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## RELEVANCE

### \*\* IS THE EVIDENCE ADMISSIBLE?

Where to use: **admissions, tendency/coincidence, hearsay, credibility/character**

### Step 1: Rule

To be admissible under **s 55(1) EA**, it must be relevant to the **fact in issue**.

- **s 55(1) EA**: Evidence is relevant in a proceeding if the evidence that, if it were accepted, could **rationaly affect** (directly or indirectly) the **assessment of** the probability of the existence of a **fact in issue** in the proceeding
- **s 55(2) EA**: evidence **should not be dismissed** as irrelevant just because it pertains to:
  - (a) credibility of witness
  - (b) admissibility of other evidence
  - (c) failure to adduce evidence
- **s 56(1) EA**: relevant evidence must be admissible
  - **UNLESS** another provision of the EA excludes it (e.g. hearsay privilege, unfair prejudice – **s 135**)
- **s 56(2) EA**: Evidence that is **not relevant** in the proceeding is **inadmissible**

Evidence must be taken as its **highest** when assessing relevance – it is to be believed (**IMM v R**)

- Issues of reliability/credibility do not factor in this decision.

#### RULE:

- The threshold for relevance is **low** and should **not be strictly circumscribed**. (**Green v R; Smith v the Queen**)
- Evidence need only have a minimal logical connection to the probability of a fact (**DPP v Paulino**)
- It is to be assessed as a matter of common sense and experience.

### Step 2: Identify facts in issue

**Fact in issue** = The factual/legal element in dispute. i.e. murder charge; did X intend to? Did X kill Y?

- Evidence must be relevant to the elements specific to the case and tailored to the factual matrix
- **s 57(1) EA: Provisional relevance**: If evidence's relevance depends on another fact being found (e.g. that the evidence is what the party says it is), the court may still treat it as relevant if:
  - **(a)**: Evidence can be treated as relevant if it's **reasonably open** to make the necessary finding now
  - **(b)**: Evidence can be treated as relevant **conditionally**, if further evidence later could make that finding reasonably open.

### Step 3: Identify EACH type of evidence

\*\*EACH type of evidence MUST be identified

#### 1. Directly Relevant Evidence

Evidence which, if accepted, tends to **prove/disprove a fact in issue**

- No additional reasoning is required

##### EXAMPLES

- Oral evidence of witness's sensory perceptions of facts in issue
- Documentary evidence depicting facts in issue
- Admissions made by the defendant

#### 2. Indirectly Relevant Evidence

Evidence that requires the tribunal of fact to **extended reasoning processes** to determine whether the existence of the fact in issue is made more or less probable by the evidence

##### EXAMPLES

- Credibility evidence: Shows that a witness should or should not be believed
- Tendency evidence: Shows a person has a tendency to act in a particular way (**s 97**)
- Coincidence evidence: Evidence that it would be too much of a coincidence for two or more unusual events to have happened by chance, so the same person probably did them (**s 98**)
- Failure to adduce evidence: what facts may be inferred from a party's silence, or failure to adduce evidence that could assist their case, in the face of allegations made by the other side

##### 2a. Circumstantial Evidence

A kind of indirectly relevant evidence

- Evidence of facts which **provide a logical basis for inferring** that a fact in issue is more/less likely to have occurred
  - Does not prove a fact in issue unless an inference is drawn (**Plomp v R**)
  - Evidentiary circumstances must bear **no other reasonable explanation** (**Plomp v R**)
  - **Smith v R**: Evidence adds nothing **if it's the same as what the jury can observe themselves** → irrelevant, since it doesn't affect their assessment of a fact in issue

### Step 4: Analogue with Case

#### **Plomp v R (High Court) – RELEVANT**

##### Facts:

- The accused was charged with drowning his wife while surfing. There were no witnesses to the death.
- However, evidence showed he was having an affair and had told his lover's children she would be their "new mummy."

