

RELEVANCE

Step 1: Is the evidence (logically) relevant?

- **s 55(1):** Relevant evidence is that which, **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
 - o **fact in issue:** the issues in the proceedings defined by the substantive law eg in criminal law it is the factual elements of the crime and any defence
 - o **'rationally affect':** logical connection to the facts in issue + low threshold
 - Burton: evaluations how evidence can rationally affect a fact in issue is still plagued by subjective assumptions (sexual assault victim had earlier expressed interest in another man)
 - o **'affect'** = positive or negative bearing on our assessment of the facts in issue, ie does the evidence make it more or less likely to have happened?
 - o **Directly:** direct evidence
 - o **indirectly:** inferential reasoning, circumstantial evidence, credibility etc
 - o **'if it were accepted':** taken as truthful/reliable (IMM v The Queen; Papakosmas)
- **s 55(2):** Evidence is not to be taken as irrelevant only because it relates to:
 - o (a) the credibility of a witness;
 - o (b) the admissibility of other evidence;
 - o (c) failure to adduce evidence.
 - Purpose is to make clear that the fact that evidence 'only' goes to credibility does not mean it is not relevant to facts in issue.
- Note: If satisfied, this establishes that the evidence is probative, but not the **level** of probative value.

Smith

- Facts: charges for bank robbery, key question was whether Smith was the person depicted in the CCTV photos of the robbery. Prosecution had called 2 PO's who testified that they recognized Smith in the photos
- Issue: whether this evidence was relevant – could it rationally affect the assessment of the probability that it was Smith in the photos?
- Held: No
- The jurors could make their own comparisons and conclusions, the police had no greater adv in drawing their conclusions than the jurors
- Would have been relevant if the police had an adv, eg if Smith had changed his physical appearance since the robbery, or police knew an identifying feature not evident from the photos eg a limp.
- **Family members: distinguish Smith**, family can do something the jury can't.

Evans

- Facts: bank robbery, prosecutors had eye witnesses and seized clothes from Evans that matched the descriptions of the robbers disguise given by the eye witnesses.
- Fact in issue: was Evans the robber?
- Issue: whether the prosecutor's request to have Evans dress in the retrieved clothes and parade in front of the jury then sit in the clothes was relevant under s 55.
- Held (majority): Relevant. A fact in issue was whether the accused was the offender, and relevant to this is whether, when dressed in overalls and a balaclava, there were apparent similarities in the jury's view bw the appearance of the accused and the earlier descriptions.

Step 2: is the evidence given by the defence?

- **Grant:** where the accused offers evidence that is logically relevant, scrutiny of its admissibility is infused with accusatorial principles.
- This lightens the admissibility load that the accused must meet
- Au case of Lockyer: the probative value of defence given evidence was to be measured relative to the lack of burden placed on the accused

Step 3: Is there provisional evidence?

- **s 57(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
 - o (a) if it is reasonably open to make that finding; or
 - o (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 (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Step 6: Inferences as to relevance

- **s 58(1):** If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

MANDATORY AND DISCRETIONARY EXCLUSIONS

Section 135 DISCRETIONARY exclusion

- s 135: The court **may** refuse to admit evidence if its probative value is **substantially outweighed** by the **danger** that the evidence **might**:
 - o (a) be unfairly prejudicial to a party, or
 - o (b) be misleading or confusing [to the jury], or
 - o (c) cause or result in undue waste of time
 - 'undue': high standard
 - used when there are lots of documents, lots of witnesses, etc.

Section 137 MANDATORY exclusion

- s 137: 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.

Step 1: What is the probative value of the evidence?

- Definition: The extent to which the evidence could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.
- Probative value exists on a scale
- Must be 'taken at its highest': ie its greatest possible effect on the assessment of the probability of the existence of the facts in issue (it is completely credible and reliable, max potential, the version most favourable to the Crown) (Shamouil; Imm v the Queen; XY; Burton; SRJC)
- You don't try determine the probative value that the jury might attribute to the evidence

Step 1.1 Is the evidence reliable?

- Reliability plays no part in the evaluation of the probative value of evidence (IMM)
- Cf Victoria: Dupas: the trial judge must make their own assessment to consider the quality and weight of the evidence when assessing its probative value
- **DPP v JG**: reliability of child witness after hypnosis and video-recorded interview
- Held
- (1) Introduction of accused by interviewer presents a real risk of unfairness bc the juror won't know the effects, but this can be ameliorated
- (2) Concerns about effective cross-examination after having seen the video recording was 'etched into the jury's mind' have been dismissed by Parliament by permitting evidence to be given in that form
- (3) There is not enough evidence to prove that the hypnosis interfered with her memory

Step 2: What is the danger of unfair prejudice?

