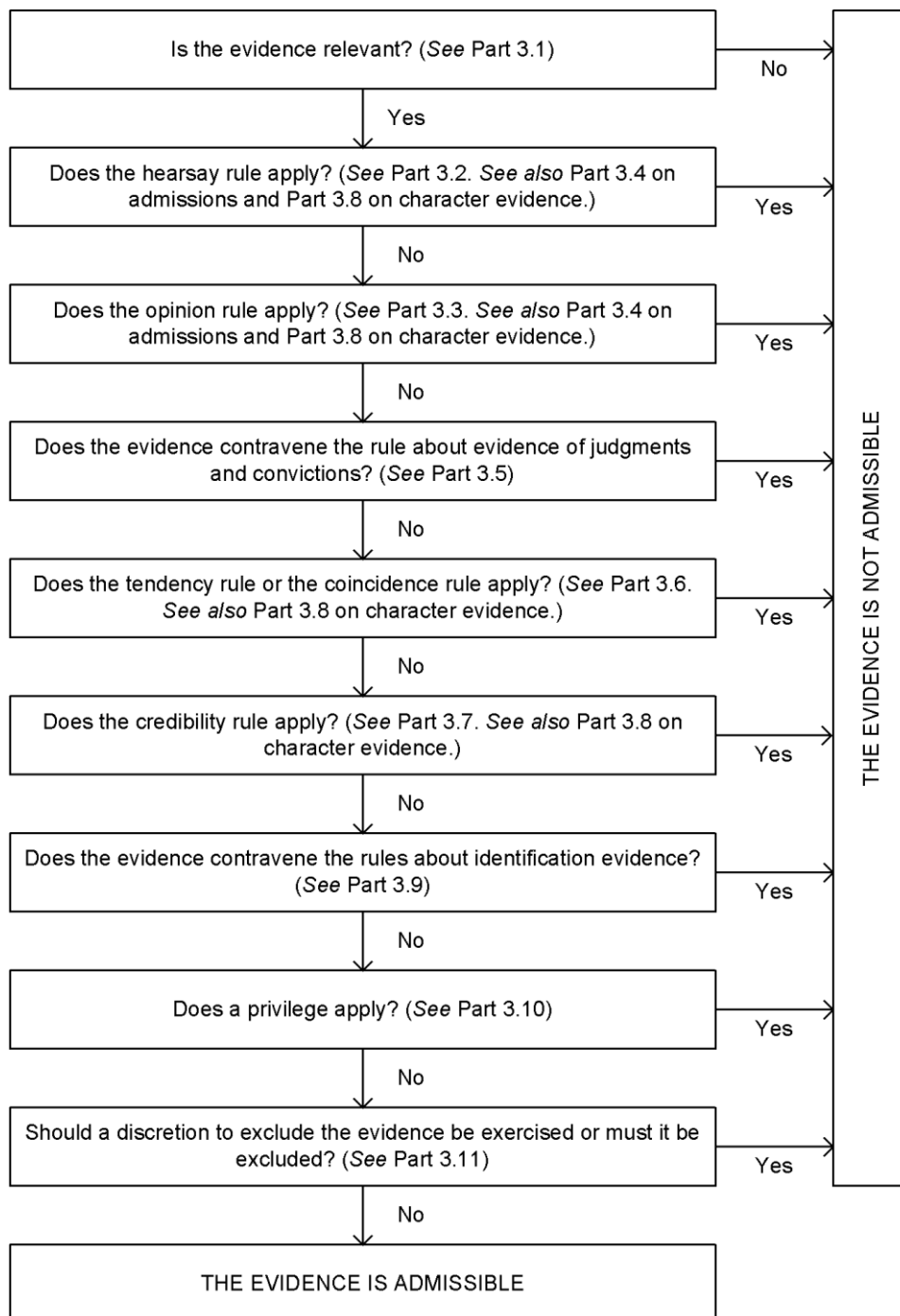


LAW5012: EVIDENCE EXAM NOTES 2025 (T3 2025)

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INTRODUCTION

General Principles

- **Reliability Principle:** Quality of decision determined by quality of the E that goes before the trier of fact: exclude E that is unreliable (hearsay, because the E cannot be tested in X-examination).
- **Libertarian/Protective Principle:** E excluded to redress potential unfairness in a contest between an individual and the State (privilege against self-incrimination).
- **Disciplinary Principle:** Discretion to exclude illegally obtained E (court won't eat the fruit of the poisoned tree).

