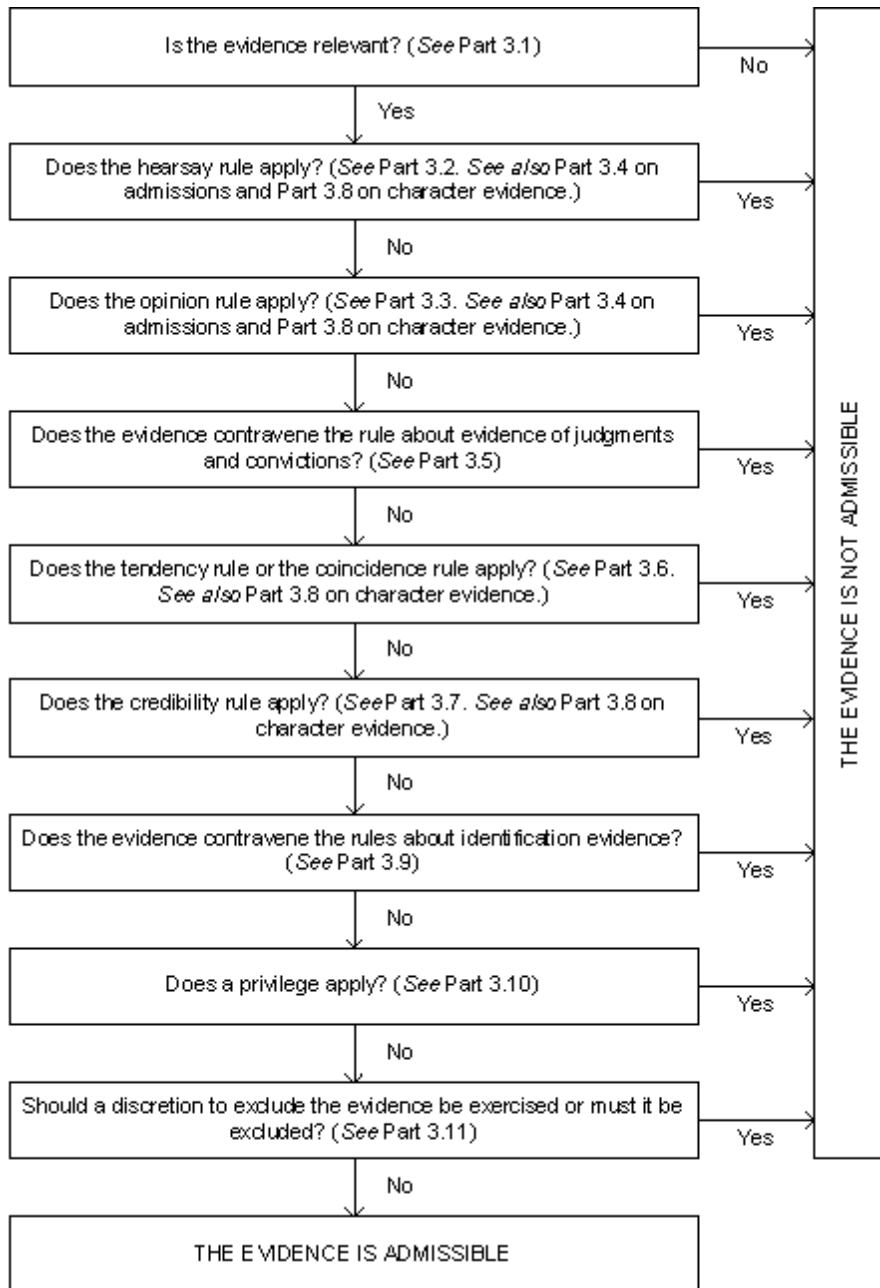


CPEP Exam Notes



PRE-TRIAL PROCEDURES.....	4
KEY ABBREVIATIONS IN NOTES.....	4
GENERAL TRIAL PRINCIPLES.....	5
PROSECUTORIAL DUTIES	5
STANDARDS OF PROOF.....	8
PROTECTIONS FOR THE ACCUSED	9
PROCEDURAL RULES.....	10
COMPETENCE	10
COMPELLABILITY	11
EXAMINATION IN CHIEF	12
UNFAVOURABLE WITNESS.....	12
LEADING QUESTIONS IN XIC: UEA s37	12
REFRESHING MEMORY: UEA s32.....	12
APPLICATION FOR LEAVE: EA s192 → SEE BELOW	13
UNFAVOURABLE WITNESS: UEA s38	13
CROSS-EXAMINATION	14
IMPROPER QUESTIONS (s41).....	14
LEADING QUESTIONS (s42)	14
RE-EXAMINATION	15
RE-OPENING THE PROSECUTION CASE.....	15
<i>BROWNE V DUNN</i> PRINCIPLE.....	15
PRIOR INCONSISTENT STATEMENTS: UEA s43	16
APPLICATION FOR LEAVE: UEA s192	16
STEP 1: IS THE EVIDENCE RELEVANT? (LOGICAL RELEVANCE)	17
FACT IN ISSUE	17
ASSESSING RELEVANCE	17
WHAT IS THE PURPOSE(S) FOR WHICH THE EVIDENCE IS BEING ADDUCED? IS THIS PURPOSE PERMITTED BY THE RULES?	18
STEP 2(A): DOES THE CREDIBILITY RULE APPLY?.....	19
EVIDENCE ADDUCED IN CROSS-EXAMINATION	19
EVIDENCE IN REBUTTAL OF DENIALS	21
EVIDENCE TO RE-ESTABLISH CREDIBILITY	22
EVIDENCE OF PERSONS WITH SPECIALISED KNOWLEDGE: s108C	22
CREDIBILITY OF NON-WITNESSES	22
GRANTING LEAVE TO XXN ACCUSED ON CREDIBILITY	23
STEP 2(B): DOES THE HEARSAY RULE APPLY?.....	24
STEP 1: IS IT HEARSAY EVIDENCE?	24

STEP 2: ARE THERE ANY EXCEPTIONS TO ALLOW THE HEARSAY EVIDENCE TO BE ADMISSIBLE?	26
DUAL RELEVANCE	27
FIRST HAND HEARSAY.....	28
REMOTE HEARSAY	31