- TEST: ALRC Report 102: danger of unfair prejudice may arise if the jury could misuse the evidence to make a decision on an improper, perhaps emotional, basis ie on a basis logically unconnected with the facts of the case
- Relates to evidence that could evoke sympathies, arousing horror, provoking an instinct to punish, or triggering other reactions that distract from the

- Standard of danger: More than the possibility of the danger, **means a 'real' danger** (Lisoff; BD; GK)
- EXAM: list out what potential 'dangers' the evidence might cause, even if you find it is ultimately outweighed ie how the jury could misuse
- Conduct of the trial can nullify or water down the prejudice (Aytugrul; exclusion %)
- Papakosmas: evidence is not unfairly prejudicial because it makes it more likely that the defendant will be convicted

Step 3: Is the probative value in (1) substantially outweighed (s 135) or outweighed (s 137) by the danger of unfair prejudice in (2)?

- Substantially outweighed s 135: 'well outweighed' (Clarke)
- Outweighed: **Pfennig**
 - o The balancing process is a value judgement, not a mathematical equation
 - o Must consider fairness and integrity of the trial
 - o The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted.
- EXAM: Weigh up! "On one hand...on the other"

Step 4: Can the unfair prejudice be cured by a limit (s 136) or a direction (s 165)?

Application

- s 135: criminal or civil trials, defence or Crown-led evidence
- s 137: only criminal trials, only Crown evidence
 - o must be raised by an objection by the defence (ie judge doesn't have to do anything unilaterally)
 - o Accused bears burden of proving danger of unfair prejudice outweighs probative value

Section 136 DISCRETION to limit use of evidence

- s 136: The court **may** [discretion] **limit** [cf exclude] the use to be made of evidence if there is a danger that a particular use of the evidence might:
 - o (a) be **unfairly prejudicial** to a party, or
 - o (b) be **misleading or confusing**.

Step 1: Is the evidence unfairly prejudicial?

- See meaning under s 135

Step 2: If so, give direction

- Direction: the evidence has permissible and impermissible uses

Relevant to e.g. hearsay s 60

Section 138: Exclusion of improperly or illegally obtained evidence

- Recognizes that investigative misconduct in the acquisition of prosecution evidence should be reviewed

Starting point

- **s 138(1):** Evidence that was obtained:
 - o (a) improperly or in contravention of an Australian law, or
 - o (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** [on balance] the **undesirability** of admitting evidence that has been obtained in the way in which the evidence was obtained.
- Commonly arises during: police search, detention, questioning and arrest.

Step 1: What is the desirability of admitting the evidence?

- Take into account matters from s 138(3)

Step 2: What is the undesirability of admitting the evidence?

- Take into account matters from s 138(3)

Step 3: Does the desirability outweigh the undesirability?

- On balance

Step 4: Burden of proof

- Burden of proof is on the party seeking to adduce illegally or improperly obtained evidence
- **DPP v Carr:** 2 stage process
- Party seeking admission of the evidence has:
 - o (1) the burden of proof of facts relevant to matters weighing in favor of admission; as well as
 - o (1) The burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.

Factors to consider

- **s 138(3)** Factors to take into account [not exhaustive]:
 - o (a) the probative value of the evidence,
 - o (b) the importance of the evidence in the proceeding,
 - o (c) the nature of the relevant offence, cause of action or defence and the nature of subject-matter of the proceeding,
 - o (d) the gravity of the impropriety or contravention
 - o (e) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the *International Covenant on Civil and Political Rights*,
 - o (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
 - o (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an

'Impropriety'

- **Parker** (Oxford English Dictionary:) not in accordance with truth, fact, reason or rule; abnormal, irregular, incorrect
- **Robinson v Woolworths:** identification of impropriety requires attention to 3 propositions
 - o (1) identify the 'minimum standards to be expected of enforcement'
 - o (2) conduct must be 'clearly inconsistent' with those standards (not just blur the lines)
 - o (3) the concepts of 'harassment' and 'manipulation' suggest some level of encouragement, persuasion or importunity in relation to the commission of an offence.
- Campbell: **failure to caution** in accordance w s 139(1)-(3) amounts to impropriety, rendering any admissions subsequently made inadmissible by virtue of s 138

'Contravention'

- Disobedience of a command expressed in a rule of law which may be statutory or non-statutory. Mere failure to satisfy a condition necessary for the exercise of statutory power is not a contravention (Parker v Comptroller-General of Customs)

'Gravity of impropriety or contravention'

- **Marijancevic:** Impugned conduct exists on a spectrum from least to most serious:
 - o Least serious: no knowledge that the conduct was illegal; no adv was gained from impropriety
 - o Middle range: conduct which is known to be improper but not undertaken for gaining any adv
 - o Most serious: conduct known to be illegal and which was pursued for the purpose of obtaining a benefit or adv that could not be obtained by the lawful conduct.

Step x: Are there any disputed admissions?

- McKinney: where disputed admissions make their way to the jury, warnings should be given where the alleged confessions were made in circumstances where the accused is held in custody by police, police evidence of the alleged confession is disputed, and its making is not reliability corroborated.

