

# RELEVANCE

## Step One: Introduction

*Evidence is admissible if it is relevant to the proceeding, unless excluded by an exclusionary rule (eg. Exercise of judicial discretion): s 56(1). Conversely, evidence is inadmissible if it is not relevant: s 56(2)*

**S 55(1):** Outlines the test for relevant evidence: it 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*’ (*Smith*)

- This requires a minimal logical connection between the evidence and a ‘fact in issue’
  - Objective test
- Test is of ‘logical relevance’, that is, it tends to prove or disprove a fact in issue – may not be legally relevant (*cf common law position - Stephenson*)
- **S 55(2):** Evidence is not taken to be irrelevant just 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

## Examples

- Police called to identify suspect in photo – not relevant (*Smith*)
- BAC of victim’s of car accident was not relevant (*Stephenson*)
- Circumstantial evidence of husband’s ‘motive’ to kill wife allowed in (*Plomp*)

*This evidence shows [...] As such, if accepted, it can rationally affect the assessment of the probability of the existence of a fact in issue, [what is the fact?] and is therefore relevant and likely to be admitted*

## Step Two: Facts in Issue

*All those facts which the plaintiff...or prosecutor...must prove in order to succeed, together with any further facts that the defendant or accused must prove in order to establish a defence.*

- Main facts: The facts in issue are the facts required to prove the elements of the offence or some affirmative defence (*Heydon J in HML*)
- Subordinate facts are facts affecting the credibility of a witness or admissibility of specific items of evidence (*Heydon J in HML*)

### Step Three: Direct or Indirect

- Evidence is directly relevant to a fact if it affects the probable existence or non-existence of that fact with no further reasoning required
  - Where the only inference drawn by the court is as to the accuracy of its own sensations or those of the witness
  - Eg. Sensory perceptions (witness saw crime)
  - Eg. Document evidence (CCTV)
  - Eg. Admissions
- Evidence is indirectly relevant if it bears upon the probative value of evidence which is itself directly relevant, requires extended reasoning
  - Eg. Expert evidence is directly relevant to whether accused killed victim – the expert's qualifications are indirectly relevant

#### If indirect – consider circumstantial evidence

- As in *Plomp*, if the case rests solely on circumstantial evidence, court may permit it if there is no other reasonable inference that can be drawn from the evidence other than the guilt of the D
- If an issue is to be proved by circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances (*Plomp*)
  - Evidence that, even if believed, does not prove the fact in issue unless and until the court draws an inference
  - Such evidence can be indirectly relevant if it bears on the probative value of evidence, which is itself, directly relevant
  - Is there a link in the chain, or just a strand in the cable (*Plomp; Shepherd*)
  - Essentially, an “amplification” of beyond reasonable doubt rule

*It is not necessary to prove circumstantial facts BRD: ss 61, 62 Jury Directions Act (cf *Shepherd*)*

### Step Four: Conclude

- *S 56(1): The evidence appears relevant and therefore admissible unless rendered inadmissible by further application of the EA*
- *S 56(2): The evidence is not relevant and therefore inadmissible*

# HEARSAY: s 59

## Recognizing Hearsay Problem:

- ✓ Out of court assertion (words/conduct/doc) who made it?
- ✓ Who is the in-court reporter?
  - If there's more than two steps, might be hard for hearsay
- ✓ What is the purpose of leading the evidence?
  - CL: *Subramaniam* test – is it intended to be relied on for some assertion that the maker intended to make, or is it being led for some other purpose?
  - Justices really explored different reasons for tender
- ✓ Remember: memo/iphone doc can be considered an extra step
- ✓ If it's second or third hand, it's always inadmissible (unless can be adduced for another purpose)
  - First hand, you can admit it as an exception under s 63, 64, 65, 66

## Step One: General Rule

- S 59 excludes evidence of a 'previous representation' adduced 'to prove the existence of a fact that it can reasonably be supposed that the person [who made the representation] intended to assert by the representation'

*X's representation is likely to be hearsay as it is a previous representation made outside of court, made by a person containing an asserted fact, adduced to prove that fact and X intended to assert that fact'*

