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MLL334- EVIDENCE LAW

HD ASSIGNMENT & EXAM NOTES UPDATED*

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TOPIC 1 - INTRODUCTION & UNIFORM EVIDENCE ACT

Introduction to the Uniform Evidence Acts

Evidence law: defines the type of information that fact-finders can and cannot be received by a decision maker (whether a judge alone or member of the jury) to resolve factual issues in dispute in civil and criminal proceedings.

The 2008 Victorian Evidence Act (**Evidence Act**) is based on legislation that has been operational in NSW and Federal courts since 1995. It has only been operational in Victorian courts since January, 2010. The legislation extinguishes most of the common law rules with the goal of uniform evidentiary rules in all state, territorial and federal courts.

62 Restriction to "first-hand" hearsay

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

It is an unnecessarily complex definition of what is essentially a simple concept: first hand hearsay.

The Victorian Courts, in particular the Supreme Court & Court of Appeal, are rapidly accumulating case law that explores the provisions in the Evidence Act. In these decisions, judges do refer to NSW decisions as authority for various principles.

Overarching concepts: evidence in the courtroom

The best place to start with the Evidence Act is with the various types of evidence that are dealt with by the legislation and the overall scheme of the legislation.

The legislation deals with three types of evidence:

1. Witness testimony
2. Physical objects or exhibits
3. Documents

Witness Testimony

Witness testimony is usually called oral evidence or *viva voce* evidence in practice – testimony is more of an American usage. Of the three types of evidence, oral evidence is the most problematic. It is problematic since it based on the perceptions and memory of a human being. Human beings are bizarre, unpredictable, fallible and potentially dishonest. When you examine a witness you never know exactly what will come out of his or her mouth - particularly during cross-examination.

However, it can be said that the evidence that the witness gives will fall into one of these three types:

1. Honest evidence
2. Dishonest evidence
3. Honest but mistaken evidence

Working out what type of evidence is being given is in part derived from the person giving the evidence. What to believe and what not to believe is the function of the jury or judge/magistrate depending on the type of hearing. However, a reliable guide as to a person's honesty or otherwise is elusive. Facial micro expressions, polygraph tests

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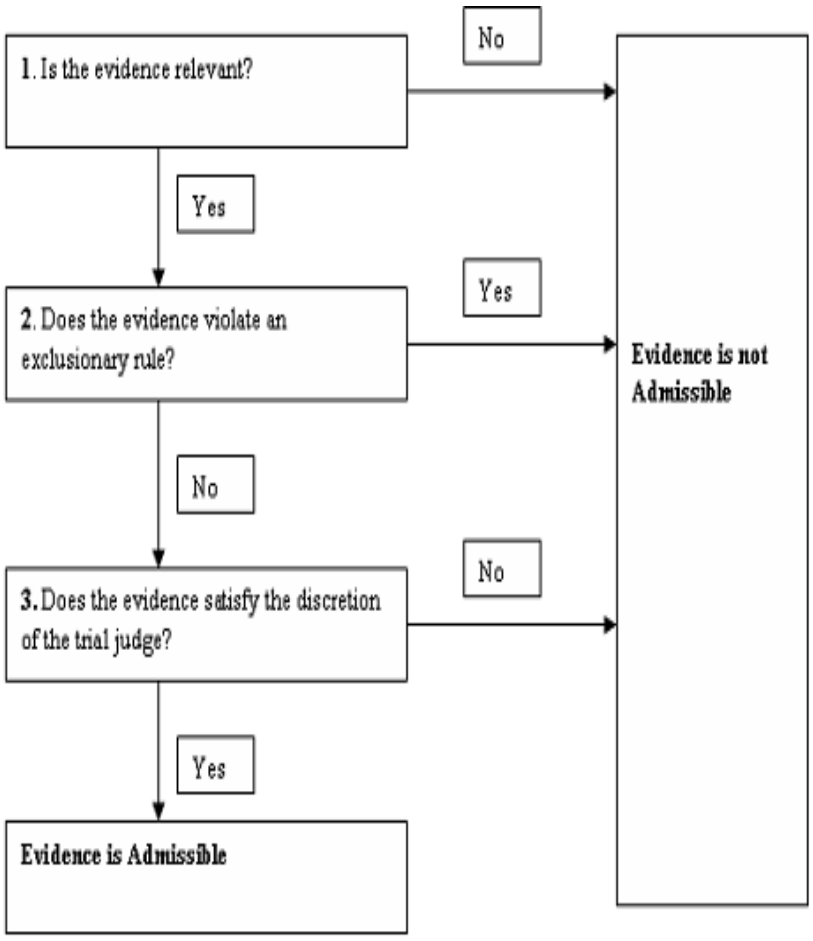
of circumstantial evidence and we will see examples of it throughout the course. Circumstantial evidence is often quite common in a criminal trial. Can you think of a reason why this might be the case?

