

IN THE MAGISTRATES' COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

Suitable for Publication

Case No. K10099459

DIRECTOR OF PUBLIC PROSECUTIONS

Crown

v

CRAIG DUGALD MCLACHLAN

Accused

MAGISTRATE:

Wallington B

WHERE HELD:

Melbourne

DATE OF HEARING:

18 - 21 November 2019, 25 - 29 November,
2 - 6 December 2019, 9 December 2019, 11
March 2020, 21 April 2020, 27 April 2020, 2
October 2020, 2 November 2020, 4 - 6
November 2020 and 9 November 2020

DATE OF DECISION:

15 December 2020

CASE MAY BE CITED AS:

DPP v McLachlan

APPEARANCES:

Counsel

Solicitors

For the Director of Public
Prosecutions

Mr Matt Fisher
Mr Lachlan Cameron

Office of Public
Prosecutions

For the Accused

Mr Stuart Littlemore QC
Mr Sam Tovey

Milides Lawyers

INTRODUCTION

1. The allegations against the accused, Craig McLachlan ('the accused'), arise from the 2014 production of the Rocky Horror Show ('RHS') in which the accused played the lead role of Frank-N-Furter. The tour began in Brisbane and then travelled to Perth, Adelaide, and finally, Melbourne between 26 April and 14 July 2014.
2. Four actresses, who had various roles in the production, allege that during the Melbourne run of the RHS, the accused indecently assaulted them.
3. Charges of common law assault were filed as alternatives to each of the indecent assaults, save one. There is a further, stand alone, allegation of common law assault against one complainant.
4. Some of the alleged assaults occurred on stage during live performances; others in various parts of the Comedy Theatre, including the dressing rooms. All were in the complainants' workplace.

GENERAL DIRECTIONS

5. In a hearing where there are multiple complainants and multiple charges, each charge must be given separate consideration, other than where the court has ruled that the evidence is cross-admissible.
6. I am required to direct myself as a judge would a jury.¹
7. The Crown bears the onus or burden of proving the accused guilty with respect to each of the charges beyond reasonable doubt.
8. The accused is presumed to be innocent of any charge until such time as the Crown satisfies me beyond reasonable doubt of his guilt. The accused bears no onus of proof in these proceedings.
9. I may only draw an inference against the accused if it is the only inference that may rationally and reasonably be drawn in the circumstances.

¹ *Jury Directions Act 2015* (Vic) s 4A.

10. I must assess the reliability of each witness, that is whether the witness has an accurate memory of the events about which the witness has given evidence. I must determine the relevant facts logically and rationally, according to the evidential material.
11. I am not required to reject a witness wholly. I can accept everything that a witness has said if I consider all of it worthy of acceptance, I can reject everything that a witness has said if I consider none of it worthy of acceptance, or I can accept that part of what a witness said I consider worthy of acceptance and reject the rest of what that witness said as I consider it unworthy of acceptance.
12. The accused gave evidence. He was not obliged to. His evidence is to be assessed like that of any other witness. Even if I reject his evidence, the burden remains upon the Crown to prove its case beyond reasonable doubt.
13. I must set out the reasoning process by which I have applied the relevant law to my findings of fact.²
14. The complainants are accorded pseudonyms in conformity with the *Judicial Proceedings Reports Act 1958* (Vic): CA, CB, CC and CD respectively. Where the naming of other witnesses might lead to the identification of a complainant, they too have been accorded pseudonyms.

² *Makeham v Sheppard* [2020] VSCA 242.

THE CHARGES

15. The charges provided:

Charge 1	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CB in indecent circumstances by pressing his penis against her body while being aware that CB was not consenting or might not be consenting, or while giving no thought to whether CB was consenting or might not be consenting.
Charge 2	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CB in indecent circumstances by kissing her mouth while being aware that CB was not consenting or while not giving any thought to whether CB was consenting or might not be consenting.
Charge 3	Dismissed at the end of the prosecution case on a successful no case to answer submission.
Charge 4	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CA in indecent circumstances by kissing her mouth while being aware that CA was not consenting or might not be consenting, or while giving no thought to whether CA was consenting or might not be consenting.
Charge 5	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CA in indecent circumstances by kissing her neck while being aware that CA was not consenting or might not be consenting, or while giving no thought to whether CA was consenting or might not be consenting.
Charge 6	Withdrawn by the prosecution.

Charge 7	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CC in indecent circumstances by running his hand up her inner thigh while being aware that CC was not consenting or might not be consenting, or while giving no thought to whether CC was consenting or might not be consenting.
Charge 8	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CD in indecent circumstances by partially tracing down the join of her labia while being aware that CD was not consenting or might not be consenting, or while giving no thought to whether CD was consenting or might not be consenting.
Charge 9	The accused at Melbourne on the 9 th May 2014 did assault CD (at common law).
Charge 10	Withdrawn by the prosecution.
Charge 11	The accused at Melbourne between the 26 th of April and the 13 th July 2014 did assault CB (at common law, alternative to charge 1).
Charge 12	The accused at Melbourne between the 26 th of April and the 13 th July 2014 did assault CB (at common law, alternative to charge 2).
Charge 13	The accused at Melbourne between the 26 th of April and the 13 th July 2014 did assault CA (at common law, alternative to charge 4).
Charge 14	The accused at Melbourne between the 26 th April 2014 and the 13 th July 2014 did assault CA in indecent circumstances by straddling her lap while being aware that CA was not consenting or might not be consenting, or while giving no thought to whether CA was consenting or might not be consenting.
Charge 15	The accused at Melbourne between the 26 th of April and the 13 th July 2014 did assault CA (at common law, alternative to charge 5).
Charge 16	The accused at Melbourne between the 26 th of April and the 13 th July 2014 did assault CC (at common law, alternative to charge 7).
Charge 17	Withdrawn by the prosecution.

THE ELEMENTS OF THE OFFENCES

16. The elements of the offences are not the subject of dispute. They are set out in the prosecution submissions:

Indecent assault

17. In order to prove the offence of Indecent assault, the Crown must prove the following five elements beyond reasonable doubt:

- (i) that the accused touched the complainant in the way alleged (can be direct or indirect);
- (ii) that the touching was intentional (it was deliberate, not accidental);
- (iii) that the touching occurred in indecent circumstances (it must involve a sexual connotation);
- (iv) that there was no lawful justification for the touching (such as the consent of the complainant); and
- (v) that at the time of the touching the accused either was aware that the complainant was not or might not be consenting, or, was not giving any thought to whether the complainant was not or might not be consenting.

Common assault

18. To prove this offence, the Crown must prove the following three elements beyond reasonable doubt:

- (i) the accused applied force to the body of the complainant;
- (ii) the application of force was intentional; and
- (iii) the application of force was without lawful justification or excuse.

THE EVIDENCE

Complainant 1 (CA)

19. CA was cast in one of the principal roles in the RHS. She met the accused for the first time during pre-publicity for the show, prior to rehearsals commencing in Sydney on 9th December 2013. Her relationship with him at that time was “fun”, he was “goofy”, he knew a lot of people and he had played the role before. In contrast, it was only her second theatrical production and she was conscious of some criticism. Her relationship with CD, in particular, was not very good during the tour, and there had been a dispute with her over a dressing room.
20. While the company was performing in Adelaide, the accused visited CA in her dressing room on a number of occasions of which two stood out because he entered her dressing room after asking if she was “decent” and though she said “no”, he came in anyway. She did not protest because it was uncomfortable and awkward, and he was the star of the show.
21. During the Melbourne tour between 26th April and 14th July 2014, the accused told her he needed to speak to her about something important. This was the occasion of charges 4 and 13.
22. The accused came to her dressing room door a few times but did not enter when others were there. A short time later when she was alone, he came in, knelt before her and asked her to stop doing her makeup and look at him because what he had to say was very important. He said he thought she was beautiful, that he couldn't stop thinking about her, he was falling for her, he was increasingly enchanted by her and, then he said, “there's something I've got to do”. He took her face in his hands and he kissed her. It was “just a kiss” and it was brief. Someone knocked on the door, and he jolted up and stood behind the door and as they entered, he disappeared down the corridor. She was shocked by this event as it was an intimacy she was completely unprepared for.

23. Later backstage, he said "I'm so embarrassed. I'm such a fool, I'm such an old fool" and she said "just forget about it. Don't worry about it". On stage the atmosphere was tense, and he didn't look at her.
24. The incident represented by charges 5, 14, and 15 occurred when CA was on the couch in the Green Room. On this occasion, the accused straddled her on the couch, with his knees on either side of her and his hands next to either side of her shoulders. He then kissed her down her neck. In a very "camp tone" he said, "too much? did I linger too long?" and when she said "yes", he climbed off and sauntered away.
25. CA said the accused's "crutch" was on her lap. She was completely taken aback by it and felt very uncomfortable as she had thought the first incident was now out of the way.
26. CA said she told the wig mistress, her best friend and the company doctor. She didn't say anything to anyone in the company as she didn't feel supported in the environment and didn't feel she had any ally there. She felt she was no longer in a professional environment.
27. CA also witnessed the accused, in two different performances, touch the actress playing Columbia when CA and Columbia were both on a platform on stage and their bottom halves were hidden from the view of the audience. She saw the accused reach up and try and grab Columbia on the bottom and tickle between her legs. AH³ was cast in the role of Columbia and two understudies, CB and CC, performed the role from time to time. CA said the actress playing Columbia that night was AH. The second time it happened she was unsure who the actress was, but she thought it was AH. The accused was standing behind tickling around Columbia's bottom and between her legs. She said she had a specific memory on the second occasion of seeing the actress kick backwards.

³ Identification of this individual may lead to the identification of a complainant. As such, they are hereafter referred to as 'AH'.

28. CA also witnessed the accused grab CD's face between his hands and "sort of shoved her face to the side". This was on stage in a scene where the direction was to touch CD's character very gently, but this was "not the usual thing" and "it struck me as being aggressive". She was one to two metres away when she saw this.
29. Sometime in the last two weeks of the show (the first two weeks of July 2014), CA invited three other female cast members, CB, CC, and AE,⁴ to her dressing room for a meeting. They confirmed they too had been on the receiving end of unwanted physical conduct from the accused. CA told them of the dressing room kiss and being straddled on the couch, CB said the blocking (directed action) had changed on stage and that "things were becoming more affectionate or advanced than she was comfortable with". CC referred to being pushed against the wall by the accused, attempted kissing, that he came into her dressing room and closed the door behind him and that there was inappropriate touching on stage.
30. On the last day of the production the four of them discussed whether they would make a formal complaint about the incidents and whether they would return to the production the following year. They all went away to think about it as "it's a big decision to make a formal complaint". CA told her agent she did not want to return unless there was a cast change.
31. Towards the end of 2017, CA spoke to the union and to her lawyers, and then on the basis of their advice she contacted the police.
32. As to why she didn't complain at the time she said she didn't feel there was support and she thought her job was at risk.
33. CA made contemporaneous notes on her phone where she recorded:
 - "straddle and kiss on couch in front of others"
 - "kiss neck -too much, linger too long".
 - "in when changing -are you nude-come and hug"

⁴ Identification of this individual may lead to the identification of a complainant. As such, they are hereafter referred to as 'AE'.

- “kissing and hiding behind door”
 - “hand up skirt-witness”
 - “hiding behind door”
 - “lock door”.
34. CA gave evidence that she did not consent to the accused kissing her, straddling her, or kissing her on the neck.
 35. In cross-examination she said she thought the accused was a terrific performer and accepted that “he’s a bit of a constant flow of this sexy jokey stuff” but she didn’t agree that she was constantly amused by it and said she thought a lot of it to be crude. She agreed that during pre-publicity in February 2014 she did say, “Craig makes each day an absolute hoot”.
 36. Defence Counsel, Mr Littlemore QC, presented a number of photographs to her.
 37. CA’s response to the first one of these photos, a publicity shot, was that it did not depict “a simulated sex scene” it was the two of them, she and the accused, dressed under the bedcovers, appearing to order room service. There were further publicity shots with the two of them in towels in a sauna and in a romantic situation by a fireplace.
 38. The photographs were apparently designed to demonstrate that CA had no objection to crudity, but they fell short of the mark and were irrelevant to any fact in issue or CA’s credibility.
 39. It was put to her that the accused entering her dressing room, however she was dressed, was “all part of his schtick”. She said she didn’t know what he did with others, only what he did with her. She agreed that she didn’t raise any objection with him.
 40. CA said she did not “reciprocate” by sitting in his lap but she did sit in his lap as part of the publicity shots. She was not overtly affectionate to the accused right through the run of the play.
 41. CA refuted the proposition that she had said “I don’t wanna sound like some kind of a butt-stalker but...”. She said that was not even close to the language she would use.

42. She did not spend more time with the accused than any other cast member. She had not had a discussion with the accused about the feud with CD just prior to him attending her dressing room on the occasion of charge 4.
43. She agreed that the accused was speaking in a “camp voice” when he said “too much, did I linger too long?” but did not agree the incident could only have been perceived as a joke; she said at no point did it feel like a joke to her.
44. The kiss in the dressing room was momentary but only because someone, she thought her dresser, entered the room and interrupted it. A kiss on the lips was not a “mere demonstration of concern and support” for her. She agreed it was a romantic style kiss with his hands on either side of her face when he kissed her.
45. At this point in the cross-examination, Mr Littlemore QC accused CA of fabricating the notes on her phone where she had recorded egregious behaviour by the accused. Ultimately, he conceded that “we are not asserting to the witness on any basis of evidence that she did in fact falsify it”. I mention this cross-examination because, despite Mr Littlemore QC saying to the witness that “that’s in the nature of an apology to you”, he appeared to revive this incorrect and unfair allegation in his submissions.
46. It was put to CA that the accused had no specific memory of the Green Room incident, but he agreed something like this could well have happened if he was in that mood, i.e. tomfoolery, prankishness or over the top carrying on. If so, she was asked, his weight would have been on his knees? CA said his weight was in her lap.
47. She was not aware of there being a bit of a joke within the culture that involved people kissing each other on the neck. It was not put to her that she herself engaged in this behaviour.
48. CA was asked if she had made statements which were utterly inconsistent with her being offended by anything the accused did to her. She said that following the show it was still part of her duty to protect the show. She agreed that she lied about the accused by painting him to be a much better person than he was. However, she did not say to a friend of the accused “I

just love Craig. We had so much fun on Rocky Horror. We were so naughty. It was the best gig, so wild”.

49. She agreed that in the doctor’s notes where it recorded her complaints of sexual harassment and bullying, she was not referring to the accused as bullying her.
50. She agreed that there were no further conversations with cast members about the allegations in 2015 or 2016 and it was not until October 2017 when the Harvey Weinstein stories emerged that she was contacted by CB and CD. It was the Hollywood revelations that was the catalyst: “it was very triggering for all of us”. It did not trigger “the seeking of mass media publicity”. She went to see a lawyer first, then the union, and then the ABC, upon advice that it would be the best way to have the accused removed from the cast in the 2018 production. It was at this point that Mr Littlemore QC asked CA if she would rather be famous as an actress or a victim. The court upheld the prosecutor’s objection to that question.
51. There were further questions about the ability of someone to hide behind the door in the dressing room, though the evidence, as I understood it, was that he jolted up and stood behind the door, not that he was actually hidden.

Assessment of CA as witness

52. CA was a strong witness. She was clear and consistent in relation to her allegations, did not appear to exaggerate and made concessions where appropriate. I found her to be a credible and reliable witness.

Complainant 2 (CB)

53. CB first performed in RHS in 2007 and again in 2010. In 2014, she was cast in one of the ensemble roles, playing a “Phantom”, and was an understudy for the lead parts. She met the accused for the first time in rehearsals at the end of 2013.
54. CB said the show revolved around the accused on and off the stage.

55. It was in Adelaide that her relationship with the accused began to change. A friendship had been formed and there was more offstage interaction between them. In Adelaide, the accused started saying more things to her in a romantic sense, including that she was “beautiful”. He took her hand and squeezed it and said that every day he was falling more and more in love with her. When he met her then fiancé, BF,⁵ he said now he understood why she wasn’t interested in him “cos he was too old for her, maybe if his butt was still perky or if he had Botox”.
56. In Adelaide the accused changed the blocking (directed movement) to add an approach to her Phantom character. He said he had created a “moment” for her, and she could thank him later. He also started making comments about her breasts around this time.
57. By the time the tour started in Melbourne she was very uncomfortable, his behaviour was inappropriate, it was not professional. When she went on in Columbia’s costume, he said how good her breasts were on multiple occasions.
58. CB said she tried to keep things light and just brush his comments off or otherwise he would get angry and bullyish as she had seen him behave with others. She told BF about his behaviour but didn’t feel she could complain to management as the accused was in control and he and the company manager were very close.
59. On an occasion in Melbourne offstage he was hugging cast members and asked if he could hug her. She said it was a bit of a joke amongst the cast that she didn’t enjoy close physical contact. He was wearing his tiger boxer shorts (given to all cast members by CA as a jokey opening night gift) and he pressed his pelvis right into her body and she could feel his partially erect penis against her. He moved his hips around, still pressed against her. She felt

⁵ Identification of this individual may lead to the identification of a complainant. As such, they are hereafter referred to as ‘BF’.

she couldn't say anything or push him off because she had told him in front of everybody that he could hug her.

60. On a further occasion, the accused asked to see her in his dressing room and when she went in he was undressing. Then he stood up and he took his underwear off fully, exposing his penis. She said "oh fuck" and he was laughing and said "I didn't notice what I was doing." She mentioned this incident in his presence, in front of CC and another cast member Kristian Lavercombe and he said "oh come-on" like she was making a big deal. She believed she told Dwan Attwood, the stage manager, about this incident.
61. CB was one of the understudies for the part of Columbia. She had observed that in the "I'm Going Home" scene, a kiss had developed between the actress who played Columbia and the accused which wasn't in the original blocking. The kiss looked "like a pash": it looked passionate. She told the resident director, Leah Howard, that she didn't want to do the kiss. On the first night she was to go on as Columbia in Melbourne, the accused asked her if her fiancé was going to be in the audience and she said he would be. There was no kiss that night. The second night he asked about her fiancé again and she told him he wouldn't be in the audience.
62. In that second performance, the accused kissed her on her mouth. It was a forceful passionate kiss, open mouth, and he sort of put his tongue into her mouth. She said to him afterwards "you are a cheeky fucker aren't you?" and his response was very aggressive he said "how dare you, I will end you". She apologised and said she was joking, to placate him. She told CC and her fiancé that night about the kiss and about his response to her afterwards. She was sure she told Ms Howard about the kiss but not about his reaction to her protest.
63. She saw the accused become angry when a drummer made a mistake during a show. He was pointing at the drummer, stomping around and looking up and glaring. She was a couple of metres away downstage left when this happened.

64. She told Ms Attwood that he was staring and stomping. Ms Attwood said he was a nightmare, but don't worry and she (Ms Attwood) was looking out for her.
65. On another occasion CB saw the accused grab CD's face by the jaw and throw her face to one side. She said she would've been 4 or 5 metres away, on the other side of the stage. It was during a number which was not the "I'm Going Home" song. Afterwards, during the final bows he clapped right in CD's face. There would have been 2-3 people between her and CD. She didn't speak to CD about what happened.
66. Other cast members shared their complaints with her.
67. CC told her that when she went on in Janet's role, before she had to go onstage, the accused had pushed her up against the wall in the corridors outside her dressing room and had tried to kiss her neck; as she related this to CB, CC was running her hand on her body to show where he had touched her, up the inside of her thigh and up the side of her breast.
68. In Melbourne, CC told her that after a show when she was in the shower, the accused came into her dressing room and he tried to open the shower door while she was in there.
69. On the day of the final show CB had a conversation with CA in CA's dressing room. CA told her that the accused had come into her dressing room and forced himself upon her and kissed her. CA didn't say exactly when. She was very upset and crying when she spoke to CB. CA asked if anything had happened to her and she said yes but they should talk about it another time after the show because you couldn't perform if upset.
70. During the dressing room conversation with CA, CB told CA that she was worried about what might happen in the show that night and asked CA to be watching during the "I'm Going Home" number.
71. There was no evidence from CA of this conversation.
72. After the tour ended, CB met with CC and a third cast member, AE, (who did not make a complaint to police) at a cafe. The meeting wasn't to share complaints but to discuss what to do about them, including whether they

should go to the Gordon Frost Organisation ('GFO'), the production company, through lawyers. CC and AE were afraid that if they did that, they wouldn't get any further work.

73. In the end CC was the only one of the female cast members who went on to take a role in the 2015 production. CB said she told her agent that she would join the cast if the accused was not in the role.
74. During 2014 she also told her friend Laura Barlow what had happened to her.
75. She didn't speak to the other cast members until November 2017 when she was invited to join a Facebook Messenger group.
76. She spoke to lawyers first, and then to the union who explained the difference between sexual harassment and sexual assault and told her that if what she had experienced was sexual assault she should go to the police.
77. She told her fiancé BF that the accused had kissed her "like he did AH" in the going home scene.
78. Mr Littlemore QC commenced his cross-examination by putting to CB that the unwanted attention such as the staring at, and comments about, her breasts were mere pleasantries. CB disagreed.
79. The questioning became offensive when the witness was shown a photo of her "in close proximity to a man in his underpants and you are sticking your breasts out, let's not mince words". I note that this was not a question, it was an objectionable comment, and that both persons in this photo were in costume and it appeared to be a publicity shot.
80. The cross-examination hit its nadir when having given evidence that the accused commented on her breasts, she was asked whether she was pleased with her figure. This question was, unsurprisingly, disallowed.
81. CB denied that CA had said she was doing her makeup when the accused entered her dressing room. She said CA had definitely said to her that she was undressing at the time. CB also confirmed she had been told by CA that the accused "forced himself upon" CA, that CA told him to stop and the accused had "flipped out" and said CA had led him on.

82. It was put to CB that she could not possibly have seen the assault on CD as she had been off-stage vomiting at the time. After initially denying any vomiting, she accepted that if it was in the show report then it happened.
83. CB confirmed that there was no mention by her of the accused's enquiries as to the presence of her husband in the audience in a document she had prepared for her interview with the ABC.
84. She said she couldn't disagree with the proposition that the accused had kissed her on each of the five occasions in Melbourne that she had gone on as Columbia, but she could only recall the kiss on the second night. She didn't mention seeing the accused's penis when she entered his dressing room in her initial police report, but she did say that he stood up and took off his underwear.
85. On the evening of the day of the hugging incident, she told BF that the hug had been uncomfortable but did not say that the accused's penis was partially erect at the time. She did tell him at a later time that she had felt the accused's penis against her when he hugged her. She agreed that her initial police report did not mention his penis was partially erect and could not recall if she included or omitted the allegation of grinding against her in that initial report or in her media interviews. She said she didn't go into detail with everyone and denied that these allegations were the product of recent invention.
86. CB said she would not describe the backstage culture of the RHS as sexually suggestive or ribald; in the beginning it was playful, and toward the end it was toxic.
87. She said that her evidence that she had told Ms Attwood that the accused was stomping around the set was not false nor was her evidence that she told Ms Howard she didn't want to do the kiss. She did not fabricate CA's confidences to her on the final day.
88. CB was asked whether she had said that CC had to fight the accused to keep the shower door shut and she said that she was told by CC that she had to physically hold the door to keep him from coming in. She did not say that CC

was standing then naked, wet and cold. CC had told her that the accused pushed her against a wall, not the door of her dressing room.

