

**EVIDENCE FINAL**  
**EXAM NOTES**

1. Introduction – Burden of Proof, Facts in issue
2. Methods of Proof
3. Types of Evidence
4. Competence and Compellability
5. Privilege
6. Examination of Witnesses at Trial
7. Hearsay, Hearsay Exceptions
8. Confessions and Admissions
9. Illegally obtained evidence
10. Identification
11. Opinion Evidence, Corroboration

## (1) Intro - Relevance, Witness Credibility etc.

### Evidence

Information that may be presented to a court or tribunal to enable decide on probability of fact asserted in the case before it.

#### Sources of Law

- Law of evidence not governed by code
- CL works effectively though

#### Qld Courts (including where exercising Federal jurisdiction):

- Common law
- *EAQ - Evidence Act 1977 (Qld)*
- *EAC - Evidence Act 1995 (Cth)* s 5 [generally speaking EAC doesn't govern Qld]

#### Federal Courts

- Common law
- EAC
- EAQ – (s4 EAC; s79 Judiciary Act - if there is a gap in EAC then evidence law of state in which court sitting will apply – EAQ)

#### Adversarial system – influence on rules of evidence

- Plaintiff has to prove, defendant has to rebut
- Not inquisitorial

#### Judge – decider of law

- Whether witness competent to give evidence
- Whether evidence admissible
- Sufficiency of evidence – if no case to answer, if prima facie case then goes to jury
- Directions on points of evidence in summing up

#### Jury – decider of fact

System heavily weighted in favour of accused, as should be. Crown heavily resourced.

#### Order of Proceedings at Trial

##### Jury trials

- Civil proceeding – can elect to have jury trial if right not excluded by statute (UCPR r472)
  - o Not for personal injury proceedings (s73)
- Criminal proceedings – can elect to have judge-alone trial if in interests of justice (Criminal Code ch 62, div 9A)

#### 'Voir dire' (trial within a trial)

Preliminary facts determined at pre-trial directions hearing (s590AA CC) or voir dire, not in front of jury

- Admissibility of contested evidence

### ADMISSIBILITY

Evidence admissible if it is relevant and does not infringe exclusionary rule

### RELEVANCE

#### Facts in issue

- Civil – pleadings
- Criminal – indictment
  - Elements of the offence are the facts in issue

#### What is relevance?

Any two facts - one either taken by itself or in connection with other facts proves or disproves or renders probable the past, present, or future existence or non-existence of the other.

#### Goldsmith v Sandilands (2002) (Qld)

- Evidence relevant if it could rationally affect, directly or indirectly assessment of probability of existence of fact in issue

#### s55 EAC - Relevant evidence [not different from Qld approach]

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

#### s56 EAC – relevant evidence to be admissible in the proceeding

Dictionary to Act – 'probative value' means the extent to which evidence could affect assessment of probability of fact in issue

- Not predicated on assumption that evidence will be accepted as s55 is '[if it were accepted, could rationally affect]'
- No significance

*Adam v The Queen (2001)* - Relevance to be determined on assumption that tribunal of fact accepts the evidence.

#### What will be relevant?

*HML v The Queen* – use common sense methodology.

*R v Horvath* – evidence of driving by accused 45 mins before accident was not relevant. Held: If showed course of conduct, may be relevant. One incident on road not necessarily relevant to proving another.

*R v Wickham* – sexual encounter when 14 yrs old. Wanted to lead **evidence of similar activity before occasion**. Apparently isolated act may be difficult for jury to believe. Held: Putting evidence as if **describing isolated incident would have been misleading** and unfair for complainant.

*R v Marsh (2015)* – accused was marine, had knife training, had attacked partner before. Relevant? Held: no separate piece of evidence established guilt but **taken together could establish**.

**Brides in the Bath Case** (*R v George Smith (1914)*) – evidence of other deaths relevant but highly prejudicial. All highly relevant. One drowning – accidents happen. Held: Evidence taken together ruled out accident. **Aggregation of resemblances** could not have occurred without design, combination of factors too uncommon to be coincidence.

