PART II: *IMM*, PV, (UN)RELIABILITY
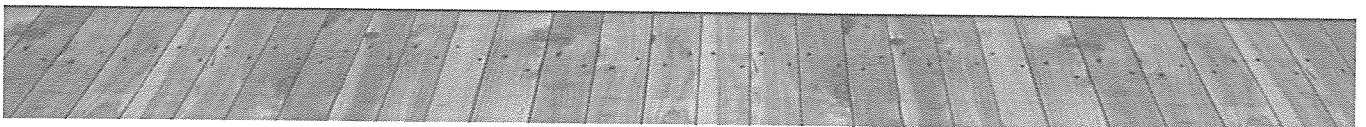
DEFINITIONS

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* s 137, Evidence Act:

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

* Probative value – dictionary

'the **extent to which** the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'

* Degree of relevance? Or content (relevance) + genesis?

CREDIBILITY AND RELIABILITY

- Common law definition: Nettle and Gordon JJ, *IMM*:

"Before proceeding further, it is important to be clear abut what is meant by "credibility" and "reliability" in this context. At common law, a distinction was ordinarily drawn between the two concepts. The credibility of a witness was commonly understood as meaning the **"truthfulness" of the witness** – whether the witness genuinely believed that he or she was telling the truth. Reliability on the other hand, referred to the **ability of the witness accurately to discern and relay the truth** as to an event, including the witness's ability to observe and remember facts."
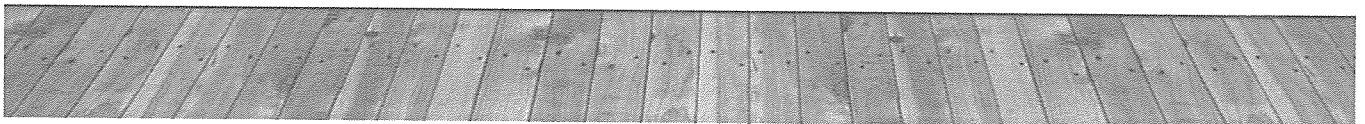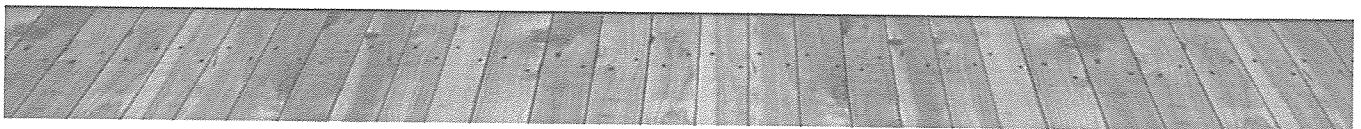
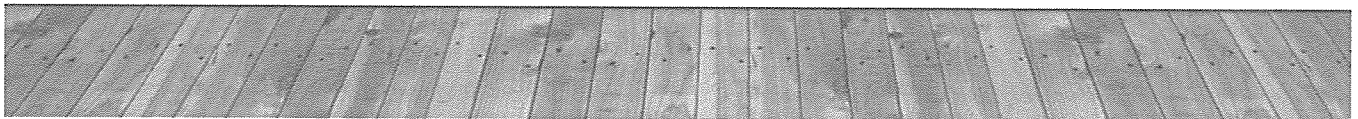# CREDIBILITY AND RELIABILITY

- Evidence Act Dictionary

Credibility:

"credibility of any part or all of the evidence of the witness, and includes the witness' ability to observe or remember facts and events has given, is giving, or is to give evidence."

- So: subsumes **both** credibility and reliability from common law – 'honesty' **and** 'capacity to observe'

- Reliability *not* defined, but goes beyond common law reliability given that is subsumed by credibility definition in the Evidence Act

IMM V THE QUEEN [2016] HCA 14

- Appeal from admission of tendency evidence

- Issue turned on dispute between Victorian/NSW Supreme Courts – when determining PV: do we assess credibility/reliability or not?

- **Majority:** NO – proceed on an assumption that the jury will accept evidence, precludes this assessment

- **Gageler J:** YES, both

- **Nettle/Gordon JJ:** YES, both

# PROBLEM WITH IDENTIFICATION EVIDENCE POST-*IMM*

- Any identification generally a positive, black-and-white assertion, i.e. 'I saw X commit an offence'.

