Law of Evidence (Law 2591)

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Introduction

What is Evidence Law?

The rules and legal principles that govern the proof of facts (in issue) in legal proceedings (trial):

- The rules that 'regulate how courts ascertain the facts to which the substantive law is applied'
- The rules are primarily concerned with accurate fact-finding
- Accurate fact-finding is the reason we have specific rules about what kind of evidence can be considered by the court and/or by the jury.

They determine what evidence must, or must not, be considered by the trier of fact:

- Trier/tribunal of fact.
- Trier/tribunal of law.

Facts in Issue

We are referring to those which the plaintiff, the prosecution and the defendant the accused must prove in order to be successful.

However, the facts of the issue in a given case are determined first by the substantial rule of law and second by the charge and a plea in criminal cases and pleadings in civil cases. Thirdly also in the manner in which the case is conducted.

'Facts in Issue'

Evidence must be relevant to 'facts in issue' which was further clarified by McHugh J in ***Goldsmith v Sandilands* [2002] HCA 31** at [31]:

"Under the common law rules of evidence, evidence is generally admissible only if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact"

Explanation: This directly intersects with the first general rule of the law of evidence, and that is **for evidence to be admissible evidence, it must *directly or indirectly be relevant* to the facts in issue, and that is, it *must remedy the existence of the fact more or less probable.***

What constitutes evidence?

•Statements, records, testimony – any information that helps to prove a 'fact in issue'.

What is a 'fact in issue'?

•A fact that must be determined as a matter of substantive law to resolve a particular dispute and evidence must be relevant to those facts in dispute ***(Goldsmith v Sandilands)***

Evidence is **not relevant**, and therefore **not admissible** if it relates only to a question of law.

Guiding Principles

Principle (1) Fact-finding should be rational

- ***R v Young* [1995] QB 324**

    - We can see the Commonwealth Act applies to proceedings in the High Court, Federal Court, Family Court and other Federal Courts. We do have exceptions to this in relation to tribunals, eg, the **Refugee Review Tribunal**, is not required to apply the laws of evidence and this is because **s 420 of the *Commonwealth Migration Act*** provides that the tribunal is not bound by the rules of evidence. Similarly, the **Administrative Appeals Tribunal** is not bound by the rules of evidence.
    - **LATEST: *ADMINISTRATIVE REVIEW TRIBUNAL ACT 2024* (NO. 40, 2024) - SECT 52 Tribunal is not bound by rules of evidence**
    - When you read s 4, you see that the reference to the proceeding, and the word proceeding is not defined in the *Evidence Act*, which led to some discussions in cases, mostly in relation to proceedings brought under the *Corporations Act*.
- Applies to both civil and criminal matters in Victorian Courts.
- This includes the **interlocutory proceedings**: These are proceedings that deal with specific issues in a matter in which an application is usually filed while a hearing is prepared or before the final hearing in the decision of the case and this includes applications for the exclusion of evidence.

Trial Process

Criminal Trial	**Civil Trial**

• Committal
• Trial
• Opening addresses
• Prosecution case
• Defence election to call
• Evidence
• Closing addresses
	• Directions Hearing
	• Discovery
	• Trial
	  ○ Opening addresses
	  ○ Plaintiff's case
	  ○ Defendant's case
	  ○ Closing addresses

- ❖ In civil and criminal trials, they apply during all stages.
- ❖ The role of evidence is in all of those stages in a criminal process.
- ❖ In criminal trials and civil trials, it even applies before the committal hearing, although not enforceable for instance, the gathering of the evidence even before the trial commences can be relevant to a question of admissibility of evidence.
- ❖ Although when saying it applies to all stages, it applies to before those stages as well because the evidence needs to be gathered properly in accordance with those rules.

Burden of Proof

- Concerned with who has the burden of proving a particular fact in issue.
- Onus means on which hand proof of effect in a dispute initially lies.
- Burden of Proof is a duty that lies on a party to either introduce evidence so that the party's case or particular defence maybe left on the jury to decide upon. We also refer to this as the evidential burden.
- All these different evidential burdens ultimately lead to persuading the jury that a party has established a case or not.
- Evidential burden is a legal burden, so the issue or burden of proof is a matter of substantial law in all jurisdictions.

Relevance and Admissibility

Introduction

If evidence is not **relevant**, it will not be admitted into evidence. However relevant evidence may be inadmissible for some other reason. For example, it may involve privileged legal advice. In other words, relevance is a necessary, but not a sufficient, condition of admissibility. Admissible evidence is a subset of relevant evidence. Most of the time the relevance of evidence is not in doubt and needs no discussion. On rare occasions, however, the question is a live one. ***R v. Stephenson* [1976] VR 376** and ***Smith v. R* (2001) 206 CLR 650** are two such cases. The fundamental importance of relevance is underpinned by the *rationale* nature of evidence laws. The starting point is what is relevance in this context, **S 55 of the *Evidence Act 2008* (Vic)** provides us with a definition, if there is a dispute about the facts, the evidence submitted must have a more logical connection to these disputed facts. But if the evidence does not meet the definition of s 55, there is **S 56 of the *Evidence Act 2008* (Vic)** determines that this evidence is inadmissible due to relevance, the case of ***Smith v. R (2001)* 206 CLR 650** provides more clarification about the test of relevance. In ***Smith v. R (2001)* 206 CLR 650** the court set out the fundamental propositions of the test of relevance, important is that we first identify the dispute effects and subsequently we analyse whether the evidence has a minimal and logical connection to these facts. A dispute of relevance of evidence is rare but it does occasionally occur, it is however the fundamental pillar of our evidence laws despite it rarely occurring.

This topic will also explore circumstantial evidence. Circumstantial evidence is not directly linked to establishing the facts however, this type of evidence assists in pointing out the existence of facts. It is therefore not directly linked to proving a fact but it provides a reasonable inference that a fact exists. We need to keep the burden of proof in mind, if a case is based on circumstantial evidence only, it is very unlikely that a claim can be proven beyond reasonable doubt in criminal matters or on balance of probabilities in civil matters. However this does not mean that these thresholds cannot be matched with the circumstances, we have seen cases where largely circumstantial evidence still led to a person being found guilty beyond reasonable doubt and those are cases where the body of the victim was never found. These cases include ***Susan Neil-Fraser*** in Tasmania, ***Lindy Chamberlin*** case and the NSW case against ***Kelly Lane***. This topic will discuss circumstantial evidence and what the rules are that govern their admissibility and we will further discuss Jury Directions relevant to reliance upon circumstantial evidence.

Circumstantial evidence is evidence not of a fact in issue itself but of some other facts pointing towards the fact in the issue. For example, in the case of a person accused of murdering another person by drowning him, a fact in issue is whether the accused drowned the victim. Direct evidence would be eyewitness testimony that they saw the accused drown the victim. By contrast, circumstantial evidence would be facts (such as the accused having a reason to drown the victim, the accused being in the vicinity of the victim when she drowned, the accused making statements about drowning people, the accused having looked up how to drown a person on the Internet) that point towards the accused having drowned the victim. Circumstantial evidence can be strong or weak but, in criminal cases, it must exclude all reasonable possibilities of innocence; if it does so, as in ***Plomp* (*Plomp v. R* (1963) 110 CLR 234)**, it can be said that the accused's guilt is not subject to reasonable doubt.

In some—but by no means all—cases a logical step in the Crown's case must be proved beyond reasonable doubt even though it does not constitute full proof of guilt. This is sometimes referred to as an indispensable intermediate fact. A famous example concerns Lindy Chamberlain **(*Chamberlain v. R***

Imagine that you are accused of a bank robbery, the robber was wearing like balaclava and overall and then you are asked to wear that in the courtroom for the jury to see. Do you think that is really fair? Do we think that is potentially unfairly prejudicial?

