

Chapter 3

The Admissibility and Relevance of Evidence

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¶3-100 Introduction

The admissibility of evidence refers to the “the juridical determination of whether evidence may be considered in deciding the issues” in a legal proceeding.¹ Whether evidence is admissible, is first and foremost a question of relevance. The key question is therefore whether the evidence is relevant to the facts in issue that stand to be determined in the present case.

No evidence as to any fact, matter or thing is admissible if that evidence is irrelevant or immaterial and if it cannot conduce to prove or disprove any fact in issue or fact relevant to a fact in issue. In other words, all facts relevant to the issue in legal proceedings must be proved, and all irrelevant evidence will be inadmissible.² Murphy articulated the rationale for the exclusion of irrelevant evidence as follows: “Because the purpose of evidence is [to] establish the probability of the facts upon which the success of a party’s case depends in law, evidence must be confined to the proof of facts which are required for that purpose. The proof of supernumerary or unrelated facts will not assist the court, and may in certain cases prejudice the court against a party, while having no probative value on the issues actually before it.”³ Schwikkard and Van der Merwe also noted other factors that warrant the exclusion of irrelevant evidence. These include the considerations of time, costs and inconvenience, the limitations of the human mind, the undesirability of a court being called upon to adjudicate matters which are not related to the litigation at hand, the risk that the real issues might become clouded, and the obvious consideration that a party against whom irrelevant evidence is adduced may find him or herself in a position difficult to defend.⁴

1 Young, Simon N.M. *Hong Kong Evidence Casebook* Hong Kong: Sweet and Maxwell (2011) p. 31.

2 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 49.

3 Ibid, quoting from Murphy, P. *A Practical Approach to Evidence* 10th Edition (2008) p. 25.

4 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 50.

Thus, while it stands firm that irrelevant evidence will not be admissible, it must also be noted that not all relevant evidence is always necessarily admissible: “The ... rule ... is that any evidence which is relevant is admissible unless there is some other rule of evidence which excludes it.”⁵ Other rules of evidence which may operate to exclude relevant evidence are, for example, rules of exclusion which require that evidence unlawfully obtained be excluded, or legal professional privilege which also requires that relevant evidence that falls under the privilege be excluded for policy reasons. These evidentiary rules that govern the admissibility of evidence will be considered in the subsequent chapters. For now, however, it is important to clarify exactly what is the meaning of relevance and how relevance ought to be determined.

Ultimately, the issue of relevance and admissibility is a question of law, to be decided by the presiding judicial officer in the case. The presiding judge or magistrate may allow for evidence to be admitted and presented at trial, or may provisionally allow the evidence but later decide for it to be excluded. Or, the presiding judge or magistrate may admit evidence for specific purposes and relating only to specific facts in issue. In the case of the latter two instances, and where a jury is present to decide on questions of fact, clear instructions must be given either as to the disregard of such evidence from their deliberations, or for the consideration of such evidence only with regard to specific facts in issue.

¶3-200 The Meaning of Relevance

The concept *relevance* is a product of the nineteenth century; principally refined by Sir James Fitzjames Stephen (1829-1894) who made a distinction between logical relevance and legal relevance. Logical relevance, according to Stephen, refers to the “rational, inferential relationship of a piece of evidence to a fact to be proved”, and legal relevance refers to “the study of what evidence should be admissible.”⁶ Of logical relevance Stephen said that “[t]he word ‘relevant’ means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.”⁷ This distinction between logical and legal relevance can still be seen in the Indian Evidence Act 1 of 1872.

For example, Part I of the Indian Evidence Act 1 of 1872 is titled “Relevancy of Facts” and in Chapter I, section 3 of this part, the key concepts underpinning the Law of Evidence are defined as follows:

5 Ibid, at p. 49.

6 Glover, Richard *Murphy on Evidence* 14th Edition Oxford: Oxford University Press (2015) p. 5.

7 Stephen, James Fitzjames (Sir) *A Digest of the Law of Evidence* 4th Edition New York: The Editor George Chase (1849-1924) (1887) Article 1.