89. She and the other complainants had not exchanged their versions of the alleged offending in full detail.
90. She disagreed that the kiss in the "I'm Going Home" scene was part of the scene.
91. She did not tell Mr Irving that "the kiss was a little longer than he usually did".
92. She did not remember telling the ABC that the accused had removed CC's underwear and kissed her on the vagina, her memory was that CC had said he moved her underwear to one side and kissed her.
93. It was put that her "alleged" reluctance to return to the show after 2014 was because she was not offered a lead part, not because she wanted to avoid the accused. She was read part of an email from her agent to the producers in October 2014 which said, "Were it a Magenta offer, then she would have jumped at the chance as she absolutely loves the show". She confirmed that she auditioned for the part of Columbia in the 2018 production and discovered the accused was to play the lead again on the day of the audition. She said that when she didn't get the part, she warned the woman who did get the part of the accused's behaviours.
94. She did not say to Mr Irving that she and the other complainants did not go to the police because they agreed that the matter was not sufficiently serious.
95. In re-examination she agreed that she had sent an email to her agent on 14 August 2014 in which she wrote:

"Haha, you know what, I would do this again, however, who's playing Frank-N-Furter? Anyway (sic) of finding out if it's Craig McLachlan? I'd only go in if I was sure he wasn't playing Frank. Thoughts?"

Assessment of CB as witness

96. I had no reason to doubt CB's truthfulness but there were issues of reliability. Her memories of what she observed and was told about, of offending against

others was confused and sometimes prone to exaggeration. It is clear that on 9th May 2014 she could not have made the observations of the common law assault on CD in the circumstances she described. Possibly she was in the wings, but this is not the evidence she gave.

97. CB's accounts of the offending against her evolved as time went on. She did give evidence under difficult circumstances, being the mother of a very young baby who she was required to breast feed, during breaks in her evidence. Further, because of the scheduling of overseas links and an audio malfunction with the recording, she was required to attend court on four occasions. She was not afforded an optimum environment in which to give her evidence.

Complainant 3 (CC)

98. CC performed in the RHS productions of 2010, 2014, and 2015.
99. In the 2014 production she was cast in an ensemble role as a "Phantom" and was an understudy for the parts of Columbia and Janet.
100. She described a friendly working relationship with the accused - she had purchased a guitar and the accused offered to give her a lesson. The relationship changed though when the tour reached Adelaide.
101. On 4th April 2014, when the show was in Adelaide, she played the role of Janet. During her microphone check she was reminded that she didn't have her lipstick on, so she returned to Janet's dressing room to apply it.
102. On her way out of the dressing room, she encountered the accused, whose dressing room was next door to Janet's. She said the accused "kind of picked me up" which she demonstrated with her right hand around her waist. He half lifted/half dragged her back into the dressing room, then, having closed the door, he pushed her up against the door, ground his pelvis against her and then kissed her down the side of her neck. He said, "I can't wait for the bedroom scene", then kissed her on the mouth. She was terrified and felt vulnerable given his importance in the show, it was an impossible situation. She had heard him call the CEO of the production company by his nickname,

“Frosty”. He’d say “when I was on the phone to Frosty this morning...”. She thought “who are they going to get rid of, him or me?”.

103. In the Janet bed scene, the script required the accused to say “so soft” with a kiss on the neck, and “so sensual” with a kiss on the left shoulder and then he was directed to stop kissing and disappear under the covers (of the vertical bed) but on this occasion he proceeded to kiss down the front of her body to the top of her underwear.
104. He continued to run his hand up and down the lower part of her leg for a period of about 5 seconds, while he remained out of sight of the audience. After that, the accused popped back up and continued with the scene. Later CC told CB about the incident in the dressing room and the incident on stage. She didn’t tell anyone else because she felt there wasn’t anyone who would have her confidence or who would be impartial.
105. In the days following, the accused ignored her, he kind of froze her out. She felt almost like she had done something wrong and it made her really worried about what the accused might tell John Frost about her, that she had no control over. The company manager Sally Greenwood had a very close relationship with the accused. She was worried she’d lose her job and future work. Apart from CB and another cast member who she resided with, she didn’t tell anyone until the end of the show when she spoke with CA, CB and AE. She did write about it in her journal.
106. During the dressing room incident, she was wearing the Janet dress, a pink pinafore; in the Janet bed scene her costume was underwear: white bra, white underwear, a suspender belt and stockings.
107. In the Melbourne run of the show, CC played Columbia while the normal actress was off the show with a shoulder injury. The charged incident occurred during the number “Touch-A-Touch-Me”.
108. In “Touch-A-Touch Me” the characters Magenta and Columbia are on a platform with just their torsos visible to the audience. The platform is quite high, and the actors access it by a ladder (in fact a moveable staircase).

109. While CC was performing the number, she felt a tickle on her right foot, which caused her to shake her foot to try to stop it. Then a hand went up over her knee and was going up the inside of her thigh when she kicked her leg back and it stopped. She kicked her leg back because it didn't feel like the tickling was going to stop, and she couldn't take any other action because she was performing on stage. She couldn't turn around or duck without it being quite obvious. She felt angry and vulnerable.
110. CC said she looked down at the next available moment, over her right shoulder, and saw the accused, who was laughing. This was quite close in time to the moment she felt the touching. As she passed the accused in the backstage area he said to her "Mate, you nearly kicked me in the head." He made a gesture with his thumb and forefinger quite close together to demonstrate how close it was.
111. CC didn't say anything to the accused in response because she was feeling anxious; she had never really retaliated before so when he made a joke of it she walked away feeling quite relieved.
112. When asked if she could recall any other incidents, she said the other one that stands out to her was after a show when she had played Janet. She was leaving her dressing room which was next to the accused's and he called out to her to "come here for a second". When she pushed the door open, he was at his dressing table, taking his makeup off and he was not wearing any clothes. By this point she was really over it. She thought she said something to the effect of "ah put some clothes on" and turned to leave. As she did so she heard him say "ah no, no, it's just because I feel so comfortable".
113. She told CB about the platform incident (Melbourne) the night it happened and her best guess as to when she told her about the dressing room incident (Adelaide) was the next day. She worried about the ramifications telling anyone else in a very small industry. She believed that the accused had the power in the company of hiring and firing people after an incident involving a drummer who had to leave after he made a mistake in the introduction to one of the accused's songs.

114. CB disclosed a few incidents to her. She said she didn't want to do the kiss with the accused, the kiss that had become part of the show over time between the accused and AH. She told her she'd said to Ms Howard that she didn't want to do the kiss. CC saw that the kiss did happen and CB was very upset. CB told her that the accused's tongue had gone into her mouth. She also told her that she had confronted the accused afterwards and he had been quite angry and said to her "who do you think you are, you are nothing."
115. Late in the run of the show she and CA, CB and AE met to discuss their concerns. CC didn't talk about the incidents that she had experienced. She couldn't remember specifically anything CB said during the conversation. CA said they should consider raising this with management but she, (CA), was worried about what would happen, that they could lose their jobs and harm their careers long-term.
116. CC said CA had told her that the accused used to hide in her dressing room, behind the door, he sat on her, kind of, and kissed her. He had put his legs on either side when she was sitting on a lounge and he had kissed her. She did not recall if CA had said where on her face or body the accused had kissed her.
117. CC was the only one of the female cast members to return to the RHS in 2015. She said she minimised her interactions with the accused and was mindful of essentially flying under the radar.
118. She maintained a friendship with CB.
119. She had no contact with CD between the end of the show in 2014 and the end of 2017.
120. She made her statement on 3rd March 2018 and she had not seen anybody else's witness statement.
121. She did not consent to the accused touching her in an indecent manner.
122. In cross-examination, CC agreed that the accused had never taken her underwear off or kissed her vagina and she had never said that he did. He did not push her against the wall in the hallway (it was the door of the dressing room).

123. The accused had struck her from the start as a “prankster, a larrikin, a bit of a clown, a joker”.
124. She did not ask the accused if she could attend his hotel room for a guitar lesson, he invited her. He had behaved impeccably during the guitar lesson.
125. In terms of backstage culture, people’s bottoms got smacked, their cheeks got kissed and their shoulders were hugged. She did recall sitting on the accused’s lap but only once, maybe twice. The only time she remembered was in a technical rehearsal when he guided her to sit in his lap and she felt uncomfortable. She did not recall whacking the accused on the backside.
126. She did say to the accused that it was always a pleasure working with him. This was because they would be working together on the 2015 RHS tour and she didn’t want any animosity or bad blood between them.
127. When she played Janet as understudy, the accused did try to make her “corpse” (break out of character and laugh). The accused tried to make everyone corpse.
128. CC disagreed that she went into the accused’s dressing room wearing just her underpants and whatever she had on your upper body. She said she wore her costume. The Janet costume consisted of underwear.
129. She didn’t sit on the accused’s lap in the Janet bed scene costume, her recollection was that she was wearing her Phantom costume. When it was put that she sat on the accused’s knee when she had very little clothing on your lower half, she said “I was wearing my costume, that’s right”.
130. She did not recall saying to the accused that she couldn’t wait for the bedroom scene tonight, but she may have.
131. When the accused was under the covers (behind the covers given it was a vertical bed) it was not physically and temporally impossible for him to kiss and touch her.
132. CC played the role of Janet on about 15 occasions. The occasion she described in her evidence was not the only unwanted physical contact, but it was the one of the greatest level of severity.

133. She agreed that the accused did generally go for laughs from the audience, particularly in the bed scene.
134. She did not say anything to the accused or management that indicated she had a problem with scenes she played with him.
135. When she was on the platform on stage as Columbia, her ankle would have been a metre and a half above the stage. It would not have been impossible for the accused to mount the stairs in his heels, she had done so in heels herself. She agreed she did not see him on the stairs.
136. It was put to CC that it was AH and not CC who was tickled in that scene, but she confirmed that it was her. She was not aware that CA had said she, CC, was not tickled (in fact, CA did not say that CC was not tickled, she said only she saw AH tickled and she could not definitely say it was AH who was tickled on the second occasion).
137. It was put to CC that the accused did tickle an actress playing Columbia, but CC was not that actress, and CA must have seen it if what CC was saying was true. CC said it happened, but CA may not have seen it happen.
138. She agreed that when she looked down and saw the accused he was laughing or giggling as if the whole thing were a joke. As to whether he was trying to make her "corpse", she didn't really find it funny, so no.
139. The accused sometimes attended cast warm-ups prior to the performance where he gave people full body hugs. She did not protest when he hugged her.
140. She agreed that CA did say that the accused would hide in her dressing room and jump out and scare her.
141. It was put to her that the issue with the drummer, if any, was 2015, but she disagreed and thought it was 2014. She did agree that she believed that he was dismissed from the band because of a mistake he made, and about which the accused protested.
142. She, AE, CA and CB did decide, after they met following the end of the show, not to take matters further, but this was not because they didn't think it was serious.

143. In re-examination CC said that following the incident in Adelaide the accused's demeanour changed towards her and he essentially iced her out so when it came to things such as hugs at company warm ups she didn't push him away because she didn't want to anger him.

144. When he touched her on the platform, his hand was halfway up her thigh.

Assessment of CC as a witness

145. CC was an impressive witness. She was cross-examined at length and she did not resile from or contradict her evidence. She gave her evidence clearly and sincerely with no exaggeration. She remained calm in the face of puttage, which took her by surprise, and despite the cross-examination, remained a calm and courteous witness who gave her best in answering what was asked of her.

Complainant 4 (CD)

146. CD was cast in the lead role of Janet. She worked for the first time with the accused in Grease in 2005. The accused's partner was a friend of her husband's.

147. In the rehearsal stage of the 2014 RHS, the accused was friendly and fun. He was always very sexually suggestive, "that is just who he is". She did see his temper early on - the main thing she took away was that he had made a threat to someone and there was no repercussion, everyone just continued like that was normal.

148. Her relationship with CA soured at the beginning of the Perth season when there was a rift over the allocation of dressing rooms.

149. The Janet bed scene has a vertical bed and the actors stand behind the blanket, providing an illusion that they are lying down. The accused as Frank-N-Furter was required to kiss Janet's neck and arm and then disappear out of the sight of the audience and move the bedsheet in a simulation of sexual acts.

150. The accused began to make changes to the bed scene: sometimes out of the sight of the audience the kisses would continue down her chest to her

stomach. She didn't object because initially it was a very fun scene and she didn't want to make it uncomfortable. Sometimes she would wriggle if she didn't think the kissing would stop. The scene required her to have her hands up on the top of the bedsheet.

151. During a performance in Perth, the accused lifted the elastic of her underpants and kissed her butt cheek. This was a once-off. After she ducked down to go through the manhole, the accused poked her in the ribs and said "he he he" but she didn't react, which was unlike her. She was shocked on this occasion and it was disgusting.
152. The next night it didn't happen again, and she pushed the idea of their relationship being like brother and sister; they had a similar sense of humour and would do pranks.
153. By the time the tour reached Melbourne, CD's costume had been washed so many times that she was worried that it was becoming see-through. She told the accused she was feeling exposed in the costume and he said, "yes I can see the little slit" and after this he would often refer to "the little slit". He also said, when they were discussing the bed scene, that he could smell her vagina and it smelt sweet. She didn't tell anyone that he had said this.
154. One night during the Melbourne show, in the bed scene, when the accused ducked under the covers and was no longer visible to the audience and she was performing, he traced the line of her vagina with his finger. She closed her legs as tight as she could and her hands that were up on the bedsheet, she looked down and swatted his hand away. He traced where the labia join, about two centimetres. It was a very shocking moment. It occurred subsequent to the comments he had made about "the little slit" and her vagina smelling sweet. When she swatted his hand, he stopped. She didn't recall saying anything to him or to anyone else involved in the show. She didn't want him as someone not on her side. He spoke a lot about having a direct line to John Frost and that he could get people fired.
155. An incident occurred when Timothy Maddren, who played Brad, changed something in the bed scene and there was some sort of commotion off stage

and the accused was late for an entrance to a song called “Wild and Untamed Thing”, which was very uncommon. Not long after that number, there’s the final song, “I’m Going Home”, where the accused would come around to each of the characters and say goodbye to them. Normally he would say goodbye to Janet with a gentle stroke on the face or sometimes a kiss on the cheek or a kiss on the hand. This time when the accused went towards her, he seemed furious and he grabbed her by the jaw, with his thumb on one side and fingers on the other and threw her face to one side. Later during the bows, when they clapped the band the accused started clapping about 10 to 15 centimetres from her face. She didn’t say anything to him, but she said to Ms Howard, the resident director, “what the fuck was that?” and Ms Howard said, “he’s angry”.

156. CD spoke to John Frost, the producer, when he came to the theatre the next day. He asked if she was okay and she said no, she was scared of the accused. She was crying and John Frost said to go and talk to the accused but she was afraid of being alone with him.
157. Before the evening show the accused came to her dressing room door and said “I know you love Tim but you’ll have to forgive me”. She said, “you really scared me” and he said, “oh come on”. He took a few steps inside the room and said she had to forgive him now and reminded her that he had supported her over the dressing room dispute with CA, and she said, “get the fuck out of my room”. She was crying and hyperventilating as they got ready to start and Mr Maddren asked her if she was OK, and she said “no”.
158. The next day she texted Ms Howard saying she was upset, that she felt there was bullying and intimidation going on, this behaviour had been witnessed and nothing was being done about it. Ms Howard responded by saying it was out of her jurisdiction and that she would need to talk to the company manager, who is a very good friend of the accused’s. CD’s only relationship with the company manager had been in relation to her back injury. CD also spoke to the stage manager Dwan Attwood who said it was a very serious

allegation and CD would need to provide 3 examples of bullying to take to the producers and their lawyers.

159. The following day, the cast received a box of chocolates with a note that said, "Uncle Craig's been cranky. It's not his usual state of being. Doing too much. Still love you all though".
160. During the tour she told her two best friends Michelle Barr and Lisa Campbell about what had been happening to her
161. By Melbourne, the relationship with CB was no longer friendly, she didn't know why.
162. The #MeToo movement produced a great anxiety for her and she decided to send a text to CA that the #MeToo movement had brought up a lot of stuff for her and she just wanted to know if CA was okay.
163. CD had been contacted by a media organisation in relation to another actor she had worked with and she contacted that journalist in relation to the accused before she spoke to the police informant. Prior to contacting the journalist, she spoke to a lawyer and to the union; CB, CC and she discussed a plan of protecting the women involved in the latest production of RHS due to commence in 2018. They contacted GFO via the lawyers and only went to the media after GFO ignored their requests to investigate the matters they alleged and had threatened defamation proceedings if they persisted.
164. CD said she made her complaint to police sometime in the final week of January 2018. CA and CB had told her they had filed reports with Detective Senior Constable Rachel Hazeldene and she found herself feeling nervous to leave the apartment because she had a fear that the accused would be there waiting for her. She decided that if the anxiety was making her feel that way, she needed to call the police.
165. In cross-examination, it was put to CD that, having said the accused was sexually suggestive, she was also sexually suggestive, an assertion which she denied. She was then shown a photo of herself taken 14 years ago in her Grease costume, bending over with the accused behind her. She agreed that

the photo was sexually suggestive, but she did not consider herself to be a sexually suggestive person.

166. Another photo was shown of her joking around in a photo in January 2018, the vice said to be that this was the period in which she was terribly upset; going to police, the union and lawyers at that time and this was inconsistent with such a state of distress.
167. CD was also asked about the dressing room feud with CA.
168. She agreed that the accused was trying to crack her up in the bedroom, getting her to "corpse".
169. She said she had played a game with him where she would hide behind pieces of the set and jump out to scare him and she had slapped and pinched his backside when he was in his knickers costume.
170. It was put to her that she was sexually playful, and she said perhaps in photos, but never would she refer to herself as being sexually playful.
171. She agreed that she was not afraid to stand up for herself if she believed she had been wronged.
172. She agreed that there were exchanges of friendly texts between herself and Vanessa Scammell (the accused's partner) in 2014.
173. It was put to CD that in the entirety of 2014 there was nothing in her conduct that the accused could possibly have perceived to be even the slightest hint that she had a problem with any of his conduct. She said that her reactions to the unwanted physical contact when she didn't react with laughter and closed her legs and slapped his hand away, she believed was her letting him know that she wasn't comfortable with what he'd done.
174. She did agree that there was nowhere in any of her messages a suggestion that the accused was responsible for any of her unhappiness during the RHS tour and that she had sent a message saying, "you had been like a brother to me". She confirmed that there were several messages in which friendly messages had been exchanged between them following the 2014 RHS tour, and that they had continued their good relationship when they both worked on the television show, "The Wrong Girl". She said she had enjoyed working

with the accused on "The Wrong Girl", it was a very different environment where he was not the star and they did have fun together then.

175. A message shown to CD in which the accused expressed his regret at CD not being in his current show was described by Defence Counsel as "friendly to a fault". It read "no one to be filthy and funny with, no white knicker slit".
176. Another message was shown to her where she had written to him saying "I'm thinking of you. If you need anything, I'm here in Melbourne for a couple of weeks". CD said this was in response to the death of the accused's very good friend.
177. She agreed the alleged common law assault was not part of any show incident report relating to physical mishaps. She agreed that the fact that she did not perform in the show the following day was not because of the accused.
178. She disagreed that she was absolutely silent throughout 2014 about the subject of these allegations. She told her husband in 2014; after the tour finished because while she was on tour they were apart, living in separate states, and she didn't want him to worry or be angry.
179. She told her friends Ms Campbell and Ms Barr about the sexual assaults during the tour, soon after they happened.
180. It was put to her that she was the one who introduced the expression "your little slit". She denied this; the words were from the accused.
181. It was not common for the cast to hear her talking about whether the audience could see her vagina through her underwear; she was concerned that her vagina was exposed but she did not say "maybe just the slit."
182. It was put to her that in the bedroom scene she could not see what was happening and she only assumed that the accused had touched her with his finger. She said he was crouched down in front of her, there was nothing else it could have been. It could not have been the vape cigarette he used in the scene. She disagreed that the touching could have been accidental because she felt it and it felt purposeful and occurred in the context of him talking about the little slit. Though he had to make a "flub-flub" noise by striking his lip with his hand, he was not making that noise the whole time he was out of

sight. She was uncertain as to the precise moment the touching had occurred but after being shown a video of the scene, she thought it was where the prosthetic leg was lifted up and he went down in front of her.

183. When she spoke to Dwan Attwood about the accused she did not want the accused to know she'd made a complaint as she did not want to make him any angrier.
184. CD agreed that the catalyst for her making a complaint was the Harvey Weinstein story. That was when she contacted CA. Initially they tried not to make it public but yes, then they did go public. She let the others know that she had been contacted by a journalist.
185. The Harvey Weinstein stories were a trigger because she realised that what happened was not okay and was not her fault. She agreed that on the ABC she said she didn't know how inappropriate it was because it was always a joke. As to whether she thought there was an advantage in depicting herself as a victim, she said there had been no advantage in this process at all.
186. In re-examination she said she didn't feel she could make that sort of complaint to management, that she felt embarrassed and shocked, did not know it was sexual harassment and did not feel comfortable confiding in any of the management at the RHS.

Assessment of CD as a witness

187. Despite the invitation by defence to be very critical of CD, the series of photographs tendered to undermine her credibility, designed to show that she was untruthful when she said she was not sexually suggestive, did not have that result. There is a qualitative difference between posing for jokey photographs on social media and being sexually suggestive towards actual people in real life. The photographs were of marginal relevance and the process of having the witness go through so many of them was oppressive.
188. The differences I was urged to note between CD's playfulness with friends and colleagues (even if a bit wicked) and her demeanour in court were

specious. CD presented appropriately dressed for a court appearance. If her hair was “artfully tousled” that observation escaped my notice.

189. Demeanour as a measure of credibility can be misleading. It is preferable to approach credibility and reliability by assessing the internal consistency of the evidence and the extent to which it is consistent with other evidence which has been accepted by the fact finder.

190. I found CD on both these fronts to be a credible and reliable witness.

Nathan Wright, choreographer

191. Mr Wright was the director of dance for the RHS tour.

192. His evidence was that there was no kiss between Columbia and FNF during the song, “I’m Going Home”.

193. In cross-examination he agreed that small movements within that embrace were entirely a matter for the accused, in particular, to decide on the night.

BF, witness of complaint for CB

194. BF was CB’s fiancé and is now her husband. He made visits to all of the cities the show played in except Perth and met the accused for the first time in Adelaide.

