

- (1) 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 can be relevant** even if it relates to the **credibility of a W**, the **admissibility of other evidence** or **failure to adduce evidence** (for P only – see RTS)

Note: Only requires a minimal logical connection between the evidence and the facts in issue. It does not need to make the fact in issue probable or sufficiently probable. It only needs to be capable of affecting the probabilities.

**Step 2: general rule**

General rules (**s 56**): Evidence that is relevant in a proceeding is admissible in the proceeding. Evidence that is not relevant in the proceeding is not admissible.

**Direct and indirect evidence**

S 55 allows both direct and indirect evidence

Directly relevant	Evidence which affects the probable existence/non-existence of that fact (the Court only has to consider the <i>accuracy</i> of the evidence – e.g. I saw X shoot Y) <ul style="list-style-type: none"> <li>only inference drawn by Ct is as to accuracy of own sensations or those of witness</li> <li>e.g. inaccurate observations/report by witness, misrepresentation, testimony may be misunderstood</li> </ul>
Indirectly relevant aka circumstantial	Evidence that even if believed, does not prove the fact in issue unless the Court draws an inference from the evidence to the relevant facts in issue ( <b>Smith</b> ) <ul style="list-style-type: none"> <li>Errors all of the above + drawing wrong inference.</li> </ul>
	Requires an additional step: there must be no other reasonable explanation apart from the inference that the party is asking the Court to make if the evidence is relevant ( <b>Plomp</b> )
	<ul style="list-style-type: none"> <li>Consider the circumstantial evidence as a whole (do not apply the reasoning in Plomp to one piece of circumstantial evidence)</li> <li>If the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty.</li> </ul> <p>It is customary to direct jury that in order to bring verdict of “guilty” it must be not only a “rational inference” but also the only rational inference that the circs enables the jury to draw.</p>

**Plomp:** A convicted of murdering wife. Both had gone surfing and no witnesses. CE: A had liaison with woman (before his wife’s death) and told her his wife was dead and so asked her to marry him. Held: relevant. When combined with other factors (e.g. wife being a good swimmer and normal weather conditions) helps show motive.

**Smith:** Bank security cameras with photographic evidence of 3 men robbing bank. Police gave evidence they knew A (from previous matters) and recognised him in photos. Held: not relevant. The police Ws were in no better position to make a comparison between A and the photographed person than the jury. Assertion that they recognised A was simply substituting one view for another and does not promote the process of reasoning from the evidence to the fact in issue.

**Topic 3: Competence and Compellability**

**Competence**

**Step 1: presumption**

**S12:** unless act expressly says otherwise (a) every person is competent to give evidence and (b) every person who is competent to give evidence about a fact is compellable to give the evidence.

**Step 2: Competence and special parties**

The Accused	<p>Only in criminal proceedings, accused not competent to give evidence as a prosecution W (even if they consent to do so) (<b>s 17(2)</b>)</p> <p><b>S 17(3)</b> Associated accused (co accused) not compellable to give evidence for or against each other, unless they are being tried separately (but they are competent to do so).</p> <p>If they are being tried in the same proceeding, the Court must be satisfied that the W is aware of s 17(3).</p>
-------------	--

**Step 3: Competence (general) (s 13)**

Step 1	<p><b>S 13(6):</b> There is a presumption that a person is competent to give evidence of a fact unless the Court decides the contrary.</p> <ul style="list-style-type: none"> <li>In doing so, the Court may ‘inform itself as it thinks fit’ including obtaining expert evidence (<b>s 13(8)</b>)</li> <li>If a W dies before finishing their evidence, the evidence they have already given is admissible, but discretionary exclusion may be appropriate (<b>s 13(7)</b>).</li> </ul>
Step 2	<p><b>S 13(1)</b> A person is not competent to give evidence about a fact (for any reason, inc mental, intellectual or physical disabilities) if they:</p> <ol style="list-style-type: none"> <li>do not have the capacity to understand a question or</li> <li>do not have the capacity to give an answer than can be understood</li> </ol> <p>And that incapacity cannot be overcome.</p>
Step 3	<p><b>S 13(3)</b> a person can be competent to give evidence about a fact, but will not be competent to give <i>sworn evidence</i> unless they have the capacity to understand that in giving evidence they are under an obligation to give truthful evidence.</p> <p><b>GW:</b></p> <ul style="list-style-type: none"> <li>There is a distinction bw understanding the importance of telling the truth (relating to whether W is competent to give unsworn evidence) and whether the W understands the meaning of the obligation to give truthful evidence under oath (which goes beyond the importance ordinarily attached to telling the truth)</li> <li>Means understanding the nature and consequences of the requirement to tell the truth in Court (being morally and legally bound)</li> <li>Semantics not important.</li> <li>Consider the whole circumstances (including the child’s age – here was 6)</li> </ul> <p><b>S 21 and 22:</b> W giving sworn evidence must do so under oath or affirmation</p> <ul style="list-style-type: none"> <li><b>ss 24 and 24A</b> oaths may have religious undertones but do not require a religious text be used or that the W believes in God.</li> <li>An oath is effective even if the person did not understand the nature and consequences of the oath (<b>s 24(2)(b)</b>).</li> </ul>
Step 4	<p><b>S 13(4) and (5)</b> If a person is not competent to give sworn evidence, they can give unsworn evidence if the Court tells the person:</p> <ol style="list-style-type: none"> <li>it is important to tell the truth; and</li> <li>to tell the court if they don't know an answer or cannot remember an answer and</li> <li>to only agree with statements they believe are true and no pressure to agree with statements they believe are untrue.</li> </ol> <p>The purpose of this is to allow young children and mentally incapacitated people to testify even if don’t necessarily understand ‘obligation’.</p> <p>Note: this is not a choice: if you can give sworn evidence you must.</p> <p><b>SH:</b> Judge failed to tell 10 yr old complainant that child did she not need to feel pressure to agree with something. Note the prosecution informed the child (message got across). Held: trial miscarried as section not complied with. The Judge needed to put this to W themselves, counsel could not fill this gap. However, does not require the section specifically to be read out, as long as the points get across.</p>
Step 5	Unsworn evidence is still evidence and is treated no differently from other evidence ( <b>GW</b> )
Step 6	<p><b>S 13(2)</b> people who are incompetent to give evidence of one fact may be competent to give evidence of other facts.</p> <p>E.g. children may understand some things, but not others, people with dementia may not remember exact timelines, but may be able to recall other things.</p>