***Smith v The Queen* [2001] HCA 50** ● Facts in issue are the 'ultimate issues' which are 'expressed in terms of the elements of the offence'. ● • [24] *"..That test requires no more than that the evidence "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". Other provisions reinforce the impression that the Act's test of relevance is not a stringent or narrow one. A broad interpretation is also consistent with the purpose of the Act, which is to aid the court process rather than delay it"*	***Evans v The Queen* (2007) 235 CLR 521** ● Asking the accused to wear the clothes the robber was wearing

Section 55

- The Uniform Evidence Legislation adopts a broad test for relevance as we have seen in the interpretation of Kirby J in ***Smith v The Queen***, as well, and that test is rationally effective as we have also seen in case law.
- **Section 55** assumes the evidence is credible – 'if it were accepted'.
- Credibility of evidence is assumed because if it were accepted, it could rationally affect the assessment of the probability of the existence of effects in issuing and proceeding.
- So this means that the trial judge does not consider reliability and credibility when determining whether the evidence is relevant, with one **exception**: ***IMM v The Queen* [2016] HCA 14**

IMM v The Queen [2016] HCA 14

***IMM v The Queen* [2016] HCA 14:** 'There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in an issue would be nil and it would not meet the criterion of relevance'

- Indecent dealing with a child and sexual intercourse with a child under the age of 16. The key case issue in this case was the admissibility of the evidence. During the trial, the appellant was found guilty of two counts of indecent dealing with a child and one count of sexual intercourse with his stepdaughter. So the only direct evidence presented to support these charges was provided by the complainant and despite objections, the prosecution was allowed to present additional evidence known as tendency evidence and complaint evidence. The tendency evidence was given by the complainant and described an appellant ran his hand up her leg while she and another girl were giving him a back massage. The trial judge determined that the Tendency evidence was admissible because it held significant probative value. It is important to note that the trial judge evaluated the property value of the tendency evidence based on the

straightforward. The evidence directly addresses and supports the fact, and it leaves little room for interpretation or inference and as long as the direct evidence relates to a fact in issue, it is generally considered relevant and admissible.
    - **Eg:** I saw two cars smashing each other
- **Circumstantial Evidence** on the other hand, requires fact-finding to draw inferences to make logical deductions to establish a connection between the evidence and facts in issue, and a test for relevance for circumstantial evidence involves evaluating whether the evidence, when considered in conjunction with other circumstances or events supports a reasonable inference about the fact in issue and each piece of circumstantial evidence may not directly prove the facts but when viewed collectively, they contribute to building a logical chain of events or circumstances that lead to a reasonable conclusion, and the relevance of circumstantial evidence is determined by assessing its probative value in establishing the facts in dispute.
    - Can someone be convicted entirely on circumstantial evidence? The answer is yes and we see this mostly in cases that are body-less homicides, where the body has never been found. In those cases. there is a lot of circumstantial evidence and that can lead ultimately to conviction. Cases: ***Susan Neil-Fraser Case*** in Tasmania, ***Kelly Lane Case***.
    - **Eg**: I have seen this person with their orange tshirt run out of the laneway but it can be put in a chain which will prove something combined with other evidence.
    - Case where there is no direct evidence
    - **Eg:** Guy stole laptop and posted on facebook to sell it, you put the pieces of the chain together.
- **Credibility Evidence** is typically relevant to the extent that it helps to evaluate the truthfulness and reliability of a witness's testimony. The tests of relevance for credibility evidence involve considering whether the evidence provides insight into the witness's credibility and the potential impact it may have on their ability to provide accurate and truthful information. Evidence regarding the prior inconsistent statements, their reputation for honesty or dishonesty or bias can assist a fact-finder, the jury or the judge if it is a judgment trial in assessing the credibility of the witness testimony. However, it is important to note that not all credibility evidence may be relevant or admissible. So the court must really carefully consider the specific circumstances and potential prejudicial impact of the credibility evidence before determining its relevance and admissibility.
    - **Eg:** Copy of Criminal Record and if it includes 3-4 thefts; that goes to the question that they have not been an honest and credible person.
    - **Eg:** Murder Case, Brutal murder, client goes to house and murdered and walks down the street, later a neighbour of client was having coffee and heard a bin shut in which a knife was found. The witness did not have prior criminal history. The client was living in a community house. This witness was very hostile, and put things on social media, goes on site and we cross examined and went to jail, you don't like the people in the house, line of attack on credibility, motivation and bias with witness, you say you had a motive, and your as the lawyer trying to weaken the credibility
    - **Eg:** Expert Evidence, as a lawyer you can say, you wrote this paper and that paper was withdrawn for plagiarism, or you didn't do a reasonable test, that goes to credibility.

Direct Evidence	Circumstantial Evidence	Credibility Evidence
If accepted, establishes on its own a fact in issue. • Eyewitness to the murder	Not evidence about having perceived the event in question, but evidence about other facts that render the event in question	Relevant because it has a bearing on the probative value of evidence that has a direct bearing.

	more or less likely • Eyewitness seeing accused leaving site or murder with blood on clothes	• Evidence that the eyewitness has given false testimony in a previous trial. • Gans, Palmer and Roberts, page 103.

Applying the test of relevance

Wilson v The Queen (1970) 123 CLR 334

- Evidence of arguments between married couples is relevant to determining if the shooting was intentional or accidental.
- The applicant to the HCA was convicted before the Supreme Court of Victoria of the murder of his wife. He appealed to the High Court on the grounds that the evidence of statements by his wife that she knew he wanted to kill her should have been inadmissible and if the evidence was admitted, it should nevertheless be excluded because a trial judge should have exercised the discretion to exclude.
- Barwick CJ also held that the nature of the relationship between the applicant and his wife prior to the murder was relevant to the question to be decided by the jury. So he stated that the evidence of a close affection relationship could have properly been used by the jury to incline against a conclusion that the applicant had killed his wife, but his evidence assisted the prosecution to establish that it was intent.
- It is interesting in this case that the court considered the evidence of the relationship between the applicant and the victim in different ways to hold that the evidence was admissible with regard to the argument from the applicant that the evidence was highly prejudicial. The court stated that the prosecution already had a very strong case and that the trial judge should not have to exercise that discretion to exclude.
- Now this case teaches us and it has been considered in later cases as well that evidence of a relationship between an accused and their victim can be used by the Crown but also the defence. Queensland has actually directly incorporated this in its Evidence Act as a result of these cases.

R v Burton [2013] NSWCCA 335

- In sexual assault cases, evidence of the complainant's previous attraction to the person in the bar is irrelevant to establishing sexual availability.
- This was another application of the test of relevance in relation to previous representations.
- So here in New South Wales, the respondent was charged with the offence of sexual intercourse without consent, this is a rather complicated case but one of the key evidentiary questions was whether the evidence of the victim's previous attraction to a person in a King's Cross bath was relevant to establish her sexual availability. Now, here the court said that it was not relevant to the accused attempting to use this evidence to demonstrate that the complainant showed signs of sexual interest in him. But the court said that this could not be strengthened by evidence that she showed signs of sexual interest in a man.
- So the takeaway from this case is the sexual attraction to a person or the inference of a sexual attraction to a person is not relevant to the fact in issue of whether or not the accused had raped this woman.

Competence Compellability & Examination of Witness

Introduction

Competence is the capacity to give evidence. Compellability means that the witness can be forced to give evidence through compulsory court processes such as the subpoena.

