THE UNIVERSITY OF ADELAIDE

LAW 3502: EVIDENCE AND ADVOCACY

SEMESTER 2, 2019

EXAM NOTES

CONTENTS

TOPIC 1: Evidence Foundations – The Jury and Relevance

Part 1 — The Jury

Who is the Jury?

- Juries for indictable offences
- Accused can elect trial by judge or jury in SA for indictable offences.
- Around 80% elect for jury in SA.
- 12 Men and/or Women (15/18 in long cases)
- Jurors can be *only* men or *only* women per Jury Act but extremely rare.
- Called to service from *Electoral Roll* of the State/Territory
- Comprised in Monthly 'Pools'
- Empanelled by Ballot following Arraignment
- May be Challenged, as of right, 3 times by Crown and Defendant/s
- Can challenge more than 3 times if have a reason.
- Parties know only a Juror's: 1) Occupation, 2) Suburb/Postcode, 3) Age
- Determine Convictions or Acquittals in Indictable Cases
- Cannot Ask Questions (limited exception)
- Cannot be Asked Questions (limited exception)
- Common reasons to challenge based on occupation, eg nurses, school teacher, bank manager (sympathetic or 'leading' role).

The Jury Tension

- Juries, are representatives of the community – and normally a good representation of the populous (contrary to general scepticism)
- Juries are expensive, but they are there to maintain public confidence in the legal system.

'Baby Jurors' – the Traditional Issues… *or* Myths!

- But, Jurors are the infants of the Courtrooms they inhabit.
- Jurors have the *least experience* in the processes of criminal justice over which they will exercise *final* decision-making power:
  - They may be improperly influenced by inadmissible evidence (unlike a judge)
  - There is a case flow management principle achieved by *voir dire* to exclude inadmissible evidence
  - The accusatorial adversarial system acts on these premises to restrict the jury to only adjudge the case on the scope of evidence presented by the parties (confirmed as admissible by the presiding Judge)

'Baby Jurors' – the Traditional Issues… *are* Myths!

The issues on which we (common law jury systems) base our constriction of Juries are questionable to the point of falsity

Part 2 — Relevance

Evidence as a Cornerstone for Civil Society

https://www.netflix.com/watch/80093106?trkid=14170286&tctx=1%2C0%2Ccd13b259-e525-447e-9b7d-95f967dff44c-133894401

The Invisible Guest, 2016

What Evidence?

- Evidence-based Resolutions
- What evidence?
  - How do you pick the evidence to present to resolve the dispute?
- How could it be selected? – Make a list
- Relevance IS the Threshold for admissible Evidence!!
- Relevant to what?

'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'

— *Evidence Act 1995* (Cth) *Federal Act — Uniform Evidence Law*, s 55. Effectively the same in the common law.

- **Every jurisdiction — except SA, QLD, WA — uses uniform law jurisdiction. Each has slight differences but essentially the same.**
- **In SA we have common law, so principles come from cases (eg, opinion evidence — common law (case law), hearsay — mix of case law/statute).**

Evidence must be Relevant to the Proof or Disproof of Material Facts

- **Relevance (by its ordinary meaning and nature) requires the identification of a relationship between at least two things.**
- In law, relevance denotes a **relationship** between a piece of evidence and a material fact.
- That relationship may be positive or negative regarding the existence of the material fact.

Inferences determine whether Evidence is Relevant (relates) relates to Proof/Disproof of a MF

- In law, relevance denotes a **relationship** between a piece of evidence and a material fact.
- To establish that relationship there may be 1 or several steps.
- These steps are **inferences.**
- **1 inference = Direct Evidence (eg, I saw…)**
- **>1 inference = Circumstantial Evidence (eg, red substance/blood on ground — most common type of evidence)**

Part 1 – Witnesses and The Issues

Why witnesses (Ws) in Common Law Democracies

- The problems with witnesses
  - Human fragilities (eg, anxiety, uncertainty/insecurity)
  - Human self-interest (eg, deceptiveness/forgetfulness/over-confidence)
  - Cost
  - Time
- Through the evidential process, the vicissitudes that accompany the fallibilities and failings of witnesses are tested and, as far as possible, neutralised.
- Ultimately, witnesses should be the primary form of evidence in any democratic justice system because public participation promotes confidence in judicial outcomes.

So, which witnesses and why?

- **Compellability of witnesses**
  - ie, whether you can be required to give evidence.
  - All witnesses are presumptively compellable **(exception for close relatives now, rather than immunities).**
  - **Unsworn evidence for children — no oath or affirmation — but child must still comprehend truth vs lies. Protects witnesses from lies.**
  - **Others can provide unsworn evidence — not only children.**

- **Competence of witnesses**
  - *Whether you can actually give evidence*
  - Does the W have the capacity (competence) to testify according to the requirements of the law?
    - Reduced capacity is normally related to mental development, linguistic skills, or the age of a W
  - Presumption of competence remains provided the W can understand the difference between truth and lie, even if the W does not understand the legal sanctions for untruthful evidence. In such a case, the W gives 'unsworn' evidence.
  - Must be specifically addressed by judge, per SA and Cth Evidence Acts, that there is no difference in quality between sworn and unsworn evidence by mere virtue that one is sworn and one is unsworn. There was formerly warnings about unsworn evidence being less credible.

