



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 215

MAY 2025

**CRIMINAL LAW
INVESTIGATION AND PROCEDURE
VICTORIA**

I Freckelton

Material Code 42608718

Print Post Approved PP255003/05497

© Thomson Reuters (Professional) Australia Limited 2025

Looseleaf Support Service

You can now access the current list of page numbers at

<http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599>. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195

Fax: 1300 304 196 Email: Care.ANZ@thomsonreuters.com

Mirko Bagaric has made the following updates to Vic Crim:

Chapter 27B Evidence Act

In *Obian v The King* [2024] HCA 22, the High Court upheld a decision relating to 233(2) of the Criminal Procedure Act 2009 (Vic) (which contains a statutory prohibition against the prosecution splitting its case) where it was held that the prosecution could tender further evidence because evidence given by the appellant was not reasonably foreseeable.

[EA.79.80] Evidence wholly or substantially based on that knowledge

In *R v Whitfield* [2024] NSWCCA 124, the Court made the following observations in admitting expert evidence of the effects of blood alcohol content on the operation of a jet ski:

1. In conformity with the cautions offered by Dixon CJ in *Clark v Ryan* at 491-492, referring to what was said by Williams J in *Reg v Silverlock* [1894] UKLawRpKQB 152; (1894) 2 QB 766 at 769, “[n]o one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people.” No person may be “qualified as an expert to express his conjectures, which [are] paraded as scientific opinions”: per Menzies J in *Clark v Ryan* at 501.

In *BQ v The King* [2024] HCA 29 the High Court ruled on the admissibility of expert evidence regarding the behaviour of child sexual abuse victims. The appellant was convicted of a number of sexual offences against his two nieces. At the trial, the prosecution adduced evidence from Associate Professor Rita Shackel regarding how child sexual assault victims generally respond to the offences committed against them.

[EA.87.20] Admissions made with authority

- In *Audish v R* [2024] NSWCCA 196, at [85], it was held that in criminal proceedings, s 87(1)(c) ‘should be construed as requiring that the common purpose relied upon is a common purpose embraced by the offence charged’.
- If the prosecution wishes to rely on admission, the trial judge must give an ‘incriminating conduct’ direction, pursuant to the *Jury Directions Act 2015* (Vic), s 21. The failure to give such a direction regarding an implied admission

in *Sturt* (a pseudonym) v *The King* [2024] VSCA 102 resulted in a retrial being ordered.

- **SECTION 90 COMMENTARY**

- *Ridley* v *The King* [2024] VSCA 308 summarised the operation of section 90 in the following terms at [50]-[53]:
- In *Em*, Gleeson CJ and Heydon J held that the reliability of evidence was a factor affecting the fairness of its use.[29] They noted that it is possible for an accused person to invoke s 90 successfully, even if they fail to invoke, or fail to successfully invoke, any other ground of exclusion.[30] Gummow and Hayne JJ held that considerations of reliability may have a role to play if the statement was not made in the course of official questioning (s 85(1)(a)), or as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or continued (s 85(1)(b)). However, if s 85(1) is engaged, and the evidence not excluded pursuant to s 85(2), then considerations of reliability are not relevant to the exercise of the s 90 discretion.

[EA.PT3.6.100] Meaning of probative value

In *Pham* v *The King* [2024] VSCA 159, at [74], the Court noted that:

It appears to be accepted that a Court making an assessment of the probative value of identification evidence for the purposes of admissibility under s 137 may have regard to the circumstances that surround the identifying witness' initial observation of a certain person. The High Court in *Dickman* appears to have given approval to the notion that identification evidence that is in the nature of evidence of mere 'resemblance' — that is, where the identifier is other than 'adamant' that the person identified was the offender — may also be a relevant consideration for the purposes of an assessment of probative value under s 137.[36] This Court in *Moreno*, and in *Fowkes*, has interpreted *Dickman* as authorising the taking into account of risks of displacement and suggestion inherent in a later process of identification such as the use of a photoboard or picture.