**Held:**

- ADMISSIBLE
- While an affair doesn't prove murder on its own, when viewed with "all the circumstances," it provided a motive.
- This motive made the probability of the fact in issue (that he killed her rather than it being an accident) more likely.

**Smith v R (2001) (High Court) – IRRELEVANT**

**Facts**

- A bank was robbed.
- The prosecution called two police officers to testify that the person in the bank's CCTV security photos was the accused.
- The police officers did not know the accused personally; they had just studied the photos.

**Held:**

- INADMISSIBLE
- The jury had the photos and could see the accused in the dock. The police were in no better position than the jury to make the comparison.
- Because the evidence provided no "value add" or logical assistance, it could not rationally affect the assessment of the facts.

**R v Stephenson (Vic Supreme Court) – IRRELEVANT**

**Facts:**

- The accused caused a fatal car crash involving another car (a Fiat) containing three people.
- The defence wanted to introduce blood alcohol readings of the victims in the Fiat to suggest contributory negligence or that they caused the crash.
- It was unknown who was actually driving the Fiat.

**Held:**

- INADMISSABLE
- Because the defence couldn't prove who was driving the Fiat, the blood alcohol levels of the occupants were too remote and tenuous.
- There was no logical connection established between the victims' alcohol levels and the accused's culpability.

**BBH v R (2012) (High Court) – RELEVANT**

**Facts:**

- The accused was charged with sexual offences against his daughter. The prosecution led evidence of a separate, uncharged incident where the accused was seen with his face near his daughters bare bottom.

**Held:**

- The evidence was relevant.



- Even though it was a different child and uncharged, it showed a "sexual passion" or interest (motive).
- This made it more probable that the daughter was telling the truth about the charged offences.

### Step 5: Consequence of Evidence

As [EVIDENCE] is relevant, it is prima facie admissible (**s 56**). Otherwise, it is inadmissible

### Step 6: Would Any Judicial Discretions Operate to Exclude/Limit the Evidence? s 135 – s 137

#### Terms

**Probative Value:** The extent that the evidence could rationally affect the assessment of the probability of existence of a fact in issue (**Dictionary in EA**)

**Unfair Prejudice:** The undue impact of the evidence, adverse to the accused, on the jury over and above its probative value (**Pfennig v R**).

- e.g. evidence that is shocking/gruesome

#### Discretions

Evidence must have a sufficient **probative value** outweighing its prejudicial effect.

- Not all evidence which is logically relevant is legal admissible (**R v Stephenson**)

#### **S 135 – General Discretion to EXCLUDE**

The court (**civil and criminal**) **MAY** exclude evidence if its probative value is substantially outweighed by the danger that it might:

- Be unfairly prejudicial to a party; or
- Be misleading or confusing; or
- Cause or result in undue waste of time

#### **Unfairly prejudicial**

- Means that the jury may use the evidence in some unfair way (**R v BD**)

#### **S 136 – General Discretion to LIMIT use**

Grants a discretion to the court (**civil and criminal**) to **LIMIT** the use of evidence if there is a danger a particular use of evidence might be:

- unfairly prejudicial; or
- Be misleading or confusing;

#### **S 137 – MANDATORY exclusions of PREJUDICIAL evidence (CRIMINAL)**

**Mandates** that, in **criminal proceedings**, prosecution evidence **MUST** be excluded if its probative value is outweighed by the danger of unfair prejudice to the defendant.

