

Evidence Notes

Ordinary answer skeleton

To weave in authority (case and legislation):

- ___ is authority for the proposition that ___. In these circumstances therefore _____.
- _____ is authority that there is justification for a _____.
- - 'the application of s__ will result in _____'

When using case law, consider:

- Does the case apply? Are the facts sufficiently similar or can it be distinguished?
- What is the ratio of the case? Is it binding precedent or just persuasive?
- Why is the current scenario similar to justify applying the case?

If missing facts, ensure to state that! State what facts would be required for a more robust analysis.

1. Note the different parties:
 - a. *If Civil: Possible plaintiffs and defendants*
 - b. *If Criminal: The possible accused, co-accused, victims and witnesses*
2. Note the possible charges/causes of action – *this will inform what the material facts are.*
3. Consider the jurisdiction of the dispute:
 - a. What Court?
 - i. Is it a Common Law or UEA jurisdiction?
 1. This Act applies in Federal courts around Australian and in ACT courts by virtue of s 4.
 - b. Is it Civil or Criminal?
 - i. *Note proof:*
 1. If criminal: the jury or a single judge will be the determiner of fact, and the judge will be the determiner of law: *R v Williams*
 - a. Accused can apply for a trial by judge alone under section 7 *Juries Act 1927 (SA)*
 2. If civil: the determiner of fact and law will be the judge.
 - ii. *Voir Dire disputes:*
 1. UEA 189(2) If there is a jury, a question whether:
 - a. (a) evidence should be admitted; or
 - b. (b) evidence can be used against a person; or
 - c. c) a witness is competent or compellable is to be heard and determined in the jury's absence.
 2. 142(1) The standard of proof in determining whether evidence should be admitted is the balance of probabilities
 - a. 2) Court may take into account –
 - i. (a) importance of the evidence in the proceeding; and
 - ii. (b) gravity of the matters alleged in relation to the question
4. ***What is the evidence:**
 - a. Testimonial
 - i. Is witness compellable and competent?

1. Sworn or unsworn testimony?
 - a. See SAEA ss 6, 9.
 - b. See UEA ss 12, 13
 2. Consider right to silence (*also note directions that must be given: Azzopardi and s 12 SAEA (for uncorroborated child evidence)*). :
 - a. For accused: SAEA s 18, UEA s 17
 - b. For Close relative of accused: SAEA s 21, UEA s 18
 3. Note overall discretion for Court to exclude unreliable testimony: *R v Zenes; R v Horsfall*
- ii. Consider if the person is a protected witness in SA:
 1. Young Children: s 12 SAEA
 2. Embarrassed: s 13 SAEA
 3. Vulnerable: ss 4, 13A SAEA
 4. Interpreter: s 14 SAEA
 5. *Also note the exception: ss 13A(11)(a)(i) and (ii)(A) SAEA*
 - iii. Evidence must be given orally and from memory: *Heatherington*
 1. BUT, can proof: *R v Richardson*
 - a. Note effects of *Collaton* in SA and UEA s 34.
 2. BUT, can request witness uses *aide memoire*: *R v Da Silva* if SA and UEA s 32.
 3. *Also note process for tendering a document through examination – see below.*
 - iv. In-chief examination limits:
 1. No leadings questions (*Mooney* if SA; s 37(1) UEA).
 - a. UNLESS: forgetful or confused (*Neal, Regos and Morgan*)
 - b. UNLESS: hostile (*Vocisano* or UEA s 38(1)).
 - v. Consider broad limits on examination.
 1. If prior consistent statement – *prima facie* inadmissible (s 59 UEA or *Corke* if SA).
 - a. Note: hearsay exceptions
 - b. Note: Bolster rule exceptions
 2. Note: Case-Splitting Rule (*R v Chin*)
 - a. *Note consequences – see below*
 3. Note: *Browne v Dunn* rule (or s 46 UEA)
 - a. *Note consequences – see below*
 4. Note: Credibility Rule
 - a. See s 102 UEA or *Goldsmith* if SA.
 - b. Apply exceptions – *see below.*
 5. NO vexatious, inappropriate, misleading or confusing questions: see SAEA s 25 or UEA s 41.
- b. Real
 - i. Document
 1. Note UEA Dictionary or s 4 AIA (SA) definition.
 2. Has it been authenticated?
 - a. SA: *R v Robson*
 - b. UEA: ss 56(1), 57(1) and 58 AND *NAB v Rusu*
 - c. Also note exceptions – *see below*
 3. Does the Best Evidence Rule Apply?
 - a. *Semple v Noble* if SA and ss 51 and 48(1) UEA
 - ii. Demonstration – *see below*
 - iii. Charts and Plans – *see below*