Evidence Act

- The Evidence Act Applies to all proceedings in a Victorian court (s 4 EA) which means the Supreme court or any court created by the parliament and it includes any person that applies the laws of evidence (s 3 EA).
- Rules and principles of common law and equity (s 9 EA) as well as the courts' general powers (s 11 EA) continue to apply, except to the extent the Act provides otherwise expressly or by necessary intendment.
 - There is some authority that Chapter 3 (admissibility) effectively operates as a code, abrogating the common law (*McNeill v R*).
 - Except otherwise provided by this Act, E that is relevant in a proceeding is admissible in the proceeding (s 56 EA).

Burden and Standard of Proof

- **Standard of Proof:** Degree to which an issue must be proved.
- **Burden of Proof:** Who has the onus of proving a particular issue?
 - **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

- 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 (mental impairment):** Defence bears evidential and legal burden (standard is on BOP; s 141(2)).

Civil Standard of Proof

- 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 BoP (s 140(1)).

Voir Dire: s 189

- Questions of admissibility, use of evidence, competence and compellability are determined on a 'voir dire'.
 - Arguments, objections, and rulings occur in the jury's absence.

Judicial Directions and Warnings

Unreliable Evidence: *Jury Directions Act*

Definition of Unreliable Evidence

- Evidence of a kind that may be unreliable" includes (s 31 JDA):
 - a) Hearsay; admissions.
 - b) E where the reliability may be affected by age, ill health (whether physical or mental), injury or the like.
 - c) E given by a witness criminally concerned in the events giving rise to the trial.
 - d) E given by a witness who is a prison informer.
 - e) Oral E of questioning by an investigating official where the questioning is not acknowledged by the accused.

Direction of Unreliable Evidence

- The Pros or Def may request (s 12 JDA) the trial judge direct the jury on E that may be unreliable (s 32(1) JDA).
- The Pros or Def counsel must specify (s 32(2) JDA):
 - a) The significant matters that may make the E unreliable. **OR**
 - b) If E given by a child, the significant matters (other than age) that may make the E of the child unreliable.
- In giving a direction, the trial judge must (s 32(3) JDA):
 - a) Warn the jury that the E may be unreliable. **AND**
 - b) Inform the jury of:
 - (i) the significant matters that the trial judge considers may cause the E to be unreliable. **OR**
 - (ii) if the direction concerns E given by a child, the significant matters (other than age) that the trial judge considers may make the E of the child unreliable. **AND**
 - c) Warn the jury of the need for caution in determining to accept the E and the weight to be given to it.

Leave Permission or Directions

- A court may give leave, permission or direction on such terms as the court thinks fit (s 192(1) EA).
- In deciding whether to give the leave, permission or direction, it is to take into account (s 192(2) EA):
 - 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.
 - e) The power (if any) of the court to adjourn the hearing or to make another order direction.

Discretions to Exclude Evidence

- The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party **OR** be misleading or confusing **OR** cause or result in undue waste of time (s 135 EA).
- The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party **OR** misleading or confusing (s 136 EA):


Criminal Proceeding

- In a criminal proceeding, the court must refuse to admit E adduced by the prosecutor if its PV is outweighed by the danger of unfair prejudice to the D (s 137 EA).

Probative Value v Prejudicial Effect

- **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 (Dictionary, EA).
- **Prejudicial effect** is not defined in the Evidence Act does not define the term 'unfair prejudice'.
 - Interpreted to mean there is a real risk 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' / 'misjudge' the weight to be given to evidence. Evidence is not unfairly prejudicial because it incriminates the accused." (*Dupas v The Queen*).
- *Pfenning v R* - P is charged with the murder of a 10yo boy. Last seen playing near Murray Bridge. He had been seen talking to P who had his van parked nearby. Boy never seen again nor found.
 - Pros's case entirely circumstantial, incl. proof of P's abduction of another young boy, this boy was taken in P's car whilst the boy was on a bike. Placed the bike on the side of the road (also staged the scene, P pleaded guilty to that crime).
 - Pros wanted to admit E of the 2nd abduction as proof of the circumstances of his guilt in relation to the first boy.
 - Issue for HCA on appeal: Can you admit E of later offending on charges for the murder of Michael Black?
- **HELD:** E admissible. Propensity E, being a subset of circumstantial E, will only have PV beyond its prejudicial effect when there is no reasonable view of the E consistent with the innocence of the accused.
 - But prejudicial effect and PV are incommensurables (*Pfennig v R*). There is an element of value judgement. Given it's a value judgement, everyone likely to get diff answers, just show your reasoning.

