

Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective

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Abstract

In the South African legal system of fact finding and proof the relevance of an evidentiary fact is not governed by the rules of the law of evidence but by a set of extra-legal principles based on the logic of inferential reasoning and probability theory. However, there is no definitive legal definition, or practical test, of what constitutes relevance in a post-constitutional South African curial context, except for an ambiguous pre-1961 reference to a "blend of common sense, judicial experience and logic, laying outside the law". This article critically evaluates the relationship between relevance and admissibility in the adversarial adjudicative process, with particular reference to the peculiarities of the South African legal system, in which the procedural framework of the fact-finding process has been subjected to a post-apartheid constitutional democracy. In addition, this article provides an interpretative synthesis of prevailing international scholarship in the field, develops a functional three-legged practical relevance test for ease of application by all legal practitioners in the courtroom and provides a uniquely different possible statutory definition of relevance and admissibility.

Keywords

Logical relevance; admissibility; Thayer, Wigmore and Bentham's relevance theories; probability theory; legal relevance; procedural prejudice; Bayes theorem; probative value; three-legged practical test; discretionary constitutional exclusionary and inclusionary rules; electronic relevance.

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1 Introduction

A rational system of legal decision-making quintessentially demands a foundationally accurate methodology of receiving, selecting and weighing of *facta probantia*.¹ This has been achieved by a sometimes uncritical adherence by the South African judiciary to an English derived common law body of legal rules which determines what potential evidence may or may not be adduced at trial, how adduced evidence is to be presented during the course of a trial, and the manner in which adduced evidence is to be used in order to establish conclusive proof on the required standard at the end of a trial. However, there is a crucial area of the South African law of evidence where these English legal rules do not apply. Firstly, in determining the relevance of an evidentiary fact an adjudicator in an adversarial trial setting is guided not by a set of legal rules but by a set of wholly extra-legal principles. These principles are based on traditional philosophical notions of logic and inferential reasoning where an adjudicator is required to draw common sense inferences from evidentiary facts to test a particular hypothesis and to justify a particular substantive conclusion. In the words of Schreiner JA in *R v Mathews*,² a judge must apply a "blend of common sense, judicial experience and logic, *lying outside the law*" [italics added] in determining whether information in the form of potential evidence is sufficiently relevant to a dispute. Schreiner JA is paraphrasing JB Thayer who expresses this extra-legal analysis as, "how are we to know what these forbidden facts [*i.e. potential evidentiary facts*] are? Not by any rule of law. The Law furnishes no test of relevancy, for this it tacitly refers to *logic and general experience*" [italics added].³ Thayer adds that the rules of the law

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¹ Bentham *Rationale of Judicial Evidence* 22 describes the place of evidence in the process of adjudication as "justice requires not only just laws, and the just administration of those laws, but also factual truth [*objective factual truth*] and that in consequence the very possibility of a just legal system requires that there be objective indications of truth [*i.e. objective standards for better or worse evidence*]".

¹ Bentham *Rationale of Judicial Evidence* 22 describes the place of evidence in the process of adjudication as "justice requires not only just laws, and the just administration of those laws, but also factual truth [*objective factual truth*] and that in consequence the very possibility of a just legal system requires that there be objective indications of truth [*i.e. objective standards for better or worse evidence*]".

² *R v Mathews* 1960 1 SA 752 (A) 758 (hereafter the *Mathews case*); *R v A (No 2)* [2002] 1 AC 45 per Lord Steyn "to be relevant the evidence need merely have a tendency in logic and common sense to advance the proposition in issue". See *R v Cloutier* (1979) 48 CCC (2d) 1 (hereafter the *Cloutier case*).

³ Thayer *Preliminary Treatise on Evidence* 264.

of evidence originate in the instinctive suggestions of good sense, legal experience and a sound, practical understanding.⁴ Thayer's notion of relevance as inferential logic lying outside the law is often confusing to an adversarial judge or other adversarial decision-maker.⁵ South African case law is littered with judgments which use high sounding but poorly understood and poorly applied concepts such as "probability and inferential reasoning", "logical relevance", "sufficiency of relevance and probative value". Secondly, the South African concept of relevance has been materially influenced by several human rights entrenched in the Bill of Rights to the *Constitution of the Republic of South Africa*, 1996 which has materially altered a South African legal professional's understanding of the theoretical and practical expositions of the concept of relevance as it presently exists in South African case law.

The principal intention of this article is to provide a coherent explanation of relevance as it should be applied in a South African courtroom by clearly distinguishing between the key concepts of materiality, admissibility, logical relevance, probative value and weight. In particular, this article seeks to set out a functional and practical South African test of relevance which may be easily understood and applied in the courtroom by a legal practitioner. The suggested test is structured in a user-friendly manner which also allows it to be applied to data messages in the form of electronic documents or e-files. This article will also suggest certain practical amendments to the vaguely worded statutory definition of relevance in section 210 of the *Criminal Procedure Act* and section 2 of the *Civil Proceedings Evidence Act*.

2 The concepts which have shaped the South African definition of relevance

The common law concept of relevance is a unique construction of adversarial jurisprudence which does not exist in the same degree of complexity in any other legal system (i.e. the inquisitorial system or African systems of customary law).⁶ This complexity is due to the acceptance in adversarial jurisprudence of Thayer's influential explanation of relevance as:

⁴ See also Wigmore *Treatise on the Anglo-American System of Evidence* § 27.

⁵ *Noor Mohamed v R* [1949] AC 182 192: "logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophical opinion". *Noor Mohamed* is an example of the confusion to be found in case law.

⁶ For example, in the inquisitorial system and in all customary law systems the judge does not need to be guided by technical rules of admissible evidence. The inquisitorial inquiry is free of most evidentiary barriers except common sense ones. All evidence is potentially admissible and the inquisitor decides on what evidence to

a principle not so much a rule of evidence as a *pre-supposition* involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical systems, which forbids receiving anything irrelevant, not logically probative [emphasis added].⁷

Thayer argued that the law of evidence as a rational system is grounded upon two fundamental pre-supposition axioms:

- (a) The first axiom in its negative form states 'that nothing is to be received which is not logically probative of some matter requiring to be proved'. A court cannot receive any information or potential evidence which has not been assessed in terms of the natural rules of logic.
- (b) The second axiom in its positive form states "that everything that is thus probative should come in, unless a clear ground of policy or law excludes it".⁸ A court is not obliged to receive all logically probative evidentiary facts and may in terms of established legal rules exclude certain kinds of logically probative evidentiary facts.

These two evidentiary axioms essentially create a necessary conceptual distinction between relevance and admissibility at the preliminary information gathering stage of legal proceedings. Thayer⁹ explains the divide as "where an evidentiary fact is rejected on the ground of irrelevance it is the rule of reason that rejects it, but where a relevant evidentiary fact is rejected as inadmissible the rejection is grounded on the force of law". The divide is simply summarised as - relevance is a question of fact and admissibility is a question of law. At the preliminary stage of trial relevance is regarded as a prerequisite for admissibility. This means that a court is obliged to first assess potential evidentiary facts in terms of the natural rules of logic before applying any legal rules which may render logically probative evidence inadmissible. In the seminal South African case on relevance, *R v Trupedo*,¹⁰ Innes J describes this distinction as

all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions to the operation of this general principle ... but where its operation is not so excluded it must remain as the fundamental test of admissibility.

The practical problem with the first inquiry is that the natural rules of logic would admit all logically probative evidentiary facts no matter how slight their relevance. The courts would be inundated by a mass of relevant facts with

admit or reject and is solely responsible for assigning the correct probative weight to be attached to the evidence.

⁷ Thayer *Preliminary Treatise on Evidence* 264.

⁸ Thayer *Preliminary Treatise on Evidence* 530.

⁹ Thayer *Preliminary Treatise on Evidence* 264-269.