Outline of the Evidence Act

The Evidence Act, which is a collection of rules, has a fairly simple outline that is easy to remember. The individual rules can be complex, however, the overall scheme of the act is not. The Act creates three stages that any item of evidence (witness, exhibit or document) must survive before it can be admitted. If an item of evidence fails to survive a single stage it will be excluded.

1. The evidence must be relevant.
2. The evidence must not violate any exclusionary rule.
3. The evidence must satisfy the discretion of the trial judge.

If the evidence survives all the stages, it will be admitted. A simple diagram that represents the 3 stages can be drafted as follows:



You **can use this diagram as a guide when answering problem questions in which you will have to decide whether an item of evidence is admissible or not**.
A complete answer would recognise that all three stages must be satisfied as opposed to focusing exclusively on a single exclusionary rule and overlooking the requirement of relevance and discretion.

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TOPIC 2- VERBAL EVIDENCE, COMPETANCE & QUESTIONING

In order to adduce evidence from a witness, they must be both competent and compellable. The Evidence Act deals with the type of evidence a witness can give as well.

COMPETENCE

Competence focuses on who is qualified to give evidence in court.

s. 12 – Unless otherwise provided for in the Act, all witnesses are competent and compellable

s. 13 *(exceptions)* – A person who is not competent to give sworn evidence may give unsworn evidence

Section 13 places a filter to exclude two categories of people: young people and the mentally impaired.

S. 13(1) *(general provision)* – *A person is not competent to give evidence (sworn or unsworn) if they do not have the capacity to:*

i) understand a question, or
ii) give an answer that can be understood
and this cannot be overcome

(Example: age, mental impairment, physical impairment …)

S. 13(2) – *a person who is not competent to give evidence about some facts can give evidence about other facts* (example: a child witness to arson…)

S. 13(3) *(sworn evidence)* – a *person is not competent to give sworn evidence if they do not understand that they are under an obligation to tell the truth*

S. 13(4) *(unsworn evidence)* – *a person who is not competent to give sworn evidence can give unsworn evidence*

S. 13(5) *(unsworn evidence)* – *A person can give unsworn evidence if the court has told them:*

i) it is important to tell the truth,
ii) they will be asked questions that they know, do not know, or cannot remember, and they should answer accordingly,
iii) they may be asked questions that are true or untrue, and they should agree with the statements they believe are true, and they should not feel pressured to agree with the statements they believe are not true

The difference between sworn and unsworn evidence is the weight that will be attributed to that evidence.

(S. 13(6) – repeats presumption of competence set out in s. 12)

Compellability

Compellability focuses on who can be *forced* to give evidence in Court.

s. 12 – Unless otherwise provided for in the Act, all witnesses are competent and compellable

EXCEPTIONS TO COMPELLABILITY

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- Mr Jackson brought proceedings in negligence against Lithgow City Council, arguing that his injuries were caused by tripping from the small retaining wall.
- Mr **Jackson's injuries prevented him from recalling how he came to be injured, and he sought to rely on a statement contained in a record made by the ambulance officer or officers summoned to assist him**, which was: "? FAll from 1.5 metres onto concrete" ("the Statement").

Two issues were presented in the High Court.

- The first was whether the Court of Appeal in its second decision was correct to hold that the Statement was admissible.
- The second was whether, even if the Statement was not admissible, the conclusion that causation was established could be supported by other evidence.

