

# IS JUDICIAL CONSIDERATION OF CREDIBILITY AND RELIABILITY UNDER SECTION 137 OF THE UNIFORM EVIDENCE LAW A GUARANTEE OF FAIRNESS OR 'MORAL TREASON'?

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*This article considers the operation of s 137 of the Uniform Evidence Law, which requires the exclusion of evidence that is more prejudicial than probative. The operation of this provision is contested by two recent decisions: Dupas v The Queen, delivered by the Victorian Court of Appeal, and R v XY, in which the New South Wales Court of Criminal Appeal largely endorsed its previous decision in R v Shamouil. These courts adopted different positions as to whether reliability should be considered when assessing the probative value of evidence. Both courts agreed that credibility should not be considered, for different reasons. The article emphasises that, like any statutory provision, s 137 must be understood in light of its purpose, and critically evaluates how these decisions have understood and applied the provision in light of that purpose. It is suggested that there are aspects of both decisions that will lead judges to misestimate the effect directions must have on evidence to render its prejudicial effects proportionate to its probative value.*

## I INTRODUCTION

Section 137 of the Uniform Evidence Law<sup>1</sup> provides:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

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<sup>1</sup> The term 'Uniform Evidence Law' shall be used to denote the *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT), using the word 'presented' in place of 'accused'; *Evidence Act 2004* (Norfolk Island); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic), using the word 'accused' in place of 'defendant'. The Uniform Evidence Law now covers all Australian jurisdictions except for Queensland, South Australia and Western Australia.

Recently, intermediate appellate courts in Victoria and New South Wales have arrived at different conclusions as to whether, when determining whether to exclude evidence as being unfairly prejudicial pursuant to s 137 of their respective *Evidence Acts*, a judge should assess the probative value of that evidence in light of its credibility and reliability. In *Dupas v The Queen*,<sup>2</sup> a bench of five judges of the Victorian Court of Appeal held that reliability, but not credibility, should be considered. They did so on the basis that s 137 was intended to replicate the assessment at common law.<sup>3</sup> In doing so, *Dupas* departed from the approach of the New South Wales Court of Criminal Appeal in *R v Shamouil*,<sup>4</sup> which had held that reliability and credibility have at best a limited role in the application of s 137 and had previously found favour in Victoria. *Dupas* was criticised by a majority in *R v XY*<sup>5</sup> (itself a five-judge bench), which endorsed a particular conception of *Shamouil*.

In this article, we advance another interpretation of s 137. Like the *Dupas* Court, we accept that the reliability of the evidence is a relevant consideration in the application of s 137. However, unlike *Dupas*, we do not consider s 137 to be necessarily restricted to the range of considerations that attended the common law discretion. As such, we allow that credibility may also be a relevant consideration in particular circumstances. Like the *XY* Court, we accept that s 137 is distinguished from the common law. Unlike the *XY* Court, however, our opinion is that the statutory scheme does not exclude credibility and reliability as relevant considerations. *Shamouil* — and subsequently *XY* — rested significantly on the proposition that deference must be shown to the jury's fact-finding function when applying s 137. Although we accept that proposition, in our view its interpretive force is limited to accepting that evidence should always be put before the jury when its distortive effect is curable by directions. Evidence will be held to be so cured if its unfairly prejudicial effect on the jury is rendered proportional to the effect of its probative value. If the probative value of evidence is evaluated as if the evidence was accepted as reliable and credible, it may lead to the admission of evidence with a prejudicial influence disproportionate to its actual probative value. We argue that this would be contrary to the purpose of s 137.

## II CREDIBILITY, RELIABILITY AND THE TENSION IN SECTION 137

Put broadly, evidence that is unreliable or lacks credibility tends to be possessed of certain characteristics that cast into doubt the accuracy of the facts it purports to establish. To the degree that there is a clear and meaningful distinction between credibility and reliability, it may be put as follows: where evidence is not credible, it is because the source of the evidence possesses certain characteristics that

2 (2012) 218 A Crim R 507 ('*Dupas*').

3 Ibid 524–5 [63].

4 (2006) 66 NSWLR 228 ('*Shamouil*').

5 (2013) 84 NSWLR 363 ('*XY*').

make it less likely that the source's account of the evidence is in good faith and thus true; where evidence is unreliable, it is because the circumstances in which the evidence was obtained, witnessed or discovered are insufficiently certain to guarantee that the material which comprises the evidence was accurately recorded or perceived.<sup>6</sup> There is a certain amorphousness about these concepts.<sup>7</sup>

Because they can cast the accuracy of the facts asserted in the evidence into doubt, the credibility and reliability of evidence are dimensions of its probative value.<sup>8</sup> It follows that a conclusive determination of the actual reliability and credibility properly assignable to evidence is essentially a predetermination of weight that precludes any conclusion reached by the jury.<sup>9</sup> Such an assessment is anathema to many legal scholars, because it shows insufficient deference to the jury. For example, John Wigmore described the very suggestion that a judge should make legal rulings on the basis of weight-related assessments as 'moral treason'.<sup>10</sup> Aside from the interventions authorised by the exclusionary rules, which he defended on the pragmatic ground that they had proved themselves over time,<sup>11</sup> he was strongly of the view that '[i]t is for the jury to give ... [evidence] the appropriate weight in effecting persuasion'.<sup>12</sup>

On the other hand, s 137, like the common law discretion articulated in *R v Christie*, is directed at the exclusion of evidence that is technically admissible but 'would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value'.<sup>13</sup> Where improperly admitted evidence could have affected the jury's reasoning such as to deprive the accused of the chance for an acquittal, a miscarriage of justice has occurred.<sup>14</sup> The application of s 137 in this way is underpinned by the assumption that juries are not completely able to assess evidence in light of certain factors that detract from that evidence's probative value.<sup>15</sup> It is applied in recognition of the maxim that '[m]any controversies which might ... obliquely throw some light on the issues

6 Various approaches to this distinction are discussed in *Dupas* (2012) 218 A Crim R 507, 582–4 [260]–[266]. See also *XY* (2013) 84 NSWLR 363, 400 [169] (Simpson J).

7 For example, witnesses are at times treated as lacking credibility because certain factors have detracted from the reliability of evidence given: see *R v Hyatt* [1998] 4 VR 182, 187 (Winneke P).

8 *R v Burton* [2013] NSWCCA 335 (20 December 2013) [159] ('*Burton*').

9 *Burton* [2013] NSWCCA 335 (20 December 2013) [160] (Simpson J).

10 See John Wigmore, 'Book Review' (1909) 3 *Illinois Law Review* 477, 478. See also Andrew L-T Choo, *Evidence* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 15–17.

11 William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld and Nicolson, 1985) 70.

12 John Henry Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (Little, Brown, and Company, 1913) 14.

13 [1914] AC 545, 559 (Lord Moulton) ('*Christie*').

14 *Mraz v The Queen* (1955) 93 CLR 493, 514–16 (Fullagar J); *Baini v The Queen* (2012) 246 CLR 469, 479–81 [26]–[31] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 493 [65]–[66] (Gageler J) ('*Baini*'). See also generally at 485–91 [46]–[56] (Gageler J). As *Baini* amply demonstrates, what exactly constitutes a 'miscarriage of justice' turns on the wording of the relevant statutory ground of appeal. In addition, what constitutes a miscarriage of justice is not limited to those circumstances in which it can be argued that the error affected the outcome (that is, the jury's verdict), 'but also departures from proper trial processes irrespective of their impact on the trial outcome': at 482 [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

15 Lisa Dufraimont, 'Evidence Law and the Jury: A Reassessment' (2008) 53 *McGill Law Journal* 199, 227. See generally Choo, above n 10, 20–2.

must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them'.<sup>16</sup>

Given the strong fact-finding role that our trial system assigns to the jury, and the conceptual and practical role the jury has played in the development of the rules of evidence,<sup>17</sup> this tension strikes at the heart of our jury system. Sir Owen Dixon, as a judge of the High Court, once described the tension thus:

at bottom the choice is between the course of placing before the jury material which bears upon the case, leaving them to judge of its reliability and probative value, and the course of withholding it from them on the ground that there is too much danger in their taking into consideration matter which by reason of its source or provenance is prima facie dubious and untrustworthy.<sup>18</sup>

The differences between the *Dupas* and *XY* Courts are essentially over how the statutory language of s 137 requires this tension to be resolved. As Priest JA concisely summarised in *Murdoch (a pseudonym) v The Queen*:

The position taken in NSW is that in judging probative value in s 97, and for the purposes of s 98, s 101 and s 137, the court generally should not take into account issues of credibility and reliability, but take the evidence at its highest. This Court has, however, in *Dupas* adopted a different approach, so that reliability is a matter which must be taken into account when ... assessing [the] probative value of evidence.<sup>19</sup>

The *Dupas* and *XY* Courts disagreed as to whether the judicial assessment of credibility and reliability would, as put by Spigelman CJ in *Shamouil*, 'alter the fundamental relationship between the judge and jury in a criminal trial'.<sup>20</sup> To resolve this disagreement, *Shamouil* and *Dupas* both relied upon competing interpretations of the common law. The *Dupas* Court determined that *Christie* required a consideration of reliability, and, therefore, so did s 137. On identical premises, the *Dupas* Court determined that an assessment of credibility was prohibited under s 137.<sup>21</sup> Some of the *XY* Court, in contrast, understood s 137 as involving something distinct from its common law equivalent. Regardless of whether they followed *Shamouil* in this respect, the majority of the *XY* Court, similarly to *Shamouil*, determined that both credibility and reliability were almost entirely irrelevant considerations under s 137. They did so on the premise that s 137 had to be read subject to a principle of judicial deference to the jury's decision-making. This principle required the probative value of the evidence to be evaluated as if it was accepted by the jury as reliable and credible.<sup>22</sup>

16 See *Stanoevski v The Queen* (2001) 202 CLR 115, 130–1 [64] (Hayne J), quoting *Toohy v Metropolitan Police Commissioner* [1965] AC 595, 607 (Lord Pearce).

17 *Harriman v The Queen* (1989) 167 CLR 590, 605–6 (Toohy J) ('*Harriman*').

18 *Sinclair v The King* (1946) 73 CLR 316, 333.

19 [2013] VSCA 272 (27 September 2013) [84] (citations omitted).

20 (2006) 66 NSWLR 228, 238 [65].

21 For further discussion of *Dupas*, see below at pp 266–72.

22 For further discussion of *XY*, see below at pp 272–5.

*Dupas* and *XY* both concerned evidence that is usually attended by a degree of volatility as regards its credibility and reliability. Given the nature of the evidence, it is therefore unsurprising that s 137 was invoked. Identification evidence was at issue in *Dupas*; '[t]he concern about the use to be made of such evidence is that its inherent unreliability can be masked by the jury's perception of the witness as generally plausible'.<sup>23</sup> *XY* concerned alleged admissions, and there can be some uncertainty about whether a statement should be attributed the force of an admission when it lacks credibility or is made in unreliable circumstances.<sup>24</sup>

The identification evidence at issue in *Dupas* placed Dupas in the vicinity of a murder scene. Memorably described by Ashley JA as a 'notorious rapist and murderer',<sup>25</sup> in August 2000 Peter Dupas was convicted of the 1999 murder of Nicole Patterson and, in 2004, of the 1997 murder of Margaret Maher. The murders and subsequent legal proceeding were the subject of considerable media attention. Dupas' initial conviction for the murder of Mersina Halvaxis was in 2007, before the introduction of s 137 of the *Evidence Act 2008* (Vic). At first instance, and on the subsequent appeal, Dupas sought to have identification evidence excluded under the *Christie* discretion.<sup>26</sup> Three witnesses had claimed to have seen someone resembling Dupas at Fawkner Cemetery on 1 November 1997, where Ms Halvaxis had been stabbed to death while visiting her grandmother's grave. It was put by Dupas that this evidence was tainted by virtue of the media attention that had surrounded his alleged involvement in the killing.

In respect of the first appeal, the Court of Appeal rejected Dupas' argument regarding the *Christie* discretion, but ordered a retrial on different grounds.<sup>27</sup> When the matter was raised again before Hollingworth J on the retrial, the *Evidence Act 2008* (Vic) had since been enacted and Dupas' application was made pursuant to s 137. In ruling that the evidence should not be excluded under s 137, her Honour noted:

Defence counsel accepted that 'the preponderance of authority suggests it is not open to a trial judge in assessing (for the purposes of s 137) the probative value of any piece of evidence, to take into account his or her own evaluation of its reliability or the credibility of the witness through which it is tendered'.<sup>28</sup>

*XY*, in contrast, concerned audio recordings asserted by the Crown to be admissions by the accused about sexual contact between the complainant and himself. The respondent had been arraigned in the District Court on an indictment containing six counts, five of indecent assault and one of aggravated sexual intercourse. The alleged acts had occurred at the complainant's home when she was approximately

23 *R v Rose* (2002) 55 NSWLR 701, 712 [289] (Wood CJ at CL and Howie J). See also *Alexander v The Queen* (1981) 145 CLR 395, 426 (Mason J) ('*Alexander*').

24 *Tofilau v The Queen* (2007) 231 CLR 396, 405 [7]–[8] (Gleeson CJ), 412 [34] (Gummow and Hayne JJ).

25 *R v Dupas [No 3]* (2009) 28 VR 380, 397 [66].

26 In relation to his first trial and successful appeal against conviction, see *ibid*.

27 For the Court's discussion and dismissal of the *Christie* issue, see *R v Dupas [No 3]* (2009) 28 VR 380, 447–8 [264]–[269].

