

## Relevance

Evidence must be relevant in order to be admissible (**s56**)

1. What is relevant evidence?

- Evidence that could rationally affect the assessment of the probability of the existence of a fact in issue (**s55(1)**)
- Directly relevant: When the evidence itself bears on the probable existence or non-existence of that facts
- Indirectly relevant: When it affects the probative value of evidence said to be directly relevant

2. If relevant, could it still be excluded under **s135-137**?

- If probative value is outweighed by the danger that it might be unfairly prejudicial, misleading or confusing, cause time delays, or demean the deceased in a homicide case, the court may *refuse to admit* the evidence (**s135**)
- If evidence is prejudicial or misleading or confusing, court may *limit its use* (**s136**)
- In criminal proceedings, if probative value outweighed by danger it will be unfairly prejudicial to the defendant, court *may exclude* (**s137**)
  - Only applies to criminal proceedings
  - Only applies to evidence led by the prosecution

3. Is it logically relevant but not legally relevant?

- Not all evidence that is logically relevant is legally relevant
  - If it does not prove any of the facts (**R v Stephenson**)
  - If it does not increase probability (**Smith v R**)
  - But if it is consistent with D's guilt in some way it will be admissible/relevant (**BBH v R**)

4. Circumstantial evidence

- Where a case is based on circumstantial evidence, to meet the standard of proof there must be no rational hypothesis/explanation on the evidence with D's innocence (**Plomp v R**)

5. What must the judge direct the jury about in relation to relevance?

- Trial judge may only direct jury that the only matters to be proved beyond a reasonable doubt are (**s61 Jury Directions Act**):
  - The elements of the offence charged or an alternative offence; and
  - The absence of any relevant defence

## Competence and compellability

A witness must be both competent and compellable

Except as provided for in the Act, everyone is competent to give evidence and anyone who is competent is compellable (**s12**)

1. Oaths and affirmations

- A witness giving sworn evidence must take an oath or give an affirmation (**s21(1)**)
- A witness may choose whether to take an oath or make an affirmation (**s23(1)**)
- If an oath is taken, for it to be legally effective the witness does not have to:
  - Swear on a religious text (**s24**);
  - Be religious (**s25(2)(a)**);
  - Believe in a god (**s24A**);
  - Understand what it means to take an oath (**s24(2)(b)**)

2. When is a witness competent?

- Not competent if (**s13(1)**):
  - Do not have capacity to understand a question about a fact; or
  - Do not have capacity to give answer to question about a fact; and
  - Capacity cannot be overcome

- To give sworn evidence: If they do not have the capacity to understand that he/she is under obligation to be truthful (**s13(3)**)
- But – A person who is not competent to give evidence about a fact may be competent to give evidence about other facts (**s13(2)**)

3. If incompetent to give sworn evidence under **13(3)**, are they competent to give unsworn evidence?

- Competent if court has told the person that (**s13(5)**):
  - It is important to tell the truth;
  - They should tell the court if they are asked questions that they do not know/can't remember the answer to;
  - They should not agree or feel pressure to agree with statements they believe are not truth