Held:

- The High Court held unanimously that the Court of Appeal erred in treating the Statement as an admissible opinion under s 78 of the Act. **The Statement was so ambiguous as to be irrelevant**
- In any event, the nature of the **Statement was such that it was not possible to find positively that it stated an opinion.** Moreover, even if it was assumed that the Statement did express an opinion, it was not one which satisfied s 78 of the Act.
- The Court held by majority that Mr Jackson had not established causation because the conclusion that a fall from the vertical western face of the drain caused his injuries could not be drawn on the balance of probabilities

R v Fieldman [2010]

In *R v Fieldman* (Ruling No 1) [2010] VSC 257 the prior convictions of the deceased were held to be relevant and evidence admitted, in that they may have motivated the deceased to flee from the accused with particular desperation. Kaye J held that the evidence was substantially more probative than prejudicial, and declined to exercise his discretion under s 135.

It was said that 'the question is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact, here the jury, of the probability of the existence of a fact in issue in the proceeding.'

***Patrick v The Queen*[2014] VSCA 89;**

Father came to his daughter and made admission 'he wanted to apologises for everything he had done'

Issue: the girl was asked, what do you think, the father meant by that comment? She replied; that it was regarding indecent assault.

Papakosmas v The Queen [1999] HCA 37

Victim leaving toilet, she encountered Pap, Pap forced the complainant to engage in a sexual act, despite her protest/resistance.

- The fact the complainant made a comment to her colleague, does that make a difference, because she said to her colleague or not, the rape occurred
- It is relevant because it happen right after the incident; HC said it made it more likely to happen.
    - Hersey; HC cited cases relating to Hersey.

Held: relevant evidence 'relationship evidence' i.e. when the incident occurred and when it was told to others

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TOPIC 5- HEARSAY EVIDENCE

Hearsay evidence only applies – if you are trying to prove a fact.

When looking at first section hearsay exception – need to make sure that someone has seen or heard; perceived the representation being made

The rule against hearsay evidence

The rule against hearsay comes from 'the best evidence rule', an old common law principle that says that the best evidence is 'original evidence.'

Thus, the court will prefer the evidence of an eye-witness giving their account of the facts from their memory under oath in the witness box.

The Rule against hearsay therefore deems hearsay evidence prima facie inadmissible.

The Rule against hearsay is contained in section 59 of the Act:

Section 59: The hearsay rule—exclusion of hearsay evidence

(1) 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.

(2) Such a fact is in this Part referred to as an asserted fact.

What is hearsay evidence?

As noted above, section 59 defines hearsay evidence as:

"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."

Hearsay evidence therefore has two elements:

- a previous representation; and
- Tendered to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

First-hand hearsay

The person who makes a representation asserting a fact *has personal knowledge* of the fact.

Example: A school burns down. Michael sees it. Michael says: *"the school burned down"*.

Second-hand hearsay

The person who makes a representation asserting a fact *does not have personal knowledge* of the fact – they have been told by someone who did have personal knowledge.

Example: A school burns down. Michael sees it. Michael says to his friend James: *"the school burned down."* (This is first-hand hearsay).

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⇨ The role of reaching conclusions or opinions that are based on evidence (facts) belongs to the **jury alone,** and not witnesses. This is the rationale for the opinion rule.

⇨ Despite the opinion rule, which excludes opinion evidence, opinions do enter the courtroom in a variety of ways. We will examine some exceptions to this rule.

EXCEPTION: Evidence relevant otherwise than as opinion evidence

Section 77 – Evidence relevant otherwise than as opinion evidence:

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

- This section *allows opinion evidence to be admitted if it is not being used to prove a fact based on the opinion,* but for some other purpose.
- An example might be to explain why the witness then did something (after he or she heard the opinion).