28 *R v Dupas* [2011] VSC 200 (21 October 2010) [51].

eight years of age.<sup>29</sup> Some years later, after reporting the offending to police, the complainant had engaged the respondent in two taped telephone conversations with the intention of having the respondent make admissions or confessions about the sexual acts. A series of statements were made in the phone calls that, as the trial judge observed, gave rise to some ambiguity about whether the accused misunderstood to whom he was speaking.<sup>30</sup> On one view, he could have believed he was speaking to a person who had been of high school age during the relevant period, and the acts to which he allegedly admitted were ambiguous.<sup>31</sup> The trial judge decided to exclude the evidence on that basis.<sup>32</sup>

### III THE CENTRALITY OF STATUTORY INTERPRETATION

The differences between *Dupas* and *XY* are fundamental,<sup>33</sup> which suggests that the plain language of s 137 does not sufficiently communicate the range of concepts that are to guide the exclusionary rule's application. As Smith and Odgers have observed, '[t]he issue is one of statutory construction'.<sup>34</sup> Our approach to s 137, and the Uniform Evidence Law more generally, places significant reliance upon the modern approach to statutory interpretation. This approach gives life to ambiguous statutory language with reference to a range of extrinsic materials. It recognises statutory language as intended to intervene in the functioning of the common law but treats the common law as relevant where that language is explicitly derivative of the common law.<sup>35</sup> Fundamentally, a construction which promotes an Act's purpose is to be preferred over a construction which does not.<sup>36</sup> This is particularly apposite where, as is true here, it is necessary to fix the meaning of statutory language sufficiently ambiguous as to be capable of bearing rival-eligible meanings.<sup>37</sup> Yet the observation would still be pertinent if the literal

29 An account of the facts in *XY* can be found at *XY* (2013) 84 NSWLR 363, 366–7 [4]–[10] (Basten JA).

30 *Ibid* 369 [17]. It should be noted that the fairness discretion provided for in s 90 was also at issue in *XY*, although it was not given detailed consideration on appeal. As Basten JA noted, '[a]lthough there was some confusion at particular points [of the trial judgment] as to whether the judge was addressing s 90 or s 137, that was no doubt due to an overlap between the concepts in each section': at 370 [21].

31 *Ibid*.

32 *Ibid* 370 [20].

33 Although, ironically, both the *Dupas* and *XY* (Basten JA and Simpson J dissenting) Courts upheld the rulings below, notwithstanding their taking issue with the manner in which the law was applied in each ruling. See also Gary Edmond et al, 'Christie, Section 137 and Forensic Science Evidence (after *Dupas v The Queen* and *R v XY*)' (2014) 40 *Monash University Law Review* 389, 395. As they note, it is the broader reasoning that is of concern, not the particular outcome in each case.

34 Tim Smith and Stephen Odgers, 'Determining "Probative Value" for the Purposes of Section 137 in the Uniform Evidence Law' (2010) 34 *Criminal Law Journal* 292, 294.

35 *Baini* (2012) 246 CLR 469, 484–5 [43] (Gageler J).

36 It should be noted that *Acts Interpretation Act 1901* (Cth) s 15AA goes further and requires that the interpretation that 'would best achieve the purpose' is to be preferred; this goes even more to the point.

37 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 305 (Gibbs CJ), 322 (Mason and Wilson JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'), citing Francis Bennion, *Statutory Interpretation* (Butterworths, 3<sup>rd</sup> ed, 1997) 343–4; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, 208–9 [114]–[116] (Kirby J), 241–2 [225]–[227] (Callinan J).

meaning is relatively clear but fundamentally inhibitive of the statutory purpose. So much is made apparent by high authority.<sup>38</sup> To resolve this statutory ambiguity, we follow the directive of the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd*:

It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which the statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.<sup>39</sup>

As is well known, the Uniform Evidence Law is largely the product of work by law reform bodies. For example, the Explanatory Memorandum for the Evidence Bill 2008 (Vic) provides that '[m]odel uniform evidence law arose out of a comprehensive review of evidence laws by the Australian Law Reform Commission (ALRC) in the 1980s'.<sup>40</sup> It notes that a Model Uniform Evidence Bill was developed by the Standing Committee of Attorneys-General, based upon recommendations made in a 2005 report the ALRC co-authored with the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) ('Commissions'), *Uniform Evidence Law*.<sup>41</sup> The Victorian, Northern Territory and Australian Capital Territory Acts were based on this Model Bill, and the Commonwealth, New South Wales and Tasmanian Acts were amended accordingly.<sup>42</sup> The Victorian Explanatory Memorandum provides that '[t]he policy behind this Bill is that all relevant and reliable evidence that is of an appropriate probative value should be admissible unless such evidence would cause unfair prejudice to a party to a court proceeding'.<sup>43</sup>

38 See, eg, *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397 (Dixon CJ); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ); *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 261–2 (Dawson, Toohey and Gaudron JJ); *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J); *Saraswati v The Queen* (1991) 172 CLR 1, 21–2 (McHugh J); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky* (1998) 194 CLR 355, 381–4 [69]–[78] (McHugh, Gummow, Kirby and Hayne JJ); *Australian Finance Direct Limited v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96, 112–13 (Kirby J). See also *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1931* (Tas) s 8A.

39 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

40 Explanatory Memorandum, Evidence Bill 2008 (Vic) 1. The reports to which the Memorandum refers are the Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) ('1985 Interim Report') and the Law Reform Commission, *Evidence*, Report No 38 (1987) ('1987 Report').

41 Ibid. See ALRC, NSWLRC and VLRC, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112 and VLRC Final Report (2006) ('2005 Joint Report').

42 Explanatory Memorandum, Evidence Bill 2008 (Vic) 2; Explanatory Statement, Evidence (National Uniform Legislation) Bill 2011 (NT) 2; Explanatory Statement, Evidence Bill 2011 (ACT) 2. See also Explanatory Memorandum, Evidence Amendment Bill 2008 (Cth); Explanatory Notes, Evidence Amendment Bill 2007 (NSW); Tasmania, *Parliamentary Debates*, House of Assembly, 21 September 2010, 37 (Doug Parkinson, Leader of Government Business in the Legislative Council).

43 Explanatory Memorandum, Evidence Bill 2008 (Vic) 2.

## A The Purpose of Section 137

The law of evidence often requires a judge to assess the factual circumstances surrounding evidence in order to determine whether it is admissible or whether a particular direction is required in respect of it. Historically, the law of evidence has structured the jury's fact-finding function in the sense that 'it seeks to rationalize the search for truth by regulating the introduction of proof at trial', by imposing 'encumbrances' on the range of matters that can be taken into account by the jury,<sup>44</sup> either through giving directions or by excluding evidence altogether. It has been observed in the context of private law that because 'there are infinite degrees of relevancy',<sup>45</sup> '[t]he court determines what degree of relevance or probative value will satisfy the requirements of the law',<sup>46</sup> and that 'it is the court which determines what degree is requisite for admissibility and whether offered evidence will be so confusing or prejudicial that its probative value is outweighed'.<sup>47</sup> Further, and as Griffith CJ once observed, '[i]f the admissibility depends upon a question of fact or of inference of fact, the fact must be ascertained or the inference must be drawn by the Judge'.<sup>48</sup>

Section 137 is designed to identify and exclude evidence that has a greater chance of misleading a jury than it does of legitimately assisting their deliberations towards a verdict in a criminal trial. The exclusion of such evidence is thought to increase the probability that the jury will properly assess the evidence and reach a conclusion of fact open to them on that evidence.<sup>49</sup> Such a function was also achieved at common law through the use of the discretion articulated in *Christie*. The ALRC proposed in its *1985 Interim Report* to 'retain this judicial discretion in its conventional form'.<sup>50</sup> Similarly, in their *2005 Joint Report*, the ALRC, NSWLRC and VLRC noted:

The discretion to exclude evidence where its probative value is outweighed by the risk of unfair prejudice derives from the common law *Christie* discretion, which enables the trial judge in criminal trials to exclude evidence which is likely to produce incorrect verdicts by misleading or prejudicing the jury.<sup>51</sup>

In *Festa v The Queen*, it was said that the purpose of the *Christie* discretion was to negate the kind of prejudice that arose 'when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task'.<sup>52</sup> That purpose

44 Dufraimont, above n 15, 201.

45 James Fleming Jr, 'Functions of Judge and Jury in Negligence Cases' (1949) 58 *Yale Law Journal* 667, 671.

46 *Ibid.*

47 *Ibid* 671.

48 *Harris v Minister for Public Works (NSW)* (1912) 14 CLR 721, 725.

49 Charles L Barzun, 'Rules of Weight' (2008) 83 *Notre Dame Law Review* 1957, 1987–97.

50 ALRC, *1985 Interim Report*, above n 40, 529 [957].

51 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 555 [16.8] (citations omitted).

52 (2001) 208 CLR 593, 609–10 [51] (McHugh J) ('*Festa*').



has been imported into s 137. For example, in *EM v The Queen*, Gleeson CJ and Heydon J noted that s 137 operated to prevent the jury 'using ... [evidence] for a purpose other than that for which it was tendered, or ... overreacting to it in an illogical or irrational manner'.<sup>53</sup> Such evidence may generally be described as having a 'distortive effect' on the jury's decision-making. Statements like these indicate that s 137 is a form of 'risk management'; it involves a prospective risk assessment directed at the identification and exclusion of evidence that is likely to infect the jury's reasoning. We shall make much of this characterisation later.<sup>54</sup>

Like ss 135, 136 and 138, s 137 derives from the exclusionary discretions that inhered in the court at common law. As the Commissions noted, however, 'their application differs in accordance with the policy changes effected by the uniform Evidence Acts'.<sup>55</sup> A principal policy objective of the Uniform Evidence Law is to more neatly separate 'the factual and policy questions involved in determining admissibility'.<sup>56</sup> Section 55, which sets out the test for relevance under the Uniform Evidence Law, is directed at an assessment similar to that involved in ascertaining 'logical relevance' at common law,<sup>57</sup> which simply requires that the fact the evidence tends to prove 'proves or renders probable the past, present, or future existence or non-existence' of a fact in issue.<sup>58</sup> In contrast, for reasons of public policy ss 135–8 exclude (or in the case of s 136, limits) evidence already found to be relevant and otherwise admissible under the particularised exclusionary rules.<sup>59</sup> The rules of admissibility have been relaxed with the advent of the Uniform Evidence Law,<sup>60</sup> and '[h]ence, the provisions ... play a more important role in determining the admissibility of evidence than the discretionary exclusions at common law'.<sup>61</sup>

Section 137 is distinguished from ss 135, 136 and 138 in two related and important ways. First, it allows no latitude for there being a prejudicial effect greater than the evidence's probative value. Under s 135, evidence may be at risk of being (a) unfairly prejudicial; (b) misleading or confusing; or (c) causative of an undue waste of time, and still be admitted if, in the court's opinion, that risk does not 'substantially outweigh' the probative value of the evidence. It follows that danger of unfair prejudice may 'insubstantially outweigh' the probative value of the evidence but still not be excluded under s 135. Second, and unlike the other provisions, s 137 is only to be exercised for the benefit of the accused in criminal proceedings that invariably involve juries. One might observe that s 137 and its

53 (2007) 232 CLR 67, 82 [37] (Gleeson CJ and Heydon J) ('*EM*').

54 See VI B 'In Defence of "Partial Assessments"' below at pp 278–81.

55 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 553 [16.1].

56 *Ibid* 556 [16.13].

57 See *Papakosmas v The Queen* (1999) 196 CLR 297, 321–2 [81] (McHugh J) ('*Papakosmas*'); *Smith v The Queen* (2001) 206 CLR 650, 653–4 [6] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Washer v Western Australia* (2007) 234 CLR 492, 498 n 18 (Gleeson CJ, Heydon and Crennan JJ). See also *DPP (Cth) v Fattal* [2013] VSCA 276 (2 October 2013) [104] (Buchanan AP, Nettle and Tate JJA).

58 *Harris v Minister for Public Works (NSW)* (1912) 14 CLR 721, 725 (Griffith CJ), citing Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan, 4<sup>th</sup> ed, 1893) 2.

59 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 553 [16.2].

60 *Ibid* 554 [16.5].

61 *Ibid*.

common law iteration are not restricted in application to jury trials. As Odgers has noted, however, practically speaking it would be unheard of for a judge to concede that he or she is at risk of being unfairly prejudiced.<sup>62</sup> Indeed, we suspect that such an admission would give rise to a successful recusal application.

That s 137 is more robust reflects the privilege the Uniform Evidence Law gives to the interests of the accused. As the ALRC noted in its 1987 Report, ‘it is in the interest of the community that the risk of conviction of the innocent be minimised even if this may result in the acquittal from time to time of the guilty’.<sup>63</sup> Therefore, ‘[a] more stringent approach should be taken to the admission of evidence against an accused person’.<sup>64</sup> This rationale was reflected in the Commissions’ 2005 *Joint Report*, in which they observed:

[Section] 135 applies to evidence adduced by both parties in civil and criminal proceedings, and provides a discretion to exclude evidence which at common law might have been excluded by the legal relevance threshold. In contrast, s 137 applies only in criminal cases to evidence adduced by the prosecution and mandates the exclusion of evidence in order to avoid the risk of wrongful convictions. That a party seeking exclusion pursuant to s 135 should bear a heavier onus than an accused seeking exclusion of evidence pursuant to s 137 is consonant with the policies underpinning the uniform Evidence Acts. Parties should generally be able to produce the probative evidence available to them, however the courts should be particularly careful when considering evidence that might prejudice defendants in criminal trials.<sup>65</sup>

This rationale derives from the *Christie* discretion. As the High Court explained in *Driscoll v The Queen*, the *Christie* discretion is predicated upon the assumption that, notwithstanding the existing protections embedded in the requirements that evidence be relevant and admissible under the exclusionary rules, there were circumstances in which ‘the strict rules of admissibility would operate unfairly against the accused’.<sup>66</sup> Gibbs J described the exercise of the discretion as being ‘particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused’.<sup>67</sup> It was described by the New South Wales Court of Criminal Appeal in *R v M* as being of ‘fundamental significance in the administration of criminal law, and of ... vital concern to all who believe that every man charged with an offence, whatever it may be, is entitled to a fair trial’.<sup>68</sup>

62 Stephen Odgers, *Uniform Evidence Law* (Thompson Reuters, 10<sup>th</sup> ed, 2012) 792 [1.3.14560].

63 ALRC, *1987 Report*, above n 40, [35(b)].

64 *Ibid* [46(b)].

65 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 563 [16.39] (citations omitted).

66 (1977) 137 CLR 517, 541 (Gibbs J) (*‘Driscoll’*).

67 *Ibid*. See also *Alexander* (1981) 145 CLR 395, 402–3 (Gibbs CJ).

68 [1980] 2 NSWLR 195, 208.

