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Unfavourable witnesses

38 UNFAVOURABLE WITNESSES

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
 - (a) evidence given by the witness that is unfavourable to the party, or (harms your case)
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or (don't remember)
 - (c) whether the witness has, at any time, made a prior inconsistent statement.*I a-c sets out the 3 circumstances can XM for being unfavourable*
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility. *R v Lee*
- (4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs. *You get to go first*
- (5) If the court so directs, the order in which the parties question the witness is to be as the court directs.
- (6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account: *Factors as to whether you get leave*
 - (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and *Realise not going way want*
 - (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party. *Whether or not the other party wants to question*

R v Garrett 2016

The meaning of "unfavourable": in this case, inconsistency was sufficient. If the party calling witness contends witness should be able to give evidence supportive of that party's case, and witness fails to do so, may suffice to be unfavourable.

Facts: D + Police officer accused of assaulting the complainant. Police told witness what to say, inconsistent with what said under XM.

R v Hogan 2001

Considered a narrower approach: NSW CCA stressed the court should provide the bases for giving leave under section 38(1) and to ensure that XM is limited to credibility

- Cross-examination in this case was general and went to matters collateral in the trial. Focus of the trial shifted from whether the appellant was guilty of maliciously causing GBH to whether the witness was lying to protect the appellant

R v Lee (2002)

Scope of XM: S38 permits testing of evidence in chief to see whether matters contained in the previous inconsistent statement were true

Facts: police search, D flushes heroin. Girlfriend gave statement that it was D's heroin. Later at court said it was hers. Not helpful for crown

- S38 permits x-exam on matters of credibility to accept the prior inconsistent statement and to reject later sworn evidence
 - o It permits x-exam as to reasons, and motives, for that change

R v Dickman 2017

Follows **IMM**. Balance with unfair prejudice was whether it would be misused in any way.

Facts: German backpacker falsely claimed was member of Hells Angels to gain entry to a nightclub

- Was asked to ID german members and when couldn't, D threatened with knife and beat with baseball bat
- Prosecution used photo IDs of bikies in case
- Convicted, appealed on basis Judge failed to exclude certain ID evidence as was unreliable, prejudicial

Held: risk of prejudice to D was minimal, and conviction was inevitable anyway

- Trial judge accepted evidence had low probative value but the balance with unfair prejudice was whether it would be misused in any way.

R v Sood 2006

Its not the judge's job to discount probative value and exclude evidence because there is other explanations. Jury to decide.

Facts:

- D prosecuted for 96 counts of dishonestly obtaining a financial benefit by deception from the Health Insurance Commission
- TJ **excluded** evidence of receipt books and cash receipts thrown in a waste paper bin in D's clinic **using the section 137 discretion.**
- TJ held the evidence was not strongly probative because of the inference D may have been afraid of **being prosecuted for tax evasion**
- P appealed to NSWCCA.

Held:

- No evidence that D expected to be prosecuted for tax evasion and had denied in the VD that she had placed the receipt books and cash receipts in the bin.
- Even if she had, the receipt books and cash receipts covered a different period to that referred to in the charges.
- No unfair prejudice and appealed allowed

Lancaster v R 2014

S69(2): each representation within the business document must be measured against (personal knowledge)

Facts: D convicted of SA against 2 children, each with a file with the DHS. Files produced under subpoena and neuropsychologist gave an expert opinion based on the reports

- TJ said reports were not business records and therefore inadmissible, therefore so was expert opinion, appealed

Held: DHS engaged in care of complainant + entries were in course of caring therefore were business documents

- Each representation within the file would have to be looked at and measured against 69(2) individually

Thomas v State of NSW 2008

Document can't be made in connection with an Australian Proceeding

- Statement given during a Royal Commission = a tribunal, therefore 'obtained in connection with an Australian proceeding.'
- Also, like evidence given in court = a special class of evidence which **does not have an inherent likelihood of reliability, unlike ordinary business records**

Lithgow City Council v Jackson 2011

Without personal knowledge of fact, still hearsay even if a type of business document

Facts:

- J found unconscious and injured in a drain. Council only liable if he fell from the vertical retaining wall
- Document: "patient healthcare record" saying fell 1.5 metres onto concrete. Signed by two ambulance officers, neither gave evidence at hearing
 - o Admitted as per s78 as **opinion** fell from retaining wall
 - o Also argued to be a business document, to get around argument that admissions were hearsay so s69 applied
 - o Appeal to HCA re: admissibility

Held: 69(2)(a) did not apply because officers **did not have personal knowledge of a fall of 1.5m**, because it happened before they arrived

- Had been told by bystanders fell in that way, who also did not have personal knowledge

ACCC v Air NZ (no1) 2012

Asserted fact applies to lay opinions

Facts: Air NZ objected to **minutes of meetings** on basis they did not fall within s69: entities not businesses and minutes didn't necessarily form part of records just because they were made

- **"it was agreed that"** are not statements of facts within meaning of s69, inadmissible opinions of minute taker

Held: Perram: opinion as to the existence of a fact falls within definition of "asserted fact" s69(2)

- HCA in **Lithgow** said this was "a little strained" but this was obiter and not binding to be followed

Limits on Credibility

- Re: boundaries of what credibility rule will allow
- What is line between fact, issue, and credibility of witness

PURE CREDIBILITY EVIDENCE: can only be admitted via XXM

- s103 means credibility rule will not apply if the evidence would **substantially affect the credibility**

103 EXCEPTION: CROSS-EXAMINATION AS TO CREDIBILITY

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could **substantially affect the assessment of the credibility of the witness.**
- (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made **a false representation** when the witness was under an obligation to tell the truth, and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Palmer v R 1998

