LAW20009
Evidence Law

- Evidence Law: Judicial Discretion to Exclude Evidence
- 3-Hour Structure: Foundations → Discretions → Problem-Solving
- Focus: Sections 135, 136, 137, 138 Evidence Act
- Outcome: Systematic framework for evidence admissibility

Week 2
Roles of Judge and Jury
and the Judicial Discretion to Exclude Evidence
Alana Ray

Learning Objectives

- Apply five-step analytical framework to evidence problems
- Distinguish between discretionary exclusion provisions
- Analyse probative value vs prejudicial effect
- Solve complex evidence exclusion problems
- Advise clients on likely admissibility outcomes

KNOW
ING

Five-Step Analytical Framework

- ▶ Step 1: Privilege (Immunity from disclosure)

- ▶ Step 2: Relevance (Section 55 - makes fact more/less probable)

- ▶ Step 3: Exclusionary Rules (Hearsay, opinion, character)

- ▶ Step 4: Discretionary Exclusion (Sections 135, 136, 137, 138)

- ▶ Step 5: Weight/Reliability (Jury assessment of admitted evidence)

KEY: Evidence must pass ALL admissibility steps

KNOW ING

Judge vs Jury Roles

▶ Judge: Questions of LAW (admissibility decisions)

▶ Jury: Questions of FACT (weight, credibility)

▶ Reality: Most civil cases judge-alone; criminal cases may have jury

▶ Admissibility = Law = Judge's Domain

KNOW
ING

Criminal Proceedings Flow

▶ Pre-trial applications (advance rulings)

▶ Voir dire (trial within trial)

▶ During trial (objections to evidence)

▶ Appeal (challenging admissibility decisions)

▶ Timing affects strategic options

KNOW
ING

Voir Dire Procedure

- Section 189 - "Trial Within Trial"
- Purpose: Determine admissibility without prejudicing jury
- Procedure: Conducted WITHOUT jury present
- Standard: Balance of probabilities
- Effect: Excluded evidence never reaches jury

Probative Value Definition

▶ Evidence Act Definition: "The extent to which evidence COULD rationally affect the assessment of the probability of the existence of a fact in issue"

▶ KEY WORD: "COULD"

▶ Focus on capability, not certainty

▶ Foundation for all discretionary analysis

KNOW
ING

NSW Approaches

- NSW Approach (R v Shamouil): Take evidence "at its highest"

- Ignore reliability/credibility issues

- Focus on maximum potential probative value

- **R v Dupas** was decided in 2010, but subsequent Victorian cases have moved toward the NSW position

- Current: Most jurisdictions follow NSW approach

KNOW
ING

Key Judicial Powers

- Section 11: Preserves inherent powers & abuse of process

- Section 192: General discretion (fairness, time, importance)

- Section 192A: Advance admissibility rulings

- Sections 135-138: Specific exclusion discretions

- Result: Comprehensive judicial control over evidence

Section 135 Framework

- General Discretion (Civil & Criminal)

- Court MAY refuse if probative value SUBSTANTIALLY OUTWEIGHED by:

- (a) unfairly prejudicial to a party

- (b) misleading or confusing

- (c) undue waste of time

- Key: MAY (discretionary) + SUBSTANTIALLY (high threshold)

KNOW
ING

Understanding Unfair Prejudice

▶ NOT Unfair Prejudice: Evidence damaging your case, supporting opponent's case, weak evidence

▶ IS Unfair Prejudice: Evidence provoking irrational emotional response, given more weight than deserved, causing improper decision

▶ ALRC: "Unacceptable damage by provoking irrational response"

Section 135 Examples

▶ Unfair prejudice: Gruesome photos when cause of death undisputed

▶ Misleading: Complex scientific evidence beyond jury comprehension

▶ Time wasting: Marginally relevant evidence requiring extensive hearing

▶ Balancing: Probative value vs specific danger identified

KNOW
ING

Section 137 Framework

- Criminal Proceedings Only
- Court MUST refuse prosecution evidence if probative value outweighed by unfair prejudice to defendant
- MUST (mandatory) vs MAY (discretionary)
- No "substantially" requirement
- Prosecution evidence only

KNOW
ING

Why Section 137 Exists

- Better to acquit guilty than convict innocent

- Prosecution bears burden beyond reasonable doubt

- Accused deserves protection from prejudicial evidence

- Scales tipped toward defendant

- Defense rarely uses s.135 when s.137 available

KNOW
ING

Section 137 Applications

- Character evidence about defendant's bad reputation
- Evidence of uncharged criminal acts
- Poor quality identification evidence
- Inflammatory evidence with less prejudicial alternatives
- Test: Does probative value outweigh prejudicial danger?