“Fact”. – “Fact” means and includes – (1) anything, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

...

“Relevant”. – One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

“Facts in issue”. – The expression “facts in issue” means and includes – any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

[...]

“Proved”. – A fact is said to be proved when, after considering the matters before it, the Court; either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

“Disproved”. – A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

“Not proved”. – A fact is said not to be proved when it is neither proved nor disproved.

[...]

“Conclusive proof”. – When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

These definitions are then followed by Chapter II of Part I of the Indian Evidence Act 1 of 1872, which is titled “Of the Relevancy of Facts” and which details in sections 5 to 16, all the various *facts* that may have *legal relevance*. Section 5 is the baseline provision of this Chapter II and provides for evidence to be given “in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others”. Section 6, for example, relates to the relevancy of facts forming part of the same transaction, section 7 relates to facts which are the occasion, cause or effect of facts in issue, section 8 relates to facts relevant to showing or constituting a motive, or preparation for relevant previous or subsequent conduct, and section 9 relates to facts

necessary to explain or introduce relevant facts etc. As with the definitions in Chapter I of the Act, each of the sections in Chapter II with regard to the possible legal relevance of facts are further contextualised by way of examples, which are referred to as *illustrations* in the Act. Included below as an example, is section 11 of Chapter II of Part I of the Indian Evidence Act 1 of 1872:

11. When facts not otherwise relevant become relevant. – Facts not otherwise relevant are relevant –

- (1) if they are inconsistent with any fact in issue or relevant fact;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

- (a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

- (b) The question is, whether A committed a crime.

The circumstances are such that the crime have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Thus, while the distinction between logical and legal relevance as formulated by Sir James Fitzjames Stephen is still evident from the provisions of the Indian Evidence Act 1 of 1872, the concept relevance in the laws of England and Wales has since developed to refer to a strict logical analysis of probative value. In *DPP v Kilbourne* [1973] AC 729 Lord Simon of Glaisdale said: "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness,' except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."⁸ Relevant evidence can therefore make the existence of a fact in issue more likely to be true, or less likely to be true. This is referred to as the

⁸ *DPP v Kilbourne* [1973] AC 729 at 756.

probative value of evidence and must be distinguished from the relevance of evidence. Evidence is either relevant or not relevant. There are no degrees of relevance. However, once it is determined that evidence is relevant, that evidence may either have a strong probative value or a weak probative value in proving or disproving a particular fact in issue. Lord Steyn in *Regina v A* (No 2) [2002] 1 AC 45, described this as follows:

“Relevance and sufficiency of proof are different things. The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue.”⁹

The probative value of relevant evidence is therefore closely connected with the weight that will be afforded by the trier of fact to that evidence at the end of the trial, and it will depend on various factors including the reliability of the evidence or witness having presented the evidence, the degree to which it is contradicted by other evidence, how decisive the evidence is in proving a fact in issue, whether the evidence relates to only a collateral issue, whether other inferences can be drawn to explain the evidence, etc.¹⁰ (In Chapter Two, the weight of evidence was described as the persuasiveness of evidence, alone or in conjunction with other evidence, in satisfying the court as to the *facta probanda* of the case.)

A particularly appealing definition for the concept *relevance* in law, due to its clarity and simplicity, is Rule 401 of the United States of America Federal Rules of Evidence: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”¹¹ The South African Law Reform Commission (SALRC) has also recommended that the concept *relevance* be codified in terms of South African law.¹² This recommendation has, however, not (yet) been promulgated in law.¹³

9 *Regina v A* (No 2) [2002] 1 AC 45 at 61-62.

10 Simon Young describes the probative value of evidence as a measure of both its reliability and its potential to prove a material fact. Young, Simon N.M. *Hong Kong Evidence Casebook* Hong Kong: Sweet and Maxwell (2011) p. 63.

