

The Nature of the Law of Evidence Summary

Introduction:

- The rules of evidence applied in Australian courts serve a number of functions:
 - o They regulate what material a court may consider in determining factual issues.
 - o How that material is to be presented in the court.
 - o How the court actually goes about the task of deciding the factual issues on the basis of the evidence.
 - o Ensuring reliability of evidence
 - o Ensuring a fair trial
 - o Controlling investigators
 - o Efficiency by keeping trial to the real issues
- The Act as originally enacted, was not a restatement in statutory form of common law and existing statutory rules of evidence. Significant reforms were introduced.
- Types of Evidence:
 - o Real evidence: Physical items of evidence such as a knife, fingerprint, or other items found in the course of a search or investigation. E.g. certificate of alcohol percentage, photographs.
 - o Confessional evidence: A statement. It can be oral or written – a full acknowledgement of guilt, or admissions some element of the crime. The main consideration is whether what the suspect said is likely to be true or reliable and where the admission is liable to disadvantage the accused.
 - o Direct evidence: Goes directly to prove a material fact.
 - o Circumstantial evidence: Requires the factfinder to draw inferences (assuming facts are established).
- Material Facts:
 - o Common law procedural system is centrally concerned with the discovery of those facts that entitle a party to a remedy under a particular rule.
 - o Rules of evidence are primarily concerned with the discovery of those disputed material facts alleged by the parties upon which their legal remedies depend.
- Voir Dire:
 - o A private 'trial within a trial' where counsel go before the judge to argue about the admissibility of particular pieces of evidence.
 - o Almost any dispute under the Evidence Act 2008 (Vic) will be heard in voir dire.
- Admissibility of Evidence:
 - o An accused has a number of legal rights which trial judges have a duty and a responsibility to protect; e.g. right to silence, right to fair investigation
 - o The police have a duty to carry out effective criminal investigations; the law and the community does not expect the police to go about their investigations unduly hampered by inappropriate restrictions or artificial limitations being placed on their role.
 - o Trial judges have a duty to ensure that the community can have confidence in the integrity of the courts so that the courts are not seen as condoning illegal or unfair police conduct.
 - o The community and court expect law enforcement agencies to follow the law and act within the law as part of the Rule of Law. This is a broad public policy.
- Prejudicial Effects v Probative Value:
 - o Historically, the court had a common law discretion to excuse any evidence where the prejudicial effect outweighs the probative value (*R v Christie* (1914) AC 545).
 - The common law has been replaced by **Part 3.11 of the Evidence Act 2008 (Vic)**.
 - o In civil matters, the court has a discretion to exclude or limit evidence which is unfairly prejudicial (**ss135-136**)
 - o In criminal matters, the court must exclude evidence where the prejudicial effect outweighs the probative value (**s 137**).