- 1st step is to look at whether or not a witness can give evidence - Competence and compellability.
- Competence is to be distinguished from credibility, the competence of a witness is not affected if they provide a clear witness statement.
- Competence refers to the person's ability to function as a witness.
- The general rule and presumption articulated in **s 12 of the *Evidence Act*** is that every person is competent to give evidence.
    - This means that they must be capable of understanding the nature of oath or affirmation.
    - This means that they are competent in giving sworn evidence.
- However, this presumption can be rebutted by demonstrating that the desired witness lacks capacity. Now lacking capacity in this context is comprehensively addressed in **s 13 of the *Evidence Act***.
    - For instance, if the person does not have the capacity to understand questions, they are not competent as a witness.
    - This does however not mean that they cannot give evidence, they can still give unsworn evidence. The provision of unsworn evidence is subject to additional rules which are outlined in ***s 13*** as well.
        - **Important:** Unsworn evidence can be relied upon, however, it can be requested by parties that the jury be warned about the potentially unreliable evidence in this context. This particular request was discussed and explained in detail in ***R v GW* (2016) 258 CLR 108.**
            - In Victoria, **s 165 of the *Evidence Act*** provides the basis for this request in civil proceedings.
            - **S 32 of the *Jury Directions Act 2015*** regulates this request in criminal proceedings.
    - There are other exceptions too that can lead to a rebuttal of **s 12**. There are certain types of people who are presumed not to be compellable to give evidence. These include for instance sovereign heads which include members of Parliament, judges and jurors are also incompetent to give evidence in a trial in which they have been acting in the role of judge or juror. They can, however, give evidence about matters that affect a conduct or proceeding.
    - In criminal trials, an accused person is not competent to give evidence as a witness for the prosecution.
    - A co-accused person can be competent to testify for the prosecution if they are tried separately from the defendant. This means that in joint trials a co-accused person cannot be compelled to testify against another accused in the same trial.
    - Lastly, spouses, de facto partners or family members may not be competent to testify as witnesses in criminal proceedings if the defendant successfully objects against their competency. The issue of whether a person is competent to give evidence is for the judge to decide in the absence of the jury on the **balance of probabilities**.

R v GW (2016) 258 CLR 108

- This High Court decision is very relevant to the testimonies of children.
- The child gave unsworn evidence in circumstances where the judge did not first determine if the child was competent to give sworn evidence.
- GW was found guilty of committing an act of indecency in front of a five-year-old daughter who is referred to as R. When R, the victim, was six years old, she provided evidence at a pre-trial hearing before a single judge of the Supreme Court and it was agreed that R was competent to give evidence but there was a question about her capacity to give sworn evidence.
- According to the uniform evidence law, the person must understand the obligation to provide truthful evidence in order to be competent to give sworn evidence. Now if a person is competent to give evidence but not sworn evidence, they may still give unsworn evidence, as long as the court informs them about the importance of telling the truth and other relevant matters. So during the pre-trial hearing, the judge assessed R's competence to give sworn evidence. However, the judge ruled that he was not convinced of R's capacity to give sworn evidence and suggested that her evidence may be taken as unsworn.
- This went all the way up to HCA and the HCA held that the pre-trial judge's failure to state his conclusion about R's capacity to give sworn evidence in the exact same terms of the uniform evidence laws did not indicate that he was not satisfied with her competence.
- So, the determination of whether the pre-trial judge was satisfied lacked the capacity to give sworn evidence, which required considering all the circumstances including the judge's assessment of R's competence as a 6-year-old child.
- The HCA also established that the High Court does not favour sworn or unsworn evidence when it comes to giving weight to them. Therefore the trial judge was not obliged to provide the instruction when it was required by the defence counsel. So, the fact that R did not give sworn evidence was not significant to the jury's assessment of the reliability of her testimony.
- Now, no specific instruction was necessary according to the Uniform Evidence Law, or the common law. So this case was an important decision in interpreting whether the judge must or may warn of any potential incapacity issue.
- *'Neither the fact that [the six-year-old] did not take an oath or make an affirmation before giving her evidence, nor that she was not subject to the sanctions that may apply to the failure to adhere to the oath or affirmation, was material to the assessment of whether [her] evidence was truthful and reliable such that the jury could accept and act upon it.'*

Warnings and special arrangements

This section highlights the key points relating to the treatment of children and witnesses in trials in Victoria. These are in addition to the discussions about **s 13**.

Section 165A(1) of UEA

- Judges in civil trials cannot give warnings about children based on stereotypes or assumptions about children, such as them being less reliable simply because of their age.

Section 32 *Jury Directions Act 2015* (Vic)

- **Section 32** permits a judge to give a direction about the reliability of the evidence of certain classes of witnesses (such as children) where the warning is based on specific matters (other than the witness's age). In other words, the judge can provide instructions to the jury about the

(3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

- **Leading Questions**
  - Prohibited
  - Dictionary definition – suggests answer or assumes the existence of fact not yet established
  - Can ask questions that try to exhaust witnesses' memory (try to job their memory) but cannot ask leading or suggestive questions
  - But **s 37** – allowable in certain circumstances
  - For instance, asking a witness 'On May 5th, did you see the defendant's car travelling on Jones Street at a high speed and collide head-on with the plaintiff's car?' Would that be considered a leading question? That would typically be rejected unless there is an objection from the opposing counsel. To elicit such evidence, the council should ask a series of non-leading questions instead, really focussing on letting the witness tell their story. An example where this rule was upheld is the case of
    - ***Martin v The Queen* [2013] VSCA 377:** In this case, the council asked numerous questions to exhaust the memory of the witness but the court firmly stated that leading questions were not allowed. However, there are specific instructions in the evidence act, that provide for the exceptions to the common law rule.

Exceptions to leading questions

See **S 37 of the *Evidence Act*** first before looking at these.

- **S 37(1) of the *Evidence Act*** outlines situations where leading questions may be allowed during the examination of chief or re-examination and these include when the courts grant permission when
  - the question relates to an introductory matter
  - When there is no objection made to the question and all other parties are represented by legal practitioners when the questions in relation to the matter are not in dispute
  - when the witness has specialised knowledge and the question seeks their opinion on a hypothetical statement of facts
- **S 37(2) of the *Evidence Act*** clarifies that in civil proceedings unless the court directs otherwise, the subsection 1 rule does not apply in questions related to an investigation, inspection or report made by witnesses in the course of carrying out public or official duties.
- **S 37(2) of the *Evidence Act*** specifies that the provision does not prevent the court from using its powers under the rules of the court to allow written statements or reports to be tendered or treated as evidence in chief.

Reviving memory (Document to refresh memory)

- **Section 32(1)** – the court can give leave for a witness to use a document to revive their memory
  - This means that if a witness is having difficulty recalling certain details, they can refer to a document to help revive their memory and provide an accurate testimony.