11 Rule 401 of the United States of America Federal Rules of Evidence, 1 December 2014, Committee on the Judiciary House of Representatives Washington: 2017.

12 South African Law Reform Commission, Discussion Paper 113, Project 126 Review of the Law of Evidence (Hearsay and Relevance) ISBN: 0-978-0-621-37675-3.

13 From the Draft Bill on the Law of Evidence p. 59 of South African Law Reform Commission, Discussion Paper 113, Project 126 Review of the Law of Evidence (Hearsay and Relevance) ISBN: 0-978-0-621-37675-3.

2. Relevance

(1) Relevant evidence, 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) Evidence is not irrelevant 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.

To explain the concept *relevance* in Hong Kong law, regard can be had to *HKSAR v Chu Pak Cheong* [2006] 3 HKC 330. The appellant in this case was convicted before a Deputy High Court judge and a jury on two counts of unlawful trafficking in a dangerous drug. The prosecution's case was essentially that the appellant had, on two occasions in January 2005 and within the jurisdiction of Hong Kong, sold the dangerous drug *ice* to an undercover officer in a police operation which had at aim to detect the unlawful sale of dangerous drugs in the Hong Kong entertainment industry.¹⁴ The appellant unequivocally denied these allegations.¹⁵ The main ground of appeal against these convictions related to the ambit of the cross-examination of the appellant at trial, as well as the related jury-direction.

At trial and whilst cross-examining the appellant, the prosecution also questioned the appellant in respect of his allegedly extravagant lifestyle for the period from 3 June 2004 to 9 February 2005. This line of questioning had at aim to suggest that that the appellant was able to afford his alleged extravagant lifestyle – which included luxury traveling, accommodation, and entertainment – because he was selling drugs.¹⁶ Of this, the judge noted, during summing-up to the jury, the appellant's limited known sources of income and also highlighted the fact that the prosecution had suggested that the appellant's known income could not support his lifestyle, and that he (the appellant) was (according to the prosecution) therefore not truthful in his evidence to the court.¹⁷ With this summing-up Judge Lunn writing for the majority of the Hong Kong Court of Appeal did not agree and held that the evidence of the appellant's allegedly extravagant lifestyle for the period prior to him having allegedly committed the offences charged, was irrelevant and therefore inadmissible, as it did not relate to the two acts of unlawful trafficking in a dangerous drug in mid-January 2005, which the jury in this present case was charged to determine.¹⁸ Judge Lunn explained

14 *HKSAR v Chu Pak Cheong* [2006] 3 HKC 330 at 332, para [2].

15 *Ibid*, at 333, para [3].

16 *Ibid*, at 330 and para [9].

17 *Ibid*, at 333-334, para [8].

18 *Ibid*, at 335, para [11].

that “[t]he prejudice is obvious: the jury were being invited to infer past acts of unlawful trafficking in dangerous drugs and to consider them relevant to the issues they had to decide.”¹⁹ The trial judge had also failed to properly explain to the jury how they were to approach this evidence other than in the context of the credibility of the appellant.²⁰ For example, the trial judge should have made it clear to the jury that it was for them to decide whether this evidence had any probative significance.²¹ And, that this evidence elicited by the prosecution under cross-examination was not of itself either evidence of possession of drugs on a particular occasion or a basis for disbelieving the appellant.²²

An appropriate jury direction in this regard would have been as follows:

“Of itself it does not prove anything against the defendant and certainly not that he unlawfully trafficked in dangerous drugs. But there are circumstances in which you may take this evidence into account when deciding whether he unlawfully trafficked in dangerous drugs as alleged in counts 1 and 2. Before you can take this evidence into account you would have to be sure of a number of facts:

