

PROCESS AND RELEVANCE

FORMALITIES AND PROCESSES

PROCESS	CIVIL	CRIMINAL
Who has the burden?	<p>P = evidential + persuasive + self-defence persuasive.</p> <p>D = evidential + persuasive for defences and counterclaims.</p>	<p>P = evidential + persuasive (presumption of innocence) <u>Woolmington v Dpp</u> + persuasive burden for self-defence.</p> <p>D = plea of mental impairment (both burdens <u>s 269D CLCA</u>), + self-defence evidentiary burden.</p> <p><i>Note: D's persuasive burden lowered (balance of prob) <u>s 141(2) CEA</u>.</i></p>

Voir dire: Is it required? S 189 CEA - Admission of evidence, whether evidence can be used against person or W is competent, should be determined in jury's absence s 189(2) CEA.

Reopening Trial: Only in exceptional circumstances:

- Issues raised not reasonably foreseeable by proponent.
- Fresh evidence come to light
- Formal, technical or non-contentious matters overlooked
- Interests of justice R v Chin.
- Civil – interests of justice demand reopen on basis of mistake where court satisfied additional evidence relevant and would have significant impact Urban Transport Authority v Nweiser
- Criminal – Crown not permitted to call evidence in rebuttal to refute an alibi because foreseeable. Killick v R

Appeals:

- **Mag Court** – to single judge of SC Mag Court Act s 40 (civil), 42 (crim)
- **District/Supreme Court** – to full court r 280(1)(a)-(b).
- **Basis (crim) s 353 CLCA**
 - D can l if verdict unreasonable or unsupported by evidence, wrong decision on q of law, miscarriage of justice.
 - E.g. Inadmissible evidence/direction is evidential error = error of law s 352, 353 CLCA.
 - Prosecution cannot appeal against acquittal.
 - Appellate court won't interfere with a trial judge's exercise of **discretion** unless they ignored or gave insufficient weight to a relevant fact House v R
 - Must show:
 - Trial judge misdirected himself about existence of discretion or about the facts which call for its exercise
 - Trial judge took irrelevant considerations into account or failed to take account of relevant considerations
 - Trial judge exercised his discretion unreasonably

NOTE: s 35 SAEA – do not need proof of existence of a law, only judicial notice required.

MF SATISFYING REQUISITE STANDARDS OF PROOF

NO CASE TO ANSWER SUBMISSION

1. Sub on law, non-existent inferential relevance chain. No election. Weight, credibility, sufficiency of evidence not considered Tepper v DiFrancesco.
2. If **criminal**: Submit at close of pros case on failure to meet evidential burden. Absolute right. If jury, judge must **direct** them to acquit.
3. If **civil**: is evidence so weak it should not be accepted? Tate v Johnson

INSUFFICIENCY SUBMISSION

1. Sub on facts at close of P case, inferential links weak, persuasive burden SOP not met. Court has discretion (no entitlement). D must elect to call no ev. R v Prasad, Tepper v DiFrancesco.
2. If **criminal**: Unsafe to convict upon, judge sitting alone reluctant to end case prematurely.
3. If **civil**: Court will not entertain sub unless ev in and D submits at end. Copper Industries v Hill

ADMISSIBILITY OF EVIDENCE

1. Is it **relevant** to proof of a MF -does it pass the threshold?
 - a. What **form** is it - Testimonial, documentary (written stmt, subtype of real), real (CCTV).
 - b. What **type** is it?
 - i. **Direct evidence** (1 inference, no inference required)
 - ii. **Circumstantial evidence** (court to draw +1 inference)
 - c. Is it relevant for original evidence or HS? Then consider question of authentication.
- d. **COMMONWEALTH**
 - i. Apply S 55(1) CEA

*Evidence relevant if could **rationally affect directly or indirectly**, the assessment of the probability of the existence of a fact in issue in the proceeding.*

See also: Application in Smith v the Queen.

- ii. S 55(2) CEA Evidence not irrelevant only because relates to
 - a) *Credibility of a witness; or*
 - b) *Admissibility of other evidence; or*
 - c) *A failure to adduce evidence.*

- iii. Apply s 56(1) CEA *Evidence that is relevant is admissible, evidence that is not relevant (s 56(2) CEA) is not admissible.*
- iv. Accused can formally admit facts, this is sufficient proof s 184 CEA
- v. Whether evidence should be admitted SOP is BOP s 142 CEA.
- vi. **Provisional relevance** – If referred to by W and not authenticated then part of W testimony inadmissible. Reasonably open to make finding later s 57(1).

e. **SOUTH AUSTRALIA**

- i. Apply: Evidence that tends to prove or disprove a MF in issue or a fact relevant to a MF in issue R v Stephenson.
- ii. Accused can formally admit facts, this is sufficient proof s 34 SAEA
- iii. Can be provisionally relevant, received conditionally on assurance that other info will be tendered to show the relevance R v Elsom.
- iv. All facts with rational, probative value are admissible unless rule forbids Smith v R.