- If credibility/reliability cannot be assessed then:

Facebook ID hypothetical
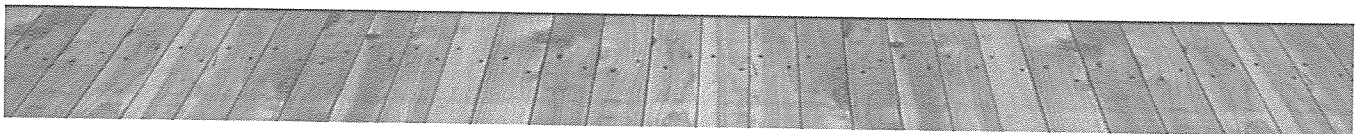
AND

ID after properly conducted photoboard....

- **Same** probative value: highest possible – in a pure identification case, couldn't be **more relevant**

- Why 'degree of relevance' not complete picture
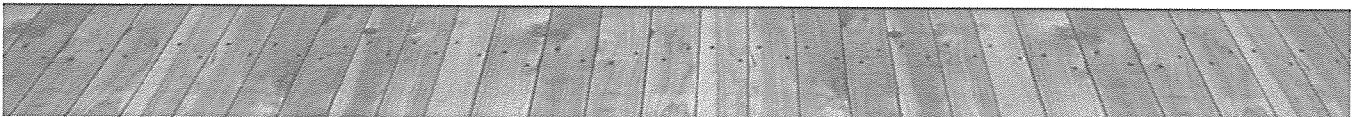
TWO TAKEAWAYS FROM *IMM*

How to deal with this problem? Two takeaways from *IMM* that might help

1. Justice Heydon's hypothetical – 'dark and foggy night'
2. Types of reliability

JUSTICE HEYDON'S HYPOTHETICAL

At [50] of *IMM*:

It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all. **The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified.** As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). **On another approach, it is an identification, but a weak one because it is simply unconvincing.** The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. **The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.**
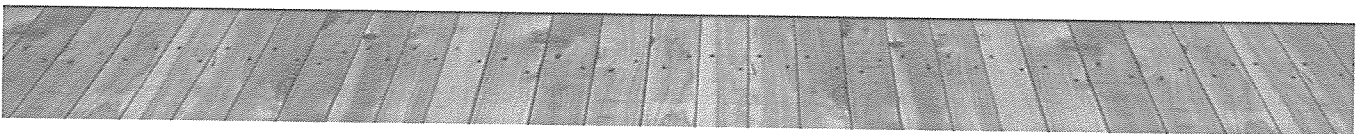
HEYDON J'S HYPOTHETICAL CONT'D

1st question: is 'simply unconvincing' a static bar or spectrum?

- Do circumstances bring ID to a point where it drops off to become 'simply unconvincing'

- OR: is it a scale of 'unconvincingness'?

- Second makes more sense

- Problem: appears to simply be another name for unreliability

- Nevertheless: VCA in *Bayley* used *IMM* to find that Facebook ID in that case was 'simply unconvincing', **lowering its probative value**
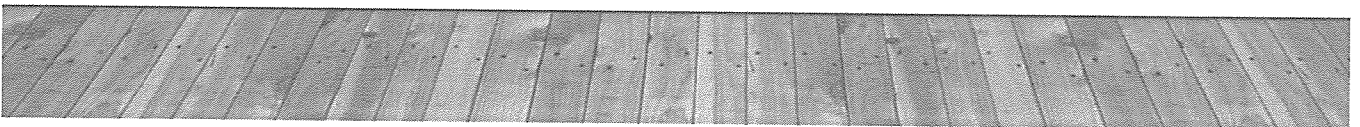 - Relied on delay and displacement rather than 'foggy night'
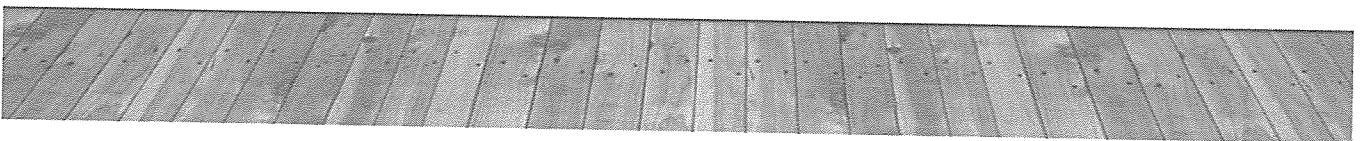
TYPES OF RELIABILITY

- Suggested way of understanding these problems: **three types of reliability**

1. **'Personal' reliability**

Per common law: capacity to observe and relay events:

