

EVIDENCE EXAM NOTES

LAWS5107

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2 OVERVIEW

2.1 (1) IS THE EVIDENCE RELEVANT?

2.2 (2) IS THE EVIDENCE ABLE TO BE GIVEN?

- If oral testimony - competent and compellable?
- If documentary evidence - authenticated?
- If real evidence - variables

2.3 (3) EXCLUSIONARY RULES OF EVIDENCE

- Hearsay Evidence
 - o Exception is confessions and admissions
- Opinion Evidence
 - o Exception is ID evidence
- Similar Fact Evidence

2.4 (4) DISCRETION TO EXCLUDE

- *Christie*
- *Lee*
- *Bunning*

2.5 (5) WARNINGS GIVEN NATURE OF EVIDENCE

- Corroboration Warning?
- Domican Warning?
- Admissions (*Edwards*)

2.6 (6) WEIGHT TO BE GIVEN TO EVIDENCE?

2.7 (7) PRINCIPLES FOR COURT OF APPEAL - MISCARRIAGE OF JUSTICE

- If a party appeals on the basis that a discretion was wrongly exercised, the CoA must identify an error that creates a miscarriage of justice (*Australian Coal and Shale Employees*)
 - o **Strong presumption in favour of TJ's decision** (advantage of seeing witness/facts) (*Australian Coal*)
 - o Verdict cannot be overturned because CoA would have exercised a discretion differently (*In the Marriage of Richards*)
 - Discretion will not be overturned unless it is obviously wrong.
- **s30 Criminal Appeal Act** - CoA must allow appeal where:
 - o **(3)(a)** - verdict is unreasonable or cannot be supported
 - Decision was made on the basis of a mistake about the facts of case
 - o **(3)(b)** - there was a wrong decision on a question of law
 - If wrong principles are applied
 - If TJ gave weight to matters irrelevant to discretion or ignored relevant matters
 - o **(3)(c)** - A miscarriage of justice
 - o **(4)** CoA may dismiss appeal where there is no substantial miscarriage of justice (cost the accused a fair chance of being acquitted)

3 RELEVANCE AND ADMISSIBILITY, BURDEN AND STANDARD OF PROOF

3.1 ADMISSIBILITY FRAMEWORK

- There are three levels of inquiry to be made to determine whether material can be admitted as evidence:
 - o 1) the evi must be sufficiently/logically relevant and not too remote (**Hollingham**)
 - **ASSUME THAT ALL EVIDENCE IN THE FACTS ARE RELEVANT**
 - o 2) the evi must not offend any **exclusionary rule**.
 - o 3) the evi must not be excluded by a trial judge by **judicial discretion**.

3.2 RULE OF RELEVANCE

- **Smith; Hollingham**
 1. Only relevant material can be admitted
 2. All relevant material is, *prima facie*, admissible evidence unless excluded by other rules

3.2.1 FACTS IN ISSUE

- Facts that comprise the disputed elements
 - o doesn't include agreed facts
 - o includes material facts that constitute claimant's cause of action and any material facts providing defence/excuse/justification (McHugh J in **Goldsmith**)
- 2 types of facts in issue
 - o **Direct Facts** - Directly support/undermine the disputed element
 - E.g. A is charged with robbery. Witness saying "I saw him in ANZ pointing gun at teller" is a direct fact (going to the disputed element of ID/commission)
 - o **Circumstantial/Indirect Facts** - Facts from which an inference can be drawn that supports/undermines a disputed element
 - Fact that requires a further inference before it can prove an element
 - E.g. Witness saying "I saw him walking next to ANZ with a violin case" (requires inference that gun was in case)
- 2 kinds of evidence - 2 ways in which evidence can be relevant to either type of fact in issue
 - o **Directly Relevant** - Where a fact is directly observed/perceived (E.g. "I saw")
 - o **Indirectly Relevant (Collateral Evidence)** - Where fact bears on reliability of directly relevant evidence
 - Normally credibility evidence
 - E.g. Evidence that the witness was short-sighted

4 COMPETENCE AND COMPELLABILITY

4.1 STEP 1: INTRODUCTION

- → Generally, all witnesses are both competent and compellable for both parties (**Hoskyn**)
 - o **Competence** - A witness is competent if they may be lawfully called by a party to give evidence
 - o **Compellability** - A witness is compellable if they may be lawfully obliged to give evidence
- In exam do not talk about it for every W
 - o Only when child, mentally impaired, A giving evidence, spouse giving evidence

4.2 STEP 2: COMMENT ON MODE OF TAKING EVIDENCE

- →Evidence may be given by oath or affirmation ('sworn evidence') (**ss 97(1)**), or unsworn (**s100A(1)**).
- The fact a person has no religious belief does not affect the validity of the oath (**Oaths Act, s 4(2)**).

