
RELEVANCE

Rule: only relevant ev is admissible, *except as otherwise provided by this Act (s 56(1))*

- Courts give ‘relevance’ a broad interpretation (intended by **ALRC**)
- All evidence is to be taken at its highest in assessing relevance (**IMM**) – reliability/credibility n/a

Logical Relevance: *To be relevant in proceedings, [ev] must be capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue (s 55(1))*

- Under **s55(2)**, the evidence is not necessarily irrelevant if it is collateral to a fact in issue:
 - o (a) The credibility of a witness; (b) The admissibility of *other* ev; or (c) to adduce ev

Fact in Issue (FII): [ev] must have a minimal logical connection to the Facts in Issue (FII) (must prove)

- “Ev is admissible *either* if it is relevant to a fact in issue OR if it is relevant to a fact which is relevant to a fact in issue” (**HML** – Heydon J)
- **Civil:** facts necessary for elements or to establish defences
- **Criminal:** elements of the offence/defence (**HML**) including identity (**Smith**) – identification not relevant - reaching conclusion identity based only on material not substantially different to jury’s
- This is interpreted as relating to issues in the proceedings defined by substantive law and pleadings and thus extends to facts to be proved in undefended or ex-parte proceedings.

Establish Evidence: **S 55** provides that ev must rationally affect assessment probability of facts in issue

Direct Relevance: Proves/disproves the FII directly without requiring a further inference or reasoning

Indirect Relevance: Requires extended reasoning process by jury to determine if ev makes the FII more/less probable

- *Types of indirectly relevant evidence include:* credibility, tendency, coincidence, failure to adduce ev, circumstantial evidence, uncharged acts (**BBH**), identification (**Smith**), opinion evidence (**Dasreef**)
- *Plomp* - wilful murder of wife. Question of adulterous r/ship despite not yet proving he did it- HC held motive was relevant, made it more likely he killed spouse. Wife good swimmer unlikely to drown, he promised to marry other woman, represented as widower. Indirectly relevant evidence.

Could the evidence rationally affect

- Rationality connotes logical reasoning (**Papakosmas – Gaudron, Kirby JJ**)
- It is necessary to point to a process of reasoning, by which the information could affect the jury’s assessment of the probability of a FII.
- This assessment of probabilities should be made in the context of other evidence adduced
- Generally, ev is taken at its highest (**IMM; Bauer**)
- Criminal: there needs to be potential for the evidence to affect the jury’s mind (**Smith**)
- High probative value more likely to pass this test
 - o If ev is ‘so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury,’ it does not change probability= irrelevant (**IMM**)
 - Consider risk of reliability, collusion, contamination, time etc.. (**Bauer**)
 - o Eg Ambiguous evidence in **Lithgow** was irrelevant.

All evidence having PV is admissible and assessed with regard to other evidence in trial, subject to exclusionary rules (**BBH**) – Proof of seeing circumstantial evidence capable of supporting inference

Logical Relevance (the current test intended by the **ALRC (Papakosmas per McHugh J)**)

- Must make the fact more or less probable than it would be without the ev (**s 55; Smith**)
- **CRIMINAL:** ev must provide more info to jury than already available (**Smith**)

Legal Relevance: (**old law**) Not all logically relevant evidence is legally admissible (**Stephenson**)

Probative Value: *The extent to which the ev could rationally affect the assessment of probability of the existence of a FII.*

Adduce: *If remotely relevant, [ev] is prima facie admissible under s 55* (McHugh J in **Papakosmas**)

- even if evidence meets the standard of relevance, its probative value may be extremely low (**Smith**)
- if evidence is not relevant, no further questions arise and that evidence may not be received (**Smith**)

JDA if criminal: Unless an enactment provides otherwise, the *only matters* that the TJ may direct the jury *must be proved BRD* are: elements of the offence charged or alternative offence; and the absence of any relevant defence (**s 61**)

- this is supreme over any common law (**s 62**)

Questions of admissibility are determined by a voir dire (s 189)

DISCRETIONARY AND MANDATORY EXCLUSIONS (SS 135-137)

S 135 – discretion to exclude (similar idea to s 137 - *Bauer*)

- Where PV is substantially outweighed by danger that it may be unfairly prejudicial to a party, misleading, confusing or time-wasting or (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence (*exclusive to Victoria evidence law*)
- This balancing act is weighed in favour of admitting the evidence

