

Comprehensive Notes for Court Process, Evidence and Proof (LAWS2351)

1 PLEADINGS AND PROSECUTING	3
1.1 Rights to Privacy, Silence and Liberty	3
1.2 Criminal Trials	3
1.3 Screening weak cases and Disclosure	3
▪ Guiding Principles in Criminal Proceedings	3
▪ Rule against Double Jeopardy	4
▪ Guiding Principles in Prosecuting (DPP)	4
▪ Prosecutors' Disclosure and Fairness Obligations	5
▪ Defence Disclosure	7
2 PROOF, ADJUDICATION, ADVOCACY, AND THE JURY TRIAL	9
2.1 Adversarialism: Strength, Weaknesses and Rules of Engagement	9
▪ Prosecutors' In-court Fair Trial Obligations	9
✓ Libke v R	10
✓ Wood v R	10
2.2 The Art of Proof	11
▪ Advocacy	11
▪ The Jury	11
▪ Mechanics of Proof	12
▪ Substantiating Facts for Admitting Evidence	12
▪ Judges	12
3 FRAMING THE CRIMINAL TRIAL	13
3.1 Fairness	13
3.2 Right to a fair trial	13
3.3 Rectitude of Verdict/Truth-seeking	13
3.4 Presumption of innocence – Accusatorial Trials	14
3.5 Presumption of Innocence and the Accusatorial Trial – the theory	14
✓ R v Few	14
4 INTRODUCING THE LAW OF EVIDENCE: RELEVANCE, DISCRETIONS & FAIRNESS	16
4.1 History of the UEA*	16
4.2 RELEVANCE	16

▪ Rationalism and relevance	17
▪ Capacity of evidence to assist the decision maker by throwing light on already admitted evidence	17
✓ R v Mundarra Smith	17
✓ Evans v R	18
▪ Probative Value & Unreliability	18
✓ R v Burton	18
✓ R v XY	19
4.3 Discretionary exclusions and the Mandatory 'Discretion'	20
✓ R v Stepheson	20
▪ The danger of unfair prejudice	20
▪ Probative Value Outweighed by the Danger of Unfair Prejudice	21
✓ Aytugrul v R	21
✓ Director of Public Prosecutions (NSW) v JG	21
▪ Unfair prejudice arising from procedural considerations: ALRC Report 102^	22
▪ Discretion to Limit the Use to be Made of Evidence (s 136)	22
✓ Papakosmas v R	23
▪ Discretionary exclusion – unfairness s 90	23
▪ Discretionary exclusion – improperly or illegally obtained evidence	24
5 THE WITNESS IN THE BOX	25
5.1 Getting in the Box	25
▪ Competency and the Witness	25
▪ Compellability and the Witness	26
5.2 The Witness in the Box	26
▪ Children as Witnesses	26
▪ Evaluating Witnesses – Credibility	27
✓ State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)	27
✓ Whisprun Pty Ltd v Dixon	27
▪ Examination in Chief	28
▪ Leading questions	28
▪ Examination in chief by police officers	29
▪ Testifying after time	29
▪ The Lying Witness	30
▪ The Unfavourable Witness	30

✓ Adam v R.....	31	6.5	The rule in Browne v Dunn	42
✓ R v SH, MV and KC.....	31		✓ Ashby v Slipper	42
✓ R v Veleviski (No 2).....	32		✓ Kuhl v Zurich Financial Services Australia Ltd..	42
✓ DPP v Bourbaud	32		✓ New South Wales v Hunt	43
5.3 Re-examination of own witness.....	33		✓ MWJ v R.....	44
▪ Prior consistent statements and rehabilitating credibility	33	7	HEARSAY – THE RULE	45
✓ KNP v R	33	7.1	Definition	45
5.4 Reopening the prosecution case.....	34	7.2	Non –Hearsay Previous Representations	46
✓ R v Chin	34			
6 CROSS-EXAMINATION, WITNESS CREDIBILITY AND RELATED CHALLENGES	36			
6.1 Cross-Examination	36			
▪ Leading Questions.....	36			
▪ Credibility	36			
✓ Peacock.....	37			
6.2 The Credibility Rule	37			
▪ Determining whether Evidence is Relevant Solely to Credibility	38			
✓ Piddington v Bennet and Wood Pty Ltd	38			
▪ Cross-examination and Credibility Evidence .	39			
✓ R v Lodhi	39			
✓ R v El-Azzi.....	39			
▪ Exceptions to the Finality Rule	39			
▪ (A) Bias, Motive for Being Untruthful	39			
✓ Nicholls v R.....	39			
✓ Kamm v R.....	40			
▪ (B) Has been convicted of an offence, including an offence against the law of a foreign country	40			
▪ (C) Prior Inconsistent statements	40			
✓ R v Abebe and Mulugeta	41			
▪ (D) Inability to be Aware of Matters to Which His or Her Evidence Relates	41			
▪ (E) Knowingly or recklessly making a False Representation Despite a legally imposed Obligation to Tell the Truth.....	41			
6.3 The Ambit of Questioning	41			
✓ Stack v The State of WA	41			
6.4 Improper Questioning	41			