[EA.PT3.6.200] No need for striking similarity

In commenting on the significance of *Bauer*, the Court in *Harris* (a pseudonym) v *The King* [2024] VSCA 43 at [70] stated:

In *Bauer*, the High Court drew a distinction between single-complainant and multiple-complainant cases. In relation to the former, the tendency is built on

a sexual attraction to a particular person, being an attraction that would apply equally in different contexts.[26] In relation to the latter, there must be some common feature or link.[27] In this case, although there was a time span and the charges ranged in seriousness, there was a common and important link in the relationship in that it covered children who had been in the applicant's care (both his biological children and JK). It was this link that provided the evidence with its significant probative value. The same link provides a strong basis for distinguishing McPhillamy.

For an example in which a conviction was overturned because of the inadequacy of tendency direction by the trial judge, see *Briggs (a Pseudonym) v The King* [2024] VSCA 80.

[EA.110.20] Good character evidence by accused

In *Schmidt v The King* [2024] VSCA 256 convictions for sexual offences were overturned when it was that the trial judge made a mistake in not permitting a witness to give evidence that that accused is a person who behaves respectfully towards women, even when affected by alcohol. In *Wallace v R* [2024] NSWCCA 176 a conviction was overturned because the judge failed to give a good character direction.

Magistrate Gregory Connellan has added the following updated to Chapter 42 Road Safety Act:

[RSA.48.140] Effect of s 48(1A) presumption

- A defence is created by s 48(1A) in relation to s 49(1)(f) *“if, and only if, the alcohol in a sample of breath taken within three hours of driving was solely due to the consumption of alcohol after driving or being in control of a motor car.”* The same will apply to alcohol in blood or a prescribed illicit drug in oral fluid in relation to s 49(1)(g) and (j).

Expert evidence as to effect of consumption of alcohol on the accused based solely on the accused's own account of their alcohol consumption is not *material evidence* that corroborates the accused's evidence in the sense required by s 48(1A). Note evidence as to effect of consumption of alcohol on the accused is admissible only for the purpose of rebutting the presumption created by s 48(1A): s 49(6).

[RSA.49.80] Section 49 offences – absolute responsibility

The test to determine whether a statutory offence should be considered an absolute or strict liability offence is set out in the NSW case of *R v Narouz*. Narouz's case involved an offence of driving whilst a prescribed illicit drug was present in the person's oral fluid, blood or urine. The wording of the NSW legislation is significantly different from offences created by s 49(1). In *Narouz Chen J*, relying on *He Kaw Teh*, identified four

considerations for determining whether a statutory offence displaced the common law presumption intent or mens rea is an essential element of an offence.

[RSA.49.1040] Defences to s 49(1) offences

For commentary in regard to some of those defences see [RSA.49.1640] “Defence – permissible non-prescription or prescription drug”, [RSA.49.2720] “Defence – reason of a substantial character for refusing s 55(9)”, [RSA.49.3240] “Defence – substantial reason for refusing s 55E(12)”, [RSA.49.3420] “Defence – alcohol due to post driving consumption”, [RSA.49.3440] “Defence to s 49(1)(f) – EBT instrument not working or improperly used – s 49(4)”, [RSA.49.3680] “Defence to s 49(1)(g) – analysis not correct – s 49(5)”, [RSA.49.3840] “Defence – drug due to post driving consumption”, [RSA.49.3860] “Defence to s 49(1)(h) – result of analysis not a correct result – s 49(5)”, [RSA.49.4080] “Defence – drug due to post driving consumption”, [RSA.49.4100] “Defence to s 49(1)(i) – analysis not correct – s 49(5)”.

[RSA.49.1100] Second or subsequent offence and corresponding law

). However, where the prosecution relies on a Certificate pursuant to s 84 of the *Road Safety Act 1986* to establish a prior conviction based on a traffic infringement notice the Certificate must comply with the requirements of the legislation. A document signed by the informant containing the prescribed particulars, including the particulars of the alleged prior convictions or finding of guilt, can only be tendered with the consent of the accused if the accused is present at the hearing

