Relevance

FUNDAMENTAL RULE OF ADMISSIBILITY

The **general rule** is that relevance is a requirement for evidence to be admissible under **s 56** of the Evidence Act (EA)

Identify the fact in issue

Criminal: any of the facts that are necessary to establish factual elements of crime (conviction) or factual elements of a defence (*Smith v R)*
i.e. for murder the facts in issue would be the facts used to establish A/R and M/R of murder – direct facts to prove stabbing, circumstantial pieces of evidence used to draw inferences to prove M/R (the way we do this introduce evidence).
Civil: facts disputed by parties, in pleadings

THE TEST

Evidence is relevant if: **s 55(1)** it ***could*** **rationally affect** (directly or indirectly) the assessment of the probability of the **existence of a fact in issue**
Not irrelevant if only goes to **s 55(2)**
a) The credibility of a witness, or

b) The admissibility of other evidence

c) A failure to adduce evidence

Note: **this excludes any assessment of reliability** (and procedural fairness) **of the evidence** (Papakosmas v R [1999] HCA McHugh K [87]).
Courts **assume** the credibility of the evidence– confirmed by the inclusion of the worlds *'if it were accepted'*.

Relevant cases

Papakosmas v R (1999): evidence can be relevant for more than one use.

Facts: Papakosmas was convicted of sexually assaulting a colleague at an office Christmas party. Complainant and 3 other witnesses gave evidence at the trial of her immediate complaints. According to the evidence, when the complainant returned to the party, she saw a colleague. The complainant was crying and her colleague asked her what was wrong. Complainant said P raped her. Colleague took her outside to a table where she repeated the complaint to another person. She was crying and holding her head in her hands and appeared very distressed. Shortly afterwards the complainant repeated her story to a third woman who gave evidence that she was crying uncontrollably and appeared extremely distressed

Issue: Fact in issue was consent. Was the evidence of these 3 witnesses relevant?

Held: Evidence was **relevant** to proving the facts asserted by the complainant. That is she had not consented to sexual intercourse (hearsay purpose) and it was also **relevant** to supporting the credibility of the complainant. Two forms of relevancy here.

If relevant, do any of the exclusionary rules apply?

- If not so excluded, is its probative value outweighed by prejudicial effect?
- Do any of the discretionary exclusions apply or is a warning as to reliability sufficient?

Hearsay for a Non-Hearsay Use

On the facts … is not adopting their previous statement made (police statement) therefore it loses a hand, becomes second-hand *Lee v R (1998).* However, the previous statement may still be admissible under s 60 for a hearsay use if the prosecution establishes it is relevant for another purpose other than the proof of an asserted fact (probably credibility use – *demonstrate you know how this operates).*

Section 60 Evidence relevant for a non-hearsay purpose exception

Collateral use rule

1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section **62 (2)).**

Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in ***Lee v The Queen (1998)***
3) However, this section does not apply in criminal proceedings to evidence of an admission.

Note: The admission might still be admissible under **s 81** as an exception to the hearsay rule if it is "first-hand" hearsay: see **s 82**.

ALWAYS CONSIDER S 136 limiting to one use

Section 60 cases

***Lee v R* (1998), if the witness does not adopt police statement (or previous statement) than it loses a hand THUS BECOMES SECOND-HAND**

Admissions Exception

S 81: hearsay & opinion rules do not apply to evidence of an admission

S 81(1) the hearsay rule and the opinion rule do admissions.
S 81 (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:
a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time, and
b) to which it is reasonably necessary to refer in order to understand the admission.

- Sometimes you have an actual admission, 'I did a bad thing', sometimes you have representations to understand the admission this whole package goes to the admissions rules

Is it an admission?

Part 1 Definitions: *admission* means a previous representation that is:
(a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), **and**
(b) adverse to the person's interest in the outcome of the proceeding.

Two kinds of admissions

Inculpatory Admissions

- An admission that goes towards proving the fact in issue.
- **E.g.** confessing a crime, admitting to a fact of the crime, admission of something that will go towards a fact of a crime, agreeing with the statement put to you about the crime, conduct agreeing with the crime (i.e. nodding head), conduct can admit guilt (i.e. flee, change story, caught lying).

Exculpatory Admissions

- Where you deny being involved but there is evidence that prove you were involved.

- ***Edward v R (1993)*** sets out exculpatory guidelines i.e. **how lies turn into admissions** (note: not all lies infer guilt, there must be a connection with consciousness of guilt)

1) The accused tells a deliberate lie

2) There is a realisation by the maker that the truth will implicate them

3) The lie cannot be told for another reason

4) The must be consciousness of guilt (told out of fear of the truth)

Oral testimony (witnesses) (Pt. 2.1)

Who can be called?

- ***R v Apostilides (pre EA)*** essentially up to prosecutor to determine which witness to be called

- ***R v Kneebone (post EA)*** adopted the position in Apostilides

No adverse inference from failure Section 20(2)

- Judge may comment on failure to call witness BUT may not suggest failed to give bc guilty (very close to right to silence)

- EXCEPTION ***Jones v Dunkel*** where P does not call witness that could reasonable be expected to; judge may direct jury that failure to call can involve adverse inference

Can the judge call a witness

- Judge may only call in exceptional circumstances ***(R v Damic)***

- ***Damic***: D mentally unstable – judge called a psychiatrist as witness on fitness to not run an insanity defence