HD APPROVED

EVIDENCE

MLP334

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

1 NATURE OF EVIDENCE LAW

INTRODUCTION TO THE UNIFORM EVIDENCE ACTS

Evidence law = The rules that define the type of information that can and cannot be received by a decision maker (whether a judge alone or member of the jury) to resolve disputes about facts in civil and criminal proceedings.

- Is **not substantive** — Does not create legal rights or duties
- Is **procedural** —
    - Sets out the process by which substantive legal issues are determined
    - Ensures that substantive law achieves accurate results

Hence,

- Information that **can be received** = admissible
- Information that is **excluded** = inadmissible

SOURCE OF EVIDENCE LAW: Uniform Evidence Acts

1) *Evidence Act 2008* (Vic)

Based on NSW & Federal legislation (*Uniform Evidence Act 1995* (Cth))

- Act has been adopted in seven jurisdictions
- Applies to:
    - Jury trials
    - Non-jury trials
    - Criminal proceedings
    - Civil proceedings

2) Common Law Rules

3) Case law = interpretation and clarification of statute

Note: Still similarities between statute and common law evidence law

- The legislation extinguishes most of the common law rules with the goal of uniform evidentiary rules in all state, territorial and federal courts.
- The Evidence Acts are a work in progress.
    - As with all legislation there have been occasions when the provisions are unclear and as a result there is an emerging body of case law that attempts to clarify the meaning and operation of the Act.
    - There is a rapidly expanding body of Victorian cases that deal with provisions of the Evidence Act since it began operating in 2010.
- Some sections of the Evidence Act are straightforward whilst others are diabolical.
    - Consider **section 62** as an example. It is perhaps the most poorly drafted provision ever seen. It attempts to define first hand hearsay – It is an unnecessarily complex definition of what is essentially a simple concept: first hand hearsay.

Rules in evidence

There are **two types** of rules in evidence —

1) Rules regulating matters of processing concerning how evidence can be given + who can give the evidence
2) Rules prescribing what sort of information can be received by the courts to resolve issues in dispute

Objective of Evidence Law

Truth

- Objective of the law of evidence is to ascertain the truth

Discipline

- To ensure that wrongly obtained evidence is excluded
- To discourage law enforcement officers from adopting inappropriate practices in the detection and investigation of a crime
- Arguably flawed:
    - Police officer suffers no tangible detriment
    - May be displeased that case has been weakened but will not be punished

Protection

- To ensure that the parties to litigation are treated fairly and protected from possible prejudices
    - E.g. the rules prohibiting the admission of prior criminal convictions

Reasons to restrict proof = To increase the **accuracy** and **speed** of the legal process

OVERARCHING CONCEPTS

Nature of Court Proceedings

Criminal proceedings — Brought by the state against an individual who is suspected of committing a crime

Civil proceedings — Brought by an aggrieved party against a party it claims has committed a legal wrong

Role of Judge and Jury

Re jury —

Lower courts — No jury; Magistrate/judge only

Higher courts — Usually have a jury

- Criminal matters — Jury consists of 12 people
- Civil matters — Jury consists of four to six people

Role of judge —

- Summarises arguments and explains the relevant law to the jury at the end of the trial (known as the charge to the jury)

- Directs the jury on how to conduct its fact finding function

Voir Dire

- When a dispute about a question of law arises during the course of a proceedings that dispute is heard and determine separated from the main trial
- The hearing that is conducted in relation to the matter is called a Voir Dire
- During Voir Dire parties are entitled to:
    - Call, cross-examine or re-examine witnesses
    - Make legal submissions
- Occurs in the absence of the jury to prevent exposing them to potentially inadmissible evidence
- Governed by **s 189 UEA**

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- Decision to grant a Voir Dire:
    - Matter of discretion
    - Not a right
    - Party seeking must first satisfy the Judge or Magistrate that there are reasonable grounds
    - Counsel must identify the issues to which it is directed: *DPP (NSW) v Zhang* [2007]

TYPES OF EVIDENCE

The Evidence Act deals with three types of evidence that can be adduced in court:

1) **Witness testimony**
2) **Physical objects or exhibits**
3) **Documents**

1) Witness testimony

- **In-court testimony** given by a person
- Usually called oral evidence, or viva voce (testimony = American usage)
- Most problematic form of evidence because it is based on memory and perceptions of a human being
    - Human beings are bizarre, unpredictable, fallible and potentially dishonest
    - When you examine a witness you never know exactly what will come out of his or her mouth - particularly during cross-examination.

Evidence that the witness gives will fall into one of **three types**:

a) **Honest** evidence
b) **Dishonest** evidence
c) **Honest but mistaken** evidence

Still no solid way to test the type of evidence:

- Working out what type of evidence is being given is in part derived from the **person giving the evidence**.
- Facial micro expressions, polygraph tests and brain fingerprinting are not accepted by the courts as being conclusive techniques that detect dishonesty in a person.
- The fact is that people do lie despite taking an oath – If they did not, the offence of perjury would be unnecessary.
- What to believe and what not to believe is the **function of the jury or judge/magistrate** depending on the type of hearing.

Hence, **cross-examination** = main tool for discovery of facts + work out what type of evidence is being given (**honest**, **dishonest** or **honest but mistaken**)

- Cross-examination is about testing a witness – **not only for honesty but for accuracy** (both fall within the concept of 'reliability').
    - If a witness is lying or mistaken, then it will be desirable (and theoretically possible) to expose this by way of cross-examination.
    - The assessment of a witness in terms of his or her reliability will be heavily influenced by their performance under cross-examination.
- John Henry Wigmore, the original author of the leading American text on evidence, wrote: "Cross-examination is the **greatest legal engine ever invented for the discovery of truth**."
    - However, that comes with an important qualification: "You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it."

