

Table of Contents

Relevance	3
Privilege	6
Client Legal Privilege	6
Professional Confidential Relationship Privilege	Error! Bookmark not defined.
Competence and Compellability	Error! Bookmark not defined.
Presumption – s 12	Error! Bookmark not defined.
Competence	Error! Bookmark not defined.
Compellability	Error! Bookmark not defined.
Documents	Error! Bookmark not defined.
Adducing Documents	Error! Bookmark not defined.
Real Evidence	Error! Bookmark not defined.
Definition for ‘views’	Error! Bookmark not defined.
Out of Court VIEWS	Error! Bookmark not defined.
Examination of witnesses	Error! Bookmark not defined.
Seeking Leave – s 192	Error! Bookmark not defined.
Examination of Witnesses	Error! Bookmark not defined.
Refreshing memory	Error! Bookmark not defined.
Unfavourable witnesses – SECT 38	Error! Bookmark not defined.
Cross-Examination	Error! Bookmark not defined.
Improper Questions	Error! Bookmark not defined.
The Rule in <i>Browne v Dunn</i>	Error! Bookmark not defined.
Prior Inconsistent Statements	Error! Bookmark not defined.
Credibility Evidence	Error! Bookmark not defined.
General Rule – s 102	Error! Bookmark not defined.
Credibility of the witness – s 101A	Error! Bookmark not defined.
Exception to the General Rule in s 102	Error! Bookmark not defined.
Hearsay (first hand) and Exceptions	Error! Bookmark not defined.
Steps to Establish Hearsay: Simpson J in <i>Vickers v R</i> [2006]	Error! Bookmark not defined.
The Hearsay Rule	Error! Bookmark not defined.
Exceptions to Hearsay Rule	Error! Bookmark not defined.
1 st Exception: First Hand Hearsay – s 62	Error! Bookmark not defined.
Notice to be given	Error! Bookmark not defined.
Other Hearsay Exceptions	Error! Bookmark not defined.

Evidence for Non-Hearsay Purpose	Error! Bookmark not defined.
Non-hearsay Purpose.....	Error! Bookmark not defined.
Admissions	Error! Bookmark not defined.
Types of Admissions.....	Error! Bookmark not defined.
Exclusionary Rules Relating to Admissions	Error! Bookmark not defined.
UNFAVOURABLE INFERNECE CAN BE DRAWN – s 89A	Error! Bookmark not defined.
SECT 90 – Discretion to Exclude Admissions.....	Error! Bookmark not defined.
Opinion Evidence	Error! Bookmark not defined.
General Opinion Rule – SECT 76	Error! Bookmark not defined.
Exceptions to Opinion Rule	Error! Bookmark not defined.
EXAM - Three Step Process for s 79 Specialised Knowledge Opinion .	Error! Bookmark not defined.
Discretionary Exclusion of Opinion Evidence.....	Error! Bookmark not defined.
Tendency and Coincidence	Error! Bookmark not defined.
General Definitions	Error! Bookmark not defined.
Process for determining the admission of evidence under s 98 (Admissibility): <i>Gale & Duckworth</i>	Error! Bookmark not defined.
Tendency – SECT 97	Error! Bookmark not defined.
Coincidence Evidence – SECT 98.....	Error! Bookmark not defined.
Meaning of: “Significant Probative Value” – applies to both Coincidence and Tendency	Error! Bookmark not defined.
Coincidence Cases.....	Error! Bookmark not defined.
Case for tendency AND coincidence	Error! Bookmark not defined.
Prosecution Requirements - CRIM ONLY SECT 101	Error! Bookmark not defined.
SECT 101(2) Concocted or Contaminated Evidence	Error! Bookmark not defined.
Discretionary/Mandatory Exclusionary Provisions	Error! Bookmark not defined.
SECT 135 – General Discretionary Rule.....	Error! Bookmark not defined.
SECT 137 – Mandatory Exclusion	Error! Bookmark not defined.
Definitions.....	Error! Bookmark not defined.
Cases for SECT 137 – history & controversy (talk about NSW position and Victoria position) ..	Error! Bookmark not defined.
SECT 136 – Limit the Use.....	Error! Bookmark not defined.
Warnings and Directions – SECT 165	Error! Bookmark not defined.
Judicial Comments – SECT 20	Error! Bookmark not defined.