¹⁰ *R v Trupedo* 1920 AD 58 62 (hereafter the *Trupedo* case).

low probative value resulting in confusion and costly time-wastage. On the basis of this very practical reason the courts have developed a number of exclusionary threshold legal rules to contain this possible deluge. The natural rules of logic and probability, while accurate in determining relevance, cannot in themselves determine where and how this threshold level should be set. This determination is properly the domain of the legal rules of the law of evidence. The two most influential approaches which attempt to explain where the relevance threshold should be set are (i) Wigmore's "Legal Relevant Approach" or the inquiry into legal relevancy which integrates into the concept of logical relevance an additional requirement of probative value or "plus value", in the sense that a logically relevant fact must also have an additional legal relevancy in order to be admissible; and (ii) Thayer's "Logically Probative Approach" in which relevance is explained as a two-step inquiry where the first inquiry is about logical relevance and the second inquiry about admissibility in the form of discretionary rules of exclusion. Thayer's approach has been the preferred option of the South African law of evidence, and of most other Anglo-American adversarial jurisdictions, because it clearly distinguishes between the natural domain in which relevance is assessed and the legal domain in which admissibility is determined. Wigmore's legal relevancy has been criticised because it obscures the distinction between relevance and admissibility. In the adversarial jurisdictions which have adopted the Thayer approach the basic functional test of relevance may be summarised as "where an evidentiary fact is irrelevant it must by logic be excluded. Where an evidentiary fact is logically relevant it must be received by a court unless the Law in the form of a canon of exclusion or a policy consideration requires its exclusion".¹¹ A number of initial observations may be made about the framework in which the Thayer concept of relevance is analysed in order to assist in properly explaining it:

- (i) relevance is assessed in terms of inductive logic and tested by way of probability;
- (ii) relevance is also a matter of common sense and judicial experience;¹²
- (iii) relevance cannot be assessed in a vacuum - relevance may only be explained in terms of the relationship between an item of factual

¹¹ See Rule 402 of the *USA Federal Rules of Evidence*, 1975 as amended.

¹² Baxter 1998 *Cardozo L Rev* 1987; Lempert 1998 *Hastings LJ* 343. A legal system is characterised as an autonomous discipline or autopoietic system which is a self-referring, largely closed and autonomous system of communication with its own distinct forms of knowledge. Law creates its own unique world view with its own set of background beliefs which informs the type of reasoning that a judge labels as common sense. A judge's common sense in such a system is quite different from the ordinary lay person's notions of common sense.

evidence and a substantive fact forming a material element of a civil dispute or a criminal offence;

- (iv) the decision maker in a South African court is a judge and not a jury. Any analysis of relevance must be understood in this context especially when assessing the procedural prejudice of an evidentiary fact to be received at trial; and
- (v) a distinction must be drawn between direct and circumstantial evidence. A direct testimonial item of evidence, where reliable, serves to directly resolve a fact-in-issue. The discussion below concerns the relevance of circumstantial evidence.

2.1 *The meaning of logical relevance*

Relevance as a logical construction is concerned with the relationship between at least two propositions of legal fact. According to Wigmore relevance reasoning is based on inductive and not deductive logic and the primary concern is with the quality of the inference to be drawn from a first proposition (i.e. the evidentiary fact – proposition A) as to the proposition in question (i.e. the fact-in-issue of the legal dispute – proposition B).¹³ Proposition A is relevant to proposition B - meaning that the truth of A has the tendency, however minimally, to support/confirm the truth of B (or to show that proposition B is false). This tendency is assessed by way of a simple kind of probability theory.¹⁴ Relevance explains how both propositions adhere logically to each other. Materiality is also at issue here. An evidentiary fact is only relevant when it can be logically linked to a material fact-in-issue.¹⁵ An evidentiary fact which can only be logically linked to an immaterial fact-in-issue is by definition irrelevant.¹⁶ Therefore

¹³ Wigmore *Treatise on the Anglo-American System of Evidence* § 30-36. See also the inferential reasoning of Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 (HL) 733g as accepted in South African law by *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 2 SA 603 (A) 620 and *Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 3 SA 916 (A) 931-940.

¹⁴ Lempert 1977 *Mich L Rev* 1021, 1026: according to the Bayesian model of logic "evidence is logically relevant only when the probability of finding that evidence given the truth of some hypothesis at issue in the case *differs* from the probability of finding the same evidence given the falsity of the hypothesis at issue".

¹⁵ *R v Gill* (1987) 39 CCC (3d) 506 514: "Evidence must be material to be admissible. Material evidence is evidence which is pertinent or germane or significant in proving or disproving the guilt of the accused."

¹⁶ Murphy *Practical Approach to Evidence* 25: "the purpose of evidence is to establish the probabilities of the facts-in-issue and evidence must be confined to the proof of these facts-in-issue. The proof of supernumerary or unrelated facts does not assist the court and may cause prejudice while adding no probative value to the substantive issues before it"; *R v Yaeck* (1991) 68 CCC (3d) 545 565; *Lithgow City Council v Jackson* (2011) 244 CLR 352 para 26 "where the effect of the evidence is so ambiguous that it could not rationally affect the assessment of the fact-in-issue, the evidence is irrelevant".

all admissible evidence must be material evidence. An evidentiary fact is immaterial because (i) it cannot, in the factual circumstances, be logically connected to a fact-in-issue, or (ii) even if it can, the substantive fact to which it is connected is not in dispute before the court. Relevance at the information-reception stage of a trial is the test used to sift potential evidentiary facts from a mass of mostly irrelevant and directionless information and may be understood in terms of the following characteristics of a common law system of evidence:

- (a) A particular evidentiary fact (proposition A above) must exist in a relationship with a substantive fact-in-issue (proposition B above).
- (b) A particular evidentiary fact (proposition A) is relevant or has probative value when it has the tendency in logic to render the existence or non-existence of a substantive fact-in-issue (proposition B) more or less probable.
- (c) The relevancy of an evidentiary fact is also dependent on its relationship with any material fact-in-issue. An evidentiary fact in a relationship with an immaterial fact-in-issue only is by definition irrelevant.
- (d) A logically relevant evidentiary fact with high probative value may be excluded from trial by certain policy considerations.
- (e) The admissibility or inadmissibility of a logically relevant evidentiary fact with marginal probative value is determined by weighing its probative value against an appropriate procedural rule of exclusion by way of a cost benefit analysis.

In all adversarial jurisdictions which apply a strict system of evidence the general test of relevance may be understood as consisting of a three-legged inquiry (note, the jurisdictions used to demonstrate this inquiry are for the sake of brevity limited to Canada, USA, UK, New Zealand and South Africa). The first inquiry is a test of logic and inferential reasoning based on probability in order to determine whether an evidentiary fact is relevant or irrelevant. The second inquiry is the extent to which the reception of a relevant evidentiary fact is procedurally undesirable. The second inquiry requires a balancing of countervailing considerations, and a court will require an evidentiary fact to possess a substantially sufficient degree of probative value before it will admit an evidentiary fact which may be likely

to cause prejudice, confusion or result in any other material disadvantage.¹⁷ The third inquiry is whether a relevant evidentiary fact may be excluded by reason of certain policy considerations (e.g. privilege, etc.). According to the Supreme Court of Canada in *R v Cloutier*,¹⁸ "even when evidence is relevant, material, and admissible, the court retains a discretionary ability to exclude evidence where the probative value of the evidence is exceeded by its prejudicial effect".