- iv. Objects – *see below*
- v. Views – *see below*
- c. Out of court statement (hearsay or original purpose)
 - i. Note: bolster rule.
- 5. ***How is it relevant?**
 - a. See ss 55 and 56 UEA OR *Haddara v R; Smith v R*.
 - b. Consider what the Material Facts are: *this will inform how pieces of evidence are relevant!*
 - c. Does it go to credit, or issue?
 - i. Note that credibility evidence relating to character of Defendant Witness in criminal trial is restricted, → *See below, The Shield*
- 6. ***Is it admissible?**
 - a. Opinion
 - i. *Prima facie* inadmissible (*UEA s 76 or Clarke v Ryan* if SA).
 - ii. EXCEPTION 1: lay person observational inferences (*Sherrard v Jacobs* or *UEA s 78*).
 - iii. EXCEPTION 2: Expert testimony
 - 1. If SA: per *R v Bonython and Clarke*
 - a. Does the fact finder need assistance?
 - b. Can the expert provide the assistance?
 - c. On what facts is the opinion based?
 - 2. If UEA: s 79(1)
 - a. The expert must have specialised knowledge based on their training, study or experience; and
 - b. The opinion must be wholly or substantially based on that specialised knowledge.
 - b. Hearsay
 - i. *Prima facie* inadmissible to prove truth of statement: *Subramanian* if SA or s 59(1) UEA
 - 1. Is it a hearsay use, or original use? – *See table below*
 - a. Statement containing an express assertion
 - b. Statement containing an implied assertion
 - c. Statement containing a contemporaneous assertion or intention or state of mind
 - d. Conduct containing express or implied assertions
 - e. Contemporaneous assertions of physical health and sensation
 - f. *Res Gestae*
 - 2. If hearsay use, consider exceptions:
 - a. SA:
 - i. *Res Gestae*
 - ii. Telephone
 - iii. Statements made by person since deceased
 - iv. Admissions
 - v. Statutory exceptions – *see table below*
 - b. UEA:
 - i. CIVIL: maker unavailable (s 63) or maker unavailable (s 64)
 - ii. CRIMINAL: maker unavailable (s 65), maker available (s 66), or testimony given in prior proceedings (s 65)
 - iii. BOTH: - *see table below*

