

EVIDENCE NOTES 2020

Thayer as developed by Wigmore

If evidence was seen as being relevant to the issue in the case then the evidence should be admitted – unless there is reason to exclude it

If the evidence is irrelevant to the issues before the court then it should not be before the court as it would be no assistance in deciding the case and only had the potential to be distracting and potentially create an injustice)

1. IS THE EVIDENCE RELEVANT?
2. ARE THEY JUDICIAL MATTERS?
3. DO ANY OF THE REBUTTABLE PRESUMPTIONS APPLY?
4. IS A WITNESS COMPELLABLE AND COMPETENT TO GIVE EVIDENCE?
5. DOES THE CREDIBILITY RULE APPLY?
6. DOES THE TENDENCY RULE OR COINCIDENCE RULE APPLY?
7. RESTRICTIONS ON ADMISSIONS AND PREVIOUS REPRESENTATIONS?
8. DOES THE OPINION RULE APPLY?
9. DOES THE EVIDENCE CONTRAVENE THE RULE ABOUT EVIDENCE OF JUDGMENTS AND CONVICTIONS?
10. DOES THE HEARSAY RULE APPLY?
11. DOES A PRIVILEGE APPLY?
12. SHOULD A DISCRETION TO EXCLUDE THE EVIDENCE BE EXERCISED OR MUST IT BE EXCLUDED?

IF NO, THE EVIDENCE IS ADMISSIBLE = SHOULD THE COURT GIVE A WARNING TO THE JURY

RELEVANCE

THRESHOLD QUESTION

If evidence is relevant? – it is admissible

Section 56:

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding
- (2) Evidence that is not relevant in the proceeding is not admissible
 - Note there is no exception to s56(2) → it is conclusive

As s 56(2) provides that evidence that is relevant is never admissible, the question of what is relevant evidence under s 55 (which is relevant unless 'otherwise provided' by the Act (s 56(1)) is fundamental to assessing the admissibility of evidence. Thus s 55 must be read along with s 56.

Section 55

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding
- (2) In particular evidence is not taken to be irrelevant only because it relates only to:
 - a. the credibility of a witness; or
 - b. the admissibility of other evidence; or
 - c. a failure to adduce evidence

This section is merely asking: Could the evidence, if accepted, affect the probability, even indirectly, of the existence of a fact in issue in the proceedings? There need only be a minimal logical connection between the evidence and the fact in issue (Papakosmas v R (1999)).

The common law distinguishes between evidence that is logically relevant and evidence that is legally relevant, with only legally relevant evidence being admissible (R v Stephenson [1976]: although the test for relevance is not logic, not all evidence which is logically relevant is legally admissible). The logical connection between a fact and the issue to be determined may be so slight that the fact is treated as too remote and evidence of it as inadmissible.

Heydon JA described s 55 as indicating that the ALRC intention (R v Clark 2001) a judge to be satisfied that the evidence is reasonably capable of rationally affecting the assessment of the probability of the existence of a fact in issue in the proceeding rather than the higher test that the evidence actually affects the relevant probability

FACT IN ISSUE

Facts in issue are those facts necessary by law to establish the claim, liability or defence, forming the subject matter of the proceedings (ALRC 26 vol 1 at [641])

This will include facts which explain something or which add to or detract from the plausibility of something that a witness had said or the likelihood of an event occurring. Relevant facts may simply provide a context for an understanding of a narrative (HML v R (2008)).

Facts in issue are determined by:

- Substantive rules of law
- Pleadings (civil) or charge & plea (criminal)
 - In civil cases the main facts in issue are those which are commonly defined by the pleadings this includes the applicable legal principles require to be provided and any defences/causes of action to be made out (Goldsmith v Sandilands (2002))
 - In criminal cases, the main facts in issue are those which the prosecution is obliged to prove if guilt is to be established or which the defence must prove if some positive defence is relied on (HML v R)
- The manner in which the case is conducted
- Example:
 - Defendant is charged with causing grievous bodily harm under s 54 of the *Crimes Act 1900* (NSW)
 - Whosoever by any unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years.

- Assume defendant pleads not guilty
- Facts in issues are likely to include:
 - Was *harm* caused to a *person*?
 - Does the *harm* suffered satisfy the definition of *grievous bodily harm*?
 - Did an *act/omission of the defendant cause this harm*?
 - Was the act/omission *unlawful* or *negligent*?

