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RELEVANCE

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NB: Court's general discretion to admit or not admit E is *s 136*, go to PG 64

[Is the evidence relevant? (Papakosmas at [21]–[81]; s 55(1) EA).]

STEP 1 → WHAT ARE THE FACTS IN ISSUE?

[The facts in issue in this case are [insert facts in issue].]

1. Determine if we are dealing w 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

STEP 2 → WOULD THE EVIDENCE RATIONALLY AFFECT THE ASSESSMENT OF THE PROBABILITY OF THE EXISTENCE OF A FACT IN ISSUE?

1. *[Under s 55, E is relevant if, assuming it to be true, it could rationally affect (directly or indirectly) the assessment of the probability of the fact in issue (Papakosmas). This requires only a minimum logical connection, not proof of probability (Smith). Thus, because [insert why relevant], relevance is established.]*
    a. There must be a 'minimum logical connection' b/w the E and a fact in issue (*Papakosmas*). This is an objective test grounded in human experience.

CREDIBILITY

IS THE EVIDENCE EXCLUDED BY THE CREDIBILITY RULE?

- Is it credibility E?
    - Prima facie, the E is excl
- [Exceptions] However, is the E admissible under an exception?
    - Qs asked in CE of a W (ss 103 and 104)
        - Is it a criminal scenario?
    - Rebuttal of denials (s 106)
    - Re-establishing credibility of own W (s 108)
        - During re-examination
        - Due to prior inconsistent stmt - you can introduce consistent stmt
    - Persons w specialised knowledge (s 108C)
    - Character of accused persons (s 110)
- Jud discretion

[(1) *Credibility E, is E which does not go to the substantive facts in issue, but rather to the Ws credibility, and it is not admissible pursuant to s 102 unless it falls within an exception.*]

STEP 1 → IS IT CRED E?

1. Cred refers to the Ws ability to observe or remember facts and E abt which the W has given, is giving, or is to give as E (*EA Dictionary*)
2. Pursuant to s 101A, E is cred E if it is E that is:
    a. Relevant only bc it affects the credibility of the W (s 101A(a)); or
    b. Relevant to the Ws credibility **and also** relevant to a **non-credibility purpose**, but it is inadmissible for that purpose due to another reason (such as hearsay) (s 101A(b))
        i. *[(2) Prima facie, the E of [INSERT/DESCRIBE] is cred E as it goes towards the cred of [INSERT PERSON].*

STEP 2 → IS THE E ADMISSIBLE FOR ANOTHER PURPOSE?

1. E is only excl as credibility E where credibility is the **SOLE** admissible purpose for adducing E
    a. Subsequently, if not, the E is not caught by *s 101A* (cred E) and the exclusionary rule (s 102) does not apply
        i. For instance, in *Papaskosmas*, E of the SAs of the D to her friends went to both the fact that she was assaulted and her cred as a W

	Hargraves: H charged for bribery and corruption. Cred E about unrelated misconduct doesn't have substantive probative value, but it can, here it was not. Held → critical distinction b/w legit cred attacks (such as exposing bias, motive to lie, inconsistency) and impermissible attempts to show a W as generally bad or dishonest person. Much of the E here was on the basis of past dishonesty rather than the charges being tried. Appeal allowed, new trial ordered.

STEP 1 → Start w credibility rule (s 102)

- s 102 → E relevant only to credibility is inadmissible unless exception applies

STEP 2 → Ask: where is this E coming from?

A. From the W in CE
    a. Apply s 103 (pg 41)
        i. Is the Q relevant only to cred?
            1. If yes, it's admissible only if the answer could substantially affect the assessment of that W's cred
               E.g. "You've been convicted of fraud, haven't you?"
B. From some other source (not from W in CE):
    a. Apply s 106 (pg 43)
        i. Can you prove it otherwise (e.g. thru another W or docs?)
        ii. General rule → need leave (s 106(1)(b))
            1. Exception → no leave is required if it's about 1 of the 5 categories in s 106(2) (pg 43)

STEP 3 → If the W is the Accused (special rule only in crim)

- Apply s 104 (pg 42) (tit-for-tat rule)
    - Prosec needs leave to CE the A abt cred (s 104(2))
        - Leave only given if the A has already adduced cred E against a prosec W subject to s 104(5) exclusions (bc not mere cred issues)

