

The process for admissibility for every Q

1. Relevance: s 55. Does the evidence rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue?

If relevant, it is admissible: s 56.

2. Exclusionary rules – see respective sections of notes

NB: if leave is required for ANYTHING, you must consider the mandatory things to be taken into consideration by the court: s 192(2)

3. Discretionary and Mandatory exclusions

Pre-prepared paragraph on ss 135, 137:

Sections 135 and 137 provide for a final consideration on whether the evidence should be excluded. Section 135 provides a general discretion for the court to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial; be misleading or confusing; or waste time. Section 137 places an obligation on the court to exclude evidence where it is adduced by the Crown and if the probative value of the evidence is outweighed by the danger of unfair prejudice.

In interpreting ss 135 and 137, R v Shamouil and R v Mundine provided that considerations of reliability or credibility of the evidence should not be regarded as part of its probative value. In addition, the cases are authority for the proposition that instances of prejudicial effect go to unfair prejudice where it cannot be cured by a warning or direction to the jury.

4. Warnings required? S 165
5. Leave required anywhere? Must consider considerations in s 192(2)
6. Witness subpoenaed? Must give them conduct money.

Relevance

The process of getting evidence admitted:

1. Is the evidence relevant? (Section 55 test with s 56 relevant evidence to be admissible);
2. Is the evidence not admissible due to the exclusionary rules?
3. Has the judge used a general discretion to exclude evidence: s 135?

Breakdown of the test in s 55:

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness, or
 - (b) the admissibility of other evidence, or
 - (c) a failure to adduce evidence.

‘Rationally affect’ – logical connection between evidence and fact in issue

‘could’ – possibly

‘probability’ – probative value

‘fact in issue’ – elements of cause of action or offence

‘directly or indirectly’ – indirectly = circumstantial

The test (phrase problem responses in this manner): Does the evidence of _____ rationally affect the assessment of the probability of the existence of a fact in issue?

Then, apply:

- What are the issues at trial?
- What is the disputed fact in contention?
- Does this evidence go directly or indirectly towards assessing the probability of that fact in contention?
- Does it do so in a logical way?

Some relevant principles and examples:

- The test in s 55 must be given an extremely broad ambit: *Evans v The Queen* (2007) [95]
- Questions of relevance are highly fact specific: Ibid [98]
- Evidence may be relevant for more than one purpose: *Papakosmas v R*

- Evidence was relevant to prove the facts asserted as the statements by the complainant were closely contemporaneous with the events alleged by the Crown and by doing so, rationally bear on the probability of the occurrence of the events (i.e. whether the complainant did not consent to intercourse with the appellant): at [59] per McHugh J. (the hearsay purpose); and
- The credibility purpose by reason of recent complaint
- *Evans v R*
 - it was held that requiring the appellant by the prosecution to put on a balaclava, overalls and a pair of sunglasses (that were not in evidence), walk up and down in front of the jury and say some words that the robber was said to have used, was not relevant to the facts in issue.
 - The issue in that case was whether he was the robber, NOT whether there had been a robbery and NOT whether the robber had been wearing a balaclava, overalls and sunglasses. (the facts were that a security camera photographed an armed man robbing people of money and wore overalls, sunglasses and a balaclava) (Gummow and Hayne JJ)
 - Per Gummow and Hayne: dressing the appellant with the clothes provided the jury no information that could rationally affect, directly or indirectly, the determination of any fact in issue as it revealed nothing about the wearer and nothing about the whether the appellant was the actual robber. It revealed nothing that the jury didn't already know.
 - This can be contrasted with requiring the appellant to walk in front of the jury and speak certain words as observing how he walked and spoke might bear upon their decision whether he was the man witnesses had described
 - Kirby J: evidence was relevant BUT evidence inadmissible from ss 135, 137 due to serious prejudice by dressing in garb, looking sinister and criminal-like. If the jury glanced at for a moment at the accused, it would create an imprint of the jury's collective mind and make him look like a criminal. This is unfairly prejudicial.
 - Heydon J (dissenting), Crennan J agreeing – was relevant and if he did not look like the person on video, it can show the jury it definitely was not him; Crennan J agreeing.
- *Smith v R*
 - S was accused of robbing a bank and was acting as a lookout. He was recorded on bank security cameras.
 - The fact in issue: whether Smith was the person depicted in the photographs taken by the cameras at the time of the robbery. The Crown asserted that the person in the photos was S.
 - Two police officers (who have dealt with the accused before) gave evidence for the Crown that the person depicted in the photographs was him. The prosecutor conceded that there was little evidence other than that
 - Held:
 - By Gleeson CJ, Gaudron, Gummow and Hayne JJ – that the evidence was not relevant as there was nothing about the police evidence that would rationally help a juror in making their OWN assessment of whether the person in the photo was the accused or not.
 - Where it will be relevant: where the witness identifies someone and proves it is them in another way other than from looking at the accused in the dock and comparing it with the photographs;