Competence

- ***Usually age in question, but can be infirmity***

CEA and *The Queen v GW* [2016] HCA 6
(under Uniform Evidence Act (because NSW) so not Federal Evidence Act)

- GW, the father of two girls, R and H, allegedly committed three acts of indecency upon or in the presence of each child. R was five years old and H was three years old.
- **If witnesses under 10 years old wishing to testify, in criminal or civil proceedings, would be customary for lawyers to question their competence unless addressed by judge.**
- At a pre-trial hearing R had been questioned in order to establish her level of competence.
- Aged over six years at the time of this proceeding, R was able to respond rationally to questions, satisfying the general test for competence.
- Trial Judge said that she 'understands the difference between the truth and what is not the truth, and understands that she has an obligation to tell the truth today'.
- But, His Honour continued that 'because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence'.
- This meant that, although generally competent to be able to give evidence, R did not have an understanding of the legal and moral 'obligation to tell the truth' and so R was allowed to give unsworn evidence.

Questioning witnesses

Before XN comes Proofing Your Witness

- The witnesses you call 'in chief' are, effectively and in most cases, the major and crucial evidence on your case – *they are your case.*
- How do you know that?
- You have 'proofed' all your witnesses in the course of preparing your case. The proofing of witnesses is the process of discerning and compiling their evidence – so you first know if you have a case.
  - What do you 'proof' (ie, ask) your witnesses about?
  - If you choose to call the W to give evidence, what would you like the relationship to be between the W's Proof and their XN?
  - How many times should you proof your Witness?

Examination-in-Chief (XN)

- **The witnesses you call 'in chief' are, effectively and in most cases, the major and crucial evidence on your case – *they are your case.***
- So what are your witnesses in court to do?
- Examination-in-Chief ('XN') (in US, it is known as 'Direct Examination')
- The witnesses you call 'in chief' are, effectively and in most cases, the major and crucial evidence on your case – *they are your case.*
- **So what are your witnesses in court to do?**
  - **Testify to the issues in the case (these constitute the disputed material facts**
- **And – what do you not want to worry about with your witnesses?**

Part 1 — Challenging Through Cross-Examination

Cross-examination: more about YOU — the cross-examiner!
Cf. examination-in-chief: Your witness, you want them to shine!

YouTube Video — Effective Strategies to Cross-Examination Effectively

Effective Cross Examination, James Glissan QC, Advocacy Conference, 2011 **<https://www.youtube.com/watch?v=u0BZjQeWN88>**

How do you Prepare for XXN? (3 critical things):

- Endless instruction in law about **preparation**! Read everything (eg, case theories, plans, etc.)
- **Control** — have to be able to control material, witness, documents, and the judge (don't want judge to be asking the questions), and most importantly yourself (eg, strategies if you have a difficult witness, expert witnesses). YOU determine the examination, you ask the leading questions. You often get recalcitrants, 'obfuscators' in the court room (obfuscate: the action of making something obscure, unclear, or unintelligible).

Where do you begin for XXN?

Before XXN comes proofing Your W. (Remember XN? XXN is the same deal!)

- The Witnesses you call 'in chief' are, effectively and in most cases, the major and crucial evidence on your case – *they are your case.*
- You have "proofed" all your Ws in the course of preparing your case. The proofing of Ws is the process of discerning and compiling their evidence – so you first know if you have a case
- **Your** Ws are also your first source of information and material about **their** Ws.

Proving Your Case means being prepared for *Their* Case

- Your W's are the primary source of information about what the Opposing Case will be.
- You need to proof Your Ws to also see how their story compares to the story you may need to rebut. For example:
  - How strong is your W's story as against the contradictory version you may meet from the other side?
  - Does it sound like your Ws are holding information back from you?

Proofing Your W is the first, key, step to:

(a) Preparing for XXN of *Their Ws*; and
(b) Ensuring you are not embarrassed by evidence from *Their Ws* for which you were not prepared!

Cross-Examination (XXN) — Why?

Why should you XXN a W?

- Because you need to — you have a purpose in doing so!
  - If you do not have a clearly defined purpose from your case strategy/theory (taking into account the XN testimony) for asking a W questions — don't ask!
  - Especially if it's not your W — don't let the opposition have the microphone for longer than needed!

Cross-Examination (XXN) — Is About Issues

Why should you XXN a W?

- Because you need to – you have a purpose in doing so!

What is the primary purpose in XXN?

