

LAW 550 LITIGATION Week 12 - Credibility Evidence

- Credibility evidence is evidence about a witness
 - this is different to hearsay
- It is evidence about collateral facts
 - it is probative of the witness' reliability
 - = about the believability of a witness

Credibility Evidence

Dictionary of Evidence Act 1995 (NSW)

"credibility" of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

- credibility is different to credibility evidence

Credibility evidence is **relevant** because it **indirectly** affects the assessment of the probability of the existence of a fact in issue.

Section 55(2) Relevant evidence

...evidence is not taken to be irrelevant only because it relates only to... the credibility of a witness
= it is relevant because it is relevant to whether a witness can remember e.t.c

- rationale for excluding this kind of evidence
 - = may make the jury take their eye off the ball
 - = may distract the fact finder to focus on the credibility of the witness as opposed to the facts in issue
 - ~ thinking of collateral issues as opposed to the real issues

Section 102 The credibility rule

Credibility evidence about a witness is **not admissible**.

Section 101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

- (a) is relevant only because it **affects the assessment of the credibility** of the witness or person, or
- (b) is relevant:
 - (i) because it affects the assessment of the credibility of the witness or person, **and**
 - (ii) for **some other purpose for which it is not admissible**, or cannot be used, because of a provision of Parts 3.2 to 3.6 (hearsay, opinion, tendency e.t.c).
- this narrows the scope of what inadmissible credibility evidence is
- if we have a credibility issue, then we go to credibility "exceptions" to get that evidence admitted

Combined effect of Sections 101A and 102:

- 2 situations where credibility evidence will not be admissible

1. **If the evidence is only about the credibility of a witness** (ie relevant only for a credibility purpose), it is inadmissible unless it satisfies one of the exceptions.
 2. If the evidence is relevant for a credibility purpose and for a non-credibility purpose, and it is **inadmissible** for that other purpose, it is also inadmissible for its credibility purpose unless it satisfies one of the exceptions.
 3. If the evidence is relevant for a credibility purpose and for a non-credibility purpose, and it is **admissible** for that other purpose, it then becomes admissible for its credibility purpose.
 4. If the evidence is completely prohibited by one or other of the exclusionary rules, it cannot be used for a credibility purpose or any other purpose.
- dual relevancy such as it has a hearsay and credibility purpose for a prior inconsistent statement
 - = real value of PIS relies in the credibility of the witness under hearsay
 - doctors report evidence: can be used for opinion expert exception and also the credibility purpose
 - = could be to bolster the D's case
 - admission purpose and credibility purpose
 - = cops getting admission out of force or without caution

Most evidence that is relevant for a credibility purpose is also relevant to a fact in issue.

- **Palmer v R (1998) 151 ALR 16** – McHugh J

Common law test for assessing whether a matter is relevant only to credibility:

- the rationale for distinguishing between credibility evidence and one that goes to the fact in issue is to prevent side-tracking and time wasting of the courts expenses
- if there's no difference between the fact that the car went through a red light (fact in issue) and a witness saying car went through a red light (credibility of witness)
 - = if you can get evidence under another purpose, then it would be reliable enough to be used for its credibility purpose

- **Attorney-General v Hitchcock (1847) 1 Exchequer 91**

(Pollock CB):

"Is the matter sufficiently relevant to the facts in issue that the party would have been permitted to lead evidence of the matter in its case in chief?"

- if Annie was 100 m away or was sight impaired; this just only goes to her credibility
- if evidence would show she was overseas at the time, this would still go to her credibility

3 EXCEPTIONS:

- impeach the credibility of the other side's witness
- bolster the credibility of your own witness
- attack the credibility after your own witness; if they have been declared unfavourable

The two principal ways of getting credibility evidence into evidence are:

1. To argue that the evidence is admissible for another purpose (a non-credibility purpose) and a credibility purpose (through s 101A(b)). In this way we are **avoiding section 102**.
2. To argue that the evidence should be admitted under one of the exceptions. In this way we are using an **exception to section 102**.

