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Basic Evidentiary Concepts

Admissibility

- When evidence is ‘admissible’, it is allowed to be used by the fact-finder to determine the case

Fact in Issue

- That which must be found to exist before a party can succeed in the proceedings and which are not conceded by the opposing party
 - In criminal trials, the issues are expressed in terms of the elements of the offence
- Ultimate fact in issue is called the ‘probandum’

Weight

- Persuasive effect of the relevant evidence once admitted on the ‘probandum’
- Considerations of weight bear on the extent to which the fact-finder (usually the jury) would be likely to give effect to the evidence in determining the ultimate issue

Probative Value

- Defined as “extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”: s 3
- Restrictive approach to circumstances in which issues of reliability and credibility are taken into account in determining the probative value and questions of admissibility
- Focus is on the capability of the evidence to influence decision; not what the jury is likely to conclude: *R v Shamouil* (2006) 66 NSWLR 228

Relevance

- Evidence which tends to show the existence of the fact or proposition
- Any relevant evidence which is not otherwise excluded by an exclusionary rule, by exercise of judicial discretion or procedural provision, is ‘admissible’: s 56 EA
 - Importantly, evidence may be relevant for one purpose, but not for another
 - Court asks what “use” they are invited make of the evidence by the party tendering?
 - If the evidence is relevant for that particular use, then it is admissible
- Whether something is relevant, is whether it ‘could’ rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding: s 55 EA
 - ALRC commented that this is determined by reference to the facts ultimately sought to be proved and requires some form of ‘minimal logical connection’
- To pass the s 55 EA relevance test, evidence need not render the fact probable or improbable, only render it *more probable or less probable*
 - “if evidence is of some albeit slight probative value then it is admissible unless some principle of exclusion comes into play... it is not enough to say it is weak”: *Festa v The Queen* [2001] HCA 7, Gleeson CJ
- Furthermore, “logically” relevant evidence is admissible unless excluded by an exclusionary rule of evidence and subject to judicial discretion: s 135 EA
- Evidence may also be ‘provisionally relevant’, that is, where relevance of proffered item depends upon proof of another fact (the ‘finding’)
 - The evidence is provisionally relevant if it ‘reasonably open to make that finding’: s 57 EA

Exclusion of Evidence

Mandatory and Discretionary Exclusion of Evidence

Section 135 Discretion

- Confers on the trial judge a discretion to exclude evidence otherwise admissible in both criminal and civil matters if the evidence might:
 - Be unfairly prejudicial: s 135(a)
 - Be misleading or confusing: s 135(b)
 - Cause or result in undue waste of time: s 135(c)
- Discretion comes from the common law concept of sufficient relevance
- Court required to balance probative value of evidence against the “dangers” in (a)-(c)
 - These must substantially outweigh the probative value
 - Heavy onus on party seeking exclusion
 - If the evidence is unfairly prejudicial, misleading or confusing, but does not outweigh the probative value, the evidence may be ‘limited’ under s 136
 - Jury must be warned of evidence that is admissible in one aspect of the case but not to be considered in another
- ‘Unfairly prejudicial’ is the danger that the fact-finder may use evidence on an improper (perhaps emotional) basis logically unconnected with the issues
 - Current judicial approach is that it is “damage to the accused’s case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have”: *R v Lisoff* [1999] NSWCCA 364
 - Requires ‘real risk of unfair prejudice’, not just ‘mere possibility’: *Lisoff*
 - Ambiguity does not equate to ‘unfair prejudice’: *R v SJRC* [2007] NSWCCA 142
 - There may be ‘unfair prejudice’ in procedural considerations
 - eg. inability to cross-examine a witness: *Galvin v R* [2006] NSWCCA 66
- Dangers in s 135 discretion:
 - Evidence may be excluded if it is ‘misleading or confusing’: s 135(b)
 - However, evidence may not be misleading in itself, but misleading because it is not presented in a way that is sufficiently clear to the jury: *GK* (2001) 53 NSWLR 317
 - This would be difficult to prevent using this rule
 - Crosses with (a), in that the way evidence is presented may lead to jury attaching greater weight than is capable of bearing (eg. it is science so it’s definitely right!): *Aytugtul v The Queen* [2012] HCA 15
 - Tribunal of fact may be misled by ‘incorrectly assessing the weight of the evidence’: *Reading v ABC* [2003] NSWSC 716
 - Danger of confusion
 - Exclude evidence that presents only part of relevant picture, distorting true situation
 - Exclude evidence that may be ambiguous and invite speculation as to its meaning: *R v SJRC* [2007] NSWCCA 142
 - Exclude evidence which causes or results in undue waste of time: s 135(c)
 - Only in extreme circumstances, adding complexity without assisting resolution of facts