Identification

Introduction

- This type of Evidence is **only relevant to criminal proceedings.**
- Identification evidence is the evidence provided by the prosecutor which aims to establish that the accused person was witnessed to have committed a crime.
- Identification evidence is defined in the dictionary of the Evidence Act and refers to *'evidence that the person saw or heard somebody who resembles the accused at the time the offending occurred.*
- It has a number of **elements** which have been further explained in the HCA decision of ***Alexander v The Queen*** which includes
    - Recognition
    - Identify resemblance
    - Visual or non-visual recognition
- It is based on <u>what the witness has seen or heard</u> and not what this witness has been taught happened.
- Now what is important is that identification evidence of a person must have taken place at the time and place when the offence occurred. So this essentially means that the identifying witness was an eyewitness to the offence. Over the years, concerns have been raised about the reliance on identification evidence, <u>Eyewitness mis-identification has led to some substantial miscarriage of justice cases.</u> Forensic psychology research has demonstrated that eyewitness memory and recollection is not always as reliable as one may assume. We therefore have additional safeguards and warnings if the prosecution presents identification evidence.
- Assertion by a witness can take different forms, one type of identification assertion is visual identification evidence of which the admissibility is governed by **s 114 of the *Evidence Act***.
    - Visual Identification evidence refers to identification evidence that relates to identification based wholly or partly on what the person saw but it does not actually include picturing identification.
    - Visual identification evidence is subject to additional rules in order for it to be admissible in proceedings, for instance **s 114** requires the use of an identification parade, in which the witness identifies the accused as a person they witnessed at the scene at the time the crime took place. So this is required unless it was not reasonable to hold such a parade.
- The evidence act provides further limitation on the reliance of identification evidence by restricting the admissibility of picture identification in ***s 115***.
- Where identification evidence has been admitted **s 116 of *Evidence Act*** and the ***Jury Directions Act*** requires the judge to inform the jury, there is a special need for caution before accepting the identification evidence.
    - This mandatory warning aims to protect the accused and the system against the risk of witness misidentification and subsequently miscarriage of justice.

Hearsay

Introduction

Hearsay is not admissible. This is determined in **s 59 of *Evidence Act*** that states that Evidence of previous statements made by a person is not admissible to prove a fact that the person intended to assert by that statement. This hearsay rule applies to the testimony from a witness as to the making of the previous representation and to a document if these contain the previous representation. There are requirements for such evidence to be called by the hearsay rule

- Firstly the evidence is a previous representation
- Secondly the previous representation was made by a person and
- Lastly the evidence of the previous representation is adduced to prove the existence of a fact asserted by the representation.

Each of these elements have been comprehensively addressed in case law and by the Australian Law Reform commission and you will study those elements.

In principle, the law excludes, via the hearsay rule, statements made out of Court as evidence of the truth of what they were intended to assert. However, this is not only a very difficult rule to apply; it is also subject to a number of exceptions.

How does this apply?

Eg: If Andrew was studying at RMIT's library and he saw Bobby steal two library books from the library, he then told Carla about seeing this. In this case, Carla cannot subsequently give evidence to establish that the library books were stolen by Bobby. Carla can only give evidence to establish what Andrew has told her. Now Carla's testimony can be used to assert that she spoke to Andrew about what she saw, however, it is not to be used to establish that Bobby stole two library books.

The rationale for Hearsay rule is that such evidence is potentially unreliable and cannot be tested by cross-examination and it is also usually not the best evidence available.

There are however a number of exceptions to the Hearsay rule:

- **S 60 of *Evidence Act*** allows the admissibility of the evidence if it is being admitted for a non-hearsay purpose.
- Another exception is when it concerns so called first hand hearsay under the circumstances listed in **s 62 of *Evidence Act.***

Importance of purpose of statement

In principle, hearsay is not admissible. It is defined in Act, **s 59 (1)**. A simplified definition would be:

Evidence of a previous statement made by a person is not admissible to prove a fact that the person intended to assert by the statement.

It will immediately be observed that the hearsay rule fastens on the purpose for which a statement is to be admitted ('… to prove …'). This is the key to understanding hearsay. The point is made clear by example 2 at the foot of **s 59** (emphasis added):

Eg: P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

The statement would, however, be admissible to prove not that the handbrake was in fact defective, but that W had reason to believe that it was. W's state of knowledge might be relevant (N.B.!) if, for example, W is a defendant in an action for negligence caused by the car's running out of control owing to the defective handbrake, or if W is charged with a driving offence. P (or anyone else who saw the defective handbrake with their own eyes) would need to be called to prove the state of the handbrake in the external world, but anyone who heard P tell W about it could be called to give evidence that W knew of the defect, as long as the state of his knowledge is relevant of course. Furthermore, if W said that he was aware of that fact to anyone else, that person could be called for the purpose of showing that he was aware of it.

Subramaniam is the classic example of the same point. During the Malayan Emergency, a communist guerrilla insurgency in the 1950s in what is now peninsular Malaysia, the accused was captured by communists and forced to carry their ammunition. According to the original report,

The appellant described his capture thus:

When I was just walking down a small hill, where there was lallang at the sides, a Chinese man came out and asked me to halt; I did not know then that he was a communist; he came from behind me. I asked him why are you stopping me? I want to return home. He spoke in Malay and I replied in Malay. He then asked me: 'Do you know who I am?', and so saying he drew out a revolver from behind him; to all appearances he was a civilian; he pointed that pistol at me and said 'I am a communist' and it was then I knew that he was one. He asked me to produce my I. Card; when he looked at my I.C. he spoke something in his own language and two others came out; the three then surrounded me; of the other two one had a pistol and the other had a rifle about a yard long; they told me I could not return home; two of them had knives like sickles. **([1956] 1 WLR 965, 969f)**

What was relevant to the accused's defence of duress was the effect on the mind of the accused of the statement 'I am a communist', not the truth about the speaker's political convictions. This point becomes even clearer if we change the statement slightly to 'this gun is loaded'—it does not matter on these facts whether the gun is or is not actually loaded, because it is the effect on the hearer's mind that is relevant. So the statement is not admitted to prove the truth of what it asserts.

To take this point to its ultimate extreme: if the question were whether P was alive at the time in question, evidence that he was speaking to W would be admissible to prove that he was alive. Nothing would depend on the content of his statement as the only point would be that he was in a position to say something (anything), and therefore it would not be admitted to prove anything he intended to assert.

The reason why the law of hearsay is concerned with the purpose for which a statement is admitted, and whether it is admitted to prove its truth or for some other reason, is that courts do not give weight to something said out of court. **This is because statements made out of court are not made under oath, cannot be the subject of cross-examination and do not permit us to observe the demeanour of the speaker.**

But if we are admitting a statement not to prove the truth of what was said, but rather for some other purpose which does not depend upon its truth, then we are not contravening the basic value of the law of hearsay and the statement can be admitted.

(Imagine I told you: do not cite Wikipedia in your assignments. But then you had an assignment about the role of Wikipedia in primary schools' teaching. You would not be breaching my rule by citing Wikipedia in that assignment, because you would be using it not to show the truth of what Wikipedia says about anything but rather as a phenomenon in its own right and not in reliance on the truth of what the entries say.)

How to apply the rule

1. ***Is the evidence relevant? See Subramaniam v The Public Prosecutor [1956] WLR 965***

   |

2. ***Does the evidence fall within the scope of the hearsay rule?***
   - ***If so, prima facie inadmissible***

   |

3. ***Does it fall within an exception?***

   |

4. ***Even if within exception, should it still be excluded?***

Subramaniam further clarifies this. The effect on the accused state of mind when he was told I am a communist was relevant to the defence of duress. A truth of the speaker's political convictions was not the focus, rather, it was the **impact on the mind** that mattered. The statement was not admitted to prove its truth. But when it comes to hearsay, you have to think about **why** this statement matters. Is it to prove if what is said is true, or was it to prove something else? Like what someone knew? What did they feel? So statements that serve multiple purposes can be accepted in the court **as long as** they meet legal requirements for admissibility. On top of that, when it comes to hearsay, there are true and also apparent exceptions in the law.

- So **true exceptions** let you bring the evidence that can be used to prove if what was said, was in fact true.
- But with **apparent exceptions** like in ***Subramaniam's*** case, the statements are not allowed to be used as proof of the truth so that they do not breach the hearsay rule. So they can be submitted for other reasons or for other purposes.
- Exceptions are laid out in **s 62-75**.