RELEVANCE

-  Admissions, tendency, hearsay, credibility/character.

Step 1: Identify the Evidence

- **WRITE:** The adduced evidence (E) includes **[describe each article of evidence]**.

Step 2: Identify the Fact in Issue

- **WRITE:** The fact in issue is that [D] committed [describe offence]. The factual issue is whether [D] did it. The legal issue is the elements of the offence which includes [list the elements].

Step 3: Apply General Rules

- **WRITE:** To be admissible, E must firstly be relevant (s 56(1) Evidence Act ('EA')).
- **WRITE:** Pros will argue that, if accepted, [E] could rationally affect (directly/indirectly) the assessment of the probability of the existence of a FII being **[fact in issue]** (s 55(1) EA).
- **WRITE:** Evidence is not taken to be irrelevant only because it relates only to (s 55(2) EA):
 - The credibility of a witness **OR** The admissibility of other evidence **OR** A failure to adduce evidence.

Step 4: Is the Evidence Relevant to the Fact in Issue?

- **WRITE:** The question of relevance is determined by taking the E at its highest (*IMM*).
 - Reliability/credibility do not factor in this decision (*IMM*).
 - E may be so lacking in credibility that it could not rationally affect the assessment of the existence of a FII, in which case it is irrelevant (*IMM*).
- **[Is the evidence direct or indirect?]**.

Direct Evidence

- The E is direct evidence as it goes to proving [a fact in issue] without further inferences or additional reasoning.
 - Oral evidence of a witness' sensory perceptions / Documentary E depicting issues in fact such as a photo/fingerprints / Admissions made by a defendant.

Indirect/Circumstantial Evidence

- E which, even if believed, does not prove the FII unless and until the court draws an inference from the relevant circumstantial E to the FII (*Smith*).
- DNA on gun/knife; motive to commit crime; conduct of A before or after crime; capacity to commit crime (*Plomp*).
- Circumstantial evidence requires several pieces of E pointing to the same conclusion (*Plomp* Dixon CJ).
 - Credibility evidence (adduced to determine whether a witness should/should not be believed).
 - 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).

Motive

- Circumstantial evidence of P's adulterous relationship with a woman he promised to marry was admissible (*Plomp*).

State of Relationship Between 2 People

- Circumstantial evidence of W hearing the accused + wife arguing = admissible to show relationship between the deceased and accused and assist jury whether it was more likely wife was murdered or died accidentally (*Wilson v R*).

Step 4A: Circumstantial Evidence: Does Not Need to be Proved BRD

- The Pros only bears the onus to prove the charge elements BRD. Circumstantial facts BoP (*Shephard v R*).
- Trial judge may direct the jury that only offence elements must be proved BRD (s 61(a) JDA) or the absence of any relevant defence (s 61(b) JDA).
- Common law rules requiring a trial judge to direct the jury that a matter be proved BRD, other than matters in s 61, are abolished (s 62 JDA).

Step 5: Provisional Relevance

- **WRITE:** The court may find that the E is relevant if it relates to determining if other E is relevant (s 57 EA):
 - (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 6: Probative Value (PV) v Prejudicial Effect (PE)

Civil Proceeding

- E may be refused if its PV is substantially outweighed by the danger the E might be unfairly prejudicial to a party (s 135(a) EA) **OR** be misleading/confusing (s 135(b) EA) **OR** cause/result in undue waste of time (s 135(c) EA).
- The court may limit the use of evidence if there is a danger that a particular use of the evidence might (a) be unfairly prejudicial to a party **OR** (b) be misleading or confusing (s 136 EA).

