

EVIDENCE NOTES

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Pre-semester

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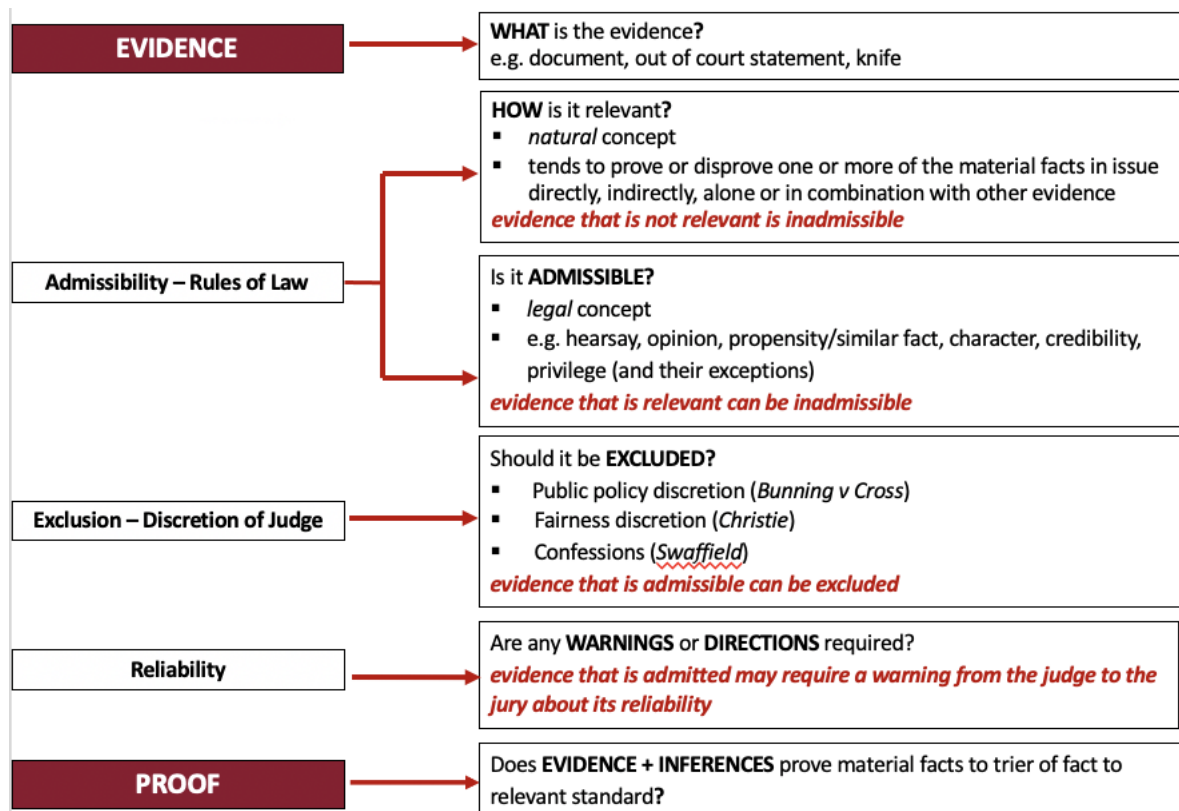
Topic 2 Cross Examination

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QUESTIONS

- What is the piece of evidence in the question?
- What type of evidence is it? Testimonial, OOC statement, document, thing.
- What issue is it relevant to?
- What is the purpose of presenting it? What are you trying to prove/show by calling it? Is there more than one purpose?
- Is it permissible to use the evidence for that purpose? (this generally raises questions about relevance, hearsay, credit, propensity etc). If it's ONLY relevant for one of those purposes, then you might be in trouble.
- If not, is there another purpose you can use it for?

Try to create a story about each piece of evidence:

- this piece of evidence is relevant to...(identify what fact it might prove)
- I want to use this piece of evidence to prove....by arguing that....
- The problem with this use is that it's hearsay/similar fact/unproven document
- To get it in I would need to argue that (be specific about the common or statutory tests for that particular use)
- Or I could use it for a different purpose – because it is still relevant to...