## **B The Operation of Section 137**

To identify and exclude evidence that has a distortive effect and thus produces unfair results, s 137 employs an 'evaluative judgment'.<sup>69</sup> The evaluative judgment is, as Sheller JA observed in *R v Blick*, 'a trial judge's estimate of how the probative value should be weighed against the danger of unfair prejudice will be one of opinion based on a variety of circumstances, the evidence, the particulars of the case and the judge's own trial experience'.<sup>70</sup> It is necessary to stress that this weighing or balancing exercise is nothing but an analogy. It is a heuristic tool designed to assist the judge in the identification and exclusion of evidence of a distortive character.

The Commissions observed that the evaluative judgment renders the operation of s 137 as being akin to a discretion because it involved 'an exercise of judgment as to the application of broad principles, to be exercised in relation to all types of evidence'.<sup>71</sup> Similarly, some courts have held that an appeal from a ruling pursuant to s 137 is governed by the principles set out in *House v The King*,<sup>72</sup> which effectively permits a degree of latitude as to the significance a judge attaches to probative value and prejudicial effect (assuming the law has been properly applied).<sup>73</sup> Regardless of whether this is correct, it is clear that s 137 was made mandatory to encourage consistency in its application. In the *2005 Joint Report*, the Commissions adopted the observation in *Blick* that there is

a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected.<sup>74</sup>

The balancing exercise is sometimes criticised as being opaque. Such is the legacy of a common law in which 'gut reaction' has strongly featured in the exercise of exclusionary rules. In the context of the common law, the ALRC made the general observation that '[t]he courts in their differing definitions of what is relevant evidence have failed to articulate the factors that must be considered and

69 *R v Sood* [2007] NSWCCA 214 (19 July 2007) [23] (Latham J) ('Sood'); *Gonzales v The Queen* (2007) 178 A Crim R 232, 250 [55] (Giles J); *McCartney v The Queen* (2012) 38 VR 1, 7 [33] ('McCartney') (described by Maxwell P, Neave JA and Coghlan AJA as an 'evaluative task'); *XY* (2013) 84 NSWLR 363, 380 [59] (Basten JA).

70 (2000) 111 A Crim R 326, 332–3 [19] ('Blick').

71 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 562 [16.37].

72 (1936) 55 CLR 499.

73 See *Vickers v The Queen* (2006) 160 A Crim R 195; *R v Arvidson* (2008) 185 A Crim R 428. Cf *Riley v The Queen* [2011] NSWCCA 238 (14 September 2011); *McCartney* (2012) 38 VR 1, 7–9 [31]–[39].

74 *Blick* (2000) 111 A Crim R 326, 333 [20], quoted in ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 562 [16.36].

balanced'.<sup>75</sup> Given the subject of this article, that difficulty can be safely assumed to have persisted into the functioning of the Uniform Evidence Law.

A major contributor to the opacity of what is required by the evaluative judgment is that probative value and prejudicial effect are sometimes characterised as 'incommensurables'.<sup>76</sup> The balancing assessment was famously described by Scalia J of the United States Supreme Court as requiring the court to determine 'whether a particular line is longer than a particular rock is heavy'.<sup>77</sup> Even judges who do not accept such incommensurability accept that the considerations involved are 'distinct and opposing'.<sup>78</sup> These perceived difficulties in the balancing exercise arise in great part because it is difficult to assign meaning to terms such as 'probative value,' 'weight,' 'prejudicial effect' and 'danger of unfair prejudice' with precision.<sup>79</sup> For example, probative value and weight are used interchangeably.<sup>80</sup> Similarly, 'prejudicial effect' is sometimes used to denote the illegitimate effects of evidence, notwithstanding that it is widely recognised that the prejudicial effect caused by the evidence's probative value is an acceptable effect of that evidence.<sup>81</sup> Similarly, the Commissions' 2005 *Joint Report* observed:

It is clear from the conflict in the authorities that there is uncertainty as to the meanings of the terms 'probative value' and 'unfair prejudice.' It has been suggested that the difficulty lies in the fact that the concepts are insufficiently distinct. This is because it is difficult to measure prejudice without reference to the degree of probative value. As McHugh J said in *Pfennig*, 'in many cases the probative value either creates or reinforces the prejudicial effect of the evidence'. Hence, it is apparent that the concepts are interdependent. Difficulties of interpretation arise when attempts are made to treat them as completely distinct.<sup>82</sup>

The concepts are interdependent, and perhaps distinct and opposing in some respects. They are not, however, 'incommensurable', if that suggests that they measure fundamentally different things. Rather, they are parallel normative dimensions of the weight assignable to evidence. When not being used as a synonym for probative value, 'weight' refers to the raw significance or degree

75 ALRC, 1985 *Interim Report*, above n 40, 276 [503]. We take 'relevant' in this context to refer, in an oblique way, to 'degree of relevance' or 'weight'.

76 *Pfennig v The Queen* (1995) 182 CLR 461, 528 (McHugh J) ('*Pfennig*').

77 *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888, 897 (1988).

78 *Doolan v The Queen* [2013] NSWCCA 145 (3 July 2013) [57] (Emmett JA) ('*Doolan*').

79 Terence Anderson, David Schum and William Twining, *Analysis of Evidence* (Cambridge University Press, 2<sup>nd</sup> ed, 2005) 224 n 1.

80 See, eg, *Alexander* (1981) 145 CLR 395, 402–3 (Gibbs CJ) where the Chief Justice expressed the discretion as properly exercisable when 'the evidence had little weight but was likely to be gravely prejudicial to the accused'. See also *Driscoll* (1977) 137 CLR 517, 541 (Gibbs J).

81 *Pfennig* (1995) 182 CLR 461, 487–8 (Mason CJ, Deane and Dawson JJ); *Papakosmas* (1999) 196 CLR 297, 325 [91] (McHugh J); *Festa* (2001) 208 CLR 593, 602–3 [22] (Gleeson CJ); *EM* (2007) 232 CLR 67, 82 [37] (Gleeson CJ and Heydon J); *HML v The Queen* (2008) 235 CLR 334, 354 [12] (Gleeson CJ) ('*HML*').

82 ALRC, NSWLRC and VLRC, 2005 *Joint Report*, above n 41, 89 [3.44], quoting *Pfennig* (1995) 182 CLR 461, 528.

of relevance<sup>83</sup> a piece of evidence will be assigned by the jury when considering the existence of a fact or facts in issue and, ultimately, towards a verdict. That is how it is used in decisions such as *Davies v The King*,<sup>84</sup> where it was treated as a value-neutral expression referring only to the evaluative significance assignable to evidence by a jury, and not involving an assessment as to whether such significance would be properly assigned.<sup>85</sup>

When weight is assigned to evidence, the resulting effect on the jury can be described in a value-neutral way as 'prejudicial'. Yet it is only one species of prejudice — *unfair* prejudice — which is relevant to s 137. As Gleeson CJ observed in *Festa*, '[a]ll admissible evidence which supports a prosecution case is prejudicial to an accused in a colloquial sense; but that is not the sense in which the term is used in the context of admissibility'.<sup>86</sup> Therefore, what is sought to be ascertained is whether the prejudice is of a kind that attracts the operation of s 137. We adopt a simple dichotomy: the weight assigned either reflects the probative value of the evidence, in which case the resulting prejudice to the accused is 'fair'; or reflects those characteristics of the evidence which cause it, or the weight of other evidence, to be misconstrued, in which case any resulting prejudice is 'unfair'.<sup>87</sup>

Probative value is defined in the dictionary in sch 2 of the Uniform Evidence Law as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. Essentially, probative value refers to the weight evidence can be *legitimately* assigned.<sup>88</sup> Gleeson CJ observed in *HML* that probative value is commensurable with the evidence's 'legitimate tendency to inculcate'.<sup>89</sup> That is consistent with the High Court's equivocation of 'probative value' with 'cogency' in decisions like *Hoch v The Queen*,<sup>90</sup> *Bunning v Cross*,<sup>91</sup> and in the context of the Uniform Evidence Law, *BBH v The Queen*.<sup>92</sup> Following those decisions, we take 'probative value' to denote the weight that the jury can *rationally*, or for sound and fair reasons, assign to a piece of evidence towards

83 As opposed to the *fact* that evidence has a minimum degree of relevance, the 'relevance' inquiry the subject of s 55. The equivocation between 'weight' (or probative value, that is, 'legitimate weight') and a degree of relevance can be found in decisions like *R v Lockyer* (1996) 89 A Crim R 457 ('*Lockyer*'). See also below n 88.

84 (1937) 57 CLR 170.

85 See, eg, its use at *ibid* 184.

86 *Festa* (2001) 208 CLR 593, 602–3 [22].

87 This is a dichotomy set out by Emmett JA in *Doolan* [2013] NSWCCA 145 (3 July 2013) [57]. See also *EM* (2007) 232 CLR 67, 82 [37] (Gleeson CJ and Heydon J); *HML* (2008) 235 CLR 334, 354 [12] (Gleeson CJ); *Aytugrul v The Queen* (2012) 247 CLR 170, 184 [24] (French CJ, Hayne, Crennan and Bell JJ) ('*Aytugrul*').

88 Consider as an example the equivocation between the phrases 'probative value' and the 'degree of relevance' by Hunt CJ at CL in *Lockyer* (1996) 89 A Crim R 457, 459. In our view, that passage is making a normative claim about the degree of relevance the evidence can legitimately (or 'rationally') have, as opposed to a descriptive claim about the degree of relevance a jury will attribute or has attributed to evidence (the meaning we assign to 'weight').

89 *HML* (2008) 235 CLR 334, 354 [12].

90 (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ).

91 (1978) 141 CLR 54, 64 (Barwick CJ).

92 (2012) 245 CLR 499, 524–5 [68] (Hayne J).

establishing that a particular fact exists or does not exist. That definition is of universal application to what is recognised as an otherwise ‘floating standard,’ in the sense that how evidence legitimately effects the probability of an asserted fact turns on its degree of relevance to, and the context of, that fact.<sup>93</sup>

The phrase ‘danger of unfair prejudice’ in s 137 of the Uniform Evidence Law describes the risk created by another sub-species of prejudicial effect given life by those features of the evidence that may cause the jury to assign weight to evidence *irrationally*, unsound or otherwise bad reasons that are unfair to the accused. This is the definition supported by the ALRC’s *1985 Interim Report*, which describes the risk of unfair prejudice as ‘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’.<sup>94</sup> The nature of the evidence must create ‘a real risk that the evidence will be misused by the jury in some unfair way’.<sup>95</sup> That definition would appear to reflect the meaning of ‘prejudicial effect’ at common law.<sup>96</sup> Unfair prejudice can, of course, arise in a variety of ways. For example, in *Alexander*<sup>97</sup> Stephen J identified unreliable identification evidence as having a “displacement” effect,<sup>98</sup> later described by Gleeson CJ in *Festa* as being the ‘inherent risk of error associated with suggestibility’.<sup>99</sup> Stephen J identified the “rogues’ gallery” effect,<sup>100</sup> which he suggested as having a prejudicial effect in that it would ‘strongly suggest to a jury that the accused has a criminal record, perhaps even a propensity to commit a crime of the kind with which he is charged’.<sup>101</sup>

The more inflammatory, emotive or distortive the evidence, the greater the danger that the jury will, acting irrationally, assign it more weight than it deserves, or misconstrue the weight of other evidence in light of it. It is the *extent* of this danger that is of interest. The extent of the danger is to be assessed in light of the effect of the evidence as a whole, the conduct of the trial and the effectiveness of directions. As the High Court noted in *Aytugrul*, the dangers of unfairly prejudicial evidence can be reduced or eliminated when it is put in context by these factors.<sup>102</sup> Therefore, the only relevant danger is that which persists notwithstanding the potential context provided during the trial.

93 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 556 [16.15], quoting Jill Anderson, Jill Hunter and Neil Williams, *The New Evidence Law: Annotation and Commentary on the Uniform Evidence Acts* (LexisNexis Butterworths, 2002) 312.

94 ALRC, *1985 Interim Report*, above n 40, 351–2 [644].

95 *R v GK* (2001) 53 NSWLR 317, 324 [30] (Mason P), quoting *R v BD* (1997) 94 A Crim R 131, 139 (Hunt CJ at CL).

96 *R v BD* (1997) 94 A Crim R 131, 139 n 19 (Hunt CJ at CL), citing inter alia *DPP v Boardman* [1975] AC 421, 456; *Pfennig* (1995) 182 CLR 461, 487–8.

97 (1981) 145 CLR 395.

98 *Ibid* 409.

99 *Festa* (2001) 208 CLR 593, 602–3 [22].

100 *Alexander* (1981) 145 CLR 395, 409.

101 *Ibid*.

102 (2012) 247 CLR 170, 185–6 [30] (French CJ, Hayne, Crennan and Bell JJ).

We suggest that the word 'outweigh' requires this danger to cause the evidence 'to exceed in value, importance [or] influence' the effect it can legitimately have on the jury.<sup>103</sup> The requirement that the danger of unfair prejudice *outweigh* its probative value therefore refers to the danger that, because of its unfairly prejudicial qualities, the evidence will have an effect on the jury's reasoning such that the total weight assigned to the evidence *exceeds* the weight properly attributable to the evidence's probative value. This is why Gleeson CJ observed in *Festa* that evidence is impugned 'because of a danger that a jury may use the evidence in some manner that goes beyond the probative value it may properly be given'.<sup>104</sup>

This conception of s 137 therefore stands for the proposition that the higher the probative value of evidence is, the greater or more significant the unfairly prejudicial effect must be before it is capable of increasing the risk that the overall weight assignable to evidence will be inflated. If those illogical, irrational or distortive considerations productive of unfair prejudice do not compel the jury to treat the evidence with more weight than they would have otherwise have done, it follows that there has been no distortive effect on the jury's reasoning. When evidence is so probative that the jury is impelled to a result, it is virtually impossible to assign more weight to that evidence, whether unfair or otherwise. An example of this is with respect to evidence of a kind that is almost inherently productive of unfairly prejudice, similar fact evidence. At common law, this evidence will generally only be admitted when it is so probative that there is no reasonable view of the evidence consistent with the innocence of the accused.<sup>105</sup> As the majority noted in *Pfennig*, '[o]nly if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect'.<sup>106</sup> This is because it is almost impossible to imagine an additional and unmerited effect of evidence the probative value of which essentially impels a jury to discount the innocence of the accused as a rational interpretation of that evidence. Conversely, evidence that might otherwise impel the jury to error because of its unfairly prejudicial characteristics will not be unfairly prejudicial when, on the whole of the evidence, it is unlikely to lead to additional and unmerited weight being assigned.