2.2 Logical relevance in a system of exclusionary legal rules

Historically the majority, but not all, of the exclusionary rules which make up the common law body of the law of evidence are said to be the consequence of a jury system in which several arbitrarily selected lay persons sit as judges of fact-finding. It was found necessary, based on a formal kind of epistemic paternalism,¹⁹ to exclude certain classes of evidentiary facts from these legally ignorant jurors on the reasoning that it would psychologically mislead or unfairly prejudice them against the accused. Bentham,²⁰ an early 19th century critic of the growing complexity of adversarial exclusionary rules, argued for a free natural system of evidence and fact-finding in some respects similar to that of the inquisitorial system. In his antinomian thesis Bentham argued that a technical system of exclusionary evidentiary rules impeded the rectitude of decision-making (i.e. rectitude as the accurate implementation of substantive law to the true facts). Bentham contended that all evidentiary facts should be admitted save where (i) irrelevant; (ii) superfluous; or (iii) their reception would involve preponderant vexation, expense or delay when judged by the standard of utility. He was also of the view that evidence should not be excluded simply by reason of its material prejudicial effect or on any other grounds such as due process, public policy considerations or procedural rights which offended the logic of a utilitarian search for accuracy of fact-finding. Accordingly, the English law of evidence

¹⁷ Zuckerman *Principles of Criminal Evidence* 51: "the admissibility test is therefore a composite test made of a mesh of considerations of logical probabilities and of practical utility".

¹⁸ The *Cloutier* case 1; *R v Corbett* [1988] 1 SCR 670 715; *Ashmore v Corporation of Lloyd's* [1992] 2 All ER 486 (HL) 493. See also *R v Collins* (2001) 160 CCC (3d) 85 para 19.

¹⁹ Allen and Leiter 2001 *Va L Rev* 1502: "epistemic paternalism entails designing rules of evidence that are epistemically best for jurors – that lead them to form true beliefs about disputed matters of fact". Wigmore *Treatise on the Anglo-American System of Evidence* § 28: "admissibility of evidence ... owes its origin, maintenance, and system to the separation of function between judge and jury".

²⁰ Bentham *Rationale of Judicial Evidence* 99-100, 336-337: "the system of evidence is a technical system consisting of a collection of Byzantine exclusions, privileges, presumptions and formulae for weighing evidence".

with its "thicket of exclusionary rules is incompetent to the discovery of truth and to the purpose of justice".²¹

However, Wigmore²² takes a contrary view and argues that the existence of these complex canons of exclusion is due to the reality that any inquiry of the law of evidence, whether of relevance; admissibility or proof, operates under constraints not found in a scientific inquiry. The courtroom must be differentiated from the laboratory for the following reasons: (i) a trial inquiry is held over a fixed time and there is an immediate need for an accurate and final decision; (ii) a trial proceeds on disputed issues of fact between human beings moved by strong emotions and tempted by any means possible to improve their chances of success; (iii) time needs to be saved at trial by rejecting trivial facts and avoiding a proliferation of issues; and (iv) a trial is a place of surging emotions unlike the quiet solitary routine of a science laboratory. Hence the need for special safeguards to prevent the emotional conditions of a trial from influencing the decision-making processes of the adjudicator. According to Haack,²³ the law seeks "quick, final and binding judgments – the desideratum of promptness imposing time constraints at one end of the adjudicative process, and the desideratum of finality-and-bindingness at the other". "Moreover, legal determination is constrained not only by the desire to arrive at factually correct verdicts, but also by other, non-truth related desiderata: that citizens' constitutional rights must be respected; that it is much worse to convict an innocent man than to acquit a guilty one, etc". Clearly exclusionary rules insulate a party against the cost of having to defend against the errors inherent in certain types of evidence thereby increasing the likelihood of a more accurate judgment. An exclusionary rule-based approach is an integral part of the adversarial definition of relevance and the explanation about relevance below takes place within the agreed upon epistemological boundaries of the South African law of evidence in its common law form as inherited from English law.²⁴

²¹ Twining *Theories of Evidence* 70-71: "Bentham overvalued the pursuit of truth, undervalued procedural fairness/rights, relied too much on the ethics of officials and underestimated the risk of abuse by officials unfettered by rules". See also Haack 2004 *Am J Juris* 43, 56.

²² Wigmore *Treatise on the Anglo-American System of Evidence* § 27: "the logical powers employed must be those of everyday not those of the trained logician or scientist. The conclusions and tests of everyday experience must constantly control the standard of legal logic".

²³ Haack 2004 *Am J Juris* 43, 50.

²⁴ Legislative intervention subsequent upon South Africa becoming an independent Republic on the 31 May 1961 specifically stated in both the *Criminal Procedure Amendment Act* 92 of 1963 and the *Civil Proceedings Evidence Act* 25 of 1965 that the common law relating to evidence in South Africa was the English common law in effect "as at the 30 May 1961".

3 Relevance as a logical construction in South African case law

The relationship between relevance and accuracy of decision-making rests heavily on the reasoning ability of the decision-maker critically labelled by Risinger as the "god perspective view of relevance" in which the decision-maker must know "all that is necessary to make as many accurate inferences as possible from any given item proposed for consideration and has no time or processing capacity constraints".²⁵ The purpose of the adversarial concept of relevance is to provide a court with a practical and utilitarian tool to be used in sifting through all the information which may possibly assist in proving a civil or criminal dispute in order to determine which of these informational facts should be admitted or excluded. Relevance cannot be determined in isolation and must be assessed by examining the totality of the unique combination of factual circumstances which make up each individual case. According to Van der Merwe J in *S v Zuma*,²⁶ the first question is always - what are the issues? Relevance cannot be divorced from the disputed facts of a particular case before a court. These unique sets of factual circumstances vary on a case-by-case basis and the concept of relevance cannot be easily reduced to a single abstract legal theory. The meaning of relevance now begins to take shape – fundamentally relevance is a question of fact and inferential logic and not a matter of law.

The first step in any coherent relevance inquiry is to identify the substantive facts of the dispute before the court. Common sense dictates that an item of evidence (i.e. an evidentiary fact) is selected to be a part of the legal-truth seeking process because it has a logical connection to a primary or even a secondary material fact-in-issue. Evidence which has a logical connection to an immaterial fact-in-issue is superfluous and irrelevant for the purpose of proving the material fact-in-issue. The second step in the relevance inquiry is to examine the nature of the relationship between an evidentiary fact and a material fact-in-issue. Stephen's influential definition of relevance, as adopted into South African law by *R v Katz*,²⁷ explains this relationship as:²⁸

the 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

²⁵ Risinger 2010 *Brook L Rev* 1349, 1353.

²⁶ *S v Zuma* 2006 2 SACR 191 (W) 199f; *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733 738.

²⁷ *R v Katz* 1946 AD 71 78 (hereafter the *Katz* case).

²⁸ Stephen *Digest of the Law of Evidence* art 1. See also *R v Nethercott* [2002] 2 Cr App R 117.

on its own, or in connection with other facts, *proves or renders probable the past, present or future existence or non-existence of the other.* [italics added]²⁹

Lord Simon in *DPP v Kilbourne*,³⁰ reworks Stephen's definition in terms of probative value as "evidence is relevant if it is logically probative or disprobative of some matter which requires proof. That relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable". Section 210 of the *Criminal Procedure Act*³¹ codifies the South African common law relationship between an evidentiary fact and a fact-in-issue as "no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot *conduce* to prove or disprove any point or fact-in-issue" [italics added]. Section 210 of the *Criminal Procedure Act* is merely a badly worded iteration of Stephen's definition and simply means that there must be a logical relationship between the *facta probantia* (i.e. the evidentiary facts) and the *facta probanda* (i.e. the material substantive facts-in-issue) from which an inference may be drawn in order to demonstrate the probable existence, or probable non-existence of a particular fact-in-issue. According to Thayer the probable non-existence or existence of a fact-in-issue is demonstrated by "a presupposition which forbids receiving any fact which is irrelevant - i.e. *a fact which is not logically or rationally probative*" [italics added].³²

Thayer argues that relevance is essentially a matter of logic and that "without exception nothing that is not logically relevant is admissible".³³ The threshold test of relevance is an inquiry based on inferential logic about the relationship between an evidentiary fact and the probable existence, or non-existence, of a fact-in-issue. The common-sense logical relationship between an evidentiary fact and a fact-in-issue may be a close one or it may be a remote one. Where the relationship is a close one an evidentiary fact renders the existence of the fact-in-issue probable (i.e. the evidentiary fact has a high degree of probative value) and the evidentiary fact is said to be logically relevant but where the relationship is extremely remote the existence of the fact-in-issue becomes improbable (i.e. the evidentiary fact has no probative value) and the evidentiary fact is rendered irrelevant. Clearly a threshold line must be drawn between a relevant evidentiary fact and one which is irrelevant. The question of where such a line is to be drawn

²⁹ Rule 401 of the *USA Federal Rules of Evidence* similarly defines relevant evidence as "evidence having any tendency to make the existence of any fact (i.e. fact-in-issue) more probable or less probable than it would be without the evidence". The Canadian and English definitions are to the same effect. See also the *Cloutier* case 1; *R v Sims* (1946) 13 Cr App R 158 164.

