene of the crime or an act connected with the crime) at the “wrong time” (ie at or about the time of the crime or connected act);
- based on what the witness perceived at that place and time.

The definition of identification evidence includes evidence of recognition (*Trudgett*). But “identification evidence”, as defined, does not include the following: evidence of identifications of persons other than D; identifications of objects; evidence of description (because it is not an assertion that D was or resembles the person); evidence in the form of CCTV footage of a crime or connected act (because such evidence is not an assertion of a person); DNA or fingerprint evidence (ALRC 102, 13.25ff); & evidence of an exculpatory identification (because it is not an assertion that D was or resembles the person).

“Visual Identification Evidence”

The definition of visual identification evidence (“VIE”) (s 114(1)) has three elements:

- the evidence is “identification evidence”;
- it is based wholly or partly on what a person saw;
- it is not “picture identification evidence”.

“Picture Identification Evidence”

The definition of “picture identification evidence” (“PIE”) in s 115(1) has three elements also:

- the evidence is “identification evidence”;
- the identification was made wholly or partly by the witness examining pictures;
- the pictures were “kept for the use of police officers”.

“Pictures” are defined to include photographs: s 115(10)

Note that s 114 rather than s 115 will be relevant where the witness identified D from a photograph if the photograph was not one “kept for the use of police officers,” eg, if the witness recognised D in a newspaper photograph.

S 114 – Exclusion of visual identification evidence

In relation to VIE, the first part of s 114(2) creates the exclusionary rule, namely, VIE adduced by P is not admissible. The rest of s 114(2) creates three exceptions to the exclusionary rule which are all predicated on the witness not having been intentionally influenced to identify D. Under s 114(2), VIE is admissible if:

- an ID parade involving D was held before the identification was made; or

- it was not reasonable to hold a parade; or
- D refused to take part in a parade.

The first and third bullet point exceptions above are straightforward. As regards the second exception, s 114(3)-(6) provides inclusive criteria for determining whether it was reasonable to hold an ID parade.

S 115 - Exclusion of evidence of identification by pictures

As regards PIE, three exclusionary rules are created by s 115(2),(3) & (5).

The exclusionary rule created by s 115(2) has two elements:

- P is adducing the PIE;
- the pictures suggest they are pictures of persons in police custody.

There is no exception to this rule. Note that s 115(2) is not just concerned with the propriety of the picture of D which the witness picks out.

The exclusionary rule created by s 115(3) has four elements:

- P is adducing the PIE;
- the witness examined the pictures when D was “in the custody” of a police officer;
- that officer’s police force was investigating the offence with which D has been charged;
- the picture of D examined by the witness was made before D was taken into that custody.

The courts have given a narrow meaning to the words “in the custody of”. It means “under physical restraint” (*McKellar* at [37]). Hence, if D was not under arrest but just assisting police with their enquiries at the time the witness examined a photo-board and picked out D, this exclusionary rule is not engaged.

There are two exceptions to the rule created by s 115(3): first, if D’s appearance has changed significantly between the time of the offence and the time he or she was taken into custody; secondly, if it was not reasonably practicable to make a picture of D after he was taken into custody: (s 115(4)).

Turning now to the exclusionary rule created by s 115(5), which is the most important of the three exclusionary rules created by s 115. It has three elements:

- P is adducing the PIE;
- the witness examined the pictures when D was “in the custody of” a police officer;
- that officer’s police force was investigating the offence with which D has been charged.

There are three exceptions to this rule:

- D refused to participate in an ID parade (s 115(5)(a)); or

- D’s appearance had changed significantly from the time of the crime(s 115(5)(b)); or
- it was not reasonable to hold an ID parade including D (s 115(5)(a)).

The same inclusive criteria as mentioned in s 114 apply to determining whether it was unreasonable to hold an ID parade involving D (s 115(6)).

S 116 – Directions to jury

S 116 is only one of a number of relevant provisions concerning jury directions. Regard must also be had to ss 115(7) & 165.

Note that s 165 deals with potentially unreliable evidence generally. Even if an identification does not fall within the Dictionary definition of “identification evidence,” s 165 may apply (*Jamal*).

S 115(7) relates to PIE only, and it is “triggered” by a request by D to the trial judge. It provides for directions to overcome any “rogues gallery effect.”

S 116 directions should only be given when ID is disputed (*Dhanhoa;Trudgett*). The obligation on a trial judge to give the directions is not dependent on a request from D.

Regarding s 165, note that it refers to a request by a party for the trial judge to give the relevant directions. The party could be P. If an exculpatory identification has been adduced by P or D (eg an eyewitness identified someone other than D as the offender), P may want the jury cautioned about the possible unreliability of that witness’ identification evidence (*Rose* at [283-298]).