- **Cross-Examination (XXN) – About Issues! Credibility is subsidiary.**
- Why should you XXN a W?
- **ISSUES! Remember, the trial is about resolution of disputed issues. The presentation (XN) and challenge (XXN) of evidence is centred around persuasion on the issues**
- **XXN is first and fundamentally for you to challenge their Ws about their testimony on the issues.**
- **An example of issue XXN challenge on a police shooting case:**
  - Answer in XN: "I saw the police officer shoot the young man"
  - Question in XXN: "Were you aware the police officer's gun had a damaged firing pin?"

Cross-Examination (XXN) – Challenging Credit

- Of course, XXN also permits Qs to challenge the Credibility of Ws.
  - XXN permits Qs relevant to Issue and Credit. You'll recall XN, permits Qs only relevant to Issue, subject to the 'Bolster Rule' exceptions (cf, Week 2).
- Depending on the case, your XXN may only be to challenge credit. That's fine — **it's your decision, based on your case theory, as to the point and purpose of XXN. Just do not lose sight of the issues in XXN and think it is just about showing their Ws lack credit.**
- An example of credit XXN challenge on a police shooting case:
  - Answer in XN: "I saw the police officer shoot the young man"
  - Question in XXN: "You don't like police officers, do you?"

Cross-Examination (XXN) – What's the point in all these questions?

- **Why do you spend time carefully crafting questions in XN and XXN?**
- The Q&A provides a transcript of evidence in the case. At the end of the trial, I craft a closing submission that seeks to persuade the fact-finder of the conclusions they should draw from the evidence. (eg, which issues have been proved, who is a liar and who is not).
- My Closing Submission can only rely upon those matters that have been the subject of evidence.
- Remember, the very point of democratic-based litigation is that judgments are based on the presented evidence, because:
  (a) that evidence has been admitted (ie, it has passed admissibility tests of relevance and propriety in basing decisions on it); and
  (b) that evidence has been subjected to test and scrutiny by each side, so that the evidence has been fairly presented AND CHALLENGED by each side.

TOPIC 4: Restricted Evidence: Lay and Expert Opinion

Part 1 — Lay Opinions

What is an Opinion and why is evidence of Opinion generally excluded?

- **Opinions are the drawing of conclusions from perceptions (one of the senses) about facts.**
- An opinion is, effectively, an **inference**
- Allowing Ws to state opinions/conclusions/inferences about facts **usurps the role of the fact-finder.**
- Ws tell the Court what they saw, heard etc and then the Court (as Fact-Finder) determine and decide the inferences to draw/opinions to form as a result
- **So, as a general rule, the W is limited to stating what they perceived (usually what they saw), without opining as to what conclusions/inferences may be drawn from their perceptions.**
  - The W provides the Fact-Finder the raw data (the observations)
  - The Fact-Finder determines what to infer from that data (the opinion/findings the raw data proves)

Is it practical to exclude Lay Witnesses from giving any opinion whatsoever?

- The trial process employs Ws to provide the factual building blocks for the Fact-Finder to consider and draw inferences (opinions) the FF considers proved by those facts.
- But, **in some cases**, it is more practical, logical and facilitative of Fact-Finder understanding/ consideration for the W to give opinions.**Which cases?**

Workshop – Lay Testimonial Recall

- Watch: https://www.youtube.com/watch?v=qvE2miLMbNk
- *Catching Zack the Race Car,* Sergeant Cooper, 2017

- As in real life, Ws often (if not always) are asked to call upon their memory of events after the event happened (without necessarily knowing at the time that they would need to recall the event).
- **Try to recall and state (ie testify)**
- Each of the following is an **opinion**:
  - The speed of the main cars in the video? **Fast**
  - The age of buildings and surrounding roads in the video? **New, 5 years or less**
  - The condition of the main cars and crane in the video? **New, latest models**
  - The type of cars in the video? **Sports car and Police car**
  - The apparent expressions on the two main cars at the end of the video? **Angry/Smug**
  - The possible damage bill to the wooden building by the orange car? **$50,000****
- **These opinions are within the scope of common experience/understanding (except the last — expert opinion needed)** = Lay Ws can readily make these inferences; and**
- **Allowing Lay Ws to draw these inferences is much more practical than requiring them to give us only the "raw data"…..**

2. **General acceptance, *Frye* test**
   - This is the test that has emerged
   - eg, is it peer-reviewed?
   - common with, eg, new and emerging areas
   - eg, *Kontinnnen* (battered woman's syndrome, admitted)
   - eg, *R v C* (child sex abuse syndrome, excluded)
   - Existence of scientifically accepted body of knowledge about syndrome?