The corollary of this conception is that the probative and unfairly prejudicial effects on the jury's decision-making are always — eventually — reducible to discrete impacts on the weight assigned to evidence. Notwithstanding the range of unfairly prejudicial effects identified that do not expressly involve the assignment of additional weight, the danger they ultimately pose to the jury's reasoning is that evidence will be unfairly assigned weight to establish a proposition that is detrimental to the accused's interests.<sup>107</sup> More weight has been assigned whether the jury treats a proposition established by evidence as

103 Following the dictionary definition given of the word 'outweigh' in C Yallop et al (eds), *Macquarie Dictionary* (Macquarie Library, 4<sup>th</sup> ed, 2005) 1020.

104 *Festa* (2001) 208 CLR 593, 602–3 [22] (Gleeson CJ).

105 *Pfennig* (1995) 182 CLR 461, 481–5 (Mason CJ, Deane and Dawson JJ), cf 515–6, 529 (McHugh J).

106 *Ibid* 483 (Mason CJ, Deane and Dawson JJ).

107 Support for this view is found in *R v Carusi* (1997) 92 A Crim R 52, 55 (Hunt CJ at CL) ('*Carusi*').

being of greater significance than it is, or as establishing a different, logically unconnected proposition that is nonetheless conducive of the accused's guilt. Treating distortive effects as having an unquantifiable prejudicial effect makes the weighing process more opaque and shifts the analytical focus away from the need to make an evaluative judgment about the fair and unfair effects of the evidence. Unless certain evidence was unquestioningly taken on judicial notice as posing a fixed danger of unfair prejudice — an approach disapproved of in *Aytugrul*<sup>108</sup> — it would be difficult to identify why a mitigating effect adequately responds to that danger. In any case, that function is somewhat achieved by the particularised exclusionary rules.<sup>109</sup>

That is not to say that the balancing exercise is a 'mathematical calculation', because the relative weights will be the product of a value judgment.<sup>110</sup> Nonetheless, the test certainly lends itself to being analogised in quantitative terms. If nothing else, it allows the onlooker to understand the relative significance the judge has assigned to probative value, unfairly prejudicial effect and the ameliorative effect of directions.

### C The Role of Directions

In the context of the balancing exercise, directions reduce the unfairly prejudicial effects of evidence by making them apparent to the jury. It follows that unfairly prejudicial evidence can be made 'fairly prejudicial' because of directions. The Commissions noted in their *2005 Joint Report* 'that an important consideration in the balancing test will be the extent to which a warning can cure or mitigate the danger of unfair prejudice'.<sup>111</sup> The effect of directions on the jury's appreciation of evidence is central to the weighing exercise contemplated by both the *Christie* discretion and s 137. Consistently with our understanding of the balancing exercise, it is not necessary for directions to eliminate the danger of unfair prejudice but merely render it proportional to the evidence's probative effect.<sup>112</sup> If our previous analogy with *Pfennig* is accepted, it follows that the greater or more significant the assessment of probative value, inevitably the less effect directions must have on the unfairly prejudicial aspects of the evidence to render the two proportionate.

The effect of such directions was described in two of the major decisions concerning the *Christie* discretion. In *Alexander*, Mason J stated the test as being that 'the judge has a discretion to exclude ... [evidence] when he considers its prejudicial effect outweighs ... [its probative] value, and that directions may be

108 (2012) 247 CLR 170, 182–4 [19]–[21] (French CJ, Hayne, Crennan and Bell JJ), 201 [70] (Heydon J).

109 *Harriman* (1989) 167 CLR 590, 606 (Toohey J).

110 *Pfennig* (1995) 182 CLR 461, 529 (McHugh J).

111 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 565 [16.47] n 67, citing *R v Lisoff* [1999] NSWCCA 364 (22 November 1999).

112 *TKWJ v The Queen* (2002) 212 CLR 124, 153–4 [90] (McHugh J).



given to ensure that unfair use is not made of the evidence'.<sup>113</sup> In *Festa*, McHugh J observed:

In exercising the discretion to exclude positive-identification evidence, the judge must take account of the risk that that evidence will be given greater weight than it deserves and will operate to the prejudice of the accused. In considering that risk, the judge must determine whether the *Domican* directions that will be given will be likely to overcome the prejudice that might ensue without those directions. If, despite those directions, the risk of prejudice remains and the evidence is weak, the proper exercise of the judicial discretion may require the exclusion of the evidence.<sup>114</sup>

Similarly, Gleeson CJ accepted the observation of the Supreme Court of Canada in *Mezzo v The Queen*<sup>115</sup> that the 'critical question [was] whether the problems as to the quality of the evidence could be addressed adequately by appropriate instructions and warnings to the jury'.<sup>116</sup> '*Domican* directions' are the directions that were set out in respect of unreliable identification evidence in *Domican v The Queen*.<sup>117</sup> In that decision, the majority held that 'where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed'.<sup>118</sup> In issuing that direction, the judge must identify for the jury those factors that affect reliability in the particular case.<sup>119</sup> That function continues in respect of s 137.<sup>120</sup> When confronted with unreliable evidence, the trial judge is required to give the particular direction contemplated in s 165 of the Uniform Evidence Law. There nonetheless remains the possibility, contemplated in *Christie*, that, 'despite ... direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not, rid their mind of it'.<sup>121</sup>

#### IV DEFINING PROBATIVE VALUE IN THE FACE OF STATUTORY AMBIGUITY

As noted previously, the assessment of probative value involves considering both relevance and weight. It is unclear, however, as to whether it involves credibility and reliability. The Commissions were certainly alive to this question:

113 (1981) 145 CLR 395, 430.

114 Ibid 614 [65].

115 [1986] 1 SCR 802.

116 *Festa* (2001) 208 CLR 593, 602 [21].

117 (1992) 173 CLR 555 ('*Domican*').

118 Ibid 561, citing *Kelleher v The Queen* (1974) 131 CLR 534, 551; *R v Burchielli* [1981] VR 611, 616–19; *R v Bartels* (1986) 44 SASR 260, 270–1.

119 *Domican* (1992) 173 CLR 555, 562. See also *Festa* (2001) 208 CLR 593, 614 [64] (McHugh J).

120 *R v GK* (2001) 53 NSWLR 317, 324–5 [31] (Mason P); *R v Filitis* [2004] NSWCCA 68 (11 February 2004) [22] (Sully J); *R v Cook* [2004] NSWCCA 52 (12 March 2004) [37] (Simpson J) ('*Cook*').

121 *Christie* [1914] AC 545, 555.

The question is open as to whether probative value is determined solely on the basis of the degree of relevance or whether the court is permitted to consider the credibility and reliability of the evidence. This issue has arisen mostly in the context of jury trials, and hence the relevant question has been whether the judge may consider whether the jury should accept the evidence.<sup>122</sup>

Complicating matters is that the definition of probative value applicable to s 137 is similar to that used in respect of relevance in s 55 of the Uniform Evidence Law. The definitions section provides that probative value is ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’. Under s 55, relevant evidence is ‘evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding’. The definitional similarity was explained by the Commissions as requiring probative value under s 137 to be evaluated ‘at least in part by reference to the degree of relevance of a piece of evidence to a particular fact in issue’.<sup>123</sup>

In *Papakosmas*,<sup>124</sup> it was held by McHugh J that relevance as articulated in s 55 is a concept ‘that is concerned with logic and experience’.<sup>125</sup> McHugh J also contrasted s 55 against exclusionary rules like s 137, which reflected ‘other policies of evidence law, such as procedural fairness and reliability’.<sup>126</sup> For that reason, McHugh J adopted the view that the use of the word ‘extent’ required that the ‘assessment, of course, would necessarily involve considerations of reliability’.<sup>127</sup> Gaudron J adopted a different approach in *Adam v The Queen*.<sup>128</sup> Her Honour held that, when assessing the probative value of evidence, it was necessary to assume the evidence would be accepted by the jury:

The omission from the dictionary definition of ‘probative value’ of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition.<sup>129</sup>

Judges have subsequently disagreed as to which interpretation is to be preferred. An oft-cited example is found in *R v Rahme*.<sup>130</sup> Mr Rahme had been tried and convicted of a series of offences against a 15-year-old girl, the offending principally concerning child prostitution. The appeal was substantively concerned with whether the trial judge had correctly exercised s 105 (now s 293) of the *Criminal*

122 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 557 [16.16].

123 *Ibid* 556 [16.14].

124 (1999) 196 CLR 297.

125 *Ibid* 321 [80].

126 *Ibid* 321–2 [81].

127 *Ibid* 323 [86].

128 (2001) 207 CLR 96 (*Adam*).

129 *Ibid* 115 [60].

130 [2004] NSWCCA 233 (14 July 2004) (*Rahme*).

*Procedure Act 1986* (NSW), which required the Court to exclude evidence if its probative value did not outweigh any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission. On appeal, Sully and James JJ determined that the trial judge had not correctly exercised that provision. James J wrote a separate judgment in which he considered the grounds of appeal concerning the exclusion of the witness evidence. James J disagreed with McHugh J's reasoning in *Papakosmos*, finding:

The use of the word 'could' in the definition of 'probative value' lends some support to the view that a trial judge, in determining the probative value of a piece of evidence, is not to attempt to make a final determination of the extent to which the evidence does affect the assessment of the probability of the existence of a fact in issue.<sup>131</sup>

Hulme J was in agreement as to the orders proposed by James J, and with his reasons, but for the question of how probative value is to be assessed.<sup>132</sup> Like McHugh J in *Papakosmos*, Hulme J did not accept that the omission of the phrase 'if it were accepted' had no effect on the meaning of 'probative value'. His Honour considered the approach in *Adam*<sup>133</sup> to be contrary to the canons of statutory construction, particularly the failure in *Adam* to treat the difference in language, between the definition of relevance and the definition of probative value, as being of interpretive significance.<sup>134</sup> Specifically, Hulme J noted that the inquiry into probative value was into 'the extent to which the evidence *could rationally affect* the assessment of the probability of the existence of a fact in issue'.<sup>135</sup> As the investigation was not merely into the ability of the evidence to have rational effect, but to what extent, this required the judge to have regard to the factors that limit that extent.<sup>136</sup> Considerations of credibility and reliability, where those factors could rationally affect probative value,<sup>137</sup> were said to facilitate 'a far more useful comparison'.<sup>138</sup> However, the word 'could' served to qualify the test so that it 'is not simply whether the judge believes it'.<sup>139</sup> Hulme J considered his analysis of the meaning of 'probative value' to make an assessment of credibility and reliability relevant for the discretionary exclusion set out in s 135, as well as the mandatory exclusion set out in s 137.<sup>140</sup>

131 Ibid [201].

132 Ibid [215].

133 (2002) 207 CLR 96, 115 [60] (Gaudron J), quoted in *ibid* [218].

134 *Rahme* [2004] NSWCCA 233 (14 July 2004) [220].

135 Ibid [221] (emphasis altered), quoting Uniform Evidence Law Dictionary (definition of 'probative value').

136 Ibid [219].

137 Ibid [222]–[223].

138 Ibid [223].

139 Ibid [222].

140 Ibid [223].

## A Shamouil and the Restrictive Approach

*Shamouil* adopted what Spigelman CJ described as a ‘restrictive approach’ to the circumstances in which credibility and reliability could inform an exercise of s 137, which his Honour regarded as supported by the ‘preponderant body of authority’.<sup>141</sup> The *Shamouil* decision involved an interlocutory appeal from a trial judge’s ruling to exclude identification evidence that was attended by sufficient doubt to reduce its credibility. The evidence had been given by the victim, who had claimed to have recognised the person who shot him as the accused, but later retracted his identification. In allowing the appeal, Spigelman CJ, with whom Simpson and Adams JJ agreed, made a series of propositions in support of the assertion that ‘[t]he trial judge can only exclude ... evidence ... where, taken at its highest, its probative value is outweighed by its prejudicial effect’.<sup>142</sup>

Those propositions can be summarised as follows:

1. Section 137 is a ‘replacement’ for the *Christie* discretion.<sup>143</sup>
2. ‘[T]he *Christie* discretion ... did not involve considerations of reliability of the evidence’,<sup>144</sup> nor did it involve credibility.<sup>145</sup>
3. Courts should adopt a ‘restrictive approach’<sup>146</sup> to the exclusion of evidence under s 137, proceeding ‘on the assumption that the jury accepted the evidence, as long as the evidence was fit to be left to the jury’.<sup>147</sup> The evidence must therefore be ‘taken at its highest’.<sup>148</sup>
4. The interpretation of the dictionary definition of probative value compels this approach: following *Adam*, the use of the word ‘could’ in s 137 is about ‘capability’<sup>149</sup> and thus draws attention to ‘what it is *open* for the tribunal of fact to conclude’, not what it is ‘*likely* to conclude’.<sup>150</sup>
5. Where there is a danger of unfair prejudice, the judge applying s 137 must consider whether that danger can be cured by directions.<sup>151</sup>

141 *Shamouil* (2006) 66 NSWLR 228, 237 [60].

142 *Ibid* 236 [50], quoting *Carusi* (1997) 92 A Crim R 52, 65 (Hunt CJ at CL).

143 *Shamouil* (2006) 66 NSWLR 228, 236 [49].

144 *Ibid*.

145 It is worth noting that Spigelman CJ did not explicitly state that *Christie* did not involve an assessment of credibility. One of two things seem likely: either Spigelman CJ was using ‘reliability’ at this stage as a way of describing both credibility and reliability (as occasionally happens), or his Honour regarded it as so beyond controversy that it was not worth mentioning separately. In either case, Spigelman CJ’s judgment is clearly predicated on the position that *Christie* involves neither of these considerations, otherwise he would have addressed the position taken in relation to credibility in *Christie* explicitly.

146 *Shamouil* (2006) 66 NSWLR 228, 237 [60].

147 *Ibid* 235 [40].

