

## TOPIC 2: RELEVANCE

### (1) Introduction

**SAY:** Upon the facts, [X] is seeking to bring [evidence] for [purpose]. In order to be admissible, the evidence must be relevant (s 56(1)). Irrelevant evidence is inadmissible (s 56(2)).

- Per s 55(1), the evidence will be relevant if – were it accepted by the jury – it could rationally affect the assessment of the probability of the existence of a fact in issue.
- **NB:** merely because evidence is admissible does not mean it can be used for all relevant purposes – e.g. credibility evidence.
- There need only be “a minimal logical connection” (ALRC 26, Vol 1, para 641); relevance should be given “a broad interpretation” (Odgers, p. 304).
- Is the evidence only relevant by engaging in circular reasoning? (**BBH**)

### (2) Identify the fact in issue

**Main facts:**

- In civil cases, facts in issue are facts, which the law requires to be proved if some cause of action or some defence (or answer to defence) is to be made out – **HML**, per **Heydon J**.
- In criminal cases, FII = facts that prosecution is obliged to prove to establish guilt or which defence must prove if a positive defence is relied on (i.e. elements of offence/defence) – **HML**, per **Heydon J**.

**Subordinate or collateral facts:**

- Facts that affect the credibility of a witness or the admissibility of particular items of evidence; **HML** **Heydon J**

### (3) Does evidence satisfy s 55 threshold?

**SAY:** As above, the evidence must rationally affect the assessment of the probability of the existence of a fact in issue (s 55(1)).

- Per **BBH**, s 55 suggests that all evidence with any probative value is admissible (a logical relevance test)
  - **BBH** – sexual offence from father against daughter, brother saw his sister’s pants down and his dad’s face near her bottom, daughter didn’t remember this particular evidence. Issue: could have been looking at an insect bite
    - Majority held: this was recurring behaviour from the father, accepted the evidence as tendency evidence
- Here, legislature has moved away from the CLs more strict test of relevance as embodied in **Stephenson** – not everything that is logically relevant is legally admissible; connection cannot be too remote
  - **Stephenson** – accused wanted to know the state of intoxication of the driver of the victims car, to reduce his criminal culpability. Held: not able to use this evidence in court, criminally negligent
- Instead, exclusion of overly-remote evidence is left to the Act’s **exclusionary rules** (s 135 & s 137).

**Case:** **Smith**, police officers’ evidence in identifying D in CCTV photograph irrelevant as did not *affect*

- Held: Jury could ascertain the same information (i.e. was it Smith?) by examining the photographs themselves
- Kirby J Minority: police officers’ testimony that it was S was irrelevant and inadmissible

**Case:** **IMM**, tendency cases involving multiple complainants of sexual assault, possibility of collusion.

- Held (French, Kiefel, Bell & Keane JJ): Relevant → The question of relevance is determined ‘at its highest’, assume the jury accepts the statements as given [NB: if clear evidence of collusion or attempt to collude = irrelevant]
  - However, some evidence may be “so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury” in which case it will **not** be relevant

### (4) Direct or indirectly relevant?

**SAY:** Under s 55, both directly and indirectly relevant evidence is admissible.

- Directly relevant evidence affects the probable existence/non-existence of the fact in issue. The only inference the court can draw is as to the *accuracy* of the evidence. E.g. “I saw him shoot X”.
  - The accuracy of the evidence = accuracy of Courts own sensations or those of the witness
- Circumstantial or indirectly relevant evidence is evidence that, even if believed, does not prove the fact in issue unless the court draws an inference from the evidence to the relevant facts in issue.
  - “Facts relevant to facts in issue” – *Smith*
  - CE includes: credibility, tendency, coincidence, silence/failure to adduce
  - Consider whether too many ‘links in the chain’ weakens probative value (*Stephenson*)

#### NB: possible errors involving DE and CE

- Inaccurate observation on the part of the witness; Inaccurate report on the part of the witness; The witness may deliberately misrepresent what he or she saw; The witness’ testimony may be misunderstood; and Erroneous Inference [‘Lindy Chamberlain Case’ – thought paint was blood]

### 4.1 Circumstantial evidence (CE)

**SAY:** However, indirectly relevant evidence – circumstantial evidence (‘CE’) – requires an extra step: that there must be “no other reasonable explanation” (apart from the inference [party] is asking [court/jury] to make) if circumstantial evidence is to be relevant (*Plomp v R*, per **Dixon CJ**, quoting *Martin v Osborne*).

- **Plomp:** A convicted of wife’s murder. Both had gone surfing and no witnesses. CE in issue: A promised to marry mistress.
  - Held: **Relevant** as, in combination with circumstances (V a good swimmer, was normal surfing conditions, introduced his children to his mistress as ‘mummy’), CE suggested A had a reason to kill wife → more likely.