³⁰ *R v Kilbourne* [1973] AC 729 756-757 (hereafter the *Kilbourne* case).

³¹ Section 2 of the *Civil Proceedings Evidence Act* 25 of 1965 is to the same effect.

³² Thayer *Preliminary Treatise on Evidence* 264-269.

³³ Thayer *Preliminary Treatise on Evidence* 266.

will depend on the circumstances of a particular case. The line will generally be drawn where inferential logic and common sense give way to mere conjecture and speculation. As early as 1915 the Court of Appeal in *R v Mpanza*³⁴ explained the logical connection between an evidentiary fact and a fact-in-issue as allowing for an inference to be drawn from the existence of the evidentiary fact about the probable existence of the fact-in-issue which cannot be based on mere speculation or conjecture.³⁵

In simple terms an evidentiary fact is relevant if it has any tendency to make a fact-in-issue more or less probable than it would be without the evidentiary fact.³⁶ Probability, however it is defined, is not an actual state. Probability is always relative to the quantum of evidentiary facts available to the decision-maker at the time a decision is made. If all the possible evidentiary facts were available, the decision-maker would not be dealing with probability but with certainty. The use of the phrase "more or less probable" invites an explanation of relevance by way of a probability theory explained in terms of a mathematical model or a "likelihood ratio". A powerful mathematical tool for weighing the strength of inferences of guilt from circumstantial evidence in a quantitative manner is offered by the probability formula known as Bayes' Theorem. The Theorem is used mostly to accurately assess the probabilities inherent in the admission of circumstantial evidence at trial.³⁷ The Bayes' Theorem may also be adapted to fit the inferential reasoning of relevance probability. Lempert explains how relevance probability may be assessed³⁸ in terms of a likelihood ratio between the core formulae of the

³⁴ *R v Mpanza* 1915 AD 348 352-353.

³⁵ *Hollingham v Head* (1858) 140 ER 1135 1136: "it is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins". The line is generally drawn where considerations of fairness and convenience require it to be drawn. See also Zeffertt and Paizes *South African Law of Evidence* 239.

³⁶ Rule 401 of the *USA Federal Rules of Evidence*. See also s 55 of the *Australian Evidence Act, 1995* (Cth).

³⁷ Tribe 1971 *Harv L Rev* 1329. See also the summary by Paizes in Zeffertt and Paizes *South African Law of Evidence* 113-118. Bayes' Theorem is explained in terms of a ratio between two elementary probability formulae (where A and B are the factual propositions and P stands for the probability relationships): then (i) the probability that A and B are true is equal to the probability that A is true if B is assumed to be true multiplied by the probability that B is true – expressed as $P(A \& B) = P(A/B).P(B)$; and (ii) the probability A is true is equal to the sum of the probability that both A and B are true and the probability that, *at the same time*, A is true while B is not – expressed as $P(A) = P(A \& B) + P(A \& \text{not } B)$. Ultimately from these two basic formulae Bayes' Theorem is derived as: $P(A/B) = \frac{P(B/A). P(A)}{P(B/A).P(A) + P(B/\text{not } A). P(\text{not } A)}$

Theorem - $P(E/G)$ and $P(E/\text{not}G)$.³⁸ The adapted Bayesian equation describes the way knowledge of a new item of evidence (E) would influence a rational decision-maker's evaluation of the probability (P) that a defendant is guilty (G) or not guilty (notG). Relevance turns on the relative difference in magnitude between $P(E/G):P(E/\text{not}G)$. For example, the prosecution presents evidence of a blood sample (the evidentiary fact) found at the scene of the crime. The blood sample is type A. The accused's blood is also type A. Let's assume that 50% of the other identified possible suspect population also have type A blood (i.e. the reference population).³⁹ Thus if the accused is in fact guilty, the probability that the blood found at the crime scene is type A is $P(EG) = 1.0$. But if the accused is in fact innocent (i.e. that one of the suspect population committed the crime), the probability of finding type A blood at the scene of the crime is $P(E/\text{not}G) = 0.5$ or $\frac{1}{2}$, since only half of the other possible suspects have type A blood. The likelihood ratio is the ratio of the first probability to the second probability which is 1.0:0.5 or to round it up 2:1. An evidentiary fact is considered relevant where the ratio is other than 1:1 – since a ratio of 1:1 means that the probability of the evidentiary fact is the same whether the accused is guilty or innocent. The magnitude of the ratio's deviation from 1:1 determines the probability or the improbability of the evidentiary fact. In the above example the magnitude of deviation is significant and the blood sample is admissible relevant evidence. Pardo⁴⁰ argues that while Bayes' Theorem is a useful theoretical tool in analysing the reasoning behind relevance it is neither practically applicable in a courtroom⁴¹ nor was the word "probable" in the

³⁸ Lempert 1977 *Mich L Rev* 1021, 1022-1027. Lempert adapts the two basic formulae by substituting A for G (guilt) and B for E (new evidence) to analyse relevance probability. The two basic formulae are expressed as: (i) $P(G \& E) = P(G/E) \cdot P(E)$; and (ii) $P(G) = P(G \& E) + P(G \& \text{not} E)$. From these two basic formulae Bayes' Theorem may be derived as: $P(G/E) = \frac{P(E/G) \cdot P(G)}{P(E/G) \cdot P(G) + P(E/\text{not} G) \cdot P(\text{not} G)}$

³⁹ The suspect population is relatively large and consists of all males in the locality where the crime was committed (assuming the accused is male) – labelled as the reference class of the probability ratio.

⁴⁰ Pardo 2013 *Vand L Rev* 547, 576, 600: "relevance/probative value depends on whether evidence supports a party's explanation or is a challenge to the other side's explanation". This broad definition avoids the problems of a mathematical probabilistic concept of relevance such as: (i) overlapping evidence that is relevant but does not distinguish between the cases probabilistically; (ii) relevant evidence that does not coincide with increases (or decreases) in the probability ratio; and (iii) determining the size, composition and other parameters of the reference-class. Determining the reference class also determines the number of likelihood ratios. This determination is often done on an arbitrary basis (Pardo 2013 *Vand L Rev* 601-603).

⁴¹ *R v Adams* [1996] 2 Cr App R 467, an attempt by the defence to use Bayes' Theorem to minimise the evidentiary value of a DNA matched semen sample was held to be an inappropriate method of fact-finding in a jury trial as it would result in confusion. See also Zeffertt and Paizes *South African Law of Evidence* 116-118.

common law definition of relevance meant to be defined in mathematical terms. A mathematical test of probability cannot be an exclusive way of testing for logical relevance as it does not reflect the reality of daily courtroom practice. For example, a court will always allow adversarial parties to introduce conflicting interpretations of the same agreed upon common factual event – the one version consistent with innocence and the other with guilt. Yet in terms of the likelihood or probability ratio, the ratio of the first version to the second would be 1:1 and the evidentiary fact should be irrelevant and inadmissible.

