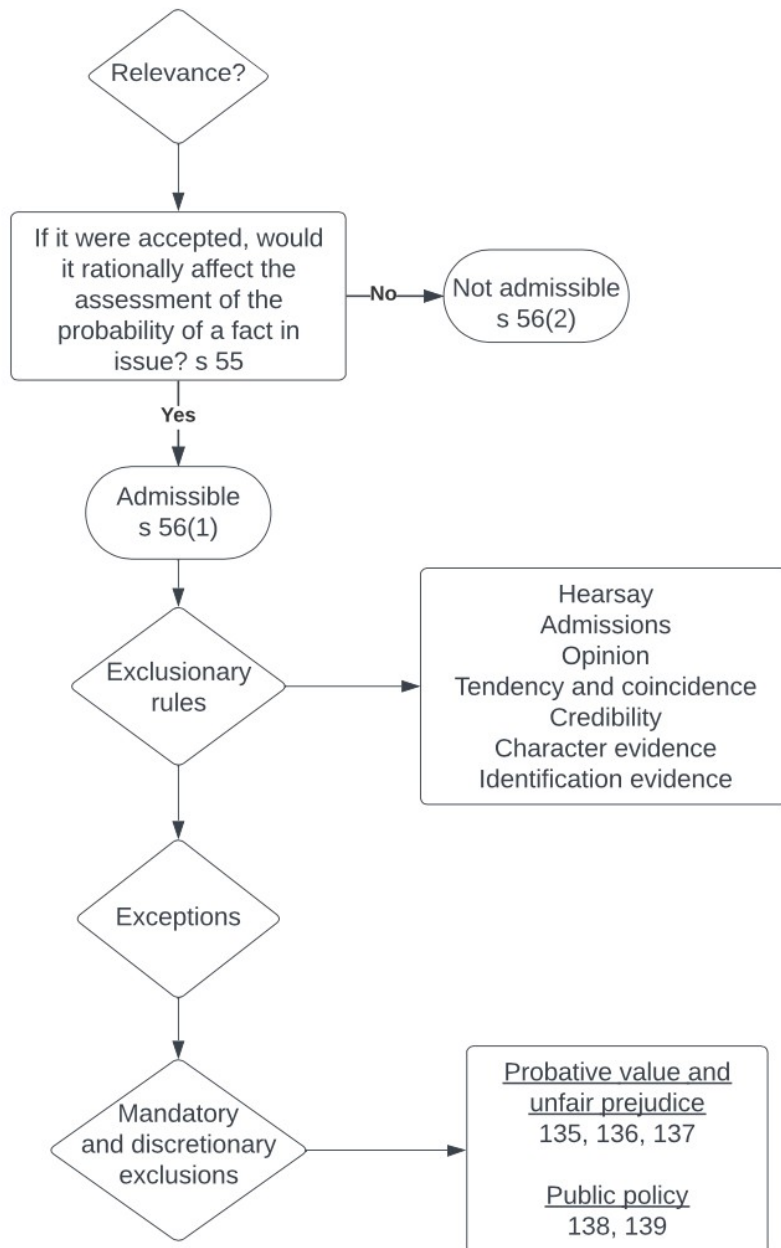


LAWS2207 Final Exam Notes

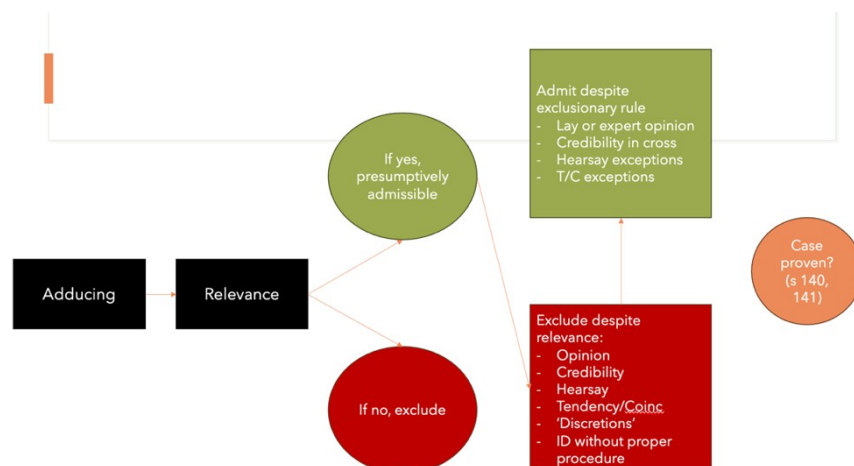


Steps for evidence problem solving:

- (1) Adduce evidence
- (2) Relevance
- (3) Exclusionary rule
 - ⇒ Exception to an exclusionary rule
- (4) Proof

Rationale for Evidence Law:

- 'Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.'