195. CB told him that she began to feel progressively more uncomfortable with the accused from the time the show was in Perth. She told him that the accused made sexual type comments re her breasts and told her he was falling in love with her. The comments escalated in Adelaide. CB relayed this on multiple occasions. She told him of comments about her breasts that made her feel uncomfortable. When in Adelaide she told him that the accused came up to her and asked her for a cuddle – he had a half erection and he held her tight.

196. They spoke daily so she would have mentioned it on the actual day it happened. He asked her if there was any reciprocation and that was clearly not the case. It was the mention of the erection that stood out to him. She said she was concerned about being too aggressive for the sake of her job. She also told him about a dressing room incident that occurred in Adelaide. She was

asked to see the accused; when she went to his dressing room, he was naked or virtually naked. She said "Jesus Christ put something on" and he said "what's the big deal" basically, or words to that effect.

197. When the show reached Melbourne, CB was happy to be able to go on in an actual type role but she said it had progressively gone off script with the girl that was performing it, with a passionate kiss and that she didn't want that to happen with her. She said she'd speak to the stage manager about it. The first night she performed the role in Melbourne he was there and there was no kiss. The next time she told me it happened, she was kissed in the scene. She confronted him about it, and he said "don't talk to me like that, I'll end you" so she made a joke of it so as to not provoke him further. She was really upset.
198. In the latter part of 2017 when BF was overseas, they had a conversation about the 2018 RHS and she said even to this day she felt a bit sick about it and she wouldn't want to have what happened to her happen to someone else.
199. In cross-examination it was put to him that as a lawyer he could not have been told anything that warranted action or advice, or he wouldn't have told her there was nothing she could do. He said he obviously didn't give it the weight it deserved.
200. To the proposition that the accused's comments weren't "sexual" e.g. "does your mother have breasts like that" and "wow", that these comments were admiring, not sexual, he said he thought it a question of degree. The accused's comments were persistent and jocular instead of predatory in the first half of the season, but it progressively changed.
201. As to whether the comments were very pleasant, very complimentary and the comments about her breasts, being made in front of others, could not be said to have a sexual intent, BF said not necessarily. He agreed that the request for a cuddle occurred in rehearsal when other people were around. He was asked why, if CB wanted to protect innocent young girls in 2017/18 had she not done so in 2015/16. He said he guessed they just moved on with their lives and just tried to forget about it.

Assessment of BF as a witness

202. BF was clearly mistaken when he said he was told about the hugging incident when CB was in Adelaide. Having discussed these allegations over the years, and taking into account the evidence CB gave of telling him about the accused's semi-erection after the tour, it is unclear as to when the complaint was made to him or whether it was "fresh in the memory" of CB when she made it.
203. BF's evidence was rather vague.

Luigi Lucente, actor

204. Mr Lucente was cast in the ensemble role of "Phantom" in RHS 2014.
205. CC told him when the tour was in Adelaide that the accused had walked in on her in the shower and he recalled her being visibly distressed and upset about it.
206. He recalled the drummer incident where a cue was missed, and the accused turned around and pointed at the musicians in anger and frustration.
207. CB told him during the Melbourne run about a kiss on stage and that she was upset that it had happened. The accused had kissed her during one of those scenes where they weren't necessarily supposed to. She was quite angry and agitated that it had happened. He based this on her body language, her tone and her physicality which was "quite clenched". She told him maybe later that evening or the next day.
208. In cross-examination it was put that the drummer incident was in 2015, but he said he was not in the 2015 production and he recalled that happening on stage. He was not of the understanding that the drummer had been sacked as a result, he did not recall that outcome.
209. He did not agree that CA was generally disliked and stayed in isolation.
210. He agreed that the accused had a licence to seize the moment and maximise the appeal of each of those with improvisation if it felt right at the time and that was the way the show operated. The direction in the "I'm Going Home" scene was to watch the accused and he did not see anything untoward.

Lisa Campbell, theatre producer, complaint witness

211. Ms Campbell is a friend of CD and has known her since 2007.
212. During 2014, she spoke to CD on the phone a couple of times a week. She recalled CD telling her of an incident where there had been an argument within the cast and the accused had grabbed CD by the face. CD was crying and distressed when she told her. It had happened the night before, though Ms Campbell said she could not remember the date. He also clapped in her face. CD told her that she'd gone to the resident director Ms Howard after the incident who had said the accused was angry. The following day AE sent her a photo of some chocolates and an apology sent to the cast by the accused.
213. Ms Campbell also recalled other phone calls with and messages from CD about the accused during the tour, including a comment by him that her replacement's vagina smelt.
214. CD also told her about the accused touching her inappropriately but not until about 2016. CD told her that the accused had touched her vagina in the part of the show where Janet and Frank-N-Furter are in bed.
215. Later, on "The Wrong Girl", CD said the accused seemed to be making amends.
216. In cross-examination she said she knew the accused, but not well, and agreed he was fulsome, excessive in his compliments.
217. She agreed that GFO was highly professional. She was on the board of the Hayes Theatre Company and it had protocols and procedures for sexual harassment at work which were from the Live Performance Australia Union. She did not know if GFO's protocols were the same.
218. She knew Ms Howard well and Ms Howard was god-mother to her child. She thought Ms Howard was made nervous by confrontation.
219. Ms Campbell gave her evidence in a straightforward manner, unscathed by cross-examination.

Brendan Irving, actor

220. Mr Irving played the role of “Rocky” in 2014 (and in 2015, 2017 and 2018). He got on well with everyone, but not with CD after Perth, when she said it was his fault she’d hurt her back.
221. The issue of the back problem was resolved by management and lifts (on stage) were adjusted. He was perhaps closest with CB. He met her at The Winery in Sydney 2-3 weeks after the show ended where she told him that she accused “lingered on a kiss for a little too long and that when she confronted him afterwards, he said something along the lines of pull yourself together, who do you think you’re talking to, I could make sure you don’t ever work again.”
222. CB told Mr Irving she had met with other cast members and she had thought of taking formal action but had decided it wasn’t serious enough to need any action and that she was going to leave it. He had no further discussions about the allegation between 2014 and August 2017.
223. In August 2017, he met CB at a café in Collingwood. They had both submitted for roles in RHS 2018. They knew the Frank-N-Furter role had been filled but not by whom.
224. Back in 2014, there had been an incident when he had accidentally thrown a bag of fake body parts into the accused’s face instead of his lap and he was contacted by stage management in a very professional and relaxed way to request he be more careful please. If an incident occurred during a performance the process was that there would be an informal meeting with Ms Attwood, the stage manager. It would be unprofessional for an actor to talk to an actor about something like that. There is a chain of command; you could take it to a stage manager, (Dwan Attwood) or a director (Lisa Howard) or potentially the company manager (Sally Greenwood)
225. Anything performance related would go to the stage manager or director.
226. Asked about physical interaction between the accused and Columbia, he said he thought it was a kiss on the lips between AH and the accused.

227. When cross-examined, Mr Irving said that when the allegations first became known to him he was “shocked, horrified”. The allegations were impossible to reconcile with his experience on the show.
228. He said CD was perhaps the principal in backstage shenanigans and that hugging and kissing backstage was commonplace; he agreed the cast had a sexualised sense of humour, to varying degrees.
229. The accused was very flirtatious offstage, including with him – touching him but definitely not crossing any boundaries. It was all in good fun and he would make “lovely” statements like “if I were gay, if I were 20 years younger ... lovely things like that”. He was over the top in public, affectionate, he would tell people they were good-looking and comment on their physique. It came only from a positive place to make people feel loved.
230. The accused didn’t have power to hire or fire, Mr Irving remembered telling CB this.
231. Mr Irving said he was close to CB until the allegations came out. He said she was not afraid of confrontation. She became aggressive when she didn’t get a part in the 2018 tour and believed the accused had some influence over the matter.
232. He never saw the accused kiss CB and put his tongue in her mouth, “absolutely not” and agreed he was in a position to see, “very much so”.
233. If that had occurred it would have been jarring, hugely so, it would have caused an outrage. If she had pushed him, someone would have lost their job. It would have been very, very out of the ordinary.
234. In cross-examination, he agreed that the accused’s reaction to the two incidents he cited, namely the bag of body parts and the musical cue, was absolutely justified.
235. CB’s complaint to him in 2014 was that the kiss went on a little too long.
236. CD caused friction amongst the cast, he saw her challenge the director and there seemed to be tension between her and Mr Maddren. He said CD loved shock value, in general she was more vulgar and tore down stereotypes of typical feminine behaviour, she took it to a point that shocked him.

237. When CB wasn't successful in getting a role in RHS 2018, she asked him if the accused would've contributed to that and she became increasingly aggressive. This was the push to make her decide to do something about what happened in 2014, which she, years earlier, didn't think was serious enough. She was more furious in 2017 than she had been in 2014.
238. In re-examination I allowed the prosecutor, upon application under s 38 *Evidence Act 2008* (Vic), to cross-examine the witness on his evidence about the legitimacy of the complainants' allegations. Mr Irving agreed that it was his belief that some or all of the complainants had motives other than the truth of the allegations. He said he was not saying that the complainants were lying but he said his evidence suggested that there may be more to it. He denied that he had taken sides.
239. He confirmed that there was a kiss between CB as Columbia and the accused as Frank-N-Furter because that was part of the blocking. CB went on twice as Columbia and there was a kiss each time, which was a "hold it there for a moment", it was a very gentle and passionate kiss.
240. When asked if he remembered the accused saying to a female member of the cast, "you've got great breasts" or "great boobs", he said he didn't recall those exact words, but he could certainly remember things like that being said in jest.
241. He said CB only took action because her ego was bruised. He thought it was a devastating thing to do and he couldn't be friendly with someone when he didn't agree with their actions.
242. The defence did not seek to cross-examine further.
243. Mr Irving was a hyperbolic witness and his evidence seemed to be coloured by his personal feelings.

Christopher Luscombe, director

244. Mr Luscombe has directed the RHS for 13 years in various countries. He first met the accused when he auditioned him in 2013, was present for rehearsals and when the show opened in Brisbane, he returned to London. Thereafter he

received the nightly show reports and remained available to the management team for consultation.

245. He said that the RHS script did not have many stage directions, most of the physical interactions are worked out by the director working with the cast in rehearsal. Any subsequent changes in directions would be discussed by him and the assistant director and would be unusual. There might be minor tweaks but if they were of any significance at all they would be shared by the assistant director with him. He did not recall any significant changes to the direction of the 2014 run of the show. Ad-libbing refers mainly to answering back to the audience. Frank-N-Furter and the narrator are the only characters who can do this.
246. In the "I'm Going Home" scene, Columbia rushes over to Frank-N-Furter and hugs him to say goodbye. There was no other direction by him in relation to touching between the characters of Frank-N-Furter and Columbia in that scene.
247. In cross-examination, he agreed that CD was not the most cooperative of actors with whom he had worked and at one point the accused spoke up for her when there was talk of taking the part away from her.
248. It was put that by the time the show was in Melbourne there had been worked into the show a kiss between Columbia and Frank-N-Furter which began in rehearsals. He said he did not remember them kissing. If so, he assumed it was never raised with him because it was deemed to be perfect within the spirit and style of the original staging and that would be the responsibility of Ms Howard. He saw the show in Adelaide and didn't see anything that had crept into the show that he didn't accept; he was delighted with the show.
249. In re-examination, he said the kiss on the lips was not part of the directions as per the rehearsals he conducted in Sydney.

Dwan Attwood, stage manager

250. As stage manager for RHS 2014, Ms Attwood “called” the show, i.e. she prompted such things as the movement on the stage of set pieces and lighting changes. She did all the scheduling of rehearsals and was responsible for the show report. She watched the show on a tiny monitor and made notes of anything she could see that was out of step that the audience might notice.
251. During the 2014 run no one went to her with a complaint of sexual harassment.
252. She never had a conversation with Sophie Norfolk about an incident.
253. CD did come to her in an unofficial capacity, saying several times she wanted to have the conversation off the record. CD said that the accused was bullying her to which Ms Attwood responded “it’s a very serious allegation, we need to put it in writing with three examples, have people sign off on it and take it to the producers, do you want to do that?” CD said, “absolutely not” and had the same response when Ms Attwood asked if she wanted her to speak to the accused about it. CD said, “please forget this conversation ever happened”. She did not give Ms Attwood any details about any bullying. Ms Attwood was pretty sure that she asked for examples and CD said “just everything” The proposal she put to CD of listing three examples and taking it to the producer was the standard protocol in the United states where she had worked previously. Within ten minutes of the conversation with CD she spoke to Sally Greenwood (company manager), she felt she had a duty of care to document that conversation.
254. CB played the role of Columbia in Melbourne, but she did not remember how many times. She did not recall an occasion when CB was playing the role of Columbia and she and Frank-N-Furter kissed but there must have been if CB was on as Columbia.
255. In cross-examination she said that if CD had wanted to take the complaint further, she absolutely would have. She left the meeting confused because she thought the accused and CD were friends, she had often seen them mucking around together and enjoying each other’s company.

256. If an actor had pushed another actor in a scene, she would expect it to be noted in a show report though she wouldn't necessarily see it on her small monitor. Others watching the show could have come to her with their observations. On the final night there were extra creatives and producers involved in the show who were in attendance.
257. CB never came to her to express concern about the kiss between Columbia and Frank-N-Furter in the final scene and she did not recall saying to anyone that she was looking out for them because the accused was angry and was stomping around backstage. She did not have a memory of the accused often stomping around backstage or that he was often angry or aggressive. She thought it was safe to say that he was affectionate with everybody. He would often give over the top compliments; she never heard him call anybody "the love of his life" but he did tell people he loved them.
258. If an actor had been requested to attend another actor's dressing room that would be announced over the tannoy, she wouldn't usually deliver these messages personally, she didn't have the time.

Kristian Lavercombe, actor

259. Mr Lavercombe was cast in the role of "Riff Raff" in the 2014 tour, a role which, it emerged, he has played over 1600 times.
260. He first heard of the allegations when they came out in the newspaper and he made his police statement on 20 December 2018.
261. The accused was very kind to him and looked out for him. CD was "disruptive" and "caused a lot of trouble". She was very disrespectful to the director and questioned everything he was saying, which is not how it works.
262. With CC, he would say they were friends; he bumped into her once after the 2015 season. CB was the same as CC, "old friends". He had not spoken to her since the show finished in July 2014. He was friendly with her but had no contact with her after the show finished. He left the country in August 2018 and had a catch-up with the accused at his house before he left. He was aware

of the allegations by then and he arranged the catch-up as the accused had been very kind to him throughout the show.

263. During the "I'm Going Home" number he stood and watched Frank-N-Furter for the duration of the song. Frank-N-Furter farewells Janet, Brad and Rocky. Columbia runs up to Frank-N-Furter during the song. He recalled CB playing the Columbia role twice. Columbia and Frank-N-Furter embrace and they have a goodbye moment. Exactly what happened during that scene varied from night to night. There would occasionally be a peck, a kiss, there might be a hug, they might put their heads together. The kiss would last about a second, there was no time for it to last any longer than that.
264. In cross-examination, he agreed that the 2014 cast was incredibly affectionate with one another, exchanging hugs and kisses, and sitting on each other's laps - probably every day.
265. He was asked if he had any recollection of CC sitting on the accused's lap once in a while. He said that during a song when Riff Raff and Frank-N-Furter were not on stage, CC would quite often sit on the accused's lap and chat to them or something like that, it was a regular occurrence, including during the Melbourne run.
266. CD's sense of humour was fairly close to the mark and would be quite sexualised. By "close to the mark" he meant shocking and he agreed by shocking he meant sexually shocking.
267. The accused told him he loved him possibly every single day he did RHS, he heard him tell nearly everybody at some point that. He said to him, "if only I was 10 or 20 years younger".
268. Ms Zaphir, Ms Attwood, Ms Howard, and Ms Greenwood were "incredibly professional, incredibly approachable", especially in the Melbourne season, as their office had glass walls. If he had an issue with anyone in the cast, he could talk to any of those people. On the first day of the show, they were told who to see if they had a problem. If someone in the cast was to make a serious complaint about the accused their job wouldn't be in jeopardy, you might get talked to, and that's about it.

269. CD asked him if her costume was see through. He thought she said, “can you see my vagina through these pants?”. She and the accused seemed to get on very well and their senses of humour were similar. He saw CD pinch the accused’s bum. In the “I’m Going Home” number he didn’t take his eyes off Frank-N-Furter. He never saw a tongue kiss; it would have been jarring and something he would remember. He never saw Frank-N-Furter lose his balance in that scene.

Laura Barlow, complaint witness

270. Ms Barlow is a friend of CB and they had met through retail work in 2013. Ms Barlow attended the opening night and party in Melbourne. During the Melbourne season, CB told her about an unscripted kiss that the accused improvised. CB was very upset and said to him, “don’t do that again” and she said the accused backed her up against a wall and said “don’t you dare talk to me like that. I will end you.” She said he barged in when she was showering along with another cast member.

271. CB mentioned another incident where he had leant up against her and basically had an erect penis.

272. In cross-examination Ms Barlow said that CB said she was not necessarily in a position of importance for somebody to do something about these incidents, or words to that effect.

273. She did not give Ms Barlow any other details about the kiss.

Sophie Norfolk, deputy head of sound

274. Ms Norfolk is a sound technician who was hired as Deputy Head of Sound on the 2014 tour. Her job included monitoring the performers’ microphones.

275. She met the accused in Brisbane and he was very friendly and made everyone feel very welcome.

276. She recalled an incident when at interval she went to the accused’s dressing room to check his microphone, she knocked on the door, and walked into the

room and noticed he didn't have any costume on. She checked the cable and didn't find anything wrong with it.

277. Once, she met CC who was playing Janet as she came out of the accused's dressing room. CC looked shocked and said to Ms Norfolk, "don't go in there, he's got no clothes on".

278. On another occasion, Ms Norfolk went to the Green Room to get a cup of tea and as she walked down, she saw the accused kind of straddling CA. CA was kind of pushing herself back. The accused said something like "too much" or "am I being too much?" and CA looked very uncomfortable. His face was very close to hers, and she (Ms Norfolk) thought he was going to kiss CA, or that he had kissed her, Ms Norfolk wasn't sure. Later she asked CA if she was alright and she laughed it off and said she was fine. She didn't look fine, but she said she was fine.

279. During the "I'm Going Home" scene when the accused would hold the cast's faces quite lovingly, Ms Norfolk observed that one night there was an action where a face was kind of thrown off to the side. She demonstrated the action in court with her thumb on one side and four fingers on the other. She couldn't remember which cast member this was.

280. When cross-examined she agreed that, often enough, she did see people naked in their dressing rooms. She always knocked and when she was invited to come in there were a number of occasions she entered, to find a person naked.

281. At this point the witness appeared to become distressed and a break was called.

282. When cross-examination resumed, she confirmed that in her statement she said in the "I'm Going Home" scene, the accused would grab people's faces as part of engaging with the characters in the show. Whatever recollection she had, had been the subject of a number of discussions with other people.

283. It was put to her that there was never an interval at which the accused was naked in his dressing room and that there was no reason for him to be naked. She agreed but said it happened. She agreed that she didn't say that she

knocked on the dressing room door in her police statement, but she said she definitely would have knocked. She agreed that when she said he was “in his swivel chair” she was mistaken, it was the (swivel) action which probably prompted her to say that.

284. In 2018, she sent a text to CA in which she said she had told the informant about what she witnessed such as remembering the accused sitting on top of CA, which she thought was on a couch, when she went to make a cup of tea. CA responded “yes”, she remembered correctly. CA couldn’t recall who else was in the room when the accused straddled her on the couch, but she was very relieved that Ms Norfolk could support that “story”. Ms Norfolk told Ms Atwood about the CA/green room incident, but Ms Atwood did not see it as something of concern.

285. In re-examination, Ms Norfolk said that the accused looked angry when he threw the cast member’s face to one side.

Assessment of Ms Norfolk as witness

286. Ms Norfolk was terribly nervous giving her evidence and at one stage was quite overcome by the stress of the proceedings. Nevertheless, she was an independent witness, who took a strong moral stand by speaking up when she did, within an industry which has clearly been divided by these allegations. I found her to be a credible and reliable witness who stuck to the facts as she recalled them and did not seek to embellish any details.

John Frost, theatre producer

287. Mr Frost is the managing director of the GFO.

288. He first met the accused in the late 1990s and would say he had a strong bond with him, that he was a friend. When the RHS tour started in Melbourne in 2014, he attended the opening night and then went straight to “number one dressing room”, which was the accused’s dressing room, and gave him a very expensive bottle of champagne.

289. He thought that he saw a couple of other cast members on the way out and he also congratulated them.
290. It was his idea to put the accused in the role because he had done the role several years earlier to great acclaim. When Mr Frost was approached by the overseas producers about doing the show he told them they should use the accused: the country adores him, he's very good in the role and he'd be "box office" for the producers, as he sells lots of tickets.
291. His relationship with CD was cordial. With CC he wouldn't know if she walked into this room. CA had worked for him before Rocky, she was always cordial and charming, and he liked her. She was always very nice to him. CB - again, he wouldn't know what she looked like.
292. Compared to CD and CA, his relationship with the accused was much closer, the accused was his star, he was the leader of the company - he'd worked with John Frost several times. The other girls worked for him once and he didn't really have a relationship with them other than as employees
293. He told the court that the cast looks up to the leader for guidance. The accused called him "Frosty", the others probably didn't.
294. He became aware of the allegations through lawyers ringing him just before Christmas 2017 and his reaction was: "angry". At that stage he didn't know who was making the allegations.
295. In cross-examination he agreed that GFO had procedures for work health and safety which were contained in the Company 'Welcome Pack' for RHS.
296. Ms Zaphir, Ms Greenwood, and Ms Attwood were all strong women who would without doubt have executed their duties in relation to work health and safety, very much so, if not to the extreme. They were all very approachable. The accused didn't have any special status with him, but he was the star of the show. They wouldn't have done the show without the accused.
297. The accused didn't have to audition for the show. When it was put to Mr Frost that the accused did audition, he said "well he met with the director" -

if the director had said he wouldn't be terrific then he would have had to go into battle for him.

298. He didn't recall CD complaining about the accused to him, but he did see her crying in her dressing room and thought "this is none of my business". Sally Greenwood said she's in pain because of back problems. CD was inaudible. He couldn't understand what she was saying so he thought he would get out of there and went straight to the accused's room.

299. In re-examination he was read that part of the 'Welcome Pack' where it said, "an effective procedure is provided for all complaints to be lodged and investigated", and he was asked where the procedure was laid out. He said they would have gone to stage management, to one of the four women. That wasn't set out anywhere, that's just how it works.

300. Where the 'Welcome Pack' said that reporting is encouraged, reporting is encouraged by providing the 'Welcome Pack', it was just a general thing. Under the heading Grievance Procedures where it said that "most problems are best resolved by avoiding them in the first place" and so on, that meant they would call them in and try to mediate.

301. He said, "when our friends in the media decided to do a tap dance, when all that hit the fan, we thought okay we've got to be proactive on this" and they called in some experts.

302. Mr Frost was an engaging and confident witness. He gave very persuasive evidence of essential background and context evidence for the prosecution case.

