

## General Evidence Formula

1. Is the evidence relevant? (Either to the facts in issue or the credibility of a witness)
  - a. It is the **facts in issue** to which evidence must be relevant
    - i. Civil case – the elements of the cause of action being brought
      1. *Goldsmith v Sandilands* - The facts in issue in a civil case emerge from the pleadings, which are framed in light of the legal principles governing the case
    - ii. Criminal case – the elements of the crime with which the defendant is charged
      1. *Smith v R* [2001]
        - a. The facts in issue are the ultimate issues expressed in terms of the elements of the offence, or cause of action in civil proceedings
        - b. Evidence of identity is only relevant if:
        - c. It is suggested that there is some distinctive feature revealed by the photos which would not be apparent to the jury (e.g. manner of walking)
  - b. Section 55(1) - Evidence is relevant in a proceeding if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in a proceeding
  - c. Section 56 - Evidence that is not relevant is not admissible except as otherwise provided by the act
    - i. *Evans v The Queen* - To determine the relevancy of evidence, look to the issues at trial. Relevance by itself does not prove anything
  - d. *Papakosmas v R* [1999]
    - i. In assessing evidence, the judge assumes that the evidence is reliable
    - ii. Evidence is relevant if it appears to the court to be relevant at the time it is tendered
    - iii. Whether an out of court statement has any capacity to affect the probability of the existence of the facts to which the statement relates can only be determined in light of the circumstances in which it was made
  - e. Section 102 – Evidence relevant only to the **credibility** of a witness is not admissible
    - i. *Adam v The Queen* [2001]
      1. Evidence relevant only to the credibility of a witness is not admissible
      2. Section 102 must not be interpreted as applying to evidence which is not admissible on any basis other than the credibility of a witness

3. The criterion of operation of s 102 is the relevance of the evidence, not any question of its admissibility
  4. A unfavourable witness must give evidence that is more than merely not favourable or neutral to the case of the party who called the witness, the evidence must actually be unhelpful
2. Are there any additional requirements of admissibility?
- a. Is the evidence tendency or coincidence evidence?
    - i. Section 97(1) – The **tendency** rule
      1. Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind
      2. Encompasses evidence of the character, reputation or conduct of a person, or a tendency that a person has or had
    - ii. *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000)
      1. Held that the tendency rule (s 97(1)) is a contingent exclusionary rule
      2. Evidence of character, reputation or conduct of a person; or a tendency a person has or had, is not admissible to prove the person has or had a tendency to act in a particular way; or to have a particular state of mind IF the court thinks that the evidence would not, either by itself or having regard to other evidence, have significant probative value
      3. There are 3 factors that will be taken into account when determining the probative value of the evidence
        - a. The cogency of the evidence relating to the conduct of the person
        - b. The strength of the inference that can be drawn from the evidence as to the tendency to act in a particular way
        - c. The extent to which the tendency increases the likelihood that the fact in issue occurred
    - iii. Examples of tendency reasoning:
      1. *Zaknic v Svelte Corp Pty Ltd* - Evidence that people seeking to enforce a written guarantee had engaged in various disreputable acts involving documents, being used to infer that those people have a tendency to falsify documents
      2. *Jacara v Perpetual Trustees WA* - Evidence that an agent of a shopping centre owner made certain representations to prospective tenants, being used to infer that the agent has a tendency to make such representations

3. *Elias v R* - Evidence that the alleged victim of a shooting had, on earlier occasions, carried or had access to a firearm
- iv. Section 98(1) – The **coincidence** rule - Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstance in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally
- v. Section 98(2) – Exceptions - Coincidence evidence is admissible if:
  1. (a) The other party has given reasonable notice and;
  2. (b) The court thinks it would have highly significant probative value
- vi. S 100 - provides for the waiver of the notice requirement on application of the party adducing the evidence
- vii. Examples of coincidence reasoning:
  1. *Sheldon v Sun Alliance Ltd* - An insurance company, facing a claim for fire damage to the insured's home, leading evidence of several other fires that occurred in homes occupied by the insured and with respect to which the insurance claims had also been made, to support an inference that the insured started the fire in question
  2. *Boniface v Smec Holdings Ltd* - Evidence of similar themes, subject matter, terms, misspellings, style and hardware and software origins linking 9 anonymous defamatory emails or letters, used to show that they had been sent by the same person
  3. *Vitler v Chief of Army* - Evidence of four large unauthorised withdrawals on a government credit card, each occurring either shortly after the owner of the card gambled and lost large amounts of money, used to show that the owner caused the withdrawals and did so aware that they were unauthorised
- viii. *Pfennig v The Queen* (1994) - Pfennig Test - Similar fact evidence is not admissible unless the judge concludes that there is no rational view of the similar fact evidence consistent with an accused's innocence - Overruled by *R v Ellis*
- ix. *R v Ellis* (2003)
  1. Held that the statute overrode the common law rules
  2. Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case
  3. The only test to be used is:

- a. Does the probative effect of the evidence substantially outweigh the prejudicial effect on the accused?
    - b. If it does, then the evidence can be admitted
  - x. *AE v The Queen* [2008]
    - 1. Similar fact evidence can be given by one complainant or several complainants
    - 2. However, the probative value of such evidence can be affected by the possibility of concoction
- b. Is the evidence opinion evidence?
  - i. Section 76(1) – The opinion rule - Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion was expressed
  - ii. Section 77 – General exception to the opinion rule - The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proving the existence of a fact about which the opinion was expressed
  - iii. Section 78 – Lay opinion exception
    - 1. The opinion rule does not apply to evidence of an opinion expressed by a person if
      - a. (a) The opinion is based on what the person saw, heard or otherwise perceived about an event; and
      - b. (b) Evidence of the opinion is necessary to obtain an adequate account or understanding of the persons perception of the matter or event
  - iv. *Partington v R* (2009) - The opinion must be based not only on what the witness saw, heard or otherwise perceived, but that evidence of that opinion must also be necessary to obtain an adequate account or understanding of the witnesses perception of the matter or event
  - v. Section 79 – Expert opinion exception - (1) If a person has specialised knowledge, based on their training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge
  - vi. *R v Tang* [2006] - The word knowledge connotes more than subjective belief or unsupported speculation. The term applies to any bod of known facts, or any body of ideas inferred from such facts or accepted as truths on good grounds
  - vii. *Hannes v Director of Public Prosecutions* [2006]
    - 1. The court must be wary of expert opinion evidence, as it can appear to the tribunal of fact to have more weight than it deserves