Chapter 4

Probative Value, Reliability, and Rationality

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It is a fundamental principle of the law of evidence that relevant evidence is admissible, provided its probative value outweighs the risk of any unfair prejudice to which its reception would give rise. This principle is found in unmediated form across a number of provisions of the Uniform Evidence Law (UEL). Section 56 provides that only relevant evidence is admissible. There are general exclusionary provisions – ss 135 and 137 – that provide for the exclusion of evidence, the probative value of which is outweighed by the risk of unfair prejudice.[1] The weighing of probative value and risk of prejudice is also required by the provisions that govern the admissibility of evidence used for tendency and coincidence reasoning.[2] Such evidence must possess 'significant probative value', and where it relates to the defendant in a criminal trial, its probative value must 'substantially outweigh' any prejudicial effect that it might have.

The way in which probative value and prejudicial effect are conceptualised will have a significant bearing on the amount of important but problematic evidence that is presented to juries in criminal trials. The text of the UEL does not indicate how prejudice ought to be understood. Nor does it have anything to say about what kind of prejudice constitutes 'unfair' prejudice. Despite this, the courts have arrived at a broadly accepted understanding of these matters without too much difficulty. Unfortunately, the same cannot be said of attempts to determine how the issue of probative value ought to be approached.

The nature and scope of the inquiry involved in the task of determining probative value is an issue that has divided the appellate courts of the two most populous States to have adopted the UEL. The position adopted by the New South Wales Court of Criminal Appeal required the evidence is to be taken 'at its highest'. Under this approach, regard was to be had to issues of reliability in only a narrow range of 'exceptional' cases. The approach was one born of a concern that permitting a trial judge to engage in his or her own assessment of the reliability of the evidence would undermine the fact-finding role that has traditionally been assigned to the jury.[3] However, it is an approach that was rejected by the Victorian Court of Appeal, which declared it to be 'manifestly wrong'.[4]

1 It is also relevant to decisions to waive the rules of evidence under s 190 and to exclude improperly obtained evidence under s 138.

2 Sections 97 and 98.

3 *R v XY* (2013) 84 NSWLR 363; *R v Shamouil* (2006) 66 NSWLR 228. G Edmond, D Hamer, A Ligertwood and M San Roque, 'Christie, Section 137 and Forensic Science Evidence (After *Dupas v The Queen* and *R v XY*)' (2014) 40 *Monash University Law Review* 389, 395.

4 *R v Dupas* [2012] VSCA 328.