

Witnesses

Verbal evidence refers to any evidence given by a person orally, using their words, to describe an event. An example is physically appearing in a court room, or by via conference or in a pre-recorded session.

It is the prosecution's duty to call all witnesses and present full evidence – even if a witness has evidence adverse to the prosecution's case.

This would be an interlocutory application and the burden of proof is on the balance of probabilities.

Competence

Competence focuses on who is qualified to give evidence in court (ie. who is permitted to testify).

As a general rule, every person, including all witnesses, are competent to give evidence (section 12(a) EA).

There are exceptions to this rule:

- Lack of Capacity – Section 13 EA.
 - A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) (section 13(1) EA):
 - (a) The person does not have the capacity to understand a question about the fact; or
 - (b) The person does not have the capacity to give an answer that can be understood to a question about the fact,And that incapacity cannot be overcome.
 - For example, very young children and those who are mentally impaired may not be competent to give evidence.
 - Further, those who are deaf, mute or do not speak English may be competent if their incapacity can be overcome (ie. by an interpreter).
 - Nonetheless, a person who is not competent to give evidence about a fact may be competent to give evidence about other facts (section 13(2) EA).
 - This means that a person may be competent to give evidence on some occasions relating to some facts, but not others.
 - For example, a child may be able to answer simple factual questions about an event, but cannot understand or answer a question requiring an inference to be drawn.
 - A person is not competent to give evidence if they do not have capacity to understand that, in giving evidence, they are under an obligation to give truthful evidence (section 13(3) EA).
 - As an alternative to giving sworn evidence, the person may give unsworn evidence.
 - Before unsworn evidence can be given, the Court must tell the witness that it is important to tell the truth, that they may be asked questions they don't know the answer to (they should tell the Court if this is the case) and they should only agree with statement which they believes are true and should feel no pressure to agree with untrue statements.
 - The weight that will be attributed to unsworn evidence is likely to be significantly less than sworn evidence, depending on the circumstances.
- The Accused – Section 17 EA.
 - An accused is not competent to give evidence as a witness for the prosecution (section 17(2) EA).
 - They can, however, give evidence for themselves.

Documents and Admissibility

Types of Evidence

- Oral evidence.
- Documentary evidence.
- Real/other evidence.

Documentary evidence relies on its contents (section 47(1) EA), whereas other evidence is something tendered as an item of physical evidence to identify itself – not relying on its contents.

Some evidence may be tendered as both documentary evidence and other evidence.

- For example, a drink bottle may be tendered as an item (ie. that was the murder weapon) and as documentary evidence with reference to the contents on the label (ie. that the wording was misleading and deceptive).

Documents

The EA defines 'document' broadly to include any record of information including anything on which there is writing marks; figures; symbols; anything from which sounds, images or writings can be produced; or a map, a plan, a drawing, or a photograph (Dictionary EA).

- May include transcripts and video/audio files (section 48(1)(c) EA; Regina (phone call transcript); E Sleiman; Wade).

Adducing documents (section 48 EA).

- (1) A party may adduce evidence of the contents of a document by tendering the document by one or more of the following methods –

- (a) Adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;

- Allows to prove the content of a document using admissions.
- An admission is a previous representation made by a party to the proceeding that is adverse to the party's interest in the outcome of the proceeding.

- (b) Tendering a document that –

- (i) Is or purports to be a copy of the document in question; and
 - (ii) Has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
- Allows to prove the content of a document using copies and providing it to the Court.
 - It does not matter if the copy is not an exact application, as long as it is identical in all relevant aspects (Giovannone).

- (c) If the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing) – tendering a document that is or purports to be a transcript of the words;

- Allows to prove the content of a document using transcripts, sound recordings and coded material.
- Shorthand notes, for example. If an audio recording is difficult to understand, a transcript should be used. If there is an issue as to whether or not a transcript is accurate, the jury should prioritise what they hear (Cassar).
- If translations between languages are confirmed by oral testimonies of translators, this is sufficient and admissible (Butera).