- Burden of Proof:
 - The burden of proof refers to which party must prove the facts. “Innocent until proven guilty” indicates that the prosecution bears the burden of proving the accused is guilty: [Woolmington v DPP \[1935\] AC 462](#). This may also be called the onus of proof.
 - The standard of proof refers to how thoroughly the party must prove its case. In civil cases, the standard of proof is on the balance of probabilities. However, in criminal cases, the standard is beyond reasonable doubt.
- A clear distinction was drawn by the ALRC between civil and criminal trials:
 - Civil:
 - Fact-finding: Although a civil trial is not a search for truth” it is nonetheless of critical importance that the courts make a genuine attempt to find the facts.
 - Procedural Fairness: The parties must be given, and feel they have had, a fair hearing.
 - Expedition and cost: The parties and the community will judge the civil trial system in part by considering its efficiency. Any rules or proposal’s must be evaluated in the light of their effect on the time and cost of the trial.
 - Quality of rules. To the extent that the system operates under rules, the more anomalous, technical, rigid, and obscure the rules seem, the more system s acceptability is lessened.
 - The standard of proof is on the balance of probabilities ([s 140](#); [Briginshaw v Briginshaw \(1938\) 60 CLR 336](#)).
 - ✎ While there is only one standard of proof, the strength of evidence needed to reach the standard may vary depending on the facts of the case and the claims made by the plaintiff.
 - A party will succeed in civil proceedings if the circumstances raise a more probable inference in favour of their case.
 - ✎ [Transport Industries Insurance Co v Longmuir \[1997\] 1 VR](#).
 - ✎ [Chapman v Cole \[2006\] VSCA 70](#).
 - Criminal:
 - Accusatorial system: A criminal trial is not directed to resolving a dispute between parties. Although the Crown makes allegations and these are disputed by the accused, the trial is accusatorial and the accused is presumed innocent until proved guilty and is under no obligation to assist.
 - Minimising the risk of wrongful convictions: The criminal trial traditionally has been seen to reflect the view that it is in the interest of the community that the risk of conviction of the innocent be minimised even if this may result in the acquittal from time to time of the guilty.
 - Definition of central question: The central question in a criminal trial is whether the Crown has proved the guilt of the accused beyond reasonable doubt.
 - Recognition of rights of the individual: The convictions of “guilty persons are not to be pursued and obtained at virtually any cost.
 - The standard of proof is beyond reasonable doubt ([s 141](#)).
 - ✎ The burden rests with the prosecution. (The accused may bear the burden to prove defences, e.g. self-defence. This will usually be on the balance of probabilities.)
 - ✎ Two-stage process: (a) prosecution case; (b) defence case.
 - ❖ At end of prosecution case must be some evidence of every element of the offence charged.
 - ❖ There can be ‘no case to answer’ submission at the end of the prosecution case.
 - ❖ Such a submission argues that the evidence is such that the tribunal of fact could not convict - generally because there is no evidence of one of the elements of the offence.

- ☞ The prosecution must exclude beyond reasonable doubt any reasonable hypothesis consistent with innocence.
 - ☞ Circumstantial cases are often distinguished as being 'strands in a cable' or 'links in a chain' (*R v Shepherd (No 3) (1988) 856 ALR 387*).
 - ❖ In links in a chain cases, each inference leads sequentially to the next. If any of those inferences fails, the whole chain breaks. Therefore, they must all be proven beyond reasonable doubt.
 - ❖ In strands in a cable cases, the inferences strengthen one another, and each does not need to be individually proven beyond reasonable doubt.
- Assisting adversary contest: It is also important to arm an accused person with some protections to give credibility, if not substance, to the idea of the adversary system as a genuine contest.
- Procedural Perspective:
 - The Laws of Evidence can only be understood as part of the procedural system within which they apply. e.g. cases are decided by courts striving to determine correctly those material facts upon which the outcome of cases depend.
 - In civil cases, one/both of the parties have elected to begin proceedings. They have the ability to waive the strict application of procedural and evidentiary rules (*s 190*; *Sankey v Whitlam (1978) 142 CLR 1*).
 - This option is available in very limited circumstances to the accused in a criminal case (*s 190(2)*).
- Judge:
 - Criminal:
 - The judge's function in a criminal trial is to determine the admissibility of evidence.
 - In some situations, the judge may have no choice but to exclude the evidence, even if it results in a substantially weakened or doomed prosecution case.
 - Practically speaking, the primary duty of the trial judge is to ensure the trial is fair to the accused (*R v Dietrich (1992) 177 CLR 292*).
 - *Tofilau v The Queen [2007] HCA 39*
- Illegally obtained evidence:
 - The wrongful admission of improperly obtained evidence may create a forensic disadvantage to the accused.
 - The evidence obtained by the breach may be crucial to the prosecution case, or it may be extraneous.
 - If the breach arises from a failure to comply with a statutory provision (e.g. regulating the taking of a fingerprint or the conduct of a forensic procedure) then often the statute will state the consequences of a breach of the relevant provision.
 - If the breach does not arise from a failure to comply with a statutory provision, then the common law rules governing exclusion of evidence apply.
 - Public Policy Discretion:
 - In Victoria, the mere fact that evidence has been obtained unlawfully, improperly, or unfairly does not mean that the evidence will automatically be excluded.
 - Illegally obtained evidence is prima facie admissible but the court has a discretion to reject or admit the evidence.
 - *R v Ireland (1970) 126 CLR 321*

