

2026 Evidence Law Notes

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Topic 1 - Introduction & Relevance

1. Introduction to the course

The governing Victorian statute for the unit is the Evidence Act 2008 (Vic). Students must have a copy of that Act, obtainable by download, and must also have the Jury Directions Act 2015 (Vic), which is equally critical.

The common law remains relevant unless specifically or by inference displaced by the uniform evidence law in Victoria.

2. Topic Overview

The topic is foundational and sets out the nature of the Evidence Act, what counts as evidence, why courts exclude evidence even if it seems useful, how to determine relevance, limits of judicial discretion to exclude, burdens and standards of proof, judicial notice, certificates and statutory presumptions, the judge–jury divide, the role of the voir dire as a trial within a trial about an evidentiary dispute, and appellate options to prevent wrongful convictions and correct substantial miscarriages of justice, particularly the evidentiary aspects and what juries are told.

3. What is Evidence?

In legal settings, evidence is information presented to the court to prove or disprove a fact in issue. A fact in issue is a material fact that must be established to resolve the dispute. In criminal cases, facts in issue include elements such as actus reus, mens rea, identity, and similar. In civil cases, they include matters such as what was agreed in contract, breach of a standard of care, causation, and damage.

Evidence can take many forms.

- Oral evidence or testimony: what a witness says in the witness box. This can be direct eyewitness evidence, hearsay observations, or circumstantial observations, for example seeing airline tickets on a kitchen bench from which an inference is drawn. Expert opinion is a type of oral evidence that provides technical or scientific insight from a qualified specialist on matters outside common understanding. Experts can give opinions; lay witnesses ordinarily cannot, subject to exceptions considered later in the course.
- Documentary evidence: written records, business records, contracts, emails, text messages, and digital documents such as CCTV recordings, metadata, and social media posts. Rules govern how such documents are produced and how they can be used.
- Real evidence: physical items, for example a weapon used in an assault, a pair of shoes with blood later analysed by DNA experts, keys, or a food dehydrator. Chain of custody and proper presentation are necessary.
- Digital evidence: CCTV, metadata etc

Not everything that seems useful or persuasive in everyday discussion will be admitted. Evidence passes through legal filters governed by the law of evidence. A party may use multiple types of evidence to prove one or more aspects of a case, each subject to its own admissibility and use rules, and each contributing in combination to a complex evidentiary picture.

Relevance

Step 1 – Explain that relevant evidence is admissible, except as otherwise stated by the Act (s 56(1)). Irrelevant evidence is inadmissible (s 55(1)).

Relevance as the gateway to admissibility

To be admissible, evidence must be relevant under section 55. Relevance is the gateway to admissibility, with section 56 then providing that relevant evidence is admissible and irrelevant evidence is not, except as otherwise provided by the Act.

Step 2 – Applying the core test – s 55(1)

Evidence must be capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue (s 55(1)).

Put simply, this means that Evidence is only admissible if it can logically change (even slightly) how likely it is that a key fact in the case is true or false. It doesn't have to prove the fact outright — it just needs to have *some* rational bearing on it, whether directly or indirectly.

“Fact in issue” refers to a material fact in dispute that must be resolved in deciding the case.

Take the evidence at its highest (IMM). Even if evidence is barely relevant), evidence can still be prima facie admissible (Papakosmas). - Reliability/credibility issues aren't assessed here. BUT, if so unreliable and lacking in credibility, then it might not rationally affect assessment of the probability of the existence of a FII (IMM).

Example: In a murder trial, the fact in issue is whether the accused killed the victim. A witness testifying they saw the accused near the crime scene that night is relevant — it doesn't prove guilt, but it rationally affects the probability that the accused was involved.

Other practical examples of whether something is relevant

Relevance is contextual. The same item can be relevant in one case and irrelevant in another. What matters is articulating the link between the evidence and facts in issue.

- A witness seeing the accused punch the complainant in an assault case is clearly relevant because it directly tends to prove the actus reus.
- CCTV showing someone resembling the accused entering a building shortly before an offence may be relevant because it increases the probability of presence, though it does not by itself prove presence at the relevant time.
- The accused owning a T-shirt with a logo described by a witness as worn by the offender may increase the probability of identity. Its probative value may be debated later under exclusionary rules if the logo is common.
- Unpaid parking fines of the accused are generally irrelevant to an unrelated assault. Context might change that conclusion if the assault concerned a meter inspector or the fines bore on time and location in dispute, though the unpaid status would likely be neutral.
- Angry social media posts about the victim or family might be relevant to motive or relationship context, subject to prejudice risks.
- Practising martial arts with a broomstick two weeks before an alleged broomstick assault could be relevant to familiarity with the object, with potential prejudice concerns.

Step 3 – Conclude on BOP (s 142)

Step 4 – Would any judicial discretions apply to exclude/limit the evidence

Even where evidence is relevant under section 55 and presumptively admissible under section 56, the court can exclude or limit its use.

Section 135: general discretion to refuse evidence

Applies in civil and criminal proceedings.

The court may refuse evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, misleading or confusing, or cause or result in an undue waste of time.

The provision imposes a balancing exercise.

Key terms:

- Probative value: logical strength or weight of the evidence in proving a fact in issue. Direct proof of a fact in issue has high probative value. Peripheral or speculative items have lower probative value.
- Unfair prejudice: Risk of improper reasoning or emotional reaction. Not mere damage to a party's case but the risk of improper reasoning, such as convicting because the accused appears to be a bad person, reacting emotionally rather than rationally, or punishing for unrelated misdeeds.
- Misleading or confusing: risks that decision makers cannot apply the evidence properly. This often arises with expert evidence, where juries might overvalue or overgeneralise expert conclusions. Basically, May cause jury to misunderstand or overvalue evidence
- Waste of time: where lengthy evidence adds little beyond cumulative material and consumes disproportionate hearing time. Basically disproportionate time for minimal evidentiary benefit

Case law examples

Smith and the Queen (2001) 206 CLR 650: Smith was charged with robbery. Poor-quality CCTV captured a person near the scene. A police officer with no special expertise purported to identify the accused from the footage after comparing it with a photo. The High Court held the evidence should have been excluded because the risk of overvaluation by the jury and the inherent weakness of the identification created unacceptable confusion.

Haddara and the Crown [2014] VSCA 100: Haddara was charged with murder after a drive-by shooting allegedly linked to gang activity. The Crown sought to adduce evidence of gang affiliations, prior threats, and an ongoing feud. The defence argued high prejudice. The Court of Appeal upheld admission because the probative value for motive, context, and identity was very high and, on balance, not substantially outweighed by prejudice.

S 135:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might— (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time."

Section 136: limiting use rather than excluding

(1) Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might be: (a) Unfairly prejudicial to a party; or (b) Misleading or confusing

Allows the court to limit the use of otherwise admissible evidence to reduce prejudice or confusion. For example, in a case like Haddara, the judge might admit evidence of criminal association for motive or identity but direct the jury that it cannot be used to reason that guilt follows from associations. Section 136 typically operates through precise jury directions.

Section 137: mandatory exclusion in criminal proceedings

Applies only in criminal proceedings and only to prosecution evidence (meaning the defence can use this provision to ask the court to exclude evidence by the prosecution). The judge must exclude evidence where the danger of unfair prejudice outweighs the probative value. There is no "substantially" qualifier. Even marginally greater prejudice requires exclusion.