**THEN SAY:** On the facts...

- The only reasonable inference to draw is [inference] and therefore evidence is prima facie relevant; **OR**
- There is more than one reasonable inference that can be drawn – [inference 1] and [inference 2] and therefore the CE is irrelevant.

### (5) Conclude – is evidence admissible?

**SAY:** Accordingly, [evidence] is [ir/relevant] and therefore [admissible (s 56(1))/inadmissible (s 56(2))]

### (6) Exclusionary rules?

**SAY:** Regardless, [evidence] may be excluded or its use limited under the Act.

#### **S 135 – both civil and criminal, defendant and prosecution/plaintiff**

- S 135 grants a discretion to the court (**civil and criminal**) to exclude evidence if its probative value is substantially outweighed by the danger that it might:
  - (a) Be unfairly prejudicial to a party; or
  - (b) Be misleading or confusing; or
  - (c) Cause or result in undue waste of time.

#### **S 136 – limited use**

- S 136 grants a discretion to the court (**civil and criminal**) to limit the use of evidence if there is a danger a particular use of evidence might be (a) unfairly prejudicial or (b) misleading or confusing.

#### **S 137 – ONLY criminal cases AND raised by defendant**

- S 137 mandates that, in **criminal** proceedings, **prosecution** evidence **must** be excluded if its probative value is outweighed by the danger of unfair prejudice to the defendant.

### Note per s 137:

- **Probative value** = extent to which evidence could rationally affect the assessment of the probability of the existence of a fact in issue (*Evidence Act Dictionary, Part 1*).
- **Prejudicial effect** = undue adverse impact to accused that evidence may have on mind of jury beyond the expected impact if consideration confined to evidence's probative force (*Pfennig v R*, per **Mason CJ, Deane and Dawson JJ**).
  - *Pfennig*: 10yr-old boy never seen again after swimming + speaking to P → clothes were *neatly* folded upstream; reports of P's van leaving at high speed. 1yr ago evidence: P convicted of sexual assault/abduction of 12yr-old boy.
    - Held: Evidence rationally connected, even though he did not murder the 12yr-old, that boy's bicycle was found *neatly* on the side of the road. Prejudicial effect (**M CJ, D+D JJ**).
  - Example articulations of prejudicial effect:
    - Jury may fail to give adequate weight to alternative explanations for the evidence other than the truth of the fact in issue (e.g. eye witness testimony; coincidence cases)
    - Jury's ability to reason subsumed by visceral reaction (e.g. family/sexual violence)
    - Jury will make impermissible or erroneous assumptions
    - Jury will impermissibly assume the credibility of the witness (e.g. pseudo-expert witnesses, see topic 12 especially, *HG v R* per Gleeson CJ)

### (7) Jury directions?

#### Reliability Warnings:

- **SAY**: If evidence is unreliable but admissible, the prosecution or defence counsel can request an unreliability direction per s 32 JDA. TJ must:
  - (a) Warn jury that E may be unreliable;
  - (b) Inform the jury of matters that may cause the E to be unreliable; and
  - (c) Warn jury of need for caution in accepting/weighting evidence.
- **THEN SAY: S 31 JDA**: Evidence of a kind that may be unreliable includes:
  - (a) Hearsay and admissions; (b) Evidence which may be affected by age, ill health (physical or mental), injury or the like; (c) Evidence by a witness who might reasonably be supposed to have been criminally concerned in the events; (d) Prison informers; (e) Secret tape recordings

#### Abolishes the 'Chamberlain Directions':

- Parliament included ss 61-62 in the *Jury Directions Act 2015 (Vic)*. This mandates that the only matters a judge can direct the jury that must be proved beyond reasonable doubt is are elements of an offence charged or the absence of a defence (s 61) and abolishes any common law rules (s 62).

## TOPIC 3: COMPETENCE AND COMPELLABILITY

**SAY**: In order for [witness] to give evidence, he/she must be both competent and compellable. The Act provides two rebuttable presumptions that every person is competent (ss 12(a), 13(6)) and that every competent person is compellable (s 12(b)).

### (1) Competence

**SAY**: The question is whether [X, the witness] is competent to be lawfully called to give evidence.

- Is a preliminary question for the judge to determine and may be made on a **voir dire** (s 189(1)(c)).
- The Court may inform itself as it sees fit, including calling a relevant specialist (s 13(8)).
  - Questions of admissibility, the use to which evidence may be put and C/C are determined
- **NB**: evidence given by witness not inadmissible merely because – before witness finishes giving evidence – he or she dies or ceases to be competent (s 13(7)).