4.3 Discretionary exclusions and the Mandatory 'Discretion'

❖ Legal relevance – s 135

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially **outweighed** by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

- ❖ Legal relevance balances the probative value of evidence against public policy considerations (e.g. those listed in s 135)
- ❖ Distinguishing two levels of relevance highlights the practicalities of trials
- ❖ Outweigh is not a mathematical calculation – they have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. They are value judgments
- ❖ Relationship between logical and legal relevance in **R v Stephenson**:
 - Although logic is the test of relevance, 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. In some cases, such evidence is described as being irrelevant, an expression which must be taken to indicate that its weight is so minimal that it does not serve to add to or detract from the probability of the principle issue being established. Such evidence may be more correctly described as insufficiently relevant or too remotely relevant.

R v Stephenson

- ❖ Facts
 - Negligent driving prosecution from two-car accident. Stephenson could not identify driver of the car because all three possible drivers had been killed. Each had a blood alcohol reading of varying levels.
- ❖ Issue
 - Was evidence of the blood alcohol readings relevant logically? Legally? The Court answered both questions in the negative
 - The question was whether the def was so negligent that it was culpable driving
- ❖ Held:
 - The connection of the condition of the driver of the Fiat with the question of whether the applicant was guilty of the charge was extremely tenuous, and the logical relevance of the former to the latter in this case may well have been regarded as so slight that

evidence of the former became inadmissible on the ground of remoteness. When to that fact is added the fact that the driver could not be identified and that any evidence elicited as to the condition of one or more of the men in the car could not be linked with the driver, the examination which counsel sought to undertake lost even the colour of relevance and was properly excluded.

- ❖ Ss 55 and 135 are not a close stepped two stage process
 - From Act's chart first step is relevance, then exclusionary rules, then discretionary exclusion
 - Reliability of evidence is a matter to be determined either by an exclusionary rule or failing that by the decision maker, but not principles of relevance

The danger of unfair prejudice

- ❖ By risk of unfair prejudice is meant the danger that the fact finder may use the evidence to make a decision on an improper, perhaps emotional basis, ie on a basis logically unconnected with the issues in the case
 - Evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decisions on something other than the established proposition of the case
- ❖ There is consensus that evidence will not be unfairly prejudicial simply because it damages the defence's case or because it has low probative value
 - Evidence will be prejudicial if it tends to prove the opponent's case but will not be unfairly prejudicial unless there is some potential for misuse by the tribunal of fact
- ❖ Danger of unfair prejudice operates:
 - As a consideration of whether the judge should order a demonstration, experiment or inspection under s 53(3)(c) 55 and
 - As a consideration in determining the extent to which a party may make submissions and 'refer to relevant information' where a trial judge takes judicial notice of matters of common knowledge: s 144(4).56
- ❖ Notion of fairness (unfairness) operates in the context of disadvantage (1-2 relating to defendants and 3 may also apply to witnesses)
 - (1) with respect to the admissibility of admission having regard to the circumstances in which they were made: s 90
 - With respect to holding an identification parade: s 144(4)
 - With respect to a judge giving a part leave, permission or direction to proceed in a particular way, the extent to which this would be unfair to a party or to a witness: s 192(2)(b)

- ❖ Unfair prejudice is also considered in the exercise of ss 101(2), 135, 136, 137
 - s 135 – broad and demanding test to persuade a court to exclude otherwise relevant and admissible evidence. Court is not obliged to exclude evidence that satisfies the test of having its probative value substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party – this exclusionary discretion applies to either party and in civil or criminal trials
 - Contrast of s 135 and s 137
 - S 137 mandates a judge exclude prosecution evidence if its probative value is (merely) outweighed by the danger of unfair prejudice, which relates solely to the criminal defendant
 - Consider s 101(2)'s application of unfair prejudice – where the prosecution evidence in question must first be established as having a significant probative value because by its nature and the kind of reasoning that the jury must employ to gain its relevance, it may be unfair to a defendant

Probative Value Outweighed by the Danger of Unfair Prejudice

❖ UEA Discretionary and mandatory exclusions

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing.

s 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law, or
- (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

❖ Common law foundations

- **s 137** -- Exclusion of prejudicial evidence in criminal proceedings
 - Foundations in the common law 'the Christie discretion' → under the common law a trial judge had a discretion (contrasted to an obligation under s 137) to exclude evidence which the probative value was outweighed by its prejudicial effect