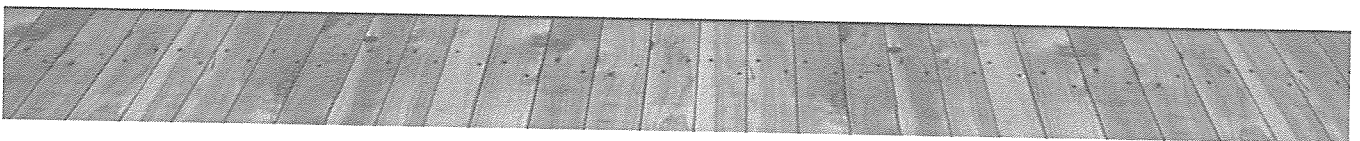   Sight, hearing, drunkenness, memory etc

TYPES OF RELIABILITY CONT'D

2. Circumstance' reliability (Heydon's hypothetical)

Per *IMM* majority: 'unconvincingness

Factors external to the person: night, fog, raining, delay

Finds conceptual support in *DPP v Hague* [2018] VSCA 39

DPP V HAGUE [2018] VSCA 39

- Victorian Court of Appeal decision – uphold DPP appeal against exclusion of ID evidence as 'reliability/credibility' considered
- In so doing recognise 'circumstance reliability' as applied in *Bayley*:

"Plainly enough, **the probative value of identification evidence is likely to be affected by 'surrounding circumstances'** such as: the **weather conditions** at the time the witness observed the person...; the **distance** between the witness and that person; and the presence of **other people** in the vicinity... at the relevant time."
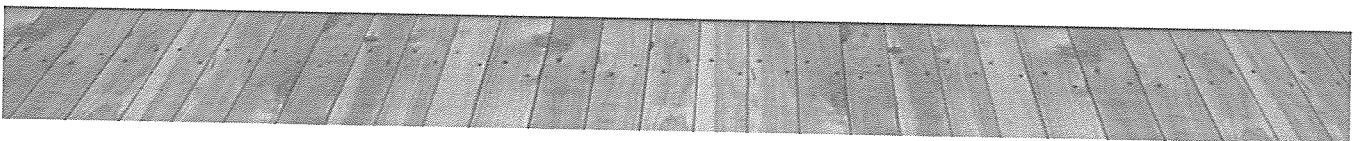
DPP V HAGUE – CONT'D

"Thus, as the High Court said in IMM, it would be open to a judge to conclude that the existence of foggy conditions and poor light at the time… **reduced 'the extent to which'** the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. In those circumstances, the 'highest level' of the evidence might be assessed as being 'not very high at all'."

- 'extent to which' – degree of relevance, but not **content**

- So probative value not just **content**, but **genesis** of evidence

- Applies to either types of 'reliability' as well – reliability of evidence depends on its genesis
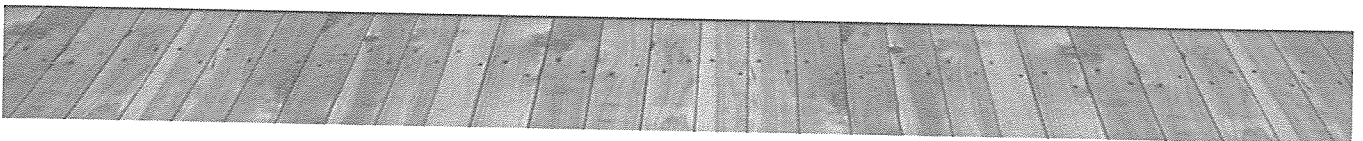
TYPES OF RELIABILITY CONT'D

3. 'Categorical' reliability

Categories of inherently unreliable evidence, - ID, hearsay etc – s165, *EA*

Unreliable evidence due to its **nature**, regardless of personal or circumstance reliability

Nettle and Gordon JJ, *IMM*:

"Similarly under the Act, the rules of admissibility an exclusion are based on the understanding that some evidence may be so unreliable as to have minimal capacity to bear on the facts. Just as at common law, so too under the Act it is recognised that **particular categories of evidence** – including hearsay evidence, identification evidence and evidence of bad character (of an accused or witness) **can be and sometimes are so unreliable** as to make the evidence unsuitable for the jury's consideration."
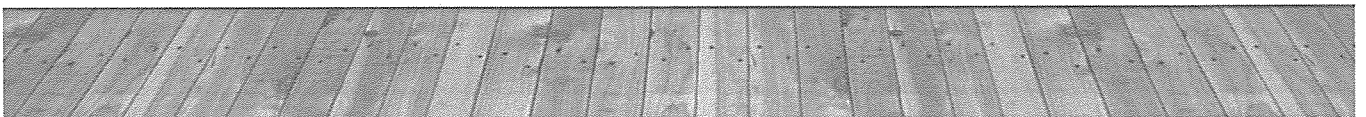
THE QUEEN V DICKMAN [2017] HCA 24