Leah Howard, resident director and choreographer

303. Ms Howard took over from Chris Luscombe after the show had opened.

304. If there was to be a change in the direction of a particular scene, the procedure would be that people would come to her and then she would go to Mr Luscombe or Mr Wright and discuss it with them and go back with an answer.

305. On an occasion in the Melbourne run, following the song “Wild and Untamed”, she was approached by CD about the accused. CD told her that the accused had grabbed her face hard out there and Ms Howard needed to do something about this. She spoke to the accused in his dressing room and told him he should apologise and then went straight to the company manager, Sally Greenwood. She didn’t have an office.
306. Ms Howard couldn’t recall if she had relayed to the accused CD’s actual complaint. She may have, she couldn’t recall. He said he would apologise. The following day CD told her the accused had apologised and she said to Ms Howard she hadn’t wanted him to apologise and Ms Howard was very confused as to why. Ms Howard also spoke to Ms Attwood about the incident CD raised with her.
307. If a kiss was to be introduced into a scene, it would require the approval of the international creatives, i.e. Mr Luscombe and Mr Wright.
308. She didn’t recall seeing any kissing between Frank-N-Furter and Columbia nor ever having a conversation with CB about any issues she had with the accused.
309. She left the incident CD complained of with Sally Greenwood to follow up.
310. In cross-examination she said she had not ever said that she told the accused the basis of CD’s complaint.
311. In re-examination she agreed that she had told the accused that CD was upset that he had grabbed her face and had been very angry on stage.

Timothy Maddren, actor

312. Mr Maddren was cast in the role of Brad. He met the accused on the first day of rehearsals and had a good relationship with him at that stage. Prior to RHS he was friends with CD’s husband. He met, CA, CB, and CC for the first time in RHS.
313. By Melbourne in April 2014 his relationship with the accused was “workable”, with CD “good”, with CA it was “distant”, with CB “amicable” and with CC “good”.

314. At one point, Mr Maddren attempted to contact Mr Luscombe (director) about how the accused was playing a scene. He didn't feel comfortable speaking to the accused - if things didn't go the accused's way, he would become angry and aggressive; an example being the run-in with the drummer. He spoke to Ms Howard about what he could do to remedy the situation and Ms Howard said he could try incorporating a change into the scene. After he made the change in the scene, Ms Howard told him the accused wanted to see him in his dressing room. It wasn't the standard protocol for dealing with a dispute. He did go and Ms Howard waited outside. It became a heated discussion and at one point the accused said to him that if anyone had behaved like that on the Dr Blake show they would lose their job. To move forward he just had to continue with the accused's modification to the scene.
315. CD asked him to be her support person for her to chat to management about the accused's behaviour to CD. He went with her to see Ms Attwood. CD said something about "I'm here to talk about sexual assault", and Ms Attwood said, "that's a pretty heavy accusation to make" and CD seemed to deflate after that. He couldn't remember the precise words she used but he knew they were there to talk about the indecent behaviour of the accused towards CD.
316. On one occasion in the Melbourne run when CD exited from the bed scene, she muttered words to the effect that the accused had touched her arse.
317. In the "I'm Going Home" scene, as an addition which only seemed to take place later, the accused would kiss AH on the lips for a second or two. It became part of the show in the second half of the tour.
318. Later when he watched CB on the 7.30 report, CB mentioned the words "you really are a cheeky fucker" and as soon as she said that he thought: "that's word for word what he heard her say she said to the accused".
319. He did not want to work with the accused again in the 2015 show as he believed the accused's behaviour towards the women in the cast was not acceptable.

320. In cross examination he said that though he heard CB say “you really are a cheeky fucker” to the accused, he did not hear the accused’s response to this. He couldn’t tell where or how it was said. When it was put that he couldn’t say it happened in a conversation he witnessed he agreed (it was unclear if the witness was referring to CB’s comment or the accused’s lack of one).
321. He said he remembered getting a wedgie from CD, he didn’t know if he thought it was funny, but he didn’t find it offensive. It was meant to be humorous.
322. Defence Counsel put to Mr Maddren that CD didn’t mince her words. Mr Maddren agreed she called a vag a vag, a vagina a vagina, but he didn’t believe she called a slit a slit. He had a memory of her complaining about the transparency of her costume.
323. He agreed he had taken sides. However, he couldn’t say he believed all of the allegations because he didn’t know what all of the allegations were, and it would be unwise of him to comment.
324. He said he did witness the accused’s displeasure in an incident with the drummer in the 2014 tour.
325. He agreed that he may have been mistaken when CD spoke to Ms Attwood, and the word harassment or bullying may have been used rather than sexual assault, but he thought they were there to talk about indecent assault and CD hadn’t complained to him that she had been bullied.
326. In re-examination Mr Maddren clarified that he had heard CB say the words “you are a cheeky fucker” but he couldn’t remember where or when.

Assessment of Mr Maddren as a witness

327. At times it seemed possible that Mr Maddren’s memory had been overlaid by what he had seen in the media: this happens, especially with the visual medium that is television. CD’s complaint to Ms Atwood was about bullying; Mr Maddren is mistaken when he says that CD told Ms Attwood that she was there to speak about “sexual assault”. Otherwise, he was a

principled witness and his faulty memory did not affect the overall credibility of his evidence.

Michelle Barr, complaint witness

328. Ms Barr is a performance and television producer who has known CD since 2011. During 2014 they were communicating almost daily via phone calls and text messages.

329. Ms Barr recalled CD telling her that she felt intimidated at times and harassed by the accused. There was some physical assault, inappropriate comments and inappropriate touching on stage. The accused had mentioned that he could see the outline of CD's vagina through her costume. CD told her that the accused had grabbed her jaw on stage and pushed it away violently, and that he had kissed her bottom. She said he had touched her vagina, Ms Barr thought on stage, the outside of her vagina through clothes. CD was wearing her Janet costume, which was white underwear. (witness made a gesture with her finger to demonstrate the action). When CD was telling her these things she was sometimes upset; she was stressed and anxious. She indicated she had reported the situation to her company manager and resident director, Ms Howard and either Ms Attwood or Ms Greenwood. She had also told Mr Frost that she felt uncomfortable.

330. In cross-examination, she agreed that she had not mentioned the names of the people CD had made reports to in her police statement and she had not thought to include the conversation with Mr Frost. She agreed that she had had hundreds of conversations with CD since 2014. She couldn't recall precise dates, but she could recall what she had been told in 2014 as opposed to later.

331. CD said she was made to feel that if she spoke up, she would be seen as difficult. They asked her if she wanted to take it further, but she again felt that she would be seen as being difficult and it would be easier just to keep quiet. Ms Barr felt that CD felt pressured not to make a complaint.

332. She did not say in her police statement that she said the accused had pulled CD's underwear aside and touched her vagina, she was referring to her

bottom. She did read the newspaper articles and she saw CD 's appearance on TV; she conceded that the gesture she made with her finger could have been picked up from what CD did during her interview. She did not think her memory was muddled because of this.

333. CD said she was keeping the peace with the accused and it wouldn't surprise Ms Barr to hear they were sharing pranks upon each other. She did not recall CD hiding in his dressing room and jumping out and scaring him. She would not be surprised to know CD often grabbed the accused on the bum during the Melbourne show or that they engaged in dirty jokes together, but CD's humour was not sexually inappropriate.

334. Ms Barr believed that CD continued to hold the feelings she expressed about the accused in 2014 over the following years. She recalled that they worked together again on "The Wrong Girl" in 2016, she knew they had sent jokey text messages during that time. She would perhaps be surprised to learn that CD had invited him out for dinner.

335. In re-examination she confirmed that what she had actually said in her statement was that the accused sometimes pulled CD's underwear aside and he touched her vagina or her bottom in a bedroom scene where nobody could see what he was doing.

Vincent Hooper, actor

336. Vincent Hooper was cast as a "Phantom" and was understudy for the part of Rocky. He had a good relationship with, and liked, the accused.

337. The accused would sometimes kiss the actress who played Columbia, not every time. When CB went on as understudy, he also kissed her. He saw the accused kiss CB for a couple of seconds. Either after the show, or the next day, she and he discussed it and CB was upset and angry. There was a subsequent conversation at which Mr Lucente, CC, CB and himself were present where CB said, "I can't believe that fucking bastard kissed me on stage" and that she had confronted him. He got angry and said "do you know who you are talking to, I could end you" or something like that.

338. CD had a conversation with him during the Melbourne run about feeling uncomfortable because things were happening under the bed in front of the audience sexually, but he didn't feel comfortable with his memory of exactly what she said happened. It was of a sexual nature and he remembered her saying that when the accused would go down under the covers, she felt uncomfortable then.
339. In the "I'm Going Home" scene when Frank-N-Furter goes around to each of the characters and exchanges a loving gesture, at this one time, the accused grabbed CD by the jaw.
340. CD told him that the accused had made a comment about the understudy's vagina smelling.
341. He had one foggy memory of seeing the accused lounging on CA. He didn't think too much of it at the time. It was on a couch in the green room. The accused was sort of over the top of CA, but his memories were truly foggy and he did not want to elaborate too much because he did not want to give false evidence.
342. Following the end of the tour, he did not have any conversations with any of the complainants about the accused.
343. When cross-examined, Mr Hooper agreed that the accused was "like a big kid" and was overtly sexual, as are many in the theatre. He agreed that the cast chose to lounge all over each other and used to hug and kiss each other goodbye.
344. The accused did have a frequent practice of commenting on how girls looked. He was lovely and supportive to Mr Hooper, definitely.
345. In court was the first time he had heard that Frank-N-Furter and the narrator were entitled to make variations to their performance to maximise audience response.
346. The kiss he saw the accused give CB was something that was part of the scene and there was nothing notable when he saw it.
347. He agreed he hugged and kissed the accused: he may possibly have put his hand on his buttocks; and the accused probably did frequently compliment

him on his looks. The accused did say he loved him, and that meant he thought they were good friends.

348. When he said the kiss was a kiss on the mouth, the difference between a kiss on the mouth and a kiss on the lips was that one is more invasive than the other, though he couldn't say why. He agreed that the lips and the mouth are similar.

Rachel Hazeldene, police informant

349. On 5 December 2017, Ms Hazeldene received a call from Leading Senior Constable Ruth Hable of the Camberwell Police who had received CB's complaint of indecent assault. Following that, she received CA's complaint, spoke to Ms Norfolk, and CC emailed her on 10 January 2018.

350. Ms Hazeldene obtained the transcript from the ABC website, the video of the 7.30 report, the Sydney Morning Herald article of 8 January 2018, the media release from GFO on 8 January 2018, and the Sunday Telegraph article on 21 January 2018. She spoke to CD on 25 January 2018.

351. CA provided her with an account of the allegations that had already existed. CD emailed her an account also but did her statement from her recollections.

352. She obtained photographs and floor plans of the Comedy Theatre.

353. In cross-examination, the informant said CB did three drafts of her police statement and it was correct that she mentioned the accused's penis being semi-erect the third time they met, when they completed the statement. In the first draft CB had said she felt his groin.

354. CA said CB had told her to provide background. It was possible that CB had told CA to provide dates and times and places.

355. She didn't recall when the Harvey Weinstein stories emerged, but she understood that caused some of the complainants to create a Facebook Messenger page.

356. In order to establish whether the complainants had tainted each other's evidence, she obtained all their Facebook Messenger conversations and covered that possibility in the statements she took.

357. When asked whether she raised the “perhaps notable duplication of allegations, in very detailed form by different people”, e.g. CA saying AH kicked out at the accused, and “CC attributing to herself a story she heard about AH”, Ms Hazeldene said she had thought this was not an adoption of someone else’s complaint but a pattern of behaviour.

The accused

358. The accused has been a performer for over 30 years.

359. The accused said he and CC had a similar sense of humour and work ethic. There was a great deal of physical contact on and off stage, which was relaxed and playful. CC would regularly sit in his lap and tell a joke, usually in her underwear.

360. This happened for most of the performances and continued into 2015. She told him how much she loved the Janet role and told him she couldn’t wait for the bed scene and hoped he would not make her laugh, as she had laughed at a particularly funny line. He never tickled her, but he did hug and kiss her; for encouragement before a performance, and for congratulations afterwards.

361. As the leading man it was important to really get to know the cast and take an interest in them, including the crew, as you get a great result if people are happy. Jokes and pranks are part of that process. CC treated him as a confidante of secrets and she often came to his dressing room in between performances. She didn’t communicate being offended, ever, and her behaviour and messages were inconsistent with being offended.

362. The guitar lesson was not his idea.

363. He never assaulted CC and he never tickled her. He did tickle AH to make her laugh or corpse after she came to his dressing room and leapt out at him in a werewolf costume. His head was level with the platform, and he could only reach her foot.

364. Before CA was in RHS, she had been a fashion model. She was new to musical theatre and she was not an accomplished or a confident performer. She was affectionate towards him and told him he had a great arse. He was probably the only friend she had in the cast. She was not a shrinking violet; she was an active participant in backstage shenanigans including “goosing” which is putting a finger between the buttocks to elicit a shock. Doing “vampire kisses” was part of CA’s “shtick”, she started it in technical rehearsals in Brisbane.
365. CA and CD had a feud over a dressing room in Perth, though the feud was mostly from CD’s side, CA wasn’t as nasty. CD said CA was a “talentless tranny”, a “garbage cunt” and had “man hands”. The accused didn’t take sides and he didn’t attempt to intervene. CA was hurt so he attempted to comfort her. She sat in his lap in Perth and told him about the dressing room. In Melbourne she had a chest infection and he bought her medication and glucose sweets. His accompanying comment that she was the secret love of his life was nothing beyond fondness.
366. CA was correct when she said he tickled AH. When he tickled AH, it was sexual in appearance but not in intent.
367. He did kiss CA in her dressing room. Kissing on the lips between theatricals is “de rigueur”, there was no sexual meaning to it, he went to her dressing room to show her support. She was doing her make up, he said, “I can’t stop thinking about you”, which was true, and he had discussed it with his partner, Ms Scammell. He joked “I think I might be falling in love with you”, then he spun on his heel like Jim Carrey in “The Mask” because he wanted to leave on something funny. He did not apologise to her later. He did not say to her that he was an idiot or that he was embarrassed.
368. He had no recollection of straddling CA in the green room, some semblance of that might have happened but not as she described it. If he possibly did, it would have been pranky, with googly eyes; he may have said “did I linger too long?”, and he may have kissed her neck in the context of “vampire kisses”.

369. CD was without doubt the most enthusiastic participant in backstage high jinks, doing wedgies, goosing, trying to “dack” people.
370. He and CD previously had a terrific friendship; Ms Scammell and he have socialised with CD and her husband. CD is extroverted and vulgar – he accepted that. The photo from Grease was CD’s idea. She suggested to him that while they were in their “cozzies” she could lean against the wall and he could “fuck her from behind and pull her hair.” He said he wouldn’t pull her hair, but he would pose.
371. CD would come into his dressing room in white knickers and her bra.
372. He did use the phrase “your little slit” but CD used it first, in Brisbane. She said to the accused, “do you think the audience will see my little slit?”. He said “huh?” and she said, “my vag”. If she said vag, cunt, or box, he used the word slit.
373. He never assaulted CD.
374. She came to his dressing room in Melbourne, she looked flat; this was at a time after she said he had sexually assaulted her. She confided in him and thanked him and bought him dinner.
375. He was devastated when CD joined his accusers, as their friendship had survived until then. Nothing had changed in their friendship. In 2014, they always debriefed after a show.
376. When they were on the show “The Wrong Girl” their relationship was better than ever, they just got closer and closer. The allegation in the bed scene was the one that hurt him the most. If she’d raised it, he would have been mortified, but it would have been impossible to do what she alleged. He had watched a video of that scene 20-25 times – when she takes the leg he was up the far end and once the leg is safely removed he was making the sound effect.
377. Nor could he have kissed her right buttock in that scene as she had turned away, it is physically impossible. He didn’t assault her on any occasion. The scene is set to music – he put his left hand against Janet’s cheek. Using the

right hand would block the scene and he did not use both hands as CA alleged. CD said right hand in her police statement.

378. If he didn't do a scene as directed there would be technical chaos.

379. He left the note after the 9th May 2014 performance as he and Mr Maddren had had a disagreement, and he had been annoyed and confused. He had been filming around Melbourne during the day and there was a costume malfunction and a sound problem which made him run late and he collided with a cast mate.

380. After that particular show, he was uncharacteristically quiet, a little cranky. It didn't intrude into his performance.

381. He didn't clap angrily into CD's face – the cast didn't clap in the bows, he just pointed to the band.

382. Ms Howard did not say anything to him about CD being assaulted or him clapping in her face, she said, "hey babe CD's upset she thinks you're pissed off with her". He said he'd talk to her and Ms Howard said, "good idea". He thought it was because he was cranky with Mr Maddren, he and CD were very, very close. He did go to speak with her. He stood at the doorway of her dressing room on the evening of the 10th May 2014 and said "I know you're upset about Tim, I'm having a shitful show and I'm really fucking knackered. I'd appreciate your support", as he had given to her. Her mood was normal, she was doing her makeup. She didn't run out of the room, she wasn't hyperventilating, she didn't ask him to leave and she didn't say "get the fuck out", she didn't say she was scared of him, she didn't say anything about him mistreating her.

383. In the show he was directed to touch others and he complied with the directions.

384. CB and CD are lying. The cast did not clap during the curtain call. The video shown depicts gesturing towards the band, not clapping. The cast is never directed to applaud the cast or the band.

385. He did not have a lot of personal contact with CB. She was very easy to get along with, she was one of the bolder cast members, “out there” and extroverted.
386. His own backstage demeanour was to camp it up, on the 2014 tour – a fruity accent, flamboyant, greetings and professions of undying love. It’s just who he is. Whenever he has the lead, he always made the effort to get to know cast and crew. He would praise performances when unpraiseworthy to encourage them and he would compliment them on their appearance. “The gals” complimented him on his appearance, e.g. “you’re so fuckable in that costume”. CB thoroughly enjoyed his compliments, she would strike a mock seductive pose, hand on hip and push her breasts up or together. That became a running joke. He did not compliment her on her breasts per se.
387. He would recall if she’d objected to the hug as offensive, if she had he would’ve said that wasn’t his intention at all. However, CB may have appeared in the witness box, she was forthright, confident, assertive and called it as she saw it.
388. He has never pushed himself or his genitals against CB or gyrated when hugging her. He would never do a warmup in just boxers and nothing underneath.
389. In the “I’m Going Home” song he did kiss CB on the lips, the kiss is part of the scene. It wasn’t part of the original direction, but it became incorporated during the show. It did evolve over the course of the tour. It was a brief one second kiss. A tongue kiss would be impossible in the timing of the song. She played the part five times and he kissed her five times. You would never do anything to put an understudy off, let alone a second understudy. The kiss was not contrary to any direction.
390. He never doubted that she was consenting to the kiss in that scene. She did not call him a “cheeky fucker”, at least not that he heard.
391. He had never heard the expression “I will end you” before this case.
392. He did not ask her if her fiancé would be in the audience.

393. There is not a word of truth in her assertion that he exposed his penis to her. He did not ask Ms Attwood to pass on a message that he wanted her to see him in his dressing room – she is very busy, he wouldn't ask her to courier messages, never. CB never came into his dressing room while he was undressing.
394. He would not have been naked when Ms Norfolk came into his dressing room to fix his microphone, he wouldn't have time to have got out of the costume, he couldn't get out of the corset without his dresser.
395. In cross-examination, it was put that the accused told CA to look at him and then he kissed her, that she didn't kiss him, to which he responded, "it's a two-way street, she didn't have to". He said, "I think I may be falling in love with you" before he left CA's dressing room as a joke he routinely used, daily. She did smile. He remembered that.
396. When he said CC would come into his dressing room in knickers and a bra, she was never in costume on stage in just a bra and knickers. Her dressing room was a level above his and she would have to walk along the corridor and the stairs in that state. He did not recently invent this.
397. CC asked him for a guitar lesson and she said she would come to his hotel room.
398. He was not exaggerating his friendships with the complainants; they came to him for support, he didn't solicit any of that.
399. Despite having no memory of the Green Room incident, he could dispute the version given by CA. He disputed that he straddled CA or that the kisses were anything other than a replica of kisses she gave to everyone including the crew.
400. CD's dressing room was next to his, when he said she came into his dressing room in white knickers and a bra, the bra was part of her costume, he couldn't say definitely that the white knickers were.
401. It was the case that he would only use derogatory words in texts in response to CD's use.

402. He said CD was the most vulgar person he knew but after being referred to photos of himself simulating masturbation and on the toilet, etc, said she was the most vulgar person he'd ever met.
403. He agreed that the touch on the labia CD described could not have been accidental; when put to him for a second time, he said "honestly, I don't know".
404. He was not seeking to minimise his role in the interactions with the complainants. The emotion he expressed when giving evidence about being hurt by CD's allegations was genuine, he didn't despise CD despite suing her for defamation and alleging she had ruined his career.
405. It was possible to take a step up the ladder (to tickle CC in the way she described) but he wouldn't risk the possible injury or missing his next cue. With the platform shoes he was wearing it would be impossible to climb the ladder staircase in the dark. He agreed that he moved around the set and danced in those shoes.
406. Though some corsets had laces, the dressers did experiment with a zip.
407. The "white knicker slit" comment he made in a text to 2015 was not in direct response to anything CD had written but was in continuum from 2014.
408. In response to a series of questions about the Janet bedroom scene, he said he was out of audience view on three occasions, from five to seven seconds to a few more seconds. He did not have time to touch CD on the vagina. He was required to do a number of things in the time she nominated.
409. Mr Maddren upset him not by going off script but by changing the playing of the Brad bed scene. He had apologised to cast and crew.
410. In her police statement, CD said he threw her face to the left with his right hand. Questioned whether with either hand it would have been possible, he said he could only say, no.
411. When Ms Howard said to him, "CD is upset, she thinks you may be pissed off with her", he said "well I'm not".
412. CC, amongst others, said he was "so fuckable" in his costume.

413. The kiss on the lips that CB complained of was not contrary to any direction given to him and AH. It was workshopped in rehearsal and occurred as it opened in Brisbane. As to who gave the direction that the kiss would take place, the accused said it came from Mr Luscombe, himself, AH, and the choreographer.
414. He was asked if, given CB did not workshop it, it was without her consent and he said absolutely not. He did not discuss it with CB beforehand.
415. No one from GFO or anyone involved in the production told him about the allegations, he learnt about them in the media.
416. Anyone could discuss matters with management, they would not necessarily listen to him above others. He did not make comments about the way the understudy and CD's vaginas smelt. He denied sexually assaulting each of the complainants by exploiting his role as lead actor and taking advantage of them.
417. During the "Touch-A-Touch-Me" number, CC was at extreme prompt with the set and crew in her line of sight. His warmup outfit was boxer shorts and underwear. He wore three different corsets each night, the fastenings for the corsets varied.

