LAW OF EVIDENCE

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Today (Part 2)

- Admissibility of evidence – relevance (KOP Chapter 5)

- Admissibility of evidence – discretionary exclusions and limits on use (KOP Chapter 6)

  - General power to exclude
  - Exclusion in criminal cases “unfair prejudice”
  - General power to limit use
  - Improperly obtained evidence

- Admissibility of evidence – hearsay (KOP Chapter 7)

  - First hand hearsay exceptions
  - Other exceptions

Admissibility of evidence

Evidence Act - Chapter 3

Admissibility of evidence

- Chapter 3 deals with the question of whether adduced evidence is admissible.

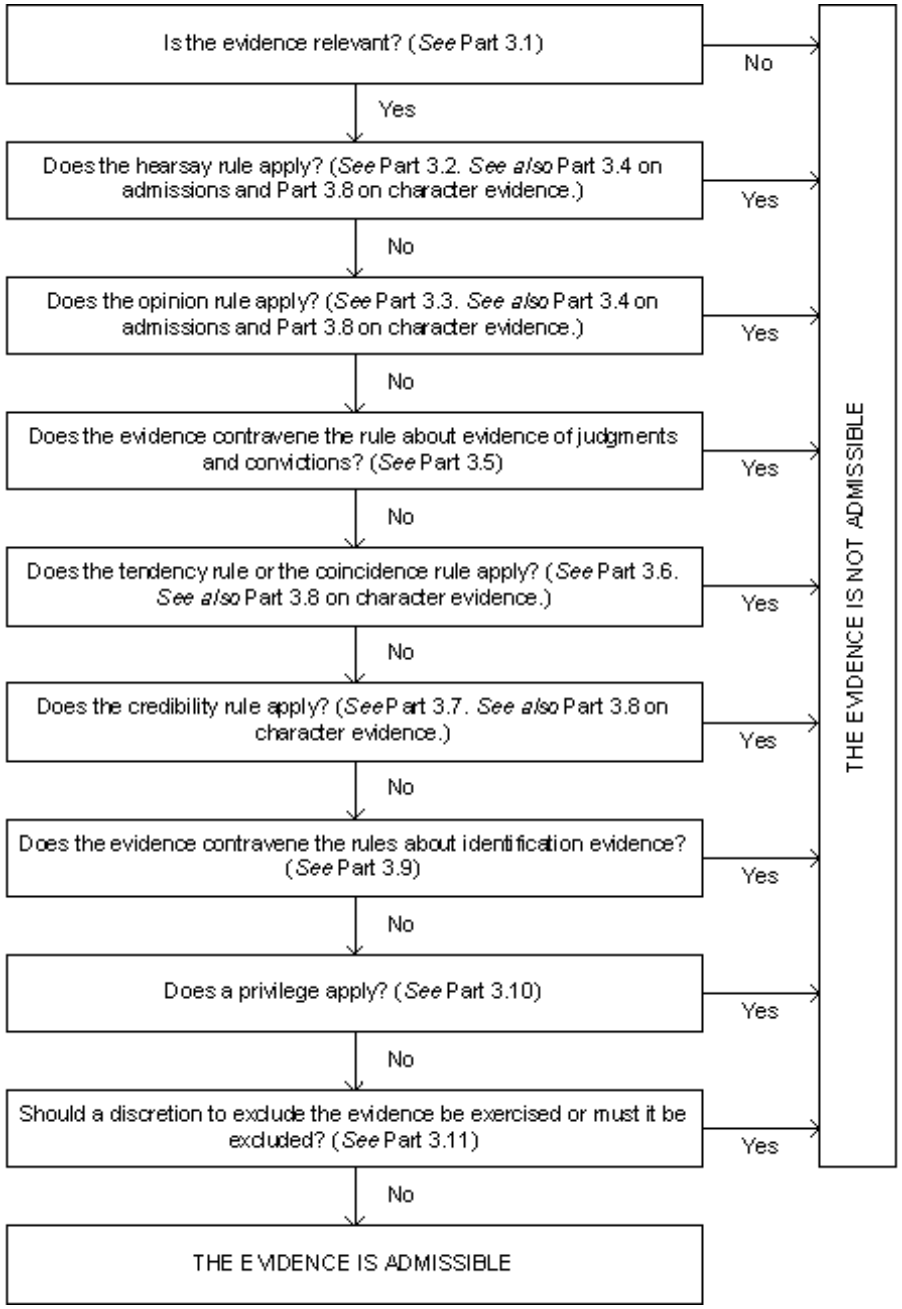
- Just because evidence is adduced in accordance with the procedural requirements under Chapter 2 and common law does not mean it will be admissible.

- If it is not admissible, the Court will refuse to admit it and it will not betaken into account in deciding the case.

- If it is admitted, it may still not be taken into account if "discretionary" or "mandatory" exclusion occurs under Pt 3.11.

Admissibility of evidence

Relevance


Is the evidence relevant? (*See* Part 3.1)
No
Yes
Does the hearsay rule apply? (*See* Part 3.2. *See also* Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the opinion rule apply? (*See* Part 3.3. *See also* Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
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Does the evidence contravene the rule about evidence of judgments and convictions? (*See* Part 3.5)
Yes
No
Does the tendency rule or the coincidence rule apply? (*See* Part 3.6. *See also* Part 3.8 on character evidence.)
Yes
No
Does the credibility rule apply? (*See* Part 3.7. *See also* Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rules about identification evidence? (*See* Part 3.9)
Yes
No
Does a privilege apply? (*See* Part 3.10)
Yes
No
Should a discretion to exclude the evidence be exercised or must it be excluded? (*See* Part 3.11)
Yes
No
THE EVIDENCE IS ADMISSIBLE
THE EVIDENCE IS NOT ADMISSIBLE

Admissibility - Relevance

Section 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

(2) 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

Admissibility - Relevance

- Definition requires the minimal logical connection between he evidence and the facts in issue.
- Whether logical, or rational connection exists is an objective test grounded in human experience.
- Does not need to make a fact ‘probable’, just more or less probable than it would be without the evidence.
- Indirect connection is sufficient (e.g. defendant expressed intention to kill victim).
  - supports inference that did have that intention.
  - more likely that those without such an intention to have actually killed victim.

Admissibility - Relevance

- Facts in issue emerge from:
  - Pleadings (civil case)
  - Elements of the offence (criminal)
- Note that evidence can be "relevant" in different ways (that is, for different uses).
- Evidence that a person has made certain factual allegations may to relevant to prove the truth of the allegations (hearsay use) but may also be relevant, if the person subsequently testifies, to their credibility as a witness (supporting credibility if the out-of-court allegations are consistent with the in-court testimony, diminishing credibility if inconsistent).
- Under ss: 59, 76, 89, 91, 97, 98, evidence that is relevant for more than one use **might** only be admissible for one of those uses. The mere fact that evidence has been admitted does not mean it can be used in all the ways that it is relevant.

Admissibility - Relevance

Section 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

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- Smith was convicted of robbing a bank. Bank security cameras captured the event. Prosecution said he was keeping a lookout while co-offenders took the money.

- FACT IN ISSUE: was the person in the dock (Smith) the person in the photos?

- Two police officers gave evidence that they knew Smith and that he was the person in the photos.

- The question on appeal was whether that evidence was properly admitted.

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- High Court considered whether evidence was relevant.
- Held: evidence not relevant (by majority - Kirby J dissenting on this issue).
- Gleeson CJ, Gaudron, Gummow and Hayne JJ at [8]:

  "…question for the jury was whether they were satisfied, to the requisite standard, that the person then standing trial before them is shown in those photographs."

- Could the police officer's evidence assist the jury to determine this question?

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- Question had not been considered at trial, or in CCA. "that question must always be asked and answered."

- In determining relevance, you have to determine the issues at trial. In a criminal trial, the ultimate issues are the elements of the offence with which defendant is charged.

- Here, the issues at trial were narrow. There was no dispute that there was a robbery. The question was whether defendant was the person in the photos.

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- The only evidence led against defendant - evidence of police officers and evidence that demonstrated the photos tendered in evidence had been taken by bank's security cameras during robbery authenticity). Only basis for police officer's conclusion - earlier encounters with witness.

- No suggestion that physical appearance had changed materially, or that the police were at some advantage due to prior interactions.

- Acknowledged by counsel that by time evidence had concluded the jury had spent more time observing defendant than the time Police had previously spent with him.

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- Police in no better position to make comparison than jurors were observation of defendant in dock with observation of photos. Therefore police's evidence could not rationally affect jury's assessment of whether defendant was the person in the photographs.

- The fact that someone else has reached a conclusion about identity does not provide any logical basis for affecting jury's assessment when it is based on material no different to what was before the jury.

- May be different if defendant's appearance at trial differs in some significant way from time of the crime, e.g. had a beard then, doesn't now. Or if there is some distinctive feature revealed by photos (e.g. manner of walking) that would not be apparent to jury in court.

Admissibility - Relevance

Smith v The Queen (2001) 206 CLR 650 (KOP[5.40])

- Kirby J (in dissent)

- The evidence was indirectly relevant as police had seen the accused in various guises, in daylight, and from various angles, and were in a better position to assess if he was the person in the photos. Don't want to set the hurdle of relevance too high.

- However, excluded the evidence as opinion evidence under s 76 (not salvaged by s 78).

Admissibility - Relevance

[11] *Because the witness's assertion of identity was founded on material no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant is not evidence that* ***could rationally affect the assessment by the jury of the question*** *we have identified. 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.*

- Held: Evidence irrelevant.

Admissibility - Relevance

Papakosmas v The Queen (1999) 206 CLR 650 ([KOP 5.40])

- Defendant charged with rape; issue was not whether sex took place, but consent.
- Issue was whether the complaint that 'P raped me', made to Ms Ovadia, Ms Stephens and Ms Fahey, almost immediately after the time complainant said the rape occurred, was relevant.
- Potentially relevant for two purposes: its hearsay purpose (to prove defendant raped the complaint) and its non-hearsay purpose (as a prior consistent statement that supported the credibility of the complainant as a witness).

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])
- Defendant did not dispute it was relevant to credibility. He argued it was not relevant to prove truth of facts asserted.
- In assessing relevance the judge assumes that the evidence is reliable – [81].
  - Approved in *Adam v The Queen* at [22] (p 397 of KOP).

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

Gleeson CJ and Hayne J

- The evidence of the three witnesses Stephens, Fahey and Ovadia was relevant for both purposes (at [30]).

- Discussed historical rule - complaint evidence not admissible to prove truth of facts asserted (here, to prove rape occurred). But this was not because it was considered irrelevant. It was because of the common law hearsay rule (now amended by the Act).

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

Gleeson CJ and Hayne J

- Evidence relevant for hearsay purpose:
  - Although, in general, do have be cautious about risk of fabrication. Fact that an untrue complaint is repeated does not make it any less untrue.
  - In this case, it is impossible to deny that the evidence of the complaints made to the three witnesses in question could be regarded by the jury as affecting their assessment of the probability that there was no consent to intercourse.

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

- Gaudron J and Kirby J

- Explained defendant's argument - evidence had no probative value beyond what it would at common law - could prove no more than that the complaints were made and could only be used to rebut an inference that might otherwise be drawn as to complainant's credit (i.e. if she had not complained at all, it might be inferred that she is making it up now). They rejected this argument.

- There are circumstances in which a statement is made that might render it probative of the facts asserted. This was recognized even at common law.

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

- Gaudron J and Kirby J

- Depends upon nature and degree of connection between making of statement and fact asserted. More likely to be probative of facts asserted if there is close contemporaneity between statement and fact in issue.

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

- Gaudron J and Kirby J

- Has to be something more than the mere making of the statement - anyone can make false accusations - has to be something about the circumstances that makes it probative of facts asserted.

- In the present case, the statements to the three witnesses were closely contemporaneous with the events alleged by the complainant and were of a kind that might ordinarily be expected if those events occurred. That being so, they rationally bear on the probability of the occurrence of those events and, thus, were admissible as evidence of the facts asserted in them (at [59]).

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

McHugh

- First considers relevance to credibility - seen to be consistent with what complainant would do if she had been assaulted. He questions this assumption. Cites Fitzgerald P in *R v King*. Based on male assumptions concerning the behaviour to be expected of a female who is raped - human behaviour following such a traumatic experience likely to be influenced by a variety of factors. Here, defendant did not dispute evidence was relevant to credibility.

- It is difficult to see why complaint evidence is not also "relevant" to the issues of consent and intercourse. In almost every conceivable instance of sexual assault, evidence that the victim had complained about the assault at the first reasonable opportunity, would "rationally affect...the assessment of the probability of the existence" of intercourse having taken place and of a lack of consent to that intercourse having been given (at [77]) .

Admissibility - Relevance

- *Papakosmas v The Queen* (1999) 206 CLR 650 ([KOP 5.40])

McHugh

- McHugh tested his reasoning by asking D what difference was between a statement in court "I did not consent" to such a statement out of court. Either both are relevant or neither are relevant. Demonstrated that defendant's concern was the fact that it was made out of court.

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

- Security cameras - showed armed man wearing overalls, sunglasses, balaclava robbing persons of money . Similar overalls and balaclava found at defendant's house . Required to wear overalls and balaclava, as well as pair of sunglasses similar to that in the footage, in front of the jury, for purpose of comparing his appearance with person in footage. Also asked to speak words "give me the serious cash" and walk around in front of jury.

- Objected to by defence - on basis it was unfair to dress him up as a robber. But did not raise relevance. One issue was whether the evidence was admissible under s, 53 (considered last class). Another issue was whether it was relevant.

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

- Was the evidence of the accused putting on the balaclava and sunglasses relevant?
- Was the evidence of saying “Give me the serious cash” relevant?
- Was the evidence of the accused walking in the overalls relevant?