148 *Ibid* 236 [50]–[51]. As indicated in above n 145, Spigelman CJ drew this requirement out of *Carusi* (1997) 92 A Crim R 52.

149 *Ibid* 237 [61]–[62] (emphasis in original). See also *DAO v The Queen* (2011) 81 NSWLR 568, 604 [184].

150 *Shamouil* (2006) 66 NSWLR 228, 237 [61].

151 *Ibid* 239 [72].

6. '[T]here may be some, albeit limited, circumstances in which credibility and reliability will be taken into account when determining probative value' under s 137.<sup>152</sup> This is when 'it would not be open for the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue'.<sup>153</sup> It is to these circumstances that McHugh J's reasoning in *Papakosmas* is relevant.<sup>154</sup>

## V THE RESTRICTIVE AND INTERMEDIATE APPROACHES TO SECTION 137

*Shamouil* and *Dupas* differ as to what the common law required; specifically, whether the requirement at common law that evidence be 'taken at its highest' precluded an assessment of credibility and reliability. The contemporary form of this requirement can be traced to the decision of *Carusi*,<sup>155</sup> which was identified as important by both the *Shamouil* and *Dupas* Courts. Indeed, the *Dupas* Court considered *Shamouil* to be based upon a misreading of *Carusi*. As Hunt CJ at CL observed in *Carusi*, some assessments of evidence do intervene in the jury's fact-finding in an impermissible way. He found that '[t]he trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect'<sup>156</sup> because '[i]t was for the jury, and not for the trial judge, to determine the factual issues at the trial,'<sup>157</sup> and therefore 'for the jury to determine which parts of ... [the] evidence they accepted and which parts they rejected'.<sup>158</sup> Dispute over the significance of these observations has been a principal front in the disagreement between Victoria and New South Wales.

### A *The Restrictive Approach and the Principle of Jury Deference*

The restrictive approach to s 137 provides, as a general rule, that evidence must almost always be taken at its highest, prohibiting the consideration of how credibility and reliability might detract from its probative value. In *Sood*, this was explained as requiring the judge to have regard to the probative value that would flow from an acceptance of the use to which the evidence was to be put by the prosecution.<sup>159</sup> *Shamouil* also articulates an exception to this rule in those 'limited circumstances' in which 'it would not be open to the jury to conclude

152 Ibid 236 [56], accepting the approach taken by Simpson J in *Cook* [2004] NSWCCA 52 (12 March 2004) [43].

153 Ibid 237–8 [63].

154 Ibid.

155 (1997) 92 A Crim R 52.

156 Ibid 66 (emphasis added).

157 Ibid 65.

158 Ibid 65–6.

159 [2007] NSWCCA 214 (19 July 2007) [40] (Latham J).

that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue'.<sup>160</sup> In this respect, Spigelman CJ followed Simpson J's observation in *Cook* that '[t]here will be occasions when an assessment of the credibility of the evidence will be inextricably entwined with the balancing process'.<sup>161</sup>

Spigelman CJ understood the restrictive approach to be compelled by the requirement stated in *Carusi* that the *Christie* discretion required evidence to be taken at its highest.<sup>162</sup> The reasoning in *Carusi* had been previously adopted in respect of s 137 in the decision of *R v Singh-Bal*.<sup>163</sup> In *Singh-Bal*, Hunt CJ at CL (delivering the lead judgment) adhered to the view of the common law he had expressed in *Carusi*, which was the probative value of the evidence must be treated as if it was accepted by the jury.<sup>164</sup> As it had been the intention of the ALRC to adopt the common law, this approach was equally applicable to s 137.<sup>165</sup>

In large part, judges who prefer this restrictive approach do so because it sits comfortably with the deference they regard as properly owed to the jury's fact-finding responsibility. For example, Spigelman CJ felt that to consider the actual credibility and reliability of the evidence would

usurp for a trial judge critical aspects of the traditional role of a jury. In the case of evidence of critical significance, such a ruling by a trial judge would, in substance, be equivalent to directing a verdict of acquittal on the basis that the trial judge was of the view that a verdict of guilty would be unsafe and unsatisfactory. As the High Court said in that different, but not irrelevant, context in *Doney v The Queen* (1990) 171 CLR 207 at 215, this is not a permissible 'basis for enlarging the powers of a trial judge at the expense of the traditional jury function'. In my opinion, the same is true if a trial judge can determine the weight of evidence when applying s 137.<sup>166</sup>

Similarly in *Rahme*, Sully J's interpretation was driven almost entirely by his view that the trial judge had made 'a fundamental error' because he had 'put himself in the shoes of the jury and ... [formed] for himself a view, definitive of the exercise of his discretion, as to what he thought was the probative value of the evidence'.<sup>167</sup>

There are two dimensions to the principle of jury deference that are related but the force of which turns on somewhat different premises. The 'normative dimension' has regard to the peculiar lay character of the jury and the unique benefits that accrue to its decision-making. Spigelman CJ's concern that critical aspects of

160 (2006) 66 NSWLR 228, 237–8 [63] (Spigelman CJ).

161 [2004] NSWCCA 52 (12 March 2004) [43].

162 See the discussion leading up to Spigelman CJ's conclusions on the restrictive approach in *Shamouil* (2006) 66 NSWLR 228, 236–7 [50]–[60].

163 (1997) 92 A Crim R 397 ('*Singh-Bal*').

164 *Ibid* 403 (Hunt CJ at CL). McInerney J and Donovan AJ agreeing: at 407 (McInerney J), 407–8 (Donovan AJ).

165 *Ibid*.

166 *Shamouil* (2006) 66 NSWLR 228, 238 [64].

167 *Rahme* [2004] NSWCCA 233 (14 July 2004) [65].

the jury's function would be 'usurped' was of this character. His reference in the above passage to *Doney v The Queen*<sup>168</sup> discloses the common law genesis of this conception. In *Doney*, the High Court expressed the view that 'the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters'.<sup>169</sup> To properly function, the jury must 'be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful'.<sup>170</sup>

Lord Devlin tied the normative dimension of jury deference to credibility and reliability in his work *Trial by Jury*.<sup>171</sup> There, he described the lay character of the jury as adapting it perfectly to such assessments:

I am myself convinced that the jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of twelve is more reliable.<sup>172</sup>

There is also a 'practical dimension' to the principle of jury deference. It is only after the jury has seen the credibility and reliability of the evidence tested through the adversarial processes of cross-examination and argument, and in light of the whole of the evidence, that it is able to finally determine what weight the evidence should have. Therefore, it is only through the trial process that the discrete probative value of evidence becomes fixed with a degree of specificity, making it impossible for a judge to undertake an accurate assessment prospectively. Observations to this effect led the court in *R v FDP*, for example, to conclude that 's 137 cannot operate to oblige a judge to reject evidence that may later be seen in the context of the whole of the trial to have resulted in a miscarriage of justice'.<sup>173</sup>

## **B 'Limited Circumstances' and 'No Circumstances'**

As Basten JA observed in *DPP (NSW) v JG*, the 'limited circumstances' *Shamouil* took *Cook* to establish as an exception to the restrictive approach 'were not identified with any precision'.<sup>174</sup> It may have actually been a generous reading of *Cook*. As Evans J noted in *KMJ v Tasmania*, many judges, following *Sood*,

168 (1990) 171 CLR 207 ('*Doney*').

169 Ibid 214 (Deane, Dawson, Toohey, Gaudron, McHugh JJ).

170 Ibid.

171 Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons Limited, 3<sup>rd</sup> revised ed, 1966).

172 Ibid 140. See also *AK v Western Australia* (2008) 232 CLR 438, 472 [94] (Heydon J).

173 (2008) 74 NSWLR 645, 652–3 [29] (McClellan CJ at CL, Grove and Howie JJ).

174 *DPP (NSW) v JG* (2010) 220 A Crim R 19, 38 [74] ('*JG*').

have departed from the limited circumstances exception entirely on the basis that *Cook* permitted credibility and reliability to be used only in assessing the degree to which the evidence poses a danger of unfair prejudice.<sup>175</sup> Those who have sought to give content to the exception treat it as referring to the event in which ‘the undisputed circumstances surrounding the evidence necessarily so weakened it that it could not “rationally affect” a relevant assessment by a jury’.<sup>176</sup> Although this reading of the exception does not impose a blanket prohibition on the consideration of credibility and reliability, it only permits consideration in the specific circumstances where — in a manner inversely reminiscent to *Pfennig* — the evidence is so frail that it is safe to conclude that its probative value is outweighed by its unfairly prejudicial effect. In effect, therefore, the exception proposed by *Shamouil* is zero-sum — the exclusion of evidence on the basis of credibility and reliability turns on whether it is either notionally capable or incapable of being accepted. This is why judges considering the exception will examine whether the credibility and reliability of evidence is sufficiently low to justify exclusion.<sup>177</sup>

### C *Dupas and the Intermediate Approach*<sup>178</sup>

The *Dupas* Court’s criticism of *Shamouil* can be seen to be based on the argument that *Shamouil* misinterpreted *Adam* and *Papakosmas*. As the Court observed: ‘if it is open under the statute to permit such an exception, why is it to be confined in the manner suggested?’<sup>179</sup> Their view was that both *Adam* and *Papakosmas* demonstrated that s 137 was intended to restate the position at common law, which was that the judge was required to treat the evidence as it if was credible (that is, accepted), but not assume that it was reliable: ‘Gaudron J sought to emphasise that the assumption (that the jury would accept the evidence) extended to questions of probative value, while McHugh J emphasised that it did not extend to reliability. These observations were complementary’.<sup>180</sup>

This interpretation was said to derive from the *Christie* discretion at common law. The *Dupas* Court emphasised that courts applying the *Christie* discretion were greatly concerned with the exclusion of evidence that, because of its unreliability, risked being given greater weight than it deserved by the jury. ‘Where ... the quality or frailties of the evidence would result in the jury attaching more weight to the evidence than it deserved, the trial judge is obliged to assess the extent of

175 (2011) 20 Tas R 425, 437–40 [24]–[30]. See also *Sood* [2007] NSWCCA 214 (19 July 2007) [36] (Latham J); *R v Mundine* (2008) 182 A Crim R 302, 310 [44] (Simpson J); *JG* (2010) 220 A Crim R 19, 38 [73]–[74], 41 [88] (Basten JA); *Tasmania v Finnegan (No 2)* [2012] TASSC 1 (19 January 2012) [22] (Blow J).

176 *JG* (2010) 220 A Crim R 19, 53 [142] (RS Hulme J). See also *PG v The Queen* [2010] VSCA 289 (19 October 2010) [78]–[79] (Nettle JA).

177 *JG* (2010) 220 A Crim R 19, 53–65 [143]–[176] (RS Hulme J). See also *KRI v The Queen* (2001) 207 A Crim R 552, 562–3 [54]–[55] (Hansen JA).

178 The ‘intermediate approach’ is the description used by Odgers of the position taken in decisions such as *Dupas*: Odgers, above n 62, 814 [1.3.14760], although Odgers does not specifically refer to *Dupas*.

179 *Dupas* (2012) 218 A Crim R 507, 564–5 [202].

180 *Ibid* 552 [162].



the risk.<sup>181</sup> To this end, the assessment of the weight it deserved — that being its probative value — was not designed to pre-empt the weight ‘the jury *would* or *will* attach to it’;<sup>182</sup> obviously, such a task was outside of the competence of the trial judge. The assessment was to ascertain ‘what probative value the jury *could* assign to the evidence’.<sup>183</sup>

The requirement that evidence be ‘taken at its highest’, stated in decisions such as *Carusi* and *Singh-Bal*, was said to be restricted to the question of credibility.<sup>184</sup> When Hunt CJ at CL found in *Carusi* that ‘[t]he trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect’,<sup>185</sup> he was said to be referring to the ‘trial judge’s obligation to assume that the jury will accept the witness’s evidence as credible’.<sup>186</sup> Conversely, Hunt CJ at CL’s observation that photographic evidence could be sufficiently frail as to justify exclusion, imported considerations of reliability.<sup>187</sup> Relying on Hunt CJ at CL’s earlier decision of *R v Tugaga*,<sup>188</sup> the *Dupas* Court read this as a

distinction between the jury’s role (of assessing the credibility of the identifying witness and deciding whether the evidence should be accepted) and the trial judge’s role (of deciding the question of admissibility of the evidence by assessing its quality and determining whether its frailties could be cured by appropriate direction).<sup>189</sup>

As such, *Shamouil*’s reading of that requirement was based upon a misconception.<sup>190</sup>

On this basis, and against the restrictive approach, *Dupas* adopted the view that courts must consider the weight that could be reasonably assigned to the evidence by the jury.<sup>191</sup> This consideration included an evaluation of probative value which ‘necessarily involved an assessment of the quality (and any inherent frailty) of that evidence’.<sup>192</sup> Then, ‘[t]he likelihood of the risk eventuating, and its nature, would be balanced by the judge’s view of the extent to which directions would ameliorate that risk’.<sup>193</sup> The value and risk would then be balanced, such that

where the probative value was significant and there was a low risk of the jury giving it greater weight than was warranted, or of it being used in an illegitimate way, the trial judge would not exclude the evidence. Conversely, if because of its unreliability the evidence had low probative

181 Ibid 525 [63(d)].

182 Ibid (emphasis in original).

183 Ibid (emphasis added).

184 Ibid 562 [192]–[193], 563 [196].

185 *Carusi* (1997) 92 A Crim R 52, 66, quoted in ibid 535–6 [99].

186 *Dupas* (2012) 218 A Crim R 507, 536 [100].

187 *Carusi* (1997) 92 A Crim R 52, 65–6, quoted in ibid 535–6 [99].

188 (1994) 74 A Crim R 190 (‘*Tugaga*’).

189 *Dupas* (2012) 218 A Crim R 507, 536 [100].

