

## Relevance – Part 3.1 pg. 192

### Section 56:

- (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

- **Selsam Pty Ltd v McGuiness**, Spigelman CJ said that ordinarily the words “not admissible” in the Act means “not admissible over objection”
  - However, Court of Criminal Appeal in **R v Chai** held that wrongly admitted evidence is capable of giving rise to a miscarriage of justice notwithstanding the absence of an objection
    - This is unlikely to prevail in civil proceedings

So, the threshold question is always: **IS THE EVIDENCE RELEVANT?**

- If not, it is **INADMISSIBLE**
- If it is relevant, then it is admissible
  - **UNLESS excluded** by other rules

### Section 55:

(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) In particular, evidence is **not** taken to be irrelevant only because it relates to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence
- To be relevant in a proceeding, the evidence must be:  
**Capable of rationally affecting** (directly or indirectly) the **assessment of the probability** of a **fact in issue** in the proceeding.
  - ie. the evidence must render the existence of the fact more or less *probable*
  - Probative value is defined in the dictionary of the *Evidence Act* (Schedule)
    - **Probative Value:** The extent to which the evidence *could* rationally affect the assessment of the probability of the existence of a fact in issue – Schedule to the Evidence Act
      - **Note:** Exclusionary rules may apply to exclude evidence that could be logically probative
      - Also discretions to exclude for reasons of fairness, means of obtaining it or other policy issues
        - Eg. s135 - General discretion to exclude where probative value is substantially outweighed by danger of Unfair prejudice, Misleading or confusing, Undue waste of time

### Determining Relevance:

- Need only be a **MINIMAL LOGICAL CONNECTION** between the evidence and a fact in issue – **Papakosmas v R (1999)**
  - Not to be confused with sufficiency, weight or reliability (*Reading v Australian Broadcasting Corporation* [2003])
- Apply common sense to provide guidance (**HML v R (2008)**)
- Evidence that is relevant only to credibility is indirectly relevant to a fact in issue “because it affects the weight of evidence”: ALRC 26 vol 1
  - NB: it may satisfy the s55(1) test but may be inadmissible because it fails to satisfy an exception to the credibility rule in s102
  - The morality of a person may not be evidence that is relevant to credibility unless it tends to suggest that the evidence given by a witness cannot be relied upon

- 'could' instead of 'would' reinforces the notion that s55 sets a low threshold for the admission of evidence
  - 'mere possibility' of evidence being connected to a crime is all that is necessary to make the evidence relevant: *Chanthovixay*
    - There may be arguments why the inference of connection should not be drawn, but that is an argument for the jury
- Relevant evidence need not render a "fact in issue" probable or "sufficiently probable" – it is enough if it only makes the fact in issue more probable or less probable than it would have been without the evidence – it needs to "affect the probability": ALRC 26 vol 1
  - *Probative value*: means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue

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### Credibility – Part 3.7 (pg. 484)

- Part 3.7 of the *Evidence Act* regulates the admissibility of credibility evidence
- *General rule: s 102*: Evidence that is relevant only to a witness's credibility is not admissible
  - But there are specific exceptions: see notes to s 102

#### Section 101A: Credibility Evidence

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, or
  - eg. Acts of past dishonesty is irrelevant it doesn't go to any fact in issue
- (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**, or cannot be used, because of a provision of Parts 3.2 to 3.6.

- Must be in this division – must satisfy one of these two tests
- Specific evidence which is not credibility evidence is evidence which goes to the assessment of credibility AND also goes to a fact in issue in the proceedings for which it is admissible
- Dictionary:
  - Credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.
  - Credit at common law: 'not a man to be believed upon his oath'
  - Honesty, also capacity to observe, recollect, communicate truthfully & intelligently
- Credibility' includes evidence affecting *Milat*:
  - The reliability of the witness
  - The reliability of particular testimony of the witness
    - It is relevant because it affects the probability that the witness is telling the truth, which affects the probability of the existence of the facts to which the
- Matters bearing on the credibility of a witness include truthfulness or veracity, intelligence, bias or motive to be untruthful, opportunities of observation, reasons for recollection or belief, powers of perception and memory, any special circumstances affecting competency, prior statements consistent

or inconsistent with testimony, internal inconsistencies and ambiguities in testimony and direct contradiction of testimony: *Wren*

- Examples:
  - the witness' ability to observe something, perhaps due to an eye-sight problem, and therefore to testify as to that observation
  - intelligence, memory, powers of perception
  - prior statements consistent or inconsistent with testimony; internal inconsistencies in testimony

## Section 102: Credibility of witnesses

**Credibility evidence about a witness is not admissible.**

(1) **Specific exceptions** to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