The reasoning behind the threshold test of relevance based on inductive inferential logic and assessed in terms of probability is that it cannot be amenable to a yardstick measurement of degree. The degree of remoteness or closeness of the logical connection between an evidentiary fact and a fact-in-issue should not be confused with, or translated into, degrees of relevance.⁴² Logic does not construct degrees of relevancy. Logical relevancy is a binary concept which means that an evidentiary fact is either relevant (i.e. because it is probable) or it is irrelevant (i.e. because it is improbable). However, what may be explained in terms of a matter of degree is the cogency of the probative value of a logically relevant evidentiary fact. Therefore, the careless use of the phrase 'relevance is a matter of degree' in South African academic textbooks and case law is conceptually confusing. Logically relevance cannot be a matter of degree. What may be measured by degree is the probative value of a logically relevant evidentiary fact or the lack of probative value of a logically irrelevant evidentiary fact. The correct phrase should read "the probative value of a logically relevant fact is a matter of degree". The relative nature of probative value is explained in the second inquiry about admissibility.

4 Admissibility and the degree of probative value – a cost benefit analysis

Relevance is not only a contextual test of logical probability, but it may also be explained in terms of its probative value. Probative value may be generally defined as the weight of the evidentiary fact in proving or disproving a fact-in-issue. This value depends on the strength or weakness of the logical relationship between an evidentiary fact and a fact-in-issue, along with many other factors such as, the importance of the issue, the extent to which the fact is challenged by the opposing party, and whether it

⁴² *Morris v R* [1983] 2 SCR 190 203: "relevance is independent and requires no minimum threshold of cogency"; *Conway v R* [2000] 172 ALR 185 para 181: "an evidentiary fact remains relevant irrespective of how many other evidentiary facts are adduced to prove the same facts-in-issue".

is outweighed by other countervailing factors. Specifically, a logically relevant evidentiary fact of middling or average probative value may be excluded from trial for a variety of procedural reasons,⁴³ most importantly, where (i) its probative value is outweighed by the procedural disadvantage of receiving it at trial; (ii) its admission is contrary to certain policy considerations irrespective of its probative value; or (iii) it is an unjustifiable limitation of a constitutional right. The primary practical reason advanced for these admissibility exclusionary rules is that there must be a reasonable limit on the amount of evidence adduced at trial. There is an inevitable practical limit on the quantity of relevant evidence that any person can absorb, including an experienced judge. Too much evidence may serve to decrease rather than increase the correctness of the final decision.⁴⁴ This is a question of a cost benefit analysis. The admissibility at trial of certain kinds of logically relevant evidentiary facts with marginal probative value would complicate and confuse the issues before the judge (i.e. the question commonly asked - is the evidence worth bothering about?).

In South African case law *R v Trupedo*⁴⁵ provides an example of the potential material procedural prejudice of a piece of evidence (i.e. on the facts an item of tracker dog evidence) far outweighing what little relevant probative value could be attached to it. Although, it must be noted, the procedural prejudice about which the court was concerned, was that the jury would be inclined to give the tracker dog evidence an exaggerated importance. Similarly in *S v Shabalala*⁴⁶ the Court of Appeal held that it was bound by the *Trupedo* precedent that a tracker dog's identification evidence was inadmissible because the probative value of such evidence is "so inconsequential and its relevance so problematic there would be little point in receiving the evidence". *Trupedo, and Shabalala* simply echo Rule 403 of the *USA Federal Rules of Evidence*:⁴⁷

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,

⁴³ Wigmore *Treatise on the Anglo-American System of Evidence* § 29a: "a fact may be logically relevant, and thus admissible, and yet be excluded by reason of the auxiliary principles of policy, particularly confusion of issues, unfair surprise or undue prejudice".

⁴⁴ Zuckerman *Principles of Criminal Evidence* 49; *R v Patel* [1952] 2 All ER 29 30; *Shepard v United States* 290 US 96 (1933) 104.

⁴⁵ The *Trupedo* case 62-3; the *Katz* case 78: "the legal admissibility of a fact is not entirely determined by its relevance to an issue before the court, because facts which may be regarded as logically relevant ... are sometimes excluded by the rules of evidence". See *S v M* 2003 1 SA 341 (SCA) para 17. See also the *Kilbourne* case 756-757; *R v Gordon* (1995) 2 Cr App R 61 64 (hereafter the *Gordon* case).

⁴⁶ *S v Shabalala* 1986 4 SA 734 (A) 742-743 (hereafter the *Shabalala* case).

⁴⁷ See also ss 135-137 of the *Australian Evidence Act*, 1995 (Cth); s 8 of the *New Zealand Evidence Act*, 2006.

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The number and kind of countervailing procedural considerations vary from one common law jurisdiction to another but are generally identified by way of a cost benefit analysis of what evidentiary facts should be admitted or excluded at trial in order to provide justice to the accused or litigant as fairly, speedily and as accurately as possible.⁴⁸ The New Zealand High Court in *R v Wilson* (unlike South African case law on relevance) makes a clear distinction between the inquiry of logical relevance in the form of probability/likelihood and the inquiry into countervailing considerations:⁴⁹

The foundational characteristic of relevance is described as:

[L]ack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact-in-issue but because the connection is considered to be too remote.

The second characteristic is summarised as:

Once it [*relevance*] is regarded as a matter of degree, competing policy considerations can be taken into account. These include the desirability of shortening trials, avoiding emotive distractions,⁵⁰ or marginal significance, protecting the reputations of those not represented before the courts. [N]one of these matters would be determinative if the evidence in question were of significant probative value.

The *USA Federal Rules of Evidence* make the same clear distinction between the test of logical relevance in Rule 401 and the requirement in Rule 403 obliging the court to exclude logically relevant evidence. It must be noted that section 201 of the *Criminal Procedure Act* does not make such a clear distinction, "no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot *conduce to prove or disprove any point or fact-in-issue*" [italics added]. The section requires giving the sentence "*conduce to prove or disprove any point or fact-in-issue*" a wide enough interpretation to justify excluding logically relevant facts on the basis of established exclusionary rules of evidence.⁵¹

⁴⁸ *R v Mohan* [1994] 2 SCR 9. A cost benefit analysis is not used in its traditional economic sense but rather in terms of its impact on the trial process. The factors to be balanced against probative value include: (i) an excessive procedural burden on the court; (ii) unfair surprise; (iii) confusion of issues; (iv) material procedural prejudice; (iv) unrestrained collateral side issues; (v) manufactured evidence; and (vi) excessive time wastage. In certain circumstances other well-established common law rules of evidence may serve to exclude a relevant evidentiary fact. See also *R v Schaubert-Kuffler* 1969 2 SA 40 (RA) 50b.

⁴⁹ *R v Wilson* [1991] 2 NZLR 707 711.

⁵⁰ The factor of avoiding emotive distraction does not apply in a South African courtroom. This cost aggravating factor refers to the effect certain evidentiary facts would have in a trial system where a layperson jury, and not a professionally trained judge, is the final decision-maker.

⁵¹ See Zeffertt and Paizes *South African Law of Evidence* 243 (summary).

There is of course an implied criticism which may be directed at this kind of adversarial weighing relationship between probative value and a countervailing procedural exclusion. How is weight to be measured? South African case law contains very little discussion of how the cost balancing process is assessed and measured. The problem is that the judge must weigh apples (probative value) against oranges (a countervailing consideration such as trial prejudice) in the absence of an agreed upon equivalency formula – certainly case law does not provide one. How does a judge practically weigh a given probative value against say - a given amount of procedural prejudice or time wasting at trial? By what margin must a countervailing consideration outweigh probative value or *vice versa*? Must it be by a bare minimum or a substantial margin? For example, Federal Rule 403 requires the "court to exclude relevant evidence if its probative value is *substantially outweighed* by the danger of a countervailing procedural consideration". *DPP v Kilbourne*⁵² requires that logically probative material must "be *grossly outweighed* by its prejudice to the accused". How is this measure of gross or substantive weight to be assessed? The rules of logic are of no assistance here and the judge must have recourse to his/her common sense and judicial knowledge of procedural and substantive law in ensuring that the weighing of the conflicting interests is properly carried out.