## Step Two: Is it a Previous Representation?

*X's representation is an express/implied previous representation as it was made otherwise than in the course of giving evidence in the proceeding (i.e. out-of-court statement)*

- A representation is still a "representation" though the person making it does not intend for it to be heard/seen by anyone
  - Eg. It can be overheard by someone
  - Note: person's intention to communicate a representation is distinct from what fact the person intended to assert by the representation, the latter being material in applying s 59

Dictionary: Representation includes –

- a) An express or implied representation (whether oral or in writing); or
- b) A representation to be inferred from conduct; or
- c) A representation not intended by its maker to be communicated to or seen by another person; or
- d) A representation that for any reason is not communicated

Dictionary: Previous representation is:

- ✓ An earlier statement/conduct
- ✓ Made outside court

## First-hand/second-hand hearsay

- First-hand hearsay: "they told me"
  - "When I bumped into the Defendant, he said 'I just killed Fred.;"
- Second-hand hearsay: "someone told me that he told him"
  - John said to me that, when he bumped into the Defendant a few minutes after the deceased was shot, that the Defendant told him 'I just killed a man.'"
- First-hand documentary evidence: diary entries, minutes of meeting recording i.e. what CEO said
- Second-hand documentary evidence: minutes of meeting typed up by director re CEO's words
- Third-hand hearsay: "Mary told me that John, her husband, had told her that he'd bumped into the Defendant after a shooting and that the Defendant screamed 'I just shot him!'"

### Step Three: What is the Asserted Fact and its Relevance?

- This will depend on the relevance of the statement, the elements of the offence it is tendered to prove
  - Consider this in a common sense way → what fact would they want to try to assert by adducing the evidence?
  - Can be an implied assertion
- Eg. *Ratten*: asserted fact was that it wasn't an accident
- Eg. *Walton*: asserted fact was that the dad was on the phone

[X] is the asserted fact. The fact must rationally affect (directly or indirectly) the assessment of the probability of existence of a fact-in-issue: s 55(1)

- If it is ambiguous as to what the asserted fact is, look at the circumstances in which the representation was made: s 59(2A)

### Step Four: Purpose of Adducing (Hearsay or Non-hearsay?)

- If evidence is adduced for a purpose *other than* to prove the truth of the asserted fact contained in it, it is not hearsay
  - As in *Subramaniam* – to prove he was under duress
- Is it practical for a jury – CL makes it very complicated in *Walton* → Said you couldn't use it for a hearsay purpose even if adduced for another purpose

#### Hearsay – Inadmissible

- If they want to adduce the evidence to use the exact words (testimonially), it is express hearsay and inadmissible, have to consider exceptions

#### Non-Hearsay – Admissible (Argue this)

- To prove the fact that the representation was made
- To prove the terms/matter of conversation
- To prove fact related to conversation
- To prove parties were aware of something: s 66A
  - *Kamleh*: 'I turned the TV up' – not tendered to prove truth that TV had been turned up, but to prove state of knowledge by Zappia
    - Ie. That the TV was up full volume in the crime scene, which was consistent with the crime scene
- **To prove state of mind of parties**
  - *Walton*: 'I'm going to meet John at the town centre' → Tendered to prove Mrs W's plans/intentions to meet her husband in town, not that she actually did meet him, so not to prove the truth of the statement
    - Rather, it is evidence of her state of mind, admissible as original evidence (relevant fact from which jury can infer that she did go)
  - *Walton*: 'Daddy is on the phone' → Express assertion, which tends to convey information that it is Daddy on the phone
    - McHugh J said cannot tender it to show it was W on the phone but that she believed it was W on the phone from which we infer that it was W on the phone (i.e. evidence of state of mind)
  - *Ratten*: 'get me the police' → Not hearsay because statement was not used in order to determine the truth
    - The mere fact that she said, "get me the police" is original evidence as it is relevant to show deceased's state of emotional fear and rebut A husband's statement that the call was never made so relevant and therefore admissible
  - *Subramaniam*: to prove that the statement was made not that the soldiers were going to kill him in fact