- (i) that the defendant was living to a standard much higher than might be expected in all circumstances of the case;
- (ii) that you can safely reject the explanation given by the defendant that his lifestyle at the time of the alleged acts of unlawful trafficking and shortly thereafter had nothing to do with his unlawful trafficking of dangerous drugs;
- (iii) that there is no realistic possibility that the defendant’s lifestyle can be explained other than that he was unlawfully trafficking in dangerous drugs as alleged in the two counts on the indictment.”²³

The absence of such a direction in this case constituted a material non-direction. The appellant’s convictions were consequently quashed and a retrial was set for a trial to start *de novo* before another judge and newly empanelled jury.²⁴

¶13-300 Admissibility

Coupled with this strictly logical analysis of probative value, is the concept of admissibility, which refers to a policy decision as to what relevant evidence

19 *Ibid*, at 335, para [11].

20 *Ibid*, at 335, para [12].

21 *Ibid*, at 335, para [13]; *R v Morris* [1995] 2 Cr App R 69 at 76.

22 *HKSAR v Chu Pak Cheong* [2006] 3 HKC 330 at 335, para [13]; *R v Morris* [1995] 2 Cr App R 69 at 76.

23 *HKSAR v Chu Pak Cheong* [2006] 3 HKC 330 at 336, para [14].

24 *Ibid*, at paras [15]-[16].

may be admitted.²⁵ In other words, relevance in the Law of Evidence in England and Wales, and also in the Hong Kong Special Administrative Region, “is a *sine qua non* of admissibility; but it cannot guarantee that the evidence will be admitted; in fact, on its own it is far from sufficient.”²⁶ This statement can be explained with reference to the Canadian case of *Regina v Watson* (1996) 108 CCC (3d) 310, Ont CA where it was held that

“Relevance ... requires a determination of whether as a matter of human experience and logic the existence of ‘Fact A’ makes the existence or non-existence of ‘Fact B’ more probable than it would be without the existence of ‘Fact A’. If it does, then ‘Fact A’ is relevant to ‘Fact B’. As long as ‘Fact B’ is itself a material fact in issue or is relevant to a material fact in issue in the litigation then ‘Fact A’ is relevant and *prima facie* admissible.”²⁷

Thus, while all irrelevant evidence will always be inadmissible, it does not necessarily follow that all relevant evidence will always be admissible in terms of the law. Relevant evidence may be ruled inadmissible based on policy considerations, in deference to fundamental principles of justice and/or human rights, or when the prejudicial effect of that evidence unfairly outweighs the probative value of the evidence. The prejudicial effect of evidence in this context refers to the potential for that evidence being used by either the judge or the jury “for an improper purpose that is against the interest of the accused.”²⁸ However, this does not mean that all evidence detrimental to the case of an accused is necessarily also prejudicial; “[f]or the evidence to have prejudicial effect, there must be an element of unfairness, which can arise simply by virtue of the nature of the evidence.”²⁹ Of this Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC 729 said the following: “Evidence is admissible if it may be lawfully adduced at a trial. ‘Weight’ of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law ...”³⁰

For example, Rules 402 and 403 of the United States of America Federal Rules of Evidence provide as follows:

25 Glover, Richard *Murphy on Evidence* 14th Edition Oxford: Oxford University Press (2015) p. 5.

26 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 51.

27 *Regina v Watson* (1996) 108 CCC (3d) 310, Ont CA at 323-324.

28 Young, Simon N.M. *Hong Kong Evidence Casebook* Hong Kong: Sweet and Maxwell (2011) p. 63.

29 *Ibid.*

30 *DPP v Kilbourne* [1973] AC 729 at 756.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

And the Draft Bill on the Law of Evidence recommended by the South African Law Reform Commission in 2008, and which has not (yet) been promulgated, provides as follows:

3. Admissibility of relevant evidence

(1) Subject to the provisions of any other law, evidence that is relevant is admissible.

(2) Evidence that is not relevant is not admissible.

4. Exclusion of evidence on the grounds of relevance

(1) A 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) cause or result in undue waste of time.