Criminal Proceeding

- Court **MUST** refuse to admit E by the Pros if its PV is outweighed by the danger of unfair prejudice to the D (s 137 EA).

Probative Value

- **WRITE:** [E] has PV the extent to that it could rationally affect the assessment of the probability of the existence of a FII which is [FII] (Dictionary, EA).

Prejudicial Effect

- Unfair prejudice is the undue impact of the E, adverse to the accused, on the jury over and above its PV (*Pfennig*).

Sub-Conclusion

- Here the E **[does / does not]** have any significant prejudicial effect that would **[substantially (s 135)]** outweigh its PV because **[state why]**. The E **[should / must]** be refused to be admitted.

Step 7: Defences Arguments

Reliability and Credibility

- Issues of reliability/credibility do not factor in this decision of relevance (*IMM*).
- E may be so lacking in credibility that it could not rationally affect the assessment of the existence of a FII, in which case it is irrelevant (*IMM*).

Logical Connection Too Remote

- D may argue the logical connection between the fact and E is too remote, therefore, E should be inadmissible because it is insufficiently relevant or too remotely relevant (*Stephenson*).

- The car occupant's intoxication is inadmissible because the connection was too tenuous. They did not know who was driving or who was drunk. It does not prove the driver's behaviour/actions.


Evidence Could Not Rationally Affect the Assessment

- D might argue that the E (W) 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] (Police commentary on CCTV E) (*Smith*).
 - May have been admitted if there had been a change in his appearance between the accused at trial and the accused.
 - If there is some distinct feature revealed by the pics which would not be apparent to the jury in court.

Step 8: Conclude

- **If the evidence is relevant:** it is admissible unless excluded by another provision (s 56 EA).
- **If the evidence is irrelevant:** it is inadmissible (s 56 EA).

COMPETENCE

-  Where the W is a child or has some cognitive impairment.

Step 1: Introduction

- Prima facie, every person is competent to give E and if they are competent then they are compellable (s 12 EA).

Step 2: Assess Witness's Competence

- **WRITE:** Assessing the competence of a W is a preliminary question for the judge in voir dire (s 189(1)(c) EA).
- **WRITE:** [W] is not competent to give E unless they do not have capacity (mental/intellectual/physical disability) to:
 - Understand a question about a fact (s 13(1)(a) EA). **OR**
 - Be understood when giving an answer to a question about a fact (s 13(1)(b) EA) **AND**
 - This incapacity cannot be overcome (s 13(1) EA).
- [W] may not be competent to give E about a fact, may still be competent to give E about other facts (s 13(2) EA).
 - A child could answer simple factual questions but not complex / abstract questions.
- The court may obtain expert evidence to determine the extent of incapacity (s 13(8) EA).
 - If [W] has Alzheimer's disease but long-term memory might be unaffected. Might call expert to determine this.
- The W's incompetence may be overcome by:
 - Be questioned in an alternative way (deaf / mute (s 31(1) EA) / through an interpreter (s 30 EA).
- Consider costs / delays and if evidence may be obtained by other means when considering compelling (s 14 EA).

Step 3: If the Witness is Competent, Can They Give Sworn Evidence?

- **WRITE:** [W] can only give sworn E if they understand they are morally and legally obliged to tell the truth (s 13(3) EA; *R v GW*).
- A witness giving sworn E must take an oath or make an affirmation (s 21(1) EA).
- They are to be informed by the court that they have a choice between oath and affirmation (s 23(2) EA)
- An oath will be legally effective even if the W does not swear on a religious text or being religious (s 24(1)-(2) EA) / Understand what it means to take the oath (s 24(2)(b) EA) / Believe in a god (s 24A EA).

Step 4: If the Witness is not Competent (Child / Impaired), Can They Give Unsworn Evidence?

- **WRITE:** If [W] cannot give sworn E because of competence, they can give unsworn E (s 13(4) EA) if the trial judge informs them that (s 13(5) EA):
 - a) It is important to tell the truth **AND** b) they may be asked about questions they do not know/remember, and they should tell the court this if it occurs **AND** c) they should feel no pressure to agree with statements that are untrue.
- Failure to comply with s 13(5) EA may render the witness not competent to give unsworn E (*SH*) (Inadmissible).
 - The trial judge must be the person who goes through all the matters in s 13(5) EA (*SH*).
 - The Evidence Act does not treat unsworn evidence as a kind that may be unreliable (*SH*).
- E given by a W does not become inadmissible if they die/ceases to be competent before finishing giving E (s 13(7) EA).

