

LAWS2207 Notes

Basic Principles:

***Browne v Dunn* principle:**

Cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.

Burden of Proof:

Criminal cases: Prosecution bears the legal burden of proving each element of the offence in criminal cases, which conforms with the “presumption of innocence”: *Woolmington v DPP*, s56(1) *Criminal Code 2002* (ACT), s141(1) *Criminal Code*

- can be placed upon defendant for elements by legislation s59 *Criminal Code*
- ‘Reasonable Doubt’
 - “A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances.”
 - *Green v The Queen* (1971) 126 CLR 28

Civil and defence:

- defence is balance of probabilities- S56(2) *Criminal Code 2002* (ACT)- prosecution has legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof on the defendant
- Civil proceedings s140

Tribunal:

- “when the law requires the proof of any fact, **the tribunal must feel an actual persuasion of its occurrence or existence before it can be found**. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.” (*Briginshaw v Briginshaw*)

Circumstantial evidence: evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved.’

- *Shepherd v The Queen* (1990) 170 CLR 573 (Dawson J)

Voir dire: Argument that takes place without jury in room to avoid hearing prejudicial evidence

Judge decides admissibility:

Evidence Act ACT

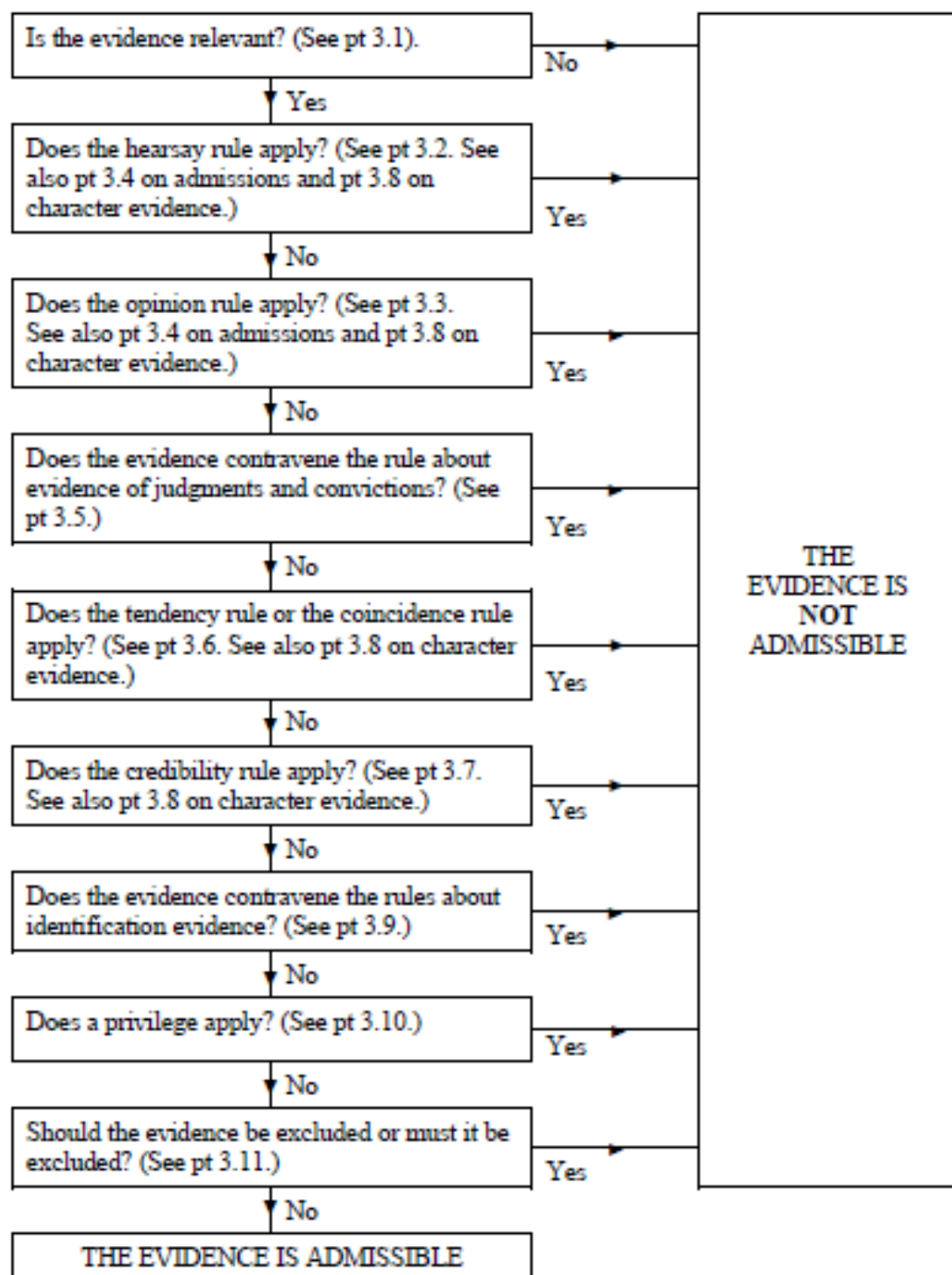
S 142: Admissibility of evidence and other preliminary questions are decided by the judge. The judge is required to find any facts needed to determine admissibility on the balance of probabilities.

