Week 1: Introduction & Overview of Litigation Systems

How do we best determine the facts of the case? How do we accept evidence?
The facts of the case are simply what the court determines them to be.
It is possible none of the parties involved are convinced by these facts so decided.

Sources of law

Evidence law is mainly drawn from the common law and the Evidence Acts.

1. General law (common law and equity) — the common law is based on the inherent and implied jurisdiction of the superior courts to regulate their own processes to provide for fair trial and avoid abuse of process.
2. *Evidence Act 1995* (NSW) — The Uniform Evidence Acts have been adopted by most Australian states and are mostly uniform. The Commonwealth Evidence Act applies in Federal Court proceedings across **all** states, regardless of whether they have also adopted the Uniform Scheme.
3. Uniform Evidence scheme — The Evidence Legislation was established at a Commonwealth level to provide a framework for uniform evidence law across Australia. They were drafted in response to recommendations by the ALRC. The Uniform legislation is not a code. It is a series of statutes which sometimes repeal the common law in specific areas, however the common law continues to apply in other specific areas.

- S9 — <u>Application of common law and equity</u>
  - The State and Territory evidence acts include s 9 to clarify that the Act does not remove the operation of common law except where it expressly declares it. The Commonwealth Act does not specify such inclusion.

Procedural v Substantive Law

- There is discussion about the extent to which evidence law is procedural or substantive law.
- Substantive law is concerned with rights and responsibilities, and governs the way members of a society are to behave. Procedural law regulates the way in which substantive rights are enforced.
- Mason CJ referred to procedural law as the "rules which are directed to governing or regulating the mode of conduct of court proceedings".
- Substantive law is governed by the law of the place where the wrongful act occurred, whereas procedural law is governed by the law of the court in which the matter is heard.
- This is important where the act and the trial take place in different jurisdictions. For e.g., where a wrongful act occurs in QLD and trial takes place in NSW, the substantive law of QLD will b considered while NSW laws of evidence will also apply.

Adversarial v inquisitorial proceedings

The inquisitorial system is a product of the cviil law while the adversarial system is rooted in common law.

The civil law system originated from Roman law and is the legal system across most European countries.

Civil law is found in civil codes and statutes and is made up of a large number of laws that claim to cover the field. Common law, on the other hand, is made from case law as the cases arose.

Civil law is commonly seen as deductive top-down law, while common law is seen as inductive down-up law. Civil law produces extensive codes that seek to cover every topic that could arise, while common law starts from the bottom with actual facts of cases that then create principles and law.

<u>Procedural differences</u>

In adversarial systems, the judge is impartial and dispassionate.

In inquisitorial systems, judges are more involved and inquisitive. They seek and question the evidence.

The role of the parties is also different. In the adversarial system, the parties have a leading role in the way the proceedings develop.

In the adversarial system the parties are generally obliged to reveal evidence when ordered in discovery.

In inquisitorial system, discovery is a matter for the courts.

In the adversarial system, greater significance is attached to the trial - it is seen as the climax of the dispute resolution process. This emphasis on the trial has lead elaborate rules for the admissibility of evidence. It has also lead to greater reliance on legal professionals. It has importantly lead to greater reliance on oral evidence.

In the civil law systems, pre-trial and trial are more blurred.

In the civil system, oral evidence is not as common as depositions, witness statements, affidavits, etc.

What is evidence?

It is information that is available to the fact-finder to enable it to decide upon the facts of the dispute being heard.

Great care is taken to ensure that the right kind of information comes before the fact-finder, and that the wrong kind of information is dismissed.

The focus is on keeping evidence out unless it passes certain tests for admissibility.

Reasons for evidence law include:

- **Efficiency** - so that the courts are not burdened by a surplus of information.
- **Reliability** - so that the courts have only the best and most reliable evidence before them.

Week 3: Adducing Evidence I

Evidence Act, Chapter 2

- Adducing evidence is concerned with how evidence is brought before the court. It does not refer to the admissibility of evidence.
- Evidence must be adduced properly before it is admitted. However even if it is adduced properly, it may still be prohibited.
- The primary way to adduce evidence is through witnesses.