<u>STEP 2(C): DOES THE OPINION RULE APPLY?.....</u>	<u>34</u>
LAY OPINION EVIDENCE: UEA s78	34
ATSI TRADITIONAL LAWS AND CUSTOMS: UEA s78A.....	35
OPINION BASED ON ‘SPECIALISED KNOWLEDGE’: UEA s79	35
AD HOC EXPERT EVIDENCE (s78 OR s79)	36
PROCEDURAL RULES AND CODES OF CONDUCT	36
SPECIALISED KNOWLEDGE & CREDIBILITY.....	37
SECTION 135 AND 137 EXCLUSIONS.....	37
<u>STEP 2(D): DOES THE TENDENCY RULE APPLY?</u>	<u>38</u>
<u>STEP 2(E): DOES THE COINCIDENCE RULE APPLY?</u>	<u>42</u>
<u>STEP 2(F): DO THE CHARACTER RULES APPLY?</u>	<u>44</u>
GOOD CHARACTER EVIDENCE.....	44
REBUTTAL EVIDENCE	45
EXPERT EVIDENCE OF CHARACTER OF CO-ACCUSED: UEA s111.....	46
CROSS-EXAMINING ACCUSED ON CHARACTER.....	46
<u>STEP 2(G): DOES THE IDENTIFICATION RULE APPLY?</u>	<u>47</u>
VISUAL ID EVIDENCE EXCLUSIONS: s114.....	49
PICTURE IDENTIFICATION EVIDENCE: s115	51
WARNINGS	52
<u>STEP 9: SHOULD A DISCRETION TO EXCLUDE EVIDENCE BE EXERCISED OR IS IT MANDATORY TO DO SO?</u>	<u>54</u>
DISCRETIONARY EXCLUSIONS: UEA s135	54
MANDATORY EXCLUSIONS: UEA s137	54
LIMITING THE USE OF EVIDENCE: UEA s136	56
EXCLUSION OF EVIDENCE DUE TO IMPROPRIETY/ILLEGALITY: UEA s138	56
ADMISSIONS FAIRNESS DISCRETION: UEA s90	58
JUDICIAL WARNINGS	58

Step 2(b): Does the hearsay rule apply?

Hearsay = evidence of a previous representation adduced to prove the existence of a fact that was intended to be asserted by the maker of that previous representation

Section 59(1)

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

Step 1: Is it hearsay evidence?

