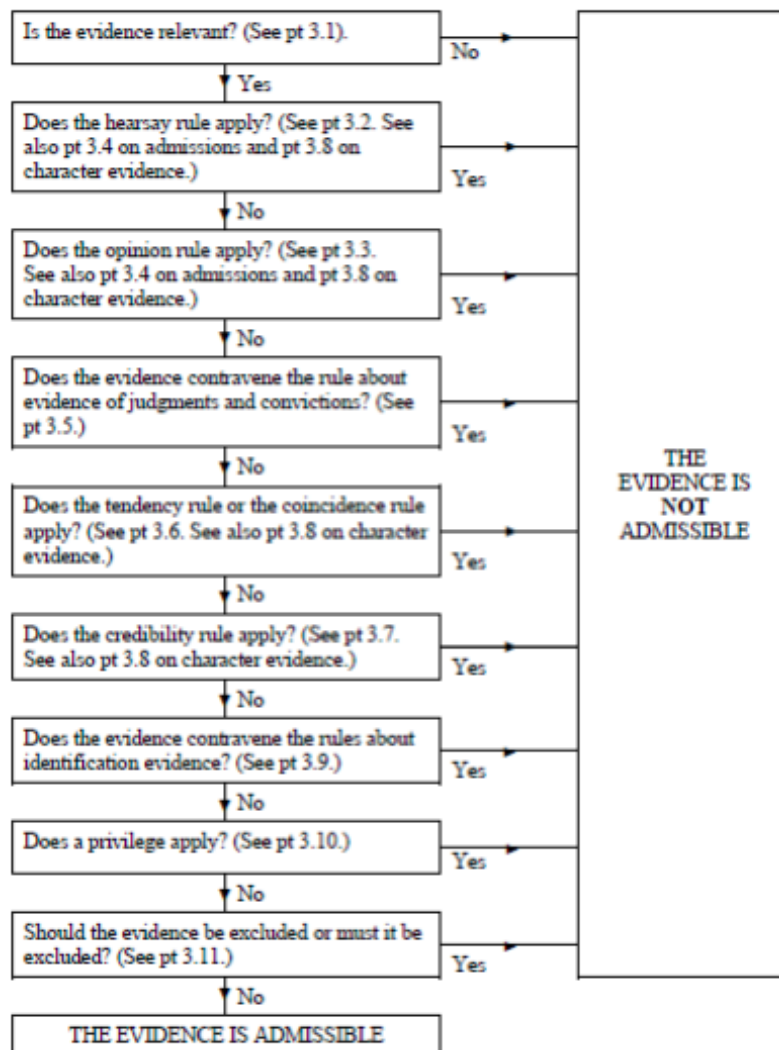


EVIDENCE STUDY GUIDE

1. Is the evidence **relevant**?
2. Does the **hearsay** rule apply?
 - a. Is it an admission?
3. Does the **opinion** rule apply?
4. Does the evidence contravene the rule about evidence of **judgments and convictions**?
5. Does the **tendency** rule or the coincidence rule apply?
6. Does the **credibility** rule apply?
7. Does the evidence contravene the rules about **identification** evidence?
8. Does a **privilege** apply? (*not examinable*)
9. Should the evidence be **excluded** or must it be excluded?



PART 1: RELEVANCE

Evidence is inadmissible unless it is relevant (s56(2)). Relevant evidence is evidence that could “rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding” (s55(1)).

- The evidence must bring forward new information capable of affecting the assessment: Evans v The Queen.
- Evidence is not irrelevant only because it relates only to the credibility of a witness; or the admissibility of other evidence; or a failure to present evidence (s55(2)).
- Evidence is generally admissible “only if it tends to prove a fact in issue or a fact relevant to a fact in issue” (Goldsmith v Sandilands).
 - “A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present or future existence or non-existence of the other fact.” Goldsmith v Sandilands
- There must be a “minimal logical connection between the evidence and the fact in issue” (ALRC).

S57(1): If the relevance of particular evidence depends on the court making another finding, the court may find that the evidence is relevant:

- (a) *If it is reasonably open to make the finding; or*
- (b) *Subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make the finding.*

Authenticating documents

- Before admitting business records or any other document as evidence, there should be an “evidentiary basis for finding that it is what it purports to be” (National Australia Bank Ltd v Rusu).
- Regarding the relevance of a document, “the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity” (s58(1)).
- Where a question arises regarding a document, the court can examine it and draw any reasonable inferences from it (s183).

PART 2: HEARSAY

Evidence of previous representations cannot be admitted as evidence if they are adduced to prove the truth of the representation's intended asserted fact (s59(1)).

HEARSAY ANALYSIS SUMMARY

- A. Is it hearsay?
 - a. What is the previous representation?
 - b. What is the intended asserted fact?
 - c. Is the previous representation being adduced to prove the truth of the intended asserted fact?
- B. Does an exception apply?
 - a. Was the maker competent?
 - b. Was the representation first-hand (and if not, is it acceptable non-first hand hearsay)?
 - c. Is it an admission?
 - d. Is it a contemporaneous statement about a person's health?
 - e. Civil proceedings: Does an exception apply?
 - f. Criminal proceedings: Does an exception apply?

A. Is it hearsay?

1. What is the previous representation?

Types of 'representations'?

- Statements or assertions of fact;
- Made by a person;
- Whether oral or in writing; and
- Whether express or implied.

A previous representation is any representation other than what the witness is saying at that moment in the stand.

2. What is the intended asserted fact in the previous representation?

3. Is the previous representation being adduced to prove the asserted fact in the representation?

The previous representation can be admitted if it is relevant for a purpose other than proof of the asserted fact - in other words, if it is for a non-hearsay purpose (s60(1)).

Typical non-hearsay purposes:

- Effect on the listener;
- Words with legal effect, like notice or contract words;
- Impeachment;
- Statement providing context for another statement;
- Previous inconsistent statement being offered to show that another witness was lying when they gave evidence of a statement contrary to it.

If evidence is admitted for a non-hearsay purpose, it can be still considered for other purposes such as ascertaining its truth.

B. Does an exception apply?

An exception to the hearsay rule may apply.

1. Was the maker of the representation competent to give evidence?

Exceptions to the hearsay rule cannot apply if the maker of the representation was not competent to give evidence under s13(1) (s61(1)). It is presumed that the maker was competent, unless this presumption is challenged (s61(3)).

- s61(1) does not apply to contemporaneous representations "made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind" (s61(2)).

When is a witness incompetent to give evidence?

- A person is incompetent to give evidence if, for any reason, the person does not have the capacity to understand a question about the fact, and that incapacity cannot be overcome (s13(1)(a)).
- A person is incompetent to give evidence if, for any reason, the person does not have the capacity to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome (s13(1)(b)).
- A person incompetent to give evidence under s13(1) about a particular fact can be competent to give evidence about other facts (s13(2)).

2. Was the previous representation first-hand?

Previous representations can only be admitted under a hearsay exception if they are first-hand (s62(1)).

Representations are first-hand if they are made by a person who had "personal knowledge of an asserted fact" (s62(1)).

- "A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact." s62(2)
- "A person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made." s62(3)

The representation, if not first-hand, can be admitted if it is:

- A business record (s69);
- A tag or label (s70);
- Telecommunication (s71);
- regarding Aboriginal or Torres Strait Islander traditional laws and customs (s72);
- A representation about marriage, family history or family relationships (s73);
- A statement of public or general rights (s74);
- A use of evidence in interlocutory proceedings (s75).