

LAWS399 – Evidence

TABLE OF CONTENTS

Introduction	3
3 aims of evidence law.....	4
The fact-finder.....	4
Types of evidence	4
Where the law of evidence doesn't apply.....	4
Sources of law	Error! Bookmark not defined.
The evidence act.....	4
Procedural v Substantive Law.....	5
Principles and purposes	5
Adversarial v Inquisitorial Systems	5
Adversarial	5
Adversarial - Civil litigation	5
Inquisitorial.....	5
Inquisitorial - Civil litigation – procedure.....	6
Similarities with Adversarial civil procedure.....	6
Trial fundamentals	6
standards and burdens of proof.....	6
The order of a criminal proceeding.....	6
Evidence process	7
Rules of evidence in criminal v civil	7
The role of the fact-finder	7
Voir dire - Preliminary questions of fact	8
Role of the judge.....	9
<i>Granting leave, permission or giving a direction</i>	<i>9</i>
<i>Stanoevski v The Queen (2001).....</i>	<i>10</i>
Resolving factual uncertainty.....	10
<i>Burden and standard of proof in criminal cases.....</i>	<i>10</i>
Exclusion of evidence	11
Summary of important exclusionary provisions	11
Improperly or illegally obtained evidence.....	14
cautioning	15
Judicial warnings	15
Summary of important warning provisions.....	15
Common law warnings.....	16
Warnings about “a perceptible risk of miscarriage of justice “.....	16
Warnings about “uncorroborated evidence”	16
<i>Some offences require corroboration</i>	<i>16</i>
<i>Evidence Act abrogates corroboration requirement.....</i>	<i>17</i>
Unreliable evidence	17
warnings in relation to children's evidence.....	19
Unreliable evidence through delay	19
Residual common law powers to issue warnings.....	20
ADDUCING OF EVIDENCE - Testamentary evidence.....	20
Summary of important testamentary evidence provisions.....	20
Calling of witnesses – COMPETENCE & COMPELLABILITY	22
Competence.....	22
Compellability	24
<i>Children.....</i>	<i>24</i>

Family members.....	25
Failure to call witness	26
Calling of witnesses in adversarial proceedings	27
Control of the court.....	28
Examination of witnesses	28
<i>The order of questioning – governed by both common law and the act</i>	29
<i>Examination in chief</i>	29
<i>Unfavourable witnesses</i>	30
<i>Cross-Examination</i>	31
<i>Re-examination</i>	33
<i>Privilege against self-incrimination</i>	33
ADDUCING OF EVIDNCE - Documentary evidence	35
Summary of important DOCUMENTARY evidence provisions	35
Proof of contents of documents.....	37
Unavailable documents.....	38
Authentication	38
ADDUCING OF EVIDENCE - Real evidence	39
Proof	41
Facts in issue.....	42
<i>The logical connection between the evidence and a fact in issue</i>	42
Burden of proof	43
Standard of Proof.....	43
<i>Judicial Notice</i>	44
<i>Presumptions</i>	45
<i>Inferences</i>	45
<i>Evidence of judgments and convictions</i>	45
ADMISSIBILITY - RELEVANCE	46
<i>Common law – logical and legal relevance</i>	48
<i>Relevant evidence (uniform evidence legislation)</i>	48
<i>Relevance and purpose</i>	50
admissibility - HEARSAY EVIDENCE	51
Rationale.....	52
Arguments for abolishing the rule	52
The hearsay rule.....	52
Hearsay process	53
“representation”	54
“previous representation”	54
Hearsay and non-hearsay uses of a previous representation	55
The requirement of intention in s 59	55
*** <i>Implied assertions</i>	55
EXCEPTION: First-hand hearsay	56
EXCEPTION: Contemporaneous mental and physical stateMENTS.....	62
Inferences to explain actions.....	62
Inferences to indicate intention	63
First-hand and second-hand hearsay	63
other hearsay exceptions → these are facilitative exceptions.....	65
<i>BUINESS RECORDS</i>	65
<i>TAGS, LABELS & WRITING</i>	65
<i>ELECTRONIC COMMUNICATIONS</i>	66
<i>ABORIGINALS</i>	66
<i>REPUTATION</i>	66
<i>hearsay exception exercise</i>	67
ADMISSIONS	67
<i>Inculpatory admissions</i>	70
<i>Exculpatory admissions</i>	70