Section 103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in **cross-examination** of a witness if the evidence could **substantially affect the assessment of the credibility of the witness**.
 - (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
 - (a) whether the evidence tends to prove that the witness **knowingly or recklessly made a false representation** when the witness was **under an obligation to tell the truth**, and
 - (b) the **period that has elapsed** since the acts or events to which the evidence relates were done or occurred.
- where you want to attack the credibility of the opponent's witness
 - you can pick at their bias, PIS
 - you need to attack the credibility of the witness; not them as an actual person
- **Bickel v John Fairfax & Sons [1981] 2 NSWLR 474**
 - Bickel wrote a book during the cold war
 - someone wrote a negative view on it
 - he sued the person who made those statements
 - questions about his communist beliefs not allowed

Section 104 Further protections: cross-examination as to credibility

- (1) This section applies only to credibility evidence in a criminal proceeding and **so applies in addition to section 103**.
 - (2) A **defendant must not be cross-examined** about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives **leave**.
 - the evidence must be capable
 - (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
 - (a) is **biased** or has a **motive** to be untruthful, or
 - (b) is, or was, **unable to be aware** of or recall matters to which his or her evidence relates, or
 - (c) has made a **prior inconsistent statement**.
 - (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:
 - (a) tends to prove that a witness called by the prosecutor has a **tendency to be untruthful**, and
 - (b) is relevant solely or mainly to the witness's credibility.
 - (6) Leave is not to be given for cross-examination by another defendant unless:
 - (a) the evidence that the defendant to be cross-examined has given includes evidence **adverse to the defendant seeking leave** to cross-examine, and
 - (b) that evidence has been admitted.
 - this is about co-defendants
- = the co-defendant can Xexamine the other D only if they have been given leave
- granting leave is under s 192 (5 considerations to be made by judge)

- **Stanoevski v The Queen (2001) 202 CLR 115**
 - = practitioner insurance scam
 - = she volunteered to open up her own good character
 - = the prosecution was allowed to put in evidence where she got in trouble by the law society
 - ~ this evidence shouldn't have been let in
- **Matusevich v The Queen (1977) 137 CLR 633**

- the crown has no automatic right to examine the D just because they raised their good character
= this is something leave has been granted for
- ~ need for transparency

Evidence in rebuttal of denials

- Goldsmith v Sandilands (2002) 190 ALR 370
 - police officer injured
= he sued the cop and the driver
= the plaintiff was playing cricket a few days ago and now the accident happened that he has hurt his back
= the location of where these people played cricket a few days ago was a collateral issue
~ if the question was whether they played different could have been different

Section 106 Exception: rebutting denials by other evidence

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced **otherwise than from the witness** if:
- (a) in cross-examination of the witness:
 - (i) the substance of the evidence was put to the witness, and
 - (ii) the witness denied, or did not admit or agree to, the substance of the evidence, and
 - (b) the court gives **leave** (under considerations from s 192) to adduce the evidence.
- (2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:
- (a) is biased or has a **motive** for being untruthful, or
 - (b) has been **convicted** of an offence, including an offence against the law of a foreign country, or
 - (c) has made a **prior inconsistent statement**, or
 - (d) is, or was, **unable to be aware** of matters to which his or her evidence relates, or
 - (e) has **knowingly or recklessly made a false representation** while under an obligation, imposed by or under an Aust law or a law of a foreign country, to tell the truth.

Section 108 Exception: re-establishing credibility

- when you want to bolster or re-establish the credibility of your own witness after they have been attacked during re-examination

- (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.
= s 39 is the re-examination provision

- (3) The credibility rule does not apply to evidence of a **prior consistent statement** of a witness if:
- (a) evidence of a **prior inconsistent statement** of the witness has been admitted, or
 - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been **fabricated or re-constructed** (whether deliberately or otherwise) or is the result of a **suggestion**, and the court gives **leave** to adduce the evidence of the prior consistent statement.