Documents in Evidence **(WHETHER DOCUMENTS CAN BE USED AS EVIDENCE?)**

- In civil trials, you can use a wider range of documents because you witness the documents observed.
- However, in criminal trials, there is a so-called business records exception in **s 69** that lets you use certain documents that meet requirements.
- So, whenever you come across organisational documents and a hearsay problem. Think about whether it might be considered a business for the purposes of that exception.

Hearsay rule: s 59

(1) **S 59**: *"Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by that representation".*

- You cannot use what someone said in the past to prove that is actually true and that is referred to as an asserted fact in **S 59(2)**.
- Hearsay refers to a representation and to really get it, we have to look at what counts as a representation and what they mean by a previous representation. We also have to look at who said it and why it was said. So basically it means that you cannot rely on someone's old words as evidence of something being real.

The Accused's Right to Silence & Admissions

Introduction

A suspect has the right to remain silent during a **criminal investigation**. However, the right to silence extends across a number of stages of the criminal process. The right to silence derives from the seminal cases of ***Woolmington v Director of Public Prosecutions* [1935] AC 462** and ***Petty v. R* (1991) 173 CLR 95 (KOP 9.170)** and it intersects with the privilege against self incrimination.

It is also specifically protected in our ***Evidence Act*** which stipulates that unfavourable inference can be drawn if the accused person decided to remain silent during the criminal investigation and/or the criminal proceedings, the jury ought to be instructed accordingly.

If an accused person decides to make a statement for instance, the police or the victim, we have to look at the evidence of admissions. **S 81** of the evidence act stipulates that an admission is a previous representation that is made by a person who is or becomes party to a proceeding which includes an accused person in criminal proceedings and its representation at first to the person's interest in the outcome of the proceeding. Hence admission evidence can be considered in both criminal and civil proceedings as you will learn in this topic, admissions can be made in many ways. Admissions are not only oral statements, it could also be conduct such as fleeing a scene or even telling a lie.

Admissions are an exception to the hearsay rule and there are specific rules for them to be admitted into evidence. Courts have the discretion to exclude admissions on certain grounds:

- Firstly, courts can consider it unfair to a party to admit the admissions.
- Secondly, the court can deem the admissions unreliable

And we have further provisions about improperly obtained evidence such as evidence obtained by oppressive conduct which can also be applied for admissions.

There are other requirements for admissions, for instance:

- Written admissions need to be witnessed in order to have validity in the court
- In criminal proceedings, if a person is questioned by the police, they need to have received a **mandatory caution warning**. If such a warning is not provided the court has the discretion to exclude the admission as it was obtained improperly.

The rights to silence

The right to silence is actually a series of separate rights:

- the suspect's right to remain silent before trial when faced with official interrogation
- the accused's right to remain silent (not to give evidence) at trial
- the accused's right not to have guilt suspected by the fact-finder because of the exercise of those last two rights
- the privilege against self-incrimination.

It is possible to separate these rights. Thus, s 35 of the Criminal Justice and Public Order Act 1994 (U.K.) provides (in part):

(3) [… T]he court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

- United Kingdom
    - Section 35 *Criminal Justice and Public Order Act* 1994
    - Permits the jury to draw inferences from silence in certain circumstances.
- NSW
    - Section 89A of EA. (exceptions to the UEA) - allows for an unfavourable inference from silence.

Admissions - Introduction

For many centuries the common law has provided a variety of different tests for the admissibility of admissions. This tradition is continued by the Act.

Admissions are defined broadly in the Act to include what, at common law and under some other legislation still in force, are called confessions as well as admissions. The difference is/was that a confession is a full admission of guilt ('I shot the sheriff'), while an admission merely admits facts that are adverse to the person speaking without being a full 'hands-up' ('I was in the vicinity of the place where the sheriff was shot at the time in question', for example).

Provided they pass the applicable tests, (confessions and) admissions are admissible as a 'true' exception to hearsay, but under the Act s 82 the evidence must be given by someone who saw or heard the admission being made so that the tests now to be outlined can be applied to it.

Since the seventeenth century, and connected with the workings and abolition of the Court of Star Chamber (Habeas Corpus Act 1640 (Eng.) s 1), (confessions and) admissions have been subject to numerous tests designed not just to ensure their reliability, but also that they were obtained in a manner that respects what we should now call basic human rights: like Monsieur Jourdain, who spent his whole life speaking prose without knowing it, the English Courts spent many centuries applying human rights law without having that modern label to affix to it. This long tradition is continued by the Act.

It is also possible for conduct to be construed as an admission. This can be done only if 'the trial judge determines that, on the basis of the evidence as a whole, the evidence of conduct is reasonably capable of being viewed by the jury as evidence of incriminating conduct' (***Jury Directions Act 2015* s 20 (1) (b)**). ***Parkes*** is a good example even though it comes from a jurisdiction where the Act just referred to does not apply. Other standard examples of conduct that may be construed as an admission include lies and flight from justice.

In principle, even silence can be construed as an admission (although Parkes' conduct clearly went well beyond that) provided that the silence was not in the face of representatives of the state, in relation to whom the right to silence applies, but rather when the accused is speaking on equal terms with someone else. This emerges from the words 'an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence' in the Act s 89 (1).

Rules and discretions

Sections 84 and 85 create rules about admissions. If the accused disputes the matter, the Crown must prove, on the balance of probabilities (**Act, s 142 (1) (a)**), that the admission does not infringe the basic human rights standards laid down. All tests must be satisfied. If not, the admission cannot be used in evidence; it is not admissible and the jury will not hear of it. (The jury can, of course, still disbelieve an admission even if it passes all tests and is in evidence.)

Illegally or improperly obtained evidence

Introduction

When evidence is obtained illegally or improperly, it is **not automatically inadmissible**. Rather, the Court needs to balance the reasons for admitting the evidence against the reasons against doing so.

No automatic inadmissibility

It is a commonly-held delusion, possibly due to the influence of American crime shows, that evidence, if obtained illegally, is, for that reason alone, inadmissible. That is not so. Rather, a discretion exists to exclude such evidence. That discretion is to be exercised in accordance with a number of prescribed factors in the Act s 138 (3), which you should read carefully. Most of these are derived from the seminal judgment of ***Bunning v. Cross***.

The overall question is whether *'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'* (Act, **s 138 (1)**).

Note, however, that statutes rendering a form of conduct illegal may also provide that the illegality results in inadmissibility. For example, **s 464H** of the ***Crimes Act 1958* (Vic.)** on tape-recording of confessions. In that case the statute concerned overrides the rules in s 137 (*generalia specialibus non derogant*).

Improper conduct

Fewer cases exist of improper as opposed to illegal conduct, but there are three real or alleged instances in the cases (***Carr, Robinson, Camilleri***) and several more specified in the Act, **ss 138 (2) and 139.**

Summary

When evidence is obtained illegally or improperly, a balancing test is applied to determine whether it is to be admitted anyway.

Introduction

- Provides for the exclusion of evidence where it has been improperly or illegally obtained.
- **Applies in civil and (mostly) criminal trials.**
- **Section 138** is a codification of the ***Bunning v Cross*** discretion.
- ***Bunning v Cross:*** In this case, the court analysed the evidence of a breath analyser test that was sought to be excluded, there was a failure by the police officer to adequately inform the accused.