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

Heydon J (Crennan J agreeing)

- Relevance of balaclava - defendant argued because it was not asserted to be the balaclava worn by the offender it was irrelevant
- Judges disagreed. If attired in balaclava he had looked very different to description given by eyewitnesses, that would have been material capable of raising a reasonable doubt. . If he had looked similar it would, taken with other evidence, have been capable of supporting a conclusion of identity.
- Relevance does not depend on its capacity by itself to prove prosecution's case on a particular issue or raise reasonable doubt - effect must be assessed with other evidence admitted by the time the evidence is tendered, or to be called.
- What he said - also relevant.
- Wearing overalls - also relevant.

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

Gummow and Hayne JJ

- [24] - showing the jury what the D looked like when wearing balaclava and overalls that were in evidence could **not** rationally affect the assessment of the probability of the existence of a fact in issue.

- The central issue was whether he was the robber. There was no dispute there was a robbery or that the robber had been wearing a balaclava, overalls and sunglasses. No one asserted that the person wearing these items could be identified by looking at that person during the robbery or by looking at the security footage. None of the witnesses said that they could recognise the man who was thus attired.

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

Gummow and Hayne JJ

- Looking at the appellant wearing the balaclava and overalls enabled a comparison between no more than the items that he put on and what was depicted in the footage. That could be drawn without asking him to put them on. Dressing the appellant in the items provided the jury with no more information. Deciding who had worn the disguise was not assisted by having the appellant put on the items.

- Asking him to walk and talk is a different matter - observing how appellant walked and how he spoke certain words might bear upon jury's decision whether he was the man the witness described.

Admissibility - Relevance

Evans v R (2007) 235 CLR 521 ([KOP 5.60])

Kirby J

- Evidence was relevant. Test of relevance is a broad one. This is compatible with the purpose of the Act which is to aid in the court process, rather than to delay or needlessly complicate the resolution of that process.

- What is relevant is much more likely to be perceived by the judge at trial, than by the ultimate national court concluding for the first time for itself than an issue which everyone considered to be relevant is irrelevant. Relevant to whether he was the offender was whether, when dressed in overalls and a balaclava, when walking in front of the jury, and when saying the words ascribed to the offender, there were apparent similarities.

- Dangerous, unfair, humiliating and prejudicial, yes. But irrelevant, no.

- Went on to conclude it was unfairly prejudicial under s 137.

Admissibility - Relevance

Some examples of cases where evidence has failed to satisfy the test of relevance are where:

1. Evidence that a criminal defendant had taken drugs intravenously four months after the robbery with which he was charged

   – In *R v Merritt* [1999] NSWCCA 29, the NSW Court of Criminal Appeal held (at [31]) that such evidence '*could not support an argument, let alone tend to establish, that four months earlier he was an illicit drug taker, nor that such drugs comprised heroin nor that they (whatever they were) were ingested shortly before the robbery so that any possible analgesic effect might have been operating at the time of the robbery*.'

   – See Stephen Odgers, *Uniform Evidence Law* (10th ed), 2012, 205.

Admissibility - Relevance

Some examples of cases where evidence has failed to satisfy the test of relevance are where:

2. Evidence from a complainant that she had interpreted an apology given by the defendant as an admission of guilt: *Patrick v The Queen* [2014] VSCA 89 at [33]-[35]: 'The fact in issue was whether the appellant assaulted the complainant, a matter about which the complainant gave direct evidence. Her subsequent interpretation of his apology provides no greater support for her allegations than her direct evidence.'

   - *Patrick v The Queen* [2014] VSCA 89 at [33]-[35]: 'The fact in issue was whether the appellant assaulted the complainant, a matter about which the complainant gave direct evidence. Her subsequent interpretation of his apology provides no greater support for her allegations than her direct evidence.'

Admissibility - Relevance

- **Consequences of irrelevant material**

- Clearly if material is irrelevant it will not be admitted. However, on one view, if it is irrelevant, unlike other grounds of inadmissibility, it could never have helped the party's case and so is no great loss. Of course, what can arise is a mistaken belief that the material is relevant, and therefore other material or other avenues of proof have not been pursued based upon this false belief.

Admissibility - Relevance

Section 57 – Provisional relevance

(1) If the determination of the question whether evidence adduced 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 that finding, or

(b)

(b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that 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 one or more other persons 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 determining whether the common purpose existed.

Admissibility - Relevance

Section 57 – Provisional relevance

- Where evidence is relevant in combination with other evidence, the judge may receive the evidence conditionally upon the assurance of the party that the other information will be properly tendered.

- Provision recognises that the relevance of evidence depends upon other facts authorship, identity, accuracy.

- Aim - obtaining a finding of authenticity need not be obtained before the evidence is found to be relevant and admissible.

Admissibility - Relevance

Section 57 – Provisional relevance

- Scenario: I want to tender evidence in the form of a document (say a diary entry in which accused says he hates the victim). It is relevant to motive - but only if the diary entry is authentic i.e. it is actually the accused's diary entry. Its relevance is dependent upon another finding. Under s 57, court may find it is relevant if it is reasonably open to find it is authentic OR I undertake to adduce evidence of its authenticity.

- Scenario 2: I want to adduce evidence produced by computer e.g. I tender a transaction report claiming it represents all transactions the accused engaged in above $5000. I will need to prove how the computer works i.e. is capable of identifying all transactions above $5000.

Admissibility - Relevance

Section 57 – Provisional relevance

" [T]he Evidence Act should be approached in a purposive manner to aid the court process and not to delay it. The only construction which fulfils this purpose is to hold that evidence is relevant if it appears to the court to be relevant at the time it is tendered. If it were necessary to have a voir dire examination to examine the objective facts underlying relevance each time an objection arose, trials would never finish".

- *per* Young J in *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336 (NSW SC)

Admissibility - Relevance

Section 58 – Inferences as to relevance

(1) If a question arises as to the relevance of document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

Admissibility - Relevance

Section 58 – Inferences as to relevance

- If a question arises as to relevance, court may examine it and draw a reasonable inference from it including as to authenticity
- For example: St George Bank statement - with logo e.t.c - can draw inference it is authentic from the nature of the document itself.
- At first blush, this seems straight forward: in determining the relevance of an object, reasonable inferences may be drawn from it. This appears to extend to the authentication of the document.

Admissibility - Relevance

Section 58 – Inferences as to relevance

- However, in *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539, Bryson J observed:

'a question of authenticity is not a question as to the relevance of documents within subs 58(1), which treats authenticity as part of the material on which relevance may be determined.'

- Bryson J considered that authenticity should be distinguished from relevance, and that on this approach, a document could not 'authenticate itself'.

Admissibility - Relevance

Section 58 – Inferences as to relevance

- This approach was doubted by:
  - Madgwick J in *Lee v Minister for Immigration & Multicultural & Indigenous Affairs*
  - Gyles and Weinberg JJ in *O'Meara v Dominican Fathers*
  - **BUT** approved by the NSW Court of Appeal in *Daw v Toyworld (NSW) Pty Ltd*. However, that was an *obiter dictum*.

Admissibility - Relevance

Section 58 – Inferences as to relevance

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1),

- Perram J reviewed the authorities and concluded that *Rusu* was 'plainly wrong', holding that a court may draw reasonable inferences from a document for the purposes of determining that the authenticity of the document may reasonably be inferred (and the document was, accordingly, relevant). His Honour provided a list of propositions which distinguished authenticity from admissibility and which held that the issue of authenticity does not arise for the tribunal of law's consideration. His Honour's reasons were compelling and in accordance with the documented purpose of s 58.

- Perram J's decision appears to have been followed by Forrest J in *Matthews v SPI Electricity Pty Ltd (Ruling No 35)*.

Admissibility - Relevance

Section 58 – Inferences as to relevance

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1), [92]

1. *There is no provision of the Evidence Act which requires that only authentic documents be admitted into evidence. The requirement for admissibility under the Act is that evidence be relevant, not that it be authentic. On some occasions, the fact that a document is not authentic will be what makes it relevant, i.e., in a forgery prosecution. In other cases, there may be a debate as to whether a particular document is or is not authentic, for example, a contested grant of probate where it said that the testator's signature is not genuine.*

2. *In cases of that kind, the issue of authenticity will be for the tribunal of fact to determine. In cases heard by a judge alone, this will be the judge at the time that judgment is delivered and the facts found. In cases with a jury, it will be the jury.*

3. *The question of what evidence will be admitted is a question of law for the tribunal of law, which will be the Court.*

Admissibility - Relevance

Section 58 – Inferences as to relevance

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1), [92]

4. *Since authenticity is not a ground of admissibility under the Evidence Act, the issue of authenticity does not directly arise for the tribunal of law's consideration at the level of objections to evidence.*

5. *What does arise for its consideration is the question of relevance under s 55. If the evidence is relevant it is admissible: s 56. It will be relevant under s 55 if the evidence is such that 'if it were accepted, [it] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue'.*

6. *The question of a document's authenticity is relevant only to the tribunal of law's consideration of relevance under s 55. It has no other role.*

7. *In that inquiry, the question for the tribunal of law is not whether the document is authentic but whether receipt of the document could, to paraphrase s 55, rationally affect the assessment of the probability of a fact.*

Admissibility - Relevance

Section 58 – Inferences as to relevance

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1), [92]

8. *If there is raised a question about the authenticity of a document (and assuming that, if authentic, it would otherwise be relevant to an issue) then there will be an issue in the proceedings about its authenticity. This will be a question for the tribunal of fact to resolve, if the document is admitted.*

9. *The question for the tribunal of law, by contrast, will be whether the document is relevant to a fact in issue under s 55. That is, the question will be whether the document can rationally affect the assessment of the probabilities of the fact, including its authenticity.*

10. *What materials may be examined in answering this question? The answer is provided by s 58…*

Admissibility - Relevance

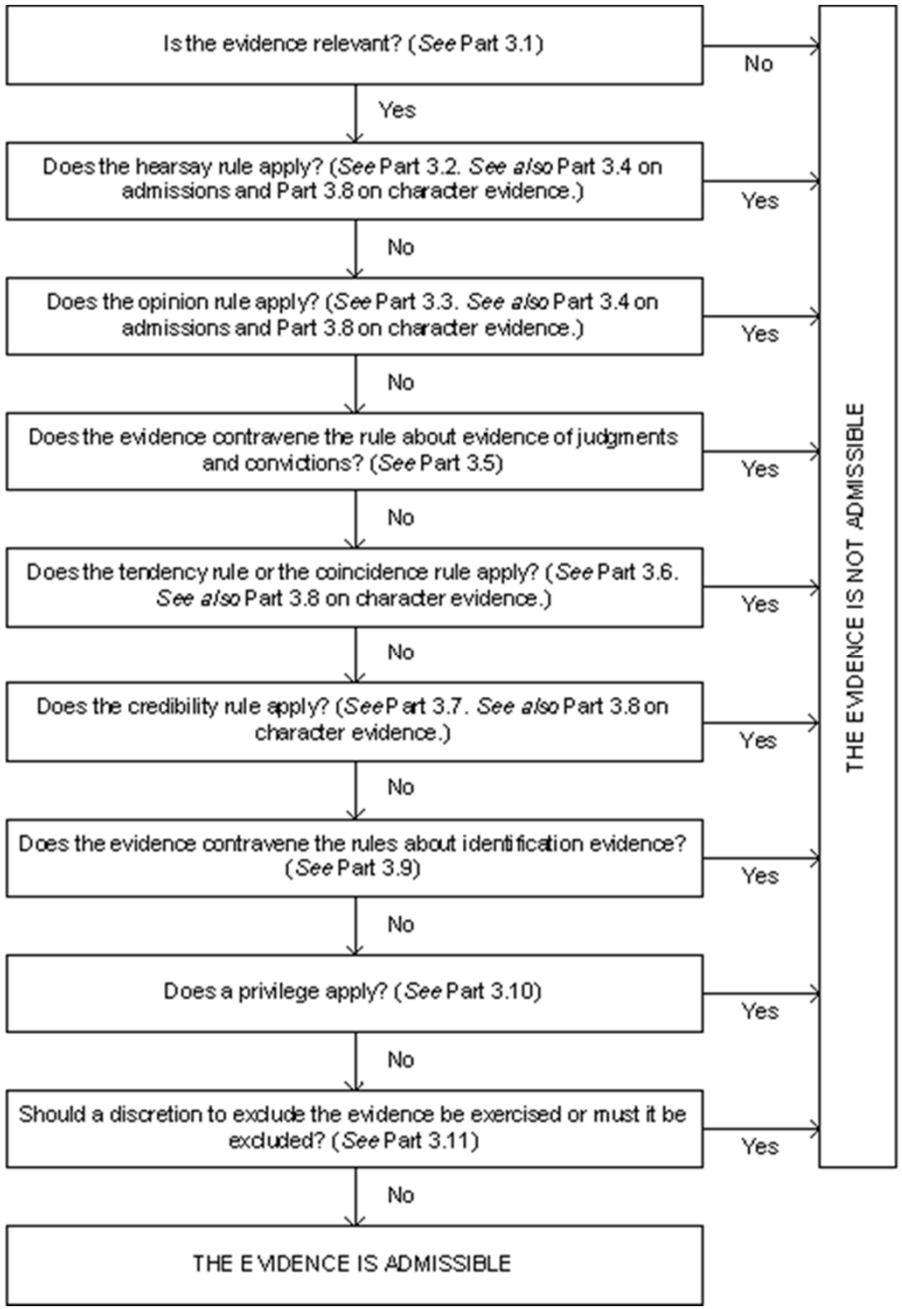
Section 58 – Inferences as to relevance

- This spread of authority appears to leave this issue and the operation of s 58 uncertain.

- It is suggested that the approach taken by Perram J is the correct one, and that his reasoning is sound, but whether his decision prevails remains to be seen.

- Finally, it should be noted that this provision does not deal with the drawing of inferences from the object or document in order to establish some other precondition to admissibility, but only relevance. However, s 183 can be relied upon to allow for such other inferences to be gained from a document or thing, for example those relating to the application of the hearsay exception in s 69.

