

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 too 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

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

- b. Leading questions are often yes or no although not all are *State v White*

2) **Is it nonetheless permissible?**

- a. The court gives leave *s37(1)(a)* in which case the *s192* factors must be considered
- b. The question relates to a matter introductory to the witnesses evidence *s37(1)(b)*
- c. No objection is made to the question and both parties are represented by lawyers *s37(1)(c)*
- d. Question relates to something not in dispute *s37(1)(d)*
- e. The witness has specialised knowledge based on training/study/experience and the question is asked to obtain their opinion on a hypothetical about fact in respect of which evidence is given *s37(e)*

Examples

- o 'Did you see another car coming very fast from the opposite direction?' (conflates 2 questions)
- o 'What did you do after Smith hit you' (putting to the witness that Smith hit him)
- o Following police W's evidence that search had taken place: 'did you find anything similar to a remote control for a garage door' *Thi Dung*
 - (were trying to establish that a garage door remote was found in the car - could have been framed as 'did you find anything in the search?')

Reviving a witness's memory

3) **Attempts to revive memory in court *s32***

- a. A witness is not allowed to use documents to revive their memory without leave of the court while giving evidence *s32(1)*
 - i. When giving leave the court will consider whether *s32(2)*
 - 4. The witness can remember without documents *s 32(2)(a)*.
 - 5. Whether doc made by witness was made when events were fresh in his memory and accuracy of doc to be used: *s 32(2)(b)*.
 - ii. The witness is then allowed to read the document allowed *s32(3)*
 - iii. The court may request the document be produced to the other party *s32(4)*

4) **Attempts to revive memory out of court *s34***

- a. The court may, on the request of a party, direct that documents used by a witness are produced to the other party *s34(1)*
 - i. Failure to do so may render the witnesses evidence inadmissible *s34(2)*
 - ii. The court is able to adjourn proceedings so that witnesses can revive their memory using documents outside of court through its inherent jurisdiction *Da Silva*

5) **[Criminal Only] Police officers in court *s33***

- a. Police can give evidence in criminal proceedings for the prosecution by reading or being led through statement previously made by them: *s 33(1)*.
- b. For this to be done, they must follow the requirements in *s 33(2)*.

TOPIC 6: Documents and Real Evidence

DOCUMENTS

- ☐ Abolition of common law document rules
- ☐ Is it a document?
- ☐ Can the document be tendered, how are its contents to be proved?
 - ☐ See section 48
 - ☐ See case law regarding transcripts of recordings
 - ☐ Can summaries be admitted?
 - ☐ Documents do not need to be authenticated
 - ☐ Court can draw inferences s58
 - ☐ Evidence given by persons regarding document s170-171
- ☐ Is the document in a foreign country?

The common law rules about 'original documents' are abolished pursuant to [s51](#) we therefore turn to statute.

Is the item a document?

- 1) Prima facie, Documents are defined in [s.3](#) and includes
 - a. anything on which there is writing, marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or sounds, images or writings can be reproduced with or without the aid of anything else, or a map, plan, drawing or photograph. (go to section)
 - b. **References to documents include:** any part of a document, a copy, reproduction, or duplicate, any part of a reproduction
 - i. Evidently this would include
 1. Books, bank statements, recordings of phone calls, transcripts, CCTV
 2. Video footage does because it is a series of photographs [Wade](#)
- 2) Is it a document in question?
 - a. Pursuant to [s47](#), we are concerned with documents in question, which refers documents which contain information, which is sought to adduce evidence, including copies of documents.
 - i. Note for copies includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.
 - ii. Write: Prima facie, the [INSERT] is a copy of a document as it has [FEATURE] and as the document is identical in all relevant respects seeking to adduce evidence is a document under [s47\(2\)](#)
- 3) Write: Prima facie, the [INSERT] is a document has [FEATURE] and as the document is seeking to adduce evidence is a document under [s47\(1\)](#)

TOPIC 8: Hearsay

Is the evidence inadmissible because of hearsay?

- ☐ Is the evidence relevant?
- ☐ Does the hearsay rule apply?
 - ☐ Identify the previous representation
 - ☐ What is the intended asserted fact in the previous representation
 - ☐ Is the evidence of the previous representation being adduced to prove that fact in the previous representation?
 - ☐ Yes – then the information is excluded unless it fits an exception.
- ☐ Does an exception apply?
 - ☐ Previous representations for a non-hearsay purpose
 - ☐ First hand exceptions
 - ☐ Contemporaneous representations about health, feelings, sensations, intention, knowledge or state of mind
 - ☐ Other exceptions
 - ☐ Business records
 - ☐ Tags, labels, writing
 - ☐ Electronic communications
 - ☐ ATSI
 - ☐ Reputation as to relationships and age
 - ☐ Reputation of public or general rights
 - ☐ Admissions
 - ☐ Judgment or conviction exceptions
 - ☐ Character of and expert opinion about the accused
- ☐ Would evidence nevertheless be excluded or use limited s136

If someone is in “quotes” or says “X told me” think about hearsay

REMEMBER: Even previous statement by the witness themselves are hearsay. i.e. If you recall something you said to someone else, is still hearsay.

REMEMBER: It's not the statement, but what the statement is being *used* to prove that decides whether it's hearsay.

E.g. Bill states out of court “I say Amy punch Cameron”

- = hearsay if Amy is on trial for punching Cameron.
- = Not hearsay if Cameron is suing Bill for defamation.

Definition: Hearsay evidence is evidence of a previous statement other than one made by a person giving oral evidence in the proceedings which is adduced to prove the existence of a fact within that statement.