- c. Confessions – *first see if confession will be inadmissible as hearsay (above)*
 - i. Consider right to silence *before* and *during* trial.
 - ii. Is the evidence actually a confession? See s 34 SAEA
 - 1. Did the maker have personal knowledge of the facts?
 - 2. Who is the confession against?
 - 3. Was it voluntary?
 - d. Discreditable Conduct Evidence (defined in s 34P(1) SAEA)
 - i. *Prima facie* inadmissible under s 34P(2).
 - ii. EXCEPTION 1: A non-propensity use (apply *only* s 34P(2)(a) test)
 - 1. *Res Gestae*
 - 2. To show background/context/credibility of complainant
 - 3. To explain relationship between parties
 - 4. To show motive or intention
 - iii. EXCEPTION 2: A particular propensity use (apply *both* s 34P(2)(a) AND (b))
 - 1. To show identify of offender
 - 2. To show propensity to or previous commission of crime
 - 3. To show previous similar fact reasoning
 - iv. Note:
 - 1. Required jury direction (s 34R)
 - 2. The notice requirements (s 34P(4))
 - 3. That s 34S overrules *Pfenning* and *Hoch*
 - 4. The potential for separate charges to be laid or separate trials for co-accused (s 34T)
 - e. Good Character – *the Shield*
 - i. Per s 18(1)(d) SAEA this is a limit on the Prosecution’s cross-examination of the accused. CANNOT ask questions that show accused is of bad character!
 - 1. If accused has *not* given evidence in-chief, then will not be an issue.
 - a. Note s 18(1)(b) and right to silence.
 - 2. EXCEPTION 1: s 18(1)(d)(i) SAEA
 - a. That the evidence to be elicited by the question is admissible as tending to show that he is guilty or not guilty of the offence with which he is charged
 - 3. EXCEPTION 2: s 18(1)(d)(ii) SAEA
 - a. The accused has acted purposively to put his or her character in issue
 - 4. EXCEPTION 3: s 18(1)(d)(iii), (2)(a) and (3) SAEA
 - a. The accused has gratuitously attacked the prosecution’s case or witness.
 - 5. EXCEPTION 4: s 18(1)(d)(iv) SAEA
 - a. The defendant has testified against a co-accused.
 - ii. Note: leave is always required from the judge for the prosecution to cross-examine the accused under one of the above exceptions (*Phillips v R*).
 - iii. Note: *the directions that the judge must give if the accused has raised evidence of his or her good character* – see below.
7. If inadmissible, is there another way to get the evidence in?
 - a. Judicial Notice
 - i. See UEA ss 143, 144, or 190(3).
 - ii. See SAEA ss 35(1), 64 or 59J(1); *Artugrul*
 - iii. If process of formal proof is dispensed with NOT in the interests of justice, it is an appealable error: *Trueman v DPP (Cth)*.
 - b. Judge’s discretion to examine witnesses

- i. Civil courts may be proactive in this regard: *Sharp v Rangott*
 - ii. Civil courts can call witnesses in exceptional circumstances: *Apostilides v R*
 - iii. Court's power to issue directions may facilitate this:
 - 1. ss 10, 117 SCR OR s 26 UEA.
- 8. ***If admissible, should the evidence nonetheless be excluded?**
 - a. Fairness discretion: *Christie*
 - b. Public Policy: *Bunning v Cross*
 - c. Integrity discretion: *Swaffield*
 - i. **will be particularly relevant for a confession*
- 9. ***If admitted, are there any jury directions required?**
- 10. Now all evidence has been determined, can the plaintiff/prosecution prove their cases to the requisite standard?
 - a. *Note burdens of proof:*
 - i. If criminal: the Prosecution has the Burden of proving its case Beyond Reasonable Doubt. However, if the Defendant raises a defence, it must prove that on the balance of probabilities and it will be disproved by the Prosecution on Beyond Reasonable Doubt (*Woolmington v DPP*; s 141 UEA)
 - 1. The accused will bear the burden for exceptions and provisos to offences: *R v Jarvis*
 - 2. The accused will bear the burden if matters are within their knowledge: *R v Turner*.
 - ii. If civil: The Plaintiff has the Burden of proving its case on the Balance of Probabilities (*Brigenshaw*; s 140 UEA)
 - b. ***No Case to Answer Submission**
 - i. See *Bilick; Starke* and *May v O'Sullivan*
 - ii. No election – if a judge fails to consider this submission, it could constitute an error of law and be appealable.
 - c. ***Sufficiency Submission**
 - i. See *Prasad*
 - ii. Court has discretion to entertain this submission – defendant must elect whether to give evidence (*Protean Holdings v American Home Insurance*).
- 11. Could a party **appeal** the decision? – *if criminal in SA*
 - a. An appellate court must allow an appeal if, per s 353(1) CLCA –
 - i. (1) There has been a wrong decision on a question of law (substantive or procedural); or
 - ii. (2) There has been a Miscarriage of Justice; or
 - 1. A Miscarriage of Justice will occur if: the accused deprived of real chance of acquittal (*TKWJ v R*)
 - 2. BUT *Weiss v R* warns against substituting such expressions for statutory language
 - iii. (3) The jury's verdict is unreasonable or cannot be supported by the evidence
 - 3. E.g. jury received inadmissible evidence or was inadequately directed
 - b. BUT NOTE: An appeal may nonetheless be dismissed under the **proviso**
 - i. On the basis that there has been **no substantial** Miscarriage of Justice
 - ii. This requires the court to consider whether the record proves the case Beyond Reasonable Doubt AND there has been no fundamental procedural error (*Weiss v R*)
 - c. *If relevant – depending on who advising:*
 - i. The DPP –