Relevance

Process:

1. **WHEN IS IT RELEVANT - Section 55** – can the evidence rationally affect the assessment of the probability of the existence of a fact in issue?
 - Not taken to be irrelevant only because it relates to credibility of witness, admissibility of other evidence or failure to adduce evidence
 - Told to mention: *Papakosmos; Smith; Evans* in exam
2. **RELEVANT EVIDENCE ADMISSIBLE - Section 56**

Evidence that is relevant is admissible, unless excluded by the operation of an exclusionary rule.

Section 55 – EA 1995 (NSW)

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**.

Exam Sentence

Firstly, evidence is inadmissible unless it is relevant: **s 56(2)**.

The key rationale of **s 55** is that there needs to be a **logical or rational connection** between the evidence and the facts to be proven: **McHugh J in Papkosmas**.

- The test of relevance is a **test of logic**.
- 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 probability** of the **fact in issue** at the trial: **Washer v WA (2007)**.

In **Papakosmas**, the HC held the evidence was relevant to proving the fact in issue, that is, no consent. It was also relevant in supporting the credibility of the complainant. What she said at the first opportunity was exactly the same complaint at court.

In ***Smith v The Queen (2001) 206 CLR 650***, the evidence was held to be irrelevant because it would not rationally assist the jury in making their own assessment as to whether the person in the photograph was the same person in the dock.

The police officers were in no better position than the jury to decide whether the defendant was in the photograph. Otherwise, the police was basically acting as part of the jury.

Therefore evidence which does not rationally assist the jury in making their own assessment will be deemed to be irrelevant.

Hence, Evidence is NOT relevant where Jury is in same position to make assessment: ***Smith v The Queen (2001)***.

On these facts, the evidence of [**type of evidence**] is relevant because it (directly/indirectly) affects the assessment of the probability of the existence of the fact in issue, being [**fact in issue of case. e.g. offence**]: **s 55(1) EA**.

Evidence that is relevant in a proceeding, through **s 55**, is admissible in the proceeding: **s 56 EA**.

Section 56 – Evidence Act 1995 (NSW)

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

Evidence that is not relevant in the proceeding is not admissible.

Therefore, Evidence that rationally affects the assessment of the probability of the existence of facts, which are relevant to the facts in issue, thereby affects the assessment of the probability of the existence of the facts in issue themselves; and satisfies the requirement of relevance.

Proving Relevance

Both direct and circumstantial evidence have a 'direct' connection to the facts in issue; and all evidence that is so connected to the facts in issue, must be either direct or circumstantial.

Direct Evidence

With direct evidence, the evidence – if accepted – establishes one or more of the facts in issue without the need for any further inference.

- Examples
 - Witness directly perceives the ultimate fact in issue, Document showing fraudulent accounts, CCTV.

Circumstantial Evidence

Opening statement

- Although the evidence of ___ is merely circumstantial evidence because it has no direct bearing on the ultimate fact in issue, it is relevant if it merely makes the fact in issue more

probable or less probable than it would be without the evidence because it would 'affect the probability': *Zaknic Pty Ltd v Svelte Corp Pty Ltd; Papakosmas*)

- As long as there's a 'possible' connection between the evidence and the fact in issue, it doesn't matter that there may be other innocent 'possibilities' that explain the evidence: **per Hulme J in *R v Chanthovixa***.
- Here, the evidence of ____ makes [the fact in issue] more/less probable because _____.

Credibility evidence

- Is a legitimate source of relevance and cannot be excluded on this basis: **s 55(2)**
- Only used to impact on the probative value or credibility of other evidence
- Things to show
 - Bias or interest in proceedings: *R v Umanski*
 - Prior convictions: Dixon J in *Bugg v Day*
 - Prior inconsistent statements: Jordan CJ in *Alchin v Cmr for Railways*
 - Showing no alibi is made as story consistent entire way: *Papakosmas v R*

Requirement of Relevance for Views and Demonstrations

- A 'view' is an inspection of a scene or object without anyone providing any explanation or commentary on it.
- A 'demonstration' is a view incorporating an explanation by a witness.
- A 'reconstruction' is an attempt to recreate the incident with witness.