STEP 4 → if credibility has been attacked

- Apply s 108 (pg 43 and 44)
    - A party may adduce PCS to rehabilitate their W's cred
    - <u>Trigger</u> → the W has been CEed in a way that suggests their E is unreliable (e.g. alleged to have made a PIS, or to have fabricated E)
    - <u>Function</u> → lets you repair cred after it has been damaged by the other side

HEARSAY

FIRST: *[The fact in issue must first be determined. In the present case, the fact in issue is [insert].]*

IS THE EVIDENCE INADMISSIBLE BC OF HEARSAY?

- Is the E relevant?
- Does the hearsay rule apply?
  - Identify the previous representation
  - What is the intended asserted fact in the previous representation
  - Is the E of the prev rep being adduced to prove that fact in the prev rep/
    - Yes - then the info is excluded unless it fits an exception
- Does an exception apply?
  - Prev representations for a non-hearsay purpose
  - First hand exceptions
  - Contemporaneous reps abt health, feelings, sensations, intention, knowledge, or state of mind
  - Other:
    - Buss records
    - Tags, labels, writing
    - Electronic comms
    - ATSI
    - Reputation as to relo and age
    - Rep of of public or general rights
    - Admissions
    - Judgment or conviction exceptions
    - Character of and expert opinion abt the accused
- Would E nevertheless be excl or use limited s 136

If someone is in "quotes" or says "X told me"... think about hearsay

[REMEMBER] → Even if prev stmt by the W themselves, is hearsay i.e. if you recall sth you said to someone else, it is still hearsay

[REMEMBER] → It is not the stmt, but what the stmt is being **used** to prove that decides whether it's hearsay.
E.g. Bill states out of court "I saw Amy punch Cameron"

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

[*Definition → Hearsay E is E of a prev rep other than one made by a person giving oral E in the proceedings which is adduced to prove the existence of a fact within that rep.*]

1. Failing to consider that the person, may not have had the state of mind or acted in that way in the occasion (ignoring other explanations for the conduct)
2. Failing to consider that many people may share the same tendency and may overstate how likely it is that someone w this tendency reoffends
3. That the jury may be clouded by an emotional response
4. Where the past conduct is in relation to uncharged conduct

b. Judges can mitigate this risk thru an anti-tendency direction (*Hughes*; *Hamilton*)

c. **[B]** *[Here, the E is highly probative bc [insert why - "it reveals a distinctive pattern of offending"/ "it closely mirrors the charged conduct"]. Any prejudicial effect is limited bc ["the conduct is not unduly inflammatory"/ "the judge can issue an anti-tendency direction"]. Given that the probative force of the E significantly assists in proving the charged offence and the prejudice can be controlled, its probative value is likely to outweigh any unfair prejudice. Thus, the requirement in s 101 is likely/not likely satisfied, and the tendency E is admissible/inadmissible.]*

3. [Child Sexual Offences] → must be under 18 at time of offence, and is clearly sexual offence (s 97A(6))

   a. *[However, if it relates to a child sex offence, s 97A applies and there is a presumption that the E has significant probative value if it relates to:*
      i. *The D's sexual interest in children, (even if not acted on); or (s 97A(2)(a));*
      ii. *The D acting on that sexual interest (s 97A(2)(b));]*
      iii. This applies even if the sexual interest was not directed at the complainant (s 97A(3))

   b. **Exception** → the court is permitted to rebut the presumption if satisfied on sufficient grounds that the E is not of significant probative value (s 97A(4)), however cannot consider s 97A(5)) unless there is exceptional circumstances
      i. The tendency is for a different sexual interest/act
      ii. The difference in circumstances
      iii. Personal characteristics are different
      iv. Relationship is different
      v. Period of time
      vi. There are no distinctive or unusual features
      vii. The generality of the tendency

   c. It is unlikely that the circumstances are 'exceptional' which is a high bar (*Clarke*)

   d. The tendency can be towards one indiv (*Davidson*)

   e. Grooming behaviour demonstrates sexual interest (*Davidson*)

2. **Old facebook photo** → purported identification from FB was 'simply unconvincing' as the eyewitness identification was made 12y after the SA took place and the photo was taken 11y after the assault (*Bayley*)

STEP 2 → (a) IS THERE UNFAIR PREJUDICE?

