Table of Contents

WEEK 1: INTRODUCTION TO THE LAW OF EVIDENCE

If evidence is relevant in accordance with the *Evidence Act* 1995 (NSW) s 55, and not excluded by any other provision of the Act (s 56), then the evidence shall be admissible. McLelland CJ in *Telstra Corp v Australis Media Holdings (No 2)* 1997 41 NSWLR 346 (Eq), described s 56 of the *EA* as the "pivotal provision". Common law principles relating to admissibility of evidence are no longer legally binding [*McNeill v The Queen* (2008) 168 FCR 198].

Excluding Evidence Prejudicial to D
The common law discretion to exclude evidence on the ground that to receive it would be unfair to a criminal defendant (as the trial would be unfair), is not caught by the operation of s 56(1) and thus, continues to apply in Uniform Evidence Law jurisdictions [*Haddara v The Queen* (2014) 43 VR 53 per Redlich and Weinberg JJA]. Another approach the court could have taken in this case is the provision, "the powers of a court with respect to abuse of process in a proceeding are not affected" [*EA* s 11(2)], as, to receive the evidence would have been prejudicial to the defendant, thereby constituting an abuse of process.

Refreshing Memory in Court
"A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave" [*EA* s 32(1)].

Privilege & Dominant Purpose Test
Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of: a confidential communication made between the client and a lawyer; a confidential communication made between 2 or more lawyers acting for the client; or the contents of a confidential document; for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client. [*EA* s 118]. The same rule applies WRT a confidential communication between the client and another person, or between a lawyer acting for the client and another person, made; or the contents of a confidential doc prepared; for the dominant purpose of provision of legal services.

Objection Against Self-Incrimination
A person can object to adducing evidence if such evidence will incriminate the person; however, the court will determine whether or not there are reasonable grounds for the objection [*EA* s 128].

Discretion to Exclude Evidence Based on Relevance
The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: Be unfairly prejudicial to a party; be misleading or confusing; or cause or result in undue waste of time [*EA* s 135]. The court may limit the *use* to be made of evidence if there is a danger that a particular *use* of the evidence might: Be unfairly prejudicial to a party; or be misleading or confusing [*EA* s 136]. [*R v Christie* (1914) AC 545]

Improperly / Illegally Obtained Evidence
Evidence that was obtained: Improperly or in contravention of an Australian law; or in consequence of an impropriety or of a contravention of an Australian law; is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

SILENCE & INFERENCES

Silence by a party who has failed to answer one or more questions or respond to a representation, whilst being investigated by an investigating official, is not admissible in drawing an inference of consciousness of guilt or inferring a party's credibility [*EA* s 89].

***EA* s 89**

(1) Subject to section 89A, in a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
(a) to answer one or more questions, or
(b) to respond to a representation,
put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

In *R v Anderson* [2002] NSWCCA 141 at [26], Mason P: "In relation to the right to silence which I have mentioned before, any citizen who is detained by police in relation to a serious criminal offence has a right to remain silent in the face of police questions. It should not be held against the accused that he has exercised this right".

Statute Takes Precedence Over Common Law Doctrines
In *Dupas v The Queen* (2012) 40 VR 182, VSCA: "It is presumed that a statute is not intended (in the absence of express words) to alter common law doctrines. A strict reading and careful scrutiny of the language of the Act is therefore necessary, in order to determine whether it was the will of the legislature to remove or encroach upon those doctrines".

In *Towney v Minister for Land & Water Conservation (NSW)* (1997) 76 FCR 401, Sackville J: "The task of [a] Court is to apply the statutory language used by Parliament, and not to substitute a different test merely because it reflects the pre-existing law".

In *Papakosmas v The Queen* (1999) 196 CLR 297, Gleeson CJ and Hayne J: "It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated".

In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, HCA: "The admissibility of opinion evidence is to be determined by application of the requirements of the *Evidence Act* rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made"

In *IMM v The Queen* (2016) 90 ALJR 529, HCA: "The statute's language is the primary source, not the pre-existing common law".

However, the position prior to enactment of the UEL may provide assistance in its interpretation.

DEFINITIONS

Asserted Fact: A fact that a person supposedly intended to assert by making a representation. Evidence of a previous representation is not admissible to prove such asserted fact [*EA* s 59(1)–(2)]. This falls within the subtopic of hearsay in evidence law.

