

Topic 2. Relevance

Core rule

Evidence is relevant if, if accepted, it could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue.

- **Section 55(1)** defines relevance with a low threshold: "any impact can be enough."
- **Section 55(2)** clarifies that evidence is not irrelevant merely because it relates only to credibility, admissibility of other evidence, or failure to adduce evidence.
- **Section 56**: relevant evidence is admissible; irrelevant evidence is inadmissible.
- **Section 57** — provisional relevance: if relevance depends on another finding, the court may provisionally admit the evidence if it is "reasonably open" to make that finding.
- **Probative value** (Dictionary definition): the extent to which evidence could rationally affect the assessment of the probability of a fact in issue. Evidence is either relevant or not; if relevant, its probative value may then be considered.

Smith v The Queen (2001) 206 CLR 650

Fact and issues: Smith was charged with robbery. The prosecution's case depended on identifying Smith as the person in photographs taken by bank security cameras. Two police officers gave evidence that they had previous dealings with Smith and recognised the person in the photo as Smith. The issue was whether this police identification evidence was properly received — specifically, whether it was relevant under s 55.

Held and ratio: The High Court held (5:2) that the police officers' identification evidence was not relevant and therefore inadmissible. The officers had no better basis for comparison than the jury themselves — they had not witnessed the robbery, had no special knowledge of Smith's appearance at the time of the offence, and were merely comparing the photograph with their memory of Smith's appearance from previous encounters. As McHugh J stated for the majority, the witness's assertion of identity "was founded no differently from the material available to the jury from its own observation." The witness's assertion was thus not evidence that could rationally affect the assessment by the jury of whether Smith was the person in the photograph. The court emphasised that the determination of relevance requires fundamentally identifying the issues at trial and then assessing whether the proposed evidence could rationally affect the probability of the fact in issue. Kirby J dissented, arguing that police officers who had met the defendant repeatedly were in a better position than jurors to make

the comparison, and that the evidence was relevant but should be excluded due to the risk of prejudice.

Takeaways: Relevance must be determined by reference to the specific fact in issue and the precise contribution the evidence makes. Evidence that merely duplicates what the jury can assess for themselves is not relevant.

Evans v The Queen (2007) 235 CLR 521

Fact and issues: Security cameras photographed an armed robber wearing overalls, sunglasses, and a balaclava. Similar items were found at Evans's home. At trial, Evans was required to wear those overalls and the balaclava, plus similar sunglasses, in front of the jury to compare his appearance with the robber in the security photographs. Evans also walked in the overalls before the jury, and the prosecution sought to have him pronounce the word "serious" (which witnesses said the robber had said with a particular pronunciation). The issue was whether these courtroom demonstrations constituted admissible evidence.

Held and ratio: The High Court held that all three items — wearing the balaclava, walking in the overalls, and pronouncing "serious" — were relevant evidence, though their admissibility was subject to discretionary exclusion under ss 135 and 137. Regarding the balaclava, if Evans had looked different from eyewitness descriptions when wearing it, that would have been capable of raising a reasonable doubt; conversely, similarity could support identity. The relevance of evidence depends on its effect taken with other evidence, not on the evidence standing alone. Regarding the walk in overalls, the demonstration was capable of making an impression favourable or adverse to Evans — either way, it was relevant. Regarding the pronunciation, only 4 of 7 witnesses claimed the robber said "serious" and only one mentioned the particular pronunciation, but the jury was entitled to conclude that the offender had speech idiosyncrasies relevant to identification. The Court noted that in-court demonstrations do not require an order under s 53 (which applies only to out-of-court views, demonstrations, and inspections). The Court left open whether the evidence should have been excluded on discretionary grounds.

Takeaways: Evidence can be relevant even if its effect depends on combination with other evidence. In-court demonstrations and comparisons with the accused's appearance are relevant to identification.

Phillips v The Queen (2006) 225 CLR 303

Fact and issues: Phillips was charged with indecent assault and rape against multiple complainants. The prosecution called all six complainants, who gave evidence about Phillips pursuing sexual activity with them without consent. The trial judge had found that the probative value of each complainant's evidence lay in its ability to show the "improbability of

similar lies by each of the complainants." The issue was whether the evidence of each complainant was cross-admissible in relation to counts involving other complainants.

Held and ratio: The High Court quashed the convictions, holding that the decision to join the charges in a single indictment was wrong in law. The evidence of each complainant about whether they consented to sexual activity with Phillips was not cross-admissible in relation to counts involving other complainants due to lack of relevance. As the Court stated: "It is impossible to see how the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused. It proves only what mental state each of the other complainants had on a particular occasion affecting them and that can say nothing about the mental state of the first complainant on a particular occasion affecting her." Each complainant's evidence was relevant only to the counts involving that particular complainant. Even if relevant, the exclusionary rule against similar fact evidence (now the tendency/coincidence rules) would apply.

Takeaways: Evidence from multiple complainants in sexual offence cases is not automatically cross-admissible. Relevance must be established independently for each fact in issue; the improbability of similar lies is not, by itself, a sufficient basis for relevance.

Analytical method

1. Identify the fact in issue.
2. Identify what proposition the evidence is tendered to prove.
3. Explain the logical connection.
4. Consider whether the evidence could rationally affect the probability of that fact.
5. Consider exclusionary rules or discretions **only after** relevance is established.

The question of relevance must always be asked and answered — never assumed (*Smith v The Queen* (2001)).

Topic 3. Proof (I): Burdens, Standards and Prima Facie Case

A. Burdens and standards of proof

1. Civil cases

Legal burden (persuasive burden): the ultimate obligation to persuade the tribunal of fact. In civil cases, the burden generally lies on the party asserting a matter (the plaintiff), though it may also depend on who has better access to evidence (peculiar knowledge).

Standard of proof in civil cases: balance of probabilities (symmetrical — same standard for both parties).

- **Section 140(1):** the court must find the case of a party proved if satisfied on the balance of probabilities.
- **Section 140(2):** in deciding whether the standard is satisfied for serious allegations (e.g., fraud, racial discrimination, assault), the court must consider the nature of the cause of action, the nature of the subject-matter, and the gravity of the matters alleged.
- The common law principle in *Briginshaw v Briginshaw* (1938) remains relevant: the strength of evidence necessary to establish facts on the balance of probabilities depends on the nature of what is sought to be proven. Serious allegations require stronger, more cogent evidence. However, this does not create a third standard of proof — it is merely the careful application of the civil standard.

2. Criminal cases

Standard of proof in criminal cases: beyond reasonable doubt (asymmetrical — high standard due to imbalance in resources and stakes).

- **Section 141(1):** the court is not to find the prosecution case proved unless satisfied beyond reasonable doubt. This is the highest level of probability (close to certainty, e.g., ~90%).
- **Section 141(2):** where the defendant bears a persuasive burden (rare statutory exceptions), the standard is balance of probabilities.
- The common law principle in *Green v The Queen* (1971): the High Court discouraged further elaboration of explaining "beyond reasonable doubt." Jurors set the standard of what is reasonable using their experience and judgment; they are not required to submit their mental processes to objective analysis.