admissibility - OPINION EVIDENCE.....	73
<i>Rationale for the opinion rule.....</i>	73
the rule	74
lay opinions	76
expert opinions.....	77
<i>Duties of expert witnesses.....</i>	77
<i>Specialised knowledge.....</i>	78
<i>Training, Study or Experience (TSE).....</i>	80
ultimate issue and common knowledge	80
Conflicting Expert Evidence	80
admissibility - TENDENCY EVIDENCE	81
the rule	83
Tendency evidence in civil cases	84
Tendency evidence in criminal cases.....	84
<i>Position at common law</i>	85
<i>Position under the uniform evidence legislation</i>	85
<i>Recent developments.....</i>	86
admissibility - COINCIDENCE EVIDENCE	86
To prove a crime has been committed	88
To prove a crime was committed by the same person.....	89
To prove a number of people are telling the truth.....	89
Tendency and coincidence evidence adduced by a defendant	89
Cases in which ss 97 and 98 do not apply:	89
<i>Presumption of continuance.....</i>	89
<i>Single transaction.....</i>	89
<i>Relationship evidence.....</i>	90
admissibility - CREDIBILITY EVIDENCE	90
the rule	91
Combined effect of Sections 101A and 102:.....	91
Examples of where it can be used	91
the exceptions	92
<i>cross-examination</i>	92
<i>rebuttal of denials</i>	94
<i>evidence to re-establish the credibility of one's own witness</i>	94
admissibility - CHARACTER EVIDENCE	95
character of the accused	95
<i>general or specific purpose</i>	96
<i>going to the ultimate issue and the credibility of the evidence.....</i>	96
Rebuttal of Good Character Evidence	96
<i>discretion to exclude.....</i>	97
<i>co-accused.....</i>	97
Directions to jury on character evidence	98

INTRODUCTION

- “Evidence is information”
- The usefulness of information as evidence in a proceeding turns on whether the information is relevant to proof of the fact in issue: s 55(1) *Evidence Act*
- The law of evidence embodies the principles applied by courts in the process of fact-finding
- The rules of evidence represent the attempt made to evolve a method of inquiry best calculated to prevent error and elicit truth: *R v War Pensions Entitlement Tribunal; ex Parte Bott* (1933)
- “What the laws of evidence do is to approve certain information presented to the courts as being not only logically probative of an issue or otherwise material, but also not affected by undesirable features that should

lead to its exclusion. Such undesirable features may be found where the admission and use of the evidence reaches the court by a route that, in general, raises serious doubts as to its reliability": *R v Pfitzner* (1976), Wells J

- *Goldsmith v Sandilands* [2002] – 'the function of evidence is to advance, or cut down, the case of a party in accordance with the rules of statute or common law that determine the nature of information a court will receive... the general rule that relevant evidence will be received is qualified based upon considerations of justice or practicability'

3 AIMS OF EVIDENCE LAW

- Truth – the truth has a very limited and specific meaning. Courts are after the 'approximate truth' – pursuing the absolute truth is not always achievable and wastes resources
- Discipline – preventing illegal evidence from being obtained and used
- Protection – making sure that parties are treated justly and fairly. Includes protecting confidential information, protecting relatives and victims, preventing prior criminal history from influencing deciders of guilt

THE FACT-FINDER

- Great care is taken to ensure the right evidence is given to the fact-finder and prevent the wrong information from impairing decisions
- The substance of the law of evidence has been influenced by judicial perception that juries are not to be trusted to make a proper evaluation of certain kinds of evidence, either at all, or without direction

TYPES OF EVIDENCE

- All items of evidence are subject to the same process and regardless of their weight or importance or probative value
- Every piece of evidence, no matter how small or large, in order to be admissible, must be relevant and must in some way (no matter how large or small) tend to prove or disprove a fact in issue
- Direct evidence
- Circumstantial evidence
- Documentary evidence
- Real evidence

WHERE THE LAW OF EVIDENCE DOESN'T APPLY

- Issues of admissibility are most commonly raised by a party making an objection – "the usual course of proceedings in trials under the adversary system requires objection to be taken to evidence": *R v Reid* [1999], Spigelman CJ
- Generally, evidence allowed in without any objection is given such probative value as the trial judge is prepared to give it
- The starting point is that if there is no objection to evidence, it is admissible, unless it relates to a specific exclusionary rule