The Hearsay Rule

Overview

- At common law, evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay
 - It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement: *Subramanian v Public Prosecutor* [1956] 1 WLR 965
 - In this case, the defendant wanted to plead duress and give evidence about terrorist threats made to him
 - The evidence was permitted on the basis that it was tendered to prove that the threats were made, and the effect they had on the defendant, not that the threats were true
 - It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made: *Subramanian*
- Now found in s 59(1) EA:
 - “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”
- There are two relevant questions to consider:
 - Is the evidence of a previous representation adduced by a party to prove the existence of a fact asserted by the representation? In other words, does it have a testimonial purpose?
 - Where the answer is yes, then the evidence won’t be caught by the hearsay rule as it is adduced for an ‘original’ purpose
 - Importantly the party must still establish the evidence is relevant and otherwise admissible for the non-hearsay purpose
 - This may include previous representations to prove consistency or inconsistency with another witness’ in-court testimony, and may bear on witness credibility
 - Can it reasonably be supposed that the person who made the representation (declarant) intended to assert the existence of that fact?
 - Express assertions
 - Oral, written and non-verbal gestures intended to state that something is so
 - Implied assertions
 - Implication from statements or conduct
 - There can be complexity in the application of this rule where the assertions were unintended: *R v Hannes* [2000] NSWCCA 503
 - For the purposes of determining whether it can be reasonably be supposed that a person intended to assert a fact, the court may have regard to all the circumstances in which the representation was made: s 59(2A)
- When dealing with the hearsay rule:
 - First, identify the disputed fact(s) you are seeking to prove or disprove with the out-of-court assertion in question (whether it be an express or implied assertion)
 - Then, ask yourself whether the assertion would be probative in regard to the disputed fact(s), irrespective of whether the declarant was speaking truthfully?
 - If the answer is yes it is still probative, then the assertion is not being tendered for the truth of the facts asserted therein, and is not caught by the hearsay rule
 - If the answer is no it is not probative, then the opposite is true, and the assertion will be inadmissible unless it falls within a statutory hearsay exception
- Even when hearsay evidence is admitted, it may be subject to a warning under s 165 about the reliability of the evidence: *Biddel v Ervin* [2012] FMCAFAM 926

Exceptions to the Hearsay Rule

- All exceptions are dependent on competency
 - If the representor was not competent at the time the representation was made, then the representation will not be admissible: s 61 EA; *R v Baladjam [No 43] [2008] NSWSC 1461*

Non-Hearsay Purpose

- Section 60 of the Evidence Act is probably the most ill-conceived provision of the entire Act. It reads as follows:
 - “The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation”
- The effect of s 60 is that if a representation (statement) is admitted into evidence for a non-hearsay purpose, it then becomes relevant for all purposes, including the truth of the statement
 - This is contrary to common law, where when evidence of a previous representation is admitted for a non-hearsay purpose, it can only be used for that purpose
- This exception does not apply in criminal proceedings to evidence of an admission: s 60(3)
- Examples of original purposes:
 - Evidence of the basis of an expert's opinion: *Welsh v R* (1996) 90 A Crim R 364
 - In *Welsh*, statements made to a psychiatrist by the defendant were admitted for the non-hearsay purpose of providing the basis for her opinion as an expert witness
 - Representations which are admissible because they formed part of conversations which were relevant to prove the making of an agreement for sale: *R v Macrauld* (unrep, 18/12/97, NSWCCA)
 - Evidence of a prior consistent statement: *R v Singh-Bal* (1997) 92 A Crim R 397; *R v H* (1997) 92 A Crim R 168
 - Evidence of prior consistent statements of a witness, may be admitted under s 64 (in civil proceedings), under s 66 (in criminal proceedings) and under s 108
 - At common law, evidence of ‘complaint’ was admissible only in very confined circumstances, and evidence of complaint could not be used as evidence that the complaint was true, but only to bolster the credit of the witness: *Kilby v The Queen* (1973) 129 CLR 460
 - By operation of s 60, evidence admitted under ss 64, 66, 108 is evidence of the fact: *Regina v BD* (1997) 94 A Crim R 131; *Papakosmas v The Queen* (1999) 196 CLR 297
 - Subject of course to judicial discretion to limit the use of the evidence: s 136
 - For PCS evidence relevant for a credibility purpose, to be used as hearsay (evidence of the fact), it must first be admissible for another purpose, such as s 103, OR it must fall within a hearsay exception: *Leung v The Queen* [2003] NSWCCA 51
 - This is because s 60 cannot apply to evidence that hasn't been admitted: s 101A
 - It should be noted that there is a line of authority to the effect that an actual attack must be made on credibility, it cannot simply be put to a witness that the assertions made by the witness are incorrect
 - If no actual attacks on credibility are made, s 108 will not be triggered and prior consistent statements will not be admitted: *Regina v Whitmore* (1999) 109 A Crim R 51; *Regina v DWH* [1999] NSWCCA 255
 - Evidence of a prior inconsistent statement: *Lee v The Queen* (1998) 195 CLR 594
 - Evidence of prior inconsistent statements of a witness are admissible:
 - Where the statements emerged in the cross-examination of the witness by the party opposing the party who called the witness, or