The design of relevance as set out above in *R v Trupedo*, *DPP v Kilbourne*; and *R v Wilson* is simply a reiteration of Thayer's thesis that relevance is primarily a matter of logic and only secondarily of law.⁵³ Wigmore⁵⁴ was of the opposite view and argued that relevance could be interpreted as a question of law and that logical relevance could be distinguished from legal relevance. According to Wigmore, an evidentiary fact is logically relevant if it tends to make the existence of a fact-in-issue more probable but in addition it must also be legally relevant in the sense that its probative value must exceed its prejudicial effect. To be legally relevant and admissible a logically relevant evidentiary fact should also possess a "plus value" in the form of additional probative value in order to outweigh any possible material procedural disadvantage its reception would cause at trial. Logical relevancy is insufficient – it only establishes a bare minimum of probative value. To be admissible logically relevant evidence requires an additional legal content of sufficiency. This view of relevance is also referred to as the

⁵² The *Kilbourne* case 757.

⁵³ *R v Stephenson* [1976] VR 374 (Australia) 380; *People v O'Brien* [1965] IR 142 (Ireland) 151; *Ram Bihari Yadav v State of Bihar* AIR (1998) SC 1850 (India).

⁵⁴ Wigmore *Treatise on the Anglo-American System of Evidence* § 28: "the judge in his efforts to prevent a jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice ... has constantly seen fit to exclude matter which does not rise to a clearly sufficient degree of value...legal reasoning denotes ... *something more than a minimum of probative value*. Each single piece of evidence must have a plus value".

test of sufficient relevance and is set out in the formula "Legal Relevance (sufficiency) = Logical Relevance + Plus Value". Hoffman⁵⁵ takes the concept of legal relevance even further arguing that the standard of sufficiency required to overcome policies of exclusion is contained within the concept of relevance itself "evidence is relevant when it has obtained the variable standard of cogency sufficient, in the absence of any exclusionary rule, to justify its admissibility". The test of legal relevance has been the subject of vigorous criticism because it blurs the distinction between the inquiry into relevance and the separate inquiry about procedural disadvantages at trial.⁵⁶ It has been criticised for confusing relevance with admissibility.⁵⁷ The concept of plus value is simply an imprecise way of stating that the probative value of relevant evidence must outweigh any procedural disadvantage (i.e. prejudice) likely to result from its admission at trial.⁵⁸ In addition the requirement of 'plus value' or an additional legal sufficiency over and above logical relevance simply confuses relevance with the evaluation of probative weight at the proof stage of a trial. Despite these criticisms the use of the legal relevance concept persists in part in South African law,⁵⁹ and in English case law.⁶⁰

Finally, a clear distinction must be drawn between probative value and probative weight. The problem with using the term probative value is that it is a term with two different evidentiary meanings and usages and may result in confusion. First, the initial stage of the inquiry into admissibility refers to the probative value to be attached to a potential evidentiary fact in order to determine whether the evidentiary fact should be admitted or not. According to Wigmore⁶¹ a judge's function in determining relevance is not that of a final arbiter but merely of a preliminary tester – he/she is concerned merely with admitting the evidence through the "evidentiary portal". Secondly, it is also used by a court for its persuasive value in evaluating the weight or cogency

⁵⁵ Hoffmann 1975 *LQR* 193, 206.

⁵⁶ Twining *Theories of Evidence* 152-155.

⁵⁷ The *Mathews* case 758. Schreiner JA seems to have confused legal relevance with admissibility by stating that the law begins with logical relevancy "and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible". See *S v Gokool* 1965 3 SA 461 (N) 475-476 where Harcourt J also confuses legal relevance with admissibility. See also Zeffertt and Paizes *South African Law of Evidence* 239-240.

⁵⁸ Lempert and Salzburg *Modern Approach to Evidence* 153: "the concept of plus value is confusing ... it is probably a less precise way of acknowledging, as modern courts do, that even relevant evidence may be excluded if it seems likely to be prejudicial, misleading or time-consuming". See also James 1941 *CLR* 659, 701-702.

⁵⁹ See SALRC *Discussion Paper 113* ch 3, 15-18. See the criticism in Zeffertt and Paizes *South African Law of Evidence* 240.

⁶⁰ The *Gordon* case 63-64; *R v Funderburk* [1990] 2 All ER 482 485 "as relevance is a matter of degree in each case, the question in reality is whether or not the evidence is or is not sufficiently relevant". See also Pattenden 1997 *E&P* 361-385.

⁶¹ Wigmore *Treatise on the Anglo-American System of Evidence* § 29.

of evidence to determine if a party has adduced sufficient quantity and quality of evidentiary facts to meet its standard of proof at the judgment stage of the trial. At this end stage Wigmore refers to the absolute demonstrative power of evidence and its appropriate weight in affecting persuasion. Both meanings of probative value are rationally linked together because when the court makes a determination of the admissibility of an evidentiary fact it is also at the same time making a provisional evaluation of the potential weight which the evidentiary fact may have in assisting a court in reaching its final judgment. A practical distinction may also be made. At the initial stage of a trial items of relevant evidence are admitted individually in piecemeal fashion or in isolated groups. The probative value of each individual item of evidence is usually assessed in isolation. At this stage the judge is concerned with making a rough estimate of the potential input that each individual item of evidence might make and whether it has sufficient probative value to warrant admission. Whereas at the final proof stage of the trial the probative weight of all the admitted evidence is evaluated together in a structured and coherent manner and in relationship to each other to meet the required standard of proof. In other words, evidence has (potential) probative value before or during admission, but carries probative weight once evaluated and when relied upon at the end of the trial.

5 Countervailing procedural, policy and constitutional considerations

5.1 *The meaning of procedural prejudice*

In its primary sense the general term material prejudice refers to certain kinds of logically relevant evidentiary facts with marginal probative value which are inadmissible because their reception may unfavourably impact on the trial process. Prejudice in this sense does not refer to the damage caused to an accused's defence or a defendant's case by the admission of such evidence, nor does it refer to unfair bias or influence on the mind of a judge - it is simply a uniform catchall for any procedural harm caused to any party in a trial. The term procedural prejudice must always be qualified by materiality and not by unfairness as is sometimes mistakenly done.⁶² All prejudice is unfair but it is the materiality of the prejudice which must be weighed against the probative value of logically relevant evidence. Admitting procedurally prejudicial evidence may result in added court costs, wasted court time, an unreasonable burden being placed on one party or the other or possible confusion and duplication of issues, etc.⁶³ The

⁶² See *S v Soci* 1998 (2) SACR 275 (E) 293-294.