#### Other notes on relevance:

##### Evidence can be taken 'subject to relevance'

- Judge takes evidence but those relying on it must prove relevance in due course

#### Relevance of motive

- May rationally affect assessment of probability of existence of other element of offence
- Failure to establish motive doesn't mean case will fail

### DISCRETION

#### Discretion to exclude for:

- Content – eg. if equivocal
- Form or circumstances in which tendered

#### Judicial discretion to otherwise exclude or include evidence:

#### s130 EAQ – Exclusionary Discretion

- If court satisfied prejudicial effect would outweigh probative value – ie it would be unfair to person charged to admit that evidence

(Note: EAC s135(b)(c) Evidence may be rejected if relevance outweighed by danger it is misleading, confusing, or wasting time

#### UCPR 394 – Inclusionary discretion

- Evidence which is inadmissible may be admitted by virtue of judicial discretion

### WEIGHT

Jury decides weight given to each piece evidence

- Weight often dependent on jury/judge perception of evidence or witness testimony

### BURDEN/ STANDARD OF PROOF

**EVIDENTIAL BURDEN** – adduce sufficient evidence on fact in issue to establish prima facie case

- "passing the judge"
- If not discharged, judge may order no case to answer

Accused can argue no case to answer. Jury may realize if no case submission was made and judge rules there is sufficient evidence to go to just – judge weighed up evidence and thinks there is prima facie case to answer.

### **Voir dire**

Judges decide on balance of probabilities whether to submit evidence or not. (*Wendo v the Queen*)

**LEGAL BURDEN** – prove a fact to necessary standard

- Party with legal burden has **right to begin** (adduce evidence first and gets last word in court)

### **Civil cases –**

**Burden on plaintiff asserting facts that constitute cause of action**

**Civil standard of proof: Balance of probabilities (s140 EAC)**

- Not a mere mathematical probability
- Actual satisfaction as to occurrence or existence of fact in issue

*In Re H and Others (1996)* – family Court deciding whether children likely to suffer further harm (standard was BoP). Held: meant whether the occurrence **of the event was more likely than not**. More serious the allegation, the less likely that the event occurred.

**\*\*But does not mean more serious allegation means standard of proof higher.** If standard were commensurate with gravity of allegation, risk confusion and uncertainty

### *Briginshaw v Briginshaw*

Look at **seriousness of matter alleged**, gravity of consequences etc. – **stronger the proof needs** to be. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, indirect inferences.

**Decider of fact must actually be persuaded of particular matters to be proved.**

### **Criminal cases –**

**Person who asserts fact in issues bears burden of proving**

**Criminal standard: Beyond Reasonable Doubt (s141 EAC)**

**(less controversial – always have to prove BRD)**

### *Helton v Allen; Stanberg v Tabibi (2012)*

- Tribunal of fact must be actually satisfied or persuaded.
- Cannot be found on mere mechanical comparison of probabilities independent of belief in reality

**s141 EAC; Corry v Dorron; ex parte Corry**

Where **accused bears burden**, it is on **balance of probabilities** (eg. **reverse onus drug offences**)

*R v Roach (2009)* – evidence of **uncharged acts** of domestic violence. Held: Evidence allowed, uncharged acts were **not indispensable link**

in chain of proof, **no direction requiring proof BRD** (criminal standard) was required.

*Woolmington v DPP (1935)* – W charged with murder estranged wife. Judge said if crown satisfied that accused killed woman, it was presumed murder unless accused proved otherwise with evidence. Held: Misdirection. Duty of prosecution to prove guilt.

### *In re Dellow's Will Trusts (1964)*

More serious the allegation, more cogent evidence required to overcome unlikelihood of what is alleged.

### **Drawing Inferences**

Exercise of the ordinary powers of human reason in light of human experience.

*Martin v Osborne (1936)* – charged with driving unlicensed taxi on particular day. Evidence of carriage between 2 points on the 2 preceding days. From this fact, **inference correctly drawn** that respondent doing so for reward, including on day in question.