THE EVIDENCE ACT

It is an attempt to achieve statutory uniformity across Australia, but isn't quite successful. It is based heavily on the common law, and still supplemented by more advancements in common law

The structure of the evidence act:

- **Adducing of evidence (Ch 2)** – the formal presentation of evidence in court, includes issues such as the competence of witnesses, giving testimonies of evidence & who can give evidence and how
- **Admissibility of evidence (Ch 3)** – which evidence can be adduced. Factors include relevance, hearsay, opinions, credibility evidence, identification → This is where most of the difficult law is
- **Controls over evidence (various chapters)** – how evidence is to be used once it is adduced and admitted. Includes proof, discretion, judicial powers, informing juries
- **Dictionary** – at the end of the act

9 Application of common law and equity

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

PROCEDURAL V SUBSTANTIVE LAW

- Evidence is procedural or 'adjectival' law
- "Rules which are directed to governing or regulating the mode of conduct of court proceedings" (Mason CJ)
- Law of the 'place' v law of the 'court'
- Fundamental importance of due process, procedural fairness and access to justice
- "Justice delayed is justice denied"

PRINCIPLES AND PURPOSES

- The purpose is to promote accuracy in the fact-finding process and maintain public confidence
- The fact-finding process is based on rationality
 - Many of the exclusionary rules were made with the jury in mind
 - *R v Young (1995)* – the jury in a murder trial resorted to using a weegee board to channel the victim and find out who the offender was. A re-trial was ordered

ADVERSARIAL V INQUISITORIAL SYSTEMS

ADVERSARIAL

- The parties choose what material is to be placed before the court or tribunal
- Have their legal origins in the UK. They are places which were at earlier times British colonies - for example Australia, New Zealand, India, Pakistan, Canada, South Africa, the United States, Malaysia, Hong Kong
- A very important feature of the adversarial system was reliance on a judge-made system of substantive law
- A system of judge-made law necessarily involves some rationalisation of views. Two different judges confronted by the same facts might perfectly reasonably arrive at opposing conclusions as to the principle of law which should be applicable to resolve the issue.

ADVERSARIAL - CIVIL LITIGATION

- Civil litigation is where, to express it in the simplest form, one party sues another to establish an entitlement to a right or privilege or to deny the other's entitlement
- The relief claimed may be debt or damages, declaration, injunctions to restrain or compel various conduct, and many other forms. There may be cross-claims. The one thing that can be said is that the judgment against a losing party will not involve the party being sent to prison

INQUISITORIAL

- The court or tribunal may itself play a part in investigating the evidence upon which the matter is decided, or in investigating the ultimate issue
- The substantive law, both criminal and civil, is codified
- The French Code civil, and *Code d'instruction criminelle*, introduced originally in the early part of the 19th century, became prototypes for the codified laws of many other European countries
 - The underlying approach of these codes is that each judge is to interpret the law and apply the relevant code provision directly to the particular case
- There is no such thing as judge-made law; in fact Article 5 of the Civil Code states that "the courts shall be prohibited from issuing rules which take the form of general and binding decisions on those cases which are submitted to them"
- Modern commentators have noticed that legal textbooks in inquisitorial systems are placing more emphasis on other judicial decisions, and academic writings play a significant part in judicial decisions

- Many codifications of the laws of inquisitorial systems have provisions expressed in broad terms, leaving much to be determined by judicial decision

INQUISITORIAL - CIVIL LITIGATION – PROCEDURE

- Proceedings are commenced by a statement of claim
- There is an exchange of pleadings, and disclosure of documents
- Except in simple cases, there will be one or more hearings before a preparatory judge, the *juge de la mise en etat*.
 - The judge has two functions
 - To direct the parties to take all the steps necessary to ensure the matter is ready for a final hearing,
 - To require witnesses to give oral evidence before that judge
 - In due course, the judge will order a closure of the proceedings and transmit the case for trial
- Most often, the trial involves little more than closing speeches by the advocates for the parties, but the court may permit oral evidence in an appropriate case.
- At the conclusion of the proceedings, the court retires to consider its decision, which it gives in due course

SIMILARITIES WITH ADVERSARIAL CIVIL PROCEDURE

- A very significant function of the *juge de la mise en etat* is to give directions in relation to conduct of the proceedings. This is mirrored in the superior courts in Australia, where judges have been given similar powers
- The practical differences between the adversarial and inquisitorial systems have also been reduced in many cases by the requirement in the adversarial system that the parties exchange the statements of the witnesses before trial, thus potentially reducing the scope for conflict

TRIAL FUNDAMENTALS

STANDARDS AND BURDENS OF PROOF

The Crown (in criminal) and the plaintiff (in civil) bear the onus of proof, and they also bear an evidentiary burden. The defendant can have an evidentiary burden as well, even though they do not bear the legal burden in the case

In civil cases, the standard of proof is on the balance of probabilities, and in criminal proof has to be beyond reasonable doubt. In criminal cases, there are greater restrictions on adducing evidence and what evidence can be used.