• R v Cassar [1999] NSWSC 352

- cassar said he saw the people push and stab people 7 months after the event
- when the event happened he didn't see anything
- he didn't say anything at the time as his family was threatened
- so basically we have 3 situations:

= if it is relevant to just credibility, it is inadmissible
= if it is relevant for another purpose and for its credibility purpose, it is admissible under both
= if it is inadmissible for its other purpose, it may be admissible for its credibility purpose owing to one of the exceptions

Character Evidence

- character evidence is only in CRIMINAL proceedings
- historically
 - = defendants could not give evidence about themselves in the past

Character evidence and the Evidence Act 1995

- Character evidence can be adduced under s 97 as tendency evidence (Part 3.6)
- Character evidence is also a form of credibility evidence (Part 3.7)
- Character evidence in Part 3.8 'Character' deals only with the character of an accused and **adduced by the accused in criminal proceedings**

At common law, character evidence about a defendant was generally inadmissible
Under statute, defendant s were not be cross-examined about character UNLESS they 'threw away character shield' (unless they brought evidence of their good character first)

- character not defined in EA
 - = Melbourne v Queen 1999
 - ~ moral constitution of a person
 - = aggregate of qualities about a person
 - ~ individuals are never the same though, this is a problem with this definition

Section 110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

- general sense: because they are a good person they would not commit a crime

- **TKWJ v The Queen [2002] HCA 46**
 - rational, tactical decision by D to raise their good character
- **The Queen v PKS (unreported, NSWCCA, 1 Oct 1998)**
 - PKS charged with good character
 - PKS did not raise good character
 - = there is no duty on the court to tell the D to raise their good character
 - if he did raise it; the prosecution could get back to him with evidence of his bad character
 - = character of good character DOES NOT NEED TO have any probative value
 - = bad character MUST HAVE probative value
 - evidence of character must pass the relevance test under s 55
- Evidence in respect of D's good character can be admitted without reference to its probative value
- Evidence of D's bad character has to exhibit probative value for it to be admissible
- Evidence of character is subject to the test of relevance in s 55 and to the judicial discretion to exclude evidence in ss 135, 137

- Directions to jury on character evidence
 - Melbourne v The Queen (1999) 198 CLR 1**
 - stabbed neighbour to death,
 - he was drunk at the time
 - he had medical treatment for substance abuse and depression
 - R v Soto-Sanchez (2002) 129 A Crim R 279**
 - it is desirable for judges to give directions to jury about character evidence that good people do commit crimes for the first time

Rebuttal of Good Character Evidence

Section 110(1) "...adduced by a defendant"

- The Queen v Bartle [2003] NSWCCA 329
 - Bartle was asked a question and responded "I've never imported drugs"
 - he was then cross-examined by the Prosecution
 - = this wasn't allowed?
- Skaf v The Queen [2004] NSWCCA 74
 - Skaf made a non-responsive answer
 - = gang rape case
 - = said he has never been in trouble with the cops
 - Prosecution could cross-examine these statements by Skaf because he had raised his own good character

Section 112 Leave required to cross-examine about character of accused or co-accused

A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

- the evidence brought by the prosecution cannot be disproportionate to showing the bad character of the defendant
 - ~ this could be prejudicial for D

Section 111 Evidence about character of co-accused

(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

- (a) the evidence is evidence of an **opinion** about the defendant adduced by **another defendant**, and
 - (b) the person whose opinion it is has **specialised knowledge** based on the person's training, study or experience, and
 - (c) the opinion is wholly or substantially based on that knowledge.
- (2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.
- goes to attacking a defendant's character by the co-defendant
 - this should not be done to throw mud at each other
 - = this could make the jury take the eye off the ball
 - = this could be allowed by the D to show they were under the control of the dominant defendant
 - = an expert can be used to show this domination situation