- Court said that the power to rule inadmissible unlawfully obtained evidence was not only concerned with the fairness of an accused.
- On one hand there is the goal of achieving a conviction and on the other hand the undesirable effect of giving a judicial approval or even encouragement of particular police conduct. This is a balancing exercise - the Public Policy Discretion.

Purpose of public policy discretion (Bathurst CJ)

Seeking the truth through relevant and reliable evidence	**Deterrence/Disciplinary Principle**
Protection of rights principle	**Judicial Integrity Principle**

The underpinning of s 138: (PRINCIPLES THAT COURT FOLLOW)

1. **Seeks the truth:** At all times, we need to consider whether the evidence supports accurate fact-finding.
2. Then there is a need for **deterrence/disciplinary principle:** There is a need to deter parties from engaging in particular conduct that is against public policy.
3. **Protection of rights principle:** Rights of parties during preliminary processes and during trial.
4. **Judicial Integrity principle:** Admission of improperly or unlawfully obtained evidence undermines the integrity and the legitimacy of the administration of justice.

Section 138

EVIDENCE ACT 2008 - SECT 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.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to

Character and credibility of the accused

Introduction

In a criminal trial, '*[a]n accused must not be cross-examined about a matter that is relevant to the assessment of the credibility of the accused, unless the court gives leave'* — **Act, s 104 (2)**, subject to the common-sense exceptions in **s 104 (3)**. But there are four other exceptions which are examined here. They concentrate on credibility as evidenced by prior bad character, which to all intents and purposes means a past criminal record. When can the accused's past criminal record be presented to the jury?

Character evidence—basic principles

Evidence reflecting on the character of a witness is **usually admissible** *'if the evidence could substantially affect the assessment of the credibility of the witness'* (**Act, s 103 (1)**). (A special regime is applicable to complainants in rape cases, partly for historical reasons and partly as a result of the special difficulties encountered by such complainants—those interested should refer to the non-examinable **ss 339 – 352 of the *Criminal Procedure Act 2009* (Vic.)**.)

The accused, if a witness at all, is in a special category. Generally speaking, **the accused is protected against attacks on credibility by means of demonstrating that he has a bad character (prior criminal offences)**. While this evidence might be relevant, as a matter of policy the law excludes it in order to ensure that the jury focuses on the facts of the offence in front of them, not just on whether the accused has a criminal history.

Losing the shield

There are, however, four ways in which the **accused can lose this protection** ('the shield'):

- if tendency and coincidence evidence is admissible – this will be discussed in the next topic
- if the accused calls character evidence designed to show the accused's own good character (**ss 109, 110, 112**)—in such a case the Crown is entitled, subject to leave (***Stanoevski***), to hit back with evidence of bad character, either generally or in a particular respect depending on what the accused put forward (***Zurita***)
- if the accused attacks the credibility of a prosecution witness outside the four corners of the defence being proffered (**s 104 (4), (5)**; ***Kocoglu***), of which the main example is giving evidence of the prosecution witness's prior convictions for offences of dishonesty such as theft unconnected with the case. In that case the Crown is entitled to show, in cross-examining the accused, that the person making the allegations against its witness, namely the accused, is of dubious character. Leave is required in order to ensure that the trial is not rendered unfair to the accused as a result of the revelation of the accused's past crimes.

A striking example of a case in which such leave should have been refused in the interests of ensuring a fair trial was ***"P." v. R* (1992) 61 SASR 75**. The accused was on trial for incest committed with his daughter and made statements in evidence which resulted in his losing the shield under the law then applicable (the statements being that his daughter had slept with many men; not being 'relevant solely or mainly to the witness's credibility' (s 104 (4) (b)), such allegations would probably not cause him to lose the shield under the present law, but that is not the point at the moment). As a result, the Crown had evidence brought forward that he had been convicted of attempting to rape his other daughter. This made a fair trial of the accused virtually impossible and as everyone is entitled to a fair trial (which is not a perfect trial, but also not an unfair trial) he should not have been deprived of the shield but should rather, to change the metaphor, have had a 'free kick'.

Section 101A

IF EVIDENCE SATISFIES THIS DEFINITION, IT WILL BE INADMISSIBLE AS PER S 102.

- Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that –
  - (a) is relevant only because it affects assessment of the credibility of the witness or person; or
  - (b) is relevant -
    - (i) because it affects the assessment of the credibility of the witness or person; and
    - (ii) for some other purpose for which it is not admissible, or cannot be used, because of the provision of part 3.2 to 3.6.

THIS DOES NOT MEAN YOU CANNOT ASK QUESTIONS TO THE WITNESS THAT MAY AFFECT THEIR CREDIBILITY BUT IT REFERS TO SITUATIONS WHERE YOU INTRODUCE EVIDENCE TO CHALLENGE THAT INADMISSIBILITY.

Nature of credibility evidence

- "credibility" of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence;
- "credibility evidence "is defined in section 101A;

  EVIDENCE ACT 2008 - SECT 101A

  Credibility evidence
  Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—

  (a) is relevant only because it affects the assessment of the credibility of the witness or person; or

  (b) is relevant—

  (i) because it affects the assessment of the credibility of the witness or person; and

  (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

- "credibility rule" means section 102;

  EVIDENCE ACT 2008 - SECT 102

  The credibility rule
  Credibility evidence about a witness is not admissible.

Relevant only to credibility

- See example in GPR at 294-5
- Evidence that is relevant in another way
- ***Adam v The Queen* [2001] HCA 57**

S 106 (2) EA

(a) Is **biased or has motive for being untruthful** (see e.g. ***Palmer v The Queen* (1998) 139 CLR 1**)
(b) Has been convicted of an offence, including an offence against the law of a foreign country (see e.g. ***R v Lumsden* [2003] NSWCCA 83**)
(c) Has made a **prior inconsistent statement**
(d) Is, or was, unable to be **aware of matters** to which his or her evidence relates (see e.g. ***Toohey v Metropolitan Police Commissioner* [1965] AC 595**)
Has **knowingly or recklessly made a false representation** while under an obligation, imposed by or under an Australian law or law of a foreign country, to tell the truth (see e.g. ***R v Gregory* [2002] NSWCCA 199**)

Section 108

ANOTHER EXCEPTION TO THE CREDIBILITY RULE - **Relates to re-establishing credibility of a witness.**

EVIDENCE ACT 2008 - SECT 108

Exception—re-establishing credibility

(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

*(2) * * * * **

The Commonwealth Act previously included a subsection referring to section 105 of that Act.

*(3) The credibility rule **does not apply** to evidence of a **prior consistent statement** of a witness if—*

(a) evidence of a prior inconsistent statement of the witness has been admitted; or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion—

and the court gives leave to adduce the evidence of the prior consistent statement.

- This may have the effect of restoring a witness credit, which may have been undermined in cross-examination.
- Meaning of subsection 3:
    - **If a Prior Inconsistent Statement is Admitted:** If the court has already admitted evidence showing that the witness made a previous statement inconsistent with their current testimony, the credibility rule does not apply. This allows the witness to present a prior statement that aligns with their current testimony to explain the inconsistency and clarify their position.
    - **If There is a Suggestion of Fabrication or Influence:** If it is suggested—whether directly or indirectly—that the witness's testimony is not genuine, has been fabricated, reconstructed, or is the result of external influence, the credibility rule does not apply. In this case, a prior consistent statement can be introduced to demonstrate that the witness has been consistent in their account over time, which may counter the suggestion of fabrication or influence.

Tendency and Coincidence Evidence

Tendency Evidence: Tendency evidence shows that a person has a particular tendency to act in a certain way or to have a certain state of mind. It's used to suggest that because of this tendency, it's more likely they acted in the same way in the matter being considered.