THE ORDER OF A CRIMINAL PROCEEDING

- The case is called and parties or counsel announce appearances
- In a criminal case a plea is taken – the fact-finding process is concluded on a plea of guilty, once the evidence presented is found to establish the elements of the offence beyond reasonable doubt
- If there is to be a jury, it is empaneled by ballot, sworn and charged
- P may open the case to the jury. In some courts, D may also be invited or be permitted to open their case
- P's first witness is called, sworn and then examined in chief via question and answer. Leading questions are generally not permitted (s 37). In a criminal matter, P cannot call D (s 17(2))
- D *may* (but is not obliged to) cross-examine P's first witness to qualify or destroy the value of the evidence and to enhance their own case. D may ask leading questions (s 42) and may attack the credibility of the witness
- P *may* re-examine the witness on matters arising out of cross-examination, but may only ask questions about new issues with leave of the court (s 39)
- P then calls other witnesses who can be examined, cross-examined and re-examined
- Witnesses usually stay outside the court unless they are giving their evidence
- At the end of P's case, D may make a no-case submission, if this is unsuccessful they will open their case
- D can call witnesses to be examined, cross-examined and re-examined. P can also call D to give witness, although D can remain silent (s 17(2))
- Each party makes a closing address to the court
- If there is a jury, the judge must sum up the parties' cases and give appropriate directions as to the law
- The jury returns its verdict

- If D is found guilty (criminal), the judge will proceed to sentencing

EVIDENCE PROCESS

1. If the evidence is relevant but subject to privilege or some other immunity (usually decided at pre-trial upon discovery etc) it is withheld and not available to the fact finder.
2. If there is no privilege issue, the question is whether the evidence is relevant (to a fact in issue). If it is not relevant, it is inadmissible. If it is relevant then it must meet the third challenge.
3. The evidence must be adduced in accordance with the provisions of the EA and any common law principles or powers of the court and its rules.
4. Does the evidence fall foul of any of the main exclusionary rules (eg hearsay or credibility) and – if so – may it be admitted under any of the statutory exclusions to those rules
5. If it passes those hurdles and is otherwise admissible, the question then is whether the evidence is subject to a discretionary or mandatory exclusion. If it is not to be excluded for any reason, it may be admitted for the consideration of the fact finder.
6. The final question is whether (even though it is available for the fact finder's consideration) a warning should be given to the jury as to the reliability of the evidence.

RULES OF EVIDENCE IN CRIMINAL V CIVIL

Many of the rules of evidence are the same for criminal and civil matters, except for the following (all with respect to criminal proceedings):

- The standard of proof in a criminal case is higher (ss140-141)
- D's position is safeguarded
- The rules as to the competency of a witness differ:
 - D cannot give evidence for P
 - D's spouse, de facto partner, parent or child can apply to the court to avoid giving evidence (ss 18-19)
- The rules relating to the admission of hearsay is different
- The court is less likely to dispense with the rules of evidence, compared to civil (s 190(1) and (3))

THE ROLE OF THE FACT-FINDER

- Traditionally, the jury has had the responsibility to determine the facts
- Today, jury trials are very limited
 - Almost non-existent in civil trials and only in larger criminal trials
- An issue of the admissibility of evidence is a question of law, whereas the issue of the acceptability of evidence (whether that evidence should be taken into consideration and to what extent it should influence decision-making) is a question of fact

189 The voir dire

(1) If the determination of a question whether:

- (a) evidence should be admitted (whether in the exercise of a discretion or not), or
- (b) evidence can be used against a person, or
- (c) a witness is competent or compellable,

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a **preliminary question**.

(2) If there is a jury, a preliminary question whether:

- (a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or
- (b) evidence of an admission, or evidence to which section 138 applies, should be admitted,

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

- (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and
- (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and
- (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Section 128 (10) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:

- (a) it is inconsistent with other evidence given by the witness in the proceeding, or
- (b) the witness has died.

