

Week 2: Verbal Evidence:

Verbal evidence is given in court where a person physically appears in court and verbally expresses his/her comments about the relevant event.

People can be forced to attend court by **subpoena**.

Competence

Focuses on who is qualified to give evidence in court.

Governed by section 13 Evidence Act –

- (1) A person is not competent to give evidence about a fact if, for any reasons (including mental, intellectual or physical disability) –
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact.
- (2) A person who, because of subsection (1) is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he/she is under an obligation to give truthful evidence
- (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person -
 - (a) that it is important to tell the truth; and
 - (b) that he/she may be asked questions that they do not know or cannot remember, the answer to, and that they should tell the court if this occurs; and
 - (c) that he/she may be asked questions that suggest certain statements are true or untrue and that they should agree with the statements that they believe are true and should feel no pressure to agree with statements that they believe are untrue.
- (6) It is presumed, unless the contrary is proved, that a person is incompetent because of this section.

→ Sworn evidence

→ Unsworn evidence

Compellability

Focuses on who can be forced to give evidence.

All competent witnesses are compellable – however, there are some **exceptions** to this.

Section 18 provides for one exception- compellability of spouses and others in criminal proceedings generally.

Week 3: Documentary evidence

Part 2.2 Evidence Act governs the methods in which documents may be presented as evidence in court.

The admissibility of a document's contents will depend on the rules set out in chapter 3 of the Evidence Act.

"Documents" are regarded as "documentary evidence".

A document means any record of information and includes –

- a) Anything on which there is writing; or
- b) Anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- c) Anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- d) A map, plans, drawing or photograph.

A record of information:

Anything that contains a record of information – written paper documents and every day items including bottles, food packaging, mobile phones, whiteboards, clothing, DVDs, computers (including RAM memory), iPods, memory cards etc, **as long as these items contain information.**

Symbols (eg. Letters randomly placed), figures or marks that have no meaning (which contain no information) are considered "**other evidence**". Other evidence also includes weapons used in an attack ("**real evidence**").

Is a video recording a document? Wade (a pseudonym) v The Queen [2014] – A video is a series of photographs comprising a 'visual and permanent record of what could have been seen by a person positioned where the camera was' – falls within s 48(4) Evidence Act.

Contents of which are sought to be adduced:

Section 47 – The rules of documentary evidence apply only to documents, the contents of which are of interest in the proceeding. These are what we would call documentary evidence, whereas "**documents**" may or may not be documentary evidence.

NOTE – Just because something is considered a document within the Act's meaning does not mean it is considered 'documentary evidence'. Whether it is considered documentary evidence depends on the purpose for its tender.

Example – A coke bottle has labels on it and is considered a document in the Act's dictionary. However, the labels on it have no relevance to the proceeding. It may have been used as a weapon in an assault and if this were the case it would be tendered as 'other evidence'.

Labels or identifying documents:

In Commissioner for Railways v Young – Physical things bearing written inscriptions ("inscribed chattels") were not documentary in nature if the writing or marks on them were relied on only as part of the appearance of the thing (as identifying marks).

At common law, **labels affixed to objects (if they were used to identify those objects) do not come within documentary evidence rules because they were considered not to be documents but merely inscribed chattels.**

Week 4: Relevance:

Ask: Is the Evidence relevant?

If yes – admissible unless an exclusionary rule applies (hearsay or against opinion evidence)

If not – inadmissible

Section 56 – Relevant evidence to be admissible

56(2) Evidence that is not relevant in the proceeding is not admissible

Section 56 is the threshold rule of admissibility.

It admits relevant evidence and excludes irrelevant evidence.

Some of the rules of admissibility operate as **exceptions** to the exclusionary rules, allowing evidence that would be excluded by an exclusionary rule to be admitted.

Example – hearsay evidence is generally excluded (even though it is relevant) because it is generally considered to be unreliable. However, there are some kinds of hearsay evidence that are considered to be sufficiently reliable, and so may be admitted under specific exceptions to the rule against hearsay.

Section 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

Facts In issue – What they are trying to prove – what element of an offence? Example – murder requires mens rea and actus reus. The defendant may have admitted to killing the deceased but claims he did not intend to do so (mens rea – state of mind – fact in issue).

Ultimate facts in issue – The ultimate facts in issue in a murder trial are defined by the elements of murder: actus reus and mens rea.

Not all ultimate facts in issue will necessarily be “in issue” in a given case because they might formally be admitted.

Example – the accused may have admitted to killing the deceased but deny having the requisite intention (mens rea). So the only fact in issue in the case will be the state of mind of the accused at the time of the killing.

Facts relevant to these issues might be things like whether the accused was present at the killing (and therefore had the opportunity to do so), or whether any particular actions of the accused had any causal relation to the death of the deceased.

Logical relevance (rationality)

The term “rational” indicates the **test** if one of a **logical connection**. In *Washer v The State of WA* – in order to establish relevance, it is necessary to point to a process of reasoning by

which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial".

The concept at common law was more restricted. It required that evidence be "legally" or "sufficiently" relevant, rather than merely logically relevant.

Note – combination of section 55 and section 135 (General discretion to exclude evidence)

Stephenson v R – The probative value of the evidence would be substantially outweighed by the danger that it would be unfairly prejudicial to a party because it might be used by the jury "in an unacceptable way", for example, by provoking some irrational logic and giving it more weight than it deserves.

In Fieldman the prior convictions of the deceased were relevant to the manner which the deceased was driving his motorbike prior to the collision with the accused's vehicle.

Smith v R is an example of evidence that was found not to have satisfied the broad test in section 55, because it had no capability of affecting the jury's assessment of the probability of a fact in issue.

For evidence to affect the jury's assessment of the facts, it must add something to the evidence already before them.

Provisional relevance and inferences as to relevance:

Evidence allowed even though at that time it is not relevant because it relies on evidence that will be tendered later –

Provisional relevance:

Sometimes the relevance of evidence will depend on the court being satisfied of another fact.

For example – the relevance of one witness's evidence may often depend on the evidence of a witness who is later to give evidence. Thus, the relevance of a knife found at the scene of a crime by a police officer might depend on a fingerprint analyst's later evidence that the fingerprints on the knife matched those of the defendant.

It is necessary to have a mechanism that allows the earlier witness to give that evidence, even if it is not apparently relevant at this stage – this is provided in Section 57 – Provisional relevance.

Section 57 provides that, if the question whether evidence is relevant depends on the court making another finding, the court may find that the evidence is relevant if it is reasonably open to make that finding, or may find it relevant subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

If evidence is admitted provisionally under section 57 it must be shown ultimately (by the end of the proceedings) to be relevant in order for it to be admissible.

Exercise in interpreting section 57(1) – NAB v Rusu – the court distinguished between "authenticity" and "provisional relevance". The document could be admitted provisionally relevant under section 57(1) but only if it were already authenticated (bank statement with no bank name or account name etc – not authenticated).