SUB QUESTIONS (types of evidence)

OOO statement	Is it hearsay? Is there another use? Remember there are multiple exceptions for hearsay, so you can find an exception to hearsay or another use for the evidence to get it in. Evidence of state of mind, or intention, or res gestae are the common ones for original use.
Document	Use to show the TRUTH of the content of the document = hearsay. Is there an exception? Business record? Used as original evidence – only if the physical document is relevant for another purpose – such as that there is a signature on it, or a document was made. In which case the content is not relevant to the point being proven. Exceptions for documents and authentication are not examinable in 2020.
Similar fact, propensity, relationship	know the relevant legislation, and be familiar with the facts of key pre s 34P cases as exemplars of how the law might apply. Be prepared to apply the test that is used to admit such evidence (prejudice/probative)
Credit/Shield	know the relevant legislation and be aware of the different ways that credit evidence can come out, and how to decide if it drops the shield or not. Be able to discuss the way discretion will be exercised in this context.

HEARSAY

OOCS flags possibility of hearsay rule

Need to consider its use

- Original = admissible
- Hearsay = inadmissible

PROPENSITY

Prior misconduct flags possibility of propensity rule

Need to consider its use

- Non propensity use = permissible (admissible)
- Propensity use = Impermissible (inadmissible)

Pre-Semester: Evidence essentials

Examinable topics: Types (real, testimonial, documentary), direct and circumstantial use, standards and burdens of proof (including tactical burdens), inferential reasoning, admissibility v weight

Structure of Trial: 1) pre-trial matters and opening address; 2) taking of evidence; 3) closing addresses and summing up

- Taking of evidence: plaintiff/prosecutor will call in turn each witness that they require to give and will examine to elicit evidence
- Then D lawyer is entitled to XN to probe, test, challenge accuracy and veracity of evidence
- After all witnesses, P closes their case and D calls their own evidence with the same process
- What the evidence means (how factfinder should interpret) comes into play during closing address 'let me tell you what it means'

Types of Evidence and Use

Evidence is the information admitted to court during trial to allow the trier of fact (judge, jury, magistrate) to make decisions on the facts in issue in the particular action

Relevance – Definition

Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding' (*Goldsmith v Sandilands* (2002))

Material Facts or Facts in Issue

Those in dispute between parties; defined by the pleadings in civil law; a guilty plea puts all facts in issue – but D might concede certain points

E.g. D charged with driving dangerously might (1) admit to being the driver of the vehicle but dispute that she was driving dangerously or (2) put the prosecution to proof on her driving

Relevance: The Rule

Unless there is some good reason for not receiving it, evidence that is relevant is admissible.

Evidence that is not relevant is inadmissible; there is then no occasion to consider any more particular rule of exclusion. Reasons for not receiving relevant evidence may relate to its content, or to the form or circumstances in which it is tendered

(*HML v The Queen* (2008))

Warning: Important to consider the type and use of evidence

All evidence which is relevant to the facts in issue in the particular case is admissible, and all evidence which is irrelevant to the facts in issue should be excluded.

Evidence is either relevant or it is not. If it is irrelevant, it is inadmissible, *Smith v R* (2001). Case was problematic as it stated CCTV ID footage of accused as irrelevant; perhaps should have been relevant but admissible on other grounds or prejudicial.

Evidence may be relevant but still excluded because the probative value may be outweighed by its unfair prejudicial effect.

Categories of evidence

- **Real:** Fingerprints, weapons, CCTV Footage
- **Testimonial:** Oral evidence given by witness under oath
- **Documents:** Either real or testimonial depending on use
- **Use of Evidence:** Direct or Circumstantial

Direct Evidence: Evidence which, if accepted, tends to prove a fact in issue (*Festa v The Queen* (2001)).

- No inferences need be drawn – generally what a witness saw or heard, but must be believed
- Real Evidence: i.e. security footage showing D robbing a service station
- Testimonial Evidence: i.e. V testifies that his wife fired a gun at him. Trier of fact must be convinced that V is
 - Credible: not trying to frame wife; and reliable: does not have mental impairment. If convinced
- D charged with attempted murder – evidence shows D attempted to murder

Circumstantial Evidence: Evidence of a basic fact(s) which jury is asked to infer a further fact(s) (*Shepherd v the Queen* (1990))

- Contrasted with direct or testimonial evidence
- I.e. Evidence where D charged with robbing a servo might include testimony that he is a drug addict, that he bought a large amount of heroin and paid drug debt day after, a printout of the staff roster for servo, movie ticket corresponding to time robbery was committed

Applying Relevance

Breach of contract: A sues B for BoC alleging that A catered B's 21st and only paid \$100/\$500

How is the contract relevant if B says there was no obligation to pay

- Direct relevance, would be adduced by A, contract shows contract existed, no inferences need to be drawn as trier of fact can read contract for itself,

If obligation was to pay \$100 and A overspent and that was on her?