Step 5: Consider Other Matters as Relevant

Cognitive Impairment

- D's counsel may seek an unreliability warning as the W's E may be unreliable (s 31-32 JDA (crim); s 165 EA (civil)).

Child

- Where E is given by a child before a jury, the judge must not warn/suggest that (s 165A EA (civil); s 33 JDA (crim)) children as a class are unreliable W / that children as a class are inherently less credible or reliable / that the child's E is unreliable solely on account of the age of the child.

Step 6: Alternative Arrangements: Cognitive Impaired or Child (Criminal Proceeding Only)

- In certain cases (sexual offences/serious assaults) special arrangements may be made for the giving of E by complainants and W who are children or cognitively impaired [select from Step 6A – 6C].

Step 6A: Alternative Arrangements

- The court may, of its own motion or on the application of a party, direct that alternative arrangements be made for giving E by a W (including the complainant) if the proceeding relates (wholly/partly) to designated sexual offences and certain designated offences (s 360 Criminal Procedure Act ('Crim PA')).
- The alternative arrangements may include (s 360 Crim PA):
 - Use of CCTV.
 - Using screens to remove the Defendant from the witness' direct line of vision.
 - Permitting a person to be beside the witness.
 - Requiring legal practitioners not to robe and/or to be seated.
 - Permitting only specified persons to be present in court.
- Court must direct use of CCTV or other facilities for complainant when the Pros applies for the complainant to give E in the courtroom and the court is satisfied that the complainant is aware of the right to give E in another place by CCTV or other facilities (s 363 Crim PA).

Step 6B: Pre-Recorded Child's Evidence (Criminal Proceedings: Sexual Offences / Indictable Offences Involving Assault/Injury/Threat of injury)

- [Child/cognitively impaired] W may give EiC in by audio-visual recording where the proceeding relates to sexual offences, and indictable assault/injury offences (ss 366(1)-(2), 367 Crim PA).
 - **Cognitive impairment:** mental illness, intellectual disability, dementia or brain injury (s 3 Crim PA).
- The recording is admissible as direct testimony if the W attests to its truthfulness and be available for X-exam and re-exam (s 368(1) Crim PA).

Step 6C: Special Hearings

- The whole of the E of a complainant for a sexual offence who is a child/cognitively impaired (including X-exam and re-exam) must be given at a separate hearing and recorded as an audio-visual recording before the trial and presented to the court in the form of that recording (ss 369, 370(1) Crim PA).
 - The recording is admissible E as if its contents were direct testimony, however, the court may rule as inadmissible parts of the video and may order they be edited/deleted (s 374(3)-(4) Crim PA).

Court May Direct that Complainant Give Direct Evidence

- Court may direct that complainant give direct E if satisfied that complainant is:
 - Aware of right to a special hearing (s 370(2)(a) Crim PA), and
 - The complainant is able and wishes to give direct testimony (s 370(2)(b) Crim PA).

Special Hearing Direction to be Before or During Trial

- The court must direct that a special hearing is to be held before the trial or during the trial (s 370(1A) Crim PA).
- Relevant factors include (s 370(1B) Crim PA):
 - (a) If the complainant is a child, the age and maturity of the child.
 - (b) if the complainant is cognitively impaired, the severity of that impairment.
 - (c) any preference expressed by the complainant.
 - (d) whether the special hearing during the trial is likely to intimidate or adversely affect the complainant.
 - (e) the need to complete the evidence of the complainant expeditiously.
 - (f) the likelihood that the evidence will include inadmissible evidence that may result in the discharge of the jury.
 - (g) any other matter that the court considers relevant.
- Conduct of special hearing (s 372 Crim PA).
 - D and lawyer to be present (s 372(1)(a) Crim PA).
 - D not in the same room but can hear and see (s 372(1)(b) Crim PA).
 - No unauthorised person to be present (s 372(1)(c) Crim PA).

Step 7: Conclude

- Conclude if the W is likely competent or not.