Does the hearsay rule apply?

Evidence of a person's previous representation is not admissible to prove the existence of a fact that the person intended to assert by that representation [s59\(1\)](#).

- The issue is whether the [PREVIOUS REPRESENTATION] is being used for a hearsay purpose

Is there a previous representation?

[Is there a representation]

1) A representation is an out of court statement and may be [EA Dictionary](#)

a. Express or implied

- i. Express: e.g. "daddy is on the phone"
- ii. Implied: e.g. "Hi Daddy" = implied Dad is person on the phone; "Is the shop open today" = implied representation that the shop is going to open

b. Oral, in writing or inferred from conduct

- i. Inferred from conduct: e.g. victim pointing to a photograph to indicate attacker

c. Evidence of the representation may be given as:

- i. All statements/conduct: Encompasses all that those statements or that conduct would convey to the listener, reader or observer: [Lee v The Queen](#)
 1. Includes contents of a document which contains the previous representation
 - ii. Silence: Silence in the face of an allegation can amount to a representation that the allegation is true where in the circumstances it is reasonable to expect that the allegation would be answered by an explanation or denial; such an expectation would not be reasonable where the allegation is made to a suspect who has been warned that he has the right to remain silent: [R v Rose](#)
 - iii. Previous court proceedings: Representations made in previous court proceedings would be caught
 - iv. Testimony from a witness about the making of the statement: Includes previous statements made by the witness who is testifying in court where they are being adduced to prove the facts they assert rather than to support or impeach credibility
 - v. Interlocutory Phase: Also covers statements made in interlocutory phase of the same proceedings
- d. a representation **not intended by its maker to be communicated** to or seen by another person, or
 - e. a representation that for any reason is **not communicated**.
- ##### f. Does NOT include:
- i. Statements made on affidavit in relation to current proceedings

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*always establish relevance

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Tendency and co-incidence

Character of the accused

Opinion

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Admissions

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Topic 9: Tendency and Coincidence Evidence

- ☐ Always consider relevance
- ☐ Tendency Evidence
 - ☐ General Principle
 - ☐ Reasonable Notice
 - ☐ Significant Probative Value
- ☐ Coincidence
 - ☐ General Principle
 - ☐ Reasonable Notice
 - ☐ Significant Probative Value
- ☐ Is there discretion to exclude? – go to

NOTE: If evidence is admitted for a different purpose, you still cannot admit it as Tendency or Co-incidence evidence. **s95** if this is the case a anti-tendency direction should be given **BRS**

[e.g., if P adduces bad character evidence in rebuttal of D's good character evidence in CRL trial (see below) then cannot use this to establish a tendency: BRS v R [bad character evidence of another sexual assault of pupil]

Tendency (where identity is known)

Evidence of a person's character, reputation, conduct or tendency being led for the purpose of proving the person has or had a tendency to act in a particular way or have a particular state of mind is prima facie inadmissible
s97(1)EA

Does it fall into an exception

- 1) However tendency evidence may be admissible if:

[1] There is reasonable notice; and **s97(1)(a)EA**

- a. Unless the court has dispensed with notice requirements **s100EA**
- b. If introduced to explain or contradict tendency evidence of the other party is not required
s97(2)(b)EA

[2] The court must be convinced it has significant probative value **s97(1)(b)EA**

[Generally]

- c. This requires that the evidence, could rationally affect the assessment of the probability of the fact in issue **EA Dictionary** to a **significant extent** **Hughes; IMM** this is a case by case inquiry
 - i. In sexual assault cases, there should be some feature which links the offending **Dennis**

- ii. The judge is to take the evidence at its highest, when making the assessment, by assuming it is reliable and truthful *IMM*
- iii. This requires more than mere relevance, but less than a substantial degree of relevant *Lockyer* the more particular the more likely.
- iv. Significant probative value which is ‘important or of consequence’ *IMM*
 - 1. NSW is a lower threshold than Vic, we consider
 - a. Frequency *Jacara; Hughes*
 - b. Time gap *Jacara; Hughes*
 - c. Degree of similarity or unusual feature *Jacara; Hughes*
 - d. Relationship *IMM*
 - e. Unacceptably high risk of concoction *AE; s94(5)*
 - f. Multiple complainants, usually require some ‘feature which links them together’ *Hughes; McPhillamy* if individual no special feature required *Bauer*
- v. If the evidence is from the same day it is likely viewed as the one ‘transaciton’ *LJW*
- d. “there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged” *Hughes*
- e. The extent to which the evidence supports the tendency *Hughes; TL*
- f. The extent to which the tendency makes more likely the facts of the offence *Hughes; TL*

[Criminal]

- a. The significant probative value must outweigh the prejudicial effect *s101*
 - a. This prejudice could include the jury *Hughes*
 - i. Failing to consider that the person, may not have had that state of mind or acted in that way in the occasion.
 - ii. Failing to consider that many people may share the same tendency.
 - iii. That the jury may be clouded by an emotional response.
 - iv. Where the past conduct is in relation to uncharged conduct
- b. This may be overcome by an anti-tendency direction *Hughes; Hamilton*

[Child Sexual Offences] – must be a under 18 at time of offence, and is clearly sexual offence *s97A(6)*

- c. However, if it relates to a child sexual offence *s97A* applies and there is a presumption that the evidence has significant probative value if it relates to
 - a. the defendant’s sexual interest in children, (even if not acted on) or *s97A(2)(a)*
 - b. the defendant acting on that sexual interest *s97A(2)(b)*
 - c. this applies even if the sexual interest was not directed at the complainant *s97A(3)*