3. **Sufficient reliability, *Daubert* test**
   - Relevant factors include:
     - Falsifiability, can it be tested?
     - What peer review exists?
     - Potential or known rates of error?
     - Acceptance by others?
   - The General Acceptance test is a factor in the Sufficient Reliability test
     - Tang is an example of mixed general acceptance and sufficient reliability (i.e. what other courts have done, together with Court's assessment of whether body of knowledge can reliably underpin opinions offered).
   - Not much specific Australian use, but ***Honeysett* (case about a UoA professor)** has implicitly endorsed the test (as have previous cases)

Admissible Opinions for Expert Witnesses: Procedure for Determining Reliability

- If the parties dispute the reliability of a science, the Court will conduct a *voir dire* to determine whether a generally/sufficiently accepted body of knowledge exists.
- Experts in the discipline will be called.
- It is akin to an investigation into the reliability of the science.
- Should it be for the Court? – *Parenzee* (2007)

voir dire: a preliminary examination of a witness or the jury pool by a judge or counsel; an investigation into the truth or admissibility of evidence, held during a trial.

- Admissible Opinions for Expert Witnesses
  Expert Witness Duties
- The Expert has an onus to be candid about the limitations of their "science".
- **The Expert and Lawyer must work together, but the Expert, given their position as "a knowledge source" for the Court has special duties to act independently and impartially**.
- Practice Note CM 7 in the Federal Court of Australia provides as follows in relation to the general duties of an expert.
  - 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
  - 1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.
  - **1.3 An expert witness' paramount duty is to the Court and not to the person retaining the expert.**

TOPIC 4: Restricted Evidence: Hearsay

By far the most important topic in the entire course is Part 1 of this lecture.

- Don't say it's a company record so it's in (business records exception).
- Say how you got there in the first place.
- **If relying on exception to hearsay, you must have determined that it is a 'hearsay use' and that will show understanding in exam.**
- **Thus, why is it a hearsay use and not an original use? That determines if you understand rules.**
- NB: A good barrister listens as much as they speak or advocate.
- OOC = Out Of Court

Part 1 — Original v Hearsay Use (Relevance) — Important Part that demonstrates understanding

What is an Opinion and why is evidence of Opinion generally excluded?

We apply the Hearsay Rule all the time!

- **Have you ever responded to a person who tells you something: 'What do you mean?'**
  - You have distinguished between the statement the person made *versus* what the person asserted (ie what the person meant). **Fundamental to distinguish between statements and assertions.**
- Have you ever read the lecture notes and thought: 'I understand the words in the sentence, but I need help on what it means'.
  - You have distinguished between the statement written in the notes *versus* what the notes assert (ie, what the notes mean)

Statements *vs* Assertions

- Understanding the Hearsay Rule begins with understanding the difference between the **statement** and what the statement **asserts**.
- **When a statement is made, the first thing we can conclude is that the statement was made.**
  - For example: Bert said 'The car was travelling too fast' = that statement exists/that statement was made by Bert.
- **But every statement also makes express and implicit assertions; from these assertions we might infer what was meant.**
  - For example: Bert said, 'The car was travelling too fast'
    - **Explicitly asserts** = the car was travelling fast (ie, express meaning of statement)
    - **Implicitly asserts** = the car was breaking the speed limit (ie, derived meaning of statement)

Part 2 — Original Uses

The Hearsay Rule at Common Law (SA)

- **An out-of-court statement cannot be tendered *for the purpose of establishing the truth of any assertions of fact contained in the statement***
- eg, geographically 'out of court'
- *Even more simply: OOCS tendered to prove the Truth of the Facts asserted*
- That's the test! Do not re-write. Do not complicate.
- Simple test: **Answered by determining if the RELEVANT USE relies on (1), (2) or (3) (as per Part 1 of Lecture).**

The Hearsay Rule under Federal Law (CEA)

- Almost the same as Common Law
- Part 3.2 deals with Hearsay Evidence
- **Section 59 is the "Hearsay Rule" which excludes all hearsay evidence.**
- The remaining sections of Part 3.2 then provide Exceptions to allow the admission of hearsay.