Admissibility – Discretionary exclusions and limits on use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Admissibility – Discretionary exclusions and limits on use

- What is a discretion?
- Discretions developed in common law – *Christie v R* [1914] AC 545
- Appeal of discretions *House v The King* (1936) CLR 499:

Admissibility – Discretionary exclusions and limits on use

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Admissibility – Discretionary exclusions and limits on use

- 135 - General discretion to exclude evidence
- 136 - General discretion to limit use of evidence
- 137 - Exclusion of prejudicial evidence in criminal proceedings
- 138 - Exclusion of improperly or illegally obtained evidence
- 90 – Discretion to exclude admissions

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

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.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- This provision, along with other provisions in Pt 3.11, may be used to exclude evidence even if it is relevant and even if it satisfies all the other rules on admissibility (hearsay, credibility e.t.c).

- It requires a balancing exercise to be undertaken - weighing probative value against dangers listed.

- Must "**substantially**" outweigh - Another way of saying the onus is on the party seeking exclusion and that exclusion will only be justified in a clear case.

- Note the use of the word "may". Exclusion is discretionary not mandatory, even if probative value is substantially outweighed by dangers. Although shouldn't place too much emphasis on this word - it is difficult to imagine a court refusing to exclude evidence where dangers outweigh probative value.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- Section 135 applies in civil proceedings **and** criminal proceedings.
- Contrast s 137 - It only applies in criminal proceedings to evidence adduced by a prosecution, whereas s 135 applies in both (Would still have to rely on s 135 if you wanted to exclude defence evidence in criminal proceedings.)
- In criminal proceedings if you want to exclude prosecution evidence, would possibly rely upon use s137 rather than s 135 because threshold is easier to satisfy.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

Dictionary:

"probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

Relevance is defined in s 55 as:

> "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."

Probative value is defined in the Dictionary as:

> "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

Difference?:

- Probative value is a matter of degree, relevance is a threshold.
- Section 55 "…if accepted.."

McHugh J in *Papakosmas:*

- In assessing relevance the judge assumes that the evidence is reliable – [81].
- Approved in *Adam v The Queen* at [22]

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- Is there an explicit requirement in the definition of "probative value" that the court should assume evidence will be accepted?

McHugh J in *Papakosmas:*

- In assessing "probative value" the judge takes into account reliability – [86].
- CF: Gaudron J in *Adam v The Queen* (2001) 207 CLR 96, [60] :
- Definition of probative value must have read into it an assumption that that the evidence would be accepted on the basis that "*evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted.*"

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- Further discussion and cases on this issue is found below:
  - *R v Shamouil* [2006] NSWCCA 112 (KOP [6.110])
  - *R v Sood* [2007] NSWCCA 214 (KOP [6.120])
  - *Aytugrul v The Queen* [2012] HCA 15 (KOP [6.130])
  - *Dupas v The Queen* [2012] VSCA 328
  - *MA v The Queen* [2013] VSCA 20
  - *R v XY* [2013] NSWCCA 121

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

Unfair Prejudice

ALRC 26, vol 1, para 644

The ALRC explained what it meant by the term (The risk of unfair prejudice is one of the potential disadvantages mentioned. By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, i.e. on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

Examples:

- Adopting illegitimate form of reasoning e.g. evidence of defendant's past criminal activity - might provoke an instinct to punish or lead jury to be satisfied with a lower degree of probability.

- Evidence admitted for one purpose but has another unfair use e.g. photos of deceased may be admitted to prove extent of injuries but may also have capacity to shock jury and provoke an emotional response. May exclude particularly if there is other evidence of injuries sustained.

- Unfair prejudice could result from the jury giving undue weight to evidence.

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- IMPORTANT: It is not enough that evidence is damaging to party's case or makes it more likely they will lose:

  McHugh J in *Papakosmas* at [91]

- Usually only applicable to a jury trial - judge is unlikely to admit evidence will cause him/her to make a decision on an emotional basis. Have been cases where Ct has held evidence is "misleading or confusing" – see Odgers [1.3.14580].

- The Court should consider other means for addressing prejudice - short of exclusion – e.g. directing the jury, editing the evidence, or adjourning the proceedings.

Admissibility – Discretionary exclusions and limits on use

Orduyaka v Hicks [2000] NSWCA 180 (KOP[6.50])

- Plaintiff unsuccessfully sued a 92 year old defendant for negligence in respect of a paving step.
- Defendant unable to attend to give evidence and a statutory declaration made by defendant was admitted into evidence under s 64.
- Defendant's declaration stated she was unaware of any instability in the paving step.
- Plaintiff unsuccessful in excluding evidence under s 135 on basis that plaintiff was denied opportunity to cross-examine.

Admissibility – Discretionary exclusions and limits on use

Orduyaka v Hicks [2000] NSWCA 180 (KOP[6.50])

- Judge had to (and did) consider that witness was not cross-examined:
  - Inconsistencies
  - Unreliability
- Court of Appeal: Judge did not err. Admission of document of probative value necessarily involves some prejudice to other party. But it is not prejudice, but unfair prejudice, with which s. 135 is concerned. Inability to cross-examine not a basis for excluding evidence - goes to weight.
- It is not prejudice, but *unfair* prejudice to part that must be weighed against the probative value of the representation.
- Don't require judge to exclude. Appeal failed

Admissibility – Discretionary exclusions and limits on use

Section 135 – General discretion to exclude evidence

- Certainly inability to cross-examine is not enough, but may significantly reduce the probative value of evidence depending upon circumstances of case (*R v Le*).
- Depends upon circumstances of case: *R v Suteski*. Relevant considerations outlined in Odgers at [1.3.14560].
- This issue arises not only from inability to cross-examine, may also arise from inability to effectively cross-examine: see *La Trobe*

Admissibility – Discretionary exclusions and limits on use

Ainsworth v Burden [2005] NSWCA 174 (KOP [6.60])

- Defendant sued for defamation over a letter he wrote to a Minister claiming that plaintiff was not a fit and proper person to hold a gaming licence.

- Plaintiff adduced evidence of 5 judgments of licensing court accepting that he was fit and proper and granting the gaming licences sought, together with report of the investigation by police officer into allegations made by defendant in his letter to the Minister

- Plaintiff's case was that they demonstrated malice on part of defendant - persistence in asserting truth of allegations in face of their constant rejection, after investigation, by the Court and in the subsequent investigation.

Admissibility – Discretionary exclusions and limits on use

Ainsworth v Burden [2005] NSWCA 174 (KOP [6.60])

- Judge excluded the evidence under s 135 - strength of findings in those documents so strong that jurors would not be able to put it out of their minds.
- NSWCA held Judge had erred.
- Evidence is not unfairly prejudicial to a party just because it is damaging to their case. May be unfairly prejudicial if there is a "real risk" that the evidence will be used by the jury in some unfair way.
- Even if there was a danger that the strength of the evidence supporting the plaintiff's case would have some effect on jury's view of defendant's claim that allegations were untrue, that does not mean its probative value is substantially outweighed by that danger.
- Really only demonstrates probative value of material.

Admissibility – Discretionary exclusions and limits on use

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2011) 100 FCR 299 (KOP [6 70])

- LT sued HP for negligent valuation of property which Jet Constructions lodged as security for a loan by LT to it in amount of $2.4m.

- Accepted at trial that if property had been valued at less than $4m, LT would not have made the loan.

- LT called evidence from Mr Gidman - one of its senior managers – about what LT would have done if it had not lent the money i.e. it would have been lent to someone else. Judge held that the evidence was relevant and not inadmissible under s.135.

- HP appealed.

Admissibility – Discretionary exclusions and limits on use

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2011) 100 FCR 299 (KOP [6 70])

FCAFC - Judge did not err.

- Evidence relevant to proving LT's lost income. But should it have been excluded under s 135?
- HP argued that evidence was of little probative value because it was unsubstantiated and it was unfairly prejudicial to HP because counsel was unable to effectively cross-examine, not knowing factual bases for his evidence.
- Counsel effectively cross-examine in the dark - unfair to make him do this with risk that Mr Gidman might elaborate on his evidence and make out LT's case.

Admissibility – Discretionary exclusions and limits on use

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2011) 100 FCR 299 (KOP [6 70])

Held:

- There are some cases where discretion should be exercised – e.g. where only part of a conversation is adduced, there was no evidence as to the substance of the conversation, and the source of part of the conversation that was adduced could not be effectively cross-examined. But not where evidence is straight forward and can easily be challenged if untrue

- Here, counsel had strategic choice open to him about how to deal with the evidence: may choose to explore and seek to expose those short comings in cross-examination, at risk of allowing witness to remedy the position through further evidence. Or counsel may leave evidence as is. The fact that a tactical choice is open does not make it unfairly prejudicial.

Admissibility – Discretionary exclusions and limits on use

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2011) 100 FCR 299 (KOP [6 70])

- There may be some cases where a witness, having given the barest of evidence in chief, has the potential to 'ambush' an opponent with new, unanticipated evidence under cross-examine and for which there is no reasonable opportunity to test.

- But in this case, no risk of 'ambush'. Witness had attached some documentary evidence to his affidavit but it was clear that, in some respects, he could not give more detailed evidence. In that respect, nothing unexpected was likely to arise in cross-examine. Issues about which evidence was to be given were well understood and, if further clarification had been given, it would hardly have come as a surprise.

Admissibility – Discretionary exclusions and limits on use

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2011) 100 FCR 299 (KOP [6 70])

- There has not been an error in the trial judge's exercise of discretion in applying s 135 to justify overturning the decision.

- To exclude evidence under s 135 there must be compelling reasons for the exclusion. This was merely a case of evidence without documents to substantiate it and without perfect recollection. It is not so prejudicial as to engage s 135.

Admissibility – Discretionary exclusions and limits on use

Reading v ABC [2003] NSWSC 716

- Misleading or confusing .
- Here judge held that transcript of TV program should be excluded under s 135 because the video recording of the program was available and there was a danger that the jury would focus unduly on the written word and fail to give due consideration to things not recorded in the transcript.
- Unlikely to often be utilised in hearings without a jury, but has been used in a judge alone hearing to exclude that presented only part of the relevant picture, thereby distorting the true situation: *Hughes Aircraft systems International v Airservices Australia* (No. 3) (1997) 76 FCR 151.
- Here judge held that transcript of TV program should be excluded under s 135 because the video recording of the program was available and there was a danger that the jury would focus unduly on the written word and fail to give due consideration to things not recorded in the transcript.

Admissibility – Discretionary exclusions and limits on use

Section 137 – Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court **must** refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Admissibility – Discretionary exclusions and limits on use

Papakosmas v Queen (1999) 196 CLR 297, [86]

McHugh J:

- In assessing relevance the judge assumes that the evidence is reliable – [81].
    - Approved in *Adam v The Queen* at [22]
- However, the assessment required by the definition of probative value "would necessarily involve considerations of reliability."
- In assessing "probative value" the judge takes into account reliability – [86].
- CF: Gaudron J in *Adam v The Queen* (2001) 207 CLR 96, [60] :
- Definition of probative value must have read into it an assumption that that the evidence would be accepted on the basis that "evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted."

Admissibility – Discretionary exclusions and limits on use

R v Shamouil [2006] NSWCCA 112 (KOP[6.110])

- Witness identified defendant on police photoboard. Later retracted this evidence in statement.
- It was excluded pursuant to s 137 by judge.
- His evidence suggested that there may have been another motive for retracing the evidence – therefore an issue about its reliability and his credit.
- How does this affect its "probative value" for the purpose of weighing it against prejudice pursuant to s 137?

<u>Spigelman J –</u>

- Adopted Gaudron J's approach in Adam.

Admissibility – Discretionary exclusions and limits on use

R v Shamouil [2006] NSWCCA 112 (KOP[6.110])

- Held that the judge took into account general unreliability of identification evidence and also the credibility of the defendant when assessing "probative value".
- Therefore he did not correctly apply authority and was in error.
- Also Judge did not identify any particular respect in which the evidence was unfair.
- Appeal allowed.

Admissibility – Discretionary exclusions and limits on use

R v Sood [2007] NSWCCA 214(KOP[6.120])

- Sood a doctor who was being sued for defrauding Health Insurance Commission.
- Cash receipt books and receipts were found in her bin during a search. Prosecution sought to rely on this to prove that she put them there and to infer that she was conscious of her guilt.
- After *voir dire*, the judge excluded evidence that cash receipt books and receipts were found in his garbage.
- Judge held that the probative value of the evidence value was not strong in support the prosecution argument, because of other overwhelming evidence that she threw them out because she was afraid of prosecution for tax evasion.

Admissibility – Discretionary exclusions and limits on use

R v Sood [2007] NSWCCA 214(KOP[6.120])

- Can a trial judge take into account competing inferences in assessing the "probative value" of evidence? **NO**

- Can a trial judge take into account reliability in assessing probative value of evidence? **NO**

- It is no part of the judge's function in assessing probative value under s 137, to have regard to competing explanations for the respondent's conduct, other than upon which the crown relied. An assessment of probative value is 'probative value in the crown case.'

- The weight of the evidence sought to be adduced is not a legitimate factor in assessing probative value. The evidence is taken at its highest when assessing its probative value.

- The reliability of the evidence cannot be taken into account when assessing its probative value.

Admissibility – Discretionary exclusions and limits on use

Dupas v The Queen [2012] VSCA 328

- Defendant found guilty of murder.
- Identified from photoboard.
- On appeal argued that identification evidence was unreliable and judge should have considered this.
- Because of *Shamuoil*, Court added 2 judges to consider the issue.
- Unanimously departed from *Shamouil* (on the issue of considering reliability in the context of s 137).