S 136 – discretion to limit use (very similar to s135)

- If there is a danger that a particular use of the evidence might be unfairly prejudicial/misleading/confusing

S 137 – mandatory exclusion

- **Criminal only** applies to prosecution evidence
- Court **MUST** exclude evidence if its PV is outweighed by the danger of unfair prejudice to the accused

Prejudicial effect “*the undue impact, adverse to an accused, that the evidence may have on the mind of the jury and above the impact that it might be expected to have if consideration were confined to its probative force*” (*Pfennig – Mason CJ, Dawson and Deane JJ*)

- Consider danger of circular reasoning as in *Pfennig*.
- Ev is not unfairly prejudicial merely because it tends to damage or support a case (*Papakosmas McHugh J*)

Unfairly Prejudicial

- Relates to the right of an accused to a fair trial - Danger only likely to be relevant in a jury trial
- Concept lacks precision (*Swaffield; Pavic*)
- Relates to misuse of evidence by the tribunal of fact, such as by giving it more weight due to an emotional (*sex and child sex offences*) or irrational response.

Consideration of Prejudice

1. Issues to which evidence relates
2. PV of un-XE's ev
3. Possible significance of XE (*Munro*)
4. Why hearsay didn't apply; whether maker available to give ev
5. Unfair prejudice exacerbated by lack of XE – eg whether it can be challenged and tested
6. Whether disadvantage may be ameliorated by something else (eg procedural disadvantage will adjourning help or warning a jury (*Munro*))
7. Ability of trier of fact to take into account lack of XE
8. Breach of the rule in *Brown v Dunn*
9. Danger that the evidence may be given more value/weight than it deserves (**135(b), 136(b), 137**)
10. The court must consider the amount that the prejudice can be reduced by: Editing; admitting the ev in one form rather than another; Limiting the use of ev; Recalling Ws; Calling further ev; Adjourning proceedings; Directions to jury

Probative Value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue; (*Dictionary*)

- The ev is to be assessed as if it were credible and reliable unless clearly fanciful (*IMM*)

COMPETENCE AND COMPELLABILITY

Oath/Affirmation

Oath or Affirmation:

- ss.21: (1) A witness giving sworn evidence must take an oath or make an affirmation.
 (2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.
 (3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.
 (4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.
 (5) Such an affirmation has the same effect for all purposes as an oath.

23 Choice of oath or affirmation

- (1) A person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.
 (2) The court is to inform the person that he or she has this choice, unless the court is satisfied that the person has already been informed or knows that he or she has the choice.
 (3) The court may direct a person who is to be a witness to make an affirmation if—
 the person refuses to choose whether to take an oath or make an affirmation; or
 (b) it is not reasonably practicable for the person to take an appropriate oath.
 If the oath is taken, for it to be legally effective, the witness does not have to:
 swear on the bible or other religious text: s 24(1), *Evidence Act 2008*;
 be religious: s 24(2)(a), *Evidence Act 2008*;
 believe in a god: s 24A, *Evidence Act 2008*; or
 understand what it means to take the oath: s 24(2)(b).

24 Requirements for oaths

- (1) It is not necessary that a religious text be used in taking an oath.
 (2) An oath is effective for the purposes of this Division even if the person who took it—
 (a) did not have a religious belief or did not have a religious belief of a particular kind; or
 (b) did not understand the nature and consequences of the oath.

24A Alternative oath

- (1) A person may take an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.
 (2) Despite anything to the contrary in this Act, the form of oath taken by a person—
 (a) need not include a reference to a god; and
 (b) may instead refer to the basis of the person's beliefs in accordance with a form prescribed by the regulations.

Rule: For [witness] to give evidence, [he/she] must be both competent and compellable. [Witness] is presumed to be competent and compellable (s 12)

COMPETENCE

Intro: Every person is presumed competent to give evidence, except as otherwise provided in EA (s 12(a))
 Whether W is competent to give evidence is determined at a voir dire (s 189(1)(c))

- The standard of proof is on the balance of probabilities (s 142(1))
- The burden of proof is on the party arguing that W is not competent

Defendant: In a crim proceeding (s 17(1)), the D is not competent to give ev for the P (s 17(2))

An **associated D** may choose to give evidence for the P (subject to a s 165 warning and possible exclusion under s 137), having been advised by the court, in accordance with s 17(4) of his right to refuse (s 17(3))

Rebutting Presumption of Competence

A person is not competent to give evidence about a **fact** if, for any reason (including a mental, intellectual or physical disability) (s 13(1))

- (a) the W does not have capacity to understand a question about the fact; or
 - o a W is better able to understand a simple Q than a complex one
- (b) the W does not have the capacity to give an answer that can be understood to a question about a fact
 - o a young **child** may be able to respond to simple Qs, but not complex Qs requiring inferences and that incapacity cannot be overcome

Date of Assessment: the incapacity is assessed at the time of giving evidence (*Hawker*)

Can the incapacity be overcome?

