

Evidence Notes

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drawn from the evidence is one of guilt
(*Chamberlain v The Queen*)

- Where there are links in a series of steps, each link must be proven BRD (*Shepherd v The Queen*)
 - However, 'links in a chain' (BRD) are different from 'strands in a cable' (not BRD, see above)
 - Not every fact in the case must be BRD, just enough so that each element of the case as a whole is BRD
 - Doesn't need to be given to jury as a direction as a rule, but depending on the case and if it would assist in their decision making (*Shepherd v The Queen*)
 - Especially if there are links that needed to be proved (rather than strands)
- Balance of probabilities for defendant (s 141)
 - Raising a 'counter scenario' does not engage this burden
- 'Prima facie case'
 - On the appropriate standard (civil/criminal), *could* the evidence prove the alleged claim, as raised by the alleging party?
 - Other party can assert there is no case (get the case dismissed) where they say the evidence could not prove the claim (*May v O'Sullivan*)
 - Criminal
 - No case must succeed if
 - Prosecution lacks evidence of an element
 - Evidence is not even close to BRD
 - Very low bar (similar to relevance)
 - Made in absence of a jury
 - Trial judge retains right to direct they don't need/want to hear defendant and to dismiss the case (*Benny v Dowling*)
 - A *Prasad* direction may be sought at anytime during the case (*R v Prasad*)
 - Judge may dismiss a case at anytime at the close of the prosecution's case if they believe that no reasonable tribunal could convict on the evidence provided
 - E.g. key witness changes story during trial/on cross examination
 - Appeal
 - Where a 'no case' fails, it is not a miscarriage of justice even if that 'no case' was incorrect, as long as the evidence used to

Sources of Evidence

Judicial Notice

- Matters that are so clear/common they are not reasonable open to dispute, and the court can accept them without other evidence
 - Matter of law (s 143)
 - Not required to prove what the law actually says or when it comes into effect (can just Google it)
 - Judge can ascertain this anyway they see fit
 - Unusual
 - Matters of common knowledge (s 144)
 - Must be something that is not reasonably open to question AND common knowledge held in the locality where the proceeding is being held/is capable of being verified by a document with no reasonable questionable authority
 - E.g. when school starts or finish, what is the nature of the internet, that asbestos can stay in the body for long periods of time
 - Science should be what is accepted in that field (*Jenkins v Repatriation Commission*)
 - Judge can acquire this knowledge anyway they see fit
 - Court/jury should take this into account
 - Parties have opportunity to make submissions/refer to information relating to these matters to ensure no unfair prejudice
 - Replaced CL in this area (*Gattellaro v Westpac Banking*)
 - Special courts can have more specialist knowledge
 - Certain Crown certificates (s 145)
 - CL/equity still applies in relation to the effect of a certificate given by the Crown with respect to a matter of international affairs unless expressly/necessarily amended by the act (s 9)
- Arises in many stages (*Le v McElwee*)
 - During the trial
 - Party may ask judge to dispense with formal proof and direct that judicial notice has been taken of that fact
 - Best way to do it; allows both parties to know + contest it
 - After close of case
 - Party may seek to rely on a fact not formally proved by seeking judicial notice
 - Tribunal of fact may rely on facts not formally proven; if raise on appeal just must show that judicial notice was taken on those facts not formally proven
 - Appellant court can be asked to make up formal defect in evidence by taking notice of it

Corroboration

- No longer required for most crimes (except perjury) (s 164)

- Perjury requires 2 witnesses or 1 with corroboration
- Can still give some warnings (thanks to s 165)

Witnesses

- Calling witnesses
 - Mostly CL, and s 11
 - Up to the parties to call/questions witnesses
 - Generally no limits on capacity/scope for cross examination
 - Judge can intervene but is rare, so while questioning on a procedural question is fine, questions of a participatory nature (such as questioning the veracity) may be looked on as improper or lead to a mistrial (*R v Esposito*)
 - Once called, general power of the court to control (s 26)
 - How the witnesses are questioned
 - If there are a number of interested parties, can allow just one to cross-examination on behalf of all of them (*GPI Leisure Corp v Herdman Investments*)
 - No arbitrary time limits on cross (*JDV Director General of Dept*)
 - Production/use of evidence
 - Order of witnesses
 - Still usually leave this to the parties (*Briscoe v Briscoe*)
 - But usually party that calls examines, then cross examination, then re-examination (if allowed by 39)
 - Accused should generally be first to avoid claim of tailoring evidence (*R v Lister, RPS v The Queen*)
 - Witnesses should not see the preceding evidence before they testify
 - But judge does have discretion to change it up (*R v Tait*)
 - Must have examination in chief before cross examination (s 28)
 - Behaviour of people in the court room (e.g. kicking people out, closing the court)
- Oaths/Affirmations (s 21-25)
 - No difference (aside from the words) between oath/affirmation in NSW regarding the effect (s 21(5), 22(3))
 - Can choose which they prefer
 - Court ensure they know they have this choice (s 23(2))
 - No need for a religious belief (s 24, 24A)
 - General rule is all evidence given by witness must be done as 'sworn' evidence under the threat of perjury/contempt (s 21)
 - Doesn't apply
 - If giving unsworn evidence (s 21(2))

- However in criminal proceedings will still be subject to cross examination
 - To a person called only to produce a document/thing to court (s 21(3))
 - Where the court has the power to inform itself (e.g. 13(8))
- In civil, where a party exclusively controls some evidence and they don't call it, can say it 'does not assist the party' (neutral expression) (*Jones v Dunkel*)
 - Can adversely read into the failure to call that evidence where other evidence casts doubt on the non-called evidence