(2) Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

**Case: *Palmer v the Queen* (1998)**

- General view is that you can't question accused about whether the complainant has a motive to lie because that reverses the onus of proof, and it cannot be expected that the accused knows what is in the complainant's head.
- **Issue:** Did this evidence about the girl's motive to lie go only to credit or also to a fact in issue?
- **Held:** It went to both a fact-in-issue and not just the credit of the complainant → the existence or otherwise of a plaintiff's motive to lie could affect the jury's assessment of the probability of the occurrence of the alleged offence. (per McHugh J)
- The truth of the proposition that the credibility of evidence is locked to the credibility of the deponent, is in reality recognised by the rule **that a witness can be cross examined as to matters of credit** → because that is so, **it is irrational to draw a rigid distinction between matters of credit and matters going to the facts-in-issue.**
- The crown was in fact entitled to cross-examine the accused as to whether he knew of any facts that would explain the complainant's allegation → failure to reveal any facts that would provide a reason for the complainant concocting her complaint, may assist the jury to find that her evidence was true.

## Exceptions:

### Section 103: Cross-examination as to credibility

- The credibility rule (s 102) 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 (*R v RPS*)
- In assessing this, the court 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, and
    - *Kerry v Kerry*: permissible to cross-examine re: 6 months earlier had lied to court about being before a court for a fire arm offence
  - b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.
    - Re: Prior Convictions
      - Evidence permitted:
        - subornation/perjury, 6 years earlier (Lewis)
        - stealing/obtaining property by deception, 12 years earlier (Jones (No 3))

- having regard to importance of the witness evidence, their demeanour, significance.
- Evidence Denied
  - Rape/assault occasioning ABH, 11 years prior (Lewis)
    - Insufficiently connected in time/subject matter
- Re: lying
  - Evidence permitted
    - Lying in a job application (architecture) (Lodhi)
      - Weight put on, importance of the truth to the employer, the persons high religious standards, and the profession itself, architecture requiring high professional standards.
- Re: Pending Social Security Fraud Charges
  - Evidence permitted
    - On trial for conspiracy, unrelated SS fraud charges, the 'type' of dishonesty was substantial (Ronen)
- Re: convictions of police officers for tampering with evidence
  - Evidence permitted
    - 11 years after conviction, on appeal, evidence of the police officers being convicted for tampering with evidence, went to both guilt of the crime and credibility of the police witnesses (Wakeley).
- Re: police corrupt conduct
  - Evidence permitted
    - 'clearly, material suggesting that a police officer has been guilty of corrupt conduct of any kind could have substantial probative value on the question of their credibility' (McGoldrick)

#### Section 104: Cross-examination of accused

- Applies to credibility evidence in a **criminal proceeding** only AND operates in addition to s 103: see s 104 (1) –
- Requires **leave of the court** (so s 192 comes into play – unfairness to accused must be taken into account) before the prosecution can cross-examine a defendant as to credibility: s 104(2)

**UNLESS** the cross-examination is about whether the defendant (under s 104(3)):

- (a) is biased or has a motive to be untruthful, or
- (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or
- (c) has made a prior inconsistent statement.

#### **Note when leave cannot be given under s104(2)**

- Section 104 (4): Leave must not be given for cross-examination of the defendant by the prosecutor under subsection (2) **UNLESS** evidence adduced by the defendant has been admitted that:
  - (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, **and**
  - (b) is relevant solely or mainly to the witness's credibility
- So, where there is such evidence, the prosecutor can be given leave to cross-examine the defendant under s 104(2)
  - Generally, prosecution cannot lead evidence of defendant's prior convictions etc. but if the defendant wants to put evidence in my good character before the court and challenge the honesty of the prosecution's witnesses then the prosecution can challenge it

#### **But section 104(5)**

- A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:
  - (a) the events in relation to which the defendant is being prosecuted, or
  - (b) the investigation of the offence for which the defendant is being prosecuted

### Section 104(6)

- Leave is not to be given for cross-examination by another defendant unless:
  - (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and
  - (b) that evidence has been admitted.
    - Co-defendant will only get leave to cross-examine if the evidence the witness has given is adverse to that co-defendant

### Bringing this together as it applies to a criminal proceeding

- Cross-examination of a criminal defendant about the defendant's credibility will only be permitted where:
  1. The evidence complies with s 103 (*substantially affect* test) and
  2. Leave is given by the court\* (\*see note next slide) and
  3. The court's discretionary powers to exclude or limit evidence (ss 135-137) have not been exercised.