4.3 STEP 4: PROTECTIONS AVAILABLE FOR CHILDREN AND MENTALLY IMPAIRED PERSONS

4.3.1 (A) CHILDREN

- **Corroboration warning** (only if uncorroborated evidence)
 - No corroboration warning on evidence of children to be given simply because they are a child (**s 106D**)
 - No warning to be given simply because the child has given unsworn evidence (**GW**)
- **Support provisions**
 - (i) **Support person** next to them in proceedings (**s 106E**)
 - (ii) A '**communicator**' / interpreter (**s 106F**) whose role includes communicating/explaining to the child the questions asked of her, and the child's given evidence given to the court.
 - (iii) Not be **cross examined by unrepresented accused** [**s 106G**]
 - (iv) Give **EIC by pre-recorded video** [**ss 106HA(1), s 106HB(1)**]

4.3.2 (B) MENTALLY IMPAIRED WITNESSES

- There must be some kind of medical foundation for a judge to direct a jury to scrutinise a witness's evidence when they have *mental illness* (**Milton**)
- Support provisions:
 - Give evidence via visual recording (**s 106HB(1a)**)

5 LEGAL PROFESSIONAL PRIVILEGE

- LPP is the form of privilege that covers the communication (oral/documentary) between a lawyer and client.

5.1 STEP 1: IDENTIFY PRIVILEGE YOU'RE DEALING WITH HERE

- Here, the privilege of LPP may be potentially enlivened.

5.2 STEP 2: IS THIS A RELATIONSHIP WHICH LPP CAN ATTACH TO?

- **Relationship + communication**
 - o For LPP to exist, there needs to be:
 - 1) Lawyer-client relationship in existence; AND
 - 2) Communication needs to relate to that relationship (*Brookfield*)
 - o Consider:
 - Privilege can extend to situation before retainer signed and if retainer never signed (*Brookfield*)
 - Focus on substance- relationship at the time the doc was made (*Brookfield*)
 - Were they friends? Even so did the friend put lawyer hat on and answered request for legal advice (not high bar)?
 - *R v Williams* – no privilege because no lawyer/client relationship between a Legal Aid employee and a man because they did not meet or communicate in the lawyer/client relationship. They were introduced by a dating agency and communications did not centre around legal advice.
 - Was advice solicited?

6 OPINION EVIDENCE

- Evidence of fact is admissible (*Hollington*)
 - o Direct reporting of sensory experiences (observations are objective) eg I saw Sally get into the car vs I think she was driving fast
- **Opinion evidence is not admissible (exclusionary rule)**
 - o Conclusions drawn about sensory experience/beliefs
 - o Rationale - fact finder should be forming opinions on basis of facts
 - o **2 exceptions - expert and non-expert lay opinion**
- **Recall the 3-step approach**
 - o 1- Relevance
 - the material must be relevant to be evidence.
 - relevant evidence is prima facie admissible.
 - o 2 - Exclusionary rules
 - relevant evidence may nonetheless be inadmissible if it offends a rule.
 - opinion evidence is excluded by exclusionary rules
 - Unreliable. Not the best evidence.
 - Role of court not witnesses
 - o 3 - Discretion
 - TJ may exercise discretion to exclude otherwise admissible evidence.
 - Even if admitted, TJ may give direction to jury on how they should use the evidence

6.1 EXPERT OPINION

6.1.1 STEP 1) IDENTIFY MAIN ISSUE

- 1) The issue is whether [Dr X's] opinion is **admissible** because it is expert opinion, being an exception to the rule against opinion evidence (*Transport; Liyanage*)
 - o As otherwise the general rule against opinion will cause the witness's expressed opinion to be inadmissible (*Hollington*)

- 2) In order to be an expert opinion (following steps):
 - o **Examples – SUBJECT OF EXPERT opinion** (not ordinary human behaviour/ outside of lay person's everyday experience)
 - Child behaviour and development when **victim** of **sexual assault or trauma** (*HG v R*) (s 36BE EA- can admit even if it is a matter of common knowledge)
 - Identifying **person** from **CCTV footage** using expert knowledge/techniques (*Dastagir*)
 - **Facial mapping**
 - Identifying someone in **disguise**.
 - Identifying **handwriting/forged signatures**- requires forensic handwriting expert (per **Cross**)
 - A handwriting expert may give evidence on similarities and differences between a handwriting sample and disputed document, and give an opinion (*Mazzone*).
 - Examples of acceptable **medical evidence** include:
 - **Bruising** on health: *Armat*
 - **Battered wife syndrome**: *Liyanage*
 - Repressed **memory** syndrome: *Bartlett*
 - The effect of exposure to post-event information on witness memory (**PTSD**): *Dupas*
 - **Drug** addition: *Collins*
 - '**Mental retardation**': *Laurie*
 - The effects of **separation** from their parents: *Trevorrow*
 - The transmission of information to patient: *Australian Red Cross Society*
 - The **causation of wounds**: *Middleton*
 - The incidence of physical **injuries** arising out of **sexual assault**: *KAP*
 - Whether **wounds** are **self-inflicted**: *Anderson*
 - conduct of **mentally defective** persons: *Schultz*
 - persons suffering from **mental illness**: *Toohy*
 - severe **personality disorder**: *Ward*
 - persons under the **influence of drugs**: *Honner*
 - persons suffering from a **psychological state caused by stress**: *Whitbread*
 - by the phenomenon of "**coerced compliant confession**": *Blackburn*
 - psychiatrist's evidence of how a person not suffering from mental illness is likely to react to the stresses and strains of life has been rejected: *Weightman*