DIRECTLY OR INDIRECTLY

To be admissible, evidence must be directly or indirectly relevant to a fact in issue

- The preferred approach is that evidence need not render a fact in issue *probable or sufficiently probable*, rather it is enough if it is only capable of rendering the existence of the fact *more or less probable* than would otherwise be the case (ALRC 26 vol 1 at [641])
- It is this approach that permits purely circumstantial evidence to be relevant, requiring the relevance to be assessed in the context of other available evidence (R v Fung)

A “low bar” test to meet – due to the wording provided for in s 55 of the Act

- **Probative value is defined in the dictionary of the *Evidence Act* (Schedule)**

RATIONAL VALUE

What is the potential value of the evidence?

- DEFINITION: The extent to which the evidence *could* rationally affect the assessment of the probability of the existence of a fact in issue – Schedule to the Evidence Act
- Recent High Court judgments (*IMM, Hughes* which we will come back to) have clarified how it is to be assessed

SMITH V THE QUEEN (2001) 206 CLR 650

Smith v The Queen (2001) 206 CLR 650

- **Facts:**
 - D charged with robbery
 - Bank security cameras had photographed the robbery and the fact in issue was “is the person standing trial the person who is depicted in the photographs tendered in evidence”
 - Police identify Smith from the photos and prior dealings with him
 - Little other evidence of identification of Smith
- Fact in issue: is Smith the person depicted in the CCTV footage photos? fact in issue was “is the person standing trial the person who is depicted in the photographs tendered in evidence”
- Appeal to High Court successful – new trial ordered
 - Police evidence on this issue not relevant
 - Police in no better position than the jury to draw this conclusion from evidence already before them. Thus the Police evidence could not *rationally affect*
 - Doesn’t add to what the jury already have before them therefore it fails to pass s 55 – it doesn’t rationally make the finding of the ID of the defendant any more/less likely than it already is
 - However recognition evidence would not always be irrelevant. For example if evidence is from a witness as to the accused features (manner of walking, item of clothing) (R v Marsh [2005])
- *Kirby J* dissented on the application of the principle, although reached the same result on other grounds

- Exclusionary rules may apply to exclude evidence that could be logically probative eg here while Kirby J saw it as relevant he would exclude it under the opinion rule
- Also; discretions to exclude for reasons of fairness, means used to obtain it, or other policy issues may apply
- HC allowed the appeal ruling that the police officers evidence should have been rejected as irrelevant and failing to satisfy s 55
- Reasoning – the jurors or indeed members of the public who sat through proceedings, had had more time in the presence of Smith than the police witnesses had prior to them giving their evidence
- Consequently the police officers evidence of recognition was not evidence that could rationally affect the assessment by the jury of the question
- Majority – recognition evidence would not always be irrelevant. It would be for example if the witness attests to the accused features (manner of walking, distinctive item of clothing in the photograph, accused appearance was different to that at trial – then evidence may not be irrelevant

EVANS V R 2007

Facts:

- Defendant charged with armed robbery and robbery itself has been captured on CCTV which had photographed an armed man robbing persons of money
- In photographs offender wearing overalls, sunglasses and a balaclava which covered everything but his eyes and mouth
- Police found overalls and balaclava in defendant's house two years later
- D was required to put them on during trial and asked to repeat words of the offender
- P argued that the relevance of that was done lay in the comparison of what the jury saw and heard with the description of the witness

Issue: Whether an in-court demonstration performed before the jury was properly admitted into evidence

Held:

- 3 members of the HC held that dressing the D was relevant
- Kirby J noted the words of s 55 and suggested that the test must be 'given an extremely broad ambit' placed evidence on the real grounds provided by the act for exclusion of evidence – is it unfairly prejudicial and can it be excluded on that ground
- The jury seeing the D when dressed was relevant to whether there were apparent similarities between the appearance and conduct of the D and the evidence given by witnesses concerning appearance and conduct of the D during the robbery
- 2 members dissented and stated that deciding who had worn the disguise was not assisted by dressing the D in items. It provided no information to the jury that could rationally affect the assessment of the probability of the existence of a fact in issue.
- 3 judges held that the in court demonstration should not have occurred. Kirby J - although the evidence was relevant it should not have occurred under s 137.
- By majority of 3:2 the appeal was allowed and a new trial ordered
- Evans v R was a different approach to assessing relevance under s 55 – appeared to turn on the degree to which it was considered necessary to make an assessment as to the probative value of the evidence at the relevance state of the analysis.
 - Gummow and Hayne JJ 'Rationally affect' requires careful identification of reasoning process and careful analysis
 - Kirby, Heydon and Crennan JJ – relevance test is undemanding, simple and requires less analysis
- Kirby J