⁶³ The *Trupedo* case 62-63; the *Shabalala* case 742-743. See also the *Cloutier* case 1; Rule 403 of the *USA Federal Rules of Evidence*.

definition of procedural prejudice will vary from jurisdiction to jurisdiction. In the South African context there is no *numerus clausus* of logically relevant evidentiary facts which at the court's discretion are inadmissible because their reception would result in material procedural damage to the trial process.⁶⁴ South African examples of some of the traditional procedural disadvantages inherent in some classes of evidence are the following:

- (a) Admitting a logically relevant evidentiary fact with marginal probative value may result in time consuming investigation into collateral or subsidiary side issues thereby diverting the court's attention from the material facts-in-issue. For example, an inquiry into the reliability and scientific validity of lie-detector tests, brain-scan testing; behaviour modification therapy, hypnosis therapy and some psychiatric evaluations would entangle the court in a time consuming investigation with little useful probative result.⁶⁵
- (b) Common law hearsay is logically relevant but is inadmissible because it is untrustworthy and prejudicial and the danger of admitting hearsay evidence may place an unfair procedural burden on an opposing party. However, hearsay is statutorily admissible in terms of section 3 of the Evidence Amendment Act when it is in the interest of justice to admit it.⁶⁶
- (c) The assessment of the trustworthiness and reliability of tracker dog identification may waste the court's time.⁶⁷
- (d) Similar fact evidence, character evidence, lay person's opinion and evidence of previous convictions are generally regarded as irrelevant but these classes of evidence may become exceptionally admissible in certain circumstances.⁶⁸
- (e) Previous consistent statements and other kinds of easily manufactured evidence are usually irrelevant and inadmissible.

⁶⁴ For example, an accused's personal motive in committing a crime may be relevant for the purpose of establishing intent or identity. In certain cases, the probative value of motive outweighs the risk of introducing potential collateral issues. See Schwikkard *et al Principles of Evidence* 52-54; *R v Kumalo and Nkosi* 1918 AD 500 504.

⁶⁵ Schwikkard *et al Principles of Evidence* 49-52; *Delew v Town Council of Springs* 1945 TPD 128; *Holtzhausen v Roodt* 1997 4 SA 766 (W); *S v Nel* 1990 2 SACR 136 (C).

⁶⁶ *Law of Evidence Amendment Act* 45 of 1988.

⁶⁷ The *Trupedo* case; the *Shabalala* case.

⁶⁸ *R v Straffen* [1952] 2 QB 911; *DPP v Boardman* [1975] AC 421; *S v Nieuwoudt* 1990 4 SA 217 (A); *R v Rowton* [1865] 169 ER 1497.

Although it must be noted that a prior consistent statement can never be relevant to a material fact-in-issue and may only be exceptionally admitted to establish credibility and in order to rebut a charge of recent fabrication made by an opposing party.⁶⁹ They are, however, deliberately allowed in terms of the common law and now by statute, in sexual offence cases.⁷⁰

- (f) Privileged evidence is logically relevant evidence with a high probative value which is inadmissible for certain policy reasons. All relevant evidence which falls under the private or public categories of privilege is usually inadmissible unless a party freely and voluntarily waives the right to privilege. Relevant admissions, confessions and pointings-out may also be inadmissible when involuntarily induced from an accused.

5.2 Exclusion of relevant evidence for constitutional reasons

The test of relevance as it is defined in the South African law of evidence is unique in the sense that, unlike the common law English test or the USA statutory test, it directly incorporates several entrenched constitutional procedures. For an item of evidence to be admissible against the accused in a criminal court it must meet not only the common law test of relevance, but also depending on the circumstances, the constitutional tests set out in section 35(5) "relevant but illegally obtained evidence", and the entrenched limitation clause section 36 "exclusion of unjustifiably obtained evidence". The influence of these constitutional principles has awarded our courts with a "constitutional discretion" in addition to its common law discretion which allows for the discretionary exclusion of unconstitutionally obtained relevant evidence in criminal cases and perhaps in civil matters. In civil matters a number of High Court decisions have tentatively alluded to a constitutionally defined discretion to exclude improperly obtained relevant evidence in order to promote the section 39 "spirit, purport and objects of the Bill of Rights".⁷¹ In particular section 35(5) principally applies to law enforcement agencies and prevents the National Prosecuting Authority from adducing logically relevant evidence at trial obtained by the police service in contravention of "the interests of trial fairness" and/or the "interests of the administration of justice".⁷² Section 36 is a general limitation clause and prevents the admission of relevant evidence at trial when obtained by any party through

⁶⁹ *S v Bergh* 1974 4 SA 857 (A); *S v Moolman* 1996 1 SACR 267 (A).

⁷⁰ Sections 58 and 59 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

⁷¹ *Fedics Group (Pty) Ltd v Matus: Fedics Group (Pty) Ltd v Murphy* 1998 2 SA 617 (C); *Lenco Holdings Ltd v Eckstein* 1996 2 SA 693 (N) but see *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 4 SA 293 (A).

⁷² *S v Tandwa* 2008 1 SACR 613 (SCA) paras 116-128; *S v Mthembu* 2008 2 SACR 407 (SCA) paras 26, 27, 30-32.

conduct that amounts to an unjustifiable infringement of the human rights set out in chapter 2 of the Bill of Rights (for example, the rights to dignity, privacy, equality and property) and the due process rights of an accused person set out in sections 35(1)-(3).

On the other hand, it may also be argued that section 35(5) read with section 34 "access to justice" may in certain circumstances justify the evidentiary rule of inclusion of irrelevant evidence. For example, in terms of the *res gestae* principles of completeness where it may be necessary in certain instances to admit an irrelevant fact because it forms part of a continuous transaction or it will allow a court to properly understand and interpret a witness's testimony. Furthermore, and in accordance with section 210 of the *Criminal Procedure Act* and section 2 of the *Civil Proceedings Evidence Act* an evidentiary fact which is not cogent to a fact-in-issue may be admitted simply because it is relevant to another fact only indirectly related to a fact-in-issue. In addition, and somewhat unique to South Africa is the application of precedent to the test of relevance. As explained above by the Court of Appeal in *S v Shabalala*, precedent established by a previous judgment (*R v Trupedo* in this instance) is binding and determines the relevance and admissibility of a certain kind of evidence. However, it is rare that the facts of two cases are always exactly the same. Therefore, precedent should serve only as a useful guideline in determining relevance in some exceptional similar factual circumstances and not as an inflexible rule.⁷³

6 The practical test of relevance

The brief theoretical test of relevance as set out by Schreiner JA in *R v Mathews* as a blend of "common sense, judicial experience and logic" requires a substantial updated revision into a user-friendly practical test. However, before relevance may be properly set out as a practical test several additional procedural points about the functional nature of relevance must be illustrated. These points may be summarised as follows:

- (a) *Relevance is a relational question of fact.* The relevance of an evidentiary fact must be assessed by its logical, relational connection to a particular substantive material fact-in-issue. Furthermore:

⁷³ James 1941 *CLR* 702: "a precedent is of no value save in another case substantially identical in all its particulars. Treated more broadly its tendency will be to mislead subsequent judges". The *Trupedo* and *Shabalala* examples also illustrate a further danger of slavish adherence to precedent. The *Trupedo* case was decided on the basis that tracker dog evidence may disproportionately influence the jury. By the time the *Shabalala* case was decided, South Africa had abolished juries. Thus, as the rationale for the precedent no longer exists, neither should the precedent.

- (i) As new material facts arise or are identified during the course of a trial so previously irrelevant evidentiary facts may become relevant and admissible;⁷⁴
 - (ii) The logical connection between an evidentiary fact and a fact-in-issue may be found not only in respect to primary facts-in-issue but also in respect to secondary facts-in-issue;⁷⁵
 - (iii) The material facts-in-issue also determine the form of potential evidentiary facts which may be relevant (i.e. in the form of oral, written, electronic or physical evidence).
- (b) *Multiple relevance and admissibility.* Depending on the given set of factual circumstances evidence may be inadmissible for one purpose but admissible for another.⁷⁶
- (c) *Provisional/conditional relevance:* an isolated item of evidence may appear to be irrelevant but when assessed together with another item of evidence its relevance becomes apparent. Where there is a problem in adducing the second item of evidence before the first item, a court may provisionally allow the admission of the first item subject to the subsequent admission of the second item.