- Unanimous HCA decision supporting conclusion that 'categorical unreliability' can affect probative value of evidence post-*IMM*

- Admissibility per s 137 of photoboard ID:

"[T]here is no dispute that the probative value of the evidence was rightly assessed by the trial judge as low. This was an estimate that did not depend upon his Honour's assessment of Aakbari's truthfulness or reliability as a witness. Assuming that the jury would accept the August 2011 identification at its highest, it was identification with limited capacity to rationally affect the assessment of the probability that the respondent was the "old man." This is to recognise not only the limitations of photographic identification, but also that the August 211 identification was evidence of Aakbari's opinion that of the 11 men whose photographs were included in the array, the respondent's photograph bore the closest resemblance to his recollection of the appearance of the man who had assaulted him two years earlier."

- 'Limitations of photographic identification' – 'reliability' of photographic identification?
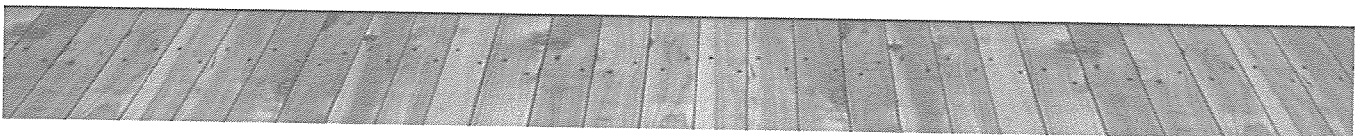
THE QUEEN V DICKMAN CONT'D

- 'Limitations of photographic evidence' both:

A 'categorical' consideration: photographic evidence **in general**

AND

A factor that lowered probative value

- HCA determine this in line with *IMM* despite **not** considering 'personal reliability', being Aakbari's 'truthfulness or reliability as a witness'

- HCA careful not to use term 'reliability', but 'limitations'
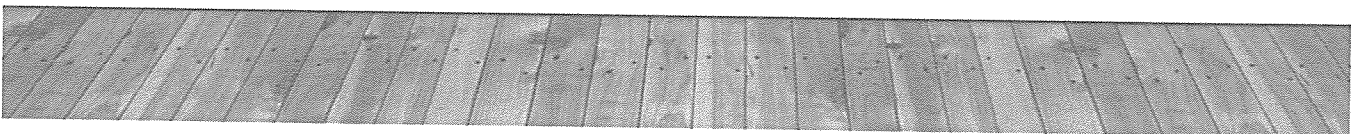
CATEGORIES OF RELIABILITY APPLIED TO FACEBOOK HYPOTHETICAL

1. **Personal reliability**

That Jane was 'slightly short-sighted' is clearly a factor that affects her personal reliability – unable to be considered in assessing PV

2. **Circumstance reliability**

Only saw offender for 'seconds' – circumstance reliability, might affect PV per 'unconvincingness' and *R v Bayley* and *DPP v Hague*

3. **Categorical reliability**

Identification evidence with risks of displacement/suggestion, would affect PV per *R v Dickman*
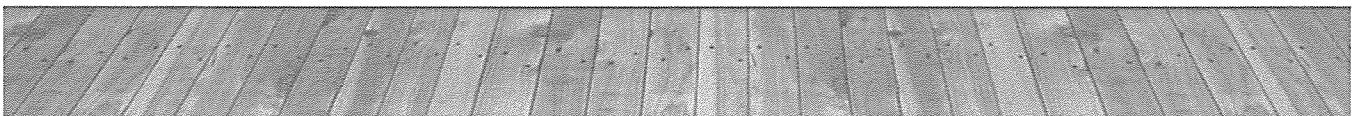
WHERE TO FROM HERE?

- Question of assessing probative value conceptually very difficult

- Cases where courts are coming to very different conclusions about PV of evidence

- Identification evidence, and categories of reliability, a useful tool to assess and unpack probative value post-*IMM*?

- Increasing use of social media will force courts to confront these difficult questions more and more often