Admissibility – Discretionary exclusions and limits on use

Dupas v The Queen [2012] VSCA 328

"When the unfair prejudice was said to be a risk that the jury would attach undue weight to the impugned evidence, the trial judge was required to evaluate what weight could reasonably be assigned to that evidence, in order to assess whether there was such a risk. That called for some assessment of the reliability and quality of the evidence, matters ordinarily viewed as being separate and distinct from the credibility of the witness." [78]

- Court not assume reliability (which is different from credibility).
- Appeal dismissed.

Admissibility – Discretionary exclusions and limits on use

Ma v The Queen [2013] VSCA 20

- Defendant found guilty 7 charges of sexual abuse.
- Defendant challenged psychiatric evidence of prosecution regarding the complainant's behavioural issues .
- Appeal dismissed:
    - Evidence only provided an informed context as to her behaviour.
    - Defendant failed to show prejudice.
    - Court followed *Dupas.*

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

- Defendant found guilty of indecent assault and aggravated sexual assault on a 10 year old.
- On *voir dire*, the judge rejected evidence of 2 telephone conversations between defendant and complainant on basis of s 137.
- Prosecution appealed.
- Because of *Dupas* and *Ma*, bench of 5 considered the appeal.

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

COMPLAINANT: Yeah do you remember what you used to do to me?

RESPONDENT: Yeah f**kin' oath and I wouldn't mind doing it again ... ha ha.

RESPONDENT: When did this happen anyway?

COMPLAINANT: When I was eight years old you just admitted it.

RESPONDENT: Eight years old ...

COMPLAINANT: Remember you used to tell me I was bad and I was the bad one but now I'm older now I know that you're the bad one.

RESPONDENT: When you were in high school man not eight years old.

COMPLAINANT: I was eight years old.

RESPONDENT: I remember you from high school, remember when you were wearing the maroon jackets and that and went to high school ....

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

- Judge followed *Dupas*.
- On appeal:

Basten JA

- "*It being also doubtful as to how far Dupas (2012) departed from the principles stated in Shamouil, read in context, and because the present case raises a slightly different issue from either (not being concerned with identification evidence) there is no compelling reason to depart from the general approach accepted in Shamouil.*"
- "*The importance of Shamouil lies not in the precise language used (the judgment is not to be treated as a statute) but in the general principle it articulates. The operation of that principle may vary depending upon the circumstances of the case. In broad terms, the principle has three elements:*

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

…

(1) in determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;

(2) it follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;

(3) it also follows from (1) that the judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight."

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

Basten JA

> "*Because no real risk of unfair prejudice arose, and s 137, for that reason, was not engaged, there was no occasion to assess the "probative value" of the evidence. It follows that there is in this case no choice to be made between the principles derived from Shamouil and those articulated in Dupas. However, at least in these circumstances, the Shamouil approach demonstrates how s 137 operates. The trial judge may need to consider the weight to be given to each possible set of inferences, without accepting or rejecting either. That is consistent with the approach adopted in Sood."* [72]

Hoeben CJ at CL

> "*In relation to s137 of the Evidence Act 1995, subject to the following observations, I agree with Basten JA and Simpson J that when assessing the probative value of the prosecution evidence sought to be excluded, the Court should not consider its credibility, reliability or weight. I specifically adopt what was said by Basten JA at [66] - [67].*"

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

> "*Accordingly, I agree that the Courts of NSW should follow R v Shamouil [2006] NSWCCA 112; 66 NSWLR 228 when applying s137 of the Evidence Act 1995.*
>
> *Where I differ from their Honours is as follows. When assessing the probative value of the prosecution evidence sought to be excluded, i.e., its capacity to support the prosecution case, a court can take into account the fact of competing inferences which might be available on the evidence, as distinct from determining which inference or inferences should be or are most likely to be preferred*."

<u>Simpson J</u>

> "*I state at the outset that, having given careful consideration to the reasoning of the Victorian Court of Appeal, I adhere to the views I have previously expressed in Cook and Mundine and my concurrence with those of Spigelman CJ in Shamouil.*

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

"*There are two evaluations that constitute the s 137 exercise - the assessment of the probative value of the evidence in question, and the assessment of its potential prejudicial effect. "A judge asked to exclude evidence pursuant s 137 is necessarily asked to do so at a time before the evidence in the trial is complete. As a matter of practice, increasingly frequently (by reason of trial efficiency, and minimisation of jury inconvenience) this is done prior to the empanelling of the jury. Ordinarily, in this State at least, the assessments of probative value and prejudicial effect are made on the basis of documentary material - principally, the statements of witnesses. For the purposes of the evaluation, the assumption is made that the evidence will be accepted as accurate."*

"*For these reasons, in addition to those given by Spigelman CJ in Shamouil, I maintain the view that questions of credibility, reliability and weight play no part in the assessment of probative value with respect to s 137. Although it does not call for present determination, it seems to me that the same must apply in all cases where admissibility depends upon such an assessment*."

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

Blanch J

> "*The trial judge correctly noted the respondent could not be expected to recognise the voice of the complainant after nine years and when she had grown up in the intervening time. She noted that the background noise in the call and the respondent's early responses indicated a degree of confusion at the respondent's end of the call. She also noted the lack of clarity in what is said to be a confession. She also noted his positive denial when he understood her claim related to a time when she was eight years old.*
>
> *Those matters are all relevant for the judge to consider when assessing the capacity of the evidence to establish the fact in issue. What must be done then is to weigh that capacity against the unfair prejudice. In this case when I do that I find the capacity of the evidence to prove guilt is compromised because of the competing inferences open when interpreting the conversations and the unfair prejudice is highly significant. It is evidence that may inflame the jury or divert the jurors from their task. Furthermore, such prejudice could not be corrected by directions to the jury and it outweighs the probative value of the evidence.*"

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

Price J

> *"As to s 137 Evidence Act 1995, I agree with Blanch J's identification at [185], [186] and [193] of the unfair prejudice that might arise to the complainant from the admission of the conversations. To my mind, it is unnecessary to consider questions of competing explanations as the evidence viewed at its highest is weak and is substantially outweighed by the danger of unfair prejudice to the respondent, which could not be corrected by jury directions. The exclusionary power in s 137 mandated the rejection of the evidence.*
>
> *Whilst upon my analysis, it is unnecessary to consider the conflict in the approaches to be taken to s 137 Evidence Act since the decision in Dupas v The Queen [2012] VSCA 328, it seems to me that enabling the trial judge to consider questions of credibility, reliability or weight when s 137 is invoked, is likely to enhance the fundamental principle that an accused is to receive a fair trial. Although Simpson J at [163], [170]-[171] refers to the practical difficulties that may arise by adopting such an approach, it is not uncommon for a witness to be cross-examined during a voir dire and an assessment can be made by the trial judge of the actual probative value of the evidence. More often than not, the probative value of evidence may be assessed from the witness statements without the necessity of calling witnesses.*

Admissibility – Discretionary exclusions and limits on use

R v XY [2013] NSWCCA 121

- Hoeben, Blanch and Price JJs dismissed the appeal.
- However, Hoeben, Basten and Simpson JJ explicitly followed *Shamouil*.
- Whilst this is still a little unclear, this decision stands for the proposition that *Shamouil* is to be followed in NSW, subject to what is said in the judgments here.
- Therefore in NSW reliability and credibility are not generally to be included in the process of determining probative value.
- This issue probably needs to be considered by the High Court.

Admissibility – Discretionary exclusions and limits on use

Aytugrul v The Queen [2012] HCA 15 (KOP[6.130])

- Murder trial
- Prosecution relied upon on DNA evidence from an expert witness who had conducted analysis on a hair found on the deceased's thumbnail
- The expert who did the DNA testing (Gina Pineda) gave evidence to the effect that one in 1,600 people in the general population (which is to say the whole world) would be expected to share the DNA profile that was found in the hair (a frequency ratio) and that 99.9 per cent of people would not be expected to have a DNA profile matching that of the hair (an exclusion percentage).

Admissibility – Discretionary exclusions and limits on use

Aytugrul v The Queen [2012] HCA 15 (KOP[6.130])

French CJ, Hayne, Crennan and Bell JJ

- No evidence was given as to the effect of exclusion percentages on the mind of jurors and therefore no general rule could be established to the effect that evidence of exclusion percentages will always have a greater effect on them

- Court cannot adopt a general rule based upon its own research suggestion body of skilled work that would support it.

Heydon J

- Evidence of how the percentage evidence was derived from the concededly admissible frequency estimate evidence was given, and how their significance was identical

- Once it was accepted that the frequency estimate evidence was admissible, the reception of the exclusion percentage evidence did not create a danger of unfair prejudice.

Admissibility – Discretionary exclusions and limits on use

Aytugrul v The Queen [2012] HCA 15 (KOP[6.130])

Heydon J (cont)

- The summing up by the judge also pointed out that:
  - the exclusion percentage was "another way" or a "reverse way" of putting the frequency evidence; and
  - that they should not treat the DNA evidence as "definitely" or "necessarily" establishing that the hair came from the appellant.
- There was no objection taken at the time to the judge's summing up

Admissibility – Discretionary exclusions and limits on use

R v Lisoff [1999] NSWCCA 364 (KOP[6.90])

- Lisoff was one of three defendants on trial for assault. DNA evidence on clothing identified defendant
- DNA evidence excluded by judge under s 137 because of its complexity. Held that there was a real danger that the fact finder would be unduly swayed by the scientific nature of the evidence to make a decision on an improper basis.
- Without it, case collapsed
- Crown Appeal

Admissibility – Discretionary exclusions and limits on use

R v Lisoff [1999] NSWCCA 364 (KOP[6.90])

- Judge over stated the complexity of the evidence. No more essentially complex or difficult than questions of fact that are routinely left to juries.
- Judge said that:
  - "a real danger that fact finders, *might* be unduly swayed…"
  - "A jury, even if properly directed, Could fail to appreciate.."
  - *"In our opinion, by applying to the statutory formula,—"the danger of unfair prejudice",—a test of mere possibility, his Honour erred in law. Section 137 requires a real risk of unfair prejudice to the defendant by reason of the admission of the evidence complained of. It is not sufficient to establish that the complexity or nature of the evidence was such that it created the mere possibility that the jury could act in a particular way. His Honour applied the wrong test."*

Admissibility – Discretionary exclusions and limits on use

Section 137 – Exclusion of prejudicial evidence in criminal proceedings

R v Dann [2000] NSWCCA 185 (KOP[6.100])

- Dann convicted of having sexual intercourse with seven year old stepson. Not charged with other incidents of sexual assault, but evidence of them was given by step-son.
- Objection to expert evidence of sexual assault – relating to dilation of anus and possible causes. As cause was not clear cut, in the end this evidence was of some value to the defence.
- Appellant argued that reception of this evidence required cross-examination and that this evidence became a distracting focus of the hearing – therefore unfairly prejudicial.
- Court of appeal – No. The evidence had probative value. Was capable of being used by the defence.
- **The unattractive nature of the subject matter was not itself prejudicial**

Admissibility – Discretionary exclusions and limits on use

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing.

Admissibility – Discretionary exclusions and limits on use

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law, or

(b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. –

Admissibility – Discretionary exclusions and limits on use

138 Exclusion of improperly or illegally obtained evidence

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
(d) the gravity of the impropriety or contravention, and
(e) whether the impropriety or contravention was deliberate or reckless, and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights* , and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Admissibility – Discretionary exclusions and limits on use

Bunning v Cross (1978) 141 CLR 54

- The High Court indicated that a court must weigh competing requirements of public policy:

  "the desirable goal of bringing to conviction the wrongdoer" on the one hand and, on the other, the avoidance of "the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law" (at 74 per Stephen and Aickin JJ).

Admissibility – Discretionary exclusions and limits on use

DPP v Carr (2002) 127 A Crim R 151 (KOP[6.160])

- Charged with offensive language, resist arrest, assault police and intimidate police.
- Magistrate that the evidence was obtained improperly because of improper mode of arrest.
- DPP appealed.

"This was more than merely a technical breach. It was inconsistent with the view repeatedly expressed by the higher courts of this State as to what are regular, permissible standards of acceptable police conduct with respect to the decision to arrest."

Appeal dismissed.

Admissibility – Discretionary exclusions and limits on use

DPP v Carr (2002) 127 A Crim R 151 (KOP[6.160])

- The actions of the officer, as he must have realised would happen, escalated the incident and led to the alleged commission of further offences.

Admissibility – Discretionary exclusions and limits on use

Robinson v Woolworths [2005] NSWCA 426 (KOP[6.170])

- Used minors to buy cigarettes to investigate compliance with law.
- Judge found that the evidence was obtained improperly.
- On appeal said that conduct was not improper.
- Section 138 covers not only impropriety in the acquisition of evidence following an offence, but also conduct which constitutes the offence.

Admissibility – Discretionary exclusions and limits on use

Robinson v Woolworths [2005] NSWCA 426 (KOP[6.170])

- Applied the common law concept of 'impropriety' to s 138, as defined by *Ridgeway v The Queen* (1995) 184 CLR 19.
- The standard of propriety is the minimum standard that a society should expect and require from those entrusted with law enforcement powers.
- Impropriety is more that a mere "blurring" or contravene those standards n minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.
- The concepts of "harassment" and "manipulation" suggest some level of encouragement or persuasion in relation to the commission of an offence.
- Where there is no unlawfulness on the part of an officer, "mere doubts" about the appropriateness of conduct is insufficient to establish impropriety.

Admissibility – Discretionary exclusions and limits on use

Robinson v Woolworths [2005] NSWCA 426 (KOP[6.170])

Not capable, as a matter of law, of constituting impropriety for the purposes of s 138 of the *Evidence Act*. The factors which support that conclusion:

(a) The conduct of the law enforcement authority provided the opportunity for the commission of the offence, but did not involve the application of any form of pressure, persuasion or manipulation.

(b) The conduct involved a straightforward request, made in a public place, in the course of a legitimate business and therefore involved no intrusion on individual rights or freedoms and certainly no harassment.

