

LAWS2016 EVIDENCE CASE NOTES

SEMESTER 2, 2024

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TOPIC 2: RELEVANCE

2. RELEVANCE

(a) Smith v The Queen (2001) 206 CLR 650

Facts

- Smith was convicted of robbing a bank. The bank security cameras captured the event. Prosecution said he was keeping a lookout while co-offenders took the money.
- The jury had to determine, was the person in the dock Smith? The person in the photos?
- Two police officers gave evidence that they knew Smith and that he was the person in the photos.
- The question on appeal was whether that evidence was properly admitted.

Issue

- Was the evidence of the police officers relevant?

Held

- A majority held that the evidence was **not relevant** (Kirby J dissenting) pursuant to s55.
 - “The question for the jury was whether they were satisfied, to the requisite standard, that the person standing trial before them is shown in those photographs”(Gleeson CJ, Gaudron, Gummow and Hayne JJ [8])
 - The question of relevance of evidence is always to be considered.

Regarding the police evidence

- The only basis for the police officers’ conclusion was their earlier encounters with the witness. Although there was no suggestion that his physical appearance had changed materially, the police were at some advantage due to prior interactions.
- Because **the witness’s assertion of identity was founded on material no different from the material available to the jury** from its own observation, **the witness’s assertion that he recognised the appellant is not evidence that could rationally affect the assessment by the jury of the question we have identified.** (the jury could come to this assessment on their own)
- The fact that someone else has reached a conclusion about identity does not provide any logical basis for affecting jury's assessment when it is based on material no different to what was before the jury

Principle

- Evidence of a witness is not relevant if it is founded on material which is not different from the material available to the jury.
- **C.f.**, this is different in cases where there may be a expert such as fingerprint expert

Dissent per Kirby J

- The evidence was indirectly relevant as police had seen the accused in various guises, and at times of day from different angles and were therefore in a better position to assess the person.
- Kirby noted that you do not want to set the hurdle too high for relevance. Either way however Kirby noted that the evidence would not be admissible as it is opinion evidence.

NB: The evidence may be relevant if the defendant’s appearance at trial differs in some significant way from the time of the trial (i.e., had a beard and now does not) or if there is some different manner i.e., walking style or as in *Goodall* it may be relevant if you are attempting to prove ownership of a jacket which was worn at a crime.

14. CROSS EXAMINATION OF WITNESSES

14.1 Form of Questioning

- (a) Unacceptable Questions | Libke v The Queen (2007) 230 CLR 559

Facts

- An appeal to the High Court on a basis of inappropriate questioning.
- High Court majority held that, in the absence of objection, the accused still received a fair trial: dismissed the appeal. Heydon J discussed the limits of acceptable cross-examination:
- Some questions were propositions put to the accused: "Your evidence is just a tissue of lies"
- Some were an injection of the prosecutor's opinion: "I've heard all of that. I'm just not buying it"

Issue

- Was this an improper form of questioning?

Held

- The court **held that the trial judge should have intervened to control the questioning**
 - The court found that the questioning was
 - 'wild, uncontrolled and offensive', calculated to humiliate and belittle, sarcastic, personally abusive and derisive;
 - Used compound questions;
 - Cut off answers and assumed answers which had not been given;
 - Argumentative i.e., 'that doesn't tell us much does it?', "look I'm giving you every opportunity"
- Despite this, the accused still received a fair trial – but the defence should have objected and the trial judge should have intervened.

NB: these questions link to section 41

14.2 LEGISLATION

- (a) Section 40 | Witness called in error
- (b) Section 41 | Improper questions
- (c) Section 42 | Leading questions

14.3 Cross Examination on prior inconsistent statements and documents

- (a) Section 43 | Prior inconsistent statements of witnesses

14.4 The Rule in Browne v Dunn

- 14.5 Rule:** The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or conduct relevant to the case, or a party's or a witnesses credit. There are various consequences such as counsel may be taken to have accepted the witnesses evidence, however this is at the discretion of the judge.