The Hearsay Rule under Federal Law (CEA) – Difference between CEA and SA

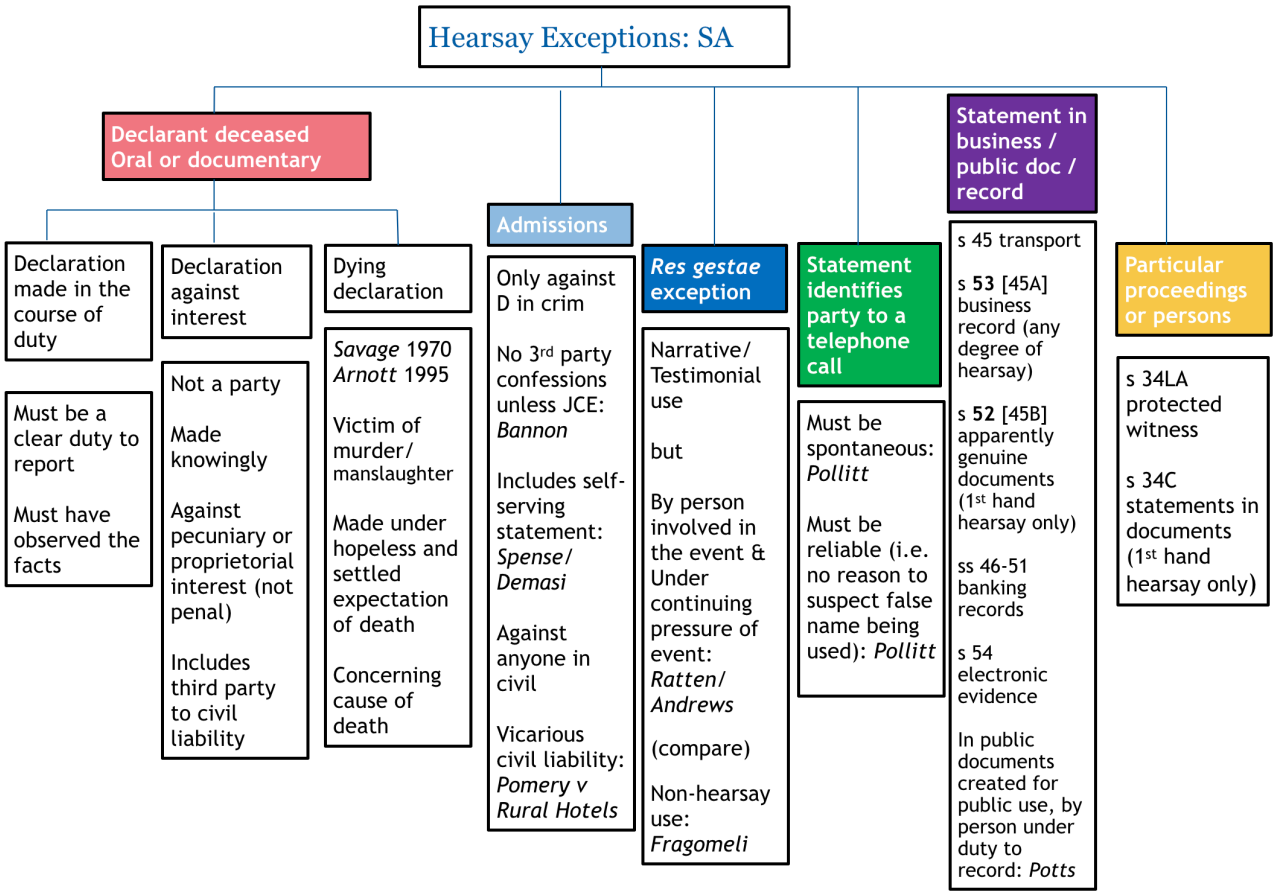
- Section 59(1) states:

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

- Almost the same as Common Law, but less restrictive because unintended assertions not caught as hearsay under CEA. Federal test is more liberal, ie it restricts more hearsay.
- eg, an unintended assertion = less worry about it being a lack of veracity = to Ian on phone: "Hi Ian, we're still on for 3, yes?"
- if you want to prove that he was talking to Ian, "Hi Ian" = a greeting = intention. Didn't attempt to identify Ian. This is an example of an assertion that was intended. **And then just requires relevance s 55.**
- **Common law more strict: whether explicit or implicit, the hearsay rule kicks in.**
- CEA test could also be written as below (which highlights the difference):
  - **OOC statement** (previous representation) **tendered to prove Truth of the Facts the person intended to assert** (the ALRC rationale being that the veracity of unintended statements was not open to doubt: ALRC 26, Vol 1, [684])

What's not Hearsay – Original Use

- When do we rely on the Out of Court Statement (OOCS) for its original use?
- Ie, when is the mere making of the statement relevant?
  - The (1) use from Part 1 of the Lecture.
- For the OOCS to have an original use it has a non-testimonial / non-narrative quality.
- That is, the OOCS explain or forms part of the actual events being litigated. As opposed to the OOCS being a narrative or re-telling of such events.



Fundamentals of Exceptions to Hearsay

- Most exceptions are facilitative of the course of evidence.
- That is, the exceptions operate if all sides agree to admitting the hearsay and only want to debate how it should be viewed by the Fact-Finder.
- So, many exceptions to hearsay (especially for documents/records), **contain "exceptions to the exception" (e.g. whereby the challenger can require the original source to be called).**
  - For example, see ss 52(3) and 53(2) of the *SAEA* 1929

