

LAW5012 - EVIDENCE NOTES

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INTRODUCTION

| INTRODUCTION | | |
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| GENERAL PRINCIPLES | <ul style="list-style-type: none"> ● Reliability principle: Quality of decision is determined by the quality of the evidence that goes before the trier of fact – exclude evidence that is unreliable (e.g. hearsay, because the evidence cannot be tested in cross-examination); ● Libertarian/Protective principle: Evidence excluded to redress potential unfairness in a contest between an individual and the State (e.g. privilege against self-incrimination); and ● Disciplinary principle: Discretion to exclude illegally obtained evidence (the court will not eat the fruit of the poisoned tree). | |
| EVIDENCE ACT | <ul style="list-style-type: none"> ● Applies to all proceedings in a Victorian court (s 4). <ul style="list-style-type: none"> ○ ‘Victorian court’ means “(a) the Supreme Court; or (b) any other court created by Parliament—and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence” (s 3). ● The Act is not a code. <ul style="list-style-type: none"> ○ Rules and principles of common law and equity (s 9) as well as the courts’ general powers (s 11) continue to apply, except to the extent the Act provides otherwise expressly or by necessary intendment. ○ N/B: There is some authority that Chapter 3 (admissibility) effectively operates as a code; abrogating the common law (McNeill v R). <ul style="list-style-type: none"> ■ See s 56: “except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding” – ie, it is only admissible if the Act provides. | |
| BURDEN AND STANDARD OF PROOF | <ul style="list-style-type: none"> ● Standard of proof = degree to which an issue must be proved ● N/B: a note on terminology - Burden of Proof: Who has the onus of proving a particular issue? <ul style="list-style-type: none"> ○ Evidential burden: Is there sufficient evidence for the issue to go before the jury? ○ Legal burden: Has the issue been proved to the requisite standard? | |
| | Criminal Standard of Proof | <ul style="list-style-type: none"> ● Standard is BRD (s 141(1)) ● Elements of the offence: prosecution bears both the evidential and legal burden ● General defences: defence bears evidential burden, but prosecution bears legal burden; ● Affirmative defences (e.g. mental impairment): defence bears both the evidential and legal burden (standard is on BOP; s 141(2)). |
| | Civil Standard of Proof | <ul style="list-style-type: none"> ● In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities (s 140(1)) |