4. Exceptions to competency

a) *Children/mental impairment*

- What is a child/mental impairment?
  - Child: A person under 18 years (**s366(2)(a) Criminal Procedure Act**)
  - Mental/cognitive impairment includes impairment because of mental illness, intellectual disability or brain injury (**s3 CPA**)
- Voir dire to determine if witness is competent and compellable (**s189 EA**):
  - Court may inform itself as it thinks fit to determine questions of competency and compellability (**s13(8) EA**)
  - A child may understand the general obligation to tell the truth without understanding what it means to give evidence, let alone understand the concept of legal or moral obligation (**R v GW**)
- Warnings about children's evidence (**s165A(1) EA**):
  - \*Civil proceedings only\* Judge must not warn or suggest to the jury that:
    - Children are unreliable witnesses;
    - That evidence of children is less credible or reliable or requires more scrutiny than evidence of adults;
    - Unreliability of child's evidence solely on account of age of child
  - Warning to be given by court, not lawyer. No particular form is required (**SH v R**)
- If party satisfies the court that there are circumstances which affect the reliability of the evidence, the judge may (**s165A(2) EA**):
  - Inform jury that evidence might be unreliable and reasons why;
  - Warn jury of need for caution in determining whether to accept evidence of child and weight given to it;
- \*Criminal proceedings only\* Trial judge, prosecution or defence must not suggest to jury that (**s33 Jury Directions Act**):
  - Children as a class are unreliable;
  - Evidence of children is less credible than that of adults;
  - Evidence of a child is unreliable because of their age;
  - It is dangerous to convict on uncorroborated evidence of a child
- Alternative arrangements:
  - For criminal proceedings that relate (wholly or partly) to a charge for a sexual offence or an indictable offence involving an assault, injury or threat of injury (**s366 CPA**)
    - Witness may give evidence-in-chief (wholly or partly) in form of audio or video recording of witness answering questions put to them by prescribed person (**s367 CPA**)
  - For sexual offences (**s369 CPA**):
    - Whole of evidence must be given at a special hearing and recorded as audio-video recording and presented at court in this form (**s370(1) CPA**)
    - May give direct testimony if they are aware of their right for a special hearing and are able and wish to give direct testimony (**s370(1) CPA**)
  - Special hearings:
    - D and legal practitioner to be present (**s372(a) CPA**);
    - D not to be in same room as complainant but is entitled to see and hear them while they are giving evidence (**s372(b) CPA**);
    - No unauthorised persons to be present; (**s372(c) CPA**);

- iv. To be given by CCTV that enables communication with courtroom (**s372(d) CPA**)
- v. Court may rule any part of the recording is inadmissible and that it be edited (**s374 CPA**)
- vi. Trial judge must warn jury that it is routine practice to have special hearing, that no adverse inference may be drawn from the recorded evidence and that it has no greater or lesser weight than direct evidence (**s375 CPA**)
- The court may direct any other alternative arrangements be made for sexual offences or certain designated offences (**Part 8.2 CPA**)
  - i. May include CCTV, screens, a support person, legal practitioners to not be robed, legal practitioner to be seated, only permitting specified persons in court (**s360 CPA**)

*b) The defendant*

- The defendant is not competent to give evidence for the prosecution in a criminal proceeding (**s17(2)**)
  - But competent for their own defence
- An associated defendant not compellable for or against a defendant unless tried separately (**s17(3)**)

*c) The defendant's spouse and family*

- An exception to **s12** (that everyone who is competent is compellable)
- Spouse, de facto, parent or child of D may object to giving evidence as witness for prosecution (**s18(2)**)
  - No spousal privilege, so spouse competent and compellable until objection given (**ACC v Stoddart**)
  - Only applies to criminal proceedings (**s18(1)**)
  - Applies to relationship at the time of giving evidence (**s18(2)**)
  - Objection must be made before giving evidence or as soon as possible after becoming aware of right, whichever is later (**s18(3)**)
  - Court must satisfy itself that the person is aware of this right (**s18(4)**)
  - Court must determine objection on voir dire (without jury) (**s18(5)**)
- When will the objection be accepted?
  - If it is likely that harm would be caused to the relationship (**s18(6)(a)**); and
  - The extent of the harm outweighs the desirability of the evidence (**s18(6)(b)**)
- Relevant factors (**s18(7)**):
  - Nature and gravity of the offence;
  - Substance and importance of evidence and weight attached to it;
  - Evidence is reasonably available to prosecutor through other means;
  - Nature of relationship between D and person
  - Whether person would have to disclose matters received by D in confidence
  - E.g. **R v Khan**:
    - i. Marriage endured through trial (had been together for 10 years);
    - ii. Had 2 young kids (suggests relationship will continue);
    - iii. Evidence could have been obtained another way e.g. police interviews
    - iv. Wife did not see stabbing so not very probative/important
- If objection is successful, the prosecution may not comment on the objection, decision of the court to allow objection, or failure of person to give evidence (**s18(8)**)