References to "Examination in Chief", "Cross-examination", and "Re-examination"
(1) A reference in this Act to examination in chief of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination.
(2) A reference in this Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.
(3) A reference in this Act to re-examination of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party [*EA* Dictionary].

Representation: Includes—
(a) An express or implied representation (whether oral or in writing); or
(b) A representation to be inferred from conduct; or
(c) A representation not intended by its maker to be communicated to or seen by another person; or
(d) A representation that for any reason is not communicated.

Investigating Official: A police officer or a person appointed by or under an Australian law whose functions include functions WRT the prevention or investigation of offences.

Leading Question: A question asked of a witness that—
(a) Directly or indirectly suggests a particular answer to the question, or
(b) Assumes the existence of a fact, the existence of which is in dispute in the proceeding and as to the existence, of which the witness has not given evidence before the question is asked.

Probative value (of evidence): The extent, to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Identification Evidence (Criminal Proceedings [*EA* s 113])
(a) An assertion by a person to the effect that D was, or resembles (visually, aurally, or otherwise) a person who was, present at or near a place where:
(i) The offence, for which the defendant is being prosecuted was committed; or
(ii) An act connected to that offence was done;
At or about the time, at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard, or otherwise perceived at that place and time; or
(b) A report (whether oral or in writing) of such an assertion.

Visual Identification Evidence: Identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence [*EA* s 114(1)]. Such evidence is inadmissible unless one of the exceptions under s 114(2) apply.

General Powers of the Court

S 11 preserves the power of a court to control its own proceedings.
S 26 gives a general power to a court to control the questioning of witnesses.
S 34 gives a court power to require production of a doc or thing used in an attempt by a prospective witness to revive memory before giving evidence.
S 36 confers power on a court to require a compellable (without subpoena) person present at court to give evidence and produce docs or things.
S 45 confers power on a court to require production of a doc of evidence as to the contents thereof, if a party is cross-examining a witness WRT a prior inconsistent statement made by the witness recorded in a doc, or a previous representation made by another person recorded in a doc.
S 133 allows a court to order production of a doc to inspect, for the purpose of determining an issue of privilege.
S 188 permits a court to impound a doc, which has been adduced before it.

Drawing Inferences

For the purposes of determining the relevance of a doc or thing, s 58 permits reasonable inferences from the doc or thing. If a question arises WRT the application of a provision of the Act in relation to a doc or thing, s 183 permits the doc to be examined by the court and reasonable inferences to be drawn from it.

WEEK 1 LECTURE / WORKSHOP

WA and SA are the only states that have not adopted the UEL. The UEL created consistency and reduced the amount of wrongful convictions. Wrongful convictions wasted court time as well as convicting innocent persons. The UEL also offers protection for the defendants in the accusatorial system.

Real Evidence: Evidence in the form of a thing, certificate of BAC, knife, fingerprint, etc.

Direct Evidence: Goes directly to prove a material fact

Circumstantial Evidence: Requires the fact-finder to draw inferences – a situation will arise where the fact-finder will draw an inference, as it 'must have been the person' who did it. This assumes facts are established. With this type is evidence, we saw this, so therefore that must have happened.

PROOF PYRAMID

- Source
- Cause of action
- Elements of the action
- Material facts for each element
- Evidence of each fact

VOIR DIRE

[*EA* s 189]: This is essentially a trial within a trial; it is a hearing to determine the admissibility of evidence, or the competency of a witness or juror. As the subject matter of the voir dire often relates to evidence, competence or other matters that may lead to bias on behalf of the jury, the jury may be removed from the court for the voir dire.

In *Banjima People v State of Western Australia* [2011] FCA 1454; 200 FCR 138, Barker J of the Federal Court agreed with the approach taken by Austin J in *Rich* at [20] *Australian Securities & Investments Commission v Rich* (2004) 51 ACSR 363, that evidence on a voir dire in a civil proceeding without a jury is, when taken, evidence in the proceeding, unless some order is made qualifying its status or significance under s 135 or s 136 of the *Evidence Act* 1995.

Examination In-Chief: An examination by a lawyer of their own witness, whereby the lawyer is permitted to ask open, non-leading questions.

Leading question [*EA* (NSW) Dictionary]: A question asked of a witness that—
(a) Directly or indirectly suggests a particular answer to the question, or
(b) Assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence, of which the witness has not given evidence before the question is asked.