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| VOIR DIRE - S 289 | <ul style="list-style-type: none"> • Questions of admissibility, the use to which evidence may be put and competence • and compellability are determined on a 'voir dire'. <ul style="list-style-type: none"> ◦ I.e. Arguments, objections and rulings typically occur in the jury's absence in order to avoid contaminating the jury's reasoning processes and these are conducted by way of a voir dire. These often occur at the very beginning of a trial. • The voir dire usually takes place in the absence of the jury. | |
| JUDICIAL DIRECTIONS AND WARNINGS | <ul style="list-style-type: none"> • In some cases, a judge may direct a jury as to how they should approach certain forms of evidence, and/or may warn them about the dangers of certain types of evidence • Such directions/warnings may have a significant impact on the outcome of a trial, and are a common ground of appeal. <ul style="list-style-type: none"> ◦ In general terms, ◦ a direction on law = binding whereas a warning/comment = advisory. | |
| | <table border="1"> <tr> <td data-bbox="402 726 602 1852"> Unreliable evidence - s 32 Jury directions Act </td><td data-bbox="602 726 1498 1852"> <p>Definition of unreliable evidence – s 31 Jury Directions Act 2015 In this Division— "evidence of a kind that may be unreliable" includes—</p> <ul style="list-style-type: none"> (a) hearsay; admissions; and (b) evidence where the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like; and (c) evidence given by a witness criminally concerned in the events giving rise to the trial; and (d) evidence given by a witness who is a prison informer; and (e) oral evidence of questioning by an investigating official where the questioning is not acknowledged by the accused. <p>Direction of unreliable evidence – s 32 Jury Directions Act 2015</p> <ul style="list-style-type: none"> (1) The prosecution or defence counsel may request that the trial judge direct the jury on evidence of a kind that may be unreliable. (2) The prosecution or defence counsel must specify— <ul style="list-style-type: none"> (a) the significant matters that may make the evidence unreliable; or (b) if evidence given by a child, the significant matters (other than solely the age of the child) that may make the evidence of the child unreliable (3) In giving a direction, the trial judge must— <ul style="list-style-type: none"> (a) warn the jury that the evidence may be unreliable; and (b) inform the jury of— <ul style="list-style-type: none"> (i) the significant matters that the trial judge considers may cause the evidence to be unreliable; or (ii) if the direction concerns evidence given by a child, the significant matters (other than solely the age of the child) that the trial judge considers may make the evidence of the child unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. </td></tr> </table> | Unreliable evidence - s 32 Jury directions Act |
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| LEAVE PERMISSION OR DIRECTIONS | <p>Leave, Permission or Direction - s 192 Evidence Act 2008</p> <p>(1) A court may give any leave, permission or direction on such terms as the court thinks fit.</p> <p>(2) In deciding whether to give the leave, permission or direction, it is to take into account:</p> <ul style="list-style-type: none"> (a) is it likely to unduly lengthen or shorten the hearing; (b) would it be unfair to a party or to a witness; (c) the importance of the evidence; (d) the nature of the proceeding; and (e) the power (if any) of the court to adjourn the hearing or to make another order direction. | |
| DIRECTIONS TO EXCLUDE EVIDENCE | S 135 | <ul style="list-style-type: none"> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: <ul style="list-style-type: none"> be unfairly prejudicial to a party; or be misleading or confusing; or cause or result in undue waste of time. |
| | S 136 | <ul style="list-style-type: none"> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might: <ul style="list-style-type: none"> be unfairly prejudicial to a party; or be misleading or confusing. |
| | S 137 | <ul style="list-style-type: none"> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. |
| PROBATIVE VALUES VS. PREJUDICIAL EFFECT | Probative value | <p>Dictionary (Evidence Act)</p> <ul style="list-style-type: none"> "probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue; <ul style="list-style-type: none"> "Probative" is a derivative of the Latin word for "proof" – to have "probative" value means "value as proof" e.g. super clear CCTV footage would = highly probative vs. someone who is legally blind in one eye, making an observation in hazy conditions that the accused was somewhere near the crime scene |
| | Prejudicial effect | <ul style="list-style-type: none"> The Evidence Act does not define the term 'unfair prejudice'. Consistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt 'an illegitimate form of reasoning' or 'misjudge the weight' to be given to particular evidence. An inability to test the reliability of evidence may carry with it the danger of such misjudgment. Evidence is not unfairly prejudicial because it inculcates the accused.'" (Dupas v The Queen) <p>ANALOGISE/DISTINGUISH</p> <ul style="list-style-type: none"> Pfennig v R - Mr P is charged with the murder of a 10yo boy |

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| | | <p>(Michael Black). Last seen somewhere near Murray Bridge, playing at the reserve near the bridge. He had been seen talking to Mr P who had his van parked nearby. Michael was never seen again and never found.</p> <ul style="list-style-type: none"> ○ Prosecution's case was entirely circumstantial, incl. proof of Mr P's abduction of another young boy, this boy was taken in Mr P's car whilst the boy was on a bike. Placed the bike on the side of the road (i.e. also staged the scene, Mr. P pleaded guilty to that crime). ○ Prosecution wanted to admit evidence of the second abduction as proof of the circumstances of his guilt in relation to the first boy (whose body was last seen near the river), ○ Issue for HCA on appeal - can you admit evidence of later offending on charges for the murder of Michael Black? <p>HELD: Evidence was admissible. Mason CJ, Deane and Dawson JJ cited Hoch as establishing that propensity evidence, being a subset of circumstantial evidence, will only have probative value beyond its prejudicial effect when there is no reasonable view of the evidence consistent with the innocence of the accused.</p> <ul style="list-style-type: none"> ● "But prejudicial effect and probative value are incommensurables" (<i>Per McHugh J in Pfennig v R</i>) <u>i.e. there is an element of value judgement</u> ● Exam tip: Lecturer says given it's a value judgement, everyone likely to get diff answers, just show your reasoning |
| | Sub-Conclude | <ul style="list-style-type: none"> ● Conclude whether or not the probative value outweighs any prejudicial effect |