Assessment of the accused as a witness

418. A significant amount of the accused's evidence was not put to the witnesses, particularly the complainants, which reduces the weight I can place on much of what he said. A non-exhaustive list includes:
- "vampire kisses" were CA's "shtick"
 - CA engaged in "goosing"
 - CD engaged in "goosing" and "dacking"
 - CD initiated the pose in the Grease photo
 - the words attributed to CD when she was said to have initiated said pose
 - CC said he was "fuckable" in his costume.

419. The accused repeatedly referred to the complainants being in his presence in their underwear which he clarified was “knickers and bra” when it was clear from the evidence that they were in their **costume**.
420. Aspects of his evidence jarred because of a certain contrivance. The emotion he expressed over CD’s allegations did not seem genuine.
421. When he tapped his fingers and sang during his evidence (ostensibly to determine the length of a beat), it was unnecessary. Having played the role over many years he is extremely familiar with all the songs. He had the opportunity to check the song before court; indeed, he said he had watched a video of the Janet bed scene 20-25 times recently.
422. Overall, he was not an impressive witness. As the accused, he does not need to persuade me of the truth of his account. Even if I reject his evidence in its entirety, I am still required to be persuaded of the evidence of the complainants beyond reasonable doubt.

PREVIOUS RULINGS

423. At the end of the prosecution case, I made a number of rulings of which only the admissibility of evidence sought to be used by the Crown as tendency evidence is relevant to my consideration of the charges. That analysis and ruling was as follows:

Tendency evidence

424. Allegations of indecent assault against four complainants, and one of an attempt to indecently assault one of the complainants, are being heard together in this criminal proceeding.
425. Though the charges are joined in the one proceeding, each alleged offence must be given separate consideration. None of the evidence admitted in the individual charges may be used in evidence in any of the other charges unless the strict requirements for cross-admissibility are met.

426. The prosecution contends that evidence to be adduced in support of some of the charges is cross-admissible on a tendency basis in proof of four of the offences.
427. Evidence that a person had a particular tendency is adduced for the purpose of providing the foundation of an inference that the person was more likely to act in a particular way or have a relevant state of mind on the occasion under consideration.
428. For the purposes of assessing the capacity of some of the evidence to make more likely the existence of a fact (or facts) in issue on the charge in question, the evidence of the prosecution was taken on a voir dire basis.
429. I must determine if the evidence that the prosecution seeks to rely upon is capable properly of being viewed as tendency evidence.
430. If I rule that the evidence is capable of being used as tendency evidence, although the charges still remain to be considered separately, I may use the tendency evidence to assist me in determining whether each relevant offence to which the evidence relates made out.

The statutory scheme

431. Tendency evidence is not admissible unless three pre-conditions are met:
- There must be written notice
 - The court must think that the evidence has significant probative value
 - The court must be satisfied that the probative value substantially outweighs any prejudicial effect resulting from the admission of the evidence for a tendency purpose
432. The *Evidence Act 2008* (Vic) provides as follows: -
- 97 The tendency rule**
- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless –

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) Subsection (1)(a) does not apply if—
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

433. The *Evidence Regulations 2019* (Vic) provide:

8 The tendency rule and the coincidence rule—form of notices

- (1) For the purposes of section 99 of the Act, a notice given under section 97(1)(a) of the Act (relating to the tendency rule) must state—
 - (a) the substance of the evidence that the notifying party intends to adduce; and
 - (b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of—

- (i) the date, time and place at and the circumstances in which the conduct occurred; and
- (ii) the name of each person who saw, heard or otherwise perceived the conduct.

The case law

434. There have been four significant decisions of the High Court on tendency evidence in recent years.⁶

435. The majority (Kiefel CJ, Bell, Keane and Edelman JJ) in *Hughes v The Queen* sets out the proper process for the determination of whether evidence sought to be used as tendency evidence has significant probative value:

“The assessment of whether tendency evidence has significant probative value in relation to each count involves consideration of two interrelated matters but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. ... In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports proof of a fact that makes up the offence charged.”⁷

The majority further stated:

“The probative value of tendency will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.”⁸

⁶ *IMM v The Queen* (2016) 257 CLR 300 ; *Hughes v The Queen* (2017) 263 CLR 338 (*‘Hughes’*); *R v Bauer* (2018) 266 CLR 56 (*‘Bauer’*); and *McPhillamy v The Queen* (2018) 361 ALR 13.

⁷ (2017) 263 CLR 338, 356-7 [41].

⁸ *Ibid* 356 [39].

And also observed:

“The assessment of the significant probative value of the proposed evidence does not conclude by assessing its strength in establishing a tendency. The second matter to consider is that the probative value of the evidence will also depend on the extent to which the tendency makes more likely the elements of the offence charged. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for the tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast a tendency expressed at a level of particularity will be more likely to be significant.”⁹

436. The Victorian Court of Appeal has observed:

“In determining whether the evidence of the complainants is admissible as tendency evidence it is important to understand the accused’s ‘defence’.”¹⁰

437. Finally, as Chief Judge Kidd stated:

“... when considering tendency evidence, the charged event itself cannot be used to prove the tendency to be inferred from the other event or events, as this would involve circular or ‘bootstrap’ reasoning.”¹¹

The tendency notice

438. The prosecution filed and served its tendency notice on 30 August 2019:-

1. Pursuant to s 97(1)(a) of the *Evidence Act 2008* (Vic) the Prosecution gives notice that it intends to adduce evidence which will establish the tendency of the Accused to act in a particular way and/or have a particular state of mind.

The Prosecution seek to rely upon the tendency of the Accused to:

- 2.1. Act in a particular way, namely:

To use the performance of a role during a musical production with fellow (female) actors, as an opportunity and cover to intentionally touch and have unscripted contact with fellow (female) actors on their mouth, inner thigh and vagina, in a sexualized and/or inappropriate manner.

⁹ Ibid 363 [64].

¹⁰ *Danny (A Pseudonym) v The Queen* [2018] VSCA 223, [27] (Whelan, Priest and Kaye JJA).

¹¹ *DPP v Pell (Evidential Ruling No 1)* [2019] VCC 149, [32].

2.2. Have a particular state of mind, namely:

To intentionally touch and have contact with fellow (female) actors indecently and/or inappropriately whilst performing a role during a musical production.

3. The evidence relied upon to establish the tendency is set out in Table A, below.
4. The issues in the case to which Tendency Reasoning applies are:
 - a. Did the acts constituting the alleged offences (“the relevant acts”) occur;
 - b. Were the relevant acts intentional rather than unintended or accidental;
 - c. Were the relevant acts knowingly unwanted (awareness of the absence of consent);
 - d. Were the relevant acts indecent, in that they were sexualized inappropriate touchings/contact, rather than innocent; and
 - e. The willingness of the Accused to engage in the relevant acts in a public forum with people observing.
5. The tendency set out at paragraph 2 is relied upon in support of the following charges as making more likely the facts founding those charges.

Charges 2 & 12 (alt.1): Indecent assault on CB, 26 April 2014 - 13 July 2014

Charge 3: Attempted Indecent assault on CB, 26 April 2014 - 13 July 2014

Charges 7 & 16 (alt.): Indecent assault on CC, 26 April 2014 - 13 July 2014

Charge 8: Indecent assault on CD, 26 April 2014 - 3 July 2014

Charge 9: Common law assault on CD, 26 April 2014 - 13 July 2014

TABLE A

Substance of evidence relied upon to support tendency	Features of evidence establishing a tendency	Relevant witness and page reference
<p><u>Date:</u> 26 April 2014 – 13 July 2014</p> <p><u>Time:</u> Showtime</p> <p><u>Place:</u> Rocky Horror Show, Melbourne, Victoria</p> <p><u>Substance of Evidence:</u></p> <p>The night following the first night as performed the role of Columbia, her husband was not in the audience. During a performance, the accused pulled as towards him, rather than away from him as per the script, and kissed her by forcing his tongue into her mouth. (as: Indecent assault/Common assault)</p>	<p><i>During a performance</i></p> <p><i>Unscripted</i></p> <p><i>Inappropriate physical contact</i></p> <p><i>Others observing</i></p>	<p>CB</p> <p>Depositions p45, para 53.</p>
<p><u>Date:</u> 26 April 2014 – 13 July 2014</p> <p><u>Time:</u> Showtime</p> <p><u>Place:</u> Rocky Horror Show, Melbourne, Victoria</p> <p><u>Substance of Evidence:</u></p> <p>During a performance, the accused knelt down in front of as, grabbed her shoulders and pulled her towards him. The accused leant in to kiss as on the mouth, whereby she pushed him away and he fell sideways.</p> <p>(CB: attempted indecent assault)</p>	<p><i>During a performance</i></p> <p><i>Unscripted</i></p> <p><i>Attempted inappropriate physical contact</i></p> <p><i>Others observing</i></p>	<p>CB</p> <p>Depositions p49, para 66.</p>

Substance of evidence relied upon to support tendency	Features of evidence establishing a tendency	Relevant witness and page reference
<p><u>Date:</u> 26 April 2014 – 13 July 2014</p> <p><u>Time:</u> Showtime</p> <p><u>Place:</u> Rocky Horror Show, Melbourne, Victoria</p> <p><u>Substance of Evidence:</u></p> <p>During a performance on a high platform, CC felt someone run their hand up the inside of her leg to ½ way up her inner thigh, causing her to kick out. She then saw that it was the accused whose hand had touched her.</p> <p>(CC: indecent assault/ common law assault)</p>	<p><i>During a performance</i></p> <p><i>Unscripted</i></p> <p><i>Inappropriate physical touching</i></p> <p><i>Others observing</i></p>	<p>CC</p> <p>Depositions p92, para 23</p>
<p><u>Date:</u> 26 April 2014 – 13 July 2014</p> <p><u>Time:</u> Showtime</p> <p><u>Place:</u> Rocky Horror Show, Melbourne, Victoria</p> <p><u>Substance of Evidence:</u></p> <p>During a performance, the accused went down under the covers of the bed. He started tracing the outline of CD's vagina with his finger (touching her vagina). This was not part of the script. She shut her legs and swatted his hand away.</p> <p>(CD: indecent assault).</p>	<p><i>During a performance</i></p> <p><i>Unscripted</i></p> <p><i>Inappropriate physical touching</i></p> <p><i>Others observing</i></p>	<p>CD</p> <p>Depositions p102, para 8.</p> <p>CD</p> <p>Depositions p103, para 9</p>

Substance of evidence relied upon to support tendency	Features of evidence establishing a tendency	Relevant witness and page reference
<p><u>Date:</u> 26 April 2014 – 13 July 2014</p> <p><u>Time:</u> Showtime</p> <p><u>Place:</u> Rocky Horror Show, Melbourne, Victoria.</p> <p><u>Substance of Evidence:</u></p> <p>During a performance, instead of gently stroking CD's face as per the role, the accused grabbed the lower half of her jaw tightly and forcefully pushed her head away towards the audience.</p> <p>(CD: common law assault)</p>	<p><i>During a performance</i></p> <p><i>Unscripted</i></p> <p><i>Inappropriate physical touching</i></p> <p><i>Others observing</i></p>	<p>CB</p> <p>Depositions</p> <p>p47 para 59</p>

The amended tendency notice

439. In oral submissions, the prosecution eschewed any reliance on the alleged tendency in relation the fault or 'awareness' element. Charge 9 is excised from the tendency notice as the prosecution no longer rely on that common law assault charge, either as tendency evidence or as being supported by the tendency evidence.

The defence application to set aside the tendency notice

440. In written submissions, the defence argues that I should set the notice aside as defective, although in oral arguments I understood counsel to have abandoned this argument.

441. In case there is any residual reliance on the written application to set aside the tendency notice I make the following comments.

442. The defence submission that a tendency in matters of sexual offences must be expressed in terms of 'sexual interest' misconceives the nature of tendency evidence.
443. 'Sexual interest' and 'the willingness to act upon it' may well establish a tendency and is particularly pertinent (but not confined to) child sexual offences. But the legislation allows for a tendency to act in a particular way or to have a particular state of mind. Whether a particular tendency has significant probative value will depend on the facts in issue in the circumstances of the particular case.
444. As far as the defence submission is critical of particular phrases used in the tendency notice, my view is that it is fairly clear that "unscripted contact" (amended without objection to 'undirected contact') addresses the element of "without lawful justification", and 'sexualised and/or inappropriate' are a reference to indecency.

The allegations relevant to the analysis of the tendency evidence

445. All allegations occur in the context of the Melbourne tour of the RHS between April 2014 and July 2014. The accused played the role of Frank-N-Furter and the complainants were all fellow actors who played the roles of Janet, Columbia, Magenta and Phantom.
446. The prosecution only relies on the evidence of offences alleged to have occurred during performances of the show as tendency evidence.

Incident 1: indecent assault (charge 2)

447. CB was the understudy for the role of Columbia. She observed that the accused and AH who played Columbia, were now kissing passionately during the song "I'm Going Home" when Frank-N-Furter says goodbye to Columbia.
448. The kiss was not part of the script and, as she observed in the twice weekly understudy rehearsals, not part of the direction.

449. When as was told that she would be standing in for AH, she said to the director, Ms Howard, that she did not want to “do the kiss”. Ms Howard told her that she did not have to, that it was “just something going on between them”, i.e. the accused and AH.
450. The first night CB played the role the accused asked her if her husband would be in the audience and she said he would be.
451. That first night, CB was relieved that the accused did not kiss her.
452. On the second night she was shocked when the accused held her by the shoulders, pulled her towards him and kissed her. She said, “it was a forceful passionate kiss in the way that there was like, he – it was an open-mouthed kiss and he kind of like, put his tongue in my mouth”.
453. After the scene, in the wings, she confronted the accused and said, “you’re a cheeky fucker, aren’t you?”. The accused “turned very aggressive. He got right up in my face and he was pointing his finger right into my face”. He said, “Never speak to me like that. You are nothing. I will end you”. The effect of his reaction upon CB was such that she attempted to diffuse the situation by apologising to him.

Incident 2: attempted indecent assault (charge 3)

454. This is alleged to have occurred when CB was in her role as Phantom.
455. In the role of Phantom there was some, but minimal, physical interaction between her character and Frank-N-Furter. During the song “Sweet Transvestite” Frank-N-Furter acknowledged the Phantom and sometimes touched her hand.
456. CB said that in the Adelaide show, in the song “I’m Going Home” the accused changed the blocking (movement) in that scene so that rather than walking to the centre after saying goodbye to Janet he turned and came towards the Phantom. He looked into her face and sang at her before continuing his normal traffic (movement) in the show. He said he had created a moment for her, and she could thank him later.

457. On the day of the final show in Melbourne between the matinee and the evening performance, CB spoke with CA and told her that the accused had kissed her in her dressing room. CB told CA that she was she was concerned about the accused because he had already kissed her on stage and because of other behaviour. She told CA that she was worried that the accused would try to kiss her in the "I'm Going Home" scene. She asked CA to keep an eye out.
458. During "I'm Going Home", the accused crouched down on his heels in front of the accused and stopped singing. He put his hand on her shoulder and leant in towards her. She said his face was very close to hers and moving closer. Fearing another tongue kiss, she pushed him and he fell slightly to the right causing him to put his right hand out to steady himself. She said he looked at her with a 'death stare', then he got up and did his normal walk to the centre.
459. She looked at CA, who nodded her head slightly. CA did not give evidence of witnessing this incident or having the prior conversation.

Incident 3: indecent assault on CC (charge 7)

460. For three weeks CC, who was an understudy, alternated in the parts of Columbia and Janet when the main actors were unwell or injured.
461. During one performance, when playing Columbia and whilst on a platform with CA as Magenta during the song "Touch-A-Touch-Me", she felt her foot being tickled. She shook her foot. The tickling stopped momentarily but then she started to feel someone touching her right leg, down near her ankle and then up her leg.
462. She felt the touch on the inside of her thigh moving upwards, as far as midway, until she kicked her leg back and it stopped. CC said she kicked out because it didn't feel like it was going to stop, and she didn't have any other action she could take because she was performing in the scene. She felt angry and vulnerable.

463. She looked down at the next available moment and saw the accused one step behind her. There was no one else in the vicinity and he was laughing. He later said, “mate, you nearly kicked me in the head”.

Incident 4: Indecent assault (charge 8)

464. CD played the role of Janet during the 2014 run of the RHS.

465. She had become concerned that constant washing had made her costume transparent. When she mentioned it to the accused, he said “yes, I can see the little slit”. He also said that in the bed scene he could smell her vagina and “it smelled sweet”.

466. In the scene, the bed is vertical and Janet stands and is hidden by the covers from just below her shoulders. At one point, Frank-N-Furter goes beneath the covers and moves them around simulating cunnilingus.

467. During an evening performance of the bed scene when the accused was under the covers, CD felt his finger tracing the line of her labia. She said the finger moved along her labia for about two centimetres and it felt purposeful.

468. CD closed her legs tight, moved a hand that had been resting on the bedsheet and swatted his hand away. The touching stopped.

The parties’ submissions

469. The facts in issue have been gleaned from the defence opening (or “Defendant’s Defences Summary”), the written and oral submissions and the cross-examination of the complainants.

470. I do not intend to repeat the submissions but only comment in so far as I have adopted or rejected the reasoning contained in them.

471. The defence correctly submits, quoting the High Court in *R v Bauer*, that “in a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be

significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together” .¹²

472. However, when the defence expands upon this statement of the law to submit that the “special feature” is highly unusual as a matter of human experience or otherwise exceptional, then I think this overstates what is meant by a “special feature”.

473. Where the defence submits that “the tribunal of fact must ... judge first ... whether the particularised allegations capable of being relied upon to prove tendency ... are proved beyond reasonable doubt”, this is misconceived. The test is whether the court thinks that the evidence, if accepted by the tribunal of fact, has the **capacity** to support tendency reasoning.

474. The prosecution submits if I find the evidence has significant probative value (and thus the capacity to be used as tendency evidence) that when using the tendency evidence in assessing guilt I have to be satisfied beyond reasonable doubt of a particular offence.

475. It should not be supposed that, at this stage, I accept the correctness of that proposition or the submission that *Dempsey (a Pseudonym) v The Queen* (*‘Dempsey’*) stands as authority for it.¹³

476. In *Dempsey*, it was critical that identity be established on the first charge before that charge could be used as tendency or coincidence reasoning on the issue of intention in the second charge. Because that finding was critical, it required proof beyond reasonable doubt.

477. Whether I need to be satisfied of any matter beyond reasonable doubt before I can use the evidence as tendency evidence depends on the process of reasoning required. It is only if the reasoning is necessarily sequential that the matter relied upon would need to be proved beyond reasonable doubt.

¹² (2018) 266 CLR 56, 87.

¹³ [2019] VSCA 224.

478. The prosecution submissions argue that “if any of the offences is admitted for the purposes of tendency reasoning, that evidence is relevant to the following facts in issue” (a, b, c, d, and e of the notice). This is too vague and general a proposition. I assume the prosecution did not intend to suggest that the tendency evidence would be assumed to be relevant to all five issues in respect of all four of the charges in question. Clearly tendency evidence can only be used where the alleged tendency makes the facts alleged to prove the charged offence more likely. This must involve an individual assessment of each charge as to the extent to which the tendency evidence has significant probative value.

The probative value of the tendency evidence

Charge 2: indecent assault on CB (Columbia – tongue kiss)

479. The accused does not deny that the kiss happened as CB described it and it was not suggested to her in cross-examination that the accused’s tongue did not enter her mouth. Indeed, it was put to CB that the kiss may have happened on four of the other five occasions on which she stood in as Columbia. Whether there was an intention to touch is therefore not a fact in issue in charge 2.

480. The accused denies that there was anything indecent about the kiss; that it was ‘forceful’; or that he was aware that as was not consenting. He says, if the kiss was part of the scene, why should he have not done it?

481. The element of indecency, on the prosecution case, is based on the body parts involved (tongue/mouth), whilst the defence appears to be that CB should not have been “offended by it”. It is difficult to see that tendency reasoning is relevant to this issue.

482. Proof by the prosecution of a lack of lawful justification (that it was not part of the scene), is inextricably linked with the issues of consent and awareness of lack of consent, and the prosecution do not rely on the tendency evidence in support of proof of these elements.

483. Tendency reasoning is not available in proof of the facts in issue in charge 2.

Charge 3: attempted indecent assault on CB (Phantom attempt to kiss)

484. The defence to this charge is that there is no evidence that the accused by his actions intended to indecently assault CB.
485. The evidence of the actions of the accused is equivocal in terms of establishing an intention to indecently assault.
486. Whether tendency reasoning may be used as evidence of that intention depends on an analysis of the capacity of the evidence of CB in charge 2 (CB2), CC in charge 7 and CD in charge 8 to make it more likely, to a significant degree, that on the occasion of charge 3, the accused had an intention to indecently assault CB.
487. The relevant tendency is to have a particular state of mind –
To intentionally touch fellow (female) actors on the mouth, inner thigh or vulva, while on stage during a performance of the Rocky Horror Show.
488. The evidence of CB2, CC and CD all provide support for the tendency alleged: to intentionally touch on the mouth, inner thigh or vulva.
489. To determine whether their evidence has significant probative value, it is necessary to assess the extent to which the tendency is probative of the fact in issue in the charge under consideration.
490. The evidence of CB2, is that on a previous occasion, the accused forcibly tongue kissed CB when she was on stage.
491. Proof of an accused's commission of a sexual offence against a complainant may make it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another occasion.
492. In this case the tendency is not being called upon as evidence of sexual attraction and the willingness to act on that sexual attraction.
493. The prosecution wishes to use the tendency evidence as evidence of intention (to touch) rather than of a sexual interest in CB.
494. The evidence in CB2 describes an event similar to the event in charge 3: on both occasions the incident occurs during the performance when both the

accused and the complainant are on stage and in full view of the cast and audience.

495. In CB2, CB was playing the role of Columbia. The history of the Columbia role was that it was ordinarily played by AH where a passionate kiss had become part of the scene in the song "I'm Going Home".
496. In charge 3, CB was in her role as Phantom and there was no history of a kiss. Instead, there was evidence that previously the accused had created a 'moment' for the Phantom by drawing close to her, and sharing a tender, chaste moment in the spotlight.
497. The tendency evidence from CB2 provides weak to moderate support for the likelihood that the accused's intention was to tongue kiss, or indecently assault, CB.
498. The tendency evidence is not to be assessed by CB's evidence in charge 2 alone; the "other evidence" which may strengthen the probative value of the evidence is that of CC and CD.
499. The dissimilarities between their evidence and the allegation in charge 3 are greater. Each of the incidents described by them occur surreptitiously, when the accused on stage is not on stage acting in his role but is hidden from the rest of the cast and the audience. The dissimilarities are such that they do not add strong support to the capacity of the tendency so as to make it more likely that the accused intended to indecently assault as when he moved towards her in the "I'm Going Home" scene.
500. Even in combination, the evidence fails on the second of the two-step process set out in *Hughes*.¹⁴
501. There is a further problem: that the equivocal nature of the evidence of attempt in charge 3 would not be bolstered by the tendency evidence; rather, the other misconduct evidence would be used to substitute for clear evidence of an attempt.