Competence

- General presumption that everyone is competent to give evidence (s 12(a))
 - Exceptions
 - Lack of capacity (s 13)
 - Must be raised before court will question it
 - If a person does not have capacity to understand questions about the fact OR person does not have capacity to give an answer that can be understood to a question about the fact
 - Fact witness cannot remember does not mean they are not competent (though may be not relevant/useful) (*DPP v R*)
 - AND incapacity cannot be overcome
 - S 30
 - S 31
 - Court can also seek expert advice to overcome incapacity (s 13(8))
 - Focus is on the capability to comprehend and communicate (*Explanatory Memo*)
 - Just because incapable about one fact, doesn't mean incapable for ALL facts (s 13(2))
 - Need to understand the obligation to tell the truth in order to give evidence, even if competent (s 13(3))
 - May be able to give unsworn evidence if they meet the requirements (s 13(4)-(5))
 - Court must tell witness the importance of telling the truth
 - That they may be asked questions they don't know the answer to, and they should say if that happens
 - May be asked if certain questions are true/untrue and should agree/disagree where they feel that way

- Just because competence changes, does not mean the evidence given before that change is inadmissible (s 13(7))

Compellability

- If competent to give a fact, they are compellable (s 12(b))
 - Exceptions
 - If court is satisfied that substantial cost or delay would be incurred in ensuring the person would be capable of understanding a question/being able to answer AND adequate evidence can be obtained from another source (s 14)
 - Can use subpoena to force to testify (*Song v Ying*)
 - If one of the following groups (s 15)
 - The sovereign, Gov general, Gov of a state, administrator of a territory
 - A foreign sovereign or head of state
 - A member of a house of parliament if it would require
 - Missing a sitting of that house/parliament
 - Missing a meeting of a committee of that house/parliament
 - Missing a meeting of a committee they are a member of
 - People in the case (s 16)
 - Judges cannot give evidence about the proceedings over which they are presiding
 - Jurors cannot give evidence on the case they are sitting
 - UNLESS about matters affecting the conduct of the proceeding
 - Person who was a judge in an Australia/overseas proceedings is not compellable about that proceeding unless the court grants leave
 - Criminal Proceeding Exceptions
 - Defendants (s 17)
 - D is not competent to give witness for P (s 17(2))
 - Cannot be waived by consent (*Kirk v Industrial Court of NSW*)
 - Associated D is not compellable to give evidence for/against primary D unless the associated defendant is being tried separately from the defendant (s 17(3))
 - If a witness is also an associated D who is being tried jointly with D, court must be satisfied that the witness is aware of the effect of the section (s 17(4))
 - Can consent as long as they understand they do not have to

- Spouses/Partners (s 18)
 - A person who is a spouse, de facto, parent or child of D may object to being required to give evidence or give evidence of a communication between the person and the D as a witness for P (s 18(2))
 - Must be made before evidence is given or ASAP once person is made aware they can object (s 18(3))
 - Court should be satisfied that anyone who is may be eligible to raise an objection is aware they can do so (s 18(4))
 - Objection is determined without a jury present (s 18(5))
 - Objection will be accepted if the court finds that (s 18(6))
 - There is a likelihood that harm would/might be caused to that person or to the relationship between the person and D AND
 - The nature/extent of the harm outweighs the desirability of having the evidence given
 - Must take into account (s 18(7))
 - Nature and gravity of the offence, substance/importance of the evidence, whether it can be ascertained from other sources, nature of the relationship, whether confidence between D and witness would breach confidence
 - If successful, P must NOT comment on (s 18(8))
 - The objection, decision of the court in relation to the object or the failure of the witness to give evidence
 - Comments where the offence is indictable and a spouse has declined to give evidence (s 20)
 - Judge may comment but must not say that was because D was guilty (s 20(2))
 - Exceptions to the exception
 - An offence against a person under 16 or DV offence (s 19 CTH ACT ONLY)

- Provisions of the *Children and Young Persons (Care and Protection) Act (s 19)*
 - Endangering children in employment, certain employers of children, child/children abuse, neglect of children
- If compelled by *s 279 Criminal Procedure Act*
 - If a DV or child assault offence, but can still be excused by the court from giving evidence if it was a minor offence OR the evidence is inessential

Form of questions

- Generally as the party sees fit (*s 29*)
 - Narrative form may be used on court's own motion or application of the party that called a witness (*s 29(2)*)
 - Allows witness to speak without being limited to the specific questions
- Can allow charts/forms etc. (see other documentary evidence) to assist
- Previous statements (see credibility/character also)
 - Can cross-examine at witness about a prior inconsistent statement made, even if no complete particulars of the statement have been given or a document record of it being given (*s 43*)
 - Limits
 - If witness denies making the statement (and no other evidence is provided), that is all that can be done (cannot adduce the evidence to contradict it post-examination) (*s 43(2)*)
 - Can adduce the prior statement if witness is given enough information surrounding the statement so they can identify it AND draw attention to the differences (*s 43(3)*)
 - Where a previous representation was made by someone other than the witness, cross examination is limited to where (*s 44*)
 - Evidence of the representation has been admitted/will be admitted OR
 - The requirements of *s 44(3)* are fulfilled and can ask if they stand by their statement
- Reviving memory
 - Witness cannot use a document to try and revive their memory about a fact unless the court grants leave (*s 32(1)*)
 - Court must consider (but are not preconditions) (*s 32(2)*, *R v Cassar and Sleiman*)