**Difficult to overturn decisions based on erroneous inferences.** Unlikely to be proved erroneous if trial judge just made a choice between competing inferences.

### **Calling Witnesses**

Party who calls witness usually not entitled to cross-examine them

### **If a party does not call a witness?**

What inferences can be drawn?

### **Criminal Cases:**

*Jones v Dunkel (1959)* – witness clearly in position to have explained or contradicted material presented.

Unexplained failure to call witness **may reinforce inference against party, that uncalled evidence would not have assisted party's case**

If uncalled witness appears to be in position to cast light on whether inference drawn: Court may draw with greater confidence inference against defendant.

Extends to where counsel doesn't question witness on particular issues.

*Blatch v Archer* – all evidence to be weighed according to proof that was in power of one side to have produced and in power of other to have contradicted.

Leads to drawing of **inference unfavourable to the party.**

### **Cf. Civil Cases**

Unexplained failure not treated as evidence of fear it would expose an unfavourable fact, nor assertion of non-existence of fact not proved (*HML v R (2008)*).

### **WITNESS CREDIBILITY**

#### **What is 'credibility'?**

*Onassis v Vergottis (1968)* - More than mere witness 'demeanour'. Assess whether person truthful, has memory correctly retained, has memory been affected by unconscious bias?

#### **Courts recognise that memory is fallible**

Long time elapsed, memory becomes weak with passage of time, witness memory often 'refreshed' by reading documents

**Best approach for judge:** place **little reliance on witness recollection** of what was said in conversations, base factual findings on inferences drawn from **documentary evidence and known probable facts**

- Can **draw inference from party not producing contemporaneous documentary evidence** that the judge is satisfied is likely to have existed

#### **Common errors:**

- The **stronger/more vivid our feeling** or experience of recollection, more likely recollection accurate
- **More confident** person is in recollection, more likely recollection accurate

#### **Apparent witness collaboration**

- Witness credit will be worthless (*NSW v Hunt (2014)*)
- Not genuinely recollected independent accounts

High degree of similarity in content, detail, terminology, sequence – could not have come into existence without direct or indirect collaboration (*Seamez v McLaughlin (1999)*)

## (2) Methods of Proof

### Cases Where Proof Not Required

#### Admissions

Where party commits in writing that fact is true

#### Civil:

- Party may in pleadings or by Notice admit facts for purpose of civil case (UCPR 187, 189)
- **s191 EAC** – where parties agree on facts, no evidence required to prove existence, no evidence can be adduced to disprove (unless court gives leave)

#### Criminal:

- **s644 Criminal Code (Qld) – Admissions**  
Admission of any fact is sufficient proof of fact without other evidence

#### Judicial Notice

Court may accept existence of fact without requiring proof if it is so **commonly known that every ordinary person may be reasonably presumed to be aware of it** (*Mutmeri v Cheesman* (1998))

- Accept it without judicial inquiry, examples:

That the advancement of learning is one of the purposes for which the University of Oxford exists	<i>Re Oxford Poor Rate Case</i>
The identity of the Minister for Defence	<i>Holland v Jones</i>
That in the State of Michigan there are important manufacturing centres	<i>Clark Equipment Co v Registrar of Trademarks</i>
That in the area near Launceston, in the absence of a scheme of daylight saving, sunset is never as late as 8.45pm	<i>Warren v Pilkington</i>
That cancer is a major health problem	<i>Re Murray; Permanent Trustee Co of NSW v Salwey</i>
That in the past 80yrs there has been an overall inflationary trend	<i>National Trustee v AG</i>
That "grass" is a term frequently applied to Indian hemp or cannabis	<i>Ringstaad v Butler</i>
In the summer time in northern Victoria there will always be a considerable number of warm nights	<i>Grasso v Love</i>
That there was current in the community a generation ago a custom of cemetery authorities selling rights to bury	<i>Beard v Baulkham Hills Shire council</i>
That HIV is a life endangering disease	<i>Mutmeri v Cheesman</i>
The age at which children start and finish school and school hours	<i>Sullivan v Gordon</i>
Enactments, seals and signatures	EAQ ss 41-43, 123; EAC s143;

Common Law that is common knowledge	EAC s144
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- Accept it with judicial inquiry (cautious approach)
- Eg. if location of island disputed - Court may take judicial notice of latitude and longitude of island

#### Presumptions

If presumption operates in party's favour, taken to have been proved without evidence.

