

Plan:

LAWVSA 14/33 Law major

Session: Teaching Period Two

<u>Course</u>		<u>Title</u>	<u>Attempted</u>	<u>Passed</u>	<u>Mark</u>	<u>Grade</u>
LAWS	1091	Business Associations	6.00	6.00	80	DN
LAWS	2351	Court Process, Evidence, Proof	6.00	6.00	88	HD
LAWS	2383	Land Law	6.00	6.00	82	DN
LAWS	2520	Advanced Legal Research	2.00	2.00	86	HD

EXCLUSIONARY RULES

(1) RELEVANCE

Rules and principles

Under s 56, only relevant evidence is admissible. The test for relevance is given in s 55. The test has a wide ambit (Nye v NSW). The test is one of logical connection; it operates on the assumption that the evidence is reliable (Graham v R). Res gestae: relevance will be enhanced if the evidence is closely contemporaneous with the subject event (Papakosmas).

Section 56 – Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding
- (2) Evidence that is not relevant in the proceeding is not admissible

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) Evidence is not taken to be irrelevant only because it relates to
 - (a) The credibility of a witness
 - (b) The admissibility of other evidence
 - (c) A failure to adduce evidence

Section 57 – Provisional relevance

- 1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:
 - (a) If it is reasonably open to make that finding, or
 - (b) Subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding
- (2) Without limiting subsection (1) if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose, the court may use the evidence in determining whether that common purpose existed.

Fina Research

- Party wanted to call an expert before a second future expert gave evidence
- Disallowed because it was not shown that the combined evidence was sufficiently more relevant compared to just the 2nd expert

Nye

- The prosecution could adduce in EIC evidence of the accused's character because the Defence indicated that they would raise character in their case.

Papakosmas – res gestae

- Shortly after being in bathroom with accused the victim complained to friends she had been raped
- Statements made were relevant because they were closely contemporaneous with the events alleged and were ordinarily expected after such an event had occurred

Categories of relevant evidence:

- (1) **Direct evidence – direct link to facts in issue**
- (2) **Circumstantial evidence – has connection to facts in issue but inconclusive**
- (3) **Relationship/background evidence**
- (4) **Credibility evidence – not irrelevant simply because it is credibility evidence s 55(2)**

APPLICATION

- (1) What are the FII (usually the elements of the crime: Cornwall)
- (2) What category does the evidence fall into (see above)

(2) Circumstantial evidence

Circumstantial evidence is evidence which if accepted tends to prove a fact from which the existence of a fact in issue may be inferred (Festa v R). Look at co-existence with other facts.

Festa v R

- The circumstantial evidence that the witness saw the accused running out of the bank was relevant because it co-existed with evidence the bank was robbed immediately before

Hodge direction

- Where the jury is asked to rely solely on circumstantial evidence, guilt should not only be a rational inference, but should be the

ONLY rational inference from the circumstances (*Shepherd v R*) (i.e. no other explanation)

(3) Relationship/background evidence

Relationship or background evidence is admissible where it has a specific relevance to FII:

- To reveal the relationship between protagonists (Conway)
- To reveal a person's state of mind (Clark)
- To show that the incident in question was part of a set of occurrences in a transaction (O'Leary)

R v Clark	Evidence that Clark had hit Lock previously, had difficult business dealings with him, been upset at seeing Lock in bed with his mother and that Lock had threatened damage to Clark's property was admissible as it was relevant to motive and the likelihood of committing the offence.
Conway v R	Evidence that Conway had put heroin in his wife's coffee threw light upon their relationship. It was relevant for motive. It was irrelevant that he had not been charged for that crime at all.
R v WJT	May be relevant to explain why the complainant feared the accused
Harriman v R	May be relevant to show why a complainant did not show distress or continued to submit to the accused
Gipp v R (common law case)	May be relevant to explain lack of surprise at being called to gratify the appellant's sexual desire, a matter of fact recounting or the failure to mention an incident to her mother

The O'Leary Principle: Where evidence discloses a connected series of events which should be considered as one transaction it will be admissible as part of that transaction (*O'Leary v R*). Such evidence helps to explain:

- The totality of an event, making it clearer or more understandable
- The state of mind of parties (in this way it is a type of background evidence)

Will not be relevant if not part of same transaction: Where there was one fight between two men (caught on camera), and then shortly after one of the men was stabbed, there was *two* transactions (*Nguyen*)

However, a 5-month gap in time can be part of the same transaction (*Serratore*). This case involved a volatile relationship and the trial judge held that the conversations 5 months earlier were 'reasonably proximate' which was enough for the appellate court.