Section 90: Discretion to exclude admissions

- s 90: In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
 - (a) the evidence is adduced by the prosecution, and
 - (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Failure to Caution

Step 1: Arrest by person empowered to arrest

- **s 139(1)(c)** For the purposes of s 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 before the questioning the investigating official did not caution that the person does not have to say or do anything but that anything that the person does say or do may be used in evidence AND:
 - o (a) the person was **under arrest** for an offence at the time, AND
 - **s 139(5) 'under arrest'**: includes a person who is in the company of an investigating official for the purpose of being questioned if:
 - (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or
 - (b) the official would not allow the person to leave if the person wished to do so, or
 - (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.
 - o (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

Step 2 Person not empowered to arrest

- **s 139(2)(c)** For the purposes of s 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 the investigating official did not, before the statement was made or the act was done, 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 AND:
 - o (a) the questioning was conducted by an investigating official who did not have the power to arrest the person, and
 - o (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence

Step 6.3: Was the caution given in the proper language?

- **s 139(3)** The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

- **'questioning' (Naa)**: formal or informal interrogation of a suspect by a police officer for the purpose of the officer obtaining information, whether or not at the time of interrogation the suspect was formally under arrest.....should not be unduly confined by technicalities or restricted so that it does not achieve the purpose for which it was enacted.
- **Illustration (FE)**: 15 yr old made admissions about a stabbing homicide. 1st interview: Not cautioned prior to, or during questioning, didn't know she didn't have to say anything or take part in the interview, not taken to the custody manager even tho she was a vulnerable person. 2nd interview: declined to participate (right to silence), but her intention was disregarded.

Admissions made during questioning

- **s 138(2)**: Evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained **improperly** if the person conducting the questioning:
 - o s 138(2)(a) **did or omitted to do, an act** in the course of questioning even though he or she **knew or ought reasonably** to have known that the act or omission was likely to **impair substantially the ability of the person being questioned to respond rationally to the question**; or
 - see s 139 failure to caution a person
 - o s 138(2)(b) **made a false statement** in the course of questioning even though he or she **knew or ought reasonably to have known** that the statement was **false** and that making the false statement was **likely to cause the person who was being questioned to make an admission**.
- An admission may also be excluded if it was gained as a consequence of an improper exercise or breach of police power or responsibility EG: admission was obtained as a consequence of:
 - o an illegal or improper arrest (LEPRA s 99)
 - o illegal detention: LEPRA Part 9 and s 99
 - o context of search warrant improperly executed.
- Campbell (illustration)
- ATSI ppl detained for questioning, which requires the police to notify the ALS and inform the ATSI person the notification would be made (s 33 LEPRA). Police didn't do this deliberately so excluded the admissions.

COMPETENCE

- Issues around this arise with:
 - o child witnesses; or
 - o those with cognitive or severe communication incapacities
- access to justice dilemma: these witnesses are often seeking to give evidence as prosecution witnesses regarding allegations they've made of sexual or other abuse

Starting point: s 12

- **s 12:** Except as otherwise provided by this act:
 - o (a) every person is competent to give evidence, and
 - o (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Step 2: Ability to give sworn and unsworn evidence

Step 2.1 Threshold competence

- **s 13(1):** A person is not competent to give advice about a fact if, for any reason (including a mental, intellectual or physical disability):
 - o (a) the person does not have the capacity to understand a question about the fact, or
 - o (b) the person does not have the capacity to give an answer that can be understood to a question about the fact
 - o and that incapacity cannot be overcome.
- *ie you want to prove that they do have the capacity to understand/give an answer*
- **s 13(2)** A person who is incompetent to give evidence about a fact bc they don't satisfy (1) may be competent to give evidence about other facts (*ie. competency is fact specific*)

Step 2.2: Ability to give sworn evidence

- **s 13(3):** A person who is competent to give evidence about a fact is not competent to give **sworn evidence** about the fact if the person does not have the **capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence***
- Must take s 21 or 24A oath

Step 2.2 Ability to give unsworn evidence

- **s 13(4)** A person who is not competent to give sworn evidence about a fact *may*, subject to (5), be competent to give **unsworn evidence** about the fact.
- **s 13(5)** A person who bc of (3) is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
 - o (a) that it is important to tell the truth
 - o (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and

- o (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
 - **Muller:** s 13(5) requires only that the directions must be given, not that they be understood or even acknowledged...testing of the potential witness's understanding of the judge's directions is not part of the process prescribed by s 13(5).
 - No particular level of understanding is required as a condition of admissibility.

Step 3: What weight should be given to the evidence?

- GW: absent other factors, there is no expectation that unsworn evidence should be given less weight than sworn evidence. The focus is on the specific evidence, not the type of evidence.

Step 4: Is the witness a child?

- Special case: Competency of children
- Very difficult to assess
- **RAG** (Latham J): abstract concepts, multi-faceted questions, legal jargon, double-negatives and passive speech should all be avoided when assessing competency.
- s 13(8) Reliance on experts to determine competency or someone w special understanding of the witness eg parent remains persuasive.