RELEVANCE

| RELEVANCE Admissions, Tendency, Hearsay, Credibility/Character | | |
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| STEP 1 - IDENTIFY THE FACT IN ISSUE | <ul style="list-style-type: none"> Fact in issue = the factual/legal element (relevant to allegation) that is in dispute <ul style="list-style-type: none"> Factual Issue (e.g. did D actually do it); or Legal issue (e.g. elements in an offence) N/B: concept not found in <i>the Evidence Act</i>; take these concepts with some caution | |
| STEP 2 - INTRODUCTION / APPLY GENERAL RULES | <ul style="list-style-type: none"> STATE: In order to be admissible, evidence must firstly be relevant (<i>s 56(1)</i>). STATE: Prosecution (P) will argue that, if it were accepted, [evidence] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue being [fact in issue e.g. identification of offender, the charge, whether there was an opportunity for the offending to occur] (<i>s 55(1)</i>) STATE: PER <i>s 55(2)</i> evidence is not taken to be irrelevant only because it relates only to— <ul style="list-style-type: none"> the credibility of a witness; or the admissibility of other evidence; or a failure to adduce evidence. N/B: The wording of <i>s 55</i> seems to oblige a trial judge not to assess the strength of the evidence or its reliability in terms of its effect on the probability of the existence of a fact in issue – if evidence appears remotely relevant, the judge must admit it | |
| STEP 3 - IS THE EVIDENCE RELEVANT TO THE FACT IN ISSUE | STATE: On the facts, it is arguable that [evidence] is [directly relevant evidence / indirectly relevant evidence because...]. The question of relevance is determined taking the evidence at its highest (<i>IMM v R</i>) <ul style="list-style-type: none"> Issues of reliability/credibility do not factor in this decision There may be cases where the evidence is so unreliable/lacking in credibility that it could not ‘rationally affect...the assessment of the existence of a fact in issue’, in which case it is irrelevant. | |
| | Direct Evidence | <ul style="list-style-type: none"> Where the only inference drawn by the court is as to the accuracy of its own sensations or those of the witness No additional reasoning is required by the tribunal of fact to conclude the existence of a fact in issue. Examples: <ul style="list-style-type: none"> Oral evidence of a witness’ sensory perceptions Documentary evidence depicting issues in fact such as a photo or fingerprints Admissions made by a defendant |
| | Indirect / Circumstantial Evidence | <ul style="list-style-type: none"> Evidence which, even if it is believed, does not prove the fact in issue unless and until the court draws an inference from the relevant circumstantial evidence to the facts in issue (<i>Smith</i>) Types <ul style="list-style-type: none"> Credibility evidence (adduced to determine whether a witness should/should not be believed) |

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| | | <ul style="list-style-type: none">○ Tendency evidence (adduced to show a person has a tendency to act in a particular way)○ Coincidence evidence (adduced to show the probability/improbability of two or more events)○ Failure to adduce evidence (facts may be inferred from a party's silence) <p>Examples:</p> <ul style="list-style-type: none">● Motive<ul style="list-style-type: none">○ Plomp v R - circumstantial evidence of P's adulterous relationship with a woman he promised to marry was admissible.○ Example: the victim and the accused were having a quarrel over money the previous day = evidence that invites the jury to make an inference that the relationship was strained and that there may have been a motive for the accused's alleged actions.● State of relationship between 2 people<ul style="list-style-type: none">○ Wilson v R - circumstantial evidence of witness hearing the accused and wife arguing and wife saying "I only know you want to kill me for my money" and "I know you want to kill me, why don't you get it over with" (after being pushed onto the ground) = admissible to show the relationship between the deceased and the accused and to assist the jury whether it was more likely that the wife was murdered or that she was killed as a result of an accident. | | | | |
| | <p>If circumstantial evidence → Shephard principle; does not need to be proved BRD</p> | <ul style="list-style-type: none">● The prosecution only bears the onus of proof to prove the elements of the crime beyond reasonable doubt – every circumstantial fact does not have to be proven beyond a reasonable doubt (Shephard v R)● The Shepherd principle has been modified and codified in s 61 and 62 JDA <table><tr><td>S 61 JDA</td><td>The only matters that the trial judge may direct the jury must be proved beyond a reasonable doubt are:<ul style="list-style-type: none">(a) the elements of the offence charged or an alternative offence; and(b) the absence of any relevant defence</td></tr><tr><td>S 62 JDA</td><td>Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to s 61, must be proved beyond doubt is abolished</td></tr></table> | S 61 JDA | The only matters that the trial judge may direct the jury must be proved beyond a reasonable doubt are: <ul style="list-style-type: none">(a) the elements of the offence charged or an alternative offence; and(b) the absence of any relevant defence | S 62 JDA | Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to s 61 , must be proved beyond doubt is abolished |
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| STEP 4 - | <ul style="list-style-type: none">● STATE: Per s 57, If the determination of the question whether evidence adduced by | | | | | |