- A voir dire occurs when a judge decides a preliminary question of fact affecting the admissibility of some piece of proffered evidence
- "A trial within a trial"
- "to see and to say" – so we see what the party has to say before they actually say it
- The jury will leave the court room during a voir dire so their position is not tainted
- S 189 of the *Evidence Act* governs the voir dire process
- Voir dire are not limited to the issues in s 189, Preliminary questions include whether:
 - An admission by D was not influenced by violent, oppressive, inhumane or degrading conduct or by a threat of such conduct (s 84)

- In a criminal matter, whether the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected (s 85)
- A witness may refer to a document to revive their memory (s 32)
- A witness is unfavourable (s 38)
- A witness has specialised knowledge and other related questions (s 79)
- In deciding how the preliminary question of fact, the trial judge must often choose between conflicting evidence – always in the absence of the jury so as to avoid tainting their judgment
- Once the voir dire has concluded, the jury will be called back into the courtroom and the evidence will be adduced
- The standard of proof to be met by a party adducing evidence of the existence of a preliminary question is the same as the civil standard of proof (s 142)

142 Admissibility of evidence: standard of proof

(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or
- (b) any other question arising under this Act,

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters that the court must take into account include:

- (a) the importance of the evidence in the proceeding, and
- (b) the gravity of the matters alleged in relation to the question.

ROLE OF THE JUDGE

11 General powers of a court

(1) The power of a court to control the conduct of a proceeding **is not affected by this Act**, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to **abuse of process** in a proceeding are not affected.

- S 11 represents the overarching role of the judge to control proceedings
- The power to control proceedings is not granted by the evidence act, it is said as not being affected by the evidence act
- *Mooney v James* [1948] VLR 22, Justice Barry: “it is the duty of the judge to regulate and control the proceedings so that the issues for adjudication may be investigated fully and fairly”, and that “the judge has all the discretionary powers necessary for the discharge of that duty”
- The judicial role encompasses a general obligation to ensure a fair trial for all parties – allowing them to pursue issues fully and question the other side

GRANTING LEAVE, PERMISSION OR GIVING A DIRECTION

- Several provisions of the Act confer power on the judge to grant leave or permission, or to direct a party to do something
- Judges can give directions at any point during the trial, and then give special directions at the end
- The judge must have regard to s 192

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

- (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
- (b) the extent to which to do so would be unfair to a party or to a witness, and
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
- (d) the nature of the proceeding, and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

STANOEVSKI V THE QUEEN (2001)

Facts: D was charged with conspiring to cheat and defraud an insurer. The trial judge ruled that id D adduced evidence of **her good character**, cross-examination of D would be permitted on certain matters, including an expert investigator's report disclosing evidence of the forgery of a signature and alleged sloppy practices when witnessing forms in D's capacity – in evidence against her good character

Held (Gaudron, Kirby & Callinan JJ): The trial judge did not take into account all the matters in s 192(2), which must be **taken into account in all cases**. [44] "s 192 is not exhaustive as to the matters to be taken into account. Plainly the weight to be accorded to the evidence sought to be adduced, whether in cross-examination or otherwise, is a matter of considerable relevance". The high court quashed the conviction

Hodgson JA, **R v Reardon [2002]**: "*Stanoevski* could be read as suggesting that a judge should, in all cases to which s 192 applies, expressly refer to the considerations set out in s 192(2), but ... I do not think that is a correct reading of that case". It is not necessary for a judge to expressly refer to s 192, as long as they do consider them. A list of the kinds of matters that may arise where s 192 should be invoked

RESOLVING FACTUAL UNCERTAINTY

BURDEN AND STANDARD OF PROOF IN CRIMINAL CASES

THE LEGAL BURDEN

- A legal burden of proof attaches to a ultimate fact in issue on a trial, and is borne by one of the parties
- It comes into play at the verdict stage and gives guidance to the jury where they are in doubt as to whether the particular ultimate fact exists
- Whether the jury is left in doubt is influenced by the standard to which the relevant ultimate fact must be proved to exist – if the jury is not certain that a fact exists beyond reasonable doubt, they must find that the fact does not exist
- Where D has a legal burden to prove that some fact exists, the standard of proof is lower - on the balance of probabilities: s 141(2)