Once these functional elements of relevance have been understood a practical test of relevance for the day to day use by a legal practitioner may be attempted. The practical test is based on three simple inquiries and is flexible enough to apply to any combination of circumstances. Note that the test offered below does not amount to an inflexible definition of relevance. Relevance is conceived from, and takes its form, within a particular set of circumstances and as circumstances change from case to case so does relevance which means that, practically speaking, relevance cannot be reduced to a single unifying abstract theory. With these variables in mind the authors set out here a functional and flexible test of relevance in the form of a three-legged inquiry as follows:

⁷⁴ *R v Solomon* 1959 2 SA 352 (A) 362.

⁷⁵ *S v Mayo* 1990 1 SACR 659 (E) 661-662: "it is not in the interest of justice that relevant material should be excluded from the court, whether it is relevant to the issue or to issues which are themselves relevant to the issue but strictly speaking not in issue themselves...".

⁷⁶ For example, evidence of character (i.e. propensity evidence) is inadmissible for the direct purpose of establishing guilt, but where an accused adduces evidence of his/her good character, the door is open for the prosecution to adduce bad character evidence for the purpose of rebuttal (s 197(a) of the *Criminal Procedure Act* 51 of 1977).

INQUIRY ONE: DETERMINING LOGICAL RELEVANCE:

- (a) Identify the material substantive facts-in-issue which make up a civil or criminal matter.
- (b) Collect all the potential evidentiary facts and sift through these facts in order to establish which of these potential evidentiary facts are logically related to the material facts-in-issue:
 - (i) *Where a strong inference can be drawn about the probable existence or non-existence of the fact-in-issue - the evidentiary fact is relevant and admissible;*
 - (ii) *Where no inference can be drawn about the probable existence or non-existence of the fact-in-issue - the evidentiary fact is irrelevant and inadmissible;*
 - (iii) *Where only a weak inference can be drawn about the probable existence or non-existence of the fact-in-issue - the evidentiary fact is relevant but possesses marginal probative value and may or may not be admitted.*

INQUIRY TWO: DETERMINING ADMISSIBILITY: WEIGHING LOGICALLY RELEVANT EVIDENCE WITH MARGINAL PROBATIVE VALUE AGAINST PROCEDURAL INCONVENIENCE:

- (a) In order to establish the admissibility of a logically relevant evidentiary fact with a marginal probative value - make a discretionary cost benefit weighing of such marginal probative value against the possible procedural prejudice which may result from its reception at trial:
 - (i) Where the probative value of a relevant evidentiary fact outweighs its procedural prejudicial impact at trial - it will be admissible;
 - (ii) Where the procedural prejudicial impact of receiving a relevant evidentiary fact at trial *outweighs its probative value - it will be inadmissible.*

INQUIRY THREE: OTHER RULES OF EXCLUSION OR INCLUSION:

- (a) Exclusion of logically relevant evidentiary facts in terms of policy considerations:

- (i) *State and private privileged relevant evidence is inadmissible;*
 - (ii) *Involuntary obtained relevant admissions/confessions & pointings out are inadmissible.*
- (b) Constitutional exclusions:
- (i) *Relevant illegally obtained evidence obtained by unjustifiably infringing s 35(5) of the Bill of Rights is inadmissible;*
 - (ii) *Relevant evidence obtained by unjustifiably infringing the rights to dignity & privacy of the Bill of Rights is inadmissible.*
- (c) Inclusion by way of precedent:
- (i) *Any evidentiary fact admitted by way of precedent.*
- (d) Inclusion of irrelevant evidentiary facts:
- (i) *res gestae evidence as to time and place to establish narrative coherence of witness testimony is admissible.*
- (e) Inclusion of relevant evidence by judicial notice:
- (i) *Notoriously well known facts are admissible without proof.*

7 Amending the statutory definition of relevance

The present almost identical definitions of relevance set out in section 210 of the *Criminal Procedure Act*⁷⁷ and section 2 of the *Civil Proceedings Evidence Act*⁷⁸ are brief, ambiguous, negatively instead of positively defined, and do not convey the true meaning of the common law definition of relevance as a relational logical inference test or the procedurally important distinction between admissibility and relevance. Neither do these definitions indicate why some kinds of relevant evidence are inadmissible or explain the probative value of evidence once admitted at trial. Therefore, the authors propose a comprehensive replacement of these sections. The suggested new definition reads:

⁷⁷ Section 210 of the *Criminal Procedure Act* 51 of 1977: "no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings".

⁷⁸ Section 2 of the *Civil Proceedings Evidence Act* 25 of 1965: "no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible".

"An evidentiary fact may be relevant and admissible at trial when it is logically connected to any fact-in-issue of a criminal charge or civil dispute, and –

- (a) the degree of relevance of an evidentiary fact, and therefore its admissibility or inadmissibility, depends on the material closeness or remoteness of the logical connection between it and any fact-in-issue of a criminal charge or civil dispute;
- (b) a marginally relevant evidentiary fact may be rendered inadmissible when its degree of relevance is outweighed by the procedural disadvantage of its reception at trial, or where a clear policy consideration or Law excludes it, or it amounts to an unjustifiable infringement of a constitutional right;
- (c) the probative value of an admitted evidentiary fact depends on whether it serves to prove or disprove the existence or non-existence of a fact-in-issue of a criminal charge or civil dispute."

First, this comprehensive definition of relevance is flexible, positive, and broad enough to distinguish between the philosophical logic and relational inferential meaning of relevance and its common law legal meaning. The term "evidentiary fact" is deliberately used here to mean any evidence of either a category type (i.e. real, oral, documentary or electronic), exclusionary kind (i.e. similar fact, character, opinion, hearsay, etc) or any kind of circumstantial evidence. Secondly, this definition is wide enough to apply equally to electronic evidentiary facts or data messages as set out in section 1 read with section 15(1) of the *Electronic Communications Act*.⁷⁹ The term "evidentiary fact" in this definition can be easily substituted by the term "evidentiary data message" without destroying its coherency. Finally, the revised definition incorporates within its meaning the three - legged inquiry set out above.

8 Conclusion

The peculiarities of the South African procedural system of fact finding – a common law-based system firmly rooted in the English law, but limited only to such aspects of English law that existed before 1961, and bereft of its traditional common law underpinning as a system for the use by a layperson jury trial, demands scrutiny against the backdrop of international standards. In particular, the test of relevance, the fundamental rationale on which this

⁷⁹ Section 1 of the *Electronic and Communications Act* 25 of 2002 defines a data message as "data generated, sent, received or stored by electronic means". S 15(1) explains that "the rules of evidence must not be applied so as to deny the admissibility of a data message...".

system hinges, over-laid as it is with ordinary legislative and constitutional developments requires careful unpacking and re-assembly. The unique value of this paper is not that it redefines the interpretation of relevance in South African law – this cannot be done – but that it grounds the concept of relevance in a uniquely South African structured coherent, logical, constitutional and statutory framework which sets out an easily understood set of procedural inquiries that can be objectively and functionally applied when a court is faced with complex issues of relevance. This demystifies *R v Mathews*' vague "common sense, logic and experience" concept referred to above and which provides little theoretical or practical assistance to legal practitioners. None of this would have been possible without a comprehensive review of the often incorrectly understood or confusingly misused common law terms which make up the structural test of relevance and without firmly delineating how these concepts should be applied at trial. This paper is singular as it presents a comprehensive analysis of relevance as it is defined and applied in the South African law of evidence.

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List of Abbreviations

Am J Juris	American Journal of Jurisprudence
Brook L Rev	Brooklyn Law Review
CLR	California Law Review
Cardozo L Rev	Cardozo Law Review
E&P	International Journal of Evidence and Proof
Harv L Rev	Harvard Law Review
Hastings LJ	Hastings Law Journal
LQR	Law Quarterly Review
Mich L Rev	Michigan Law Review
SALRC	South African Law Reform Commission
Va L Rev	Virginia Law Review
Vand L Rev	Vanderbilt Law Review