- or: where police give evidence that links the accused to the photo – e.g. accused wore a kind of jacket before the robbery and was arrested wearing the jacket that was worn pre-robbery.
- To be relevant: it needs to go beyond the bare assertion of recognition of the person on trial as the person shown in the photograph.
 - By Kirby J (Dissenting) –
 - evidence was relevant by reason of:
 - the police officers' familiarity with the accused and has this advantage over the jury: [41]
 - In addition, persons alleged to be the appellant in the photos were disguised with a hood over their heads and a jury would have impediments in identifying such persons. This was demonstrated by their request for a magnifying glass: [42]
 - The jury also watches the accused sitting still. Police officers had repeatedly viewed the appellant in daylight, in motion and from different angles and they saw him with more natural face movements: [42].
 - But, it should be excluded as the police evidence was opinion evidence, excluded under EA s 76.
 - Prior expertise based on familiarity was not ad hoc expertise for s 79 expert opinion
 - The police officers were not present at the 'matter or event' (the robbery).
 - For examination of witnesses, the relevance of a question put to a witness is relevant as long as there is a POSSIBLE ANSWER that may be relevant in determining a fact in issue: Ibid per Heydon J at [157]

Privilege

Client Legal Privilege

NB: Client legal privilege under the EA applies to pre-trial proceedings in courts: EA s 131A.

TO INVOKE PRIVILEGE

- MAKE OBJECTION BE OR ON BEHALF OF CLIENT
- LAWYER MUST CLAIM PRIVILEGE UNLESS INSTRUCTED TO WAIVE IT
- COURT SATISFIES ITSELF UNDER S 130 THAT WITNESS IS AWARE OF PROVISIONS' EFFECT WHERE AN OBJECTION IS MADE: S 132
- **FINAL STEP – HAS THE PERSON LOST THE PRIVILEGE? – SEE BELOW**

Advice privilege: s 118

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer, or
- (b) a confidential communication made between 2 or more lawyers acting for the client, or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person, for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

- Communications includes: oral discussion or documents
- Applying this section:
 - Show client-lawyer relationship
 - Show dominant purpose of obtaining or giving legal advice (see dominant purpose test below)
 - Show that the communication includes 'legal advice'.
 - Includes (from *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* (2005); applied in *AWB Ltd v Cole* (2006) (FCA): 1
 - legal advice in telling the client the law;
 - professional legal advice as to what should prudently and sensibly be done in the relevant legal context; and
 - includes what evidence and submissions should be placed before a commission of inquiry.
 - Confidential documents prepared by a third party (e.g. expert reports) TO the client OR lawyer (not the other way around) for the purposes of legal advice
 - DOES NOT INCLUDE:
 - commercial advice (the most commercially advantageous way to structure a transaction) (if a letter has both legal and commercial advice, the commercial parts will not be subject to privilege)
 - draft statements of contrition in *Australian Wheat Board*

DOMINANT PURPOSE TEST

- more than just establishing that the privileged purpose was the most important purpose but that it was the prevailing or paramount purpose: *AWB Ltd v Cole (No 5)*
- ask what the intended use or uses of the document which accounted for it being in existence
- mere fact that it concerns litigation/legal advice does not make it privileged – e.g. communications between a client, its lawyers and the lawyers and the client's auditors were not privileged as they were not made for the requisite purposes: *Westpac Banking Corp v 789Ten Pty Ltd*

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
- (b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

To apply:

- show client-lawyer relationship
- show 'dominant purpose' of litigation
- show 'professional legal services' which may include
 - legal advice and representation
 - preparation or settling of documents to be used in or connection with litigation, e.g. witness statement
 - estimates of likely outcome or cost of litigation
- show 'anticipated or pending'
 - where it is actually contemplated – mere apprehension or recognition that litigation is possible does not mean that it is 'antici[ated]': *ACCC v Australian Safeway Stores Pty Ltd* (1998)
- s 119(a) includes
 - confidential communication between client and another person or between lawyer acting for client and another person (**NB this difference w/ s 118**)
 - includes communication between two or more lawyers acting for client (as in s 118)
- s 119(b)
 - does not matter whether delivered or not
 - does not matter who prepared the document (includes third party)
 - doesn't matter whether it was communicated
 - only matters that it was 'confidential' (s 117) and prepared for dominant purpose – thus may include an expert opinion

Copies of unprivileged documents – most likely not protected as copies are not prepared for the privileged purposes – only the original is. See ss 118(c), 119(b) and 120(b).

Loss of privilege

- where removal is required for admin of justice or with rights of a person: s 121
 - s 121(1) – where it relates to intentions of a client/party who has died (succession – testamentary capacity, etc.)
 - s 121(2) – where it prevents enforcing an order of an Australian court e.g.
 - s 121(3) – where communication/doc materially affects a right, e.g. a secret trust: ALRC Report No 38
 - also by Odgers
 - defamatory utterances
 - acts of bankruptcy
 - threats (amounting to tort or crime); and
 - contractual offers
- where person covered by privilege acts in matter that is inconsistent with maintenance of privilege, e.g. disclosure: s 122 waiver
 - inadvertent disclosure – not ordinarily a waiver – where this happens during discovery, usually just get an order to have other party return it IF party makes reasonable steps to avoid the mistake and did not delay advising other party of mistake as soon as they are aware of it: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) (HCA)
- evidence adduced by defendant in criminal proceeding: s 123 unless it relates to an associated defendant
- two or more parties to proceeding have jointly retained lawyer re same matter: s 124
- communication made/document prepared for improper purpose: s 125 misconduct
 - e.g. where a person retains a lawyer to conduct a crime, like furthering a fraud, offence or something else: *R v Cox and Railton* (1884) and extends beyond the criminal law: *Kang v Kwan* (2001)
- where communication/document necessary to have proper understanding of another communication or document with respect to which privilege has been lost: s 126