## COMPETENCE & COMPELLABILITY

**Competence:** does the person have the capacity to give evidence?

**Compellable:** is the person obliged to give evidence and can they be forced to do so?

## General Presumption

There is a **rebuttable presumption** that every person is both competent (**s 12a**) and compellable (**s 12b**) to give sworn evidence. Therefore [W] must prima facie give sworn evidence (**s 13(3)**) and choose (**s 23(1)**) to take an oath or affirmation (**s 21(1)**) before giving evidence

## Competence

### Step 1: Is the Witness Competent?

This issue is a preliminary question for the judge to determine on a voir dire (at beginning of trial without the jury present) - **s 189(1)(c)**

#### **PRESUMPTION**

It is presumed that **a person is not incompetent – s 13(6)**

#### **Not Competent**

Per **s 13(1)**, a person is NOT competent if, for any reason (**mental, intellectual or physical disability**):

- a)** the person **does not have the capacity to understand** a question about the fact; **or**
- b)** the person **does not have the capacity to give an answer** that can be understood to a question about the fact

AND that incapacity **cannot be overcome**

- Consider whether the incapacity can be overcome (**s 13(1)**) → through interpreter (**s 30**) or sign language/writing text for deaf/mute (**s 31**)
- **In determining in/competence, court may inform itself as it sees fit, including** obtaining information from a person who has relevant specialized knowledge based on the person's training, study or experience – **s 13(8)**

**S 13(3)** A person who IS competent to give evidence about a fact is NOT competent to give sworn or affirmed evidence about the fact if the person **does not have the capacity to understand that**, in giving evidence, he or she is under an obligation to give truthful evidence.

#### **CAVEATS**

- If person is rendered incompetent, may be competent to give evidence about other facts – **s 13(2)**
- Evidence given by W is **does not become inadmissible** merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent – **s 13(7)**

### Step 2: If Competent – Can they give SWORN evidence?

A competent witness can only give sworn/affirmed evidence **IF**:

- They have the capacity to understand that, in giving evidence, they are under an **obligation to tell the truth – s 13(3)**
  - Not enough to merely understand difference between truth or lies, W must understand they are being 'morally or legally bound' (**R v GW**).

**\*\* If not competent to give sworn evidence, analyse below in STEP 3**

#### **Any issues with Oath and Affirmations?**

- If giving sworn evidence, **must** take an oath or make an affirmation before giving evidence – **s 21(1)**
  - **Oath**: A solemn undertaking to give the truth and refers to the witness's religious beliefs

- **Affirmation** : also a solemn undertaking but does not refer to a religious belief

#### **Qualifications** – s 21(2)

- **S 21(2) DOES NOT** apply to unsworn evidence
- **S 21(6)** - In the case of a child or a person with a cognitive disability, the following words are taken to be a similar form of oath or affirmation - "**I promise to tell the truth.**".
- A person producing a document or object does **NOT** need to take an oath or affirmation – **s 21(3)**
- A witness or interpreter may choose between taking an oath or making an affirmation – **s 23(1)**
- The court **MUST** inform the person of this choice unless they are already aware – **s 23(2)**
- If a witness refuses to choose/take an oath, the court may direct them to make an affirmation - **s 23(2)**
- A **religious text is NOT required** for taking an oath – **s 24(1)**
- An oath remains valid even if the person is not religious and does not understand the consequences – **s 24(2)**
- A person may take an oath **WITHOUT** believing in God – **s 24A(1)**
- The oath does **NOT** have to reference a God – **s 24A(2)**

#### **Step 3: If Incompetent to SWORN evidence – Can they give UNSWORN evidence?**

Witness may otherwise give unsworn evidence if TJ informs them per **s 13(4) & (5)**.

**S 13(5)**: A person who, because of **subsection (3)**, is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person—

- a) that it is important to tell the truth; **and**
  - b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should **tell the court if this occurs**; **and**
  - c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
- **Must be strictly complied with otherwise witness is incompetent to give unsworn evidence (SH v R)**
  - **Witness DOES NOT NEED TO ACKNOWLEDGE** this direction, it just needs to be given (**R v Muller**)

#### **Step 4: Other matters to suggest in/competence?**

##### **Accused in criminal proceedings**

\*\* Only applicable in a **criminal proceeding** – **s 17(1)**

- If W is the defendant in a criminal proceeding, they **are not competent** to give evidence for prosecution – **s 17(2)**
  - However, **IS** competent for their own defence

