

LAWS2351 'CPEP' Course Summary

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	W in XX b) Other questions MAY NOT be put to W unless court gives leave
Leave to recall witnesses: s 46	1) Court give leave to party to recall W to give evidence that another party raised. 2) Conditions for recalling include: a) Contradictory evidence b) Could have given evidence in chief, but didn't.
Re-opening Prosecution Case	
Key issue is whether or not the matter on which the prosecution seeks to reopen the case is one that could and should have been included in the case in chief- <i>Kane</i> .	
<i>R v Chin</i>	
<ul style="list-style-type: none"> • Prosecution ought not to split its case. P must call all evidence available. • Should not be allowed to remedy situation by calling evidence in reply except in unforeseeable exceptional circumstances. Should not be allowed to ambush the accused. 	

STEPS IN DETERMINING WHETHER EVIDENCE IS ADMISSIBLE:

STEP 1: IS IT RELEVANT

Important definitions:

Probative Value: extent to which evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Facts in issue: issues in the proceedings defined by substantive law. In Crim law - factual elements of crime and any defence.

1. DOES THE EVIDENCE MEET LEGISLATIVE REQUIREMENTS?

Legislation: s 55 & s 65 → must meet all	
S 55(1)	The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the <u>probability of the existence of a fact in issue in the proceeding</u> .
S 55(2)	Evidence not taken to be irrelevant because it relates ONLY to: a) Witness credibility b) Admissibility of other evidence or c) A failure to adduce evidence
S 56(1)	Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
S 56(2)	Evidence that is not relevant in the proceeding is not admissible.

2. PERFORM ANALYSIS

To determine admissibility, it firstly must be established whether said evidence is relevant to the proceeding.

- Considering the evidence 'at its highest' (*IMM v The Queen*), the evidence (can/cannot) rationally affect the assessment of the probability of the existence of the [INSERT FACT IN ISSUE].
- Operates on the presumption that the evidence is reliable - (*Papakosmas* [81]).

Case Law	
Smith v The Queen (2001)	Evidence is relevant or it is not. If the evidence is not relevant, no further question arises about its admissibility. Irrelevant evidence may not be received. Only if the evidence is relevant do questions about its admissibility arise.
R v Preston [1997]	Evidence can be relevant because it goes to state of mind rather than factual issue
Sievers [2004]	Evidence was relevant because → goes to consciousness of guilt consistent with murder and, therefore, relevant

3. IS THERE PROVISIONAL RELEVANCE?

1. When **determination of relevance depends on court making another finding** (incl finding that evidence is what it is purported to be) - court may find evidence as relevance
 - a) if it reasonably open to make that finding or
 - b) subject to further evidence being admitted at a later stage of the proceeding will make it reasonably open to make that finding.

SEE 3.11 MANDATORY & DIRECTORY EXCLUSIONS

MANDATORY EXCLUSIONS

S 137 - The court must refuse to admit evidence **adduced by prosecutor** if its **probative value** is outweighed by the danger of **unfair prejudice** to the defendant.

Unfair Prejudice =

- Risk that the jury will use the evidence improperly in some unfair way- **Bauer**.
- Prejudicial influence on the minds of the jury that would be out of proportion to its true evidential value - **Christie**.
- Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted - **Papakosmas v R (1999)**
- It means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way – **BD (1997)**
- There must be shown to be a danger that the tribunal of fact will use the evidence upon a basis logically unconnected with the issues in the case - **Lockyer (1996)**

GENERAL DISCRETION TO EXCLUDE EVIDENCE - S 135

S 135 - The court may refuse to admit evidence if its **probative value** is **substantially outweighed** by the danger that the evidence might:

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

Probative Value = the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

IMM v The Queen - **take probative value at its highest** assuming witness is both reliable and credible

R v Lisoff - it must be more than a mere possibility of danger. It **must be a 'real' danger**

- Evidence that accused had been threatened with physical harm if they didn't participate in crime shows they were acting under duress (**Subramaniam**) – duress was a fact in issue
- Deceased statement's about fearing the accused can be used to show non-consent in a rape case (**Matthews**)
- Prior statements that show person had specific knowledge of an event can link them to that event- (**Matthews**)- diary entry knowing death of wife before it was announced.
- Can use Papakosmos to show that someones behaviour was what an "ordinary" person would have done

HEARSAY EXCEPTION – DUAL PURPOSE

S 60 – The Dual Purpose Exception

(1) The hearsay rule does not apply to evidence of a previous representation **that is admitted because it is relevant for a purpose other than proof of an asserted fact.**

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2)).

APPLICATION:

STEP 1: Is there a previous representation that is hearsay, and not admissible under any exception to the hearsay rule for a hearsay purpose? (If yes, go to 2)

STEP 2: Is the representation admissible for a different purpose? (i.e. credibility, character tendency etc) (If yes, go to 3)

STEP 3: Representation will be admissible for its hearsay purpose, AS WELL AS the second purpose.

Where hearsay evidence is admitted for a non-hearsay purpose – it becomes evidence for both the non-hearsay and hearsay purpose.

EXAMPLES

- Evidence of a previous representation that suggests a person can speak or write a language (e.g. can understand English).
- **Credibility evidence** – e.g. prior inconsistent or consistent statement for impeaching, bolstering or rehabilitating credibility.
- Where the speaking of words are legally significant (or 'operational') such as threat, forming a contract, or in defamation.
- The use of a voice recording to identify a speaker.
- The use of a document to identify a speaker on the basis of handwriting or textual features.
- Evidence of the medical history given to a doctor adduced to prove/explain the basis of an opinion or treatment.
- **Statements that suggest a person is mentally ill or incapacitated.**
- A representation that is a lie from which a consciousness of guilt might be inferred.

FIRST- HAND HEARSAY

- For these exceptions, the **hearsay and opinion rules don't apply** (s 92(3)).
- Practical: use **s 178 certificate** to prove the fact of conviction (see note).
- **Savings — s 93** (things Part 3.5 doesn't disturb)
 - **Defamation** statutes about using convictions.
 - **Judgments in rem** (e.g., probate/condemnation binding the world).
 - **Res judicata / issue estoppel** (preclusion between the same parties).

LEGISLATION

Part 3.5 Evidence of judgments and convictions

91 Exclusion of evidence of judgments and convictions

- (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
- (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note—

Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

92 Exceptions

- (1) Section 91 (1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove—
 - (a) the death, or date of death, of a person, or
 - (b) the due execution of a testamentary document.
- (2) In a civil proceeding, section 91 (1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction—
 - (a) in respect of which a review or appeal (however described) has been instituted but not finally determined, or
 - (b) that has been quashed or set aside, or
 - (c) in respect of which a pardon has been given.
- (3) The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this section.

93 Savings

This Part does not affect the operation of—

- (a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation, or
- (b) a judgment in rem, or
- (c) the law relating to res judicata or issue estoppel.

STEP 5: DOES THE TENDENCY OR COINCIDENCE RULE APPLY?

1. **Relevance (s55):** to be admissible evidence or character, conduct must have the capacity to 'rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue
2. Tendency purpose OR non-tendency purpose
3. Coincidence purpose OR non-coincidence purpose

<i>Tendency</i>	<i>Coincidence</i>
Can be 1 event	Coincidence requires 2 or more events
Not necessary (inference - deduction)	Similarity