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| PROVISIONAL RELEVANCE | <p>a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant—</p> <ul style="list-style-type: none"> (a) if it is reasonably open to make that finding; or (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding. | |
| STEP 5 - PROBATIVE VALUE VS. PREJUDICIAL EFFECT → IMPACT ON RELEVANT | <p>Note: ‘unfair prejudice’ = the undue impact of the evidence, adverse to the accused, on the jury over and above its probative value (<i>Pfennig</i> per Mason CJ, Deane and Dawson JJ)</p> <p>Civil proceeding</p> <ul style="list-style-type: none"> • S 135 - The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might— <ul style="list-style-type: none"> (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time. • S 136 - The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might— <ul style="list-style-type: none"> (a) be unfairly prejudicial to a party; or (b) be misleading or confusing. <p>Criminal proceeding</p> <ul style="list-style-type: none"> • S 137 - In a criminal proceeding, the court MUST refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. <ul style="list-style-type: none"> ◦ Note: only applies in criminal proceedings and evidence adduced by the Crown <p>STEPS:</p> <ul style="list-style-type: none"> • Define the probative value • Define the prejudicial effect • Weight both and determine if probative value > prejudicial effect | |
| STEP 6 - DEFENCES ARGUMENTS | Reliability and credibility | <ul style="list-style-type: none"> • Although D might also try to argue that W’s evidence is not reliable or credible, issues of reliability/credibility do not factor in this decision (<i>IMM</i>) • Consider: There may be cases where the evidence is so unreliable/lacking in credibility that it could not ‘rationally affect...the assessment of the existence of a fact in issue’, in which case it is irrelevant (<i>IMM</i>) |
| | Logical Connection too remote | <ul style="list-style-type: none"> • D might try to argue that the logical connection between the fact and evidence is too remote, and therefore such evidence should be inadmissible because it is ‘insufficiently relevant or too remotely relevant’ (<i>Stephenson</i>) • Example - Relying on the intoxication of the occupants would be irrational because it is so speculative and disconnected <ul style="list-style-type: none"> ◦ evidence of the state of intoxication of the occupants of the car was inadmissible because the connection was too tenuous as did not know who was driving and even if all |

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| | | individuals were intoxicated, this does not in itself prove the driver's behaviour/actions |
| | Evidence would not rationally affect the assessment | <ul style="list-style-type: none"> • D might argue that the evidence is not relevant because it is no different from what the jury can do and does not rationally affect the assessment by the jury of the [facts in issue] (<i>Smith</i>) <p style="text-align: center;">ANALOGISE / DISTINGUISH</p> <ul style="list-style-type: none"> • <i>Smith</i> - 2 police officers who had previous dealings with S to give evidence that S was in fact the guy in the CCTV images. <ul style="list-style-type: none"> ○ The police witnesses were in no better position to make a comparison between the appellant and the person in the photographs than the jurors. ○ Note: might have been admissible to hear from these police officers if: <ul style="list-style-type: none"> ■ there had been some change in his appearance between the accused at trial and the accused ■ at the time of the offence, there is some distinctive feature revealed by the photographs (e.g. a manner of walking) which would not be apparent to the jury in court |
| STEP 7 - CONCLUDE | | <ul style="list-style-type: none"> • If the evidence is relevant it is admissible unless excluded by another provision (<i>s 56</i>) • If the evidence is irrelevant it is inadmissible (<i>s 56</i>) |