(c) The two girls acted in the manner of ordinary members of the public seeking to purchase cigarettes.

Admissibility – Discretionary exclusions and limits on use

Robinson v Woolworths [2005] NSWCA 426 (KOP[6.170])

Not capable, as a matter of law, of constituting impropriety for the purposes of s 138 of the *Evidence Act*. The factors which support that conclusion:

(d) In the case of an offence which does not involve a criminal intent, the policy against tempting people to commit crimes which otherwise might not have occurred is of limited significance.

(e) Because the victim of a contravention of the law, namely the young person who successfully purchases tobacco products, is unlikely to complain about a contravention, the conduct constitutes a viable and practical means of achieving a better level of compliance than would be likely if law enforcement were dependent on receipt of complaints.

(f) A properly run compliance program, backed by the possibility of prosecution where contravention occurs, is itself a reasonable and proper means of promoting compliance with the law.

Admissibility – Discretionary exclusions and limits on use

Section 138 - Exclusion of improperly or illegally obtained evidence

Robinson v Woolworths [2005] NSWCA 426 (KOP[6.170])

- Onus on accused to establish impropriety or illegality before onus placed on Crown to persuade that it should nevertheless be admitted.

- Assessed on the balance of probabilities.

Admissibility – Discretionary exclusions and limits on use

DPP v Marijancevic [2011] VSCA 355

- Charged with drug manufacture and trafficking.
- Affidavits in support of warrants not sworn properly.
- Warrants invalid, but DPP tried to get evidence in anyway under s 138
- Judge said no.
- Appealed.

Admissibility – Discretionary exclusions and limits on use

DPP v Marijancevic [2011] VSCA 355

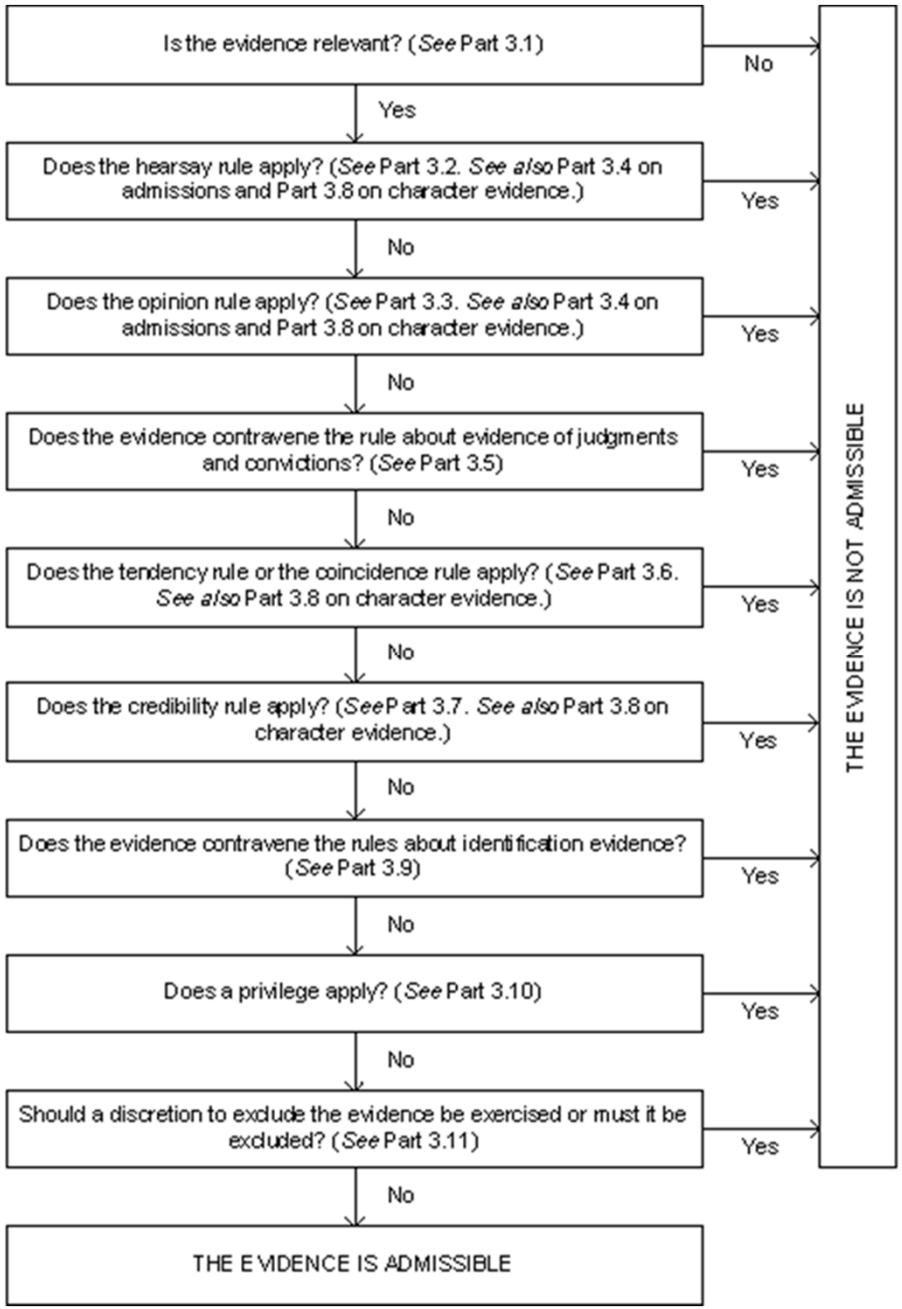
- Discretionary decision. Ability of court of appeal to intervene is limited: must demonstrate that exclusion of evidence was not reasonably open to the trial judge in a sound exercise of the discretion.
- Not just a matter of fairness to the accused, but weighing of public policy factors:
  - Public interest in admitting reliable probative evidence.
  - Vindicating individual rights and deterring misconduct.
- To proffer unsworn material has a tendency to subvert a fundamental principle of law.
- Balanced against significant probative value of the evidence – 138(3)(a).

Admissibility – Discretionary exclusions and limits on use

DPP v Marijancevic [2011] VSCA 355

- Exclusion would weaken case – 138(3)(b).
- Serious offences – 138(3)(c).
- Would have been easy to swear the affidavits – 138(3)(h).
- Gravity of impropriety – 138(3)(d) – Judge said “highest order” - rejected technical breach argument.
- Para [67] ranges of impropriety.
- Deliberate or reckless – s 138(3)(e).
- Finding of judge was not glaringly improbable or not reasonably open to him – no error.
- It was open to the judge to make these findings – Crown did not discharge its burden.

Admissibility – hearsay


Is the evidence relevant? (*See* Part 3.1)
No
Yes
Does the hearsay rule apply? (*See* Part 3.2. *See also* Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the opinion rule apply? (*See* Part 3.3. *See also* Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rule about evidence of judgments and convictions? (*See* Part 3.5)
Yes
No
Does the tendency rule or the coincidence rule apply? (*See* Part 3.6. *See also* Part 3.8 on character evidence.)
Yes
No
Does the credibility rule apply? (*See* Part 3.7. *See also* Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rules about identification evidence? (*See* Part 3.9)
Yes
No
Does a privilege apply? (*See* Part 3.10)
Yes
No
Should a discretion to exclude the evidence be exercised or must it be excluded? (*See* Part 3.11)
Yes
No
THE EVIDENCE IS ADMISSIBLE
THE EVIDENCE IS NOT ADMISSIBLE

Admissibility – hearsay

59 The hearsay rule-exclusion of hearsay evidence

(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) Such a fact is in this Part referred to as an asserted fact.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note : Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes (2000) 158 FLR 359.*

Admissibility – hearsay

Dictionary -

"previous representation" *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 adduced.*

"representation" includes:

(a) an express or implied representation (whether oral or in writing), or

(b) a representation to be inferred from conduct, or

(c) a representation not intended by its maker to be communicated to or seen by another person, or

(d) a representation that for any reason is not communicated.

Admissibility – hearsay

59 The hearsay rule-exclusion of hearsay evidence

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.

Admissibility – hearsay

- What is wrong with hearsay evidence?
- Not on oath
- Not able to cross-examine
- Not the best evidence
- Danger of inaccuracy
- Risk of fabrication

Admissibility – hearsay

- Examples: 1

- D is the defendant in a sexual assault trial

- W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred.

- Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

Admissibility – hearsay

- Examples: 1

- Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

Admissibility – hearsay

- Examples: 2

- 2 P had told W that the handbrake on W's car did not work.

Admissibility – hearsay

- Examples: 2

- Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

Admissibility – hearsay

- Examples: 3

- 3 W had bought a video cassette recorder and written down its serial number on a document.

Admissibility – hearsay

- Examples: 3

- Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W

Admissibility – hearsay

Subramaniam v Public Prosecutor [1956] 1 WLR 965 (KOP[7.30])

- Charged with possession of ammo without authority.
- He said that he had been captured by terrorists and was under duress to follow their orders or be killed. He was planning to surrender and was on his way to do so.
- Tried to admit evidence of conversations with terrorists and threats.
- Disallowed because it was hearsay – needed to call the terrorists to give the representations.
- Sentenced to death.

Admissibility – hearsay

Subramaniam v Public Prosecutor [1956] 1 WLR 965 (KOP[7.30])

Privy Council held:

- Not hearsay – because not a hearsay purpose.
- Purpose of evidence was to prove duress (his mental state) which was relevant to his defence.

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

Admissibility – hearsay

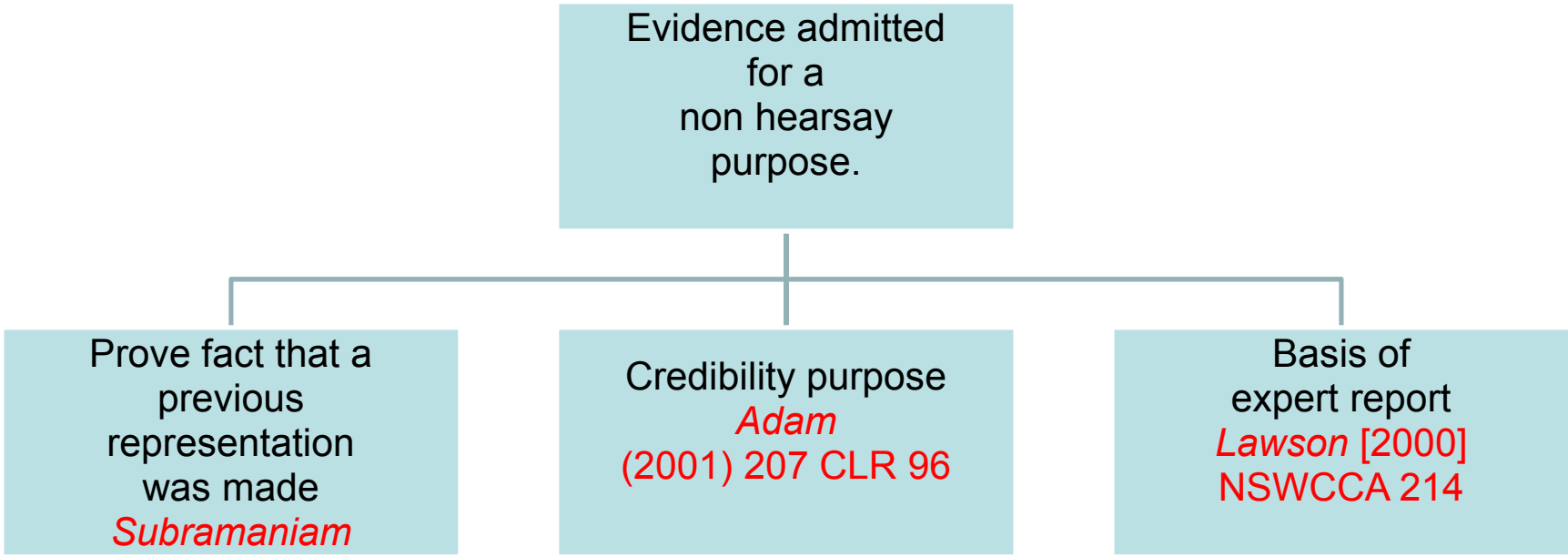
Subramaniam v Public Prosecutor [1956] 1 WLR 965
(KOP[7.30])

The evidence is hearsay and inadmissible when the object of evidence is to establish the truth of what is contained in the statement.

The evidence is not hearsay and it is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made (relevant?)

When is a previous representation admitted for non hearsay purpose?

Examples:



Admissibility – hearsay

R v Lawson [2000] NSWCCA 214

The complainant's previous representations were admitted to prove the basis of the expert's opinion.

This means they were admitted for a non-hearsay purpose and now could be used for a hearsay purpose because of s 60.

Admissibility – hearsay

Kamleh v The Queen (2005) 213 ALR 97 (KOP[7.40])

- Convicted of murder of prostitute and pimp.
- Co-offender charged with manslaughter and tried separately.
- Neither defendant gave evidence at hearing.
- Issue was admissibility of out of court statements to police and another .
- Fact in issue was whether defendant was in the unit between 1 and 4 am on 3 April 2000.
- A fact relevant to this was whether Zapia was in the unit at the same time (judge found that they were together throughout this time).

Admissibility – hearsay

Kamleh v The Queen (2005) 213 ALR 97 (KOP[7.40])

- Evidence of conversation could support the inference that he was in the apartment at that time.
- Told Simoniuk that had turned up the television (to mask gunshots?).
- Used to show that Zappia knew that TV had been turned up – inference was that was likely to only have been available to someone in the room.
- Held –
    - Not hearsay because not tendered as evidence that Zappia had in fact turned the volume of the television set up. Rather, the fact Zappia said what he did about the television set was relevant because it revealed a state of knowledge on Zappia's part that tended to prove he was at the scene of the crime at the time of the killings (only someone in the room would know that the T.V. had been turned up).