THE EVIDENTIAL BURDEN AND THE NO-CASE TEST

- The evidential burden of an ultimate fact in issue arises where a party submits that the other party (who has the burden) has not made out a prima facie case in proof that the fact exists
- The trial judge decides this question

EXCLUSION OF EVIDENCE

The uniform evidence acts contain provisions that permit or require the trial judge to exclude otherwise admissible evidence – they reflect the responsibility of a court to ensure there is a fair trial. These provisions enable a judge to manage the trial so that curial resources are used efficiently and fairly

- Ss 135 and 137 are a balancing act to assess the probative value of the evidence or on the other hand any risk or danger the evidence could unfairly prejudice the defendant

SUMMARY OF IMPORTANT EXCLUSIONARY PROVISIONS

****LOOK AT THESE GENERAL EXCLUSIONS AFTER RELEVANCE AND THE OTHER EXCLUSIONS (HEARSAY, OPINION, ETC.)**

Section	Effect	Requirements	Criminal/Civil
135	Discretion to exclude evidence if the requirements are met – if the prosecution wants to exclude defence evidence they will rely on this or 137	If the probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or an undue waste of time	Both
136	Discretion to limit the use of evidence if the requirements are met	If there is a danger that the evidence might be unfairly prejudicial, or misleading or confusing	Both
137	Not a discretion – if the test is satisfied, the court has no choice as to whether to exclude evidence	If the probative value of the evidence is outweighed (not substantially) by the danger of unfair prejudice to D	Criminal
138	Discretion to exclude illegally or improperly obtained evidence	If the evidence was obtained improperly or illegally, it is not to be admitted unless the desirability outweighs the undesirability of how it was obtained	Both
139	Guidance on what constitutes improperly obtained evidence	If the person was under arrest, questions were conducted by an investigating official, and they did not caution the person	Both

135 General discretion to exclude evidence

The court **may** refuse to admit evidence if its **probative value is substantially outweighed by the danger** that the evidence might:

- (a) be **unfairly prejudicial** to a party, or
- (b) be **misleading or confusing**, or
- (c) cause or result in **undue waste of time**.

- S 135 confers on the trial judge a discretion exercisable on particular grounds (a), (b) & (c), to exclude otherwise admissible evidence in both criminal and civil matters.
- It requires the judge to compare the probative value of the evidence to a particular danger and determine if the probative value is substantially outweighed by the danger
- **Probative value** of evidence is defined as “the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue” in Part 1 of the Act’s Dictionary
 - “Evidence has probative value if it is capable of supporting a verdict of guilty”: *R v Shamouil*
 - “Probative value is not to be determined by the weight that might be given to any piece of evidence. What is to be considered is the role that that piece of evidence, if accepted, would play in the resolution of a disputed fact”: *R v Mundine*

- ‘**Substantially outweighed**’ represents a heavy burden
- ‘**Unfairly prejudicial**’ – prejudice to the extent that it is unfair, if there is a real risk that the evidence can be misused by the fact-finder to make its decision on an improper, irrational basis
- S 135 is aimed in cases where evidence is appropriate to support one fact but not another, and that may require a judge to exclude it for unfair prejudice as to the one fact
- **Undue waste of time** – if another party has already adduced the evidence, or if evidence has a low probative value and might mislead a jury into thinking the evidence is more important than it is

Papakosmas v The Queen (1999) 196 CLR 298

- Evidence of recent complaints in sexual assault cases are allowed in for the purpose of enabling the jury to decide whether a woman’s conduct was consistent with her testimony negating her consent. The evidence could rationally affect the assessment of the probability of a fact in issue, which is largely the lack of consent.
- Gleeson CJ & Hayne J: that “there may be circumstances in which evidence of the fact that a complaint of an alleged crime has been made might be evidence that could not affect (directly or indirectly) the assessment of the probability of a fact in issue”, however this was not an issue in the *Papakosmas*
- Gaudron & Kirby JJ: “the nature and degree of the connection necessary before a statement is probative of the fact asserted in it will depend on the nature of that fact and, if it be different, the fact ultimately to be proved.” In *Papakosmas*, “the [evidence] was closely contemporaneous with the events alleged by the complaint.... That [it] rationally bears on the probability of the occurrence of those events and, thus, [was] admissible as evidence of the facts asserted”

Reading v ABC [2003] NSWSC 716

- Civil case
- One party wished to adduce a transcript of a TV program – the judge excluded the evidence
- The court held that the transcript of a TV program should be excluded under s 135 because the video recording of the program was available and there was a danger that the jury would focus unduly on the written word and fail to give due consideration to things not recorded in the transcript

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing.