- Deaf: A W who cannot hear adequately may be questioned in any appropriate way (s 31(1))
- Mute: A W who cannot speak adequately may give evidence by any appropriate means (s 31(2))
- Interpreter: W may give evidence about a fact through an interpreter (s 30)
 - o Consider the cost and delay associated and whether adequate/similar evidence may be obtained from other sources in respect of compellability (s 14)

Giving evidence about OTHER facts: If because of s13(1), the W is not competent to give ev about a fact, the W may be competent to give ev about other facts (s 13(2))

Sworn Ev

- Oath/affirmation NOT required to merely produce a document or do a thing to the court (s 21(3))

To give sworn evidence, W must understand that they are under an obligation to give truthful evidence.

- If a competent person does not have the capacity to understand that they must be truthful in giving evidence, then they are not competent to give sworn evidence about a fact (s 13(3))
 - o Obligation means the condition of being morally or legal bound (GW)
- TJ must be affirmatively satisfied on BOP before allowing unsworn ev (GW)

Unsworn Ev: A person can be competent to give unsworn evidence about a fact (s 13(4))

A person will be competent to give unsworn evidence, if the court has told W (s 13(5)) (*consider s 13(5) factors and R v GW – difficulty of gauging level of understanding, capacity to give truthful evidence*)

- If s 13(5) is satisfied, then there is no discretionary power to refuse a person to give unsworn evidence despite the use of the word may in s13(4) (SH)
- If there is a failure to give this mandatory direction under s 13(5), the evidence is rendered inadmissible and the proper conclusion is that the person was not competent to give unsworn ev because they did not have sufficient capacity to understand their obligation to tell the truth (SH)

In determining anything under s 13, the court can inform itself as it thinks fit (s 13(8))

- This includes by obtaining information from a person with relevant specialised knowledge based on their training, study or experience (s 13(8))

Children's ev: The TJ, P and D counsel must not say or suggest to the jury in any way that children are unreliable Ws (s 33JDA, s 165(1) EA; GW)

COMPELLABILITY

Intro: A person who is competent to give evidence is prima facie presumed to be compellable to give evidence (s 12(b)) However, X may object to giving evidence if an exception arises: X is a co-accused or X is D's family/spouse

Co-Acc: An accused is not compellable to give evidence for or against an associated accused if they are tried jointly (s 17(3)). However, D is compellable to give evidence for the prosecution or an associated accused in the associated accused's proceedings **if tried separately** (s 17(3))

Family: Rule: in a criminal proceeding (s 18(1)), when a witness is required to give evidence and the witness is a **spouse, de facto partner, parent or child of the accused**, they may object to being required to give evidence generally or concerning a communication between the W and D (s 18(2))

- Applies only to relationships which are in existence at the time of giving evidence.
- **De facto partner** – defined to include same-sex relationships; **Child** – means a child of any age
- **Giving ev** = at trial, tape recorded before trial, but probably not a written statement by W.
- **Stoddart** – spousal privilege does not exist, may object to giving ev under s 18(2) via s 18(6)

Objection Requirement:

1. The objection must be made before the witness gives evidence or as soon as practicable after the W becomes aware of the right (s 18(3))
2. The court must ensure that the W understands their right to object to giving the evidence (s 18(4))
3. The court is to hear and determine any objection in the absence of the jury, on a voir dire basis (s 189)

Balancing Test: X **must not** be required to give evidence if the court finds that:

- There is a likelihood that harm would/might be caused (directly/indirectly) to the W or the relationship between the W and D, if the witness gives the evidence (s 18(6)(a)) AND
- The nature and extent of that harm outweigh the desirability of having the evidence given (s 18(6)(b))

S 18(7) Factors to Consider: