

Topic 2: Relevance

1. Identify the fact(s) in issue to which the evidence is said to relate – EA s55(1) – The fact in issue can be logically connected to the evidence presented [APPLY FACTS]
2. Per the case of IMM, this evidence is taken at its highest, meaning [APPLY FACTS] is assumed to be true on its surface value, without second thoughts. If the evidence is taken at its highest, this infers that X is more likely to have acted [APPLY FACTS, e.g. aggressively than defensively].
3. If accepted, would the evidence rationally affect a fact in issue – s55(1) → if YES, determine whether the relevance is direct or indirect (Smith v R) → ideally draw connection between both directly and indirectly relevant

DIRECT EVIDENCE

Evidence proves fact directly

INDIRECT EVIDENCE

The evidence requires the tribunal to engage in an extended reasoning process to determine whether the fact in issue is more or less probable by the evidence, thus indirectly relevant.

Motive cannot prove guilt → Plomp

Facts relevant to the issue/ circumstantial evidence → apply relevant circumstances of evidence to draw inference from circumstantial evidence to facts in issue → Smith

4. Test the inferential reasoning – identify the inference the tribunal is invited to draw and ask whether the evidence provides a logical basis for that inference (IMM)

- Relevance refers to an item of evidence must be relevant to a fact in issue in order to be admissible
- **Facts in Issue:** facts which the plaintiff or prosecutor and the defence or accused must prove in order to be successful and are established by reference to substantive rules of law
- **Relevant Facts:** facts which tend to prove or disprove the facts in issue
- **Directly relevant:** to a fact if it affects the probable existence or non- existence of that fact.
- **Indirectly relevant:** if it bears upon the probative value of evidence which is itself directly relevant
- **Probative value:** the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue
- **Prejudicial effect:** the undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force: *Pfennig v R*

S.55(1) Evidence Act 2008 (Vic)

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 probability of the existence of a fact in issue in the proceeding.

S.55 (2) Evidence Act 2008 (Vic)

In particular, evidence is not taken to be irrelevant only because it relates only to—

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

S.56 Evidence Act 2008 (Vic)

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

IMM v R [2016] HCA 14 (French, Kiefel, Bell & Keane JJ)

- The question of relevance is determined taking the evidence 'at its highest'.
- Issues of reliability/credibility do not factor in this decision.
- The same approach applies when determining the extent of the probative value of the evidence; e.g. under ss. 135/137.
- There may be cases where the evidence is so unreliable/lacking in credibility that it could not 'rationally affect...the assessment of the existence of a fact in issue', in which case it is irrelevant.

Smith v R (2001)

- "The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury." per Gleeson CJ, Gaudron, Gummow and Hayne JJ

Applying s55

- Section 55 states evidence must be relevant "**directly or indirectly**" to facts in issue.
- Directly relevant evidence is:
 - evidence which, if accepted, tends to prove/disprove a fact in issue directly
 - no additional reasoning is required by the tribunal of fact
- Types of directly relevant evidence include:
 - oral evidence of witness's sensory perceptions of facts in issue
 - documentary evidence depicting facts in issue
 - admissions made by the defendant
- Indirectly relevant evidence requires the tribunal of fact to engage in **extended reasoning processes** to determine whether the existence of the fact in issue is made more or less probable by the evidence.
- **Example: Circumstantial evidence:** "facts relevant to facts in issue" (*Smith*). Circumstantial evidence is evidence of facts which provide a *logical basis for inferring* that a fact in issue is more/less likely to have occurred. Even if believed, does not prove the fact in issue unless and until the court draws an inference from the relevant circumstantial evidence to the facts in issue; the inference the jury is invited to make → If there is an alternative hypothesis which explains the facts, consistent with the accused's innocence, can prosecution succeed?
- Examples: **Plomp**: It is said that Plomp's motives cannot be taken into account until it is shown that in some way his actions were responsible for Fay's death; there is nothing to show that he physically impeded her emerging from the surf; until that is shown, evidence of motive cannot be used to prove guilt. There is no legal doctrine to that effect. All the circumstances must be weighed in judging whether there is evidence upon which a jury may be satisfied of the crime. It may be dangerous to rely on motive, where an unexplained death is not otherwise proved to be attributable to the accused. All such considerations must be dealt with on the facts of the particular case.
- Other kinds of indirectly relevant evidence includes:
 - **Credibility evidence:** evidence adduced for the purpose demonstrating that a witness, and facts deposed by that witness, should or should not be believed (Topic 6).
 - **Tendency ("propensity") evidence:** evidence adduced for the purpose of showing that a person has had a particular tendency in the past and, therefore, is more/less likely to have behaved in the way now alleged (Topic 8).