(2) When determining whether the probative value of evidence is outweighed by the risk that evidence will have an unfairly prejudicial effect a presiding officer may not adopt assumptions or make generalisations that are in conflict with the constitutional values embodied in the Constitution of the Republic of South Africa Act 108 of 1996.

Finally, it must also be noted that a court may rule certain evidence provisionally admissible, for the purpose of maintaining the continuity of the proceedings, but subject to the condition that it must later be shown that the evidence so provisionally allowed is indeed relevant and admissible. This is generally referred to as allowing proof of a fact *de bene esse*, and will only be allowed where the party introducing the evidence also undertakes

to demonstrate the relevance of the evidence in due course by introducing further evidence. If the relevance of that evidence so provisionally admitted is ultimately not established, the jury must be directed to ignore the evidence, and where the evidence was highly prejudicial, it may even be necessary for the jury to be discharged.³¹ Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC 729 explained that the relevance of evidence may sometimes depend on its evaluation by the tribunal of fact: “Exceptionally, evidence which is irrelevant to a fact in issue is admitted to lay the foundation for other, relevant, evidence ... Apart from such exceptional cases no evidence which is irrelevant to a fact in issue is admissible.”³²

¶3-400 Determining Whether Evidence is Relevant

Whether evidence is relevant, and therefore admissible, cannot be decided in a vacuum; i.e. “the question of relevancy can never be divorced from the facts of a particular case before court.”³³ Simon Young states that “[t]he relevancy of evidence will often not become apparent until it is seen against all the evidence in the case.”³⁴ The nature and extent of the factual and legal dispute before the court is therefore pivotal to the determination of relevance and ultimately also admissibility. In *Lloyd v Powell Duffryn Steam Coal Co Ltd* it was held that the first question that must be asked when determining relevance is “What are the issues?”³⁵ This is because the term *relevance* finds concrete application not only in the light of the primary *facta probanda*, but also the *facta probantia*.³⁶

In addition to the facts and circumstances of the particular case before court, regard must also be had to any reasonable and proper inferences that can be drawn from the evidence, and the potential weight that the trier of fact will ultimately attach to the evidence. In *Rex v Mpanza* 1915 AD 348 it was held that “facts are ... relevant if from their existence inferences may properly be drawn as to the existence of a fact in dispute.”³⁷ Yet, while reasonable and proper inferences drawn from evidence may indeed have strong probative value given the particular facts and circumstances

31 Glover, Richard *Murphy on Evidence* 14th Edition Oxford: Oxford University Press (2015) p. 28.

32 *DPP v Kilbourne* [1973] AC 729 at 757.

33 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 51, quoting from *S v Zuma* 2006 (2) SACR 191 (W) at 199f-g.

34 Young, Simon N.M. *Hong Kong Evidence Casebook* Hong Kong: Sweet and Maxwell (2011) p. 33.

35 *Lloyd v Powell Duffryn Steam Coal Co Ltd* 1914 AC 733 at 738.

36 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 51.

37 *Rex v Mpanza* 1915 AD 348 at 352.

of a case, heed must always be taken to avoid admitting evidence that will result in a proliferation and multiplicity of collateral issues. This is not only a waste of time for all involved, but “a protracted investigation into many collateral or side-issues which – once determined – would be of little probative value as regards the true issues” increases the risk for manufactured evidence with little probative value and possible high prejudicial influence on the trier of fact deciding the case.³⁸ Considerations with regard to the probative value of evidence weighed against its possible prejudicial effect will therefore always remain at the forefront of a determination whether evidence is relevant and whether it should be admitted. In this regard it can be noted that the probative value of evidence depends both on the reliability of that evidence as well as its potential to prove or disprove a material fact and for evidence to have a prejudicial effect there must be an element of unfairness towards either of the parties involved. Such unfairness or prejudicial effect may influence the fact-finder to convict regardless of the probative value of the evidence (moral prejudice) or may cause the fact-finder to overestimate the probative value of the evidence (reasoning prejudice).