S142(1) except as otherwise providing court must find facts necessary for deciding (a) a question whether evidence should be admitted or not, whether in discretion or not (b) any other qs have been proved if it is satisfied that they have been proved on balance of probabilities

Inclusion of Common knowledge:

S144(1)(a) proof not required of common knowledge that is not open to question

Judge and jury cannot investigate themselves (*R v Skaf and Skaf*)



Relevance

Under ss 55 and 56 of the *Evidence Act*, only relevant evidence is admissible.

For evidence to be relevant it must be the case that if accepted it could rationally affect, either directly or indirectly, the assessment of probability of the existence of a fact in question in the proceeding (s55(1)).

1. Relevance to fact in issue?

(a) Threshold

There is a low threshold for finding relevance (Justice Kirby in *Smith*).

Relevance does not hinge on capacity to prove anything by itself (Heydon J in *Evans v The Queen*), and only requires a reasonable fact finder to find a connection (*Evans*).

IMM v The Queen set the threshold was set at ‘inherently incredibly, fanciful or preposterous.’

Kirby J in *Smith*- perspectives of relevance may develop during the course of a trial as issues become clearer.

(b) Ambiguity

May be possible to argue that the evidence was so inherently ambiguous so as not to be relevant, and therefore was inadmissible (*Lithgow City Council v Jackson*)

2. Rationally affect

Evans and *Smith* clarified evidence that does affect the determination of any fact in issue will not be found to be relevant.

Relevance may be brought into question if the assertion is no different from the material available to the jury from their own observation (*Smith v The Queen*). This could be extended so as to argue that there is no logical basis for affecting the jury's decision when the conclusion was not based on material different to that provided to the jury.

Smith v The Queen

Facts:

- Two police officers gave similar evidence at trial that was admitted over the objection of the appellant. Both witnesses said that they had had previous dealings with the appellant and that they recognised the appellant as the person depicted in photographs of a bank robbery of which the appellant was accused.

Decision:

- The majority of this Court held¹⁴ that, because the witness's assertion of identity was no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant was not relevant

Unfair Prejudice

S127 prevents evidence being admitted if that evidence would create the danger of unfair prejudice to the defendant, and would not be outweighed by probative value.

1. What is the probative value of the evidence?

Probative value is the extent of relevance (*IMM*)

The trial judge will assume that evidence is truthful and reliable in assessing its relevance *R v Shamouil*

- note dissenting judges in *IMM*- must take at its highest but can consider reliability
- a very weak identification may have weak probative value as it is simply unconvincing (French, CJ, Kiefel, Bell and Keane JJ in *IMM v The Queen*)

Other cases

- A piece of evidence has significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue “to a significant extent”. *Zabnic v Svelte Corporation* (1995) 61 FCR 171
- Probably less than “substantial probative value” *R v Lockyer* (1996) 89 A Crim R 457.
- “important” or “of consequence” *DSJ* (2012) 215 A Crim R 349
- “...the statutory language incorporates a test which, although it will normally be applied before facts have been found, **involves “a degree and value judgment”** having regard both to the evidence to be adduced and other evidence adduced or to be adduced.” [74]
 - *Jacara v Perpetual Trustees* (2000) 106 FCR 51 (Sackville J with Whitlam and Mansfield JJ agreeing)

2. What is the risk of unfair prejudice?

Unfair prejudice has been held to be ‘the risk of an unfair trial’ (McHugh J in *Pfennig v The Queen*) or the ‘risk of a miscarriage of justice’ (Toohey, Gaudron & Gummow JJ in *R v Swaffield*).

This means there must be a real risk that the evidence will be misused by the jury in some way and that that risk will exist notwithstanding the proper directions (*R v Shamouil*)

This has been held to include:

- Where evidence may lead a jury to adopt an illegitimate form of reasoning (Woods CJ in *R v Yates*)
- Where evidence may lead jury to give evidence undue weight (Woods CJ in *R v Yates*)
- May cause the fact-finder to base their decision on something other than the established propositions in the case
- To be satisfied with a lower degree of probability than otherwise

Unfair prejudice is **not** when evidence merely strengthens the prosecutions case (*Festa v The Queen*, *R v Shamouil*)

3. Does the probative value outweigh risk of unfair prejudice?

This is a value, not mathematical calculation (McHugh J in *Pfennig v The Queen*).

Yes- admissible

No- inadmissible under s127

Note: general discretion to limit use of evidence

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The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

Papakosmas emphasized that mere fact that evidence that would not be admissible does not create risk of unfair prejudice in itself.