¹⁴ (2017) 263 CLR 338, 356-7 [41].

502. If I am mistaken in my analysis of the strength of the tendency evidence as regards charge 3, applying the test in s 101(2),¹⁵ I could not find that the probative value of the evidence substantially outweighed the risk of its prejudicial effect.

Charge 7: indecent assault on CC (Columbia – touch to mid inner thigh)

503. The defence identified the facts in issue as lawful justification; lack of indecency; and belief in consent. It was also put to CC that she had adopted CA's account of an incident involving AH as her own, so it would appear that the defence is also that the incident did not occur.

504. The facts in issue to which tendency reasoning may be probative are the occurrence of the act itself and whether the touching was indecent.

505. The evidence of CB2 and CD, if accepted, demonstrates that the accused took advantage of ("used") the fact they were on stage during a performance and constrained in their actions by that performance. In the case of CB she was fully visible to cast and audience and, in the case of CD, her arms and hands were visible while her lower body was hidden.

506. Both complaints support the tendency of the accused to use the performance of the RHS as a cover and opportunity to indecently assault female cast members.

507. Assessing the extent to which the alleged tendency makes the facts alleged to prove the charged offence more likely, the common feature is the vulnerability of the actors because they were performing on stage and their reactions were visible to the audience.

508. The evidence of CB has some dissimilarities with the charged conduct under consideration in that the offence against her was not surreptitious and was to a different part of her body. It provides moderate support for the likelihood that the act which is the basis for charge 7 occurred.

¹⁵ *Evidence Act 2008* (Vic).

509. The evidence of CD, if accepted, demonstrates that the accused took advantage of a situation in which a (female) actor's body was hidden from the audience and he was behind a screen, thus unseen by cast and audience, to surreptitiously touch CD on her labia in circumstances where her arms were required to be in view and her ability to protect herself was reduced.
510. The similarities in the allegation made by CC are apparent. She alleges that the accused took advantage of a situation in which a (female) actor's body was hidden from the audience and he was behind a screen, thus unseen by cast and audience, to surreptitiously touch CC on her inner thigh (moving upwards) in circumstances where her arms were required to be in view and her ability to protect herself was reduced.
511. Both women are touched while the lower half of their body is hidden by the arrangement of the set. Both are touched on or near the genitals. Both are touched by the accused when the accused is either not in the scene or not visible to the audience.
512. The evidence of CD provides strong support for the likelihood that the offence against CC occurred.
513. I also find that on the issue of whether the incident occurred, the evidence of CB when taken in combination with that of CD, has the capacity to make that fact more likely to a significant degree.
514. The defence also raises the issue of indecency.
515. The evidence of CB2 supports the tendency in the notice though on the issue of indecency the tendency is not expressed with a high degree of particularity ("to touch on the mouth, inner thigh or vulva").
516. What makes the incident in charge 2 indecent is that the accused put his tongue in CB's mouth. Charge 7 alleges touching of CC on her inner thigh and the issue is whether the touch was sufficiently approximate to her vagina or bottom to be indecent. The dissimilarities in the two events reduces the capacity of the evidence of as to say anything on the issue of whether the touch in charge 7 was indecent.

517. The evidence of CD provides strong support for a tendency which on the issue of indecency may be expressed with a high degree of particularity, i.e. to have a particular state of mind, to intentionally touch fellow female actors on or near their genital region.

518. The similarities between CD's evidence and the conduct alleged in charge 7, though comprising a single incident, are distinctive and unusual enough that the evidence of CD does have the capacity to make it more likely to a significant degree that the accused "did not intend to stop" and that the circumstances of the touching were indecent.

Charge 8: indecent assault on CD (Janet – touch on labia)

519. The facts in issue are that the incident is denied and there is denial of 'mens rea'. In this context, I take the denial of mens rea to be a denial of any intention to touch indecently; the defence being that any touch, if it happened, occurred accidentally.

520. The relevant tendency alleged is to have a particular state of mind, i.e. to intentionally touch a fellow (female) cast member indecently.

521. The complaint of CB2 and the complaint of CC support the tendency of the accused to have an intention to touch indecently.

522. The strength of the intention to touch in CB2 derives from the fact that the accused does not deny that he deliberately kissed CB but there are significant dissimilarities between the two incidents. Those dissimilarities lessen the capacity of the evidence on CB2 to make it more likely that the accused deliberately touched CD on the occasion of charge 8.

523. The evidence of CC, if accepted, demonstrates that the accused took advantage of a situation in which a (female) actor's body was hidden from the audience and he was behind a screen, thus unseen by cast and audience, to surreptitiously touch CC deliberately on her inner thigh in circumstances where her arms were required to be in view and her ability to protect herself was reduced.

524. The tendency, as it finds expression in the act described by CC, has a particularity over and above that expressed in the tendency notice.

525. It is the particularity of the tendency that provides to the single incident described by CC in charge 7 its significant probative value.

526. The evidence of CC of intentional touching of her inner thigh (when hidden from view) has the capacity to provide strong support for the likelihood that when the accused touched CD on the labia, it was deliberate rather than accidental.

Conclusion

527. In conclusion:

- The evidence of CB2 and CD may be used as tendency reasoning that it is more likely that the act alleged by CC (in charge 7) occurred.
- The evidence of CD of being touched on the vagina may be used as tendency reasoning to resolve any issue that the touching of CC is equivocal as to whether it was indecent.
- The evidence of CC being deliberately touched on the inner thigh may be used as tendency reasoning that the touching of CD (in charge 8) was more likely to be deliberate than accidental.

The weight to be given to the tendency evidence

528. My ruling that some of the evidence was admissible as tendency evidence was subject to whether I ultimately found, after hearing all the evidence, that the tendency evidence is credible and reliable.

529. Having considered whether the evidence had the **capacity** to support the inferences advocated by the prosecution, I must now consider the actual weight I will attach to the evidence.

530. Mr Littlemore QC's submission that I should have assessed the reliability of the evidence at the earlier stage is wrong in law. Where he submits that, "it is not the defence's understanding that, in a voir dire on admissibility, the prosecution case is to be taken at its highest", that is precisely what the High

Court has said the court must do. His reliance on *Velkoski* on this issue,¹⁶ to the effect that the trial judge should not assume both the truthfulness, and reliability of the evidence when assessing its probative value, cannot be accepted as a statement of the current position at law.

531. References by him to *Hoch v The Queen*,¹⁷ a common law case, are similarly outdated and are inconsistent with the language of the *Evidence Act 2008* (Vic).

532. The majority of the High Court in *IMM v The Queen* held that the determination of whether the evidence could rationally affect the assessment of the probability of a fact in issue was to be undertaken **taking the evidence at its highest**.¹⁸

533. The majority decision stated:

“Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two – reliability and credibility – as *Dupas v The Queen* may imply. They are both subsumed in the jury's acceptance of the evidence.”¹⁹

534. Though an assessment of the reliability of the tendency evidence is not prohibited by s 97,²⁰ generally issues of reliability will not bear on the assessment of the probative value of the evidence except where that evidence is so unreliable as to be rendered implausible.²¹

535. No submission that the evidence reached that level of implausibility was advanced before me.

¹⁶ (2014) 45 VR 680.

¹⁷ (1988) 165 CLR 292.

¹⁸ (2016) 257 CLR 300, 313.

¹⁹ *Ibid* 315.

²⁰ *Evidence Act 2008* (Vic).

²¹ *IMM v The Queen* (2016) 257 CLR 300, 316-7.

536. The defence have submitted that the tendency evidence is not reliable as there is a real possibility that the evidence is the product of collusion between the complainants.
537. Tendency evidence may lose its probative value where there is a real possibility that the evidence is a product of collusion between the witnesses, either in the form of concoction (the deliberate fabrication of evidence) or contamination (an unconscious process of suggestion being adopted).
538. There must be a real possibility of collusion, not a fanciful one.
539. The defence does not need to persuade me that there is a real possibility of collusion; the onus is on the Crown to exclude it as a real possibility. There is rarely direct evidence of collusion, but it may be a reasonable inference drawn from the evidence.
540. Mr Littlemore QC's submission does not suggest anything as anodyne as contamination; he asserts a fully blown conspiracy between the four women. "conspiratorial concoction, personal malice, recent invention... applies equally to each complainant, conspiracy to pervert the course of justice...".

The defence submission

541. The defence submission provided: "Herewith a brief and certainly non-exhaustive chronology of the evidence raising the reasonable possibility of concoction, which the prosecution evidence is incapable of disproving to the criminal standard:

2014	In the final 2 weeks in Melbourne (i.e. June/July), CA invited CB, AE and CC to her d/room to speak to them about what they experienced. They told CA that they had received unwanted attention from CM. Each discussed what had happened to her. [CA EIC Tp98]
2014	While RHS was still running (in Melbourne) CA got together with CB, CC and TW in CA's d/room and exchanged stories including things of which CA had no

	prior knowledge. She trusted they were telling the truth. They agreed to think about it and meet again. Did so, but there was no agreement to make a complaint, so no one complained [CA XX Tp205.17]
2014	CC and CB discussed CB's interactions with CM after the RHS2014 season [CC EIC Tp316+]
2014	A few weeks after RHS closed, CC, CB and AE met for coffee in South Melbourne. [CC EIC Tp320]
2015	There were no meetings and no stories exchanged of which CA was aware. [CA XX Tp205]
2016	The same as 2015 - there were no meetings and no stories exchanged that involved CA. [CA XX Tp205]
2017	When the HW story was breaking (7 October), CD and as both contacted CA. It was the catalyst for those girls. It was very triggering for all of us. [CA XX Tp205]
2018	CC, AH and CD met for dinner at CD's house, post CC's first meeting with DSC Hazeldene [CC EIC Tp321]
2019	<p>CD, CC, CA (and?) are interviewed and record appearances for ABCTV program (together?). HAZELDENE XX Tp16.1 accepts inevitability of complainants watching (each other's allegations on) the ABC program.</p> <p>Although at XX Tp32.2 DSC Hazeldene said she interrogated the complainants about sharing their stories, she admits she failed to interview AH²², and produced no record of her interviews concerning potential collaboration/contamination.</p>

²² AH refused to make a statement.

	HAZELDENE XX Tp20.4 CB told (me) on 6.12.17 that she had spoken to the other complainants about her own and their incidents; 18.12.17 CB told (me) she and the others had had lawyers write to GFO about the allegations; never saw that letter with bullet points.”
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542. In assessing whether the Crown has negated the inference of a real possibility of collusion the following factors are relevant: relationship, opportunity, and motive.

Relationship

543. The four complainants knew each other relatively well, each was a cast member in the same 2014 RHS. Of the four, only CB and CC shared a friendship. To the contrary: Mr Littlemore QC was at pains in his cross-examination to paint a picture of a “feud” between CA and CD, and of CA’s “isolation” from the other cast members. He elicited evidence from CD that by the time of the Melbourne tour “CB did not like me very much”. As far as relationships go, this was not a cohesive group.

Opportunity

544. The meetings listed in the defence submission form the basis of the opportunity to collude. None of these conversations occurred prior to the last two weeks of the 2014 RHS tour. There was little cross-examination as to the detail of any conversations that took place between them.

545. The conclusion I drew from this evidence was that the meetings between the complainants were not so much to exchange details of the offending but to decide what, if anything, the women could do about it.

546. The nail in the coffin of opportunity is the contemporaneous complaints of the alleged offending as it happened: CA in the notes function of her phone and to the company doctor; CB to her husband; CD to her friends Lisa Campbell and Michelle Barr.

Motive

547. The motive strongly suggested by defence was publicity.
548. On the 7th October 2017, the Harvey Weinstein allegations burst into the international news. Harvey Weinstein had used his position as a movie producer to sexually assault and harass numerous women who, over many years, had been silenced by non-disclosure agreements and by fears that their careers would suffer.
549. The effect of these revelations upon the complainants in these proceedings was one of two things: it was either the uncomfortable realisation that silence about workplace sexual harassment allowed the abuse to continue, or it was the trigger for otherwise well-balanced and successful women to decide their lives would be improved by fabricating allegations of sexual assault.
550. The second of these possibilities forms the basis of the accused's assertion of motive to concoct the allegations, e.g. "what would you rather be known as, an actress or a victim?", and "the publicity seeking opportunism of her multi-media performance".
551. The submission that the complainants were motivated by publicity is not supported by the evidence; the evidence that the complainants sought help from lawyers, the union, and GFO, to no avail, is evidence to the contrary. When asked directly, CD said "there has been no advantage..." Without an evidentiary basis, this assertion of motive seems to find its genesis in dubious gender-based myths and stereotypes.
552. The Crown has discharged its onus in negating a real possibility that the allegations were a product of collusion between the complainants. There is no basis upon which I could infer that there is a reasonable possibility that the tendency evidence arose from discussions between the complainants in July 2014 and later, nor from watching the media appearances in 2018.
553. My conclusion is that the tendency evidence is credible and reliable (with one proviso), and I may place weight on it as supporting inferences that the accused had a tendency to act in the way advanced by the prosecution (and

set out in the ruling) and was more likely to act that particular way on the particular occasions that are the subject of charges 7 and 8.

554. The proviso is that I am unable to place great weight on the evidence of CB2, which I had previously ruled had the capacity to provide moderate support for the inference to be drawn in support of charge 7.

The previous representations

555. During 2014, while on the RHS national tour, the complainants were largely separated from friends and family by distance.

556. During that time, by telephone and text, they complained to friends and family as to their treatment by the accused.

557. The prosecution seeks to use those complaints, or previous representations, under s 66 of the *Evidence Act 2008* (Vic) as exceptions to the rule against hearsay.

s 66 Exception – criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if –

(a) the person who made the representation has been or is to be called to give evidence; and

(b) either –

(i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or

(ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including –

- (a) the nature of the event concerned; and
- (b) the age and health of the person; and
- (c) the period of time between the occurrence of the asserted fact and the making of the representation.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

558. If I accept that the complaints were made and that evidence is consistent with the evidence of the complainant, then I can use that evidence in two ways:

- (i) First, I can use evidence of what was said in the complaint as some evidence that the incident did occur as the complainant said. The law says that because of the circumstances in which the complaint was made, I am entitled to use what was said in that complaint as evidence of the truth of what the complainant alleged against a person. I must consider whether I draw that conclusion in this particular case and so treat the complaint as evidence of the alleged incident by the complainant. If I do use it as some evidence of the incident that is the subject of the relevant count, then I must determine what weight to give it.
- (ii) Second, whether I do use the evidence of complaint in that way or not, the fact that the complainant raised the allegation against the accused at the time and in the manner that she did may lead me to accept the evidence she gave. In other words, it makes her evidence more

believable than if she had not raised the allegation as she did. If I use the evidence in that way, I must determine what weight the evidence should be given. I must, however, bear in mind that the fact that a person says something on more than one occasion does not mean that what is said is necessarily true or accurate. A false or inaccurate statement does not become more reliable just because it is repeated on one or more occasions.

559. The representations made by the complainants that the prosecution rely upon as evidence of complaint were made either to other complainants or other witnesses in the case.
560. CA gave evidence that she made contemporaneous notes in her phone and spoke to the company doctor. The notes from her phone were tendered into evidence and relevantly provided “straddle and kiss on couch in front of others”; “kiss neck -too much linger too long”; “kissing and hiding behind door”. The doctor’s notes were not tendered but defence read into the transcript that part of her complaint was “sexual harassment”.
561. CB made complaints to BF and Ms Barlow. BF gave evidence that they spoke daily and that the complaints were made on the same day that the incidents happened. His evidence was that he was told about the “cuddle” when CB was in Adelaide. His evidence was that it was the erection which stood out. BF’s evidence of complaint in relation to the indecent hug is inconsistent with the other evidence. That incident is alleged to have occurred in Melbourne so BF cannot have first heard about it from CB when she was in Adelaide. CB’s evidence was that at the time of that incident, she told BF that the hug had been uncomfortable but did not say that the accused’s penis had been partially erect at the time. Her evidence was that she had told him that significant detail in 2017 and when she did BF commented that she hadn’t told him that before. I am not persuaded that the complaint was fresh in CB’s memory when she told BF. BF’s memory has been contaminated by numerous conversations over the years and is not reliable.

562. CB's evidence of complaint to BF about the kiss when CB went on as understudy to Columbia, was that she told BF that the accused had "kissed her like he did AH in the 'I'm Going Home' scene".
563. BF's evidence was that CB had told him that the scene had ended up being a kiss scene, a fairly passionate kiss and she didn't want that to happen. She said to him that it did happen, she was kissed in the scene. When asked if she described the kiss, BF said "she described it as being, let's say, committed, but I can't recall whether she said, you know, he's used his tongue or not". The "kiss" is not a fact in issue, it is the use of the tongue which is in dispute and supplies the element of indecency. The previous representation by CB to BF re the kiss is not relevant to a fact in issue that I have to decide.
564. CB had told CC that she didn't want to do the kiss with the accused. CC's evidence was the kiss did happen and immediately after the show, CB was very upset and she told CC that it was an open mouth kiss where his tongue had gone in her mouth. CB told her that the accused's tongue had gone into her mouth. She also told her that she had confronted the accused afterwards and he had been quite angry and said to her "who do you think you are, you are nothing." This was a contemporaneous account given by CB to CC and it is admissible as an exception to the hearsay rule under s 66 *Evidence Act 2008* (Vic).
565. Ms Barlow's evidence was that during the Melbourne tour CB told her that there was an unscripted kiss that the accused improvised which made CB very upset and she told the accused not to do it again. The characters were meant to look like they were kissing but the accused put his face to hers and physically kissed her. This previous representation is irrelevant to any fact in issue.
566. Ms Barlow said that CB had also mentioned another incident where he had leaned up against her and basically had an erect penis. She could not remember when this conversation took place, it wasn't within days of it happening, it was sometime after. There is no evidence suggesting that this representation was fresh in the mind of CB when she made it to Ms Barlow.

567. CC's only confidante during 2014 was CB. CC said that she told CB about the Columbia platform incident on the night it happened. CB gave evidence about other complaints but said nothing about being told about the platform incident.
568. Ms Campbell gave evidence that CD was crying and distressed when she told her that the previous night the accused had grabbed her by the face and also clapped in her face. This is consistent with CD's evidence of what occurred and was clearly fresh in her memory, given CD's distress and the fact that the complaint was made within 24 hours. In 2016, CD told her that during the Janet bed scene the accused had touched her on the vagina. This was not a contemporaneous account but gains its cogency from being said prior to CD making public her complaints and from the nature of the event complained of, being touched on the vagina, which makes it likely that it remained vividly in CD's time despite the efflux of time. A lapse of two years in the circumstances is not an impediment to that complaint being admissible for a hearsay purpose under s 66 *Evidence Act 2008* (Vic).
569. Ms Barr gave evidence of detailed complaints made to her by CD during 2014. CD told her the accused had said that he could see the outline of CD's vagina through her costume. She said he had touched her vagina, Ms Barr thought on stage, the outside of her vagina through clothes. CD was wearing her Janet costume, which was white underwear.
570. CD told her that the accused had grabbed her jaw on stage and pushed it away violently, and that he had kissed her bottom. When CD was telling her these things she was sometimes upset; she was stressed and anxious.
571. The detail, consistency and contemporaneous nature of the complaints leads me to find that these previous representations are admissible as evidence under s 66 of the *Evidence Act 2008* (Vic) in charges 8 and 9.

Context and relationship evidence

572. Each complainant gave evidence of other misconduct by the accused during the RHS tour, some of it in Melbourne but also interstate, and particularly in Adelaide.
573. The prosecution seeks to use this evidence in two ways: as essential background evidence as an explanation of why the complainants did not protest or complain in relation to the charges before me; and as evidence of the accused's state of mind, that state of mind being he had previously been able to engage in a brazen manner and in similar behaviour without physical resistance or complaint.
574. Evidence of this nature may be highly prejudicial, and it is necessary to analyse the precise basis on which the evidence is relevant to a fact in issue and to use it for that purpose only. If the context evidence, when analysed does not assist in explaining actions of the complainants which would otherwise be inexplicable, then it is not admissible. If the relationship evidence does not assist in explaining why the accused acted in a certain way, then it is inadmissible.
575. If I find that the evidence of other misconduct is admissible, I must remind myself that the evidence cannot be used as establishing a tendency on the part of the accused to commit offences of the kind charged.
576. Context evidence has a limited purpose and is not evidence that the particular allegations have been established beyond reasonable doubt. I may not substitute the context evidence for evidence of the specific allegations against the accused.
577. The other misconduct evidence that the prosecution seeks to use was set out in the prosecution submissions.