PART 3.10 – PRIVILEGES

A discussion of “Privileges” could easily run to many pages. In this paper, it is proposed to deal only with the privilege against self-incrimination, save for noting that a privilege for journalists has recently been inserted in the Act at s 126K .

S 128 – Privilege in respect of self-incrimination in other proceedings.

Under the common law, the privilege against self-incrimination, if claimed on reasonable grounds, gives a witness the right not to answer a question. The privilege against self-incrimination under s 128 gives much less. In most circumstances, it only confers a right to a certificate which protects the witness against the direct or indirect use of the answer in subsequent criminal proceedings brought against the witness (s 128(7)). In very limited circumstances, namely, where the answer would expose the witness to liability for a crime or civil penalty under foreign law (s 128(4)(a)), s 128 gives the witness the right not to answer. The rationale for this new approach is that it will contribute to improved fact finding.

Application of s 128

First, it only applies to humans - corporations cannot rely on s 128 (s 127; ALRC 102, [15.93]). Second, the wording of s 128 indicates that it only applies in circumstances where a witness is testifying at a hearing (s 128(1)). In that domain, s 128 displaces the common law

privilege against self-incrimination. The common law privilege continues to operate in all other contexts (s 131A; ALRC 102 at [15.109]). Third, if the witness seeking to rely on s 128 is D, consideration must be given to the operation of s 128(10), unless D is giving evidence on a voir dire (s 189(6)). With regard to s 128(10), *Cornwell* ([84]) is High Court authority for the proposition that if the evidence the subject of D's objection under s 128 directly or indirectly tends to prove D's guilt of the offence for which he is standing trial (or tends to prove an element of that offence), he cannot rely on s 128, even if his answer might tend to incriminate him of another offence.

There are three elements to the privilege under s 128:

- the witness objects to answering;
- on the grounds it may incriminate him of an offence or make him liable to a civil penalty under Australian or foreign law; &
- the court determines there are reasonable grounds for the objection.

Pursuant to s 132, the court is obliged to alert a witness to his rights under s 128. The witness must "object" to giving the evidence in question. Then the court must determine whether there are reasonable grounds for the objection.

If reasonable grounds are established, then, pursuant to s 128(4), the court can still require the witness to answer if two preconditions are satisfied:

- the witness is not liable to prosecution for a crime or civil penalty under a foreign law;
- the court is satisfied that it is in the interests of justice for the witness to answer.

If these preconditions are satisfied, the decision whether to require (to direct) the witness to answer is discretionary in nature (*Lodhi*, [54]). The inclusive criteria referred to in s 192(2) should be considered by the court in exercising that discretion. The case law indicates that an assessment of the reliability of the evidence to be given is also an important consideration (*Collisson; Hore* at [175 -232]; *Lodhi*).

The certificate confers direct and derivative use immunity (s 128(7)). The protection extends to the use of the evidence as a prior inconsistent statement (ALRC 102, [15.99]) because that is caught by the words "cannot be used against the person."

S 128(7)(b) expressly provides for derivative use immunity in respect of certified answers. If a witness granted a certificate is subsequently prosecuted for an offence, and there appears to be a live issue as to whether the evidence relied on by P was derived from the certified answer(s), ALRC 102 suggests that P has to prove that the evidence was not derivatively obtained (ALRC 102, [15.99] & [15.140]). This view that the legal burden falls on P is supported by the Victorian decision of Warren CJ in *DAS* (especially at [159]), which concerned interpretation of a provision abrogating the common law privilege against self-incrimination in the *Major Crime (Investigative Powers) Act 2004* and rights under the *Charter of Human Rights & Responsibilities Act 2006* ("the Charter"), namely, the right to a fair hearing (s 24(1) of the Charter) & the right not to be compelled to testify against oneself (s 25(2)(k) of the Charter). Placing a legal burden of proof on D to prove a derivative link between P's evidence and D's certified testimony at an earlier proceeding is likely to be seen as infringing the Charter: placing only an evidential burden on D will not.

PART 3.11 - DISCRETIONARY AND MANDATORY EXCLUSION

S 136 – General Discretion to limit use of evidence

This discretion may be exercised even though the risk of prejudice does not outweigh the probative value of the evidence (*ISJ* at [62]). In respect of complaint evidence which is technically admissible under Part 3.2 of the Act, s 136 should not generally be used to limit the use of evidence to buttressing the complainant’s credibility (*ISJ* at [57-61], *Papakosmos*).