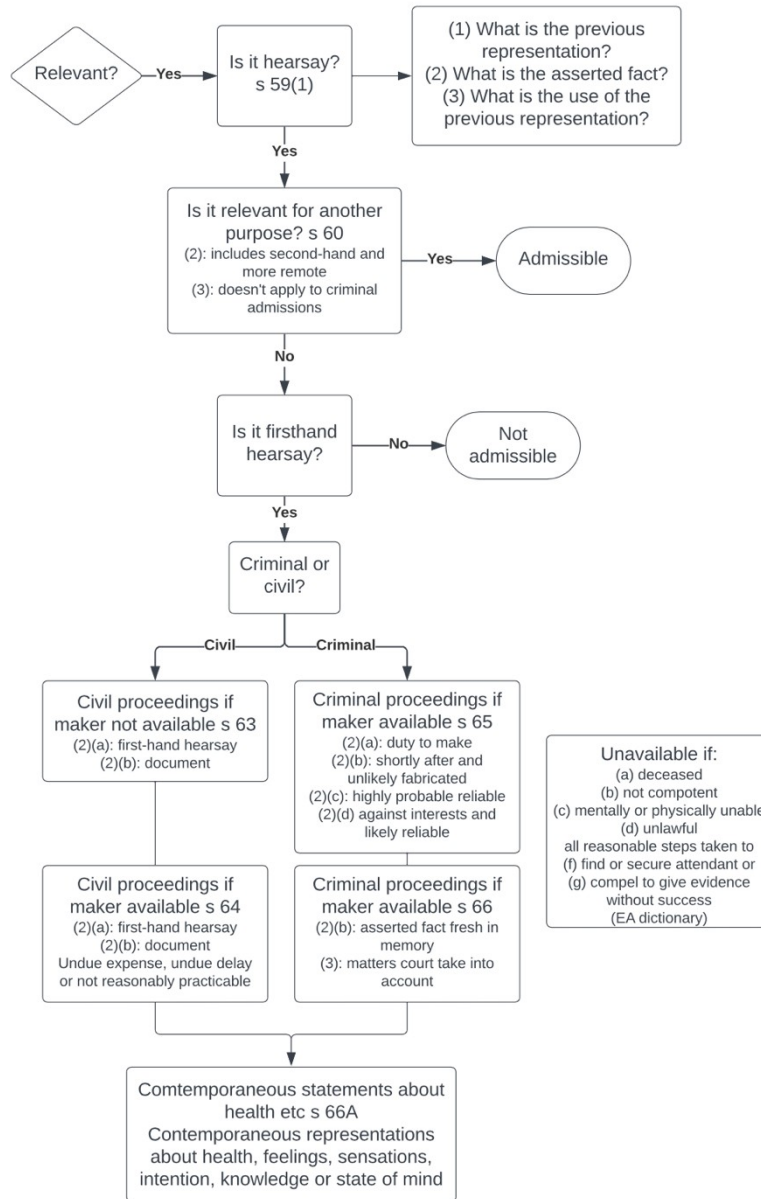


1. Relevance (s 55)

1. Is the evidence relevant?

- a. **55 Relevant evidence**
 - (1) 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.
 - **Papakosmas v The Queen**: requires a **logical** connection between evidence and a fact in issue (not a difficult standard to meet)
 - **IMM** → '...the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.'
 - (2) In particular, evidence is not taken to be irrelevant only (just) because it relates only to—
 - a. the credibility of a witness; or
 - b. the admissibility of other evidence; or
 - c. a failure to present evidence.
 - **Probative Value (EA Dictionary)**: PV is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue
 - Gradience of Relevance
 - **Smith v The Queen**: Is the evidence of police who were not eyewitnesses relevant? No because jury could have done the same thing.
 - Held: HC confirmed that evidence must be relevant to an element of the offence or in the chain of factual reasoning that leads to the proof of an element.
 - **Papakosmas**: Sometimes evidence is relevant in more than one way.
 - **Evans v The Queen**: What can the jury mentally simulate?
- b. **56 Relevant evidence to be admissible**
 - (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.
- c. **57 Provisional relevance**
 - (1) If the decision about the question whether evidence presented by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant—
 - a. if it is reasonably open to make the finding; or
 - b. subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make the finding.
 - (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and 1 or more other people had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in deciding whether the common purpose existed.
 - If admitted evidence is not relevant for a particular purpose, it is not admissible for that use.
 - The mere fact that evidence has been admitted does not mean that it may be used in all the ways it is relevant.

2. Hearsay (s 59)



1. Is it relevant and why?

2. Is it hearsay or not?

■ a. 59 Hearsay rule/definition and exclusions

- (1) 'Evidence of a **previous representation** made by a person is **not admissible to prove the existence of a fact** that it can **reasonably be supposed that the person intended to assert** by the representation.'