## Co-Accused in criminal proceedings

- An associated accused is not compellable to give evidence for or against an accused in a criminal proceeding, **UNLESS** the associated accused is being tried separately from the accused – **s 17 (3)**
- Co-accused may choose to give evidence for prosecution but must be advised by the court of their right to refuse – **s 17(4)**

## Cognitively impaired

- Opposing counsel will seek an **unreliability warning** as the W's evidence may be unreliable – **s 31-32 JDA (criminal proceeding)/ s 165 EA (civil proceeding)**

## Children

### In Criminal Proceedings

Per **s 33 JDA**, the TJ, prosecution and defence must **NOT** say, or suggest in any way, to the jury that:

- a) children as a class are unreliable witnesses; or
- b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
- c) a particular child's evidence is unreliable solely on account of the age of the child; or
- d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

### In Civil Proceedings

**S 165A EA** stipulates similarly to **s 33 JDA**:

- 1) A judge in any civil proceeding in which evidence is given by a child before a jury must **NOT** do any of the following—
  - a. warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
  - b. warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
  - c. give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child.

## Step 5: Alternative Arrangements - Sexual Assault, Family Violence, Assault Cases (IF APPLICABLE)

### Criminal Procedure Act 2009 (Vic)

## Use of Recorded Evidence-in-Chief

### APPLICATION – **s 366**

Applies to criminal proceedings that relates to **sexual offences, family violence offences, indictable offences involving assault/injury/threat of injury or an assault/aggravated assault under Summary**

### Offences Act – **s 366(1)**

- Applies to a witness who is:

- A child (under 18) – **s 366(2)(a)**
- Cognitively impaired – **s 366(2)(b)**

#### **USE OF RECORDED EVIDENCE-IN-CHIEF – s 367**

- Such a witness mentioned in **s 366** may give evidence in chief (wholly/partly) by **AV recording**

#### **ADMISSIBILITY OF RECORDED EVIDENCE IN CHIEF – s 368**

- Subject to **subsection (3)**, a recording referred to in **section 367** is admissible as evidence in a summary hearing, special hearing or trial in the proceeding as if its contents were the direct testimony of the witness if: - **s 368(1)**
  - Notice requirements are complied with – **s 368(a)**
  - D and lawyer were given reasonable opportunity to listen/view recording – **s 368(b)**
  - At the hearing W attests to the truthfulness of the contents and is available for cross-examination and re-examination – **s 368(c)**
- The court **may rule as inadmissible the whole or any part** of the contents of a recording – **s 368(3)**

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### **Procedure And Rules for Children and Cognitively Impaired Complainants (In Sexual Offence Matters)**

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#### **APPLICATION – s 369**

Applies to child under 18 y/o or cognitively impaired complainants in **sexual offences** – **s 369**

- The **whole of the evidence (including cross and re-examination) of a complainant must be** AV recorded at a **special hearing** and presented to court in that form - **s 370(1)(a)**

#### **SPECIAL HEARING FOR RECORDING EVIDENCE – s 370**

**s 370(1)** - The whole of the evidence (including cross-examination and re-examination) of a complainant must be:

- a) given at a special hearing and recorded as an audiovisual recording; **AND**
- b) presented to the court in the form of that recording.

**s 370(2)** - The court may, on the application of the prosecution, direct that the complainant is to give direct testimony if the court is satisfied that the complainant—

- a) is aware of his or her right to have his or her evidence taken at a special hearing; and
- b) is able and wishes to give direct testimony in the proceeding.

**s 370(1A)(1B)** - Court must direct that the special hearing is held either before or during the trial. Relevant factors include:

- 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 conducting the special hearing during the trial is likely to:
  - i. intimidate or
  - ii. have an adverse effect on 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; and
- g) any other matter that the court considers relevant’.