Section 136 Framework

- Limiting Use (Alternative to Exclusion)

- Court may limit use if danger that particular use might be unfairly prejudicial or misleading

- Purpose: Get probative value while reducing prejudice

KNOW
ING

Section 136 Examples

- Evidence relevant for credibility but not truth
- Expert opinion straying into legal conclusions
- Prior statements with multiple potential uses
- Evidence relevant for limited purposes only
- Advantage: Preserves probative value while controlling prejudice

KNOW
ING

Section 138 Framework

- Illegally/Improperly Obtained Evidence

- Not admissible UNLESS desirability of admission outweighs undesirability

- Two-stage process: Prove impropriety + weigh factors

KNOW ING

Key Concepts

- Illegally: Contravention of Australian law (clear standard)

- Improperly: Broader concept, not defined (professional standards)

- Examples: Illegal = Search without warrant; Improper = Trick confession without lawyer

Section 138(3) Factors

- (a) Probative value of evidence
- (b) Importance of evidence in proceeding
- (c) Nature of relevant offence/cause of action
- (d) Gravity of impropriety or contravention
- (e) Whether impropriety was deliberate or reckless
- (f) Whether breach involves ICCPR rights
- (g) Whether other proceedings taken re impropriety
- (h) Difficulty of obtaining evidence properly

KNOW
ING

Section 138 Analysis Method

▶ Burden Stage 1: Party seeking exclusion proves impropriety/illegality

▶ Burden Stage 2: Party seeking admission proves desirability outweighs undesirability

▶ Balancing: Consider all s.138(3) factors

▶ Result: No single factor determinative

KNOW
ING

Problem-Solving Steps

▶ Identify evidence: What exactly is being tendered?

▶ Relevance: Section 55 analysis

▶ Exclusionary rules: Hearsay, opinion, character issues

▶ Discretionary exclusion: Which section? Analysis? Balancing?

▶ Conclusion: Clear determination with reasons

KNOW
ING

Common Pitfalls

- Confusing probative value with weight

- Applying wrong section (s.135 vs s.137)

- Insufficient "unfair prejudice" analysis

- Forgetting burden of proof requirements

- Not considering all relevant factors

- Conclusory reasoning without explanation

Problem Question Methodology

- Systematic 5-step approach to evidence problems

- Identify evidence → Relevance → Exclusionary rules → Discretionary exclusion → Conclusion

- Focus on legal tests, not just outcomes

- Consider both sides' arguments

- Reach clear, reasoned conclusions

Framework

- Framework approach: Use five-step analysis systematically

- Law vs fact: Judges decide admissibility, juries decide weight

- Section knowledge: Different tests for 135, 137, 138

- Probative value: Take evidence "at its highest"

- Specific prejudice: Identify exactly why evidence problematic

- Contextual balancing: Consider all circumstances

KNOW
ING

Problem 1 – Anthony's Drive-by Shooting

- Anthony is on trial charged with a 'drive-by' shooting in a quiet suburban street. The victim called the police after the shots blasted holes in his front lounge window; fortunately, they had harmed no-one. The Crown's 'theory of the case' is that the incident was the sequel to an argument between Anthony and the intended victim, Karl, regarding leadership of an outlawed motorcycle gang known as 'The Crusties'.

  - For each of the case study questions you will be presented with advice on the likely **relevance**, or otherwise, of the following items of **evidence**, and explain what each item is relevant as tending to prove.

  - a) An eyewitness, local neighbour Patsy, will testify that at the time of the incident—3pm on a Sunday afternoon—she was weeding her front lawn when she heard the sound of a motor vehicle revving loudly as it raced past Karl's house, across the road from hers, foillowed by the sound of three gunshots.

  - b) Patsy made a mental note of the registration number of the vehicle, then rushed into her house and wrote it down on a piece of paper. She handed this to Detective Sergeant Booth two days later.

  - c) The fact that the vehicle identified by its number is registered to Anthony's brother-in-law Jim, who will testify that he loaned it to Anthony and his wife Sharon for to go shopping.

  - d) Sharon's evidence that she and her brother Jim haven't spoken to each other for two years, and that she is banned from driving.

  - e) Anthony *has* a conviction, now two years old, for being the 'sergeant at arms' of another motorcycle gang, 'The Beasts'.

Evidence (a) – Patsy's Eyewitness Testimony

- Heard motor vehicle revving loudly

- Racing past Karl's house at 3pm Sunday

- Followed by three gunshots

- Relevance: timing, location, sequence of events

- Weight: direct observation, good position, no bias

Evidence (b) - Registration Number

▶ Patsy made mental note, wrote down two days later

▶ Handed to Detective Sergeant Booth

▶ Relevance: vehicle identification linking Anthony to scene

▶ Issues: two-day delay, memory reliability, mental note accuracy

Evidence (c) - Vehicle Ownership

- Vehicle registered to Anthony's brother-in-law Jim

- Jim loaned vehicle to "Anthony and Sharon for shopping"

- Relevance: proves Anthony's access to vehicle

- Problem: doesn't prove Anthony was driving

KNOW
ING

Evidence (d) - Sharon's Evidence

▶ Sharon and Jim haven't spoken for two years

▶ Sharon is banned from driving

▶ Relevance: suggests Anthony was the driver

▶ Issues: ban doesn't prevent driving, arrangement questions

Evidence (e) - Gang Conviction

▶ Anthony's two-year-old conviction as "sergeant at arms"

▶ Previous gang: "The Beasts"

▶ Relevance: motive for gang leadership dispute

▶ Risk: highly prejudicial character evidence

Anthony Case Analysis

- Strong foundational evidence (Patsy's testimony)
- Vehicle connection established but driver unclear
- Memory reliability concerns (registration number)
- Character evidence prejudice vs probative value
- Circumstantial case with gaps

See you next week!!

KNOW
ING