which require such an assessment. Close attention must be paid to what is involved in assessing the probative value of evidence on the assumption that the evidence 'is accepted'.

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

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

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

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

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

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

7. Appellate review of the requirement of 'significant probative value' in s 97(1)(b) is not subject to *House v The King* limitations.

IMM v The Queen: a response from Richard Lancaster SC

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

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

Principles

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

- The question of relevance under s 55 is to be determined by a trial judge on the assumption that the jury (or judge as fact finder) accepts the evidence, as the terms of s 55 expressly require. The judge determining relevance need not and may not consider whether the evidence is credible or whether it is reliable – 'the only question is whether it has the capability, rationally, to affect findings of fact' (at [39]). The veracity or weight that might be accorded to the evidence does not arise (at [38]).
- Relevant evidence is, by definition, 'probative' because it has the capability to affect the assessment of the probability of the existence of a fact in issue and it is prima facie admissible even if the probative value of the evidence is slight (at [40]).
- The assessment of the probative value of evidence (for the purposes of provisions such as those considered directly in *IMM v The Queen*, which were ss 97(1)(b) and 137 but, oddly, not s 101) requires the possible use to which the evidence might be put to be taken at its highest (at

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

- Evidence has 'significant' probative value if it is important or of consequence, that is, 'the evidence must be influential in the context of fact-finding' (at [46]).
- The words 'if it were accepted', which appear in s 55, should be understood also to qualify the evidence to which the Dictionary definition of 'probative value' refers (at [49]). Accordingly, the assessment of probative value requires the same approach as s 55, that is, an assumption that the jury will accept the evidence, taken at its highest (at [49]-[50]). It follows that 'no question as to credibility of the evidence, or the witness giving it, can arise' and that 'no question as to the reliability of the evidence can arise', those matters being 'subsumed in the jury's acceptance of the evidence' (at [52]).

Mr Odgers refers to the required assumption that the evidence is accepted and adds 'and thus is to be regarded as both credible and reliable'. I do not agree with his observation, which seems directly contrary to the majority's indication that questions of reliability and credibility do not arise if the required assumption is made. Whether or not the distinction much affects the practical operation of these provisions, it is a real distinction in principle: on the majority's approach, probative value is detached from questions of the reliability and credibility of the particular witness and it is assumed that the evidence is accepted; as Mr Odgers summarizes it, probative value continues to depend upon the evidence of a particular witness, who is assumed to be credible and reliable. As the Victorian Court of Appeal said in *Derwish v The Queen* [2016] VSCA 72 at [75], *IMM v The Queen* applies to ss 97, 98, 101(2) and 137 'so that reliability is not to be taken into account when considering probative value'.

There are four matters in the majority reasons on which I would comment. Considerations of space do not permit me to address, in this note, the detail of the reasons of Gageler J or of Nettle and Gordon JJ, who concluded (contrary to the majority's reasons at [49]–[52]) that an assessment of probative value under the Evidence Act necessarily involves considerations of reliability (at [96] and [139]–[140]).

Relevance

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

The example of an identification

The second topic concerns an example created by the Hon J D Heydon AC QC, the utility of which is acknowledged by its repetition in each of the judgments in *IMM v The Queen*, which posits 'an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified'. The majority states that the correct approach to assessing its probative value is to accept that it is an identification (being relevant and probative to some degree) but that it is a weak identification because 'it is simply unconvincing' (at [50]). As I understand it, this means that when taken at its highest the identification evidence has low probative value because, putting aside the reliability and credibility of the person giving the evidence, the identification had characteristics that diminished the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue (being whether the person identified was at that place at that time). In other words, quite apart from the truthfulness, eyesight, attention span, memory or ability to report of the particular witness making the identification (that is, without any consideration of his or her reliability or credibility) the identification has a lower probative value than an identification made in good conditions.

Likewise, in my view, the measurement of the probative value of the tendency evidence in *IMM v The Queen* in the application of the majority's principles was to be undertaken with the complainant out of view. It was irrelevant that her evidence was uncorroborated, or that the jury might in due course decide that her account was not credible, or that there appeared to be no basis for distinguishing between different parts of her evidence so far as credibility and reliability was concerned. The probative value of the evidence was, on the principles stated

by the majority, to be determined separately and initially. In that assessment, reasonable people might arrive at different conclusions about the extent to which the (necessarily accepted) fact that the appellant ran his hand up the complainant's leg during the granddaughters' massage (whether considered by itself or with other evidence) increased the probability that the appellant had, on a subsequent occasion, done the acts the subject of the charged sexual assaults. Rationally it could affect that assessment, the s 97 question was whether the extent to which it did so was 'significant'.

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

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

Application of principles

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

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

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

In a similar vein, the majority reasons at [63] read as though the tendency in question is that of the complainant to give an accurate account of events in which she has been involved. However, the relevant tendency in this case was not the 'tendency' of the complainant to give a true or accurate account of past events (putting aside the question whether evidence tendered for that purpose could ever truly be regarded as tendency evidence). It was, as had previously been identified in the majority reasons, the tendency of the accused to have a sexual interest in the complainant. In effect, the majority at [63] hold the evidence to be inadmissible because there was

no, even incremental, contribution to the determination of the truthfulness of the complainant's account of the charged acts arising from the complainant's account of the earlier incident. In my respectful view, that analysis replicates the very thing that the majority's statements of principle disavows, namely taking into account the reliability or credibility of the complainant's evidence for the purposes of admissibility.

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

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