2. Do the inferences prove MF to requisite **SOP**?

a. **Criminal:**

- i. **Prosecution:** Beyond reasonable doubt s 141(1) CEA; Woolmington v DPP.
- ii. **Defendant:** On balance of probabilities s 141(2) CEA

b. **Civil:**

- i. On bal of probabilities (s 140(1) CEA); Briginshaw v Briginshaw.

3. Is it **probative**?

- a. Consider public interest (maintaining integrity of judicial system), beaten confession unreliable, illegally obtained drugs not excluded because probative.

4. Are there **discretions to exclude evidence**?

a. **General discretion**

i. **SA**

- a) Discretion to exclude relevant evidence, on grounds of time and cost, since throws little light on existence of the MF R v Stephenson.

ii. **Cth** s 135 CEA

Court may refuse to admit evidence if its probative value is substantially outweighed by the danger the evidence might:

- c) *Cause or result in undue waste of time*

b. Public policy (illegal/improperly obtained)

i. Preserve integrity of the judicial process, ensure police don't avoid deliberate restrictions on their power.

ii. **SA**

a) Civil and Crim: Illegally/improperly obtained evidence Bunning v Cross.

a) **Burden:** Party must establish public interest favours its exclusion.

b) **Considerations:**

a) Seriousness of impropriety, seriousness of crime charged (exclude if minor).

b) Probative value (admit if central to case), if deliberate impropriety exclude

c) Ease of obtaining evidence properly (exclude if easy).

d) Community standards (exclude if outraged)

e) Policy of regulation (exclude if policy is to restrict police power).

iii. **Cth**

a) S 138 CEA:

Evidence obtained

(a) Improperly (contravention of law)

(b) In consequence of a contravention of law,

It is not to be admitted unless the desirability of admission outweighs the undesirability of admitting such evidence

iv. **Considerations:** s 138(3) (a)-(h) CEA (similar to those above)

v. **Application:**

a) Must be casual connection between illegality and obtaining evidence Bunning

b) **Impropriety** – wide interpretation, includes situation where person denied fundamental rights and privileges. Ridgeway v R. Example:

- a) Using PO as agent to procure commission of offence
Ridgeway v R
- b) Obtaining confession recording device R v Swaffield.
- c) Isolated merely accidental non-compliance Pollard v R.

c. **Fairness discretion (prejudices)**

i. **SA**

- a) **Criminal** – discretion to exclude relevant evidence which would be **disproportionately prejudicial** to the accused, ensures fair trial and factual rectitude of the verdict. R v Christie
- b) **Civil** –discretion to exclude on grounds of procedural fairness if evidence would complicate and prolong trial Duke Group v Pilmer.
- c) Would a directed jury be capable of giving the evidence appropriate probative weight, despite parts of it might distract?

ii. **Cth**

s 135 CEA

Court may refuse to admit evidence if its probative value is substantially outweighed by the danger the evidence might:

- a) *Be unfairly prejudicial*
- b) *Be misleading or confusing*

See also: s 136(a) and (b) for limiting if danger of above listed.

See also: s 137 in crim proceeding court **must** refuse to admit evidence by P if its probative value is outweighed by danger of unfair prejudice.

Unfair prejudice – would jury place > probative value than deserved? R v Lockyer.

- Note: Where D had some control over process but failed, cannot invoke unfairness discretion Police v Hall
- Where merely unreliable and this is apparent to jury, cannot be regarded as potentially misleading R v Tugaga.

5. Are the exceptions? (reinclusionary)

- a. Judge has role to decide which facts determinative and what evidence can be put before jury.

Smith v The Queen (2001) 2006 CLR 650 – evidence relevant.

- **Facts:** Crown called 2 PO familiar with accused, to identify him as person caught on Bank security photographs (also admitted into evidence at trial).
- **Held:** evidence of PO irrelevant (s 55) and should have been excluded. Jury just as well placed (if not better) to draw relevant inferences between **photo evidence** and MF in issue **ID of accused** as bank robber.
- Let fact finder make decision themselves. Provide them with building blocks.

R v Kotzmann

- Proof of identity of a gun not indispensable intermediate fact requiring direction of proof BRD because could be used to support an inference in a cable of circumstantial proof and therefore could not be regarded as indispensable.

Aytugrul v R

- Evidence expressing exclusion percentage admissible when accompanied by equivalent FR and an explanation of the relationship between the two.
- Although adverse to the accused, such evidence is not unfair or misleading when explained to jury, therefore no ground for exercise of s 135, 137 exclusionary powers.