Closely connected to both the probative value and the prejudicial effect of evidence is the weight which the trier of fact will ultimately attach to the evidence at the end of the trial and in considering the totality of the evidence presented by all the parties involved. Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC 729 explained this with reference to the opinion of Lord Herschell L.C. in *Makin v Attorney-General for New South Wales* [1894] A.C. 57 where he stated the following:

“It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.”³⁹

38 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) pp. 53-54.

39 *Makin v Attorney-General for New South Wales* [1894] A.C. 57 at 65.

Of this passage Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC 729 explained as follows:

“That what was declared to be inadmissible in the first sentence of this passage is nevertheless relevant (i.e. logically probative) can be seen from numerous studies of offences in which recidivists are matched against first offenders, and by considering that it has never been doubted that evidence of motive (which can be viewed as propensity to commit the particular offence charged, in contradistinction to propensity to commit offences generally of the type charged) is relevant. All relevant evidence is prima facie admissible. The reason why the type of evidence referred to by Lord Herschell L.C. in the first sentence of the passage is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence: whereas in the circumstances referred to in the second sentence the logically probative significance of the evidence is markedly greater. Not all admissible evidence is universally relevant. Admissible evidence may be relevant to one count of an indictment and not to another. It may be admissible against one accused (or party) but not another. It may be admissible to rebut a defence but inadmissible to reinforce the case for the prosecution.”⁴⁰

Finally, two further factors that must be taken into consideration in determining relevance is whether any judicial precedent exists warranting the admissibility of the evidence, and whether, in terms of the principle of completeness and coherence, the evidence should provisionally be allowed so as to ensure the continuity of the proceedings, but subject to the condition that the party introducing the evidence also ultimately establish its relevance.⁴¹ Sometimes, evidence, although relevant and admissible, may also be excluded on grounds of procedural fairness. A case in point is *Gurung An Parsad v Great Wealthy Engineering Co Ltd & another* [2012] 3 HKC 451. At issue in this case was the plaintiff’s personal injury action for loss and damage allegedly arising from an injury which the plaintiff sustained at work, whilst in the employment of the first defendant. After the case was set down for trial, the plaintiff sought for further witness statements to be served but without furnishing signed witness statements of the persons concerned, which made it impossible for the master to assess the admissibility of the content of the witness statements, their relevance, and their probative value.⁴² Given this oversight, the plaintiff did not conform to the procedural requirements in terms of the objectives of the Civil Justice

40 *DPP v Kilbourne* [1973] AC 729 at 757.

41 Schwikkard, P.J. and Van der Merwe, S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 60.

42 *Gurung An Parsad v Great Wealthy Engineering Co Ltd & another* [2012] 3 HKC 451 at 453 at para [3].

Reform (Order 1A of the Rules of the High Court (Cap 4A)), and the master consequently proceeded to dismiss the late application for leave to serve additional witness statements in a personal injury action. While this appeal was resolved by an order made in terms of a consent summons filed by the parties, Judge Bharwaney for the Hong Kong Court of First Instance nonetheless gave valuable guidance on late applications to serve additional witness statements in civil proceedings and – specifically relevant to the discussion here – on the dynamic between considerations of relevance, admissibility, probative value and procedural fairness.

Judge Bharwaney for the Hong Kong Court of First Instance explained that “[w]hilst the primary aim was to secure the just resolution of the dispute in accordance with the substantive rights of the parties, which must include the right of a party to rely on admissible, relevant and probative factual evidence, the court must also have regard to other relevant circumstances, such as the potential disruption to the trial, the prejudice to the other parties, and the explanation offered” with regard to, for example, the late application for leave to serve additional witness statements in a personal injury action.⁴³ With regard to late applications to serve additional witness statements, Judge Bharwaney for the Hong Kong Court of First Instance held that it was a matter falling within a court’s inherent discretion, and that it must be exercised within the ambit of the court’s management powers and in the light of the civil justice reform, including the need to ensure: “(i) cost effectiveness; (ii) that the case would be dealt with expeditiously; (iii) reasonable proportionality having regard to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party; (iv) procedural economy; and (v) fairness between the parties.”⁴⁴ This judicial discretion must be exercised with due regard to the facts and circumstances of every case and the court “would have to carefully weigh, in each case, the relevance and probative value of such witness statement against the potential disruption to trial, prejudice to other parties, and the objectives of civil justice reform.”⁴⁵