- The trial judge may **limit** the use to be made of a piece of evidence
- Useful when evidence is admitted for one purpose but is inadmissible for another purpose
- A piece of evidence, such as opinion or credibility evidence, and the judge directs the jury not to use it as hearsay evidence – e.g. a statement from a patient to a doctor can be used to determine the extent of disabilities that a victim suffers from, but they must not use any statements made as to how the injuries were attained (that would be hearsay evidence)
- This discretion presents the judge with an alternative to exclude evidence under ss 135 or 137
- Consideration of s 136 will arise where evidence of a previous representation made by X is admissible on an original evidence basis, and as proof of the existence of the facts asserted
 - E.g. where a statement made by a patient to a doctor is admissible for non-hearsay use to show what the doctor assumed to be the facts on the basis on which in evidence the doctor gives an expert opinion. Using s 136, the judge might direct the jury that it should not make a hearsay use of the evidence

137 Exclusion of prejudicial evidence in criminal proceedings

In a **criminal proceeding**, the court **must** refuse to admit evidence **adduced by the prosecutor** if its **probative value is outweighed by the danger of unfair prejudice to the defendant**.

- While s 135 applies to both civil and criminal matters, s 137 applies **only to criminal matters** and only in respect of otherwise admissible evidence adduced by the prosecution
- It provides for a mandatory exclusion, not a discretionary one, and there is a lower threshold
- Includes evidence like graphic photographs – they inspire an emotional and irrational response, and a need to punish someone, but they often don't assist in showing who actually committed the crime
- Like s 135, s 137 requires the judge to compare the probative value of the evidence to a particular danger, but must only determine whether the probative value is merely outweighed by the danger (rather than substantially)
- S 136 operates on there being a danger that the use of the evidence might result in unfair prejudice to a party, or might be misleading or confusing
- **S 137 cannot apply to**

Lee → this type of evidence must be excluded, even if a party does not apply for it to be excluded

R v Harker [2004] – the reasons for judgment must make clear what the unfair prejudice is and why it is of such a kind that the evidence must be rejected despite its probative value

R v Cook [2004] NSWCCA 52

- D was convicted after trial of threatening to inflict actual bodily harm with intent to have sexual intercourse on the complainant. Evidence of D running from the police was adduced in evidence by the prosecution at trial following a voir dire during which the trial judge decided the evidence should not be excluded under s 137. On appeal, the admission of this evidence was challenged
- The NSWCCA: “what s 137 called for was a consideration of the probative value of the evidence or flight relative to its prejudicial effect to the extent that that could or would be unfair... the examination of the evidence inevitably gives rise to a conclusion that the probative value to the Crown case was very high indeed. ... The inferences available to a jury are obvious. The balancing exercise required by s 137 cannot, however, be undertaken without an appreciation of any explanation an accused person might seek to advance in order to nullify the adverse inferences that would arise without explanation. ... That the evidence would have a prejudicial effect is clear. ... Bearing in mind the substance of the charge the appellant faced, and the nature of the evidence he would have to adduce in order to meet the flight evidence, I have come to the conclusion that the prejudicial effect was unfair, and that it outweighed the probative value of the Crown evidence.”

R v Lisoff [1999] NSWCCA 364

- D was charged with serious assault. To identify D, the prosecution adduced evidence to show that the victim's blood was on clothing admittedly worn by the defendant on the day of the assault. The lower court rejected this evidence under s 137, arguing that the evidence had probative value which did not outweigh the danger of unfair prejudice
- The NSWCCA concluded that “there is nothing so extraordinary about the conflict in the evidence presented in this case which would justify the conclusion that a careful and sensible jury, properly directed as to the relevant law and the relevant evidence, could not decide in a reasoned and responsible way whether or not the Crown had demonstrated beyond reasonable doubt that the body of evidence supporting the Crown case should be preferred to the opposed body of evidence”
 - The DNA has probative value and should have been admitted, with sufficient directions given to the jury
 - There was conflicting scientific evidence (facts) and the jury had to decide which was the correct evidence

R v Shamouil (2006) 66 NSWLR 228: The credibility of the witness and the reliability of the evidence should not be taken into account unless there is a question as to whether the evidence was relevant at all