Witnesses

- The giving of evidence in court by natural persons in answer to questions put forward to them, even in the form of affidavits.
- There are three issues that should be taken into account in relation to witnesses:

1. Memory — humans have limited capacity to recollect things
2. Stereotypes and biases — some of the rules are designed to overcome any ingrained bias, e.g., putting too much emphasis on pressing witnesses. Juries tend to believe witnesses in uniform.
3. Assumptions about motives and relationships — some of the rules are based on the assumption that spouses/family will be bias if they give evidence.

Section 12 Competence and compellability

Except as otherwise provided by this Act:
(a) every person is competent to give evidence, and
(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

- To be competent means a person may be called to give evidence because they have that capacity.
- To be compellable means to be obliged to give evidence.
- The default is therefore that everyone is deemed to be competent.
- Historically, not everyone was presumed to be competent.
  - Criminals, non-believers, spouses, children of the accused, mentally ill persons, and the accused themselves were not competent to give evidence.
  - Children were believed to be inherently less reliable
  - The common law test for competence was based on the ability to understand the significance of taking an oath. This meant swearing an oath to a god. An oath was seen as a guarantee against fabricating evidence.
  - The common law position in Australia is that a witness is competent to give sworn evidence if they understand and appreciate the obligation to tell the truth in court proceedings — they must know the difference between right and wrong.

- Sworn evidence is seen to be more reliable and has greater weight. The judge may declare that evidence is unsworn.

- This common law position was proved wrong through research, particularly the idea that children do not know right from wrong.
- When the Evidence Act was introduced there was a move away from the common law position. The Act introduced an intellectual capacity test is s 13.

13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
(a) the person **does not have the capacity to understand a question** about the fact, or
(b) the person **does not have the capacity to give an answer** that can be understood to a question about the fact, and that incapacity **cannot be overcome**.
(2) A person who, because of subsection (1), is not competent to give evidence about a fact **may be competent to give evidence about other facts**.
(3) A person who is competent to give evidence about a fact is not competent to give **sworn evidence** about the fact if the person does not have **the capacity to understand that,** in giving evidence, **he or she is under an obligation to give truthful evidence**.

- Section 13 is mainly aimed at overcoming any intellectual incapacity that a person may have in being a witness.
- A witness is competent to give sworn evidence if they have the capacity to understand that in giving evidence they are under an obligation to give truthful evidence. (This is usually decided in a voir dire).

Week 6: Hearsay Evidence I

- The hearsay rule is an exclusionary rule which excludes the admissibility of evidence that is of a hearsay quality.
- It arises where the evidence is a past representation made by a person out of court.

Part 3.2 Evidence Act 1995

- "Thou speakest by hearesaye, rather than by anye experience." (Edward Hellowes)

Meaning

- Witnesses who speak hearsay are generally only repeating what they heard someone else say, rather than reporting what they themselves observed or experienced.

Elements of Hearsay Evidence

- An out-of-court statement (oral, written or by conduct) made by a person who may or may not be called as a witness
- tendered by a party during proceedings (either through the person who made the statement, or another witness or through a document)
- for the purpose of establishing that what is contained in the statement is true.

Giving evidence about events in the past

Through statements in court

- The witness may swear an oath or affirmation, give evidence in chief and then be subjected to cross-examination.

Through statements out of court

- If the court hears about statements made or acts done by the witness in the past in this way, this limits the ability of the fact finder to test the accuracy and honesty of that witness.

The hearsay rule:

- treats hearsay evidence as prima facie **inadmissible**
- has exceptions to the rule where the evidence is seen as very **reliable** and essential to the case.

The uniform legislation:

- narrows the definition of hearsay evidence
- increases the scope of the exceptions (especially in civil proceedings)
- increases the scope of the judicial warnings about hearsay evidence

Rationale of the rule against hearsay

- Out of court statements are usually not on oath
- There is usually an absence of testing by cross-examination
- The evidence might not be the best evidence
- There are dangers of inaccuracy in repetition
- There is a risk of fabrication
- To admit hearsay evidence can add to the time and cost of litigation
- To admit hearsay evidence can unfairly catch the opposing party by surprise.

Arguments for abolishing the rule

- Oral testimony is subject to the 'testimonial infirmities'
- Evidence is often adversely affected by adversarial proceedings
- Behaviour in court is not a reliable measure of accuracy
- Spontaneous and genuine comments out of court are often good indicators of the truth

59 The hearsay rule – exclusion of hearsay evidence

- Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.