- Directly relevant in different way; existence not issue in dispute but terms are. Original use, terms are set out although document would be hearsay but likely subject to exception No inferences need to be drawn, trier of fact can read contract for itself, contract would resolve dispute

Rape: C is charged with rape of D, semen found on D's body was tested and found to contain C's DNA

"I don't know C & I have never had sexual intercourse with her"

- Very compelling and possibly conclusive
- A material fact is whether C and D had sexual intercourse
- C's DNA in the semen is highly probative, therefore relevant, of sexual intercourse

"I had consensual sexual intercourse with her several times"

- Not relevant. Whether C & D had sex is not a material fact
- Only material fact is whether the consent was consensual
- C's DNA in the semen is not probative at all – therefore not relevant – of sexual intercourse.
- Relevance is totally different depending on the defence

Competence and Compellability: In order to be called as a witness, person must be competent and compellable

- Competence is capable of understanding nature of giving evidence under oath: s 9(1) SAEA
- A person who is competent is also compellable: s 16 parties and spouses; s 21 close relatives to apply for exemption

Rules of Evidence

Rules of evidence are principles at common law and under statute that govern which information, or evidence, that may be admitted for the purpose

Rules apply when

- Crime → Arrest and bail or report and summons → Trial proof BRD → sentence/penalty
- Trial proof on BOP may also → Voir dire 'trial with trial' to determine if evidence is admissible

Simplified Overview

- Evidence – Testimony, documents, electronic recordings, real evidence
- Evidence that is relevant is admissible at trial
- Unless it offends admissibility of evidence rule or the judge exercises discretion to excluded

Rules that Exclude Evidence

- Hearsay
- Opinion
- Propensity/Similar Fact
- Credibility
- Privileged

Exceptions to exclusionary rule

- Hearsay exception
- Observation or expert
- Permissible Use
- In cross examination
- No exception

- **NB**: Evidence is excluded if it is against public policy or it is unfair to the defendant
- Evidence that is admissible and is not excluded is admitted at trial to prove material facts
- Crim – BRD / Civil – On BOP

Proof

Proof: Having heard the evidence, the trier of fact needs to

- Assess then reject/accept the direct evidence
- Draw or decline to draw inferences from circumstantial evidence
- Make a finding of fact regarding the contested issues
- Confirmation of fact by evidence

Evidential burden

Where a party asserts the existence of a fact, that party bears the burden to adduce (call/tender) evidence sufficient to prove fact

Evidential burden is met when the totality of the evidence, taken at its highest and with all possible inferences drawn in favour of the party adducing the evidence, is capable of making out the elements of the cause of action. Judge or magistrate decides whether the issue can be presented to the trier of fact

- There is no standard of proof associated with the evidential burden – ***just needs to be satisfied***
- Criminal: P bears EB for physical+fault elements of each offence charged. D bears the EB for affirmative defences

Persuasive/Legal Burden standards of proof

- Crim: Consistent with presumption of innocence, P bears persuasive burden to prove every element of every offence charged BRD.

Inferential Reasoning

Proof of circumstantial cases

In criminal cases the ultimate inference on guilty must be drawn from one or more immediate facts. (Shepherd v The Queen)

CHAIN: Some immediate facts constitute indispensable links in a chain of reasoning towards an inference of guilt in which case it can be appropriate to tell the jury that the fact must be found BRD before the ultimate inference may be drawn

CABLE: Other intermediate facts constitute 'consists of strands in a cable rather than links in a chain and not every fact – every piece of evidence relied upon to prove an element by inference must itself be proved BRD

Weight

Judge or magistrate decides admissibility as a matter of law. Trier of fact decides 'weight' of the evidence as a matter of fact.

I.e. in a murder trial where P leads evidence of: Motive to kill V who know that D had committed other offending; DNA of D at the scene; D denying killing V; W seeing D and V together on the night of the killing and then seeing D alone.

Denial by D may be given very little weight and the evidence of the witness that saw them together might be given a lot of weight.