ARTICLE

[3530] Killing a zombie — the repeated death of Hoch v R *by Peter Berman*

A recent decision from the Court of Criminal Appeal is of considerable importance in resolving conflicting decisions in that court regarding the proper approach to take to the admissibility of tendency and coincidence evidence where there is a risk of joint concoction.

The decision should finally put aside any lingering suggestion that the rule in *Hoch v R* (1988) 165 CLR 292; 81 ALR 225; BC8802626 must be considered when deciding whether such evidence should be admitted. A risk of concoction no longer mandates rejection of the evidence. Especially, when considered along with *JG v R* [2014] NSWCCA 138; BC201406153; 21(9) Crim LN [3427], the decision will mean that tendency and coincidence evidence is admitted much more frequently.

Unfortunately the decision in not published on Caselaw as the trial of the accused is yet to be held. Accordingly, the name of the case will not be mentioned in the article, only its citation — [2014] NSWCCA 280.

Over the years, repeated attempts have been made to ignore the plain words of the Evidence Act 1995 in favour of old common law rules, with perhaps the best example of this concerning the admissibility of tendency evidence, and in particular the effect of a risk of joint concoction on the probative value of such evidence.

In 1988 the High Court considered this issue in *Hoch*. The ruling in that decision presented a significant impediment to the tender of such evidence, particularly by the prosecution.

But then, in 1995, the law on evidence changed with the introduction of the Evidence Act which overturned some of the common law rules of evidence that had been laid down by the High Court. Despite that fact, on many occasions the *Hoch* rule, rejecting propensity evidence where there was a risk of that evidence being the result of concoction, continued to be applied by trial and appellate courts. However, there was a substantial view abroad that it was a significant error of law to do so.

Writing after his retirement from the High Court, The Hon, Dyson Heydon AC QC, in delivering the Paul Byrne memorial lecture last year, summarised the position post the Evidence Act thus:

> The importation of a *Hoch* qualification was a gratuitous judicial creation, unsupported by any explicit statutory language. Indeed the judicially generated rebirth of the *Hoch* qualification in, or its grafting on to, a statute was a rather astonishing event, because it took place in the teeth of the legislative murder of its common law existence.

Mr Heydon makes his position quite clear: "the *Hoch* qualification should not have been introduced into ss 97–98".

As he notes, although the legislature tried to kill off the *Hoch* rule, it survived, perhaps most notably in 1999 in *R v Colby* [1999] NSWCCA 261; BC9906404 where the Court of Criminal Appeal held that a reasonable possibility of concoction meant that the evidence "must" be withheld from the jury.

The Court of Criminal Appeal then made an attempt to finally eradicate the *Hoch* rule in *R v Ellis* [2003] NSWCCA 319. This five judge bench decision, in which it was made abundantly clear that the Evidence Act had changed the rules regarding tendency evidence, might have been thought to have consigned *Hoch* to history. But there continued to be pockets of resistance, and, zombie like, *Hoch* just would not lay down and die!

Hoch is regularly quoted in applications to adduce tendency evidence, and the mandated rejection of evidence spoken about in *Colby* is referred to on occasion despite the fact that the decision was effectively overruled in *Ellis*.

The most prominent of the judgments attempting to keep *Hoch* alive post *Ellis* can be found in *BP v R* [2010] NSWCCA 303; BC201009509 and *FB v R* [2011] NSWCCA 217; BC201107721. Other judgments which advanced a different view are to be found in *R v Le* [2000] NSWCCA 49; BC200001004, *R v Andrews* [2003] NSWCCA 7; BC200300136 (both of which actually predated *Ellis*), the two *BJS* decisions [2010] NSWCCA 239; BC201007716 and (2013) 231 A Crim R 537; [2013] NSWCCA 123; BC201310918, *AE v R* [2008] NSWCCA 52; BC200801749 and *Saoud v R* [2014] NSWCCA 136; BC201406007.

Fortunately the Court of Criminal Appeal has now begun to speak with one voice. The recent history is largely dealt with in the restricted judgment mentioned above. Bellew J, with whom the other members of the court agreed, said:

> [75] In my view, the reliance placed by the applicant in the present case upon *Hoch* and those cases which followed it was (as Hoeben CJ at CL described it in BJS No. 2) problematic. Such an approach tends to overlook the decisions in *Ellis* and *Saoud v R* [2014] NSWCCA 136. As Bell JA (as her Honour then was) stated in *AE v R* [2008] NSWCCA 52 at [44]:
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> > *Hoch* was concerned with the admission of similar fact evidence under the common law and propounded the "no other rational view" test that was adopted in *Pfennig v The Queen* (1995) 182 CLR 461 at 482–483 per Mason CJ, Deane J and Dawson J. This is not the test for the admission of tendency or coincidence evidence under the Act; *R v Ellis* [2003] NSWCCA 319

As a result, the preponderance of views now emanating from the Court of Criminal Appeal is that decisions such as *Colby*, *BP* and *FB* are no longer good law insofar as they suggest that a real possibility of concoction requires the rejection of tendency evidence.

Popular culture suggests that zombies can be killed by an axe to the head. Given the number of times in which *Hoch* has been raised from the dead it would be a brave supporter of the statutory tests to be found in the Evidence Act who puts his or her axe away just yet.