EXCEPTION: Lay opinion

Section 78 – Lay opinions:

The opinion rule does not apply to evidence of an opinion expressed by a person if –

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and

(b) *evidence of the* ***opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.***

- Both requirements in (a) and (b) must be satisfied in order for a 'lay opinion' to be admitted into evidence.
- This provision follows the common law tradition that permits exceptions to the opinion rule for lay witnesses.
- In *Patrick v Opinion*, the county judge got it wrong, when he refused to admit evidence of admission, which may have been necessary to obtain other matter of the event,

***Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352:**

The common law permitted the reception of non-expert opinion evidence where it was very difficult for the witness to convey what they had perceived about an event or condition without using rolled-up summaries of lay opinion, either in lieu of or in addition to whatever evidence of specific matters of primary fact they could give about that event or condition.

Over time, the **common law developed a list of opinions** that have been recognised as necessary and of assistance in understanding the testimony of a witness, and therefore admissible as a 'lay opinion':

1. the identity of individuals, handwriting or things;
2. the apparent age of a person;
3. the speed at which an object was moving;
4. the condition or state of something, such as the weather or a road;
5. a person's emotional state;
6. a person's physical condition;
7. Character evidence, which is exempted from the opinion rule under section 110, is itself a form of opinion evidence. (Note this list is not exhaustive.)

***R v Whyte* [2006] NSWCCA 75**

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three elements: training, study and experience. However there was no relationship between her opinion and her specialised knowledge. It was an opinion that fell within the general knowledge of the judge or jury.

(iii) Wholly or substantially based on specialised knowledge

- There must be a relationship between the expert's opinion and their specialised knowledge.
- In the case where the expert offers multiple opinions, then it will be necessary to carefully examine the relationship between each opinion and their specialised knowledge.
- It is possible that an expert will stray into areas that are beyond their specialised knowledge during examination-in-chief, in which case their opinion will not fall within the section 79 exception.

Some practical guidelines

1. *Specialised Knowledge* An expert opinion that can be classified as general knowledge would be something that the jury would be expected to know or could reach an opinion about themselves. Such an opinion would be based on general knowledge and not specialised knowledge.
2. *Training, Study or Experience* It is important to note that the legislation broadens the grounds upon which specialised knowledge can be acquired. The common law was sceptical about specialised knowledge that was based entirely on experience rather than training or study. Typically an expert would possess academic qualifications. This is now not absolutely essential.
3. *Wholly or Substantially Based on that Knowledge* The opinion must be based on the witness's specialised knowledge. This means that you should compare the opinion expressed by the witness with their specialised knowledge. They must be related. If a witness is a ballistics expert, then their opinion must be about firearms rather than knives or poisons. Overall, section 79 is quite broad, which means that much expert evidence will satisfy this exception to the opinion rule. It does not mean that it will be admitted, however. The trial judge may exclude it in the exercise of their discretion under section 135.

The 'basis rule':

At common law under the so-called 'basis rule', whilst the expert opinion must be based on specialised knowledge, the facts underpinning the evidence must also generally be disclosed to the court. (*Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642)

The Evidence Act does not specifically adopt this rule.

However, an expert will have to set out at least in general terms the basis for their conclusions and opinions, so that it can properly be determined whether the opinions are truly within the sphere of the expert's knowledge.

The 'ultimate issue rule' and 'common knowledge rule':

'Ultimate issue' rule:

At common law, lay and expert witnesses were prohibited from expressing an opinion as to whether a person's conduct conforms to a legal standard, such as whether a person is negligent, innocent or guilty of an offence, had acted under duress, etc.

'Common knowledge' rule:

Common knowledge, as opposed to specialised knowledge, is knowledge that would be familiar to both the trier of fact and an expert. At common law, expert opinions that were based on common knowledge were excluded from expert opinions.

****Section 80** of the Act abolished these two common law rules.

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***R v Ellis* [2003] NSWCCA 319**

- ⇨ In *R v Ellis* the court did not adopt the 'another rational view' test – they adopt a less stringent test.
- ⇨ This was decided pursuant to the test in the *Evidence Act* (NSW), which is that the evidence must have "significant probative value".

