

LAWS2016

Mid Sem Scaffold

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TOPIC 2: Relevance

IS THE EVIDENCE ADMISSIBLE OR IS IT EXCLUDED UNDER THE RELEVANCE RULE?

- ☐ What are the facts in issue
- ☐ Rationally affect the assessment of the probability of the existence of a fact in issue
- ☐ Is it provisionally relevant
- ☐ The court can draw inferences
- ☐ Is it admissible or not (subject to other exclusions)

NB: Courts general discretion to admit or not admit evidence s136, go to page 53

Relevant evidence is evidence which, if accepted, could rationally affect the assessment of probability of the existence of a fact in issue in the proceeding. *Papakosmas at [21] – [81]; s55(1) Evidence Act*

What are the facts in issue?

- 1) Determine if we are dealing with a criminal or a civil case
 - a. Civil: Factual elements of the cause of action or legal defence relied upon (i.e., pleadings)
 - b. Criminal: Factual elements of the offence and any defence relied upon
- 2) Whether a fact is a fact in issue depends on the pleadings and particulars of each parties case *Goldsmith*
- 3) The elements of the offence, the ultimate issues will be expressed in terms of the elements of the offence *Smith (NB: Criminal Case)*.
 - a. Examples of facts in issue
 - i. Smith: Was the person in the photo, the accused
 - ii. Papakosmas: Was there consent
 - iii. Evans: Did the accused commit the crime

Would the evidence rationally affect the assessment of the probability of the existence of a fact in issue?

- 1) The test is if the evidence of [INSERT] were accepted, could it rationally affect (directly or indirectly) the assessment of the probability of the existence of the fact in issue? *s55*
 - a. There must be a 'minimum logical connection' between the evidence and a fact in issue *Papakosmas* this is an objective test grounded in human experience.
 - i. This is a test of logical relevance, and not one of probative value – evidence is either relevant or it is not *Smith*
 1. When conducting the test you assume that the evidence is reliable and true *Papakosmas*
 2. The evidence does not need to make a fact 'probable', just more or less probable than it would be without the evidence (it just has to affect the probability).
[Not different material]

- a. Evidence **is not relevant** if it is founded on **material which is not different from the material available to the jury** *Smith*
 - i. In this case, it was police witness testimony, which was not relevant. The police reaching a conclusion about the identity of the defendant did not provide a logical basis for affecting the jury's assessment as it was not based on anything different.
 1. **HOWEVER**, if the Police had special knowledge of his appearance this may have been admissible (i.e., a finger print expert)
 2. Kirby dissented, as the police had seen the defendant before, and he did not think the bar should be set to high.

[Requiring clothing and speaking]

- b. Requiring an accused to wear clothing after viewing footage was deemed relevant *Evans* because if the defendant looked similar to footage it would be probative value (3:2 Decision)
 - i. Dissent was because, the central issue was whether he was the robber, not what the robber was wearing, therefore dressing the defendant up would add no probative value.
- c. Requiring an accused to speak certain phrases was deemed relevant *Evans* (3:2 Decision)
 - i. [NB: Although, likely should be excluded through s137 per Kirby]

[Sexual Assault]

- d. Evidence of other victims complaints of sexual assault, and non-consent are not relevant *Phillips* this case has attracted a lot of criticism but is the current position
 - i. This was a strict application of the common law, but essentially was 'evidence of another complainants state of mind has no bearing on this complainants state of mind at the time and therefore has no probative value'
- e. Evidence from three witnesses about the plaintiff complaining about a sexual assault was relevant the fact the statements were closely contemporaneous with the events alleged, would go to probative value *Papakosmas*
- f. in almost every conceivable instance of sexual assault, evidence the victim complained at first reasonable opportunity could rationally affect assessment *Papakosmas per McHugh*
 - i. In obiter Gleeson and Hayne suggested this is not a fixed rule and the (1) nature of the complaint (2) circumstances in which it was

TOPIC 5: Adducing Evidence – Witnesses

Calling a witness

- ☐ State the evidence act is silent on calling witnesses but state s11

Civil

- ☐ Have both parties consented, if not then the court cannot
- ☐ If a party fails to call a witness, it may draw an adverse reason for that failure provided

Criminal

- ☐ Has prosecutor called all witnesses?
- ☐ Can the court call a witness?
- ☐ Has the prosecutor failed to call a witness?
- ☐ Outcome for failing to call witnesses
- ☐ Adverse inferences

The evidence act does not deal with the calling of witnesses by a party or a court, therefore it is left to the common law and the general power of the court to control the conduct of proceedings in [s11](#)

Note: the court also have control over questioning of witnesses, and can make orders through [s26](#) regarding,

- (a) the way in which witnesses are being questioned,
- (b) the production and use of documents and things in connection with the questioning of witnesses
- (c) the order in which parties may question witness
- (d) the presence and behaviour of any person in connection with the questioning of witnesses

Civil Cases

The court cannot call a witness in civil

- 1) The court will only call a witness with the consent of **both parties** [Clarke Equipment](#)
 - a. This is an absolute rule.
 - b. The court will not call a witness if one party has not consented

Adverse inferences for not calling a witness

- 2) Pursuant to [Jones v Dunkel](#) where a party fails to call a witness, the jury may draw a adverse inference that the failure was that the witness would not assist the parties case provided the following two elements are satisfied
 - a. The witness was available to testify
 - b. There is no reasonable explanation for the failure to call

Questioning of Witnesses Overview

General Order of Examination

- Prosecution presents their case first
 - Prosecutions direct examination (in chief) of Prosecutions Witness
 - Defence's cross examination of Prosecutions Witness
 - Potentially, Prosecutions cross-examination of its own witness if unfavourable s38
 - Prosecutions re-examination of Prosecutions Witness s39
- Defendant goes next. For each defence witness
 - Defence direct examination (in chief) of Defence Witness
 - Prosecutions cross-examination of Defence Witness
 - Potentially, Defence cross-examination of own witness if unfavourable s38
 - Defence re-examination of Defence Witness, pursuant to s39

Witness: examination in chief

- ☐ Parties controlling questions
- ☐ Leading questions are prohibited
- ☐ Reviving a witnesses memory
- ☐ Cross examination of own unfavourable witness
- ☐ You cannot pre-empt and treat a witness as unfavourable to 'rehabilitate credibility'
- ☐ Questioning by a judge

Parties controlling the questions

- 1) The parties are able to question any witness [s27](#) and do so in any way they see fit, subject to rules in the act [s29\(1\)](#)
 - a. However, the court can make orders as it considers just in relation to the way in which [s26](#)
 - i. the way in witnesses are to be questioned, [s26\(a\)](#)
 - ii. the production and use of documents and things in connection with the questioning [s26\(b\)](#)
 - iii. the order in which parties may question a witness [s26\(c\)](#)
 - iv. the presence and behaviour of any person in connection with the questioning of witnesses [s26\(d\)](#)
 - b. But the only duty on the trial judge is to ensure the parties get a fair trial [GPI](#)

Leading questions are prohibited in examination in chief unless they fit an exception [s37](#)

- 1) Is it a leading question?
 - a. Pursuant to the [EA Dictionary](#)
 - i. a leading question one is one which, directly or indirectly suggests the answer; OR
 - ii. assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.
 1. For example: "what did you do after smith hit you" assumes that smith hit you