1	<p><i>Incident: CA's Dressing Room</i> <i>Location: Adelaide</i> <i>Date: 21 March 2014 - 13 April 2014</i> <i>Complainant: CA</i> <i>Sought to be used to explain CA's lack of physical resistance or protest and failure to immediately complain; the accused's state of mind when committing the charged offending</i></p>	<p>CA gave evidence that in Adelaide, the accused entered her dressing room on two occasions. She said that on the first occasion he knocked, asked if she was decent, she said no, but he entered anyway. When he then saw that she was in a state of undress/underwear he said, "Oh, great timing" and gave her a hug. This made CA feel uncomfortable and awkward but at the time she didn't think there was anything untoward about it and she didn't say anything to the accused about it. CA gave evidence that this happened on a second occasion in Adelaide.</p>
2	<p><i>Incident: Grabbing 'Columbia'/AH on the Bottom and Tickling between her Legs - Two Occasions</i> <i>Location: Melbourne</i> <i>Date: 26 April 2014 - 13 July 2014</i> <i>Complainant: CA</i> <i>Sought to be used to explain the accused's conduct or state of mind (supra) and that the offending did not occur out of the blue but stemmed from an ongoing course of escalating offending</i></p>	<p>CA gave evidence that during the Melbourne run of the show, she was performing next to AH, who was performing the role of 'Columbia' that night, when she saw the accused reach up and try and grab her on the bottom and tickle between her legs. She then saw AH kick backwards. CA gave evidence that on a second occasion during the Melbourne run of the show, she was performing next to the actor performing the role of 'Columbia' that night (she thought, but was unsure who the actress was on this occasion) when she again saw the accused reach up and try and grab her on the</p>

		bottom and tickle between her legs. She then saw 'Columbia' kick backwards.
3	<p><i>Incident: Kiss in CC's Dressing Room</i></p> <p><i>Location: Adelaide</i></p> <p><i>Date: 4 April 2014</i></p> <p><i>Witness: CC</i></p> <p><i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the alleged offending</i></p>	<p>CC gave evidence that on 4 April 2014, when she was performing the role of 'Janet', she was told during her microphone check before the show that she had forgotten to apply lipstick. She said she went downstairs to her dressing room to apply lipstick and as she was doing so the accused entered the dressing room and they had a brief discussion about how she felt about the show that night. She said that as she went to step past him in the doorway and proceed back upstairs to the stage, he picked her up with one arm around her waist, moved her back into the dressing room and closed the door. She said he then pushed her up against the door, used his whole body to hold hers against the door, ground his pelvis against her, then kissed down the side of her neck three times. She said he then said that he couldn't wait for the bed scene that night, then kissed her on the mouth. She said she then managed to open the door and went upstairs to start the show.</p>
4	<p><i>Incident: CC Bed Scene</i></p> <p><i>Location: Adelaide</i></p> <p><i>Date: 4 April 2014</i></p> <p><i>Witness: CC</i></p>	<p>CC gave evidence that subsequently on 4 April 2014, when she was performing the role of 'Janet', she was performing the bed scene with the accused. This took place</p>

	<p><i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>in a piece of set where the accused could move in and out of sight of the audience. CC said that during this scene, she understood the direction was that the accused was to say, 'So soft', then kiss the left side of her neck, then say 'So sensual', then kiss her left shoulder, and then disappear from audience view down into the bed. She said the accused did this but then once he was out of sight of the audience, he continued to kiss down the front left side of her body, first in line with her bra/breasts, then on her mid-stomach, then around the top of her underwear. She described these kisses as, "quite sensual and lingering in a way". She said the accused then continued to touch her leg, running his hand up and down. She described the kisses and touching of her leg as not part of the directions as she understood them. She said she felt a "little bit frozen" and that there was "nothing she could do to really stop him".</p>
5	<p><i>Incident: CC in Accused's Dressing Room</i> <i>Location: Melbourne</i> <i>Date: 21 March 2014 - 13 April 2014</i> <i>Witness: CC</i> <i>Complainant's conduct or</i></p>	<p>CC gave evidence that during the Melbourne run of the show, after performing the role of 'Janet', the accused called out to her from his dressing room and asked her to "come here for a second" as she was leaving. She said she went to the doorway, pushed open the door, and saw</p>

	<p><i>state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>the accused sitting at his dressing table removing his makeup and not wearing any clothes. She said she could see uninterrupted skin down the whole left side of his body. She said that the accused turned further towards her and she said words to the effect of, "Ah put some clothes on" and turned to leave. She said that as she was leaving, the accused said something like, "Ah, no, no, it's just because I feel so comfortable." She said this occurred on a different night, either before or after the night on which the incidents in her dressing room and in the bed scene took place.</p>
6	<p><i>Incident: CC Sitting on Lap</i> <i>Location: Melbourne</i> <i>Date: 26 April 2014 - 13 July 2014</i> <i>Witnesses: CC, Kristian Lavercombe</i> <i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>CC gave evidence that once, maybe twice, during a technical rehearsal, the accused guided her by her hips to sit on his lap/knees. She said this made her feel uncomfortable and she wanted to get herself out of the situation as quickly as she could, but also being mindful of not coming off as offensive and shooting back up. She said she "didn't jump up like a scalded cat" but "sat there briefly and when she felt like it wasn't going to be offensive to get out of that situation" she did. Kristian Lavercombe gave evidence that he recalled CC sitting on the accused's lap offstage. He said variously that this happened "once in a</p>

		while”, on more than one occasion and “regularly”. He did not recall the accused ever grabbing her and pulling her down onto him.
7	<p><i>Incident: Hugging CC</i></p> <p><i>Location: Various</i></p> <p><i>Date: 10 January 2014 - 13 July 2014</i></p> <p><i>Witness: CC</i></p> <p><i>Complainant’s conduct or state of mind; the accused’s conduct or state of mind; circumstances of the offending</i></p>	<p>CC gave evidence that on occasion, the accused would encourage her and hug her at the company warm up for nightly shows. She said that she “didn’t really have a reaction”, was “not engaging with him”, “never pushed him away, physically”, “allowed him to hug her” and didn’t object to him hugging her because she didn’t want to anger him.</p>
8	<p><i>Incident: Comments about Falling in Love with CB</i></p> <p><i>Location: Adelaide</i></p> <p><i>Date: 21 March 2014 - 13 April 2014</i></p> <p><i>Witness: CB, BF</i></p> <p><i>Complainant’s conduct or state of mind; the accused’s conduct or state of mind; circumstances of the offending</i></p>	<p>CB gave evidence that on an occasion in Adelaide, during a rehearsal or media call and the staging of the song “Eddie’s Teddy”, the accused grabbed and squeezed her hand and said under his breath, “Every day I’m falling more and more in love with you”. CB said that she felt frozen and awkward, that the incident felt inappropriate, and that she didn’t respond. BF gave evidence that CB complained to him that the accused said to her on multiple occasions “I’m falling more in love with you each day”. He said that she told him that these comments by the accused made her feel uncomfortable.</p>

9	<p><i>Incident: Comments about CB's Breasts</i></p> <p><i>Location: Adelaide & Melbourne</i></p> <p><i>Date: 21 March 2014 - 13 July 2014</i></p> <p><i>Witness: CB, BF</i></p> <p><i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>CB gave evidence that the accused frequently commented to her that she was a beautiful woman, commented on her figure and in particular commented on the size of her breasts. He also regularly physically reacted to her breasts. She deliberately ignored this behaviour as she didn't want to encourage it and was afraid to confront him. BF gave evidence that CB complained to him that the accused had made comments to her about her breasts in Perth and Adelaide, saying words to the effect of "wow, they look amazing" and "what's your mother's breasts like?" He said that she told him that these comments by the accused made her feel uncomfortable.</p>
10	<p><i>Incident: CB in Accused's Dressing Room</i></p> <p><i>Location: Melbourne</i></p> <p><i>Date: 26 April 2014 - 13 July 2014</i></p> <p><i>Witness: CB, BF</i></p> <p><i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>CB gave evidence that after a performance in Melbourne, she was asked to attend the accused's dressing room. She said that she went inside, closed the door at the accused's request, then the accused undressed to the point of also pulling down his underwear in front of her. She said that she immediately turned away, said, "What the fuck?" and reached for the door. The accused apologised, told her not to leave and said he was just comfortable. She said the accused made her feel like she was overreacting. She didn't leave but didn't</p>

		<p>turn back until he said it was okay to look again. BF gave evidence CB complained to him that on an occasion in Adelaide, she was asked to go to the accused's dressing room and when she entered, he was naked or virtually naked. She told BF that she was shocked at this and told the accused to "put something on" but the accused responded with words to the effect of "what's the big deal?" She told BF that she then walked out of the dressing room.</p>
11	<p><i>Incident: CD Bed Scene – General</i> <i>Location: Brisbane onwards</i> <i>Date: 10 January 2014 – 13 July 2014</i> <i>Witness: CD</i> <i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>CD gave evidence that not long after the show commenced in Brisbane, the accused's kisses of her during the bed scene moved from her neck and arm to her breast and stomach. She said that on a few occasions she wriggled so that he would stop but she never said anything. She said it felt yucky but she tolerated it because she didn't want to make things uncomfortable and awkward.</p>
12	<p><i>Incident: CD Bed Scene</i> <i>Location: Perth</i> <i>Date: 16 February 2014 – 9 March 2014</i> <i>Witness: CD</i> <i>Complainant's conduct or state of mind; the accused's conduct or state of mind; circumstances of the offending</i></p>	<p>CD gave evidence that in Perth, during the bed scene, the accused kissed the top of her left breast twice as he was disappearing out of sight of the audience. She said he then sensually kissed down her stomach around three times, from under her bra to below her belly button. She said that she turned away from him but he pulled her underpants to the side to expose her right</p>

		<p>buttock and kissed the whole cheek in a circle around four times. She said she continued to perform the bed scene despite wanting to slap his head away or wriggle because she couldn't do so without disrupting the scene. She said that after the scene he laughed about it. She said she didn't laugh or say anything and was uncomfortable.</p>
13	<p><i>Incident: Sophie Norfolk in Accused's Dressing Room</i> <i>Location: Melbourne</i> <i>Date: 26 April 2014 - 13 July 2014</i> <i>Witness: Sophie Norfolk</i> <i>The accused's conduct or state of mind; circumstances of the offending</i></p>	<p>Sophie Norfolk gave evidence that a few weeks into the Melbourne run of the show, an incident occurred during an interval when she was asked to check the accused's microphone in his dressing room. She said that she knocked on the accused's door and entered after he told her to come in. When she entered, she saw the accused seated at his dressing table and not wearing any clothes. She was shocked and felt awkward but checked his microphone, observed nothing wrong with it, then left the room. The accused covered his genitals with his hands. Ms Norfolk said that this had only happened to her on one other occasion during the 2014 run of the show, with CA during a costume change.</p>

Analysis of the other misconduct evidence

578. My first general observation is that the allegations of other misconduct, numbering 13 in total are very nearly as significant in number as the remaining 14 charged offences.

579. There is a danger that this evidence could swamp the fact finding process to the extent that there would be a high degree of probability that its probative value would be outweighed by the unfair prejudice occasioned by admitting it, leading to its exclusion under s 137 of the *Evidence Act 2008* (Vic).
580. The relevance of this evidence requires an extremely careful analysis; in my view much of the work that the misconduct evidence is asked to do is clearly unnecessary and, as such, irrelevant.
581. None of the evidence is needed by me to explain lack of protest or complaint. Each of the complainant's gave evidence as to the rationale for their silence and these reasons require no further elaboration in the form of context evidence.
582. The relevant context is derived from evidence other than that of the accused's misconduct. He was the star of the show, handpicked by the producer, he had played the role many times and relied upon to be "box office". The complainants were either in their roles for the first time or they were in ensemble parts; all felt they were expendable. The offending took them by surprise; in one sense some of the offending did occur "out of the blue". On three occasions the offending is alleged to have occurred on stage when the complainant was performing and in no position to protest or resist. Nevertheless, the complainants all gave evidence that, given the situation/circumstances that they found themselves in when it would not do to cause offence, they did in fact resist: "have I gone too far?" "Yes"; CA's lack of response to the kiss leading to the accused's embarrassment "I'm such an old fool"; CC pushing his hand away, CD pushing his hand away and not laughing as it seems he may have wanted her to do, CB: -"you cheeky fucker". The only relevant context in terms of the complainants' state of mind was when having resisted CC experienced the accused's displeasure and was "iced out" meaning she was even less likely to complain.
583. Nor does the context evidence assist to explain that the offending did not happen "out of the blue".

The relationship evidence

584. The term “brazen” may lend itself to several different definitions.
585. If it means being oblivious to the prospect of discovery, or enjoying an extra thrill from its imminent prospect, then the evidence doesn’t support this. The incidents that form the subject of the charged acts were mostly surreptitious, e.g. on stage when the complainants were hidden from view or in a dressing room when alone.
586. If its dictionary meaning is relied upon, it means “bold and without shame”. That does not take matters much further.
587. If, on the other hand, what is meant by “brazen” is egotism, self-absorption, a tone-deaf sense of humour and an insensitivity to the sensibilities and autonomy of others, then the context evidence does shed some useful light. In so far as it does, it is relevant, and I will admit it as background evidence of the accused’s state of mind while giving myself a forceful reminder to avoid the pitfalls of tendency reasoning.
588. I accept the credibility, reliability, and relevance of the evidence that CA, CB, CC, and Ms Norfolk gave as to Incidents 1, 5, 9, 10, and 13, which was supported by the evidence of Timothy Maddren, Brendan Irving and Vincent Hooper.
589. When assessing the accused’s state of mind, I will have regard to Incidents 5, 10 and 13 (not warning female visitors to his dressing room that he was naked; undressing in front of them); Incident 1 (entering CA’s dressing room after she had said she was not decent); and Incident 9 (the frequent comments about CB’s breasts).

DIRECTIONS SOUGHT BY THE PROSECUTION

Other misconduct evidence

590. In order to find that other misconduct evidence is admissible in these proceedings either as context or relationship evidence I must identify how the other misconduct evidence is relevant (whether directly or indirectly) to the

existence of a fact in issue in the trial and direct myself not to use the evidence for any other purpose; remind myself that the evidence forms only part of the prosecution case against the accused and that I must not decide the case based on prejudice arising from what I have heard about the accused (see also context evidence).

Previous representations

591. The directions listed in ss 44B, 44C and 44E of the *Jury Directions Act 2015* (Vic) are not required to be given to a jury, but I will take those matters into account.

Doubts regarding truthfulness or reliability of victim's evidence

592. I will give myself the anti-*Markuleski* warning.²³

Accused giving evidence and interest in outcome of trial

593. The accused has given evidence in these proceedings. That he has an interest in the proceedings is not a matter to take into account in assessing his evidence; his evidence is not less credible or requires more careful scrutiny; any person who is on trial has an interest in the outcome of the proceedings.²⁴ The fact that he has given evidence does not alter the fact that the burden of proof is on the prosecution; his evidence must be assessed in the same way as any other witness and I must not give less weight to his evidence because he is the accused (see also general principles above).²⁵

²³ *R v Markuleski* (2001) 52 NSWLR 82; *Jury Directions Act 2015* (Vic) s 44G.

²⁴ *Jury Directions Act 2015* (Vic) s 44H.

²⁵ *Jury Directions Act 2015* (Vic) s 44I.

Whether a prosecution witness has a motive to lie

594. The defence having raised the issue of the complainants having a motive to lie, I will direct myself that the accused does not have to prove that a witness had a motive to lie (see also “collusion”).²⁶

Consent and reasonable belief in consent

595. Relevant directions are to be found in ss 37A-37AAA of the *Crimes Act 1958* (Vic) as it was in force between 26 April 2014 and 14 July 2014.

596. It is the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity..²⁷

597. I will direct myself that consent means free agreement and that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement; that I am not to regard a person as having freely agreed to a sexual act just because she or he did not protest or physically resist..²⁸

598. I will remind myself that these directions and those currently in the *Jury Directions Act 2015* (Vic) reflect that the *Crimes Act 1958* (Vic) embodies a communicative model of consent.

599. In considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, I must consider any evidence of that belief, and whether the belief was reasonable in all the relevant circumstances having regard to whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and any other relevant matters..²⁹

²⁶ *Jury Directions Act 2015* (Vic) s 44L.

²⁷ *Crimes Act 1958* (Vic) s 37A.

²⁸ *Crimes Act 1958* (Vic) s 37AAA.

²⁹ *Crimes Act 1958* (Vic) s 37AA.

Delay and credibility

600. As required by the *Jury Directions Act 2015* (Vic), I will direct myself that complainants who delay in making a complaint are not less credible or require more scrutiny than other complainants and that their delay in complaint does not require me to scrutinise the complainants' evidence with great care. I will direct myself that people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; that some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; that delay in complaint in respect of a sexual offence is a common occurrence; and there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence.

Differences in complainant's account

601. Where I consider that there is evidence that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability (e.g. a gap in that account, an inconsistency in that account, or a difference between that account and another account) I will direct myself that it is up to me to decide whether the offence charged, or any alternative offence, was committed; and differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and that experience shows that:

- (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
- (ii) trauma may affect different people differently, including by affecting how they recall events; and
- (iii) it is common for there to be differences in accounts of a sexual offence (e.g.: people may describe a sexual offence differently at different times, to different people or in different contexts.); and

- (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and it is up to me, as fact finder, to decide:
- i. whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability; and
 - ii. whether I believe all, some or none of the complainant's evidence.

Proof beyond reasonable doubt

602. I will direct myself in accordance with ss 61, 62, and 64 of the *Jury Directions Act 2015* (Vic) as to the meaning of beyond reasonable doubt, and as to which matters I must be satisfied of beyond reasonable doubt. (See also General Principles and Directions Sought by Defence)

Jury deliberations

603. See proof beyond reasonable doubt, above.

DIRECTIONS SOUGHT BY THE DEFENCE

Proof

604. The Court will direct itself that the burden of proving the accused's guilt is placed on the prosecution in respect of each element *or essential fact* forming the offence/s with which the accused is charged; and that such burden never shifts to the accused. There is no obligation on the accused to prove *any fact or issue* in dispute. The fact that the accused has tendered evidence and given an exculpatory account cannot and does not alter the burden of proof. He does not have to prove that any version offered is true, because it is the prosecution that must satisfy the Court that the accused's version should not be accepted as a version that *could reasonably be true*. The Court must entertain a reasonable doubt not only where an accused's version is capable of being true, but independently of that, where his accuser's evidence is affected by

issues of credit and contradictory fact. In either case, the Court must bring in a verdict of not guilty, for the reason that the prosecution will have failed to prove the accused's guilt beyond reasonable doubt.

605. I adopt the direction sought *in toto*.

Liberato

606. The defence submitted that a *Liberato* direction was required. This submission was not confined to any particular charge/charges. Their submission read:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue.”³⁰

607. In so far as this is a statement of the burden of proof, I give myself this direction.

Murray

608. The defence also sought a *Murray*-type direction:

“A *Murray*-type direction is that in cases such as this where the prosecution's complainant witnesses' evidence is essential to prove its case beyond reasonable doubt, caution should be exercised before convicting the accused. The direction has its origin in *R v Murray* (1987) 11 NSWLR 12. In *Robinson v The Queen* (1999) 197 CLR 162 at [25]-[26], the High Court held that the

³⁰ (1985) 159 CLR 507, 515.

direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt. The direction “emphasises what should be clear from the application of the onus and standard of proof: if the prosecution case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt.”

609. I am not persuaded that the direction sought is apt or necessary.

Complaint evidence

610. Dealt with under “Directions sought by prosecution - complaint”.

Delay in complaint: Longman direction

611. I was asked to give myself a *Longman* warning. This warning has been abolished in the state of Victoria.³¹

612. Forensic disadvantage is defined in s 38 of the *Jury Directions Act 2015* (Vic):

Forensic disadvantage means a disadvantage (that is more than the mere existence of delay) to the accused in –

- (a) challenging, adducing or giving evidence; or
- (b) conducting his or her case –

because of the consequences of delay due to the period of time that has elapsed between the alleged offence and the trial.

613. The court may only direct itself or a jury if satisfied that the accused has experienced a **significant** forensic disadvantage.³²

614. The defence submit that the delay of four and a half years before the complainants went to the police has caused forensic disadvantage due to:

- the delay in instituting the prosecution;
- the possibility of distortion in human recollection;
- the nature of the allegations and their multiplicity;

³¹ *Jury Directions Act 2015* (Vic) s 40.

³² *Jury Directions Act 2015* (Vic) s 39.

- the prosecution case is confined to the evidence of the complainant; and
- the unusual or special features of the cases – notably the prosecution’s reliance on hearsay complaints that were contradicted, or inconsistent, or self-contradictory, or attended by circumstances in which they (sic) is a real possibility of concoction or contamination.

615. The defence submit that these difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence to establish a reasonable doubt about guilt, or both. The delay means that evidence relied upon by the prosecution cannot be as fully tested as it otherwise might have been.

616. The first two items would not be considered a disadvantage that is more than the mere existence of delay.

617. The number of complainants and allegations are irrelevant to the issue of delay.

618. The prosecution is not confined to the evidence of the complainants. Any “unusual or special features” are more likely to cause the prosecution a forensic disadvantage.

619. In order to persuade a court that the defence has experienced a significant forensic disadvantage, the actual disadvantage should be identified. Matters which are often relevant to this issue have not been identified, e.g. there is no assertion by defence that potential evidence was unavailable; that any witness was deceased or unable to be located; or that the passage of time was such as to confuse or impair the memory of the witnesses.

620. I am not persuaded that the delay of four and a half years has resulted in any identified significant forensic disadvantage.

Failure to call witnesses

621. This was referred to within the defence “address” but did not appear to be fleshed out in any detail in the directions sought.

622. Complaint was made during the hearing that the drummer from the band had not been called to give evidence on a collateral issue (whether he had made a mistake that annoyed the accused to the extent that he was chastised before the cast or possibly even dismissed).

623. In any event, the prosecution supplied copies of email correspondence on this issue which clearly set out, on two occasions, the proposed witness list (and, courteously, the proposed order of witnesses) with the Prosecution instructor issuing the following invitation on 5 August 2019:

“Below is the proposed witness list from the Prosecution's perspective. Please consider the list and let me know asap if you consider other witnesses should be added to the list, because many of the witnesses live interstate or overseas so will require Videolink or travel arrangements to be made, which can take some time to organise.”

And again, on 22 August 2019:

“Forwarded below is the email I sent you on 5 August 2019 with a proposed order of witnesses and a request that you advise whether the defence agree with the prosecution's list of proposed witnesses. I repeat that request, as the Informant is going on leave in September and through October, and she would like to organise the travel and Videolink arrangements of interstate and overseas witnesses before she goes on leave.”

624. This was met with the slightly baffling response from defence (and I note copies were sent to both senior and junior counsel):

“‘Whether the Defence agrees with the list’. We are unsure of your meaning.”

625. I am satisfied that there is no unexplained or unsatisfactory failure to call any prosecution witness.

Good character

626. The failure of defence to ask for a good character direction was not inadvertent. Defence Counsel retracted any attempt to put the accused's good character in issue.

627. I take into account that the accused has no prior convictions.

PROSECUTION SUBMISSIONS ON THE ELEMENTS OF THE OFFENCES

Indecent assault

Application of Force/Touching

628. The accused must have touched the complainant. The touching does not need to be violent or to cause any physical harm or injury. Even a slight touching is enough.

Intention

629. The touching must have been intentional. That is, it must have been deliberate, not accidental. However, it does not need to have been done with any hostile or aggressive intent. It is also not necessary that the accused intended to cause any harm to the complainant or that the purpose of the touching was for the accused's sexual gratification.

Indecent circumstances

630. The Crown must prove that the touching occurred in indecent circumstances. While the term "indecent" is an ordinary, everyday word, the indecent circumstances must involve a sexual connotation. That connotation may arise from the area of the complainant's body that was touched, from the part of the accused's body that was used for the touching or from the circumstances surrounding the touching. The actual touching itself may be indecent because of the particular part of the body that was touched by the accused. In those circumstances, there would usually be no need to find any additional indecent circumstances as the elements of touching and indecency may both be satisfied by the one act.

Lack of Consent (Lawful Justification)

631. The touching must have occurred without any lawful justification. Here, the Crown allege that each complainant was touched without her consent. At law, consent means free agreement. The Crown allege that each complainant did not consent to the touching because she did not freely agree to be

touched. The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to be touched. These circumstances include where a person submits because of force or the fear of force to that person or someone else and where a person submits because of the fear of harm of any type to that person or someone else.

632. If the Court is satisfied beyond reasonable doubt that one of these circumstances existed, it follows that it must find that the complainant was not consenting. Of course, if the Court is satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven. In addition, the fact that a complainant did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is sufficient to show that the act took place without the free agreement of the complainant.

633. A complainant is not to be regarded as having freely agreed just because she did not protest or physically resist the accused or because she did not sustain physical injury. In determining whether the complainant did not freely agree to be touched, the Court must consider all of the relevant evidence. Obviously, this includes what is alleged to have been said and done (along with what was not said or done) at the time of the alleged touching and the evidence the complainant gave in Court about her state of mind at that time.

State of Mind of the Accused

634. The Crown must prove beyond reasonable doubt that, at the time of the alleged touching, the accused was aware that the complainant was not or might not be consenting, or he was not giving any thought as to whether the complainant was not or might not be consenting.