190 Ibid 562–3 [193].

191 Ibid 524 [63(a)].

192 Ibid 547 [141].

193 Ibid 547–8 [142].

value, yet there was a real risk that the jury would attach more weight to it than it deserved, and that risk could not be overcome by strong directions from the trial judge, the evidence would be excluded.<sup>194</sup>

The *Dupas* Court undertook a broad survey of decisions of the House of Lords, the High Court of Australia and the Federal Court of Australia, and state courts. It used these decisions to show that courts had consistently assessed the reliability of identification evidence,<sup>195</sup> confessions and admissions,<sup>196</sup> accomplice evidence,<sup>197</sup> expert evidence,<sup>198</sup> similar fact and relationship evidence,<sup>199</sup> and hearsay evidence,<sup>200</sup> when determining whether to exercise the *Christie* discretion. These decisions were said to establish the general proposition that '[t]he assumption as to what a jury will accept has never been extended to questions of reliability'.<sup>201</sup> To read s 137 as departing from this common law approach was to contradict a version of the principle of legality.<sup>202</sup>

It is true that many courts applying *Christie* have had regard to the reliability of evidence. It is plausible, although not unequivocal, that they draw a categorical discussion between credibility and reliability. The fact of the matter, however, is that there appears to be a range of opinions at common law as to the *degree* to which courts are permitted to assess reliability. These differences appear to reflect broader divisions in the common law as to how (without probative value) evidence must be before the balancing exercise will favour its exclusion.<sup>203</sup> That '[a]uthorities have been divided on this issue' was recognised by the Commissions in their *2005 Joint Report*.<sup>204</sup>

By reading the phrase 'taken at its highest' as just referring to an assumption about credibility, the *Dupas* Court's reading of *Carusi* supports the proposition that reliability can affect the judicial assessment of probative value. This reading,

194 Ibid.

195 Ibid 529–40 [79]–[115]. The cases referred to included: *Alexander* (1981) 145 CLR 395; *Festa* (2001) 208 CLR 593; *Duff v The Queen* (1979) 39 FLR 315; *R v Doyle* [1967] VR 698 ('Doyle'); *R v Callaghan* (2001) 4 VR 79; *Tugaga* (1994) 74 A Crim R 190; *Rozenes v Beljajev* [1995] 1 VR 533 ('Beljajev').

196 Ibid 540–2 [116]–[123]. The cases referred to included: *Driscoll* (1977) 137 CLR 517; *Jackson v The Queen* (1962) 108 CLR 591; *R v Swaffield* (1998) 192 CLR 159; *Duke v The Queen* (1989) 180 CLR 508.

197 Ibid 542 [124]. The cases referred to included: *Doney* (1990) 171 CLR 207; *Beljajev* [1995] 1 VR 533; *R v Lobban* (2000) 77 SASR 24 ('Lobban').

198 Ibid 542–4 [125]–[132]. The cases referred to included: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *R v Gilmore* [1977] 2 NSWLR 935; *R v Bonython* (1984) 38 SASR 45; *R v Carroll* (1985) 19 A Crim R 410.

199 Ibid 544–6 [133]–[138]. The cases referred to included: *Harris v DPP (UK)* [1952] AC 694; *Harriman* (1989) 167 CLR 590; *HML* (2008) 235 CLR 334; *R v Young* [1998] 1 VR 402.

200 Ibid 547 [139], although this was a reference to the ALRC, *1987 Report*, above n 40.

201 Ibid 563 [194].

202 Ibid 553 [164], 558–9 [183]. The *Dupas* Court expressed the principle as being a presumption that 'a statute is not intended (in the absence of express words) to alter common law doctrines': at 553 [164]. We take issue with this formulation, at below n 294.

203 These different approaches have been described as the 'scales test' and the 'modified scales test' by Mark Weinberg (now Justice Weinberg of the Victorian Court of Appeal): M S Weinberg, 'The Judicial Discretion to Exclude Relevant Evidence' (1975) 21 *McGill Law Journal* 1, 33–5.

204 ALRC, NSWLRC and VLRC, *2005 Joint Report*, above n 41, 557 [16.17].

however, is strongly contested in New South Wales. As Simpson J recently argued in *Burton*, in *Carusi* '[i]t was not in issue that the identification had been made; the issue was the reliability of the identification, having regard to well recognised dangers inherent in identification evidence'.<sup>205</sup> Nonetheless, both *Tugaga* and *Singh-Bal* appear to differentiate between credibility and reliability, incorporating the latter into the balancing exercise. In *Tugaga*, Hunt CJ at CL stated the question as being whether any weakness 'has so reduced the weight of the evidence ... as to cause its prejudicial effect to outweigh its probative value'.<sup>206</sup> In *Singh-Bal*, Hunt CJ at CL refused to exercise s 137 in respect of evidence of an admission given by two police officers which was argued to have occurred in circumstances 'so suspect' that it could not possibly be accepted by the jury as true; its truth was a matter for the jury to determine.<sup>207</sup> His Honour implied, in contrast, that any 'ambiguity ... such that the jury may misinterpret it as amounting to a clear admission' could have been the subject of an assessment pursuant to s 137.<sup>208</sup>

One complicating difficulty is that there is little to suggest that many of the statements made by the High Court are anything more than a description of the circumstances in which the balancing exercise has favoured exclusion. Consider, for example, the assertion by Mason J in *Alexander* that identification evidence, which is 'inherently fragile' and 'notoriously uncertain' because of the 'the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions',<sup>209</sup> may be admitted, but that 'the circumstances may be such as to show that it would be unfair to receive'.<sup>210</sup> The judgment is silent on whether those circumstances are limited. The imprecision in the judgment may be due to an attempt to leave the discretion relatively unconfined.<sup>211</sup> However, by restricting their account of the balancing exercise to those obvious circumstances in which exclusion will be justified, these decisions do not allow a conclusion to be drawn about what is required in those circumstances that are unobvious and thus controversial.

The exception to this is likely to be *Festa*. As Gleeson CJ observed in that decision, 'it is not enough to say that [evidence] is "weak"'.<sup>212</sup> Its weakness is relevant insofar as it is necessary to determine whether the jury will assign weight to the evidence 'beyond the probative value it may properly be given'.<sup>213</sup> McHugh J observed that matters going to unreliability 'are matters to be considered in determining whether evidence should be excluded because its probative value is outweighed by its prejudicial effect'.<sup>214</sup> Kirby J observed that '[t]o the extent

205 [2013] NSWCCA 335 (20 December 2013) [172].

206 (1994) 74 A Crim R 190, 196.

207 (1997) 92 A Crim R 397, 403.

208 Ibid 403–4.

209 (1981) 145 CLR 395, 426.

210 Ibid 431.

211 See Weinberg, above n 203, 32.

212 *Festa* (2001) 208 CLR 593, 599 [14].

213 Ibid 602–3 [22] (Gleeson CJ).

214 Ibid 610 [52].

that the evidence was weak' it was 'incapable objectively of adding greatly to the [probative value] needed to outweigh the distinct prejudice to the appellant'.<sup>215</sup> The references to 'beyond' and the 'need to outweigh' suggest an appreciation of the need to identify the relative weights of probative value and unfair prejudice in light of the evidence's weakness. Yet even Kirby J deemed relevant the notion that 'such evidence was "virtually valueless" in terms of probative weight'.<sup>216</sup>

This problem is apparent from one of the decisions upon which the *Dupas* Court placed significant weight — *Beljajev*.<sup>217</sup> The Court noted that '[s]ignificantly, *Beljajev* serves to confirm — if confirmation be needed — that in assessing probative value, the judge may need to consider the quality and reliability of the evidence'.<sup>218</sup> The Court in *Beljajev* (comprising Brooking, McDonald and Hansen JJ), was not explicitly considering the *Christie* discretion, but the *Dupas* Court treated its observations as relevant.<sup>219</sup> There is no particular reason to treat the caution the *Beljajev* Court expressed as any less relevant.<sup>220</sup> For example, the Court observed that 'it is difficult to see how it can be said that the trial is unfair by reason of the unreliability of evidence which is probative where the circumstances which make the evidence unreliable are properly exposed for the consideration of the jury'.<sup>221</sup> It went on to endorse the views of Carter J in *McLean and Funk*,<sup>222</sup> which it described as being that

there was no discretion to exclude evidence which was based wholly or primarily upon the trial judge's conclusion that the evidence was unreliable: the exercise of such a discretion interfered with one of the most integral of the jury's functions, a function which there was no reason to believe any properly instructed jury to be incapable of properly performing.<sup>223</sup>

This endorsement of Carter J's decision obscures that the reference is to an absence of discretion to exclude evidence that is 'wholly or primarily' based on the judge's conclusions about the evidence not being credible *or* reliable.<sup>224</sup> As the *Beljajev* Court recognised,<sup>225</sup> *McLean and Funk* came to the conclusion that even

215 Ibid 644 [169].

216 Ibid.

217 [1995] 1 VR 533.

218 *Dupas* (2012) 218 A Crim R 507, 539 [110].

219 The *Beljajev* Court treated the *Christie* discretion as a particular dimension of a general common law discretion to exclude prejudicial evidence, and thus approached the question somewhat holistically, also considering the discretion identified in *Bunning v Cross* (1978) 141 CLR 54 as the appellant had put his case on that basis. The Court did note, however, at [1995] 1 VR 533, 549:

it is not easy to think of circumstances in which grounds might exist for the exercise of that residual discretion in relation to any evidence — we are not speaking of confessions — which would not bring the case within the more specific principle whereby evidence is not to be admitted where its prejudicial effect is out of proportion to its probative value.

220 This is particularly so given Weinberg JA treated *Beljajev's* caution as relevant in *R v Dupas (No 3)* (2009) 28 VR 380, 445 [261].

221 *Beljajev* [1995] 1 VR 533, 549, citing *R v McLean and Funk; Ex parte Attorney-General* [1991] 1 Qd R 231, 255 (Carter J) ('*McLean and Funk*').

222 [1991] 1 Qd R 231.

223 *Beljajev* [1995] 1 VR 533, 553.

224 *McLean and Funk* [1991] 1 Qd R 231, 260.

225 [1995] 1 VR 533, 553.

where there is 'a total lack of credibility and reliability attached to the evidence' it cannot be excluded.<sup>226</sup> This is obviously even more restrictive in principle than *Shamouil*. Although they do not appear to have accepted that proposition, the *Beljajev* Court adopted a conservative position with respect to both credibility and reliability. For example, they observed that exclusionary discretions must be subject to

a very strong predisposition to the view that, questions of fact and credibility being for the jury and the jury being an institution in whose capacity and integrity confidence is reposed by the courts, evidence which is probative should go to the jury despite its infirmities, accompanied by the trial judge's directions concerning the considerations, both general and particular, affecting its reliability ...<sup>227</sup>

Similarly, they observed that 'case law ... shows that the common law's answer to the problem of unreliable evidence has been to leave it to the jury'.<sup>228</sup> They adopted the jury deferential view on pragmatic grounds, observing that the assessment of unreliable evidence is enhanced by the conduct of the trial.<sup>229</sup>

There is nothing in these observations that takes the *Beljajev* Court's caution outside of Gleeson CJ's general proposition in *Festa* that it is insufficient to exclude evidence because it is 'weak'.<sup>230</sup> However, the Court went on to observe that to be excluded the unreliability 'would have to be most exceptional'.<sup>231</sup> The exceptional circumstances were those in which 'the considerations affecting reliability were not "comprehensible to a jury and capable of assessment by them as the proper tribunal of fact"'.<sup>232</sup> In this event, the evidence could be 'so unsatisfactory as not to be truly probative'.<sup>233</sup> However, the Court noted that mere unreliability would not be enough to create this state of affairs; rather, the evidence would have to be 'so unreliable as not really to amount to evidence of probative force'.<sup>234</sup> Another decision discussed by the *Dupas* Court — *Doyle*<sup>235</sup> — suggests such statements are a restriction on when reliability may affect the assessment of probative value. That Court held that evidence shall only be excluded where 'its [probative value] was so trifling that any possible prejudice to the accused outweighed the possible usefulness of the evidence to the prosecution',<sup>236</sup> which did not apply in this instance because it was 'open to the jury' to adopt the inference 'strongly supporting the Crown case'.<sup>237</sup>

226 *McLean and Funk* [1991] 1 Qd R 231, 260.

227 *Beljajev* [1995] 1 VR 533, 554.

228 *Ibid* 555.

229 *Ibid* 556.

230 (2001) 208 CLR 593, 599 [14].

231 *Beljajev* [1995] 1 VR 533, 559.

232 *Ibid*, quoting *R v Peirce* [1992] 1 VR 273, 277 (Vincent J).

233 *Beljajev* [1995] 1 VR 533, 558.

234 *Ibid*, citing *R v R* (1989) 18 NSWLR 74, 84 (Gleeson CJ).

235 [1967] VR 698.

236 *Ibid* 701.

237 *Ibid*.

Such formulations resemble *Shamouil*. Some courts take issue with *Beljajev* for this very reason. In *Lobban*, *Beljajev*'s deference to the jury was 'heeded' but it was noted that the purpose of *Christie* was to prevent unfairness and should be applied to that effect.<sup>238</sup> Such observations themselves make apparent that there was a plurality of opinion at common law as to the proper application of *Christie*.

#### **D The XY Refinement and the Endorsement of Jury Deference**

It should be accepted that the *Christie* discretion has been applied in a variety of ways. This is probably because the boundaries of that discretion were left open by superior courts. Nevertheless, it is hard to conclude, as the *Dupas* Court did, that *Shamouil* is 'manifestly wrong' on the basis that it fundamentally misinterprets the common law.<sup>239</sup> However, *Shamouil* may not be an appropriate interpretation of s 137.<sup>240</sup> In responding to the latter claim, the judges in *XY* did not speak with a single voice.<sup>241</sup> At the very least, their response entails an acceptance that credibility and reliability play no part in the assessment of probative value.<sup>242</sup>

In responding to *Dupas*, some members of the *XY* Court employed the very useful notion that what is subject to debate is what *range of inferences* are available for analysis. For example, Price J found that the inference sought by the prosecution was not 'open'.<sup>243</sup> Hoeben CJ at CL and Blanch J concluded that the assessment of probative value should involve the consideration of alternative inferences, namely that the accused believed the complainant was in high school.<sup>244</sup> Yet both Hoeben CJ at CL and Blanch J accepted that the evidence should be assumed to be credible and reliable.<sup>245</sup> For Blanch J, this was because '[t]he evidence is known and can be evaluated'.<sup>246</sup> Hoeben CJ at CL similarly took as relevant that 'there were alternative inferences available which were inconsistent with the prosecution case and which were objectively plausible'.<sup>247</sup> We understand such propositions to be to the effect that ambiguities in evidence that are due to its weak credibility or reliability cannot be known or evaluated, and any inferences drawn on that basis are as such not 'objectively plausible'. Setting aside the troubling aspects of

238 *Lobban* (2000) 77 SASR 24, 46–50 [79]–[86].