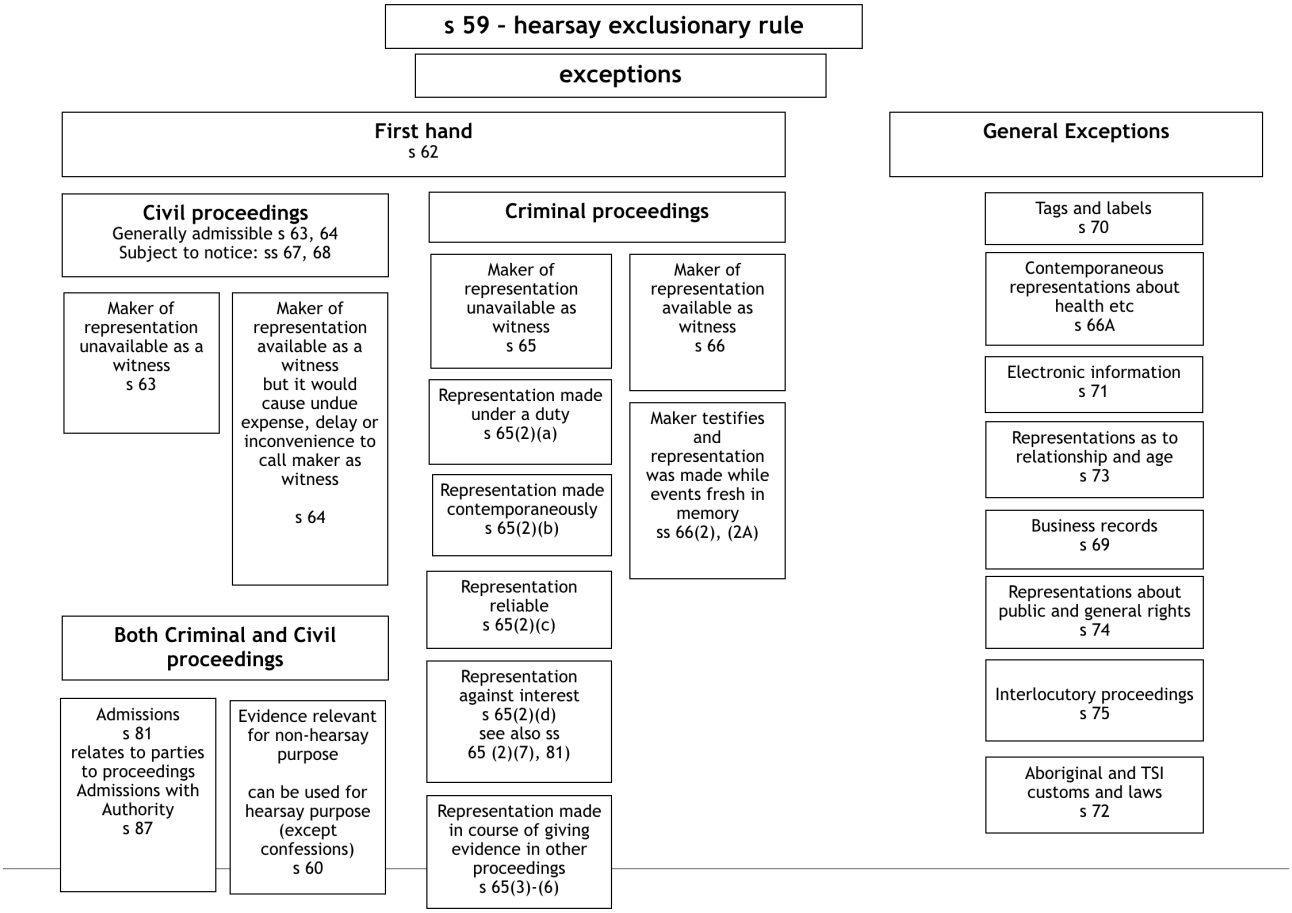
Fundamentals of Exceptions to Hearsay

- **In considering Hearsay, therefore, keep 3 steps in mind:**
  1) Is it Hearsay? If yes = inadmissible unless exception
  2) Is there an Exception, if yes = admissible subject to exclusionary ground in the exception (ie, an exception to the exception)
  3) Is there an applicable Exclusionary Ground in the Exception, if yes = inadmissible and need original source.

Fundamentals of Exceptions to Hearsay — Authenticate

- If an exception to hearsay applies = the OOCS is admissible for a USE (namely, reliance on what the statement Asserts)
- Unless there is a self-authentication provision built into the exception **(e.g. "apparently genuine" in ss 52 and 53 of the SAEA — ie, with s 52 and 53 there is no need to authenticate)**, the OOCS must still be authenticated. These are the only ones where you don't need to authenticate in SA.

Part 4 —



Workshops

Week 6 Advocacy Exercise — the written component (500–1000 words) should have practical use, ie can be relied upon and contain main points for advocacy exercise.

Podcast for this Week's Friday Debate: John Oliver on "Forensic Science"
Last Week Tonight, HBO, October 2017
Available at: https://www.youtube.com/watch?v=ScmJvmzDcG0

TOPIC 5: Principles of Evaluating Forensic Science (Guest Lecture) - Copyright material not provided for this topic.

Copyright material -

Topic was not examinable in Semester 2, 2019.

TOPIC 6: Criminal Procedure and the Role of the Police (Guest Lecture) - Copyright material not provided for this topic.

Copyright material.