Key Points of Tendency Evidence:

- Focuses on the person's usual or typical behaviour.
- Seeks to show a pattern of conduct or a characteristic way of acting.
- Can be used to suggest that a person is more likely to have committed a specific act due to their past conduct.

Examples of Tendency Evidence:

1. A person with a history of committing fraud may have evidence presented about prior fraudulent acts to suggest they have a tendency to commit fraud.
2. A teacher accused of inappropriate conduct with a student might have evidence of similar conduct with previous students introduced as tendency evidence.
3. A driver with a record of reckless driving can have past incidents presented to show they have a tendency to drive recklessly.
4. An individual accused of theft who has a pattern of stealing from employers could have previous incidents admitted as evidence to show a tendency to steal from workplaces.
5. A defendant in a domestic violence case may have past instances of violent behavior admitted as tendency evidence to show they have a tendency toward violence in relationships.

Coincidence Evidence: Coincidence evidence (also known as "similar fact evidence") involves showing that two or more events are so similar that it would be an unlikely coincidence if they were not connected. Coincidence evidence is used to argue that, due to the striking similarities between different incidents, it is improbable that they occurred independently.

Key Points of Coincidence Evidence:

- Focuses on the improbability of similar events occurring by chance.
- Typically involves multiple, highly similar acts or circumstances.
- Used to argue that the similarity between events is too strong to be coincidental, suggesting a link between them.

Examples of Coincidence Evidence:

1. Multiple thefts with the same unusual method: If a series of thefts were committed in a highly distinctive manner, this pattern could be used as coincidence evidence linking the thefts to one individual.
2. A person accused of arson at several locations with similar timing and method: The similar characteristics of the fires might be used to argue that they are all connected to the accused.
3. Repeated allegations of similar misconduct in different workplaces: If someone has faced multiple accusations of similar inappropriate behaviour across various workplaces, this similarity can serve as coincidence evidence.
4. Multiple cases of fraud with unique techniques: If a defendant uses an unusual scheme in several fraud cases, this similarity can be coincidence evidence suggesting the same person is behind all incidents.
5. Several break-ins in the same neighbourhood using a rare tool or method: The unusual nature of the break-ins could suggest they are not coincidental but rather connected to one individual with a unique modus operandi.

Summary

- Tendency Evidence: Highlights a person's usual behaviour or inclination to commit certain acts.
- Coincidence Evidence: Focuses on the improbability of similar events occurring by chance, suggesting they may be connected.

Introduction

Tendency/coincidence evidence involves evidence of the accused's past misdeeds which does not merely go to credibility; rather, it is circumstantial evidence of guilt based on the accused's habitual criminal behaviour (tendency) or the unlikelihood that a series of apparent crimes would have an innocent explanation (coincidence). It is very powerful evidence and for that reason admitted only when it is highly cogent.

- It is concerned with identifying patterns in the events that gave rise to the offending.
- Coincidence evidence = similar fact evidence.
- Tendency evidence = propensity evidence.
- Under the common law, requirement of striking similarity:
- Admission of tendency and coincidence evidence is strictly controlled to ensure a fair reasoning process.

Relationship to relevance

Tendency/coincidence evidence is the classic example of evidence that is relevant but usually not admissible—not unless, in the criminal law, *"the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused"* (**Act, s 101 (2)**).

What is tendency/coincidence evidence?

These concepts are defined in Act, **ss 97 (1), 98 (1)**, which you must read carefully. 'Coincidence evidence' is an unfortunate label—as s 98 (1) shows, a better label would be something like 'improbability of coincidence evidence'.

Some cases, such as ***Perry***, can involve a combination of the two (Mrs Perry had a tendency to poison her male relations; and it is improbable that so many people around her would all coincidentally suffer from poisoning without human intervention of some kind). There is no strict line between the two. This does not matter to the extent that the same test is applicable to both. Nevertheless, it is always worth working out what exactly the path of reasoning is that lends the evidence its 'probative value' and thus deciding whether the evidence is tendency evidence, coincidence evidence or a combination of the two.

Makin is our example of coincidence evidence (and the classic case in this field); ***Sutton*** our example of tendency evidence. Although both pre-date the Act, they are excellent examples of these two concepts.

Sources of tendency/coincidence evidence

Tendency/coincidence evidence can also come in one of two main varieties as far as its source is concerned: it may be that the accused has been convicted of past crimes; or it may be that the accused is currently on trial for a number of related crimes. The latter variation is commonly the case in relation to sexual offences. In ***Sutton***, for example, to use tendency reasoning the jury would have to conclude beyond reasonable doubt that the accused had committed one of the rapes entirely independently of the other accusations for which he was on trial. If they drew that conclusion, they could then use that finding as tendency evidence in considering the accused's guilt of the other offences—he had a tendency not just to rape in general, but to rape in a way that had his personal trademark.

Relationship to the 'shield'

Opinion evidence

What is opinion evidence?

Nature of expert evidence

Generally speaking, witnesses are confined to reporting their own 'sense data', i.e. what they have themselves perceived with their senses. **Section 78** of the Act is an attempt, albeit a very poor one, to recognise that this principle has never prevented anyone from going slightly beyond their sense experiences by statements such as 'he was old' (rather than: he had a wrinkly face, grey hair, etc.), 'she was drunk' (not: her speech was slurred, she had difficulty walking in a straight line, etc.), 'it was raining' (not: I felt small drops of liquid landing on my body and observed them falling from the sky).

Apart from descriptions of that sort of everyday event, witnesses who are not experts are not entitled to give evidence of opinions as distinct from sense data. However, a person who 'has specialised knowledge based on the person's training, study or experience' (**s 79 (1)**) may go beyond sense data by drawing on accumulated knowledge or experience in the field in question, relying (if necessary) upon machines to come up with results and then interpreting those results to the jury or fact-finder.

Qualifications of experts

Most usually an expert is qualified by study as well as experience, but it is possible to be qualified by experience only, e.g. a truck driver who knows how trucks behave on the road. This can be seen clearly from the wording of **s 79 (1)**. In the usual case, however, an expert is merely asked, at the start of evidence, to provide a summary of the expert's career including things such as University degrees and practical experience afterwards. In case of dispute, however, the expert's qualification is a question of law for the Judge.

Limits and dangers of expert evidence

Opinion evidence of this type, drawing inferences from observed facts, has been the subject of much recent debate and many recent cases, for a number of reasons: the re-statement of the common law in the Act; the expansion in the number of cases in which expert evidence is proffered; the 'C.S.I. effect', which is 'the risk that greater weight is attached to forensic evidence than is warranted' (R v. "M.K." (2012) 223 A Crim R 572, 579); and concerns about the poor quality of some of the science put forward along with the possibility that jurors might accept it too readily because it bears the hallowed label of science. Several of the cases on the reading list involve attempts to stretch the concept of expertise beyond what it can bear by having experts give evidence which falls either outside their expertise ('wholly or substantially based on that knowledge' – **Act, s 79 (1))** or probably outside any topic on which anyone is likely to have useful expertise. Thus, for example, the conclusion of the High Court of Australia in ***Honeysett at [45]***f was:

"Professor Henneberg's evidence gave the unwarranted appearance of science to the prosecution case that the appellant and Offender One share a number of physical characteristics. Among other things, the use of technical terms to describe those characteristics – Offender One and the appellant are both ectomorphic [i.e. skinny] – was apt to suggest the existence of more telling similarity than to observe that each appeared to be skinny.

Professor Henneberg's opinion was not based wholly or substantially on his specialised knowledge within s 79(1). It was an error of law to admit the evidence."

