Regulatory & Environment Insights

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Letting go of bad blood? Assessing probative value under s. 138, *Evidence Act* (*R v Riley* [2020] NSWCCA 283)

KEY POINTS

- In assessing the probative value of unlawfully or improperly obtained evidence for the purposes of s. 138 of the *Evidence Act 1995*, the court should take the evidence at its highest.
- Unless the tribunal of fact could not rationally accept the evidence, reliability should not be taken into account in the assessment of probative value.

BACKGROUND

In deciding whether improperly or illegally obtained evidence may be admitted under s. 138(1) of the *Evidence Act*, the court must take into account the probative value of the evidence: s. 138(3)(a). The Court of Criminal Appeal's decision in *Riley* provides useful guidance on the proper approach to the assessment of probative value.

In *Riley*, the accused was charged with serious offences relating to a fatal motor vehicle accident. The prosecutor sought to rely on expert toxicological evidence based on a blood sample taken from the accused after the incident. The blood sample was missing its outer tamper-proof cap when it arrived in the laboratory for analysis, although the inner cap was in place. A *voir dire* was held on the admissibility of the evidence.

JUDGMENT ON THE *VOIR DIRE*

The trial judge:

- held that it could not be positively shown by the prosecutor that the blood sample was taken in accordance with the procedure required under the *Road Transport Act 2013*
- excluded the evidence on the basis that the probative value was not high because the integrity of the blood sample could not be guaranteed.

The Director of Public Prosecutions appealed against this ruling.

COURT OF CRIMINAL APPEAL

The Court of Criminal Appeal (CCA) (Bathurst CJ, Button and Wilson JJ agreeing) held that the trial judge had erred in assessing the probative value of the evidence. The CCA considered that, in accordance with *IMM v the Queen* (2016) 257 CLR 300 and *The Queen v Bauer* (2018) 266 CLR 56, the trial judge was required to take the evidence at its highest. There was no evidence that the integrity of the sample was compromised, although this was a possibility. While the absence of the tamper-proof cap cast some doubt on the reliability of the evidence, that would ultimately be a matter for the jury, as the tribunal of fact, in assessing the evidence (at [120]).

The CCA rejected a submission by Mr Riley that even taking the expert evidence at its highest, it was based on a sample that had possibly been the subject of tampering. The CCA observed that credibility and reliability could only be considered if the risk of contamination, concoction or collusion was so great that the jury could not rationally accept the evidence. Here, the jury would be entitled to reject the possibility that the sample was contaminated. As such, the evidence taken at its highest would be of very high probative value (at [121]-[123]).

The CCA considered afresh whether the evidence should be excluded under s. 138 of the *Evidence Act* and concluded that the desirability of admitting the evidence outweighed the undesirability. Accordingly, the appeal was allowed and the evidence declared to be admissible.

IMPLICATIONS FOR PROSECUTORS

Riley is a useful reminder to prosecutors that the probative value of evidence, in the sense of its *potential* to prove a fact in issue, is determined on the basis that the tribunal of fact will take the evidence at its highest.

Potentially unreliable evidence may be admissible under s. 138; the assessment of reliability is a matter for the tribunal of fact.

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CONTACTS

Sarah-jane Morris, Director
Sarah-jane.Morris@cso.nsw.gov.au
02 9474 9390

Katrina Frearson, Senior Solicitor
Katrina.Frearson@cso.nsw.gov.au
02 9497 9558

Luke Teo, Senior Solicitor
Luke.Teo@cso.nsw.gov.au
02 9497 9276

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