Facts:

- ⇨ The accused was charged with 11 counts of breaking and entering, all of which were committed on commercial premises in rural NSW. In every case, access was obtained by removing glass from the frame.
- ⇨ The question was whether each count could be used as evidence for each other count.
- ⇨ The trial judge, without referring to *Pfennig* (the 'no other rational view' test) ruled that it met the significant probative value requirement in the statute, and that the evidence could be admitted.
- ⇨ The accused appealed.
- ⇨ **Held:** The Court of Appeal dismissed the appeal.
- ⇨ The court said the statutory requirement in the Evidence Act meant that there was no need to refer to the test in *Pfennig*.
- ⇨ The words in the Act are "significant probative value". The court stated that there may be some circumstances in which the evidence is so prejudicial that the *Pfennig* test should still be applied, however **ultimately, the words of the statute are key and should be applied.**

Under the Evidence Act: (Note that the definition of tendency or coincidence is contained in the rule against tendency and coincidence.)

Section 97 – The tendency rule

*(1) Evidence of the character, reputation or conduct of a person, or **a tendency** [first level] that a person has or had, is not admissible to prove that a person has or had a **tendency** [second level] (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless-*

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

It is important to distinguish and remember the dynamic between fact we are trying to prove and evidence of tendency to act in particular way.

How to determine Tendency?

Step 1: Evidence (Pfening admission that he abducted H)

Step 2: Conduct There are certain facts that cannot be adduced to prove that someone has tendency to do something, i.e. the facts of character, reputation, conduct of a person, tendency.

I.e. conduct- abducted for sexual purposes, with the same modes of operandi H (fact) > what was the evidence (Pfening evidence – his own admission)

Step 3: Tendency [in Pfening the tendency they were trying to establish was the tendency to abduct children with a particular mode of *oprendi*] why did this have a value to the case? To prove the ultimate fact in issue **[significant probative vale?]**

Step 4: Ultimate fact in issue -Pfennig abducted for sexual purpose, Micheal Black and murdered him.

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THE FINALITY RULE AND EXCEPTIONS TO THE CREDIBILITY RULE

There are a large range of circumstances where credibility evidence is admissible where the witness is not the accused.

The legislature has attempted to nevertheless curtail the time spent in court focusing on credibility evidence by stipulating that answers given to questions regarding credibility are final. This embraces the "collateral fact" or "finality rule" at common law. Thus in relation to collateral matters, if the cross-examiner does not get the answer desired, he/she cannot lead evidence to contradict the response.

There are however a number of exceptions in s 106:

Section 106 – Exception—rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if—

- (a) *in cross-examination of the witness—*
  - (i) *the substance of the evidence was put to the witness; and*
  - (ii) *the witness denied, or did not admit or agree to, the substance of the evidence; and*
- (b) *the court gives leave to adduce the evidence.*

(2) Leave under subsection (1)(b) is not required if the evidence tends to prove that the witness—

- (a) *is biased or has a motive for being untruthful; or*
- (b) *has been convicted of an offence, including an offence against the law of a foreign country; or*
- (c) *has made a prior inconsistent statement; or*
- (d) *is, or was, unable to be aware of matters to which his or her evidence relates; or*
- (e) *has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.*

Similar to section 104 (in relation to the accused), section 106 creates two classes of questions regarding a witness' credibility:

(i) Questions that do not require the court's leave, and
(ii) Questions requiring the court's leave.

If the question relates to a witness' credibility and tends to prove that the witness:

- (a) *is biased or has a motive for being untruthful; or*
- (b) *has been convicted of an offence; or*
- (c) *has made a prior inconsistent statement; or*
- (d) *is unable to recall matters to which his / her evidence relates; or*
- (e) *has knowingly or recklessly made a false representation while under an obligation to tell the truth,*

⇨ In all other circumstances, you will need to first obtain the court's leave to put the credibility question to the witness.
However, be mindful that – in either case – section 106 requires the barrister to first put to the witness the substance of the question. If the witness denies it (or does not admit or agree to it), then you can ask a credibility question.