Admissibility – hearsay

Kamleh v The Queen (2005) 213 ALR 97 (KOP[7.40])

- Held –
  - Telephone calls admissible, not to prove the truth of the contents of the calls, but to prove that they had concocted an alibi together. In fact, prosecution case was that the representations in the telephone conversations were not true, but they showed that the alibis were the same.
  - Statements of state of mind of intention are not hearsay if relevantly relied on for that purpose rather than to prove the contents of the statements.

Admissibility – hearsay

Approach to applying s 59:

1. Identify the previous representation.

2. What is the intended asserted fact in the previous representation? That is, what fact is the maker of the previous representation intending to assert by making the representation?

3. Is the previous representation being adduced to prove that asserted fact in the previous representation? – if yes, then section 59 excludes the evidence (see if an exception applies).

Admissibility – hearsay

Effect of section 60 (Prior to amendment – not current)

If a previous representation is admitted for non hearsay purpose then it can be used for a hearsay purpose.

Subject to discretion to limit (s 136).

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

- Convicted of assault with intention to rob
- Defence was that the robbers ran out and gave him the gun
- Calin (prosecution witness) gave statement of what Lee said to him
  - Said:
    - '*… leave me alone, cause I'm running because I fired two shots …*
    - *I did a job and the other guy was with me bailed out*'
  - At trial Cailan said that he did not recall these statements
  - Cross-examined by crown (s 38 and 43).
  - Crown relied on evidence of police who took the statement.

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

- Three pieces of evidence

i. An account of what Calin had done.

ii. An account of what Calin had seen.

iii. An account of a conversation.

- What was the purpose of Calin giving evidence of Lee's previous representations? In other words, what is that person intending to assert in the previous representation?

- "*The fact that the statement or the conduct concerned might unintentionally convey some assertion is not the point. The inquiry is about what the person who made the representation intended to assert by it*." [22]

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

What Cailin saw

- How did the High Court deal with Cailin's previous representation of what Lee did (i.e. "saw him walking fast" and "sweating")?
- Who made the previous representation? - Cailin
- How was this previous representation admitted? - It was admitted as a prior inconsistent statement (because Cailin denied this testimony in court)
- What use could be made of the previous representation? [26] – pursuant to s 60 it could then be used to prove the truth of the statement

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

What Cailin heard

- How did the High Court deal with Cailin's previous representation of what Lee said (i.e. "Leave me alone, cause I'm running because I fired two shots…I did a job and the other guy was with me bailed out")?
- Who made the previous representation? Lee
- What did the Cailin intend to assert? Only that Lee told him these things. No that the things that Lee told him were true.
- What did Lee intend to assert? That they were true.
- How was this previous representation admitted? As a PIS
- What use could be made of the previous representation? They could not be used to prove the truth of the statements because that is not what Cailin asserted by the statement, and s 60 will not operate to make them admissible

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

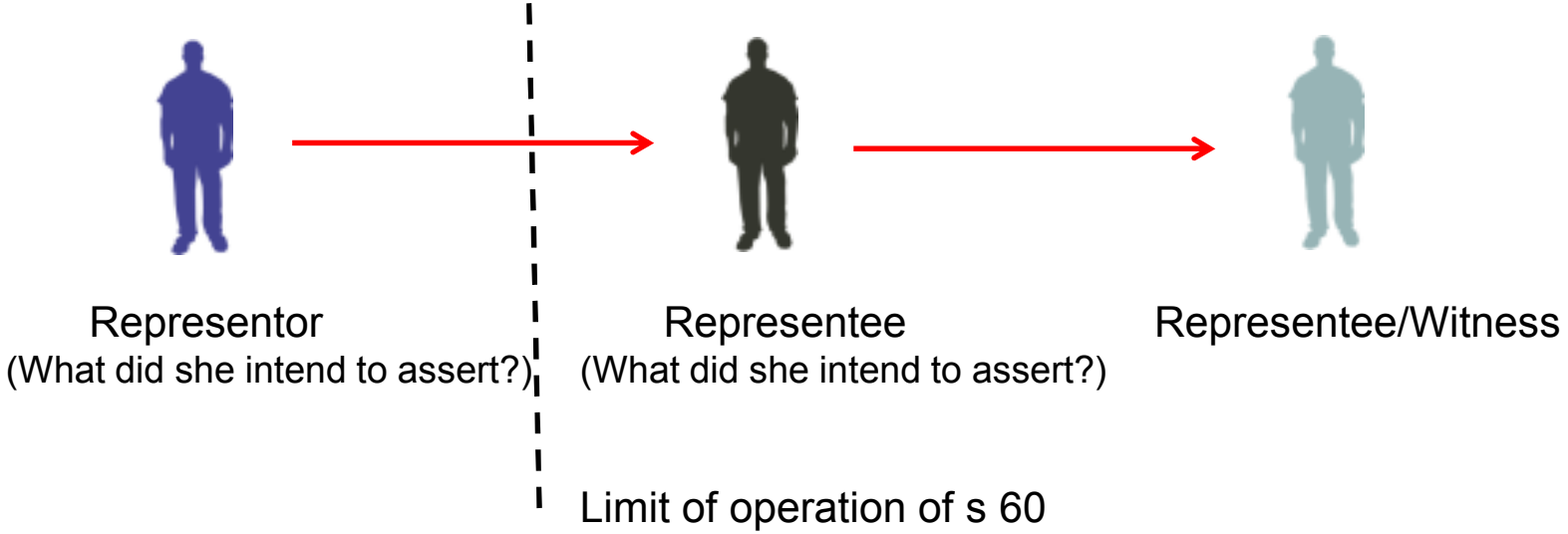
- It is important to identify the asserted fact in the previous representation and whether the previous representation is being admitted to prove that asserted fact.

- Calin's statement to police could not be used to prove Lee's confession. The only asserted fact in Calin's previous representation was an assertion by Calin that Lee said something.

Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

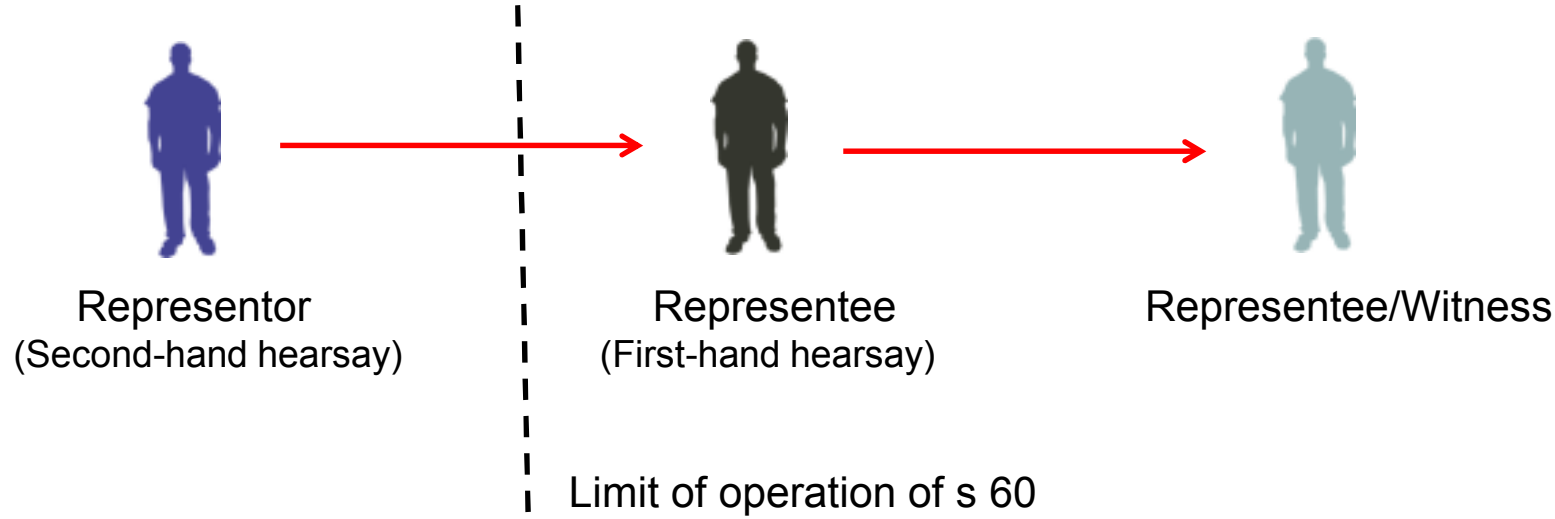
- "*To put the matter another way, s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert.*"



Admissibility – hearsay

Lee v The Queen (1998) 195 CLR 594 (KOP [7.60])

- Put simply, according to Lee, s 60 only operated on "first-hand hearsay." (But now amended)



Admissibility – hearsay

Section 60: Exception evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62)

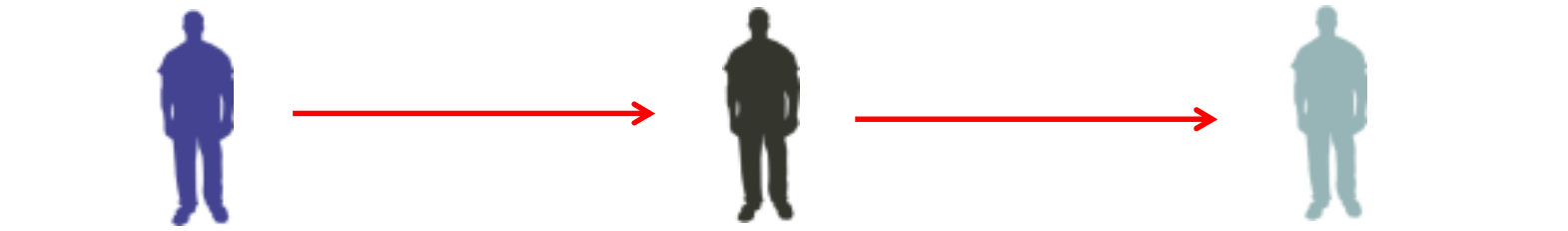
Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen(1998) 195 CLR 594* .

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

Admissibility – hearsay

- Now, s 60 operates upon second-hand and more remote hearsay.



Limit of operation of s 60

Admissibility – hearsay

- Now, s 60 operates upon second-hand and more remote hearsay.
- But s 60(3) still preserves the result in *Lee*, because it excludes the operation of s 60 in relation to admissions in criminal proceedings.

Admissibility – hearsay

Jango v Northern Territory of Australia (No 4) (2004) (KOP[7.80])

- Native title claim.
- Expert report – anthropological evidence.
- Report included factual matters used to support the basis of the expert opinion – objected to.
- Was this hearsay? N
- Effect of s 60?
- An order under s 136 was made to limit the use of this material because it was unfairly prejudicial (s 136(a)).
- See also *Quick v Stoland* (KOP[7.70])

Admissibility – hearsay

Approach to applying s 59 (again):

1. Identify the previous representation.

2. What is the intended asserted fact in the previous representation? That is, what fact is the maker of the previous representation intending to assert by making the representation?

3. Is the previous representation being adduced to prove that asserted fact in the previous representation? – if yes, then section 59 excludes the evidence (see if an exception applies).

Admissibility – hearsay

Unintended assertions:

- If the fact that the representor sought to assert by making the representation is not the fact that is being sought to prove – the hearsay rule does not apply, because the assertion of the fact to be proved is unintended (assuming that it does prove it).

Admissibility – hearsay

Unintended assertions – Examples (1):

- Wendy is charged with damage to Otto's property. Wendy contends that she has never met Otto before in her life.

- Rollo offers evidence that 2 days before the crime, Wendy was seen to wave at Otto and then make an obscene gesture.

- This conduct would be excluded by s 59 - By the wave, Wendy can be taken to have to have INTENDED a display of recognition of Otto. This is relevant to the claim that she did not know Otto. By the obscene gesture, Wendy can be taken to have INTENDED an expression of distaste towards Otto. This affects an assessment of the probability that W acted maliciously towards Otto's property.

Admissibility – hearsay

Unintended assertions – Examples (2):

- Owner of a vessel takes her husband and children to sea on the ship.
- Tendered to prove the ship was seaworthy.
- The evidence rationally affects an assessment of that probability. It is not excluded by s 59, because the owner cannot be taken to have intended to assert anything of that nature by her conduct – i.e. intention was to show them the ship.

Admissibility – hearsay

Unintended assertions:

Walton v The Queen (1989) 166 CLR 283 (KOP, 231)

- Charged with murder.
- Night before murder child took a telephone call and said “hello daddy”

1. Who made the previous representation?
2. What is the asserted fact in the representation? – greeting
3. Is the previous representation being tendered to prove the asserted fact, or something else? - the unintended assertion.