7 HEARSAY

7.1 STEP 1- IS THE STATEMENT RELEVANT?

- **RELEVANCE - Is it needed in sense that it is adding something more?**
- The opinion must be relevant material in that it renders the existence of a disputed fact (in elements of an offence/defence) more or less probable than it would have been if that evidence had not been heard (*Hollingham; Stephenson*)
 - o Common "facts in issue"
 - Identification of accused (offence)

- prove the commission of a crime- guilt
- Self-defence –
 - A held subjective belief that act was necessary to defend themselves, or
 - A had reasonable grounds for that belief.
- **APPLY →**
 - Here, [...] is relevant to the fact in issue of [...]. Thus, it is assumed [...] is relevant.

7.2 STEP 2- DOES THE MATERIAL MEET THE DEFINITION OF HEARSAY?

- The material will be hearsay and PM inadmissible if it is:
 - 1) An out of court assertion (express/implied) (oral, written, or by conduct)
 - 2) Maker of statement is not testifying to it.
 - 2) Purpose: Is the statement or assertion sought to be used as proof of the truth of the contents of the statement? (*Subramaniam*)

7.3 STEP 4A- STATUTORY EXCEPTIONS S79C -DOC EVIDENCE

- **When will a document be hearsay?**
 - A document will be 'hearsay' evidence where it is **admitted as proof of its contents without the oral testimony of the person who compiled it.**
- BUT there are exceptions for documentary evidence (**s79C**).
 - So you can admit them without oral testimony from the compiler.
- **s 79C**
 - **(1)** allows docs as proof of contents in some circs → may need to consider **(2)**
 - **(2a)** allows business records as proof of contents in some circs → maybe need to consider **(2b)**
 - **(3) s 79C** operates notwithstanding rule against hearsay (+ some other rules)
 - **(4)** restrictions on admissible docs in criminal proceedings
 - **(5)(6)** matters relevant to admission & discretion

7.3.1 1) CAN THE DOCUMENT BE ADMISSIBLE?

7.3.1.1 If the doc is made by a QUALIFIED person, admissible

7.3.1.1.1 Step 1) A DOCUMENT'S STATEMENT WILL BE ADMISSIBLE IF (s 79C(1)):

- **1) It is a statement (s 79B)**
- **2) In a document (s 79B)**
 - any book, map, plan, graph or drawing; and
 - any photograph; and
 - any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable of being reproduced therefrom; and
 - any film, negative, disc, tape, or other device in which one or more visual images are embodied so as to be capable of being reproduced therefrom.
 - **Markovina v The Queen** - information (computer diary about drug dealings) on a computer viewable only - computer was a document

8 PROPENSITY AND SIMILAR FACT EVIDENCE

8.1 WHAT IS PROPENSITY AND SFE?

- NB: **s8(1)(e)** sets out the shield and when shield will be lost
 - o **s8(1)(e)(i)** –A’s prior convictions are relevant to the charge.
 - BUT **S31A** has superseded this provision because prior convictions are relevant to the charge in SFE, but **s8(1)(e)(i)** limited to prior convictions. **S31A** is wider.
- **Propensity evidence** = any evidence which tends to show that a person is in the habit of acting a particular way
- **SFE**= evidence which tends to show guilt because of the factual similarities which exist between the evidence being tendered and the current situation
- Reasons: (**Pfennig**)
 - o creates **undue suspicion against the accused and undermines presumption of innocence**
 - o juries tend to assume that behavioural patterns are constant and **that past behaviour is an accurate guide to contemporary conduct**
 - o the facts of the other misconduct **may cause a jury to be biased** against the accused
 - o **Trials would be lengthened** and expense incurred
 - o **law enforcement officers might be tempted to rely on a suspect's antecedents** rather than investigating the facts of the matter
 - o **rehabilitation schemes might be undermined** if the accused's criminal record could be used in evidence against him

9 IDENTIFICATION EVIDENCE

9.1 STEP 1) IS THE ID EVIDENCE RELEVANT?

- The opinion is relevant as it renders the disputed fact of [the offender’s identity] more or less probable (**Hollingham; Stephenson**)
 - o Common “facts in issue”
 - Identification of accused

9.2 STEP 5: IF ADMITTED, IS A DOMICAN WARNING REQUIRED, AND IF SO, WHAT SHOULD IT COVER?

9.2.1 1) IS A DOMICAN WARNING REQUIRED?

- A **Domican warning** will be required for identification evidence (**Domican; Festa**) where:
 - o 1) ID evidence represents **a significant part of the prosecution’s case as proof of guilt**; and
 - If there’s a lot of other evidence, whereby the ID evidence is not that significant, **Domican warning** won’t be required.
 - o 2) **Reliability of the ID evidence is disputed** by the accused.

9.2.2 2) WHAT SHOULD THE DOMICAN COVER? GENERAL, SPECIFIC, AUTHORITY