### Compellability

In criminal proceedings, a person who is a spouse DF partner, parent or child of accused can object to giving evidence as a witness for the prosecution (**s 18(2)**)

<ul style="list-style-type: none"> <li>• Set categories of family members</li> <li>• Can object to certain questions or in general</li> <li>• Only applies to relationships in existence at time of giving evidence.</li> </ul>	
<b>Requirements</b>	
<b>S 18(3)</b>	The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
<b>S 18(4)</b>	If appears like W has right to object, court must satisfy itself they are aware
<b>S 18(5)</b>	Objection to be heard and determined in absence of jury
<b>Likelihood of harm</b>	
Once the W has objected, they cannot be required to give evidence if the Ct finds that (per <b>18(6)</b> ):	
(a) There is a <b>likelihood that harm would/might be caused</b> – directly or indirectly – to the <b>person</b> , or their <b>relationship with accused</b> and	
(b) The nature and extent of <b>harm outweighs desirability</b> of hearing the evidence.	
Note: the Ct can hear the objection and still require the W to give evidence if not satisfied of this.	
<b>Khan:</b> When A was away, wife and friend had affair. A found them cuddling on bed, fight ensued and friend killed. W objected to giving evidence, despite having told police A said ‘I’ve killed him’. Held: not compellable.	
Factors which must be taken into account ( <b>s 18(7)</b> ):	
<b>Identify the harm (inc economic/emotional harm) suffered by W, then balance with below factors</b>	
S 18(7)(a)	The nature and gravity of the offence <b>Khan:</b> murder was serious offence
S 18(7)(b)	The substance and importance of any evidence the W may give and weight likely to be attached to it (how circumstantial is it? PIS?) <b>Khan:</b> W intended to give inconsistent testimony – she would deny that she was enamoured with V and say she was raped. She would also say that she was shocked when gave statement, and not permitted to contact lawyers etc. Also would say that A came unarmed, and V had the knife (which A got as fight ensued). P said W statement relevant to provocation. However, overall weighted very little bc of PIS and bc those facts were already established.
S 18(7)(c)	Whether any alternative evidence concerning the matters to which W evidence relates is reasonably available. <b>Khan:</b> there was other evidence which tended to establish the circs in
S 18(7)(d)	Nature of relationship between W and A <b>Khan:</b> married couple, 10 year marriage, many children and W would have to acknowledge lack of chastity and sexual impropriety (ordeal for mother)
S 18(7)(e)	Whether the W in giving evidence would have to disclose matters they received in confidence from the accused
<b>S 18(8)</b> If the objection has been determined, the prosecution cannot comment on the objection, the Cts decision, or the person’s failure to give evidence	
<b>Step 5: conclude</b>	

<b>Form of giving evidence (special circumstances)</b>	
Ordinarily W must give evidence at time of proceeding, however, the <b>Criminal Procedure Act</b> allows three circumstances in which pre-recorded evidence can be used in criminal proceedings.	
Children or cognitively impaired W in <b>SA/violent matters (S 366)</b>	<b>S 367:</b> W can give EIC in the form of AV recording. <b>S 368(1):</b> Recording will be admissible as if its contents were the direct testimony of the witness if: <ul style="list-style-type: none"> <li>(a) Notice requirements complied with</li> <li>(b) D and lawyer given reasonable opportunity to listen to/view the recordings</li> <li>(c) at trial, witness attests to truthfulness and is available for cross-exam</li> </ul> <b>S 368(3):</b> can rule whole or part of recording to be inadmissible and order editing of recording accordingly.
Children or cognitively impaired	<b>S 370:</b> all evidence (EIC, XXN, RXN) of complainant given at special hearing and recorded. Exception ( <b>s 370(2)</b> ) if the prosecution applies and complainant is aware of right to special hearing but wishes to give direct testimony at Ct.