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***R v ERJ* [2010] VSCA 61**

- **Facts:** the applicant was convicted of a number of counts of engaging in an indecent act with a child under the age of 16 and incest. The complainant was his daughter. He appealed his conviction on a number of grounds. The convictions were set aside on the basis that the trial judge erred by refusing to allow him to cross-examine the complainant about her previous sexual history.
- **Issue:** s 37A of the *Evidence Act* 1958 (Vic) which regulated the admission of evidence of a complainant's sexual history prior to the current provisions under the *Criminal Procedure Act 2009* (Vic). The sections are effectively the same, in that they both provide that evidence of the complainant's sexual history can only be admitted where it has substantial relevance to a fact in issue and it is in the interests of justice to permit the admission of such evidence.
- **Held:** In applying this test, the court noted, that despite the ostensible rigidity of this standard, some leeway was required when there was a demonstrable forensic basis for the evidence, and that it did not matter that the evidence in question had previously been denied.

7. How is credibility evidence used in court?

Witness examination

Cross-examination has more technical requirements than examination-in-chief. The fundamental differences are;

(a) the ability to put leading questions in cross-examination; and

(b) the ability to ask questions about the credibility of a witness.

⇨ **When the witness is also the accused, the same rules apply if they are called by the defence to give evidence.** The accused may be called by the defence barrister who will conduct examination-in-chief of the accused. This will almost always be followed by cross-examination of the accused by the prosecution.

⇨ There are some important differences and some special rules that regulate cross-examination of the accused. Cross-examination of the accused is regulated more carefully by the Evidence Act than cross-examination of regular witnesses.

⇨ In addition to calling the accused as a witness, it is also possible to call character witnesses or ask the accused character-related questions during their examination-in-chief. Both options (calling the accused as a witness or leading character evidence) confronts defence counsel with important tactical decisions in a criminal trial.

⇨ As examined previously, the following principles apply to the accused (and any other observational witnesses) in cross examination:

- *Leading Questions:* You can ask any witness including the accused leading questions during cross examination (section 42).
- *Prior Inconsistent Statements:* You can ask the accused about earlier statements that they have made that are inconsistent with their in court testimony (section 43 and section 104).
- *Credibility:* Whilst, you can attack the credibility of any witness during cross-examination (under section 103), the accused enjoys special protection under section 104 which must be removed before challenging the credibility of the accused is permissible.

Tactical Decisions In a criminal trial there are tactical decisions that need to be made with respect to the accused. The accused enjoys privileges however the privileges can be lost depending on the decisions that the defence counsel makes.

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TOPIC 10: CLIENT LEGAL PRIVILEGE
Topic Overview ⇨ Client Legal Privilege ○ Background ○ Section 119 ○ Loss of Client Legal Privilege ○ Sections 127, 128, 126K, 130 and 131

1. Client legal privilege

Background and introduction to client legal privilege

⇨ The legal profession, like other professions, is regulated by an enforceable code or set of ethical rules. When you are confronted with a dilemma, the legal profession will expect you to observe this code.

⇨ If you violate the ethical rules that are contained in the code, then there is the possibility that you will be expelled from the legal profession or be publicly chastised by the courts.

⇨ Note; Barrister and solicitor has been replaced with 'Australian lawyer'. Only legal practitioner can practise law. For instance an 'Australian lawyer' who is merely admitted, cannot practise law, they also need to attain the 'practise certification'.

⇨ Retainer is not 'essential' for client legal privileges.

***Tuckiar v The King* (1934) 52 CLR 335**

- **Facts:** Tuckiar was accused of murdering a policeman.
- Two witnesses were called to give evidence of what the accused had told them.
- To one witness he admitted that he had essentially murdered the policeman.
- To the other witness he said that he had acted in self-defence.
- Before proceeding to cross-examine one of the witnesses, the accused's counsel said that he had an especially important matter which he desired to discuss with the Judge. The jury retired, and the Judge, the Protector of Aborigines and accused's counsel went into the Judge's Chambers.
- After the meeting and before the trial had ended, the accused's counsel made some fairly unhelpful statements in court from which it was possible to infer that the accused was guilty.

Issue: How does a lawyer act when given such information?