- (2) For this part, a fact mentioned in subsection (1) is an **asserted fact**.
- Out of court statements cannot be used for truth of contents
- General law definition of hearsay, **Friedman**: 'The basic definition of hearsay **includes any out-of-court declaration offered to prove the truth of a matter asserted in the declaration**. This is a vast category of evidence. Any out-of-court statement can be hearsay if it is offered to prove a factual proposition that the statement asserts'.

- **Previous Representations (EA Dictionary):** PR means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be presented.
- A previous representation is **caught by the hearsay rule** if:
 - 1. Adduced to prove the existence of a fact asserted by the representation; and
 - 2. 'it can reasonably be supposed that' the person who made the representation intended to assert the existence of that fact
- **Not caught by the hearsay rule** if:
 - (1) Oral discussions and representations to prove an alleged agreement
 - (1) Threats to prove acting under duress e.g. **R v Subramaniam**
 - (1) Previous statement to prove consistency or inconsistency with in-court statement (credibility)
 - (1) Medical history given by patient to doctor as basis of medical opinion of doctor
 - (2) A statement over the phone 'hello [name]' not intended to assert as a fact that they are talking to [name] e.g. **Walton v The Queen**
- **Subramaniam:** does not matter if the threat is real or not for duress, it is 'not the truth of the statement but the fact that the statement is said'
 - Not about truth of the threat, just that the threat existed e.g. if someone threatening to kill you, not about whether it was true that they were going to kill you, but just that they said they would
 - Here:
 - PR? = 'Hold this ammunition or I will kill you'
 - AF? = The terrorist will kill Subramaniam if he doesn't hold the ammunition.
 - Key question = Is this being adduced to prove:
 - The terrorist will kill Subramaniam if he doesn't hold the ammunition OR
 - That the terrorist said he will kill Subramaniam if he doesn't hold the ammunition
 - Even if an empty threat, still a threat, so focusing on whether the terrorist said that
- **Ordukaya v Hicks:** admissible hearsay alone isn't unfairly prejudicial