Summary: Opinion evidence is evidence that goes beyond the witness's personal perceptions. Act s 79 lays out tests that must be satisfied before it can be admitted.

- Lay opinions [**s78**];
- Evidence expressed by a member of an Aboriginal or Torres Strait Islander group about the traditional laws and customs of the group [**s78A**];
- Evidence based on specialised knowledge [**s79**];
- Admissions [**s81**];
- Evidence of the grant of probate or letters of administration of convictions [**s92(3)**];
- Evidence adduced about the character of an accused or co-accused [**s110 and 111**]

The lay opinion exception [s78]

Evidence of a lay opinion comes within the **s78** exception if it:

(a) is relevant [**s55 and 56**];

(b) is based on what the person saw, heard or otherwise perceived about the matter or event [**s78(a)**];

(c) is necessary to obtain an adequate understanding of the person's perception of the matter or event [**s78(b)**].

"Necessary" – where it is the only way that the witness' perceptions can be understood

Eg: His fitch was clenched, and he was shouting, he appeared angry; he appeared angry is admissible if it is necessary to establish a complete understanding.

Illustrations of lay opinion

***R v Whyte* [2006] NSWCCA 75**

- Complainant alleged that the defendant "tried to rape me".
- **Spigelman J**
  - Admissible under s 78.
  - Because the accused's intent could not have been described by detailing body movements or other observable acts, consistent with ***Lithgow***
- **Simpson J**
  - Not admissible under s 78 as the complainant could have described the defendant's movements in a way that made clear that it was an attempted rape. (**X**)
- **Barr J**
  - Fact, not opinion.

***R v Van Dyk* [2000] NSWCCA 67**

- Mother testified "A look of wanting" on his face
- This was a layman exception because it was needed to understand the witness testimony, however it was ultimately excluded because it was **unfairly prejudicial** to the excused - if jury hears this, it will be damning evidence.

The lay opinion exception – examples:

- **Age of a person;**
- **Intoxication;**
- **Identity** – but see Kirby J in ***Smith v R;***
- **Speed;**
- **Weather;**
- **State of the road or floor;**

Privileges

Introduction

- Privilege is an exemption given by law to a person from answering questions which would result in the disclosure of information protected by the privilege.
- Privilege is justified on public policy grounds – certain information, regardless of its probative value, cannot be compelled as its non-disclosure outweighs the public interest in ensuring all relevant information is before the court (formerly known as 'Crown privilege')
- Courts must ensure that witnesses are aware of their right to the privilege (s 132).
- The court determines whether to uphold claims of privilege.
- Fact-finder cannot draw inferences from a witness who claims privilege (Dolan v Australian & Overseas Telecommunications Corp (1993) 42 FCR 206; C v T (1995) 58 FCR 1.

Nature and list of privileges

Some privileges are absolute, while others require a balancing between the need for the evidence and the reasons to keep it out of the Courts. We have already come across one example of the latter—the ability of certain close relatives of the accused to apply for an exemption from giving evidence for the Crown under s 18 of the Act, although for historical reasons this is not always seen as a privilege.

There are quite a few privileges, including:

- **self-incrimination (including civil penalties)**
- **client legal privilege (formerly known as legal professional privilege)**
- **settlement negotiations privilege**
- **public interest immunity (formerly known as Crown privilege)**
- sexual offence counselling privilege (Evidence (Miscellaneous Provisions) Act 1958 (Vic.), ss 32AB – 32G; "S.L.S." R [2014] VSCA 31, [224]ff)
- medical practitioners' privilege (ibid., s 28)
- priest/penitent privilege (Act, s 127)
- journalists' sources privilege (Act, ss 126J, 126K).

Only the first four are examinable in this course.

All these privileges are statutory (the first four in the above list, although now found in the Act, were inherited from the pre-existing common law, while the remainder were initially created by statute). None has constitutional status, unlike, for example, in the United States of America, where the privilege against self-incrimination is protected by the Fifth Amendment to the federal Constitution. However, s 25 (2) (k) of the Charter of Human Rights and Responsibilities (Vic.) recognises the right of the accused 'not to be compelled to testify against himself or herself or to confess guilt'. This is narrower than the evidentiary privilege (which applies to anyone, not just those accused) and can also be overridden at any time by Parliament.

However, in accordance with our usual approach to basic rights, it is expected that Parliament will express itself quite clearly if it desires to abrogate one of the privileges: Daniels v. Australian Competition and Consumer Commission (2002) 213 CLR 543, 558f (no need to read). Sometimes there are good reasons for abrogating one or other privilege, but Parliament must be clear about what it is doing and put the community on notice of the pending restriction of its rights.

Every privilege is ‘owned’ by someone and can be waived by that person. Mostly it is obvious who ‘owns’ a privilege, or the Act tells you. It is important to note that client legal privilege is ‘owned’ by the client, not the lawyer (this was one of the reasons for the change in its name), and thus only the client, not the lawyer acting without the client’s instructions, can waive it.

Self-incrimination privilege

This is set out in s 128 of the Act. There is no need to reproduce or to paraphrase that section here. You should read it carefully and we shall also go through it in lectures/ lecture recordings. The basic idea is taken from the common law, but the concept of being required to give the evidence anyway in return for a certificate prohibiting its use, or the use of anything discovered as a result of the evidence, is new.

A Victorian certificate has effect in the other Australian jurisdictions listed in reg. 9A of the Evidence Regulations 2009 (Vic.), but you will not be expected to have these Regulations with you in an examination.

Related to, but different from, the privilege against self-incrimination is the privilege against expo-sure to civil penalty. This does not mean damages or any ordinary civil liability! There is no privilege against exposing oneself to ordinary civil liability to damages (Witnesses Act 1806 (U.K.)). Rich will give you more information about what exposure to civil penalty does mean, beyond the uninformative cl. 3 of Part 2 of the Act’s Dictionary.

The privilege against self-incrimination (and its little sister) apply in both criminal and civil proceedings. It is not relevant what type of proceedings are in progress—the question is whether the witness reasonably fears giving an answer that will be incriminating. For example, if asked ‘was the heroin yours?’ in any proceedings, civil or criminal, you can answer ‘yes’ (thereby waiving the privilege) or ‘I prefer not to answer that question’ (everyone knows the reasons for your preference, but you have not admitted possessing it).

In criminal proceedings, the accused cannot usually take advantage of s 128 (sub-section (9) is rarely needed). This is because the accused is not compellable to give evidence at all. If the accused chooses to give evidence anyway, that constitutes a waiver by the accused of the privilege against self-incrimination in relation to the facts in issue in the case: Act, s 128 (10); Cornwell v. R (2007) 231 CLR 260 (no need to read). Thus the accused cannot choose to give evidence about everything except the charges; once the choice to give evidence is made, evidence about the facts in issue in the case must be given even if it is self-incriminating. Accused persons who do not wish to do that should exercise their right not to give evidence at all.

Client legal privilege

As can be seen from the Act ss 118 and 119, this comes in two varieties: legal advice privilege and litigation privilege. Note that the latter is broader, as it includes communications not involving the intervention of a lawyer.

The dominant purpose test usually requires us to judge the reason for the document’s initial creation. It should be noted that, in cases from 1976 to 1999, the test used was ‘sole purpose’. This is now out of date, and in any cases during that time you should read ‘dominant purpose’ instead.

Copies of documents are to be judged in their own right, without any assumptions based upon the status of the originals. Thus it is possible for originals to be privileged but not copies or vice versa: Commissioner Australian Federal Police v. Propend Finance (1997) 188 CLR 501 (no need to read).