### **CONDUCT OF SPECIAL HEARING – s 372**

**s 372(1)** - At a special hearing:

- a) the defendant and his or her legal practitioner are to be present;
- b) the defendant
  - i. is not to be in the same room as the complainant when the complainant's evidence is being taken; but
  - ii. is entitled to see and hear the complainant while the complainant is giving evidence.
- c) no unauthorised persons are to be present when the complainant’s evidence is being taken; and
- d) the evidence of the complainant is to be given by means of closed-circuit television that enables communication with the courtroom.

### **ADMISSIBILITY OF EVIDENCE FROM SPECIAL HEARING – s 374**

- Recording is admissible as if its contents were direct testimony of witness – **s 374(2)**
- The court **may rule as inadmissible the whole or any part** of the contents of a recording – **s 374(3)**

## **Compellability**

### **Step 1: Is the Witness competent?**

If YES: Witness is prima facie compellable – **s 12(b) EA**

If NO: Not compellable

### **Step 2: Exceptions: Family of the accused**

\*\* Only applicable in a criminal proceeding – **s 18(1)**

- A person who, when required to give evidence is the **spouse, de facto partner, parent or child** of the accused **may object** to being required to: - **s 18(2)**
  - Give evidence; or – **s 18(2)(a)**
  - Give evidence of a communication between the person and the accused – **s 18(2)(b)**

### **Step 2b: Procedural matters**

- Objection **must be made before W gives E** or as **soon as practicable** after becoming aware of their right to object – whichever is later (**s 18(3)**)
- Court must be satisfied that W is aware of their right to object (**s 18(4)**)
- Objections are heard at the **voir dire** (**s 18(5)**)

## Step 2c: Court considers objection

As per **s 18(6)**, W will not be compelled to give evidence if there is:

- b) a likelihood that **harm** might be caused to the **relationship** – [apply to facts] – **s 18(6)(a)**
- AND**
- c) the **nature** and **extent** of that harm **outweighs** the desirability of having the evidence given – **s 18(6)(b)**

### FACTORS CONSIDERED: **s 18(7)**

<b>s 18(7)(a)</b> : Nature and gravity of the offence	Murder vs shoplifting - <b>R v Khan</b> : Murder of a friend.
<b>s 18(7)(b)</b> : Substance and importance of the evidence, and likely weight to be attached to it	- How vital? What weight can jury give?
<b>s 18(7)(c)</b> : Is other evidence reasonably available?	- If witness the only one who can provide evidence → will increase desirability of evidence being heard.
<b>s 18(7)(d)</b> : Nature of the relationship between D and the W	- <b>R v Khan</b> : Length of marriage, no. of children
<b>s 18(7)(e)</b> : Would W's evidence disclose a matter received in confidence from D?	- Harsh to force family members to give evidence against a partner of confidential info in context of relationship.

## Definitions of Spouse, De facto Partner, Parent, Child

- **Spouse**: a husband or wife, considered in relation to their partner (**Oxford Dictionary**)
- **De facto partner**: **Clause 11 Part 2 of EA Dictionary**
  - A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married. The following matters as are relevant in the circumstances:
    - **(a)** the **duration** of the relationship;
    - **(b)** the nature and extent of their **common residence**;
    - **(c)** the **degree of financial dependence** or interdependence, and any **arrangements for financial support**, between them;
    - **(d)** the ownership, use and acquisition of their **property**;
    - **(e)** the degree of **mutual commitment** to a shared life;
    - **(f)** the care and **support of children**;
    - **(g)** the reputation and public aspects of the relationship.
  - Includes homosexual relationship
- **Parent**: **Clause 10(2) Part 2 of EA Dictionary**
  - **(a)** an **adoptive parent** of the person; or
  - **(b)** if the person is an **ex-nuptial child**—the person's natural father; or



- **(c)** the person with whom a child is **living as if the child were a member** of the person's family.
- **Child:** means a child of **any age** and includes the meaning given in **clause 10(1) of Part 2** of this Dictionary
  - **(a)** an **adopted** child or ex-nuptial child of the person
  - **(b)** a child living with the person **as if the child were a member** of the person's family