Where this evidence doesn't amount to tendency/coincidence per the UEA, the trial judge must give a distinct warning that it can only be used as context of the relationship (*Gipp*)

O'Leary v R	Evidence of an accused's violent behaviour during an orgy was relevant to his state of mind. The transaction of events in which the murder took place could not properly be understood if isolated from the other events in the transaction.
R v (Richard) Adam	Evidence that Adam was involved in an argument before a brawl with the deceased was relevant as it was an integral part of a series of connected events proximate enough to permit inference to be drawn about the accused's state of mind
R v Serratore	Indicates that time will be a factor – the amount of time that will break the continuum will be dependent on circumstances of the case. Here evidence of conversations within a volatile relationship were admissible even though they occurred 5 months before.
Nguyen v R	Evidence of a second melee shortly after the incident in question was held to be inadmissible as it was not part of the same transaction

*Out of court statements

Look for logical connection with FII. Apply res gestae doctrine (see if analogous with Papakosmas).

*Collateral evidence is not relevant

A collateral fact of 'negligible significance' will likely be a collateral issue and irrelevant.

Goldsmith v Sandilands

- Location of the cricket arena was a collateral fact because Goldsmith had already conceded that he had played cricket (the FII was his back injury)

***EXAMPLES**

Mundarra Smith	<ul style="list-style-type: none">- FII was whether the person standing trial was the same person depicted in photos.- Police evidence was they recognised the person.- Irrelevant because police had no better ability to recognise the person in the photos than the jury.
R v Palmer	<ul style="list-style-type: none">- Distinguish Smith if police had knowledge of specific features e.g. manner of walking
Evans v R	<ul style="list-style-type: none">- Accused put on balaclava, overalls and sunglasses to perform demonstration- Majority found demonstration relevant OR IRRELEVANT???????
R v Neal	<ul style="list-style-type: none">- Evidence of accused's "sexless" marriage was deemed admissible in proceedings relating to sexual assault of a child.- It provided motive for the acts committed.- While the probative value was slight, this was insufficient to make it irrelevant
R v Stephenson (common law)	<ul style="list-style-type: none">- In question was whether the driver of the other car was intoxicated was relevant to Stephenson's guilt.- Evidence of the BAC of three possible men who may have been driving another car was not admissible as it did not help identify the other driver.
R v Ta	<ul style="list-style-type: none">- Where a complainant was drugged, in XXN her evidence of what she was doing in a video recording of the night was irrelevant because she was in no better a position than the jury to assess what was happening (she had no recollection).
Papakosmas	<ul style="list-style-type: none">- Evidence of complaint evidence just after an alleged sexual assault is relevant.
Graham	<ul style="list-style-type: none">- A complaint of a sexual assault made 6 years after the fact is questionable as to whether or not it is relevant

CREDIBILITY

SECTION 101A + EXCEPTIONS

Credibility evidence

Credibility evidence is defined in s 101A.

Section 101A

Credibility evidence in relation to a witness or other person is evidence relevant to the credibility of the witness or person that

(a) Is relevant only because it affects the assessment of the credibility of the witness or person

(b) Is relevant:

(i) Because it affects the assessment of the credibility of the witness or person, and

(ii) For some other purpose for which it is not admissible (e.g. hearsay, tendency, opinion, coincidence) or cannot be used

Peacock

- Prosecution alleged that accused had motive for murder from robbing a house (accused alleged he had an accomplice)

- Accomplice gave evidence he was not present at the robbery – this was admissible because it was not just credibility evidence; it was also relevant and admissible for the FII (whether either of them perpetrated the attack)

Credibility rule

Section 102

Credibility evidence about a witness is not admissible

Section 103 – evidence led in cross-examination

Under s 103, the credibility rule does not apply to evidence adduced in cross-examination if it has substantial probative value in relation to the credibility of the witness. This test is more demanding than the ‘significant probative value’ standard and requires evidence of a higher probative value than being ‘of consequence (Lockyer). It must have “such a potential to affect the jury’s assessment of the credit of the witness ... that the credit of the witness cannot be determined adequately without” it (Lodhi).

Section 103

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1) it is to have regard to

(a) Whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth

(b) The period that has elapsed since the acts or events to which the evidence relates were done or occurred

Examples

- Passage of time: depends on the nature of the evidence (Lewis)
 - Evidence of misleading representation to 3rd parties 5 years ago failed the test (Jacara)
 - Evidence for convictions of perjury 6 years earlier was admissible (Lewis)
- Evidence showing a motive to lie satisfies s 103 (Uhrig)
- Evidence showing the inherent plausibility of the witnesses’s account satisfies s 103 (Leung)
 - False travel documentation made account of innocence implausible because it meant witness was prepared to give false information to authorities whenever it suited him
- Lying on resume just passed the standard (Lodhi) (important he was a professional)
- Culpable driving is not substantial (Black Uhlands)
- Corrupt conduct may satisfy test (McGoldrick)
- Prior convictions: must have some connection to credibility (Fowler)
 - Conviction of assault failed test (Fowler)
 - Larceny, stealing and break and enter are dishonesty offences and can satisfy test (Burns)
 - Drug offences depend on nature of offence: trafficking is sufficient (Davidson) but possession of implement is not (Black Uhlands)

Section 106 – evidence led in chief to rebut denial in cross-examination

The finality principle is encompassed by s 102 and prevents a party from leading evidence for the sole purpose of discrediting a previous witness. An exception is given under s 106 if in cross-examination the substance of the