- A previous representation
- Made by a person
- Containing what can reasonably be supposed to be an intended assertion of fact
- Purposive test: the representation must be adduced to prove the actual existence of that fact

Previous Rep	<p><u>Previous:</u></p> <ul style="list-style-type: none"> • made other than in the proceedings in which the evidence is sought to be adduced (incl. in related proceedings such as interlocutory hearings, if sought to be adduced at the later trial) <p><u>Representation:</u></p> <ul style="list-style-type: none"> • UEA Dictionary – includes... <ul style="list-style-type: none"> ○ An express or implied representation (oral or in writing) ○ A representation to be inferred from conduct ○ A rep not intended by its maker to be communicated to or seen by another person ○ A rep that for any purpose is not communicated • Encompasses all that the statements or that conduct would convey to the observer (<i>Lee</i>) • Encompasses a communication made by silence or a failure to respond (<i>Rose</i>) - as long as the communicative situation is relatively clear that they are intending to assert a fact through their silence
Made by a person	<ul style="list-style-type: none"> • Excludes those produced by machines w/o human input and communications by other animals • Debatable where a machine does not produce a particular representation without human intervention <ul style="list-style-type: none"> ○ <i>Hansen Beverages</i>: the fact of <u>human intervention in the data collection process</u> and the <u>intention to make a particular representation</u> that lay behind that intervention was critical to this finding that it was hearsay
Intended assertion of fact	<p>Assertions of fact that the maker of the representation can <u>reasonably be supposed</u> (objective test, s59(2A)) to have intended, having regard to the circumstances in which they were made</p> <p>Q: having regards to the circumstances in which it was made, what can it reasonably be supposed that the maker of the representation actually intended to assert?</p> <ul style="list-style-type: none"> • Irrelevant if the statement/conduct concerned might unintendedly convey some assertion - the inquiry is about <u>what the person who made the representation intended to assert by it</u> (<i>Lee</i>) <ul style="list-style-type: none"> ○ e.g. "Hello, Daddy" is not likely an intended assertion of the fact that the other speaker was the father • Applies also to intended, implied assertions of fact <ul style="list-style-type: none"> ○ <i>O'Grady</i> - "Kate, tell me what happened. You know that I couldn't do something like that" --> implied that the shooting of the deceased did

	not result from a voluntary act but was done in circumstances of some abnormality of mind
Purpose	<p>Hearsay ONLY IF it is utilised to prove the truth of the asserted fact ('original evidence' if for some other purpose – <i>Wing Cheong Li</i>)</p> <p><u>Non-hearsay previous representations</u></p> <ul style="list-style-type: none"> • Can be admitted to prove that a representation was made (<i>Evans</i>) • The rep will be treated as conduct/verbal act from which inferences may be drawn (e.g. that the person was conscious, the relationship between the speakers, awareness of presence, tone of voice/emotions) <p><u>Other</u></p> <ul style="list-style-type: none"> • Reps that create contracts, trusts, deeds or wills are not hearsay (<i>Macrauld</i>) • Reps that constitute a criminal offence or an actionable tort are not hearsay (<i>Suteski (No 4)</i> and <i>GH</i>) • Relevant to credibility: <ul style="list-style-type: none"> ○ Prior reps that are inconsistent with a witness's in-court testimony ○ Evidence of a proximate complaint to improve the complainant's credibility (<i>Papakosmas</i>) • Evidence of previous representations to show the basis for an expert's opinion (e.g. diagnosis based on what symptoms are reported to them) • Identification: <ul style="list-style-type: none"> ○ The use of a voice recording to identify a speaker ○ The use of a document to identify a speaker on the basis of handwriting or textual features • State of Mind: <ul style="list-style-type: none"> ○ Representations that might produce an effect on a person's state of mind and statements made by a person from whose making their state of mind/feelings might be inferred = original evidence ○ <i>Matthews</i> (murder and rape) <ul style="list-style-type: none"> • Deceased made statements to friends about her fear of the accused prior to her death --> demonstrates her lack of consent to sexual intercourse • Accused's writing in diary of his wife's death before it became public knowledge = use of a previous rep to show the maker's esoteric knowledge of an event ○ <i>Walton</i> (murder): <ul style="list-style-type: none"> • Evidence that the deceased told others that she was going to meet the accused the next day (the day which she died) was admitted as evidence of <i>conduct</i> to show the deceased's intention to meet the accused • The 'making of a previous rep as evidence to intention' construction can only be used to circumvent the hearsay rule where the maker's state of mind is relevant to a fact in issue or IS the fact in issue ○ A lie from which a consciousness of guilt might be inferred