1. *[The E must be 'unfair', it is not enough that E strongly proves the opposing case (Ainsworth). I is not mere prejudice, but unfair prejudice (Orduyaka).]*
   Is the E 'untestable, or difficult to test'?
   a. An inability to challenge or test E may amount to unfair prejudice (*Orduyaka*), this includes:
      i. Inability to CE E, is <u>not prima facie unfair prejudice</u>, there must be sth more (i.e. must be severe)
         1. [here, a 92y was unable to attend and wrote a state-dec to be admitted as E] (*Orduyaka*)
      ii. There must be **compelling reasons** to excl the E. merely E w/o docs (or reasons) to substantiate and imperfect recollection is not prejudicial (*La Trobe*)
2. In summary, unfair prejudice, is damage to an A's case, in some unacceptable way by provoking some irrational emotional response or giving E more weight than it should have (*No 26 Rpt ALRC*)

STEP 3 → (b) IS IT MISLEADING OR CONFUSING? [can link to unfair prejudice]

1. E which would cause the fact finder to place more weight than they should are likely unfair (*Ainsworth*)
   a. Emotional evidence:
      i. E that appeals to the fact-finder's sympathies, arouses a sense of horror or provokes an instinct to punish, may cause the fact-finder to base his decision on something other than the established propositions in the case
      ii. E that the D engaged in other crimes, may invoke an instinct to punish
   b. DNA evidence, expert, or confusing statistics
      i. *Aytugurul* → use of DNA exclusion % (99.9%), which may lead jury to unfairly infer basically 100%. In this case, it was not unfair as the expert had explained what it meant
      ii. *Tuite* → the mere fact that expert E deals w difficult and highly technical subject-matter does not, in itself, constitute unfair prejudice to the A
2. Misleading, is where the jury is at risk of incorrectly assessing E's weight (*No 26 Rpt ALRC*)

STEP 4 → IS THE PROBATIVE VALUE OUTWEIGHED?

1. If the E could unfairly rationally affect the assessment of the probability of the existence of the fact in issue, then it is likely unfair (*EA Dictionary*)
   a. A direction to the jury may mitigate unfair prejudice as seen in *Sood*

i. Court noted that fear of tax investigation and prosecution would be fear appreciated by the community and could be understood

ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE

[Evidence, which is obtained improperly, or illegally, is not admissible unless the desirability of admission outweighs the undesirability of non-admission (s 138).]

STEP 1 → WHO BEARS THE ONUS?

1. The onus is on the party seeking the excl, to est that it was illegally or improperly obtained, then the onus shifts to the party seeking to use it to prove desirability (*Woolworths*)

STEP 2 → WAS IT ILLEGALLY OR IMPROPERLY OBTAINED?

1. *[[Person] has/failed to [insert act] which amounts to an illegal or improper act.]*
    a. **Failure to caution** → if person was under arrest for an offence, **and** the questioning was conducted by an official who was at the time empowered (or not due to insufficient E) bc of their office **and** failed to caution the person being questioned (s 139)
    b. **Admissions during questioning** (s 138(2))
        i. If the admission or E flows as fruits from the questioning, the questioning is improper if:
            1. They did or omitted to do sth during the questioning which would impair the ability of the person to respond rationally; or
            2. Made a false stmt in the course of questioning likely to cause the person to make an admission
    c. **Entrapment**
        i. There must be sth more than committing an offence (*Woolworths*), there should be **inducement**
            1. *Woolworths* → the Department of Health hired minors to buy cigs, this was not entrapment as there was no pressure
    d. **Warrants**
        i. Misstatements of fact in an affidavit of support of a warrant (*Cornwell*)
        ii. Deliberate use of invalid warrants (*Marijancevic*)
            1. Deliberate breaches vs non-deliberate minor (*Marijancevic*)
    e. **Breach of internal police guidelines** (*Em*)
    f. **Use of powers arrest for minor offence, when a summons would be effective** (*Carr*)
    g. **Deliberate breaches** (*Marijancevic*)