



UNIFORM EVIDENCE LAW GUIDEBOOK

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CHAPTER 1: GETTING INTO EVIDENCE

ASSESSMENT PREPARATION (PP 15-16)

SHORT BRAIN TEASERS – ADDITIONAL NOTES

1. The trial judge's ruling can be considered as alternative arguments, one where the objection that the evidence is irrelevant is upheld and the evidence not admitted; the other where the objection is overruled and the evidence ruled to be relevant and admissible.

(a) Objection upheld. Facts in issue relate to whether D committed the acts causing death with the relevant intention to kill or cause grievous bodily harm to V by multiple blows to her head with a blunt instrument (star-shaped hammer located near V's body and on which traces of her blood were found). The question is whether the 'Keyes' brand stainless steel hammers found in D's garage could rationally affect the assessment of the probability of a fact in issue, namely whether it was D who had the means to inflict blows to V's head causing her death using the large hardened steel 'Baxter' brand hammer. The connection seems remote due to the different nature and brand of the star-shaped hammers found in D's garage when compared to the hammer found near V's body. Also, D is a piano tuner so these implements are tools of his trade and used in his daily work. There is no minimal logical connection between these items and the facts in issue in the case so that the threshold test for relevance under s 55 is not satisfied.

(b) Alternatively - Objection overruled. It is arguable that the evidence is relevant to whether D committed the acts with intention to kill or to cause grievous bodily harm because a relevant consideration is whether he had the means or equipment to carry out the multiple blows to her head. This is a fact going to a fact in issue as

circumstantial evidence of the identity of the killer (D). Accordingly, the relevance of the four star-shaped hammers found in D's garage is that they are of the same character as what was used in the commission of the crime and thus can be identified with the crime as tools that might have been used (*Thompson & Wran v R* (1968) 117 CLR 313; *Radi v R* [2010] NSWCCA 265). In *Radi* it was held that it is sufficient if such tools 'might' have been so used when they can be linked to the crime. Therefore, the threshold test in s 55 could be satisfied as logically relevant to a fact in issue even though the 4 star-shaped hammers are not of the same brand and materials as the one used to inflict blows on V. They are tools used by piano tuners and as D is a piano tuner (arguably an unusual occupation in the contemporary landscape so very few others likely to have these tools) there is a minimal logical connection to facts in issue in the case.

2. The facts are similar to those in the case of *Radi v R* [2010] NSWCCA 265. The facts in issue are whether D actually had in possession and intended to possess the commercial quantity of methylamphetamine found in a sports bag on the front seat of his vehicle. Such a large quantity of a prohibited drug is deemed to be in possession for supply. Counsel for D could raise the argument that the box of bullets found in the passenger door pocket of D's vehicle was not relevant under s 55 as they could not be connected with the specific offence. Arguably, the only relevance of the box of bullets and their use in a handgun would be to establish propensity on D's part to engage in criminal conduct (*Thompson and Wran v R* (1968) 117 CLR 313).

The likelihood of counsel for D having the box of bullets successfully excluded using this argument is slim as the circumstances in *Thompson and Wran v R* can be distinguished from the instant case. It was emphasised by the High Court in *Thompson and Wran v R* that relevance could be established if the tools 'might have been so used (in carrying out the alleged crime)' not that they necessarily had been so used. The basis for the admission of the box of bullets as relevant against D following the reasoning in *Radi v R* would be that one of the indicia of drug supply is the use of firearms by persons engaged in such supply. Therefore, the finding of a box of bullets is as relevant as if a firearm was found in indicating drug supply. Although the other indicia of drug supply in *Radi* of multiple mobile phones and a large sum of cash is not present in this case, which may reduce the relevance of the box of bullets, it is still strongly arguable that there is a minimal logical connection to facts in issue. As R A Hulme J observed in *Radi* (at [56]), 'possession of bullets that may be used in a handgun in circumstances in which it is alleged that the person has a future purpose of supplying the drugs is clearly in the category of an "indicium of supply"'. The evidence on this issue was rightly admitted.'

3. The facts in issue are whether D breached their duty of care owed to P and thus caused his serious personal injuries. The potentially relevant part of the ambulance officers written record is '*? Fall from 1.75 metres onto concrete*', which goes to whether D was negligent in not fencing off the vertical drop at the top of the concrete drain to prevent people from falling and this caused P to fall and injure himself. As there are no eyewitnesses and P has no recollection as to how he fell into the drain this written record is critical. Therefore, P would argue that it is relevant under the s 55 test to whether he fell from the vertical drop and thus whether D's negligence caused his injuries, that is, it could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceeding. If accepted the statement by the ambulance officers is important evidence that P fell from the vertical drop as opposed to having tripped or ended up in the drain some other way, including from the sides of the drain.

D could argue that the written record of the ambulance officers is too ambiguous or vague to be relevant to facts in issue. It lacks substantial detail and is expressed in such an obscure manner that it is not clear what is being represented in the statement and whether it amounts to an observation or speculation by the ambulance officers. In those circumstances, the written record could not rationally affect the assessment of the probability of a fall by P from the vertical head wall (*Lithgow City Council v Jackson* [2011] HCA 36).

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