239 (2012) 218 A Crim R 507, 524–5 [63(a)–(d)].

240 *Ibid* 525 [63(e)].

241 Each judge of the *XY* Court (Basten JA, Hoeben CJ at CL, Simpson, Blanch and Price JJ) delivered a separate judgment. The majority in *XY* were Hoeben CJ at CL, Blanch and Price JJ, who dismissed the appeal. Basten JA and Simpson J dissented.

242 *XY* (2013) 84 NSWLR 363, 371 [25], 371–2 [27] (Basten JA), 385 [86] (Hoeben CJ at CL), 401 [175] (Simpson J), 405 [197]–[198] (Blanch J), 407 [215], 408 [223] (Price J). Price J would have preferred to adopt the *Dupas* approach: at 408 [224].

243 *Ibid* 407 [218].

244 *Ibid* 385 [89] (Hoeben CJ at CL), 405–6 [199]–[207] (Blanch J).

245 *Ibid* 385 [86] (Hoeben CJ at CL), 405 [198] (Blanch J), although he did not regard credibility and reliability as arising in this case.

246 *Ibid* 405 [198].

247 *Ibid* 385 [89].

such a distinction,<sup>248</sup> such propositions resemble the practical dimension of jury deference.

It is somewhat difficult to say whether Basten JA adopted the 'limited circumstances' or the 'no circumstances' version of the restrictive approach in his dissent in *XY*, because it is not entirely clear how a judge's attribution of weight to an inference is to inform the probative value arrived at for the purposes of the balancing exercise.<sup>249</sup> His Honour notes that '[t]his Court has approached s 137 by focusing on the capacity of the evidence to support the prosecution case',<sup>250</sup> and appears to endorse the evaluation of evidence at its highest.<sup>251</sup> However, he later noted that it was wrong in *Dupas* to assert that *Shamouil* concluded 'inflexibly and without qualification, that the weight of the evidence was irrelevant'.<sup>252</sup> His basic position was that

[t]he extent to which the evidence could rationally affect the probability of a fact in issue involves an evaluative judgment. That judgment is not a forecast of the weight the jury is likely to give the evidence, nor is it a statement of the weight the judge would give the evidence.<sup>253</sup>

The 'evaluative judgment' can be understood as follows:

First, in carrying out the 'weighing' exercise, it would be necessary for the trial judge to consider where the prosecution evidence fell on a scale of probative value ranging from strong to weak. Secondly, the unreliability of the evidence was a factor to be weighed on the other side of the scale, together with the likely effectiveness of warnings about the nature of such unreliability.<sup>254</sup>

Taken by itself, the 'scale analogy' is ambiguous.<sup>255</sup> However, Basten JA appears to have treated any detailed consideration of reliability as relevant only to establishing unfair prejudice, consistently with the 'no circumstances' approach set out in *Sood*. His Honour's suggestion that *Dupas* mischaracterised *Shamouil* as prohibiting *any* reference to weight, credibility or reliability directs the reader to Spigelman CJ's consideration of unfair prejudice.<sup>256</sup> Similarly, his Honour's comparison of alternative inferences is between the inference drawn by

248 For example, how *expressly* must a matter be put ('what age were you again?' or 'when did we meet again?') as opposed to 'I thought you were in high school?') before an alternative inference can be 'known and evaluated' or is 'objectively ascertainable'?

249 For a slightly different reading to the one given here, see Edmond et al, above n 33, 397–9.

250 *XY* (2013) 84 NSWLR 363, 371 [25].

251 *Ibid* 376 [46].

252 *Ibid* 380 [62].

253 *Ibid* 375–6 [44].

254 *Ibid* 376–7 [48].

255 It could mean, for example, that probative value should be assessed on a 'scale' which balances, on the one hand, the evidence at its highest, and on the other, the unreliability of the evidence mitigated by its capacity to be cured through directions. In the alternative, it could mean, consistently with *Sood*, that unreliability goes to unfair prejudice together with the effectiveness of warnings and directions.

256 *XY* (2013) 84 NSWLR 363, 380 [62], citing *Shamouil* (2006) 66 NSWLR 228, 238–40 [70]–[78]. See also at 378 [52].

the prosecution and an inference the product of unfair prejudice.<sup>257</sup> It was only in this situation that *Dupas* and *Shamouil* would be of ‘similar effect’.<sup>258</sup> Such observations are fair, but perhaps obscure the broader point about probative value. In allowing consideration of reliability in the assessment of probative value, and distinguishing this assessment from *Shamouil*, the *Dupas* Court could not have intended the word ‘could’ to require the uncritical acceptance of the inference preferred by the prosecution, particularly if the plausibility of that inference was contradicted by the weakness attending the evidence.

Basten JA went on to distinguish s 137 from the common law on the basis that it ‘obliges exclusion in prescribed circumstances, which require an evaluative judgment by the court’.<sup>259</sup> This required that ‘attention ... be paid to the language of the statute as the primary source of the law’.<sup>260</sup> His Honour treated *Shamouil* as controlling authority. Normatively, *Shamouil* ‘emphasises the constitutional role of the jury as the body responsible for assessing the credibility and reliability of witnesses, for drawing appropriate inferences and for assessing the strengths and weaknesses of the evidence’.<sup>261</sup> Practically, the ‘ultimate weight [of the evidence] will often depend upon circumstances not yet fully revealed’.<sup>262</sup>

Simpson J’s interpretation of s 137 was consistent with the ‘no circumstances’ approach and her dissent defended the practical dimension of jury deference. Because there were multiple inferences available about what had been admitted to, the ‘value of the evidence to the prosecution case ... depend[ed] entirely upon the interpretation that [the] jury [put] ... upon the evidence’.<sup>263</sup> This was why, consistently with the view of James J in *Rahme*, her Honour held that the purpose of the assessment was to determine ‘what use the jury *could* rationally make of the evidence, in the context of the trial evidence in its complete form. The evaluation is of the importance or significance of the evidence in the same context’.<sup>264</sup> A comprehensive assessment of evidence carried out before the trial had concluded would make it difficult to see where the ‘evidence fits in the overall mosaic of the evidence in the trial’.<sup>265</sup> In contrast,

should the evidence be admitted, the jury will undoubtedly have the benefit of argument from both parties as to what they should make of it, what interpretation they should place upon what the respondent said, and will also have the benefit of detailed directions from the trial judge as to the relevant alternatives.<sup>266</sup>

257 *XY* (2013) 84 NSWLR 363, 378 [52]–[53], 382–3 [71]–[73].

258 *Ibid* 378 [53].

259 *Ibid* 380 [59].

260 *Ibid* 380 [61].

261 *Ibid* 371 [25].

262 *Ibid* 375–6 [44].

263 *Ibid* 391–2 [126].

264 *Ibid* 400 [167] (emphasis in original).

265 *Ibid* 400 [170].

266 *Ibid* 397 [156].



For this reason, '[t]he actual probative value to be assigned to any individual item of evidence lies in the province of the tribunal of fact — in most criminal trials, the jury'.<sup>267</sup> Simpson J therefore concluded that 'probative value' referred to 'the potential of the evidence to have the relevant quality'.<sup>268</sup> The judge's assessment of evidence would thus be 'predictive and evaluative'.<sup>269</sup> For similar reasons, Simpson J rejected the proposition of the *Dupas* Court that 'some' assessment be made of what value *could* (as opposed to *would*) be assigned to evidence by the jury.<sup>270</sup> Her Honour noted that there was nothing in the statutory language which required such a 'partial assessment', or explained 'what limits are imposed on the extent of that exploration'.<sup>271</sup> Simpson J has subsequently reiterated this approach in *Burton*.<sup>272</sup>

## VI RESOLVING THE AMBIGUITY

Section 137 clearly 'restates' *Christie*.<sup>273</sup> That restatement can at best merely incorporate the ambiguities and tensions that were apparent at common law. *Shamouil*, *Dupas* and *XY* reproduce that tension. We respectfully suggest that in the absence of clear direction by the common law the ambiguity be resolved consistently with the rule in *Cooper Brookes (Wollongong) Pty Ltd v FCT*,<sup>274</sup> that 'if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice',<sup>275</sup> and will construe the provision 'in light of the reasonableness of the consequences which follow from giving it a particular construction'.<sup>276</sup>

### A *The Failings of the Restrictive Approach*

Section 137, like *Christie*, is directed at identifying any evidence which, because of the disparity between its unfairly prejudicial effect and probative value, is likely to inflame or divert the jury and thus cause it to give the evidence more weight than it deserves. That purpose is limited by a countervailing purpose: the application of s 137 must exclude no more evidence than is necessary to achieve its purpose. To do so would be inconsistent with the separation of the roles of judge and jury established at common law and accepted by all as relevant to s 137. Further, and unlike the jury, the judge does not have the full benefit of the trial

267 *Ibid* 400 [167].

268 *Ibid*.

269 *Ibid*, citing *R v Fletcher* (2005) 156 A Crim R 308, 317 [35] ('*Fletcher*').

270 *XY* (2013) 84 NSWLR 363, 400 [171].

271 *Ibid*.

272 [2013] NSWCCA 335 (20 December 2013) generally, but see especially [157]–[170], [196]–[198].

273 *Stanoevski v The Queen* (2001) 202 CLR 115, 125 [39] (Gaudron, Kirby and Callinan JJ).

274 (1981) 147 CLR 297.

275 *Ibid* 305 (Gibbs CJ).

276 *Ibid* 322 (Mason and Wilson JJ), quoting *Gartside v Inland Revenue Commissioners* (1968) AC 553, 612 (Lord Reid).

process. He or she cannot assess the probative value of the evidence in a final and determinative way. The countervailing purpose is the basis of the 'restrictive approach' adopted by *Shamouil* and the judgment of Simpson J in *XY*. The restrictive approach defends a conception of s 137 that is almost entirely deprived of any substantive consideration of credibility and reliability in the evaluation of probative value. It does so because it was normatively and practically required in order to show deference to the jury. It is unnecessary to read s 137 in this way, however, in order to preserve the jury's function. Sufficient deference is shown by the proposition that evidence should be put before the jury unless it cannot be made comprehensible by directions.

The balancing exercise is a conceptual device designed to assess whether such comprehensibility can be achieved. Evidence is comprehensible when its proper weight is rationally ascertainable. For the purposes of the balancing exercise, the weight of evidence is accepted as being rationally ascertainable when the danger of unfairly prejudicial effect is proportionate to its probative value. When evidence is more prejudicial than probative, its proper weight is prima facie unascertainable. The assessment then turns to whether directions can restore the proportion. When directions cannot achieve such a proportion, it follows that the evidence cannot be made comprehensible to the jury. It is not necessary to put evidence before the jury that is incomprehensible in order to show it deference. To admit it would risk an unfair result potentially tainted by improper reasoning. This is unfair to the accused.

We say that by prohibiting the consideration of reliability and credibility outside of limited circumstances the 'restrictive approach' increases the likelihood that judges will misestimate the effect that directions and other explanatory processes associated with the trial must have on the danger of unfair prejudice. An assumption that the evidence will be accepted as credible and reliable will overwhelmingly produce assessments of higher probative value than an inquiry directed at the value the evidence could reasonably be given. As previously noted, the higher the probative value of evidence is taken to be, the less impact directions must have before its unfairly prejudicial effect is deemed proportional. This is a problem because, as the *Dupas* Court observed, an assumption that evidence is reliable may lead to it being assigned significant probative value in the very situation in which the relevant danger of unfair prejudice was that probative value would be overestimated.<sup>277</sup> In such circumstances, the danger of unfair prejudice is that the jury will accept the prosecution's explanation of the evidence's significance without proper regard to its weaknesses. Therefore, if evidence is assumed to be credible and reliable for the purposes of the balancing exercise, the judge is as such neglecting to evaluate the capacity of directions to address the possibility that the jury will accept the prosecution's explanation of the evidence's weight for bad and unfair reasons. Such an approach is poorly adapted to simulating the ability of trial processes to cure those well-established unfairly prejudicial effects of certain kinds of evidence for the purposes of determining whether it should be

277 (2012) 218 A Crim R 507, 565–6 [206].

excluded.<sup>278</sup> This is particularly problematic when the evidence, if accepted, may in effect be determinative of guilt.

The normative dimension of the principle of jury deference falls away easily under this conception. It cannot require probative value to be assessed as if the evidence is credible and reliable, once it is accepted that to do so greatly increases the risk that the judge may misestimate the nature of the effect that evidence would have were it put before the jury, and thus fail to properly consider whether directions will sufficiently ameliorate that effect. If the normative dimension is enforced, it would require courts to artificially limit their insight into the distortive effects of evidence in a way that manifestly contradicts the purpose of s 137. In contrast, a closer assessment of the evidence may produce a broader disparity between the evidence's probative value and unfairly prejudicial effect. Conceptually, that disparity may more accurately represent the mitigating effect directions must have before unfairly prejudicial effect is deemed proportional to probative value.

Treating the relevance of credibility and reliability as being restricted to 'limited circumstances' because of jury deference does not rescue the 'restrictive approach' from difficulty. It is predicated upon a particular 'zero-sum' understanding of the judicial assessment of the credibility and reliability of evidence; either evidence is totally unreliable or without credibility or it is maximally probative. As Odgers has observed, there are a whole range of ways the credibility and reliability of evidence can detract from its probative value, without rendering it incapable of being accepted.<sup>279</sup> It follows that evidence of dubious credibility and reliability can still assist in the establishment of facts. The zero-sum dichotomy is thus based upon a false assumption about evidence. Indeed, the logic of *Shamouil* itself precludes the zero-sum. In the name of jury deference, Spigelman CJ prohibited the assessment of credibility and reliability unless to do so demonstrated that evidence was without any probative value whatsoever. Because the Chief Justice saw the need to impose a prohibition, he must have accepted that a range of assessments are able to be made, *but for the need to show the jury deference*. Otherwise, like those who adopt the 'no circumstances' approach, he would have simply denied the possibility of such an assessment altogether. To apply the limited circumstances exception, the judge must be able to differentiate evidence that is merely unreliable from evidence that is 'not truly probative' to determine whether he or she is entitled to exclude it. There is no reason to think that identifying evidence as being entirely without probative value is in any way less involved. Yet the judge does so without the benefit of a trial process. Thus, the limited circumstances exception restricts the consideration of credibility and reliability on entirely normative premises. As we have explained, these premises cannot be sustained.