PICTURE IDENTIFICATION EVIDENCE: s115

<p>ISSUE #1: Is the evidence 'picture identification evidence'?</p>	<p>Section 115(1): "picture identification evidence" means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.</p> <ul style="list-style-type: none"> • 'picture' includes photographs (s115(10)(a)) • 'making a picture' includes taking a photograph (s115(10)(b))
<p>ISSUE #2: Do the photographs suggest that the defendant was in custody?</p>	<p>Picture ID <u>adduced by the prosecutor</u> inadmissible if:</p> <ul style="list-style-type: none"> • the pictures examined suggest that they are pictures of persons in police custody (s115(2)) • s115(3): the photographs are not recent (made before D was taken into police custody, if they had been in police custody): <ul style="list-style-type: none"> ○ (a): when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged AND ○ (b) the picture of the defendant that was examined was made before the defendant was taken into that police custody • S115(5): when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the relevant offence, UNLESS: <ul style="list-style-type: none"> ○ (a) the defendant refused to take part in an identification parade, or ○ (b) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody, or ○ (c) it would not have been reasonable to have held an identification parade that included the defendant • S115(4): S115(3) does not apply if: <ul style="list-style-type: none"> ○ (a) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody OR ○ (b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into that custody <p><u>When picture ID can be relied on</u></p> <ul style="list-style-type: none"> ▪ At investigative stage (when no suspect has been ID'd) ▪ <u>D in custody</u>: refuses to participate in parade ▪ significant change in D's appearance ▪ not reasonable to hold a parade (see s114) ▪ unfair to D to hold a parade ▪ PHOTO ARRAY: <ul style="list-style-type: none"> ○ Minimum of 20 photos ○ Resemble D in age; general appearance ○ Photo of D must be recent ○ No mug shots; must not suggest D is in police custody

WARNINGS

1. **s115(7)** applies to picture ID evidence of D if evidence is admitted (**mandatory if requested**)
2. **s116** applies if the visual or picture ID evidence comes under the dictionary definition (**mandatory subject to *Dhanhoa***)
3. **s165** applies to ID evidence (as defined) only if warning requested by a party (**not mandatory**) OR evidence falling out of definition

<p>Section 115(7)</p>	<p>If picture identification evidence adduced by the prosecutor is admitted into evidence, the judge must, on the request of the defendant:</p> <p>(a) if the picture of the defendant was made after the defendant was taken into that custody - inform the jury that the picture was made after the defendant was taken into that custody, or</p> <p>(b) otherwise - warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence.</p>
<p>Section 116</p>	<p>(1) If identification evidence has been admitted, the judge is to inform the jury:</p> <p>(a) that there is a special need for caution before accepting identification evidence, and</p> <p>(b) of the reasons for that need for caution, both generally and in the circumstances of the case.</p> <p>(2) It is not necessary that a particular form of words be used in so informing the jury.</p> <p><u>Particularity of the warning (<i>Domican</i>)</u> The judge must address in detailed and specific terms the weaknesses in incriminating ID evidence</p> <ul style="list-style-type: none"> ▪ the attention of the jury “should be drawn to any weaknesses in the ID evidence” – the judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the ID evidence ▪ cannot just give a direction on the general dangers ▪ the adequacy of a warning in an ID case must be evaluated in the context of the evidence in the case, but must be evaluated by reference to the ID evidence and not the other implicating evidence in the case <p>It is required that the judge explain why:</p> <p>(a) there is a special need for caution — why identification evidence in general may be unreliable, thus explaining why there is a special need for caution: <i>R v Clarke</i> (1997) 97 A Crim R 414 at 428, and</p> <p>(b) the identification evidence in the particular case may be unreliable, by pointing out the particular matters in that case which may cause it to be unreliable: ss 116(1), 165(2).</p> <ul style="list-style-type: none"> ▪ the judge must direct the jury that they are bound to take those particular matters into consideration in determining whether they will (or will not) rely on that evidence ▪ The directions should indicate matters that may affect the reliability of the identification rather than matters that made it unreliable: <i>R v Riscuta</i>