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Topic 2: Verbal Evidence

Introduction

- For the verbal evidence of a witness (called viva voce evidence) to be received by a court, and thus part of the fact finding milieu, three criteria must be met:
    - The witness must be competent: they must be capable of giving evidence.
    - The witness must be compellable: in other words, lawfully obliged to testify.
    - A person who is competent and compellable, and has entered the witness box, may have a privilege not to answer particular questions.
        - E.g. the privilege against self-incrimination, legal professional privilege and without prejudice privilege.

Competence

- Incompetent witnesses can't give evidence even if their testimony is relevant, it does not violate any of the exclusionary rules and it satisfies the discretion of the judge.
- Trying to exclude a witness on the basis of their competence creates an opportunity to remove a witness from an opponent's case.
- The general rule is that all witnesses are competent to give evidence unless they fall within a very limited number of exceptions.
    - Sections 12 and 13 Evidence Act 2008 (Vic)
- The distinction between competence and incompetence under the Evidence Act revolves around the ability of a witness to understand questions and give understandable answers.
- If the competence of a witness is disputed then the dispute will be held on a *voir dire,* absent of the jury.
- The judge and legal counsel will determine whether or not the witness is competent.
- To determine whether potential witness is competent, court can obtain information from person with relevant specialised knowledge based on their training, study or experience
    - Section 13(8) of the Evidence Act 2008 (Vic)
- Person may not be incompetent to give evidence about one fact, but may nonetheless be competent to give evidence about other facts -
    - Section 13(2) of the Evidence Act 2008 (Vic): A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts
- A person can only give sworn testimony if they understand that they are under a truthful obligation
    - Section 13(3) of the Evidence Act 2008 (Vic)
- A person who is not competent to give sworn evidence may be permitted to give unsworn evidence, if the court has told them:
    - Section 13(4) of the Evidence Act 2008 (Vic)
    - (a) that it is important to tell the truth; and
    - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
    - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

Compellability

- As a general rule, all competent witnesses are compellable
  - Section 12(b) Evidence Act 2008 (Vic)
- Exceptions to this rule include:
  - the Queen/King (s15)
  - the Governor-General (s15)
  - member of parliament if they would be prevented from attending a sitting of parliament (s15)
  - judge (not compellable to give evidence about proceeding without leave of the court) (s16)
  - reduced capacity (s14)
  - family members of the accused (s8)
  - the accused (s17)
- A person is not compellable to give evidence on a particular matter if the court is satisfied that
  - substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and
  - adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources
  - Section 14 of the Evidence Act 2008 (Vic)
- Compellability creates a conflict between two important principles when there is a close relationship between the accused and the victim.
- Several factors need to be examined before a witness can be compelled to give evidence.
  - The severity of the crime;
  - The significance of the evidence that witness has to offer;
  - The impact of the relationship.
- In civil cases spouses are both competent and compellable to give evidence.
  - Section 24 Evidence Act 2008 (Vic)
- In criminal proceedings, spouses and immediate family members can apply for exemptions.
  - Section 18 Evidence Act 2008 (Vic)
  - A spouse, de facto partner, parent or child of an accused may raise an objection if they are required to give evidence as a witness for the prosecution against the accused.
  - If an objection is raised then the court must determine the objection in the absence of the jury (*voire dire*). The following requirements must be taken into consideration:
    - The nature and gravity of the offence;
    - The substance and importance of the evidence that the person might give;
    - Whether other evidence of the same matters is available;
    - The nature of the relationship between the person and the accused;
    - Whether the person would have to disclose information given to them by the accused in confidence.
    - R v Fowler [2000] NSWCCA 352
- A judge can still compel a spouse, de facto partner, parent or child to give evidence but attach conditions to the way their testimony is to be given.
  - Section 192(1) Evidence Act 2008 (Vic)
  - R v Yates [2002] NSWCCA 520

Right to silence

- An accused cannot be compelled to appear as a witness as they enjoy a right to silence.
- In criminal proceeding, the accused is not competent to give evidence as a witness for the prosecution
  - section 17 of the Evidence Act 2008 (Vic)

- Direction on accused on giving evidence or calling witness
    - If the accused does not give evidence or call a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.
    - Section 41 of the Jury Directions Act 2015 (Vic)
- In an indictable offence, the judge, or any other party other than the prosecution, may comment on the failure of the accused to give evidence.
    - Section 20 Evidence Act 2008 (Vic)
- When commenting on the accused's failure to give evidence, a judge must not suggest that the accused failed to give evidence because they were, or believed they were, guilty of the offence concerned.
    - RPS v R (2000) 199 CLR 620
- The judge may:
    - Warn the jury against improperly using the fact that the accused failed to give evidence (an Azzopardi direction);
    - Remind the jury about the onus of proof;
    - Warn the jury not to speculate about the unled evidence; and
    - Direct the jury not to draw an adverse inference from the accused's failure to give evidence or call a witness.
- In rare and exceptional circumstances, the judge may:
    - Advise the jury that they can infer from the defence failure to call a witness other than the accused or accused's family member (a Jones v Dunkel direction);
    - Advise the jury that they can draw an adverse inference from the accused's failure to provide an explanation of the prosecution evidence (a Weissensteiner direction); or
        - Weissensteiner v R [1993] HCA 65
    - Warn the jury not to speculate about the reasons for the defence failure to call a witness (an OGD direction).

Examination-in-chief

- Party can question witness in any way he/she thinks fit, but court can direct that the witness give evidence wholly or partly in narrative form
    - section 29 Evidence Act 2008 (Vic)
- Barristers prefer that witnesses deliver their testimony in question and answer form.
- Barristers will draft questions that avoid problems such as irrelevant testimonial evidence or answers that violate the hearsay rule.
- There is a prohibition upon leading questions.
    - Section 37 Evidence Act 2008 (Vic)
    - A leading question means a question asked of a witness that directly or indirectly suggests a particular answer to the question; or assumes the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.
- There are some exceptions to the general prohibition against leading questions.
    - Unfavourable witnesses: if the witness that is being examined in chief become unco-operative then it may be possible to have the witness declared unfavourable.
        - Section 38 Evidence Act 2008 (Vic)
    - Formalities: you can ask leading questions that relate to formalities such as the witnesses name, occupation or age.
        - Section 37(1)(b) Evidence Act 2008 (Vic)
    - Undisputed matters: leading question may be asked if they are not related to any facts in issue that have to be proven in the case or that are accepted by both sides as proven.
        - Section 37(1)(d) Evidence Act 2008 (Vic)