- (d) If the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the Court unless a device is used to retrieve, produce or collate it – tendering a document that was or purports to have been produced by the use of the device;

Hearsay

The hearsay rule prohibits proving a fact by the use of evidence of what someone said about that fact outside the Court.

If there is a conversation between two or more potential witnesses, it is likely to be hearsay evidence.

Example – Red-Light Incident

- Not Hearsay Evidence: Megan testifies that she saw the car run through a red light.
- Hearsay Evidence: Megan testifies that she told James that she saw the car run through a red light right after the incident. Megan was not under oath to tell James the truth right after the incident.
- Hearsay Evidence: James testifies that Megan told him that the car ran through a red light.

There are several steps to answering a question regarding hearsay evidence. There are –

1. Is It Relevant?

2. Is It Hearsay? If So, Prima Facie Inadmissible.

The Hearsay Rule – Section 59 EA

(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, in this part, refers to an asserted fact.

(2A) For the purposes of determining whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the Court may have regard to the circumstances in which the representation was made.

A statement is hearsay evidence, and thus inadmissible (section 59(1) EA), if all the following elements are established –

A. The evidence is a previous representation (section 59(1) EA).

- The statement, precisely, was an out-of-court representation (Dictionary EA); and
 - ‘Out-of-court’ refers to outside of the current legal proceeding in which the evidence is adduced.
- The representation was made by a person.
 - Representation includes an express or implied representation to be inferred from conduct, anything unintended to be shown to someone else (ie. a diary entry), or representation not communicated (Definition EA).
 - Silence constitutes a representation (Rose).

B. The previous representation asserts a fact (section 59(1)-(2) EA).

- I. The representation asserts a fact; and
 - II. The evidence of the representation is used to prove the fact asserted in it.
- In *Subramaniam* –
 - Conversations with terrorists who allegedly made the accused act under duress are only hearsay if the purpose of submitting the evidence was to prove the content of the statements.

Privileges

Privileges allow a person to resist the disclosure of information where there would otherwise be a legal compulsion to disclose or produce information.

Client Legal Privilege – provides an exclusionary rule for any confidential communication between a lawyer and a client that was made for the dominant purpose of legal advice or litigation.

- This can give rise to ethical dilemmas (Tuckiar).
 - Common Law (Tuckiar)
 - Aboriginal man was tried for murder. He told two different stories to two different witnesses.
 - Trial judge suggested that the lawyer asked Tuckiar which of the two stories were true.
 - The lawyer did so and said in open court that he was facing a dilemma.
 - Tuckiar was found guilty.
 - Lawyer informed the Court what Tuckiar confessed to him – breaching client legal privilege.
 - The Court quashed the conviction due to this breach.

Definitions

Section 117(1) EA – Definitions Relating to Client Legal Privilege

- Client: a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service).
 - Under this definition, there is no distinction between government and private lawyers, and a client is allowed to be an employer of the lawyer.
- Lawyer: anyone who was admitted to practice as a lawyer in Australia or abroad (no practicing certificate is required). Additionally, the term 'lawyer' includes employees who are employed by the lawyer or agents whose services they engage. This is a wide definition.
- Confidential Communication: a communication made in such circumstances that, when it was made, the person who made it or the person to whom it was made was under an express or implied obligation to not disclose its contents, whether the obligation arises under law or not (ie. could be a moral obligation).
- Confidential Document: a document prepared in such circumstances that, when it was prepared – the person who prepared it or the person for whom it was prepared was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law (section 117 EA).

Third Party Overhearing Confidential Communication

- Common Law (Re Giffin)
 - If a communication was made in the presence of a third party, that communication cannot be confidential. If it is not confidential then it is not privileged.
- Common Law (Braham and Mason)
 - The rule in Re Giffin is too strict.
 - The accused had a phone call with his lawyer while the policeman was in the same room.
 - Mason had already made a statement to police.
 - While he was on the phone, he asked his lawyer if he should sign it.
 - Issue – whether this conversation or evidence of it by the policeman would be privileged.
 - Mere presence of a third party does not necessarily mean that a communication was not confidential.
 - Depends on the circumstances of the case.
 - However, the knowledge of the presence of a third party may indicate that the person making the communication didn't consider it to be confidential.