1. Can appeal acquittal where trial was before judge alone
 2. Cannot appeal verdict of acquittal by jury
 - a. Can appeal on a question of law but, even if successful, acquittal stands (s 350(4) CLCA)
 - ii. Both parties –
 1. Can appeal cases tried on complaint before a Magistrate (s 42 MC Act)
- d. EXAMPLES:
- i. Unjust judicial notice: *Trueman v DPP (Cth)*
 - ii. Failure to consider 'No Case to Answer' Submission: *Bilick; Starke and May v O'Sullivan*
 - iii. Failure to give jury direction for credibility of sexual assault victim evidence under s 34M(4).
 - iv. Breach of the case splitting rule if prejudice is shown: *R v Chin*
 - v. Unreliable evidence has been put to the fact finder
 - vi. Uncorroborated witness testimony has been put to the fact finder
 - vii. A corroboration warning required by law has not been given: *Jenkins*
 - viii. A corroboration warning required by practice has not been given, AND this failure has produced a miscarriage of justice: *AG v Casey (No 2)*

Establishing the Case & Scope of Proof

1a. What is the Evidence?

1. Name it!
 - a. Testimonial
 - b. Non-testimonial
 - i. Documentary
 - ii. Real
2. *NOTE:*
 - a. Evidence may go to issue or credit, and may be probative in a number of ways
 - i. Note that credibility evidence relating to character of Defendant Witness in criminal trial is restricted, → *See below, The Shield*
 - b. Direct evidence - evidence addressing the fact in issue through direct observation
 - c. Indirect evidence - evidence addressing the fact in issue, but not directly observed and depends on the credibility of the testimony
 - d. Circumstantial/cumulative evidence - evidence which on its own cannot prove a fact in issue, but can when combined with other evidence tend to prove a fact in issue

1b. Consider: what are the material facts?

1. Material facts:
 - a. A fact is in issue when it is disputed by the parties
 - i. A plea of not guilty puts all material facts in issue (*R v Sims*)
 1. In criminal cases, the charge must give particulars and the prosecutor will outline the material facts in their opening submission: *S v R*
 2. In civil cases, the material facts must be precisely pleaded.
 - ii. D in criminal trial may narrow the scope of his defence for tactical purposes through formal admission
 1. *UEA s 184(1)* - D may admit facts (a), or give consent (b).
 - a. Only effective if done on counsel's advice (2)(a), or the court is satisfied D understands the consequences of the admission or consent (2)(b)
 2. *SAEA s 34* - an admission constitutes proof of facts without evidence, made either personally by D or by counsel in D's presence
 - iii. In SA P may serve a notice to admit facts on D charged on information - *Criminal Law Consolidation Act 1935 s 285BA(1)*
 1. Unreasonable failure to admit may be taken into account in sentencing - *s 285BA(6)*
 - a. Not unreasonable not to admit facts tending to incriminate, D retains the privilege against self-incrimination - *s 285BA(4)*
 - b. However will be unreasonable if privilege claimed over facts that are then not tested at trial, unnecessarily puts P to proof - *s 285BA(7)(a) and (b)*
 2. Restrictions
 - a. Must not serve on unrepresented D without leave - *s 285BA(2)*
 - b. Must include time for response (*s 285BA(3)(a)*) and warning about sentencing (*s 285BA(3)(b)*)