- Eg. contract law in commercial dealing presumption that intended to create legal relations

#### Prior Convictions as Evidence in Civil Cases

s79 EAQ, s92 EAC - A **defendant's conviction** in a criminal case may be used as evidence **against the D in a civil proceeding**

Eg. if hit by a negligent driver and the driver is convicted of the criminal offence, you can use that conviction as evidence in your civil claim.

- The two matters need not be directly connected: *Russel v Craddock*
- Driver could use injured's previous drug convictions to prove car crash didn't cause brain damage

Previously weren't able to (*Hollington v Hewthorn* (1943))

### Facts Open to Proof or Disproof

#### 1. Facts in Issue (directly relevant)

**GENERALLY:** evidence only relevant if proves or disproves fact in issue

- Facts prosecution must prove for offence (criminal)
- Facts from pleadings (civil)

#### 2. Relevant Facts (indirectly relevant – infer)

Fact from which it is possible to infer existence or non-existence of a fact in issue:

*R v Buchanan* – vehicle manslaughter. Admitted had **consumed large amount alcohol**. 2 witnesses gave **evidence of erratic driving 40mins** before. Held: relevant to show how accused handled car when affected by the alcohol, if accepted, showed that applicant affected by alcohol.

*R v Horvath* – evidence of **dangerous driving (overtaking other cars) 45 mins** before. Drifted onto wrong side of road (may have fallen asleep). **Acts of driving substantially separated** in time/place. No connecting link. Earlier driving no inference that applicant was in same state when crash happened.

*R v Stephenson* – accused wanted **evidence that passengers in victim's car was under influence alcohol**. There was virtual certainty

the driver was sober. Evidence of condition of driver only relevant if could be properly relied upon to raise reasonable doubt that accused was negligent. Held: Logical relevance of the former to the latter in this case may well have been regarded **as so slight that evidence of the former became inadmissible on the grounds of relevance**.

#### Evidence of Motive

Intention may be inferred from proved motive. Lack of evidence of motive not the same as absence of motive. (*De Gruchy v R*)

#### Circumstantial Evidence – indirectly relevant

- HC hasn't laid down guideline to deal with circumstantial evidence

#### Metaphors used by courts:

**Strands in Rope** – even if one strand breaks, looking at totality of evidence the rope still holds together (*Burrell's Case*) (just have to prove on balance of probabilities, but looking at totality of evidence must be proven BRD)

**Links in Chain** – every fact in the chain must be proven BRD otherwise chain breaks (*Willmington v DPP*)

*Plomp v R* (1963) - Strands in rope: victim strong swimmer, affair, told new gf he would be free to marry. Motive of husband relevant to otherwise unexplained drowning of wife. The evidentiary circumstances must bear no other reasonable explanation.

*Wilson v R* – victim died of gunshot wound, accused alleged gun accidentally went off. Evidence of past abuse/quarrels. Held: relevant as helped establish nature of relationship of parties. Assisted establishing motive, was not prejudicial.

#### United force in all circumstances put together

**Chamberlain v R** – Every circumstantial piece of evidence needs to be proved BRD. jury could draw inference of guilt from combination of facts, none of which when viewed alone would support that inference.

*Burrell's Case* – conviction circumstantially. Strands in rope: victim wife of boss used to work for, his Pajero captured on CCTV, note in kitchen saying needed rope, woman told housekeeper not to mention her visit from accused.

**Shepherd v R** – clarified circumstantial evidence. Not necessary to prove each circumstantial fact beyond reasonable doubt – Only if intermediate indispensable link then need to prove BRD.

*Baden-Clay* (2014) – strands in rope – a lot of circumstantial evidence against him.