Line b/w evidence relevant to credibility and fact in issue is often indistinct: distinction drawn to confine trial process and be fair to the witness

- Pre EA case

Facts: convicted of sexual offences against a 14 yo

- Appeal grounds included Qs asked in XXM, D had suggested to V she had accused D to pay him back for not giving her enough attention
- D XXM to suggest motive for this accusation, he could not do so

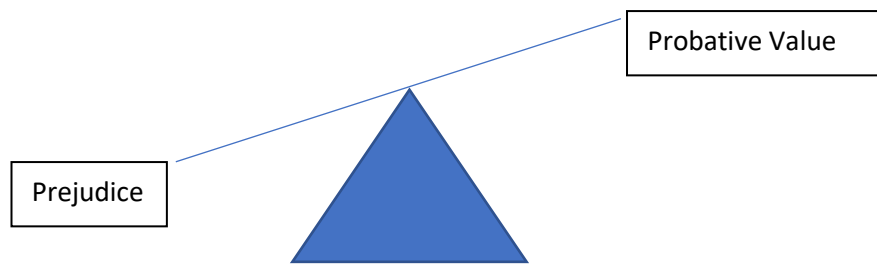
Principles:

McHugh: gave useful discussion of the distinction between evidence relevant to credibility and evidence relevant to a fact-in-issue

- Line b/w evidence relevant to credibility and fact in issue is often indistinct and unhelpful
- The probability of testimonial evidence being true cannot be isolated from the credibility of the witness except in those cases where other evidence confirms its truth
- The rationale behind the credit/fact-in-issue distinction does not depend on logic. The distinction is drawn to confine the trial process and to be fair to the witness.
- **The fact that accused is not aware of facts suggesting a motive to lie does not mean there isn't one.** But the accused is ordinarily in a position to know whether such facts exist.
 - o >> If accused can give no evidence of this, it increases the probability that there is no motive.
- The prosecution was entitled to cross-examine the accused about motive – because failure to reveal facts that might provide a basis for the complainant concocting her complaint might assist the jury to find that her evidence was true

Held: Judge's directions overcame the risk that the jury might reverse the onus.

- Now the exceptions to the CL “finality” and “bolster” rules (evidence given by witness in XXM regarding credit is final) are effectively dealt with in s 106 (rebutting denials by other evidence)



IMM V R (2016)

Despite probative value, must have **special features** in order to have “significant” PV

- While the complainant and another girl were giving the appellant a back massage, he ran his hand up the complainant's leg.
 - o Trial judge - evidence capable of showing appellant had a sexual interest in the complainant, and that there was a strong temporal nexus between this incident and the charged acts
- Argued on appeal wrongly admitted and did not have significant probative value because evidence derived only from the complainant whose credibility generally in issue

Held: while evidence of a single complaint of D running his hand up V's leg was capable of showing D's sexual interest in V, **s 97 needed more to be 'significant' PV**

- o Here –as it did not come from an independent source, difficult to see how it would add anything more **unless the uncharged acts had 'special features'.**

Hughes v R 2017

Case further developed meaning of 'special features'

- Here, the **requirements were satisfied for SPV outweighing prejudice**

Facts: lead actor charged with 11 counts of sexual offences against 5 underage girls

- **P tried to rely on tendency evidence:** evidence of each complainant and number of other witnesses (uncharged acts)
- Appellant said evidence was inadmissible because:
 - o Tendency was too broad to have significant probative value
 - o Not all proposed evidence was relevant to each count
 - o Sexual conduct related to different counts in different ways

Principle: the assessment of allowing tendency evidence requires

1. Considering the extent to which the evidence supports the tendency
2. “the extent to which the tendency makes more likely the facts making up the charged offence”

Held: even though the conduct in most of the counts was different to the other counts, majority held the evidence had SPV

- “level of disinhibited disregard of the risk of discovery”
- Force of tendency was not that he was likely to offend again, but that the evidence proved conduct **outside of ordinary conduct**

- (ii) is of events that are alleged to form part of a **connected set of circumstances** in which the alleged prescribed sexual offence was committed,
 - (b) if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,
 - (c) if—
 - (i) the accused person is alleged to have had sexual intercourse (within the meaning of Division 10 of Part 3 of the *Crimes Act 1900*) with the complainant, and the accused person does not concede the sexual intercourse so alleged, and
 - (ii) the evidence is relevant to **whether the presence of semen, pregnancy, disease or injury is attributable** to the sexual intercourse alleged to have been had by the accused person,
 - (d) if the evidence is relevant to—
 - (i) whether at the time of the commission of the alleged prescribed sexual offence there was present in the complainant a disease that, at any relevant time, was absent in the accused person, or
 - (ii) whether at any relevant time there was absent in the complainant a disease that, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person,
 - (e) if the evidence is relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery that took place after the commission of the alleged prescribed sexual offence),
 - (f) if the evidence has been given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question that may, pursuant to subsection (6), be asked, and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.
- (5) A witness must not be asked—
- (a) to give evidence that is inadmissible under subsection (2) or (3), or
 - (b) by or on behalf of the accused person, to give evidence that is or may be admissible under subsection (4) unless the court has previously decided that the evidence would, if given, be admissible.
- (6) If the court is satisfied—
- (a) that it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period—
 - (i) had sexual experience, or a lack of sexual experience, of a general or specified nature, or
 - (ii) had taken part in, or not taken part in, sexual activity of a general or specified nature, and
 - (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,
- the complainant may be so cross-examined, but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.
- (7) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (6) is to be decided by the court in the absence of the jury.
- (8) If the court decides that evidence is admissible under subsection (4), the court must, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.