- The rationale of this approach is that the test under s 55 should not do the work of excluding evidence which shifts the debate of exclusion to unduly subtle preliminary argument [103] as per Kirby J
- This approach is consistent with the text of s 55

COMMON STRUCTURE OF THE RULES

1. Relevance = in, unless otherwise excluded ss 55 - 56
2. Categories of evidence (eg hearsay, opinion) are then expressly included or excluded by a general rule
 - These general rules are then subject to further exceptions
 - There are then overriding discretions to further exclude, or limit use
 - Court has inherent power to control proceedings

UNDERLYING PRINCIPLES

- Relevance is a gateway → once this is overcome then you must overcome other considerations
- Is it “fair” to allow the evidence → does it enable a fair trial? Can unfairness be overcome?
- Is the evidence “unreliable” → goes to the nature of the evidence? Can unreliability be overcome?
- Probative Value v Danger of misuse → whether on balance the evidence should be admitted
- Sometimes the rules are not based on fairness but a desire to protect the integrity of the legal system → where evidence has been improperly or unlawfully obtained
- “Truth” is not a test for admissibility – that is a matter for the jury → look at reliability as a general concept not truthfulness/quality

PRIMA FACIE CASE

At first appearance (requires consideration of burden and standard of proof) - The party must discharge the burden of proof, to the required standard of proof

Prima facie case: If it can be shown that it is not possible to convict them on the crown's evidence

- Is there evidence that discharges the burden of balance of probabilities – CIVIL
- Does the P have no evidence of an essential element of the offence?
- The P's evidence on an essential element could not satisfy the tribunal or fact beyond a reasonable doubt - CRIMINAL
- Is there some element of the offence/charge that has not been made out?

May v O'Sullivan

1. Prima facie case/no case to answer – is the evidence capable/possible of founding a conviction (not a question of more likely than not). This is a question of law for the judge.
2. If the evidence is capable of finding a conviction – whether the jury accept the evidence and whether they would convict → are questions of fact

Note:

- ‘no case’ submission should be made in the absence of the jury
- The trial judge retains the right to direct that s/he does not wish to hear the D and to dismiss the case
Benney v Dowling

BURDEN OF PROOF

A party has to prove a case to a standard

Criminal → BOP on prosecution

Criminal BOP = Beyond reasonable doubt

Civil BOP = Balance of probabilities

1. Legal Burden = obligation to persuade the jury of the truth of the case to the relevant standard (that the case is in fact proven to the relevant standard)
2. Evidential Burden = obligation on the party bringing the case to put forward sufficient evidence to support propositions for case to go to the jury. IE duty to put forward a prima facie case
3. Tactical burden where are we in the case which is the party that needs to change their tactics to get the evidence in the case

Academics/courts have commonly used evidentiary burden in two ways

1. Duty to put forward prima facie case → proper
2. Primarily academic → tactical burden (who does the burden fall upon → shifting onus)

STANDARD OF PROOF

S 140 - CIVIL PROCEEDINGS: STANDARD OF PROOF

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on **the balance of probabilities**.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account-- (a) the nature of the cause of action or defence, and (b) the nature of the subject-matter of the proceeding, and (c) the gravity of the matters alleged.

The Act only deals with the standard to which a party must prove its case in order to successfully discharge its legal burden in a proceeding.

In all civil proceedings – the standard of proof is on the balance of probabilities. In assessing this the court may take into account any relevant matter and is required to take into account three matters in subs (2).

S 141 CRIMINAL PROCEEDINGS: STANDARD OF PROOF

- (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
- (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Overall there is no legal burden on the D to raise reasonable doubt (DF v R 2011)

S 142 – ADMISSIBILITY OF EVIDENCE: STANDARD OF PROOF

- (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding—
 - a. a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or
 - b. any other question arising under this Act, have been proved if it is satisfied that they have been proved on the balance of probabilities.
- (2) In determining whether it is so satisfied, the matters that the court must take into account include—
 - a. the importance of the evidence in the proceeding, and
 - b. the gravity of the matters alleged in relation to the question