Topic was not examinable in Semester 2, 2019.

TOPIC 7: Criminal Procedure and the Role of the Courts (Guest Lecture) - Copyright material not provided for this topic.

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Topic was not examinable in Semester 2, 2019.

TOPIC 8: Right to Silence ('RTS') and Confessional Evidence

From here on, only SA *Evidence Act* applies!

Part 1 — Silence

Does the Accused need to Speak?

- The Right to Silence is the consequence of the Presumption of Innocence in the Common Law System of Adversarial & Accusatorial Litigation
- The starting point in criminal practice in liberal democratic societies is the State making a formal accusation of criminal wrongdoing against the individual
- The presumption is that the State should prove its charge beyond reasonable doubt
- In competition with the State, the individual is at a disadvantage. The individual is not required to *defend* – the State is required to *prove*

The (General) Rule of Right to Silence

- Accusing State must prove alleged crime and citizens cannot be obliged to provide evidence against themselves.
- This gives rise to the privilege against self incrimination and the right to remain silent during investigation and trial.
- So two, general, rules arise at Common Law:
  1. No negative inferences or incriminating inferences may be drawn or suggested from silence; and
  2. There is no positive obligation on the accused to reveal the content or manner of their defence to the prosecution pre-trial.
- There are, of course, exceptions to each general rule

1st General Rule exception: Silence when accused has *peculiar* and *additional* knowledge

- The boating expedition in *Weissensteiner v The Queen* (1993) 178 CLR 217:
- Two people go missing from a yacht fortified for a third world war. Their travelling companion, backpacker Johann Weissensteiner, refuses to tell a jury what happened.
- Weissensteiner's 1991 Queensland murder trial would make legal history, with the High Court affirming that his silence, on facts only he could have known, was capable of strengthening the prosecution's case.
- But it appears Weissensteiner did talk after all, later providing a version of events that did not entirely exonerate him in the mysterious disappearance of fellow Austrian Hartwig Bayerl and Bayerl's pregnant British girlfriend Susan Zack.
  - HCA held fact-finders could take account of failure to provide explanations peculiarly within knowledge of accused in determining whether Crown proved case BRD
- ***Azzopardi v The Queen; Davis v The Queen* (2001) 205 CLR 50 limited the *ratio* of *Weissensteiner*:**
  - HCA held that for directions to be given that the failure to testify can be taken into account in determining whether Crown proved case BRD, then
  - **the accused must have *peculiar* knowledge, and**
  - **that knowledge must be *additional* to facts or matters already in evidence** (from Crown witnesses).

TOPIC 9: Dispositional and Non-Dispositional Evidence against an Accused

Part 1: Discreditable Conduct Evidence ('DCE') & Dispositional (Propensity) Evidence: s 34P(2)(a)+(b) *SAEA*

If you are XN a W: 34P — if the prosecution are leading it
If XXN accused: s 18(1)D — if the prosecution are XXN on it

Are we using to reason dispositionally (similar facts) or non-dispositionally (if it affects third party)?

What is (perhaps) the most damaging evidence the Prosecution could lead against an accused?

"Bad Character"is old language for DCE. Don't use it in exam. Just use 'DCE'.

- **Evidence revealing the accused is of bad character**
- **Persons of bad character can more readily be accepted as having committed the crime with which they are charged because:**
  - **They are just plain bad**
  - **They are the type of person who has done bad things previously so it makes sense that they would have done this bad thing too (ie. the charged criminal offence).**
- The problem is we do not want to risk the accused being convicted because the fact-finder is prejudiced by the accused's **past bad character**, rather than persuaded by the evidence showing the accused did the **present charged crime**.

Discreditable Conduct evidence against an Accused is generally excluded: s 34P(1)

- Bad character evidence is described as "discreditable conduct evidence" under the SAEA, **s 34P(1)** which defines discreditable conduct evidence as:
  - **"evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence"**
  - The definition is very wide
- Discreditable conduct evidence is generally inadmissible: ss 34P(1)(a)-(c)
  - This is to ensure the accused is prosecuted on the basis of evidence relevant to the subject, charged crimes – not prejudiced by past discreditable acts
- **The starting (first) point is to determine if the evidence the Prosecution seek to lead is "discreditable conduct evidence".**
  - **If it's not DCE** (if it doesn't reveal past discreditable conduct by the accused), it's admissible subject to being relevant to an issue in the case and any other exclusionary rule (e.g. hearsay) so don't discuss s 34P.
  - **If it is DCE**, then it is *prima facie*, inadmissible.
  - **This general exclusion can be overcome if the USE to be made of the DCE falls within a "permissible use" under s 34P(2) of the SAEA**

"Permissible" uses of Discreditable Conduct evidence against an Accused: s 34P(2)

- This general exclusion can be overcome if the **USE** to be made of the DCE falls within a "permissible use" under s 34P(2) of the SAEA.
- Determining the USE to be made of the DCE is:
  - Entirely a matter for the Prosecution; and
  - Entirely based on the RELEVANCE of the DCE to an Issue; and
  - Entirely unremarkable(!) – because, as with all evidence, it is up to the party seeking to lead the evidence to explain how the evidence may be used to relevantly and admissibly prove matters in issue.
- Accordingly, the second point is that DCE is not inadmissible by virtue of it being DCE *per se*. As with all evidence, it is not the nature of the evidence but the RELEVANT USE TO BE MADE of the evidence (DCE) which determines its admissibility.