S 137 – Exclusion of prejudicial evidence in criminal proceedings

S 137 replaces the common law *Christie* discretion but it is expressed as a rule. The onus is on D to show that the danger of unfair prejudice outweighs the probative value of the evidence: if so, the court must exclude the evidence.

Assuming reliability when assessing probative value

The first step in applying s 137 is to assess the “probative value” of the evidence. As discussed above in relation to s 101 (T&C evidence), the VSCA in *Dupas* (see especially [63]) rejected the narrow approach adopted in NSW and Tasmania and endorsed a broad approach to assessing the probative value of evidence: whilst one assumes credibility (ie, that the witness is honest), one does not assume reliability (ie, that the witness is accurate). In other words, the risk of mistake is a relevant consideration.

Unfair Prejudice

The concept of prejudice was discussed above in relation to s 101 (T&C evidence). In addition to evidence which may be misused or overvalued by a jury, unfair prejudice could arise from the evidence which D may need to adduce in rebuttal. In *Cook*, for example, P relied on evidence of D hiding from police as indicating consciousness of guilt of the alleged offence but D claimed he hid because of other wrongdoing on his part: the NSWCCA held at [48] that s 137 applied and the evidence of D hiding should have been excluded.

To date, the VSCA has considered the application of s 137 to the following types of evidence: hearsay (*ISJ, Singh, BB & QN, Darmody*); opinion evidence (*MA, DG*); admissions (*WK*); identification evidence (*Dupas, DJC, THD*).

On Appeal

On an interlocutory appeal in relation to a ruling under s 137, it appears that the principles in House apply (*McCartney* at [47- 51], *Singh* at [26])

On a conviction appeal, “where the facts are not in dispute, the appeal court can and should decide for itself whether the decision under s 137 was correct” (*Dupas* at [241], *McCartney* at [32]).

S 138 – Exclusion of improperly or illegally obtained evidence

S 138 replaces the *Bunning v Cross* discretion under which evidence illegally or improperly obtained may be excluded.

The major change from the old law is that once D discharges the burden of proving that there was illegality or impropriety, the burden of proof then shifts to P to justify admissibility. There are also provisions which deem certain conduct to be improper (ss 138(2), 139), including false statements during questioning (s 138(2)(b)). In *Weaven (Ruling No 1)*, a police “scenario case” where D was tricked into confessing to murder, Weinberg J ruled that if the police false statements were deemed to be improper (which he doubted), he would nevertheless exercise his discretion to admit the evidence of the confession (see especially [64-70]).

On Appeal

The VSCA has assumed to date that the principles in *House* apply (*MD* at [27-30], *Marijanecvic* at [13]). That is still likely to be the situation regarding interlocutory appeals but not conviction appeals if the facts are not in dispute. This follows from the approach taken by the VSCA in *McCartney*, which was a conviction appeal challenging a ruling under s 137.

Where a trial judge’s ruling under s 138 turns on a finding of fact based on an assessment of the veracity of a witness, the VSCA will be reluctant to interfere, even if the VSCA considers the fact “improbable.” In *Marijanecvic*, a drug case in which illegally obtained evidence was excluded by the trial judge, the VSCA at [80-83] thought it improbable that a police officer knowingly contravened the requirement that affidavits in support of applications for search warrants be sworn but the trial judge’s decision to exclude the evidence under s 138 was not overturned.

The failure of police to properly swear affidavits used to obtain search warrants caused much consternation in Victoria until the introduction of retrospective legislation. In *Marijanecvic*, the VSCA indicated at [92] that where the failure to swear an oath was found to be inadvertent, a trial judge might quite properly admit evidence. The issue was also the subject of a ruling by Lasry J in *Borg*, a murder case. Lasry J ([98]) rejected P’s submission that the relevant police had properly sworn the affidavits, but even though Lasry J went on to find that the failure by the police to properly swear the affidavits was deliberate, he admitted the illegally obtained evidence under s 138.

CHAPTER 4 – PROOF

S 165 – Unreliable Evidence

If evidence “is of a kind that may be unreliable,” and it is necessary to do so to avoid a perceptible risk of a miscarriage of justice, a trial judge is obliged to give the jury directions about the evidence under s 165, even though no application is made for such a direction: *Andelman* at [57].

S 165B – Delay in prosecution

Delay in prosecution may create significant forensic disadvantages for D calling for appropriate jury directions, a matter addressed in s 61 of the Crimes Act 1958 & s 165B.

Although both these sections suggest that application must be made for such directions before the trial judge is obliged to give them, the VSCA in *Greensill*, which closely analysed the similarities and differences between the two sections at [41], decided that a trial judge is so obliged, even in the absence of an application, if such directions are necessary to avoid a perceptible risk of a miscarriage of justice ([47 – 48]).

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