Aytugrul v R

❖ Issue

- Whether the expert evidence regarding DNA test was expressed in an unfairly prejudicial manner such that its probative value was outweighed by the danger of unfair prejudice to the defendant
- The DNA test was described as 99.9% of people would not be expected to have the DNA profile matching the recovered hair
- Argued that it should have been expressed by reference to a frequency ratio – i.e. 1 in 1,600 people would be expected to share the recovered DNA profile

❖ Held

- Argument was rejected
- The defence tried to rely on older cases dealing with frequency ratio, but the court in this instance said it needed to be decided on a case by case basis
- The court said it was just mathematics - any criminal jury of 12 would be likely to contain at least 1 juror capable of understanding and alerting the other jurors the frequency estimate and exclusion percentage are the same

Director of Public Prosecutions (NSW) v JG

❖ Facts

- Jan 2002 the deceased (Mrs JG) disappeared. Mrs JG was mother of CV.
- P alleged disappearance was linked to discussion family was having about whether the family should move in with Mr JG's father. CV revealed that she had been sexually assaulted by Mr JG's father. P alleged Mr JG killed Mrs JG to prevent exposure of his father's offence.
- A year later, CV made two complaints to police that were electronically recorded. There were some issues with the interview as the police had prompted CV to speak about the allegation referring specifically to JG's father.
- Oct 2003, CV had some hypnosis.
- Feb 2009, JG charged with murder.

❖ Trial

- Trial judge made ruling that the electronically recorded interviews should be excluded.
- Objection on the basis that the interviews with CV were contaminated because of police officer's suggestion and

that, due to the impact of hypnosis on CV's memory, the cross examination of the child would be compromised

❖ Issue

- Were the prompts enough to contaminate the evidence and justify exclusion?
- Did hypnosis mean the cross-examination would not be fair?
- Also, there was an issue about the interviews being in audio-visual format which was argued to have more of an impact on the jury.

❖ Discussion

- Probative value – Key point: when assessing the probative value, it has to be seen in context of what the evidence is being adduced to prove.
 - In this case, it was significant that the evidence was not trying to be used to say JG's father (Uncle Noel) had or had not done anything but rather to demonstrate a motive in the context for the disappearance. It was implausible that a mother who had just found out her daughter had been sexually abused would run away.
- Unfair prejudice – danger of attributing undue weight to the evidence – 4 factors
 - (1) a juror would not readily appreciate the extent to which the reference to Uncle Noel (JG's father) would taint her later evidence
 - (2) the ordinary juror would be unlikely to know about the effects of hypnosis upon the human memory
 - (3) the inability to cross-examine the daughter as to her true recollections given the interposition of the hypnosis session
 - (4) the difficulty in effectively cross-examining where the video recorded would be 'indelibly etched in the jury's mind'
- Each of these dangers of potential unfairness should be accepted as real, except the effects of hypnosis was not a factor affecting the initial interview but only the difficulty of cross examining effectively
- For (3) there wasn't expert evidence that there was scientific explanation of memory effects after hypnosis. And if there was expert evidence, the jury would be able to take this into account.
- For (4) Basten J looked broadly, he regarded the legislative shift that made it standard practice to require the video evidence in child sex cases, so there was a clear acceptance by parliament that that is an acceptable thing to do, Basten J did not find it unfair in this case to do something that was actually sanctioned.

❖ Held

- Basten JA concluded that the exclusion of the evidence by the trial judge was in error
- 'it is clear that none of the elements of potential unfair prejudice could outweigh the significant probative value to be attributed to the daughter's evidence. Nor, taken

cumulatively, do those elements outweigh the probative value. Accordingly, the evidence should not have been excluded under s 137 of the Evidence Act.'

Unfair prejudice arising from procedural considerations: ALRC Report 102^

Hearsay provisions and unfair prejudice

- ❖ UEA have relaxed the rules of admissibility – in particular the extension of the exceptions to the hearsay rule where the maker of the hearsay representation is unavailable for cross-examination -- it has been a matter of contention as to whether unfair prejudice can arise from procedural considerations.
- ❖ The more restrictive view, that unfair prejudice relates solely to the misuse of evidence by a tribunal of fact, was favoured by McHugh J in *Papakosmas v R*, who stated:
 - "Some recent decisions suggest that the term 'unfair prejudice' may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995 ... I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons ... [ss 135, 136 and 137] confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility."
- ❖ In *Roach v Page* (No 11) Sperling J considered inability to test the truth of a representation is a legitimate ground for excluding or limiting the use of evidence
 - However, whether this fact will result in limitation or exclusion in a particular case depends on the basis upon which the hearsay rule did not apply. Where hearsay evidence has been admitted pursuant to an exception to the hearsay rule because of the unavailability of the maker, there are 'special reasons' for not excluding or limiting the use of the evidence on that ground.[45] Conversely, where the maker of the hearsay representation is available to give evidence and has not been called, this is a legitimate consideration in favour of finding that there has been unfair prejudice.[46],

Discretion to Limit the Use to be Made of Evidence (s 136)