### Leave of court not required where:

- The defendant is being cross-examined about whether they are biased or have a motive to be untruthful; or can't recall matters to which their evidence relates; or made a prior inconsistent statement (s 104(3)) OR
- Evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and is relevant solely or mainly to the witness's credibility (s 104(4))

### Section 106: Rebutting denials by other evidence

- Applies where evidence is
  - a) adduced otherwise than from the witness and
  - b) the witness has denied the substance of the evidence
- Provided that, in cross-examination
  - a) the substance of the evidence was put to the witness
  - b) The witness denied, or did not admit or agree to, the substance of the evidence and
  - c) The court gives leave to adduce the evidence
- BUT leave is not required if the evidence tends to prove the matters listed at s 106(2)(a) – (e)
- A matter is put to the witness of a previous representation and the witness denies making it. The party will be entitled to bring evidence of the making of the representation, that is credibility evidence, in rebuttal of the denial
  - Evidence must be "put to" the witness whose credibility is impugned → that is, it is a prerequisite to use of s 106 that the "witness has denied the substance of the evidence"
  - The evidence must therefore have been put to the witness in cross-examination → this means that s103 or s104 must have ALREADY been complied with before s106 is activated → thus, if cross-examination has not been permitted on some matter relevant only to witness's credibility, then evidence of that matter cannot be admitted under s106.

### Section 108: Exception: re-establishing credibility

- s 108(1) The credibility rule does not apply to evidence adduced in re-examination of a witness
- s 108(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
  - (a) evidence of a prior inconsistent statement of the witness has been admitted, OR
  - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,
    - AND the court gives leave to adduce the evidence of the prior consistent statement.

- This section must be read in association with **s39** → which states that re-examination must be on issues that came up in the cross-exam.
- Cases applying the Evidence Act indicate that often a prior **consistent** statement (in the form of a **recent complaint**) will be relevant to the facts in dispute and as such will not be caught by the rule against accreditation.
- The exceptions developed in recognition that the circumstances either made the prior statement highly relevant or highly desirable → an alternative method of getting in a prior consistent statement is through the hearsay exception for documentary evidence s66.
- The following cases show that prior consistent statements help to jury decide whether the witness is telling the truth.
- **Re-examination is done only in response to matters raised in cross examination to restore the witness' credibility** where it has been attacked in cross examination under the exceptions to the credibility rule in ss103-6.
- You **cannot use leading questions in re examination**. → s102 doesn't apply to evidence of a prior consistent statement of a witness if evidence of prior inconsistent statement of the witness has been admitted or it is or will be suggested, expressly or impliedly, that evidence given by the witness had been fabricated or re-constructed or is the result of a suggestion and the Court gives leave (**s192**).
- The use of evidence admitted under s 108: evidence admitted under s 108 can be used for a relevant hearsay purpose pursuant to s 60, unless a direction is made under s 136 prohibiting this use.
  - Directions under s 136 can only be made if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing: see the commentary to s 136.

*Graham v The Queen (1998)* (Suggestion of Fabrication.)

**Facts:** Graham was accused of sexually assaulting his daughter when she was ten → she didn't report it until 6 years after the event.

- Initially the prosecution attempted to have her first complaint, made some years after the event, admitted under s66 exceptions to hearsay, but this was denied because the event was not fresh in her memory.
- They then attempted to have it admitted under s108 → this requires that either there has been a prior inconsistent statement admitted or a suggestion that the evidence is fabricated → here the **defence suggested the evidence had been fabricated**.

**Held:** Whether, if admissible, the complaint becomes evidence of the truth of what is asserted is not relevant to the exercise of discretion to give leave under s108.

- Rather, **exercise of discretion under s108 depends upon the effect of the evidence on a witness's credibility** → unless the making of the complaint could be said to assist in the resolution of the witness's credibility, evidence of the complaint would not be important and would only serve to lengthen the hearing.
- In this case, **the making of a complaint 6 years after the event does NOT assist in deciding whether she fabricated evidence** → thus the evidence should not have been allowed in.

*Papakosmas v R (1999)*

**Facts:** This case concerned a sexual assault at a work Christmas Party → the victim told three of her colleagues straight after the incident.

- The appellant developed an argument based on the common law rules on credibility in order to get evidence of the complaint admitted → said the rule was that evidence of immediate complaints in sexual assault cases is admissible even if it is relevant only to the credibility of the victim and not to a fact in issue.

**Held:** The argument was not successful due to the provisions of the Evidence Act → s55(2) in particular, abolishes the above rule → evidence of the complaint would affect the probability of the truth of the complaint.

- **However, if the defendant had alleged the victim fabricated the complaint, s108(3)(b) would allow admission of such evidence**, assuming the court gave leave → and thus the evidence could then be used for a hearsay purpose.

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