

Topic 2 – RELEVANCE

- **General Rule:** *Except as otherwise provided by the Act, only relevant evidence is admissible - s 56(1)*
 - Evidence that is *not* relevant is not admissible - s 56(2)
 - An item must be relevant to a 'fact in issue' to be admissible
 - Evidence may be directly or indirectly relevant

1. Logical relevance

- **WRITE:** To be relevant in the proceedings, *[the evidence]* must be capable of rationaly affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue - s 55(1) EA
 - Under this section the question is "is it relevant?", NOT 'will it be accepted' → we assume acceptance because evidence is to be taken at its highest
- **WRITE:** under s 55(2) *[the evidence]* is NOT necessarily irrelevant if it relates to - *ie. collateral to FII*
 - (a) credibility of the witness; or
 - (b) admissibility of *other* evidence; or
 - (c) failure to adduce evidence

2. Determine the Facts in Issue (FII)

- *[the evidence]* must have **minimal logical connection** to Facts In Issue (FII)
 - **ASK:** *What are the facts in issue? (eg. Was the accused there, did he have a gun etc)*
 - **Civil:** facts necessary for COA, Facts necessary to establish a Defence
 - **Criminal:** elements of the Offence/Defence (HML v R) including identity (R v Smith)
- Facts in issue
 - This is interpreted as relating to issues in the proceeding defined by **substantive law and pleadings** and thus extends to **facts to be proved in undefended or ex-parte proceedings**

3. Establish the evidence:

- s 55 provides that *[the evidence]* must be "directly or indirectly" relevant to facts in issue
- **Direct Relevance:**
 - Tends to **prove/disprove the FII directly without additional reasoning**
 - *Eg. I saw him shoot V; Video depicts shooting; 'I shot him'*
- **Indirect Relevance:**
 - **Requires extended reasoning process by jury** to determine whether the evidence makes the FII **more/less probable**
- **Types of indirectly relevant evidence include**
 - **Credibility evidence:** (Topic 6)
 - evidence adduced for the purpose demonstrating that a witness, and facts deposed by that witness, should or should not be believed
 - **Tendency ("propensity") evidence:**

- evidence adduced for the purpose of showing that a person has had a *particular tendency in the past* and, therefore, is *more/less likely to have behaved in the way now alleged*
- see **BBH v R**
 - Evidence having *any probative value is admissible*, subject to any rule of exclusion
 - need to look in broader framework and in context of case
- **Coincidence (“similar fact”) evidence:**
 - evidence adduced for the purpose of showing that, because of the improbability of 2 or more events occurring, a person did a particular act or had a particular state of mind on the occasion as now alleged
- **Failure to adduce evidence:**
 - what facts may be inferred from a party’s silence, or failure to adduce evidence that could assist their case, in the face of allegations made by the other side
- **Not calling an available witness:**
 - CL Rule in *Jones v Dunkel* – CIVIL ONLY
 - If witness is available but is not called → **negative inference may be drawn** – Jones v Dunkel
 - Can draw adverse inference that evidence would not have helped their case
 - See also *Briqqinshaw*
 - The rule in *Jones v Dunkel* **does not apply in criminal cases** as the defence is entitled to put the prosecution to their proof
- **Circumstantial Evidence:**
 - Per *Smith*: “facts relevant to FII” –
 - Circumstantial evidence = *evidence of facts which provide a logical basis for inferring that a fact in issue is more/less likely to have occurred (Plomp)*
 - Key ideas:
 - **Doesn’t prove fact in issue unless and until court draws an inference** from the evidence to the fact in issue
 - FII being proved must follow as *rational inference from established collateral*
 - **P’s onus not discharged where reasonable alternative hypothesis**
 - ‘that the contrary cannot reasonably be supposed’ - *Plomp; Shepherd*
 - Operates cumulatively – group of items of inference
 - Guilt can be inferred from *circumstantial* evidence - *Shepherd*
 - Essential elements MUST be proved BRD - *Shepherd*

4. ‘Rationally affect’: Objective Test - *McCormick*

⇒ *‘Could [the evidence] rationally affect’*

- **Criminal:** There needs to be potential for the evidence in question to affect the juries' mind
 - Evidence that could not rationally affect the minds of the jury is not relevant – *R v Smith*
- Evidence that has a **high probative value is more likely to be allowed** at trial, evidence with **low probative value is not**
- All evidence having *any* probative value is admissible, subject to any rule of exclusion – *BBH v R*

- Logical Relevance:
 - Must make that fact *more or less probable* than it would be *without* the evidence - s 55; R v Smith
 - CRIMINAL: Evidence must provide more info to jury than already available - R v Smith
- Legal Relevance: **Not all logically relevant evidence is legally admissible** – Stephens
 - Eg. Evidence that is too tenuous/remote or incapable of being proved

5. Assumption of Acceptance + Discretions

- If *remotely* relevant, the [evidence] is prima facie admissible under s 55 - McHugh J in Papakosmas
 - But this is subject to any rule of exclusion - s 56(1); BBH v R
- Do discretionary exclusionary rules apply to limit the use of otherwise relevant evid?
 - Civil & Criminal:
 - S 135 - discretion to exclude
 - Where *probative value is substantially outweighed* by danger that it might be *unfairly prejudicial to a party*, misleading, or confusing, or time wasting
 - S 136 - discretion to limit use
 - If there is danger that a particular use of the evidence might be unfairly prejudicial/misleading/confusing
 - Criminal only:
 - S 137 – mandatory exclusion
 - Court **MUST** refuse to admit evidence adduced by P if its *probative value is outweighed by danger of unfair prejudice* to D

CRIMINAL - Jury Directions Act ss 61 & 62

- ❖ S 61
 - Unless an enactment otherwise provides, the *only matters* that the trial judge may direct the jury *must be proved beyond reasonable doubt* are-
 - The elements of the offence charged or an alternative offence; and
 - The absence of any relevant defence
- ❖ S 62
 - Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished
 - **Supremacy of s 61 over any CL rules**
- **Questions of Admissibility are to be determined in a Voire Dire** – s 189