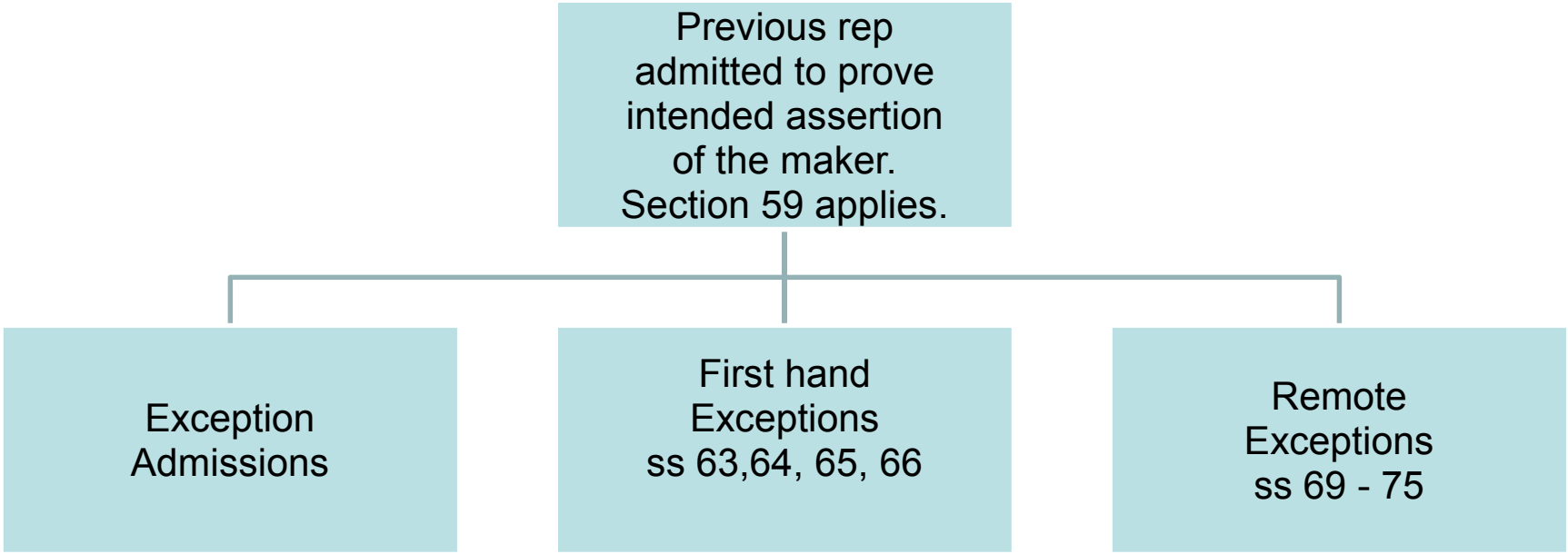
Admissibility – hearsay

Unintended assertions:

Walton v The Queen (1989) 166 CLR 283 (KOP, 231)

The child's statement is an unintended assertion and would not be excluded by s 59 because s 59 only applies to INTENDED assertions.

Hearsay exceptions



Admissibility – hearsay

Exceptions to the hearsay rule:

- Evidence relevant for a non-hearsay purpose (section 60)
- First-hand hearsay (sections 63 - 68)
- Contemporaneous statements about a person's health etc. (section 66A)
- Business records (section 69)
- Tags and labels (section 70)
- Electronic communications (section 71)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
- Marriage, family history or family relationships (section 73)
- Public or general rights (section 74)
- Use of evidence in interlocutory proceedings (section 75)
- Admissions (section 81)
- Representations about employment or authority (section 87 (2))
- Exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- Character and expert opinion about accused persons (sections 110 and 111).

Admissibility – hearsay

Exceptions to the hearsay rule:

62 - Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

Admissibility – hearsay

Exceptions to the hearsay rule:

X to M - M is witness.(1st hand)

X to M to L - L is a witness. (2nd hand)

Admissibility – hearsay

63 - Exception: civil proceedings if maker not available

(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes : 1 Section 67 imposes notice requirements relating to this subsection.
2 Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Admissibility – hearsay

Dictionary Pt 2, 4 - Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

(a) the person is dead, or

(b) the person is not competent to give the evidence about the fact, or

(c) it would be unlawful for the person to give evidence about the fact, or

(d) a provision of this Act prohibits the evidence being given, or

(e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success, or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

Admissibility – hearsay

64 - Exception: civil proceedings if maker available

(1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation, if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note : Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

Admissibility – hearsay

64 - Exception: civil proceedings if maker available

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.
Note : Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Admissibility – hearsay

Caterpillar Inc. v John Deere Limited (No 2) (2000) (KOP[7.100])

- Patent infringement – tractors.
- Wanted to admit expert evidence in depositions taken in an North American case concerning an North American expert.
- Relied on s 63(2) or 64(2). Issued s 67 notice.
- Deere claimed the expert was unavailable, as they had written to him inviting him to come to Australia to give evidence in the case. The expert did not respond.
- Re Dictionary s 4(1)(e) – [19].
- Re Dictionary s 4(1)(f) – [20].

Admissibility – hearsay

Caterpillar Inc. v John Deere Limited (No 2) (2000) (KOP[7.100])

- In relation to s 63(2):
- Wrote to him and asked him to come to Australia to give evidence in the case. The expert did not respond.
- Did not appear to offer to pay his expenses and professional fees. It was not the expert's job to start these negotiations
- Did not seek to make contact with him in other ways
- Caterpillar was a big client of his – not surprising that he did not respond
- Steps taken were insufficient – therefore "available"

Admissibility – hearsay

Caterpillar Inc. v John Deere Limited (No 2) (2000) (KOP[7.100])

- In relation to s 64(2) relevant factors included:
  - i. Actual cost of securing witness.
  - ii. A comparison of that cost with value of stake in litigation.
  - iii. Assessment of importance of the witnesses evidence.
- Here no details of (i) or (ii)
- Here, the nature of the litigation (major patent case – which often involves witnesses from Northern Hemisphere) and apparent expense that the parties were going to prosecute the litigation, suggest that litigation of significant value
- His evidence seemed important
- Expense to get him not disproportionate – therefore not “undue.”

Admissibility – hearsay

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

Admissibility – hearsay

Section 65

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

(a) made under a duty to make that representation or to make representations of that kind, or

(b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Admissibility – hearsay

Section 65

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note : Section 67 imposes notice requirements relating to this subsection.

Admissibility – hearsay

Section 65

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3), cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time, and

(b) if present could have cross-examined the person.

Admissibility – hearsay

Section 65

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note : Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party, an

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Admissibility – hearsay

Section 65

Note:

- s 65(2) applies to evidence given by a person, so does not apply to a document tendered, at least where there is no evidence given by a person who perceived the representation being made (e.g. written, typed): *R v Conway* [2000] FCA 461, [154].

- On the other hand it has been held that where such a person does give evidence, this provision does not specify the form in which the evidence may be given (thus the document may be adduced through the witness): *R v Suteski* (2002) 128 A Crim R 275, [34].

- Is there an argument that a person sees a representation in an email being made when they open it and read it (given s 71)? Perhaps not??

Admissibility – hearsay

Williams v The Queen (2000) 119 A Crim R 490 (KOP [7.120])

- Charged with robbery and attempting to pervert the course of justice.
- Buried gun in backyard of Stewart.

  21 Nov 1996 – Robbery.
  26 Nov 1996 – Video interview with Stewart.
  31 Oct 1997 – Stewart died.

- Crown wanted to admit statement which included "*I have done a rort*", and asking if he had an incinerator.
- Defence argued that interview was taken 5 days later – not "shortly after"

Admissibility – hearsay

Williams v The Queen (2000) 119 A Crim R 490 (KOP [7.120])

- It would be mistake to over-emphasise whether it was "fresh in the memory"
- Not just an issue of reliable memory, but provision serves to prevent concoction.
- The 5 day delay did not satisfy temporal requirement in 65(2)(b) – [49].
- Court not to look at "all circumstances of the case" but circumstances at time at which representation was made when assessing ss 65(2)(b) and (c). – [54].
- Here, circumstances made it likely that the representation was a fabrication [56] – [57]:
  - Drug addict living on fringe
  - Potential accomplice
  - Had reasons to tell police what they wanted to hear

Admissibility – hearsay

Harris v The Queen [2005] NSWCCA 432 (KOP [7.130])

- Convicted of manslaughter of Wright.
- Day after attack, Wright gave a statement to police and died a week later.
- Prosecution wanted to admit statement pursuant to s 65(2)(b) and (c).
- Held:
  - A “short time” is not defined by some particular period of time.
  - Each case has to be considered having regard to its own particular circumstances.
  - In these circumstances, 24 hours OK

Admissibility – hearsay

Harris v The Queen [2005] NSWCCA 432 (KOP [7.130])

- Unlikely that it was a fabrication because:
  - Although the deceased had been drinking, only a mild level of intoxication.
  - Statement not inherently unlikely.
  - Statement was formally made with awareness that making a false formal statement could get him in trouble.
  - Statement was made before he could appreciate seriousness of his injury.

Admissibility – hearsay

Webb v R [2012] NSWCCA 216

- In 1991, EF (70 years old) drove into the secure underground car park of her home. Webb watched EF open the door and then followed the vehicle into the car park. When the vehicle stopped, he confronted EF with a broken glass bottle and forced her to perform fellatio twice, and he attempted to penetrate her anally. He then stole EF's car and drove away in it.

- By 1885 the case was filed away as an unsolved crime and number of items of evidence were lost, including: her statement, photos, clothing. But a DNA sample was kept and in 2002 identified Webb. This was picked up in 2010.

- EF was re-interviewed in January 2011 (90 years old) but dies in April.

- Could the video recording of her interview be used in the prosecution of Webb – pursuant to s 65(2)(c)?

Admissibility – hearsay

Webb v R [2012] NSWCCA 216

Held

- The recorded interview satisfied s 65(2)(c) – appeal dismissed, permanent stay refused.
- Although it was unusual that the defendant could not cross-examine the witness a stay would only be ordered in an extreme case.
- The loss of primary evidence does not of necessity render a trial unfair.
- The act that the complainant had died did not give rise to any automatic consequences with respect to the trial of Mr Webb. It was necessary that his Honour consider the areas of asserted prejudice. [73].

Admissibility – hearsay

Webb v R [2012] NSWCCA 216

Held

- The Court upheld the judge's findings that it was highly probable that the representation was reliable (65(2)(c)) despite the long efflux of time, because:
  - of the close correlation between the substance of what was reported on the critical day in 1991 (and two days later) to witnesses who gave corroborating evidence in the trial and the substance of what appeared in the record of interview.
  - the ongoing general consistency of the description of the episodes of forced fellatio.

Admissibility – hearsay

66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Admissibility – hearsay

Graham v The Queen (1998) 195 CLR 606 (KOP[7.150])

(Pre 2009 amendment – no 66(2A)

- Alleged sexual assaults when complainant was 9 and 10 (1987, 1988).
- Complainant told friend in 1994.
- Charges then laid.
- Friend gave evidence of complaint.
- Evidence admitted under common law (even though EA in force!).
- Appeal against conviction based on admissibility of complaint evidence.

Admissibility – hearsay

Graham v The Queen (1998) 195 CLR 606 (KOP[7.150])

(pre 2009 amendment – no s 66(2A)

> “The word "fresh", in its context in s 66, means "recent" or "immediate". It may also carry with it a connotation that describes the quality of the memory (as being "not deteriorated or changed by lapse of time") but the core of the meaning intended, is to describe the temporal relationship between "the occurrence of the asserted fact" and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years. [4]

- Could not have been fresh in the memory – not admissible under this section.
- Possibly could be admitted under s108(3). But case was conducted without reference to the Act and under the Act admission the evidence would not have been inevitable. Therefore appellant may have lost a significant chance at acquittal.
- Appeal allowed.

Admissibility – hearsay

Graham v The Queen (1998) 195 CLR 606 (KOP[7.150])

(pre 2009 amendment – no s 66(2A)

- Could not have been fresh in the memory – not admissible under this section.

- Possibly could be admitted under s108(3). But case was conducted without reference to the Act, and under the Act admission of this evidence would not have been inevitable. Therefore appellant may have lost a significant chance at acquittal.

- Appeal allowed.

Admissibility – hearsay

66 Exception: criminal proceedings if maker available

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note : Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen(1998) 195 CLR 606.*

Admissibility – hearsay

66 Exception: criminal proceedings if maker available

ALRC 102:

> "*Graham has been applied in a large number of cases. In many of these, evidence of the complaint has been inadmissible because the representations were not considered to be 'fresh' because of the effluxion of time, including where complaints were made within months of the event. This has led to some concern about the operation of s 66 in such cases*." [8.69]

> "*The Commissions find that there is strong support for amendment of s 66 to clarify that 'freshness' may be determined by a wide range of factors. Support comes from a variety of sources. The decisions of lower courts since Graham have often sought to limit Graham to its facts in order to retain flexibility in the interpretation of s 66. The more flexible approach in R v Vinh Le and R v Adam has been noted above*." [8.119]

Admissibility – hearsay

R v XY [2010] NSWCCA 181 (KOP [7.160])

- Step-brother forced his 8 year younger step-brother to perform acts of fellatio on 8 occasions in 2003 – 2005, whilst they were living in the same house.

- Several years later, he gave police interview and said that he had told a friend about this when in year 6 and then told his parents later in 2009.

- Was the complaint evidence admissible under the new s 66(2A)? Judge said no. DPP appealed this issue.

- Looked at history of 'recent complaint' evidence: at common law it was hearsay and was not used to prove the truth of the complaint.

- Sub-section (2A) is an interpretive section, although the three matters in it are not the only factors to be considered.

Admissibility – hearsay

R v XY [2010] NSWCCA 181 (KOP [7.160])

- The context of the phrase “fresh in the memory” no longer means that it is to be taken to mean “recent” or “immediate”. Now interpreted more widely.
- The core meaning is no longer an examination of the temporal relationship between the occurrence of the asserted fact and the making of the representation (although this is still a factor).
- The Court must also take into account the “nature of the event”.
- Judge’s finding of inexactness in the evidence is not borne out. The nature of the representation suggests that the events were firmly planted in the mind of the complainant. Was fresh in the memory. Therefore admissible.
- **Ambiguity or apparent inconsistency is not a reason to reject evidence in a criminal trial.**

Admissibility – hearsay

LMD v R [2013] VSCA 164

- Accused convicted of indecent assault on a child under 16 and indecent act with a child under 16 in relation to his niece. She claims that on four occasions she was sexually molested by her uncle from when she was about 8 to 9 years old, in 1991 - 1993. The complaint was not was made until many years later.

- Each of the complainant and the two friends gave evidence. Both of the friends said that the complainant had told them, albeit at different times, that she had been 'molested' by the applicant.

- She also told her then boyfriend (now husband) The complainant gave evidence that she was having difficulty having sexual intercourse because her mind then turned to what had happened.

- The trial judge allowed this complaint evidence to go before the jury. This was appealed.