WEEK 2: ADDUCING EVIDENCE – WITNESSES

26 Court's control over questioning of witnesses
The court may make such orders as it considers just in relation to:
(a) the way in which witnesses are to be questioned, and
(b) the production and use of documents and things in connection with the questioning of witnesses, and
(c) the order in which parties may question a witness, and
(d) the presence and behaviour of any person in connection with the questioning of witnesses.

"Witness" is defined in the dictionary under the Act as: A party giving evidence, which includes a defendant in a criminal proceeding.

CALLING A WITNESS BY THE COURT

In *Sharp v Rangott* [2008] FCAFC 45, Besanko J (at [48]) observed that the powers conferred by s 26 extend only to those persons who have been called to give evidence by a party or by the judge in the exercise of power at general law or under another statute. Under the traditional common law approach, as a general rule, the parties alone call evidence [*Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 567–568 per Powell J].

In criminal proceedings, the trial judge may only call a witness in the most exceptional circumstances [*R v Apostilides* (1984) 154 CLR 563]. Thus, in *Sharp v Rangott*, Besanko J: "It was correctly accepted by the parties that at common law the exercise of the power is reserved only for the most exceptional cases and that it would be regarded as highly unusual for a judge to call a witness in a proceeding".

MANNER OF QUESTIONING A WITNESS

Ryan J: "It is the trial judge's duty to ensure all parties have a fair trial. Most relevantly, the trial judge must so exercise his [or her] discretion in and about the examination and cross examination of witnesses so that a fair trial is assured" [*LGM v CAM* [2008] FamCA 185 at [199]].

There is a rule of practice, designed to prevent oppression of witnesses, preventing two counsel from cross-examining the one witness, although the common law rule is subject to reasonable exceptions [*Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125, 273 ALR 601 at [44]–[45]].

In an appropriate case, a court might permit witnesses to stand or sit as a group while testifying, and might permit those members of a group who are to testify all to be sworn at the outset and counsel for the party who calls them to question them, switching from one to another, rather that questioning one witness to conclusion before questioning the next one [*Harrington-Smith v Western Australia* (2002) 121 FCR 82 per Lindgren J].

<u>Expert Evidence</u>
The FCA, Family Court, and NSWSC have imposed procedures relating to expert reports and evidence. Para 37 of the General Case Management Practice Note for the Common Law Division of the NSW Supreme Court provides: "All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner" [see: *Halverson v Dobler* [2006] NSWSC 1307].

27 Parties may question witnesses

A party may question any witness, except as provided by this Act.

Questioning by Court

Under common law principles, as a general rule it is for the parties to question witnesses and the judge asks questions only to remove apparent ambiguities [*Galea v Galea* (1990) 19 NSWLR 263 at 280–282 per Kirby ACJ].

Questioning by Members of Jury

This provision says nothing in regard to the questioning of a witness by a member of the jury. Nevertheless, the existing common law position is that such is undesirable [*Lo Presti v The Queen* (1994) 68 ALJR 477.

28 Order of examination in chief, cross-examination and re-examination

Unless the court otherwise directs:

(a) cross-examination of a witness is not to take place before the examination in chief of the witness, and

(b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

Affidavits and Written Statements

Given s 37(3), a witness may by way of affidavit, swear to or affirm the truth of a previous statement exhibited to the affidavit or to the truth of a transcript of a previous interview so exhibited [*Alfred v Lanscar* [2007] FCA 833]. Of course, it is equally clear that a court may refuse to receive affidavit evidence and require evidence in-chief to be given orally [*Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822].

29 Manner and form of questioning witnesses and their responses

(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

(2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

(3) Such a direction may include directions about the way in which evidence is to be given in that form.

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Except … as Directed by the Court [s 29(1)]

S 192 deals generally with the giving of directions and permits the court to give a direction "on such terms as the court thinks fit".

Narrative Form [s 29(2)]

"Narrative Form" refers to the situation where a witness stands in the witness box and speaks without being questioned [*LMI A/asia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31 per Barrett J]. However, the ultimate formulation of s 29(2) prior to amendment did not reflect the intentions of the ALRC since evidence could only be given in narrative form if the party that called the witness has applied to the court for a direction permitting it. In ALRC 102 (paras 5.32–5.34): "Should the process of giving evidence in narrative form result in undue delat or inadmissible evidence being given, a judge has sufficient powers under ss 135 and 136