- **Coincidence (“similar fact”) evidence:** evidence adduced for the purpose of showing that, because of the improbability of 2 or more events occurring, a person did a particular act or had a particular state of mind on the occasion as now alleged (Topic 8).
- **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 (Topic 7).

Topic 3: Competence and Compellability

Exam

Preliminary steps:

- What is the evidence
 - Relevance of evidence → **apply steps above**
- Start with presumption: s13(6) and s12: **per s13(6) it is presumed that [X] is competent till they are proved they are not. This coincides with s12 to provide an additional presumption that any competent person is also compellable**
 - S13(1) – explains when a person is not competent – **the Defence will argue under s13(1) that X is not competent to give evidence as they do not have the capacity to understand a question about the fact/ do not have the capacity to answer the question in a way that can be understood. Per the facts [apply] this cannot be overcome.**
 - Prosecution will argue that X is competent and thus compellable to give evidence
 - Apply is evidence voir dire: It is the question about the fact – **per s189 the evidence in question is dependent on whether [fact] exists. This is a preliminary question**
 - May suggest prosecution to call a specialist or a cognitive specialist – the degree of severity may be dependent on care
 - Conclude → Is X competent to give sworn evidence → look at case law**
 - If X cannot give sworn evidence, X can still give unsworn evidence under s 13(4) EA if the court provides X with a statement following s13(5) informing X to give truthful evidence**
 - X MUST UNDERSTAND OBLIGATION TO TELL TRUTH → case law**
 - Failure to give direction as per s13(5) = witness not competent to give unsworn evidence**
 - X may object to give evidence if s18 applies → ONLY CRIMINAL AND SPOUSE OR FAMILY**
 - Court cannot force X [IF DEFENDANT SPOUSE OR FAMILY] to provide evidence, but must take into account factors under s18(7)**

ATHEISM DOES NOT AFFECT ABILITY TO GIVE SWORN EVIDENCE – s23
IF SEXUAL OFFENCE → LOOK AT ALTERNATIVE WAYS TO GIVE EVIDENCE

Compellability

If accused – not competent or compellable for prosecution, only competent for own defence not compellable
→ not compellable for co-accused

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?

Evidence Act 2008 (Vic) S.12 Competence and compellability

Except as otherwise provided by this Act-

- every person is competent to give evidence;
- a person who is competent to give evidence about a fact is compellable to give that evidence.

Evidence Act 2008 (Vic) S.13(1) Competence—lack of capacity

A person is not competent to give evidence about a fact if, for any reason (including a 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.

S.13(6): It is **presumed**, unless the contrary is proved, that a person is not incompetent because of this section → person is presumed competent till they are proved they are not

S13(8): For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

Impaired Persons and Children

- People who might not be competent witnesses:
 - Adults with mental, intellectual or physical disability; OR
 - who otherwise are cognitively impaired

Evidence Act 2008 (Vic)

189 The voir dire

If the determination of a question whether—

.....

(c) A witness is competent or compellable— depends on the court finding that **a particular fact exists**, the question whether that fact exists is, for the purposes of this section, a preliminary question.

S.13 (2): A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

Oath or Affirmation

ss.21

- (1) A witness giving sworn evidence must take an oath or make an affirmation.
- (2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.
- (3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.
- (4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.
- (5) Such an affirmation has the same effect for all purposes as an oath.

23 Choice of oath or affirmation

- (1) A person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.
- (2) The court is to inform the person that he or she has this choice, unless the court is satisfied that the person has already been informed or knows that he or she has the choice.
- (3) The court may direct a person who is to be a witness to make an affirmation if—
 - ➔ the person refuses to choose whether to take an oath or make an affirmation; or
 - ➔ it is not reasonably practicable for the person to take an appropriate oath.
- If the oath is taken, for it to be legally effective, the witness does not have to:
 - swear on the bible or other religious text: s24(1)
 - be religious: s24(2)(a)
 - understand what it means to take the oath: s24(2)(b).
 - believe in a god: s24A; or

- Oath religious

- Affirmation – personal declaration

S13 (3): A person who is competent to give evidence about a fact is not competent to give sworn 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.

S.13(4): A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

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.

- a failure to give a direction as per s 13(5) will result in the evidence not satisfying the precondition and the witness will not be competent to give unsworn evidence
- failure will render the evidence inadmissible and conviction was set aside: **SH v R [2012] NSWCCA 79;**
SC v R [2023] NSWCCA 111.