635. The directions in force in 2014 were contained in the *Crimes Act 1958* (Vic) and were as follows:

37AA Jury directions on the accused's awareness

For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act,

the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider –

- (a) any evidence of that belief; and
- (b) whether that belief was reasonable in all the relevant circumstances having regard to –
 - (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
 - (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
 - (iii) any other relevant matters.

The Crown's submission

636. Despite the evidence of the accused as to his belief in consent, the Crown submit that the circumstances of the offending (including the type of touching, where the complainants were touched, how they were touched and with what), and the evidence of each complainant demonstrates that the accused did not believe that the complainants consented to the alleged touching.

Common assault

Application of force

637. The accused must have applied force to the body of the complainant. It does not matter how much force is applied; even a slight touch is sufficient. The duration of the force does not matter, and it does not need to have harmed the complainant.

Intention or recklessness

638. The Crown must prove that the application of force was intentional. That is, I must be satisfied that the accused deliberately applied force to the body of the complainant.

Lawful justification and excuse

639. The Crown must prove that the application of force was without lawful justification or excuse. The Crown submit that none of the complainants consented to being touched by the accused in the manner alleged. Furthermore, the Crown submit that there is no evidence of a lawful justification or excuse that the accused can rely upon.

ANALYSIS OF INDECENT CIRCUMSTANCES

640. In this case, the Crown submits that the touching was indecent because of the circumstances of the touching and/or the part of the complainants' bodies that were touched by the accused.

641. The defence submits that an assessment of what circumstances give rise to indecency must take into account "the totality of the setting in which the incident took place, the persons involved, their relationship, the history (if any) of prior such conduct between them, and the immediate cultural environment must all be taken into account as affecting the standard against which judgment is made." The defence says "backstage at the Rocky Horror Show with the cast getting around nearly naked in fishnets and briefs is not the same environment as a school speech night".

642. The defence makes general reference to Barwick CJ and his views as to the different standards to be applied to a performance in a church and a smoking concert.³³

643. I am unpersuaded that the concept of indecency as it relates to sexual offending is as "ambulatory" as it might be when applied to the concepts of

³³ See *Crowe v Graham* (1968) 121 CLR 375.

obscurity and indecency of published material as they developed over the 20th century.

644. For an exploration as to when an assault is indecent, it is significantly more enlightening to have regard to the prohibition on unwanted sexual conduct as explored in the criminal cases.³⁴

645. For the circumstances to be “indecent” they must have a sexual connotation and be contrary to “community standards of decency”. The essence of the offence of indecent assault is the lack of consent of the person who is sexually touched, rather than the indecency of the touching itself.

ANALYSIS OF THE CHARGES

Charge 4: indecent assault

646. The accused does not deny that he kissed CA in her dressing room. Some of the surrounding circumstances were also not in dispute: that she was doing her makeup at the time, and that he said “I can’t stop thinking about you and “I think I might be falling in love with you”.

647. The accused denies that he held CA’s face at the moment of the kiss and that he was subsequently embarrassed and apologised to her. Where there are inconsistencies between the accounts of the accused and CA, based on my assessments of their respective credibility, I prefer the evidence of CA.

648. To convict the accused I must be satisfied beyond reasonable doubt that the elements of the offence is made out. That he touched her intentionally is not in issue but the remaining elements of the offence are disputed.

649. I accept beyond reasonable doubt the evidence of CA on the issue of consent that she did not do or say anything to indicate that she was consenting to being kissed and that she did not consent. There is no evidence to support the accused’s assertion that it was a “two-way street”. The evidence the accused

³⁴ *R v Harkin* (1989) 38 A Crim R 296; *Sabet v R* [2011] VSCA 124; *Curtis v R* [2011] VSCA 102; *R v RL* [2009] VSCA 95.

gave was clear that CA said and did nothing to indicate that she consented to being kissed in her dressing room at the Comedy Theatre.

650. Whether the kiss was indecent is a question of fact to be determined by references to the surrounding circumstances. It is patent that not every kiss on the lips is indecent.

651. The kiss occurred in private and was accompanied by words of admiration and emotion. Leaving aside the issue of the sincerity of those words as it is irrelevant, I am not persuaded that the words imbue the kiss with a sexual connotation. Though “romantic”, the kiss was gentle and brief and not accompanied by any touching of a sexual nature.

652. I also have some doubt that the accused was aware that CA was not consenting until it was evident to him in that moment that the kiss was not being reciprocated. His lack of awareness is consistent with his embarrassment and apology.

653. The Crown has not persuaded me beyond reasonable doubt of the element of indecency nor the fault element and the accused is not guilty on charge 4.

Charge 13: common law assault (alternative to charge 4)

654. In the circumstances of this incident, once the element of indecency is removed, though an assault may in some circumstances be as gentle as a mere touch, these are not those circumstances. I am not persuaded beyond reasonable doubt that the accused is guilty of assaulting CA on this occasion.

Charges 5 and 14: indecent assault

655. These charges arise out of the one incident and I will deal with them together.

656. The allegations that form the basis of these charges are that on an occasion when CA was relaxing in the Green Room, the accused climbed into CA’s lap, straddled her and kissed her down the side of her neck.

657. The accused’s evidence was that he had no memory of this incident though he did concede that something similar may have occurred. An inference is easily

drawn that he kissed CA's neck given his evidence that CA's "schtick" was kisses of this nature ("vampire kisses").

658. During CA's cross-examination, a single publicity shot of CA as Vampira entitled "brought to you by..." became the basis for an assertion that CA had a tendency to engage in physical kisses of all and sundry. I entirely reject this. I note it was not put to CA nor to any other witness. I place little, if any, weight on the accused's evidence as it relates to CA, but his evidence does reveal a state of mind held by himself in which "vampire kisses" were perfectly acceptable/normalised behaviour.

659. CA's evidence was clear and straightforward. In cross-examination her credibility remained intact and I accept that she was a reliable witness.

660. CA's evidence derives some support from the evidence of Mr Hooper and Ms Norfolk.

661. Neither witness gave evidence of seeing the accused kiss CA, though Ms Norfolk's observations of their respective positions on the couch were consistent with him kissing her.

662. On the evidence before me, which I accept, the accused's crotch was in CA's lap with his knees either side of her. The proximity of their genitalia in this position makes a conclusion of indecency inevitable.

663. The kissing, of itself, may not have been indecent had not the accused been looming over her, sitting in her lap with his knees astride her at the time. The particular circumstances of this kissing was that it was inextricably part of the same sexualised encounter and was indecent.

664. I accept CA's evidence that she did not do or say anything to indicate that she was consenting to these actions.

665. I now turn to the fault element of the offences of indecent assault. An objective view of his conduct would give rise to an unassailable inference that he did not reasonably believe that CA was consenting.

666. However, that was not the test in 2014.

667. The fault element, prior to the sexual offence reforms which took effect on 1 July 2015, applied the "subjectivist principle" to an accused's state of mind.

This allowed an unreasonable belief that a complainant was consenting to excuse an accused from criminal liability. The reasonableness of an accused's belief was just one factor in assessing whether an accused was aware that a complainant was not consenting (or might not be consenting).

668. An added complexity was the interaction between a belief in consent and awareness of a lack of consent.

669. The fault element in existence in 2014 was rightly criticised for rewarding a sex offender for their self-absorption, who in their sexual interactions:

“Can see only what he desires and needs and who interprets a woman's reactions as invariably congruent with his own.”³⁵

670. Despite these criticisms of the law as it stood in 2014, a lack of awareness of lack of consent is consistent with the accused's subsequent behaviour – having said “too much? Did I linger too long?” and having heard CA agree that yes – it was and he had – he immediately stopped and removed himself.

671. It seems counterintuitive to find an accused not criminally liable for such sexual harassment and as I said, this is no longer the law.

672. I cannot dismiss the reasonable possibility that in his egocentric state of mind, encouraged by some amount of adulation amongst some sections of the cast and management, in combination with the lack of any checks and balances on his lewd behaviour, that he was not aware of CA's lack of consent.

673. I find that the prosecution have not negated beyond reasonable doubt the possibility that the accused was not aware that CA was not consenting and charges 5 and 14 are dismissed.

Charge 15: common law assault (alternative to charge 5)

674. Was the kiss on the neck a common law assault? It was an application of force, i.e. a touch that was outside the norms of usually acceptable behaviour. The kiss was done intentionally, and the only remaining question is whether it was done without lawful justification or excuse.

³⁵ Ngaire Naffine, *Feminism and Criminology* (Allen and Unwin, 2007).

675. The law does not accept that labelling an activity a “joke” is a legitimate excuse.

676. In the strange circumstances of the RHS behaviour, it was possibly behaviour that was generally acceptable in the course of everyday life. Mr Hooper was a witness to this incident and said he did not think too much of it at the time. Taking the surrounding circumstances into account, I find the Crown has not negated on the high criminal standard the possibility of lawful excuse for this behaviour.

Charge 1: indecent assault

677. This charge has its genesis in a warm up rehearsal on stage.

678. Having been exposed to constant comments from the accused about her breasts over several weeks, to her horror CB saw that the accused was present and he was subjecting everyone in the cast to a hug. This was not a man that CB wished to engage in close personal contact with.

679. On CB’s evidence it seems she was the last in line for the dreaded hug. Everyone else having consented, the pressure was on.

680. The accused approached. He said “CB, may I hug you?” She had to say yes.

681. What happened thereafter is a matter of dispute.

682. CB gave evidence that the accused gave her a full-bodied hug with his nether regions pressed into her stomach. He was wearing flimsy silk boxer shorts with no underwear underneath. She could feel his penis and it felt partially erect as he gyrated his hips against her.

683. There were no other witnesses to this alleged assault and the evidence is dependent solely upon the testimony of CB.

684. Undermining CB’s reliability when recounting this event, is that her account of what happened has evolved over time. When she first recounted it to her fiancé BF she said that the accused gave her a cuddle and that it was uncomfortable. When BF gave his evidence, he said that the involvement of the accused’s penis was not mentioned to him until 2017.

685. In the first and second drafts of her police statement, CB mentioned the accused's groin, then pelvis but not the word "penis". It was not until the third draft of her statement that CB included the allegation that during the hug she felt the accused's penis and that it was partially erect. Nor did she mention it in her interview with the ABC.

686. Some of CB's evidence was inconsistent with other evidence which I accept as credible and reliable, including complaints made to her by CC. CB's reliability as a witness was undermined when she gave evidence of witnessing an incident on stage where the show report for that performance documents her being forced off-stage due to vomiting.

687. I accept, and understand, that CB did not want to hug the accused on that occasion; however, I am not persuaded by the evidence that the element of indecency has been made out in charge 4.

Charge 11: common law assault (alternative to charge 1)

688. Once the element of indecency has been removed, there is evidence that CB consented to the hug.

Charge 2: indecent assault and charge 12: common law assault

689. CB gave evidence of an incident that occurred when she stepped up from understudy to play the role of Columbia.

690. The court heard evidence from several witnesses that a kiss had developed in the "I'm Going Home" scene between AH, the actress who usually played Columbia, and the accused. The evidence was not decisive as to whether that kiss was ever the result of any instruction given by the director but there is no dispute that the kiss had become part of the scene. It is unclear as to whether it was invariably part of the scene.

691. CB did not wish to kiss the accused man. By the Melbourne run she was really over him. She gave evidence that she told the resident director Ms Howard that she didn't want to do the kiss and that Ms Howard told her she didn't have to.

692. Ms Howard did not recall this conversation but whether or not CB said this to her, there is no evidence that CB's attitude was conveyed to the accused.
693. Evidence was given by CB and BF that the accused, on both the first and second nights, of CB going on as Columbia, had asked if BF was going to be in the audience. The accused denied asking this question. CB and BF gave evidence that there was no kiss on the first night when BF attended. I accept that BF, who otherwise suffers from a vague memory, would have noticed and remembered if there had been a kiss.
694. On the other hand, if the accused had asked if BF was going to be in the audience, I would not attach any sinister significance to that question. I accept that such an enquiry may have been a genuine "pleasantry".
695. On the second night, BF was not in the audience and there was a kiss. That there was a kiss is testified to by CB, Mr Hooper, and the accused.
696. CB's evidence was that she did not agree to do the kiss, that is, she did not say anything to indicate she was consenting.
697. Victoria has a communicative model of consent; there is no implied consent. Consent given one day may not be forthcoming the next. The fact that a person does not say or do anything to indicate consent is enough to show they were not consenting.
698. I am satisfied that CB did not consent to the kiss. The issues in contention are whether the kiss occurred in indecent circumstances and whether the accused was aware that CB was not consenting.
699. CB says the kiss was a tongue kiss. If I am satisfied to the requisite degree that the accused did put his tongue in CB's mouth, then I would find that to be indecent.
700. Apart from CB's evidence, there is the evidence of CC to whom CB complained immediately after the show and who observed her to be upset and angry, though that emotional reaction may have been the result of the accused's contemptuous dismissal of her protest afterwards.
701. Mr Irving said that CB had told him the kiss had "lingered for a little too long". Ms Barlow said CB had told her that it was an unscripted kiss that the

accused improvised. Mr Hooper was present when CB said, "I can't believe that fucking bastard kissed me on stage". BF said she told him she had been kissed in the scene.

702. Weighing all the evidence, I find that the accused probably did tongue-kiss CB in the "I'm Going Home" scene, but I am not persuaded beyond a reasonable doubt that he did so; the element of indecency not being established, charge 2 is not made out.

703. With regard to the alternative charge of common law assault, the kiss was not criminal if it was not indecent. Without that element, it was merely part of the way the scene was played.

Charge 7: indecent assault and charge 16: common law assault (alternative to charge 7)

704. On this occasion CC was in no position to consent to any unexpected physical touching. She was on stage and as understudy she was under pressure to step up to the role of Columbia which she was playing that night.

705. She was on a platform, on stage, with another character, Magenta. To get to the platform, they climbed a few steps up a mobile staircase. When they were on the platform, only the top half of their torsos were visible to the audience.

706. CC felt someone touching her leg. First her foot, then her knee and then her thigh was tickled. When the hand touching reached to her mid-inner thigh, she kicked backwards to make it stop. The accused man was behind her on the stage floor and he was laughing. Later he made a remark confirming that he had been responsible for the unsolicited touching. He said, "mate you nearly kicked my head".

707. The accused's denial of this allegation was a blanket one. He denied the touch and the admission.

708. The defence case theory was that it was AH, the actress who usually played Columbia, who had been tickled (though not indecently). This was based on the evidence of CA who gave evidence that she had witnessed the accused tickle Columbia up near her bottom on two occasions whilst on the platform.

On the first occasion she believed Columbia to have been played by AH, on the second occasion she was not so certain and thought it was AH. The difficulty with basing the defence on CA's evidence was that CA's and CC's evidence were not mutually exclusive. CA may be correct that AH was tickled twice, while there was many an opportunity for CC to be the object of tickling on another occasion.

709. I have previously ruled that the evidence of CB on charge 2 (CB2) had the capacity to provide moderate support, and the evidence of CD on charge 8 (CD8) to provide strong support, for the inference that it was likely that the act alleged by CC occurred.
710. Having heard all the evidence, I would not place great weight on CB2, but I am satisfied that the tendency evidence of CD8 does provide strong support for that inference.
711. Having seen CC in the witness box and having reviewed her evidence I find that CC was a sincere and reliable witness and I accept her evidence in full.
712. The inner thigh is an erogenous zone and the touching was indecent. If there is any residual doubt as to the touch being indecent, I rely on the evidence of CD8 as tendency evidence. That evidence makes it more likely that, CC having said in her evidence that the touching (as it moved toward her genital region) didn't feel like it was going to stop, she was correct and the touching was indecent.
713. There is no evidence that CB said or did anything to indicate her consent to being touched, she was fully occupied doing her job.
714. CC gave evidence that the accused played tricks on the cast, his intention being to make them break out of character and make them laugh. He certainly thought touching CC in this way was funny and he appears to have thought that she would too.
715. The current objective fault element with its emphasis on reasonableness rather than (at times deluded) honesty may well hold sexual offenders to a higher standard.

716. In this case, applying the 2014 subjectivist test, I am unable to exclude the possibility that an egotistical, self-entitled sense of humour led the accused to genuinely think that CC was consenting to his actions, i.e. that she would not mind and would also find it funny.

717. I find the accused not guilty of this charge and I am not persuaded that in the absence of the element of indecency that the touching amounted to a common assault.

Charge 8: indecent assault

718. CD was standing behind a vertical bed in the Janet bedroom scene when she felt a finger trace about two centimetres down her labia. She was performing on stage and her hands were required to be on top of the bed sheets. Only her upper torso was visible to the audience.

719. It is not in issue that an intentional touch on the labia is an assault occurring in indecent circumstances. A touch may be indecent because of (i) the area of body used to touch, (ii) the area of the body being touched (iii) the sexual gratification enjoyed by an accused or (iv) the surrounding circumstances.

720. Touching someone on the vulva without lawful justification is inherently sexual and thus indecent.

721. Prior to this incident, the accused had been in the habit of making jokes about her "little slit" being visible through her costume.

722. My assessment of CD was that she was a credible and reliable witness (see above).

723. The evidence I take into account includes:

- The direct evidence of CD
- The tendency evidence of CC which supports an inference that the touching was more likely to be intentional (see tendency ruling above)
- The previous representations of CD to Ms Campbell and Ms Barr as providing some evidence of the truth of the assertions contained in those previous representations (i.e. the charged offence)
- The previous representation as supporting the credibility of CD.

724. I decline to apply s 136 of the *Evidence Act 2008* (Vic) to limit the use of the hearsay evidence of complaint.³⁶
725. I take into account the evidence of CD as to the comments made by the accused in relation to “the little slit”. I reject the evidence given by the accused that the term “little slit” came from CD and that he only used it in response to her. I note the text from him in which he uses the term was unsolicited and not in response to any communication from her.
726. I accept the evidence of CD that she did not consent to the indecent touching; indeed, the evidence was clear that she could not communicate her consent as she was required to play her role on stage.
727. Whether the accused was aware that she was not consenting or might not be consenting is a matter of inference. One available inference is that given her lack of capacity to consent he must have been aware that she was not consenting. An alternative inference is based on his state of mind. The bed scene is a scene where he and CD had fun. They played for laughs and part of that was the playing of tricks on each other to get the other to laugh.
728. The consistent references to her vagina is direct evidence of his state of mind – that vagina jokes were acceptable humour to him.
729. The fact that he desisted when CD swatted his hand away is relevant in two ways:
1. To demonstrate that it was his hand that touched her and not a vape cigarette, as was suggested to her in cross-examination.
 2. When he did become aware that she was not consenting (albeit that awareness should have been present throughout) he stopped touching her.
730. It is possible that he desisted because the script required him to emerge back into the view of the audience.

³⁶ *Papakosmas v The Queen* (1999) 196 CLR 297, 308-11 (Gleeson CJ and Hayne J).

731. The more favourable inference is the one I am required to draw at law – that upon becoming aware that she did not want him to touch her, he stopped, i.e. he did not touch her while being aware that she was not consenting.

732. I am not persuaded that the Crown has excluded that possibility. The accused is not guilty of that charge.

Charge 9: common law assault

733. The performance of RHS on the evening of 9th May 2014 was attended by a host of problems.

734. Mr Maddren had become tired of the overly sexualised improvisation that the accused had made to Brad on the bed scene. He had changed the scene back to the original direction without informing the accused. The accused was not happy.

735. On top of this, there were technical and costume failures.

736. A late start had caused the accused to miss his cue and he collided heavily with AH in the wings on his entry to the stage.

737. By the time of the “I’m Going Home” scene, CB had left the spaceship to vomit off-stage.

738. During this song, Frank-N-Furter moves around the stage to farewell some of the other characters, believing he is returning to his planet. It is a poignant moment where he sings and interacts with each of them; the movements vary – a glance here, a touch there, a kiss.

739. In this scene the accused was supposed to place his hand lovingly on the side of CD’s face. Instead, as she described it, as he came towards her, he looked furious and grabbed her by the jaw. His thumb was on one side and his fingers on the other and he threw her face to one side. Later in the bows when clapping the band, CD said he still looked angry and clapped 10 to 15 centimetres from her face. CD asked Ms Howard what she was going to do about it to which Ms Howard responded that he was angry.

740. CD later complained to Ms Barr and Ms Campbell. The next day she told the accused that he had frightened her, to which he said, “come on”.

741. CA said that she saw that the accused “sort of shoved CD’s face to one side”. The action struck her as being aggressive. Mr Lucente’s evidence that during “I’m Going Home” he was supposed to keep his gaze on Frank-N-Furter and he did not see anything untoward. Mr Lavercombe was also supposed to watch, and he did not seem to notice. Ms Norfolk gave evidence that one night she saw an action with a case member (she did not know who) where a face was “kind of thrown off to the side”.
742. The effect of the law of assault is that everybody is protected not only against physical injury but against any form of physical molestation, i.e. unwanted physical contact.³⁷
743. The act of force involved in a common assault does not have to be forceful; a mere touch in some circumstances may be enough. The assault does not need to cause an injury, nor is it necessary that the assault be applied in a hostile manner.
744. CD did not say she felt any pain associated with the application of force by the accused on this occasion. It was not noticeable enough that everyone on stage saw it. The application of force, though not momentary, was not sustained.
745. The preponderance of evidence is that the accused did deal roughly with CD, with sufficient force that her face was pushed to one side. The consent she had given to being touched on the face in that scene did not extend to having her face pushed.
746. An element of the offence of common law assault is that the application of force must be intentional. The accused gave evidence that he and CD had a terrific friendship. I infer that he was unhappy and feeling harassed due to the problems in the performance that night, but his ire was towards Mr Maddren, not CD.
747. In all the circumstances, I cannot exclude the reasonable possibility that the unusual force associated with the goodbye touch on that evening was

³⁷ *Collins v Wilcock* [1984] 1 WLR 1172, 1177.

accidental or negligent and not intentional or reckless. The charge must be dismissed.

FINAL COMMENTS

748. The four complainants were brave and honest witnesses.

749. I was not persuaded that there was evidence of collusion between the complainants.

750. I was not persuaded that there was evidence of motive – or that the complaints were made for reasons of career ambition or for any other reason.

751. I was not assisted by the line of questioning by defence that called into question the reputations of the complainants (sexual or otherwise), the poses they struck in photographs on social media, or their appearance or what they were wearing.

752. The law requires me to apply the law as it stood at the time of the alleged offending.

753. That required me to apply a subjective test to the accused's belief as to whether a complainant consented to sexual touching.

754. The laws have since changed – but do not apply retroactively. The law on consent has been replaced with a more objective test: was the accused's belief reasonable?

755. Were the current law applicable, it is possible that the result may be different.

756. On the issue of cross-examination, the Court was not assisted in its task by questions put by defence counsel, Mr Littlemore QC (such as the length of the average female labia majora or whether they were proud of their figure) that relied on troubling and outdated stereotypes of sexual assault victims. Times have changed.

757. It was perturbing that Defence appeared unfamiliar with s 41 of the *Evidence Act 2008* (Vic), which prohibits such inappropriate questions.