'Permissible' uses of Discreditable Conduct evidence against an Accused: s 34P(2)(a)+(b)

- The Prosecution cannot use DCE to simply suggest the accused is likely to have committed the charged offence because they previously engaged in discreditable conduct: that's impermissible: s 34P(1)
  - That's because it's general and therefore evocative of **general prejudice** against the accused
- But, what if the DCE could show something **particular** about an accused?
  - If the DCE revealed something particular it may more readily relate to a specific issue on the charged offences; and
  - The particular DCE may have **probative value** to that specific issue rather than promote general prejudice against the accused
- Section 34P(2)(b) therefore permits DCE to be admitted if it shows that the accused has done something which indicates a particular "disposition" on their part relevant to an issue in dispute at trial
- Section 34P(2)(b) permits dispositional reasoning
- In those cases, DCE (or bad character) is used to establish a disposition on the part of the accused that tends to prove the accused committed the crime charged

Dispositional Cases

eg, X and Y say why you did Z

https://www.youtube.com/watch?v=DSeCQw_D-4s
Jack the Ripper, 2015

Dispositional Reasoning: 'Propensity Cases'

- Model Propensity Case: *Pfennig* (1995) 182 CLR 461. Was an SA case.
  - Propensity cases are where it is known that the accused previously committed a crime or act (because accused has a conviction for it) and that previous conviction shows a disposition that has **"strong probative value"** in respect of the current charge/s against the accused. Ie, there were similarities between the crimes.
  - Propensity cases (like *Pfennig*) are rare — we don't normally have a previous conviction

TOPIC 10: Cross-Examination of the Accused and their Shield

Shield coming down = eg, accused starts talking

Part 1: XXN of the Accused & their Shield: s 18(1)(d) *SAEA*

"Bad Character": Week 10 v Week 11

- Last week (Lecture 10) we looked at the Prosecution leading/adducing evidence of the Accused's bad character (ie DCE) as part of the **Prosecution Case-in-Chief**
  - **That is, where the Prosecution calls Witnesses or otherwise leads evidence from its own Ws that would reveal the bad character (DCE) of the Accused**
  - Where the Prosecution lead bad character evidence (DCE) of the Accused **as part of their Case-in-Chief:** s 34P *SAEA* provides the relevant tests for the admission of such evidence
- This week (Lecture 11) we look at the extent to which the **Prosecution can XXN the Accused about their bad character**, so:
  - We are at a different stage of the trial. The Prosecution case is closed; the Defence is leading evidence
  - Our primary concern is where the Accused gives evidence in their own Defence
  - **If an Accused *chooses* to testify, the law generally prohibits the Accused being cross-examined about their bad character – the law "shields" the Accused from this**
  - **This "Shield" is subject to four exceptions**
- **Where the Prosecution seek to XXN the Accused about their bad character: s 18(1)(d) *SAEA* provides the general shield against that XXN and sections 18(1)(d)(i)-(iv) provide the 4 exceptions to that shield.**
- **Section 18 is colloquially known as 'the shield'.**
- **What would constitute bad character evidence for DCE would also constitute bad character within the scope of the s 18 provisions.** Just like s 34P, sets up exceptions.
- The fundamental difference between Lecture 10 and Lecture 11 weeks/materials is that they concern the introduction of "bad character" evidence against the Accused **at different stages of the trial**
  - **Lecture 10 [s 34P] deals with the Prosecution leading bad character of an Accused as part of its case in chief**
  - **Lecture 11 [s 18(d)] deals with the Prosecution cross-examining an Accused about bad character (if the accused chooses to testify)**
- Successful advice in both situations comes from application of the respective provision [s34P / s18(1)(d)] to the *facts* of the case
  - You MUST know the provisions of each section
  - s 34P (if prosecution are leading it), s 18 (if prosecution are cross-examining on it)

Notes on Section 18 *SAEA* – *separately provided*

- **Now turn to the Notes on s 18 which are also posted under Modules. Read these Notes and then return to the slides. We will consider both the notes and the slides in the Monday lecture. 'CCCBC' = Commissions, charges, convictions and bad character. CCCBC has a wide definition like DCE — same rationale — trying to cover all different types of bad character that could have prejudicial effect.**
- The Notes will take you through the law and circumstances that concern each of the s 18(1)(d) exceptions to the shield. **Read them in combination with the provisions of s 18 of the SAEA.**