▪ **b. Hearsay Analysis**

- 1. Identify Previous Representation (PR).
- 2. What is the Intended Asserted Fact (IAF)?
- 3. What is the PR being adduced to prove?
- 4. If the PR is being adduced to prove IAF then = hearsay

▪ **c. Example**

Case	Previous rep	Asserted fact	Use(s)
<i>Col v The Queen</i> [2013] NSWCCA 303	Complainant: 'My husband attacked me'	She was attacked by her husband	(1) She was attacked by her husband (2) To impeach the credibility of complainant now because she recants this

▪ **Kamleh**

- (1) Identify the previous representation = 'I left the volume up on the TV when I left'
- (2) Identify the asserted fact in the previous representation = The volume was up on the TV
- (3) What is the use of the previous representation?
 - a. Being adduced to prove the volume was up OR

- b. To prove that he had knowledge that he shouldn't have?
 - = Prove he had knowledge that he shouldn't have had, similar to bad landlord case
- (4) If the previous representation is being used to prove the asserted fact, then it is hearsay
 - Here wasn't a hearsay use, not caught by the hearsay rule
 - [16] Such evidence did not offend against the hearsay rule. The evidence was not tendered or used to prove the truth of what Zappia said to Mr Simoniuk. **It was not tendered to prove that the television set had been turned up.** Rather, the fact that Zappia said what he did about the television set was relevant because **it disclosed a state of knowledge** on his part which had a tendency to prove that he was in unit 22 at the time of the killings. Thus, it had a tendency to prove a fact relevant to a fact in issue, because of other evidence which showed that he was in the presence of the appellant at all relevant times.
- **d. Other evidence law aspects**
 - Hearsay rule triggered by these:
 - Verdict accuracy / truth
 - Fairness
 - Integrity
 - Efficiency
 - Issue of hearsay: can't cross examine the declarant (**Friedman**)
 - ...the chief problem with hearsay is not that the in-court witness may be reporting inaccurately what the declarant said; concerns over the accuracy of the in-court witness's testimony may be address in the usual ways, principally by cross-examination. Rather, the principal concern is that, however well it may be proven that the declarant made the hearsay statement, the declarant cannot be cross-examined with respect to the statement.
 - The rules are very relaxed for getting hearsay in, except for evidence tendered by the prosecution in criminal cases, wide ranging, can almost always get it in

3. Does an exception apply?

- **a. Does it have another admissible use?**
 - **i. 60 Relevant for another purpose**
 - (1) Previous representations **can be used for truth of contents if relevant for another (non-hearsay) use**
 - Evidence relevant for a non-hearsay purpose is admissible
 - (2) **Applies whether or not person who made representation had personal knowledge of the asserted fact (includes second-hand and more remote hearsay)**
 - Added in response to decision in **Lee**
 - (3) **Doesn't apply to criminal admissions**
 - Added to codify decision in **Lee**
 - Rationale: not admitting for other purpose 'involves the drawing of unrealistic distinctions' (**ALRC**)
 - e.g. **Col v The Queen** → [32] Once the contents of the statement were admissible for a non hearsay purpose, the representations constituted evidence of the facts
 - **Quick v Stoland**: Can limit using use of evidence using **s 136** if **s 60** would be unfair
 - **s 136**: general discretion to limit use of evidence if there is a danger that it might:
 - (a) Be unfairly prejudicial to a party
 - (b) Be misleading or confusing
 - Facts: Expert relies on financial records for his expert report
 - Issue: Are those admissible for the truth of their contents via s 60?
 - Held: 'In many cases the extraordinary effect of s 60 would be unfair to the party against whom the evidence is tendered. For example, where the hearsay involves "facts" that are in conflict or "facts" that are unreliable it is quite unsatisfactory for those "facts" to be proven by the operation of s 60. One way in which this problem can be overcome is by an order under s 136 limiting the use to be made of that evidence.'