Admissibility – hearsay

LMD v R [2013] VSCA 164

Held:

- Correct to allow the evidence to go to the jury. Applied s 66.

"On any view of the timelines applicable in this proceeding, the first complaint was made years after any incident of molestation as alleged by the complainant. She was seven or eight when the first alleged assault took place. She was about 15 when she spoke to her school friend, and 18 when she told her boyfriend about being molested.

The period of time between the occurrence of the asserted fact and the making of the representation is one of the factors which the court may, by s 66(2A), take into account in determining whether that occurrence was fresh in the memory. The relevance of the passage of time is obvious. But other considerations may also be relevant, perhaps decisively so. The Act itself refers to the nature of the event concerned and the age and health of the representor. It also refers to 'all matters that [the court] considers are relevant to the question'.

Admissibility – hearsay

LMD v R [2013] VSCA 164

> The events to which the complainant referred when she said that she had been 'molested' were inherently likely to remain firmly in her mind, if not as to detail, then as to the general nature of the behaviour to which she says she was subjected. Had she never raised the topic with anyone before going to the police in 2003, she would certainly have been attacked on the basis that, had there been any substance in her allegations, she would have told someone about them. Her complaint was, therefore, evidence necessary to be called in the Crown case, at least from her; but once the conditions of s 66 were satisfied, then also from the persons to whom the representations were made, as evidence not only of consistency of conduct by the complainant but also as to the truth of the content of the representations.

> The conditions of s 66 were in my opinion clearly satisfied. That the events were fresh in the complainant's memory was demonstrated by her reaction to the approaches made by her boyfriend when sexual intercourse between them was contemplated. If the events were fresh in her memory then, so too were they likely to have been when the complainant spoke to her school friend some four years earlier.

Admissibility – hearsay

LMD v R [2013] VSCA 164

> It is no answer to this proposition that the complainant did not descend into detail, or that the girlfriend gave no evidence about the complainant's demeanour when referring to the molestation, or that the applicant was not identified by name.
>
> In the applicant's written outline of submissions, it is put that the trial judge ignored the passage of time. As his Honour's ruling demonstrates, that submission is wrong. His Honour did take that circumstance into account."

- Event was fresh in her memory when the complaints were made.
- Lack of detail not a problem.
- S 66(2A) applicable.

Admissibility – hearsay

66 Exception: criminal proceedings if maker available

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Admissibility – hearsay

Baker v The Queen [2012] HCA 27

- Two accused were tried jointly for murder. It was alleged that the murder occurred when the victim fell through a window on the first floor of a building during a fight which occurred in the early morning at a party.

- The prosecution argued that the two accused had attacked the victim and that he had fallen in the course of the attack. The precise circumstances of the fall were not known.

- One of the accused was convicted; the other was acquitted. The person acquitted had made statements to the police and to others who gave evidence at the trial to the effect that he had pushed the victim.

- The judge ruled that the out-of-court statements were not admissible in the trial of the person convicted because there was no exception to the hearsay rule which rendered them admissible.

Admissibility – hearsay

Baker v The Queen [2012] HCA 27

- Evidence Act not applied and common law relied upon.

- Previously in *Bannon v The Queen*, it was acknowledged that the common law of Australia has not to date recognised an exception for the out-of-court confessional statements of a co-accused or a third party from the operation of the rule.

- Appellant submitted that there should be this exception to the hearsay rule:

  at a joint trial in which the prosecution relies on admissions by an accused, A, in proof of A's guilt, and those admissions also tend to exculpate the co-accused, B, the trial judge should be required (or have the discretion) to direct that A's admissions are evidence in B's trial to be considered in exculpation of B.

- i.e. Third party confessions should be admissible.

Admissibility – hearsay

Baker v The Queen [2012] HCA 27

High Court held:

- Section 65 provides a broad exception – broader than common law.
- Majority – NO. Appeal dismissed

> "The consequence of upholding the broad contention would be to effect a significant alteration to the common law of evidence in those States which to date have chosen not to adopt the *Uniform Evidence Act* or to modify the hearsay rule along the lines of the English legislation or otherwise. In circumstances in which the application of the hearsay rule in the appellant's trial did not occasion a miscarriage of justice, the invitation to effect that change should be rejected."

Admissibility – hearsay

Baker v The Queen [2012] HCA 27

High Court held:

Heydon J

- "The present common law in relation to hearsay exceptions should not be changed in the respects the appellant advocated. LM's evidence was not admissible in the appellant's favour. The trial judge's direction was correct. The appeal should be dismissed." [122]

- Therefore common law test is not as broad as s 65.

Admissibility – hearsay

66 - Exception: criminal proceedings if maker available

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Admissibility – hearsay

66A - Exception: contemporaneous statements about a person's health etc

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

- Originally s 72 and usable in relation to remote hearsay as well. Now only first-hand.

- E.g. "I am afraid that he will kill me."

Admissibility – hearsay

Section 67 – Notice to be given

- Specifies manner of giving notice of reliance upon hearsay evidence pursuant to ss 63 – 65.

Section - 68 Objections to tender of hearsay evidence in civil proceedings if maker available

- Specifies manner of taking objections to use being made of hearsay representations if the maker is available, but will not be called.

Admissibility – hearsay

Remote hearsay exceptions

(Applicable to all degrees of hearsay)

Admissibility – hearsay

69 - Exception: business records

(1) This section applies to a document that:

(a) either:

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or

(ii) at any time was or formed part of such a record, and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

Admissibility – hearsay

69 - Exception: business records

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation:

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

Admissibility – hearsay

69 - Exception: business records

(4) If:

(a) the occurrence of an event of a particular kind is in question, and

(b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind, the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Notes : 1 Sections 48, 49, 50, 146, 147 and 150 (1) are relevant to the mode of proof, and authentication, of business records.

2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

Admissibility – hearsay

69 - Exception: business records

- Applies to a "**document**" that is "**business**" record – 69(1)(a).
- Applies to document that contains previous representation – 69(1)(b).
- The maker of the previous representation had or might reasonably be supposed to have had **personal knowledge** of the asserted fact. See 69(5)
- If it complies with the section, the document is admissible under s 69(2) to prove the contents of the representation contained within it.

Admissibility – hearsay

69 - Exception: business records

- How are such documents adduced?
- Sections 48, 49, 50.
- Sections 146 – 151.
- Section 69(3): is directed to avoid admissibility of self serving statements where proceedings are likely/probable
- Facts to be proved in relation to s 69 can be proved by affidavit (or written statement if a public document): s 170

Admissibility – hearsay

Thomas v State of NSW [2008] NSWCA 316 (KOP [7.190])

- Thomas was convicted of two serious criminal offences. These convictions were set aside by the NSW Court of Criminal Appeal in 1999, due to evidence given by Detective Eastwood to the Royal Commission into the NSW Police Service in 1996 that he had 'verballed' Thomas (Detective Eastwood fabricated admissions said to have been made by Thomas in an interview with him, in order to convict Thomas of the criminal offences).

- Thomas sued the State of NSW tort of malicious prosecution.

- The trial judge admitted the transcript of evidence from the Royal Commission, that Detective Eastwood had 'verballed' Thomas, on the basis that it was an exception to the hearsay rule, amounting to 'business records' under s 69(1)-(2) of the *Evidence Act 1995* (NSW).

- The case was dismissed, but NSW also argued that the transcript should not have been admitted.

Admissibility – hearsay

Thomas v State of NSW [2008] NSWCA 316 (KOP [7.190])

Hodgson JA

- The Royal Commission was an "Australian Proceeding" - dictionary
- The transcript was "obtained" "in connection" with the Royal Commission.
- Therefore, s 69(3) meant that the s 69(2) exception did not apply. The transcript was inadmissible.
- Allowing this evidence would be contrary to the rationale of s 69: "*the likely reliability of entries made in the ordinary course of business or government activities, when there is no reason to suspect ulterior purposes*."

Admissibility – hearsay

Thomas v State of NSW [2008] NSWCA 316 (KOP [7.190])

Campbell JA

- As a matter of statutory construction, the words "*in connection with*" should be construed broadly. It couldn't have a closer connection than by being given in the course of the proceedings. Therefore, the representation had a connection with an Australian proceeding. It was inadmissible

Gyles AJA (Diss)

- If it had been made in a statement prepared or obtained from Eastwood before the Royal Commission then s 69(3) would apply and it would not be admissible.

- But as it was a representation *made* in the *course* of giving evidence in the proceedings, the evidence was not excluded by s 69(3)(a).

Admissibility – hearsay

Lithgow City Council v Jackson [2011] HCA 36 (KOP [7.200])

- Jackson was found unconscious and injured in a drain. Conceded that the Council was only liable if he fell from a vertical retaining wall
- A document called "Patient Healthcare Record" recorded

  Found by bystanders – parkland
  Fall from 1.5 metres onto concrete
  No other Hx ?

- Signed by two ambulance officers. Neither gave evidence at hearing
- Document was admitted pursuant to s 78 as an opinion that he fell from the vertical retaining wall.
- Appeal to High Court regarding admissibility of the document.

Admissibility – hearsay

Lithgow City Council v Jackson [2011] HCA 36 (KOP [7.200])

- S 69(2) - the hearsay rule does not apply if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

- Here the asserted fact was that he fell 1.5 metres onto concrete.

- Section 69(2)(a) did not apply because the ambulance officers (makers of the representation) did not have personal knowledge of a fall of 1.5 metres because it happened before they arrived.

Admissibility - hearsay

Lithgow City Council v Jackson [2011] HCA 36 (KOP [7.200])

- Section 69(2)(b) did not apply because even if the ambulance officers (makers of the representation) had been told by the bystanders that Jackson fell in that way, the bystanders did not have personal knowledge of a fall and could not reasonably be supposed to have such knowledge, because it happened before they arrived.

- It is possible to argue that the asserted fact was an opinion as to how he fell, which they had personal knowledge of, but this was strained.

- Not admissible.

Admissibility - hearsay

Vitali v Stachnik [2001] NSWSC 303 (KOP[7.180])

- 2 documents setting out information of payments due to freelance nurses who services were arranged by a company of which the sole director was the defendant.
- Defendant sought to adduce them and relied upon s 69.
- Both were created by an employee at time who was involved in accounting work - 69(2) proved.
- As to s 69(3)(a) – the documents were created for the company. A previous decision said that the person entitled to the document had to be a party to the proceedings for which they are created, but Odgers said that this was surprising, and the company was in fact the alter ego of the defendant, so this was not an obstacle to the operation of 69(3)(a)

Admissibility - hearsay

Vitali v Stachnik [2001] NSWSC 303 (KOP[7.180])

- The first document was prepared after the proceedings commenced and recognised as being relevant to and potentially playing a part in the litigation. Therefore it was prepared in anticipation or connection with the proceedings. Accordingly s 69(3)(a) applied and the document was inadmissible.

- The second document was created at a time when the proceedings could not have been contemplated. Therefore s 69(3)(a) does not apply and the document was admitted.

Admissibility – hearsay

70 - Exception: contents of tags, labels and writing

The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed:

(a) in the course of a business, and

(b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Note : The Commonwealth Act has an additional subsection. It provides that the exception does not apply to Customs and Excise prosecutions. Section 5 of the Commonwealth Act extends the application of that subsection to proceedings in all Australian courts.

Admissibility – hearsay

71 - Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent, or

(b) the date on which or the time at which the communication was sent, or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Notes : 1 Division 3 of Part 4.3 contains presumptions about electronic communications. 2 Section 182 of the Commonwealth Act gives section 71 of the Commonwealth Act a wider application in relation to Commonwealth records. 3

"Electronic communication" is defined in the Dictionary.

Admissibility – hearsay

72 - Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

Admissibility – hearsay

73 - Exception: reputation as to relationships and age

(1) The hearsay rule does not apply to evidence of reputation concerning:

(a) whether a person was, at a particular time or at any time, a married person, or

(b) whether a man and a woman cohabiting at a particular time were married to each other at that time, or

(c) a person's age, or

(d) family history or a family relationship.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by a defendant unless:

(a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted, or

(b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to adduce the evidence.

(3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Admissibility – hearsay

74 - Exception: reputation of public or general rights

(1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

- A public right is one that affects the community in general.
- A general right is one that affects a particular class – such as the rights of a particular class of aborigines to a particular piece of land.

Admissibility – hearsay

75 - Exception: interlocutory proceedings

In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

- This means identification of a particular source who is reasonably likely to have knowledge of the relevant fact.

- This does not necessarily require identification of the “ultimate source” of the information.

Admissibility – hearsay

Problem 1:

A dispute has arisen as to Jack and Trevor entered a contract of sale. Trevor calls Horace to testify:

1 *I was at Jack's place on the day in question, when Trevor dropped in. I heard a conversation between them. Jack said to Trevor, 'I'll sell you this old picture for $250'. Trevor said, 'Excellent. I'll take it. I'll go and get some cash.'*

2. *After Trevor left, Sam dropped in. Sam said to Jack, 'I'll give you $1000 for this old picture'. Jack said 'done'. I was disgusted and walked out.*

3. *Later Jack said to me, 'I know I had an agreement with Trevor, but I couldn't turn down an extra $750. I need the money.'*

Is any of this evidence hearsay? Would it be admissible?

Admissibility – hearsay

Problem 2:

- Steven has been charged with the murder of Mo. Steven admits stabbing Mo but claims provocation. He testifies that that Mo told him that he (Mo) had had sex with Steven's wife, and that she appeared to enjoy it much more than he did. She told him that Steven just couldn't satisfy her any more. Steven says that he picked up a knife from Mo's kitchen bench and stabbed him.

- This evidence is consistent with what he told police in interview, which was led as part of the prosecution case.

- Another prosecution witness, Lew, testifies that he was walking past Mo's place when Mo came out into the front yard with blood dripping down his front. Mo says: 'Steven stabbed me. He found out I was having an affair with his wife and he came around with a knife to kill me.'

- Is this evidence hearsay?