TOPIC 7: CREDIBILITY EVIDENCE

22. DEFINITION AND EXCLUSION

- (a) Palmer v The Queen (1998) 193 CLR 1

Facts

- Palmer was convicted of several sexual offences against 14 year old.
- One of appeal grounds related to questions asked in cross-examination: Palmer's counsel had suggested to the complainant in cross-examination that she had accused Palmer of sexual assault to "pay him back for an unreciprocated crush."
- Palmer was asked in his cross-examination (by the Crown) to suggest a motive for the complainant's accusation against him - he could not do so.
- Trial took place prior to commencement of Evidence Act.

Issue

- Was the question as to motive allowed?

Held

- For the complainant yes, defendant no, you can cross examine a complainant about why you are telling a lie, however it is different asking a defendant why they might lie - just because you do not know why the complainant might lie is generally irrelevant. This would focus the jury's attention in irrelevancies.
- The prosecutor should not have asked the defendant the question in cross-examination.
 - The defendant's inability to come up with a motive is irrelevant.
 - "'The fact that an accused knows of no facts suggesting a motive for fabricating a charge does not mean that there is no motive or that the evidence of the complainant is true' [62]
 - 'There are dangers in allowing the accused to be cross-examined as to his or her knowledge of facts suggesting motive. If the accused cannot suggest a reason, it may influence the tribunal of fact ... to reverse the onus of proof. That is to say, it may lead the tribunal of fact to conclude that the inability of the accused to point to facts suggesting a motive for concocting the allegation suggests that he or she must be guilty...' [63]'
- Thus, the question merely elicited evidence to use only for the purpose of supporting the complainant's credibility (and thus diminishing the standard of proof)
- If evidence going to credibility has **real probative value** with respect to the facts in issue, however, it **ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts in issue**

Principles

- Evidence which is relevant only for a credibility purpose cannot be admitted unless it falls within one of the statutory exceptions
- If the evidence was relevant for another person has been excluded by one of the mandatory exclusion rules (e.g. section 84) it also cannot be used for a credibility purpose

23. LEGISLATION

- (a) Section 101A | Credibility evidence
- (b) Section 102 | The credibility rule

24. ATTACKING CREDIBILITY IN CROSS-EXAMINATION

(a) State Rail Authority of NSW v Brown (2006) 66 NSWLR 540

Facts

- Plaintiff in train accident. Damages was the only issue.
- The judge found that the plaintiff sustained injuries to neck, shoulder and back.
- The plaintiff had originally claimed damage to his teeth, but dropped this claim.
- The defendant wanted to cross-examine on why he dropped the claim (as a credibility issue)
 - to suggest that the claim was made because he was forgetful or lying when he made it because he subsequently withdrew it.
 - Therefore, this could affect whether he is to be believed on the other claims still in contest,
- But the judge stopped this line of questions. This was raised on appeal.

Issue

- Should the defence be allowed to cross examine the plaintiff regarding other injuries? The issue was in relation to damages, state rail had already accepted liability.

Held

- Appeal held that the line of question should have been allowed as would go to issue of deception – and potentially would have substantial probative value as to P's credibility
 - If he lied about his teeth, potentially, he would lie about the extent of his other injuries

Basten J Held (Santow agreeing)

- They upheld the decision, **that the line of questioning should not be allowed.**
- There was other evidence of this claim available (i.e., hospital evidence). Permission to cross-examine was in the discretion of the judge. **Court of Appeal should not interfere with judge's ruling on credit, at least where there is no basis for thinking that the trial judge didn't understand the purpose of and nature of the questions.**
 - difficulty of D's argument that abandonment implied knowing falsity by P rather than evidential difficulties

Gyles J Held [would have allowed]

- **If the questions could have produced evidence of substantial probative value, they should have been allowed, at least until the judge could tell if substantially probative evidence would emerge. The judge did not engage with this question and therefore erred.**
 - But the line of questioning was relevant to whether the respondent obtained damages for injury in other respects. There was considerable contest over the extent of injury suffered in the accident, not only as to injury to the respondent's neck.
- But not persuaded that this inability to question caused a 'substantial wrong or miscarriage' therefore appeal fails on this ground.

Principle: If the evidence will produce 'substantial probative value' then it may be allowed per Gyles, however this is contentious

25. LEGISLATION

- (a) Section 38 | Unfavourable witnesses
- (b) Section 43 | Prior inconsistent statements of witnesses
- (c) Section 44 | Previous representations of other persons
- (d) Section 103 | Exception: cross-examination as to credibility