The 'no circumstances' approach and the practical dimension of the principle of jury deference maintain a degree of force. If a judge *cannot* assess the probative value of unreliable evidence in a way that reflects the options before the jury

278 For a more detailed exposition of this problem see Edmond et al, above n 33.

279 Odgers, above n 62, 814 [1.3.14760].

somewhat accurately, the assumption that it be treated as reliable is simply an unavoidable heuristic convenience. This was why in *XY Simpson J* dismissed so readily the possibility that s 137 could be read to require a ‘partial assessment’.<sup>280</sup> Once such an assessment is dismissed, only two kinds of assessment remain: on the one hand, an entirely hypothetical exercise of probative value informed by the evidence taken at its highest; and on the other hand, an impossible exercise that tries to ascertain the actual probative value that would be assigned to evidence by the jury having had the benefit of a trial. As we shall demonstrate, however, it is unjustified to dismiss partial assessments.

## B In Defence of ‘Partial Assessments’

Our understanding of *Dupas* is that it requires an assessment of the maximum probative value the evidence could rationally sustain, without purporting to make those value judgments that must be made by the jury about how to resolve the credibility and reliability problems with the evidence. As such, we accept the thrust of the practical dimension of jury deference. The judge is not in a position to assess what a particular jury will actually do. That reality must be understood as qualifying the judge’s assessment of ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’.<sup>281</sup> For that reason, our approach does not correspond with what a particular jury will or is likely to *do*. As the *Dupas* Court recognised, that is not the purpose of the assessment.<sup>282</sup> However, as the Commissions noted in their *2005 Joint Report* — s 137, to achieve its purpose, requires a judge to make an evaluative judgment about what effect the evidence is likely to *have*.<sup>283</sup> As *Simpson J* recognised in *XY*, this assessment is ‘predictive and evaluative’.<sup>284</sup> It will always be, by its very nature, flawed, directed at approximations, and based on imperfect assumptions about the ameliorative effect of directions and other trial processes on juries.<sup>285</sup> The assessment is also anticipatory and preventative.<sup>286</sup> Any assumptions made about the evidence are to identify its inherent potential to have the relevant effect, not to establish its *actual* effect, according to a set of artificial premises about the effects of evidence that lawyers trust are precise enough to identify and exclude evidence of that potential. Therefore, it is immaterial that a judge cannot finally and conclusively determine the probative value of the evidence. That assertion is of course true, indeed uncontroversial, and so s 137 must be directed at a test of another kind. As we have demonstrated, that should not be understood to be a test that increases, without adequate justification, the risk that the jury will be provided with evidence that it will misuse.

280 *XY* (2013) 84 NSWLR 363, 400 [171].

281 Uniform Evidence Law Dictionary (definition of ‘probative value’).

282 (2012) 218 A Crim R 507, 525 [63(d)], 567 [210].

283 See the discussion above at p 250.

284 (2013) 84 NSWLR 363, 400 [167], citing *Fletcher* (2005) 156 A Crim R 308, 317 [35].

285 As Edmond et al point out, the correctness of such assumptions may be in doubt: Edmond et al, above n 33, 398–9.

286 *DAO v The Queen* (2011) 81 NSWLR 568, 586 [88]–[89] (Allsop P).

How should the balancing exercise be undertaken? As Moldaver J of the Supreme Court of Canada recently observed, such an exercise '[u]ndoubtedly ... thrusts trial judges into a domain that is typically reserved for the jury'.<sup>287</sup> In justifying the judicial assessment of the reliability of evidence, Moldaver J asserted:

The jury, as the trier of fact, is ultimately responsible for weighing evidence and drawing conclusions from it. The overlap of roles cannot be avoided, but this is not problematic as long as the respective functions of the trial judge, as gatekeeper, and the jury, as finder of fact, are fundamentally respected.<sup>288</sup>

On our conception, probative value and prejudicial effect are parallel normative dimensions of the weight evidence can bring to bear on the jury's determination that a fact in issue exists or does not exist. Whether the evidence's weight is in consequence of its probative or unfairly prejudicial characteristics turns, to a great degree, on the kind of effect the evidence will have on the jury's reasoning. It follows that trying to determine how 'probative' or 'unfairly prejudicial' evidence actually is will not help the judge very much because the jury has not had the opportunity to consider the evidence and therefore whether and to what extent these dimensions shall manifest themselves in the evidence is not yet fixed.

To repurpose (and perhaps butcher) a physics analogy, the box in which Schrödinger's cat has been placed has not yet been opened. Unfortunately for the judge, it falls to him or her to guess whether the cat is alive (the evidence is more probative than unfairly prejudicial) or dead (the evidence is more unfairly prejudicial than probative) in a situation where the variables are such that both possibilities are simultaneously capable of existing (there are weaknesses in the evidence that may or may not distort the reasoning of the jury) without knowing how the determinative process will ultimately resolve the ambiguity one way or the other (whether the reasons why weight will be assigned to the evidence by the jury will be good or bad). Because the actual effect of the evidence on the jury is unknowable, the judge needs to anticipate, using any available knowledge, what he or she is likely to see if the box is opened. Nobody wants to see a dead cat if they can avoid it.

Faced with this problem, we say the judge's task is the fundamentally conservative one of risk management. 'Probative value' should be given a meaning that produces an assessment that satisfies the judge, to the greatest extent possible, that a distortive effect in evidence can be readily addressed should it manifest itself in the reasoning of the jury. Happily, and unlike most versions of the external observer in Schrödinger's thought experiment, the judge has useful knowledge and experience that he or she can use to assess the hypothetical risk of the evidence. Using this information, the judge should (a) make an evaluative judgment about whether the prosecution's assertion of the evidence's probative value relies heavily on the jury's favourable assessment of those aspects of the evidence that the judge considers capable of distorting the jury's reasoning, and

<sup>287</sup> *R v Hart* [2014] 2 SCR 544, 584 [98].

<sup>288</sup> *Ibid.*

if it does, (b) treat that explanation as an ‘unsafe’ inference that is available only if the potential weaknesses in the evidence can be treated through directions and other trial processes. If it cannot, the evidence must be excluded.

Obviously, trifling problems with the credibility and reliability of evidence will not require a particular probative value to be deemed ‘unsafe’. Such an assessment would be over-precise and a sort of reverse-*Shamouil* process whereby the most insignificant probative value would be adopted for the purposes of the balancing exercise. Rather, in applying step (a) the judge will have to justify why it is ‘unsafe’ to deem evidence to have a particular probative value, directing attention to significant dangers and ambiguities (i) the resolution of which in the prosecution’s favour is essential to the inference they say that evidence supports, and (ii) that is of a character that, theoretically, is understood as capable of leading juries to assign evidence weight for bad reasons. A ‘safe’ probative value — that value it is reasonably safe to say does not suffer from the above problems — so conceived does not prophesise about the jury’s actual assessment, but is a functional value that assists the judge to determine whether he or she can effectively preclude the jury assigning evidence more weight than it deserves.

Assuming a risk does exist, step (b) focuses the judge’s mind on whether that risk can be addressed so that any weight assigned because of unfair prejudice is made proportionate to the weight of the probative value it is ‘safe’ to assign. The benefit of equivocating concepts such as ‘reasonably attach’ to ‘safely attach’ is that the judge applying it will have in effect considered whether directions can render any unfairly prejudicial effect proportionate to all assignments of weight hypothetically open to the jury but more controversial than the probative value it is ‘safe’ to assign. Any preferment by the jury of a greater weight could not be for improper reasons, because if the unfairly prejudicial effect of the evidence can be rendered proportional to the probative value it is ‘safe’ to assign it must by implication be proportional to the range of more controversial probative values greater than that ‘safe’ value. If no weight commensurate to even the highest possible probative value is deemed capable of being the product of unfair prejudice in the way described above, it follows that no risk of a misestimate of weight for bad reasons flows from treating the evidence as being at its most probative. In such a scenario, the relevant danger could only be that the evidence creates a prejudice beyond even the highest probative value safely assignable to the evidence. This would address those fairly common situations in which a unfairly prejudicial effect is said will lead the jury to attribute a weight to evidence beyond that attributed even by the prosecution. If that risk does not exist, there is no danger that the evidence’s unfair prejudice will outweigh its probative value.

Given the clear and established ambiguity of s 137’s statutory language, and the unclear operation of the common law, this interpretation should be adopted as consistent with its purpose. Notwithstanding Simpson J’s rejection of the ‘partial assessment’, the question of how an assessment is to be undertaken is, as the Commissions observed, open.<sup>289</sup> Indeed, ‘partial assessments’ may be more

289 See discussion above at pp 259–60.

feasible than Simpson J would accept; as Price J noted in *XY*, judges are capable of apprehending the potential credibility and reliability that evidence could have with the benefit of the *voir dire*.<sup>290</sup> In another context, Allsop P described this as ‘a quintessential task of a trial judge dealing with the living fabric of the trial and the evidence unfolding before him or her’.<sup>291</sup> If this is accepted, it overcomes Simpson J’s objections to some degree. Even if such assistance does not ultimately place the judge in the same evaluative position as the jury, it is certainly sufficient to permit judges to undertake a partial assessment of the kind we think is required to preserve the integrity of the jury’s reasoning.

### **C Considering Credibility**

Section 137 and its fellow exclusionary provisions of broad and general application are designed to have a more significant role in the identification and exclusion of unfairly prejudicial evidence than they did at common law.<sup>292</sup> Therefore, even if *Dupas*’ intermediate approach is a correct reading of the common law, adopting that reading in its entirety is troublesome. Further, to give s 137 a meaning broader than the common law does not ‘remove or encroach’<sup>293</sup> upon any common law rights *Christie* vested in the accused, but in fact enhances them, and is therefore consistent with the principle of legality.<sup>294</sup> There is good reason to do so; otherwise, as is demonstrated by the competing interpretations of *Carusi* by the *Dupas* and *Burton* Courts,<sup>295</sup> whether the weakness of evidence is relevant will become a contest over whether it can be properly characterised to going to credibility or reliability. This misses the point, particularly as the two ‘overlap at times’.<sup>296</sup> What is of concern is whether, if the factor is not considered, the judge is at increased risk of misestimating the required effect of directions. Insofar as there are features of the evidence that are ascertainable by the judge and assist in the determination of this question, they should be considered. This approach is consistent with that of the Commissions, which did not categorically distinguish

290 (2013) 84 NSWLR 363, 408 [224].

291 *DAO v The Queen* (2011) 81 NSWLR 568, 589 [99].

292 See discussion above at pp 250–2.

293 *Dupas* (2012) 218 A Crim R 507, 553 [164], citing *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 433 (French J).

294 As Brendan Lim has recently noted, as statutory intervention became increasingly common, ‘[t]he proposition that a legislative intention to abrogate the common law would be “improbable” was rendered descriptively untenable. Abrogating the common law is precisely what modern legislatures do’: Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372, 384. For that reason, the protection provided to fundamental rights by the principle of legality should not be understood as extending to the preservation of common law doctrines generally. Otherwise, any unclear or ambiguous statutory provision purporting to alter the common law could not be taken to do so, which would, to understate, exclude the operation of the established rules of statutory interpretation considerably.

295 See discussion above at pp 266–9.

296 *R v Butler* [2013] VSC 688 (13 December 2013) [146] (Croucher J). Croucher J did not endorse the substantive proposition that credibility may at times be considered. Quite the opposite — his view is that it is impermissible to withdraw evidence on the basis of its unreliability where to do so would involve a judgment as to its credibility.

between the dangers posed by credibility and reliability but generally considered them as considerations equally capable of being circumstantially relevant.

It may be that in almost every instance the judge can bring nothing more to an assessment of credibility other than his or her personal view that the evidence will be taken as true when it is in his or her opinion untrue. To base the probative value of evidence on such a view would certainly pre-empt the jury's decision-making. Nor does such an assessment offer insight into the effect of directions. On our conception, the judge must point to those facts attending the evidence that impair its credibility and would have to be the subject of directions — without determining its truth or falsity — and set a 'safe' probative value that takes into account the fact that it is unknowable whether the jury will ultimately adopt a controversial inference for fair, or unfair reasons. Undertaking an assessment of this kind accrues a conceptual benefit to the judge because he or she has to consider in detail, and explain, whether and how a particular direction would mitigate credibility-driven unfair prejudice such that it is equivalent to a 'safe' probative value. This would increase the likelihood that the direction is in fact having its intended effect; eliminating the possibility that the jury would ignore or attributed undue significance to defects in the credibility of the evidence.

## VII CONCLUSION

Our interpretation reflects that s 137 is a special instrument underpinned by an important policy objective — ensuring that when a judge is confronted with unfairly prejudicial evidence, he or she, as far as is possible, acts to preserve the fairness of the accused's trial. To that end, it increases the likelihood that the judge will undertake an evaluative judgment that comprehensively responds to the possibility that the evidence will have an effect beyond its legitimate weight, and whether that effect is immune from directions. It is very rare that such effects will not be sufficiently curable through directions. It is doubly important, therefore, to ensure that evidence that is resistant to direction has a high bar to overcome that properly reflects the danger it poses.

This approach is more consistent with the statutory language, context and purpose of s 137 than the 'restrictive approach' as traditionally conceived. To protect the accused s 137 must identify and exclude evidence with unfairly prejudicial aspects that cannot be cured by directions. Hobbled that identification in the interests of jury deference enhances the functions of neither judge nor jury. To the contrary, the restrictive approach increases the odds that judges will underestimate the required effect directions must have to make evidence safe for the jury's use. It increases, without sufficient justification, the risk that evidence will be put before the jury that will distort its reasoning. It is inconsistent with the purpose of s 137 and we respectfully suggest that it should be abandoned.