***Evans v The Queen* [2007] HCA**

Held

Gummow and Hayne JJ: held it was not relevant here as it gave no assistance to the jury in determining whether he was the person seen by the witnesses.

Dressing the appellant in the items **provided no information to the jury that could rationally affect, directly or indirectly, the determination of any fact in issue** because it **revealed nothing about the wearer and nothing about the appellant** that **was not already apparent to the jury** observing him in the dock.

Conclusion

- **High probative value**
 - Thus, the evidence clearly satisfies the low relevance threshold because it affects the probability of [the fact in issue]
- **Low probative value**
 - Even if the probative value is 'weak and [adds] little of value to the Crown's case...that is insufficient to prevent it from being relevant' (Crawford J in *R v Neal*)
 - The standard of 'logical relevance' means that evidence of minimal probative value can still be openly taken into account: McHugh J in *Papakosmas v R; Smith v R*

Privilege

1. Client Legal Privilege

Note: it protects client privilege, not Lawyer's privilege. The client is the one who has the privilege. The lawyer asserts the privilege on behalf of the client.

Steps to follow to ascertain whether there is client legal privilege:

- Is the evidence sought to be adduced relevant to a fact in issue?
- Was the dominant purpose of the communication to obtain legal advice, or to obtain professional legal services relating to litigation, so that the privilege applies to the communication?
- Has the privilege been lost for any reason?

The first privileged purpose – providing legal advice: s 118

In order to fall within the scope of this limb, the communication must have been made, or document prepared, 'for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client' (s 118). Copy straight from s 118

Section 118 – Legal Advice Evidence Act 1995 (NSW)

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**.

The second privilege purpose – Litigation: s 119

Section 119 – Litigation Evidence Act 1995 (NSW)

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.

Dominant Purpose Test

Confidential communications are only privileged if they are created for the **dominant purpose of the legal advisor providing legal advice** or services: ***Esso v Federal Commission for Taxation (1999) 201 CLR 49***.

- The dominant purpose is 'the ruling, prevailing or most influential purpose' for which a document is brought into existence: ***Spotless Services Ltd (1996)***.

Protects frankness in communication between client and lawyer that is necessary for the dominant purpose of giving legal advice: ***Carter v Managing Partner (1995) 153 CLR 500***.

- Lawyer cannot participate in commission of crime

The only way to abrogate client privilege is through express legislation. The Court will not imply such abrogation: ***Daniels v ACCC (2002) 213 CLR 543***.

Kennedy v Wallace (2004) FCAFC 337 – the note did not meet the dominant purpose test of seeking or obtaining legal advice. The Federal Court believed that communication with foreign lawyers fell within definition of lawyers.

- Subsequently, s 117 explicitly includes foreign lawyers in definition of 'lawyer'.

Mistaken Privilege

Mistaken privilege does not necessarily mean the privilege is done.

- ***Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd*** – documents were mistakenly sent which were privilege
 - The HC that a waiver could not be imputed for accidentally sending privilege documents to other party during discovery.

Definitions

Phrase 'professional legal services' is not defined, but will include:

- Legal advice and representation;
- The preparation or settling of documents to be used in, or in connection with, litigation: ***New Corp Reinsurance (in liq) v Renaissance Reinsurance [2007]***.
- Estimates of the likely outcome or cost of litigation: ***Westpac v 780 Ten Pty Ltd [2005]***

'Disclosure'

- 'The notion of disclosure involves something becoming revealed which was previously hidden, or known which was not previously known: Campbell J in ***Green v AMP Life***.
 - Even if 'not everything concerning the matter is disclosed'.

'Insufficient'

- Where the evidence merely causes the reader to ‘wonder or speculate whether legal advice has been obtained and what was the substance of that advice’: per Austin J in ***Re Sutherland Coal***.