¶3-500 Conclusion

While the question of relevance and admissibility of evidence may seem rather simple and straightforward to determine, the intricacies of this question of law as it applies in different contexts and with regard to various different types of evidence and in terms of a wide array of evidentiary rules and principles, will become evident from the discussion in the subsequent chapters of this book. To conclude this introductory chapter on the topic, reference can be made to another example from Hong Kong case law where the seemingly simple identification and correct application of these basic principles and concepts were bungled.

43 Ibid, at 451.

44 Ibid, at 454 at para [5].

45 Ibid, at 455 at para [7].

The applicant in *R v Ma Chak Kai* [1996] 4 HKC 109 was charged with four offences of obtaining property by deception and one count of evading liability by deception. It was the prosecution's case that the applicant, being a sales manager of a company, made an arrangement with the customers of the company to buy goods from the company on his (the applicant's) behalf, and that the applicant would then reimburse the customers with post-dated cheques drawn on the account of his (the applicant's) wife. The cheques, however, were not met on their presentation for payment and further post-dated cheques issued to avoid liability for the earlier ones were also not met.⁴⁶ The applicant denied these charges brought against him and submitted that he was merely a trader, that he had not acted dishonestly, and that one of his own clients had failed to pay him and that this was the reason why he was not able to honour his debts.⁴⁷ While the trial judge rejected the applicant's defence out of hand, it also transpired from the court record that certain parts of the applicant's evidence was not put to prosecution witnesses for reply.⁴⁸ What was not clear from the trial record, however, was how the trial judge dealt with this defence evidence that remained untested in terms of cross-examination of the prosecution witnesses. It seemed as though the trial judge was of the view that because certain important matters had not been put in cross-examination, that the applicant was not entitled to give evidence on them, or if he gave evidence, that such evidence was not relevant.⁴⁹ In allowing the appeal and quashing the convictions Judge Mortimer writing for the majority of the Hong Kong Court of Appeal explained that the evidence given by the defence at trial, and which had not been put to the prosecution witnesses, went to the weight of such evidence and not to admissibility or relevance of the evidence.⁵⁰

Thus, evidence is relevant if it is logically probative or disprobative of some matter which requires proof, i.e. a fact in issue or a fact relevant to a fact in issue. All irrelevant evidence will always be inadmissible while relevant evidence will usually be admissible unless it is rendered inadmissible based on policy considerations, in deference to fundamental principles of justice and/or human rights, or when the prejudicial effect of that evidence unfairly outweighs the probative value of the evidence. The prejudicial effect of evidence in this context does not merely mean evidence that is detrimental to a party's case, but requires an element of unfairness which can arise simply by virtue of the nature of the evidence. Once evidence is established to be relevant and admissible in law, the tribunal of fact will, at the end of the trial and in considering all the evidence presented by all parties involved, attach weight to the evidence and such weight will depend on various factors including the reliability of the evidence, the degree to

46 *R v Ma Chak Kai* [1996] 4 HKC 109 at 109-110.

47 *Ibid*, at 110.

48 *Ibid*, at 111.

49 *Ibid*, at 111.

50 *Ibid*, at 109.

which it is contradicted by other evidence, how decisive the evidence is in proving a fact in issue, whether the evidence relates to only a collateral issue, whether other inferences can be drawn to explain the evidence, etc. With regard to the evaluation of evidence at the end of a legal proceeding and the determination as to weight, regard can be had to the discussion in the final chapter of this book.

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