Dupas v R (2012) 218 A Crim R 507 - VIC

- Held that the *Shamouil* case was wrong
- The defendant was found guilty of murder after being identified from a photoboard. On appeal D argued that the identification evidence was unreliable and the judge should have considered this
- The Victorian Court of Appeal unanimously departed from *Shamouil*, stating it was 'manifestly wrong and should not be followed'
- If there is a risk that the jury would attach undue weight to the impugned evidence, the judge is required to evaluate what weight could reasonably be assigned to that evidence, in order to assess whether there was such a risk. That calls for some assessment of the reliability and quality of the evidence, matters ordinarily viewed as being separate and distinct from the credibility of the witness – **reliability should be considered when deciding on the exclusion of evidence, but not credibility**

R v XY (2013) 84 NSWLR 363

- **Declined to overrule the *Shamouil* approach**
- **In assessing probative value, questions of credibility and reliability should not be considered**
- The defendant was found guilty of indecent assault and aggravated sexual assault on a 10 year old. On voir dire, the judge rejected evidence of 2 phone conversations between the defendant and complainant on the basis of s 137
- The NSWCCA followed the decision in *Shamouil*
- "The importance in *Shamouil* lies not in the precise language used but in the general principle it articulates
- The principle was enunciated as having 3 elements:
 1. In determining admissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case
 2. The judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight
 3. The judge should not make his/her own findings as to whether or not to accept the inference or give the evidence particular weight
- Hoeben CJ at CL: "When assessing the probative value of the prosecution evidence sought to be excluded, the Court should not consider its credibility, reliability or weight"

IMM v The Queen (2016) 90 ALJR 529

- The majority (French CJ, Kiefel, Bell and Keane JJ) held that the appellant's arguments on the error in assessing the tendency evidence for probative value should be accepted, but that the grounds of appeal on the complaint evidence were not made out.
- The majority held that in addressing probative value, a trial judge must assume that the jury will accept the evidence, and consequently questions about its credibility or reliability do not arise
- This has arguably changed the interpretation of the evidence act re: the competence of children giving evidence – it is likely that this case will only have an effect on child sexual assault cases

IMPROPERLY OR ILLEGALLY OBTAINED EVIDENCE

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law, or
- (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the **desirability** of admitting the evidence **outweighs** the **undesirability** of admitting evidence that has been obtained in the way in which the evidence was obtained.

- Requires the trial judge to make a discretionary judgment whether to admit evidence that was obtained improperly or illegally
- The onus is on the party seeking to tender the evidence, to show that it was properly obtained (at common law, the accused had the onus of accusing the evidence was improperly obtained)
- There is no absolute prohibition on illegal evidence; it is left up to judges to exercise discretion carefully. Presumably you can take into account the way the evidence has been obtained, room to move and room for argument. Keeping in mind the way in which it was obtained.
- This kind of evidence is not to be admitted unless the judge allows it
- S 138 imposes on the court a 2-staged task:
 1. Determine whether the evidence was obtained in one of the ways in paras (a) and (b)
 2. If the evidence was so obtained, they are not to admit the evidence unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained

Ridgeway v R (1995) 184 CLR 19

- It was alleged that the police actively assisted the defendant to import heroin and then when he did so they charged him – it involved entrapment
- The high court relied on the public policy argument to exclude the evidence obtained by the police against the defendant
- Although this was before s 138 existed, it is a circumstance in which it would be used

CAUTIONING

139 Cautioning of persons

(1) For the purposes of section **138 (1) (a)**, evidence of a statement made or an act done by a person during questioning is taken to have been obtained **improperly** if:

- (a) the person was under arrest for an offence at the time, and
- (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and
- (c) before starting the questioning the investigating official **did not caution** the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

- Evidence will have been improperly obtained if the scenarios in s 139 exist

JUDICIAL WARNINGS

SUMMARY OF IMPORTANT WARNING PROVISIONS

Section	Purpose	Requirements	Criminal/ Civil	Relevant case
164	Abolishes the requirement of corroboration	Perjury and accomplice evidence still require corroboration. If there is a jury, the judge does not have to (but can) warn or direct a jury in relation to a lack of corroboration	Both	
165	Discretion to warn a jury of unreliable evidence	A party can request for the judge to warn or direct the jury, but the judge can choose not to if there are good reasons . Unreliable evidence includes hearsay or admissions, identification evidence, a co-accused in a	Both	<i>R v Stewart (2001)</i>