Held: The High Court made the following observation:

> *"It was a grave mistake to announce, in open Court, after he had consulted with the prisoner at the suggestion of the Judge, that "he was in a predicament, the worst predicament that he had encountered in all his legal career." And it was a **grave breach of the confidence reposed in him by the prisoner** to make the following public announcement after the prisoner had been convicted and before he was sentenced:—"I have a matter which I desire to mention before the Court rises. I would like to state publicly that I had an interview to-day with the convicted prisoner, Tuckiar, in the presence of an interpreter. I pointed out to him that he had told these two different stories and that one could not be true. I asked him to tell the interpreter which was the true story. He told him that the first story, told to Parriner, was the true one. I asked him why he told the other story. He told me he was too much worried so he told a different story and that story was a lie."*

Client legal privilege — *relates to the relationship between (the lawyer) and your client.*

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Loss of Client Legal Privilege

You **need to know when a client legal privilege claim will fail. In such a situation, you will have to surrender the documentary evidence or a witness will have to answer questions.** If you are in doubt about whether the privilege applies or not, it is be best to claim the privilege and let the court determine the question. There are no consequences for incorrectly claiming the privilege – apart from embarrassment. Despite this, it is best to know the rules as well as possible.

Section 121 – Loss of client legal privilege—generally

(1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.

(3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

Section 121 creates three exceptions:

(i) Privilege cannot be claimed by a client or party who has died and the evidence is relevant to the deceased person's intentions or competence in law.

(ii) Confidential communications or documents will not be protected by client legal privilege where failure to disclose will interfere with the enforcement of a court order.

***R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141**

Facts:

- A mother fled with her child despite a court order granting custody of the child to the child's father.
- The mother contacted a solicitor in order to make arrangements in relation to the matrimonial home and gave the solicitor explicit instructions not to reveal her whereabouts.
- The solicitor at this stage was unaware of the custody issues.
- The child's father obtained an order form the family court that required the solicitor to disclose the whereabouts of the mother and the child. The solicitor claimed client legal privilege.

Held:

- The confidential information however was required in order to enforce a child custody order and as a result the solicitor was required to disclose the location of the mother and the child.

(iii) Client legal privilege will not apply to confidential communications or documents if non-disclosure would affect the rights of a person.

This section is somewhat obscure. One possible example is defamation. You would not be able to claim privilege with respect to defamatory remarks, since this could interfere with a plaintiff's cause of action.

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***Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors (No 5)* [2011] VSC 295:**

Section 135 was **applied to exclude confusing evidence**. In that case, the court was required to rule on whether a file note on a solicitor's file should be excluded, even though it was admissible as a business record under s 69 of the Act.

Section 136 - General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

(a) be unfairly prejudicial to a party; or [not merely prejudicial but be 'unfairly prejudicial' because any submission would be prejudicial to a party]

(b) be misleading or confusing.

⇨ Section 136 applies in all proceedings, civil and criminal, but **rather than being a discretion to exclude evidence, it is a discretion to limit the use of evidence.** There is no equivalent to section 136 at common law. It is not used frequently and is most likely to apply in relation to s 60 (hearsay evidence) and s 77 (opinion evidence).

⇨ One important application of section 136 has been to **out-of-court statements that are used for a non-hearsay purpose.** If you remember, out-of-court statements that are used for a non-hearsay purpose do not violate section 59 (you may have to refresh your memory).

⇨ Under the common law such out-of-court statements could only be used for a non-hearsay purpose. However, **under section 60 out-of-court statements used for a non-hearsay purpose can also be used for a hearsay purpose.**

⇨ This is quite a significant change from the common law and it potentially creates a covert way of getting hearsay statements past section 59.

⇨ As a result, section 136 allows a judge to limit the use of an out-of-court statement that is used for a non-hearsay purpose. In this case, the **judge may prevent the out-of-court statement from being used for a hearsay purpose under section 60**.

⇨ These possibilities under sections 135 and 137 and the limits that can be imposed under section 136 place a **fairly significant burden upon the trial judge.**

Section 137 - Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

⇨ The **onus in relation to s 137 is on the accused**, as established in *R v D G; D G v The Queen* [2010] VSCA 173.

⇨ There has been a divergence of approach in relation to the interpretation of the s 137 discretion.

⇨ Firstly, there is uncertainty as to whether s 137 is a rule or more akin to a discretion. In Victoria, it is treated as a rule of law, thereby permitting greater scope for appellate intervention. However, there is less scope for intervention in relation to interlocutory matters.