Despite the problems with witnesses, their evidence is still usually the **most important evidence** in most cases.

2) Physical objects or exhibits

Note: this unit will not focus on this type of evidence

- Often referred to as real evidence
- There is a large array of potentially relevant items recovered from a crime scene or accident scene that might be used (adduced) as evidence in a trial. E.g. –
    - A **murder weapon** such as a rifle that is owned by the accused;
    - A serum sample such as **blood or saliva** recovered from the crime scene;
    - A glass cup from which a **fingerprint** is collected.
- In most cases, if not all, exhibits will be **treated as circumstantial evidence**.
- Exhibits from a crime scene will usually **do no more than create suspicious circumstances**.
- It is possible that an **innocent explanation** will account for the physical evidence collected from a crime scene. E.g. –
    - The accused might be the registered owner of the rifle used to murder the victim but **that alone does not reveal that they are guilty.**

- A fingerprint recovered from the crime scene that belongs to the accused will place them at the crime scene - but alone it is not enough to find a guilty verdict.
- Perhaps the accused installed insulation in the roof of the victim's house shortly before the victim was murdered and accepted a drink before leaving.

2) Documents

Note: this unit will not focus on this type of evidence

1) Letters, contracts and emails
2) Documents are a very common source of evidence, particularly in commercial litigation
    1) E.g. In fraud and tax evasion cases there can be a very large number of documents that will be admitted as evidence.
3) A 'document' might include:
    1) An airline ticket that is introduced to support an alibi.
    2) A sales receipt for a large quantity of potassium or nitric acid (ingredients that can be used to make a bomb)
    3) Phone records/Letters/Emails
    4) Diary/Journal
4) **Note**: the presence of online transactional databases leads to an enormous amount of information being generated from online transactions – This is becoming a very common source of documentary evidence.

CATEGORIES OF EVIDENCE: DIRECT & CIRCUMSTANTIAL

There are two broad categories of evidence:

1) **Direct** evidence
2) **Indirect (circumstantial)** evidence

1) Direct evidence

Evidence that **directly links the defendant to the crime**

- Does not involve any inference of implications

2) Indirect (circumstantial) evidence

Evidence which lacks a link: *Corey Travis Fuller-Lyons v The State of NSW* (HCA, 2015)

- Requires the drawing of an inference from one fact to another
    - As normally more than one possible explanation of the evidence
- **Expert testimony** often relied upon to establish said link

Indirect evidence is then sub-divided into two further categories —

a) Strands in a cable case

- Where there is an **accumulation of circumstantial evidence** which **operates cumulatively**
- Prosecution **does not need to establish each item** of evidence beyond reasonable doubt

b) Links in a chain case

- Where evidence operates **sequentially** / by sequential reasoning
- If case is sequential and there is no other evidence in support of the relevant fact, then the indispensable links must be proven beyond reasonable doubt

Facts that do not need to be proven

- There are some matters that a court will assume are correct and true and hence evidence is not required for their proof
- Known as matters of common knowledge
- Governed by **s 144 UEA**

ADMISSIBILITY OF EVIDENCE

Admissible v Inadmissible

- Information that **can be received** = admissible
- Information that is **excluded** = inadmissible

Fact in issue

- Evidence is admissible **only** if it is **relevant to a fact in issue** in the proceedings
- Fact in issue is a matter that must be proved for a party to either establish or rebut an element of a charge or a cause of action in the proceedings
- Facts in issue are determined by the substantive law and the pleadings

TEST: Is the evidence admissible?

- Is the **witness competent**? (Yes)
- Is the **evidence relevant**? (Yes)
- Does the evidence **violate an exclusionary rule**? (No)
- Does the evidence **satisfy the discretion** of the trial judge? (Yes)

If the evidence survives all four tests, it will be admitted.

BURDEN OF PROOF

Note: The burden of proof is regulated by common law principles.

Burden of proof = the rule that sets out which party in a court case has the onus of proving a matter

General rule = The party asserting a claim / allegation must provide relevant evidence that supports / proves it.

Introducing evidence in court

Who is obligated to introduce evidence in court?

- **Prosecutor or accused** (criminal cases)
    - It is **usually the prosecutor unless the defence has an independent argument** – in such a case, the defence needs to bring evidence to support that argument
- **Plaintiff or defendant** (civil cases)

Evidential and legal burdens

The burden of proof gives rise to **two questions**:

1) Is there sufficient evidence to make out a case (**evidential burden**)?
2) Does the evidence yield a persuasive argument to prove the case (**legal burden**)?

1) Evidential burden – the **sufficiency of evidence** introduced to prove a claim

- **Level of proof** that must be established in order for the relevant issue to be left to a jury
- Prosecution/defendant must **produce sufficient evidence** before a jury or judge may consider it
- Fact-finder must look at the **volume and weight of evidence** (witnesses, documents and exhibits) and decide whether there is enough.
- In a criminal trial, after the prosecution has finished presenting its evidence, the defence may make a 'no case' submission.
    - The submission must be decided by the judge – If the judge finds that the prosecution has adduced insufficient evidence then the case is over.
    - It does not happen often but if it does it is a source of embarrassment for the prosecutor.
- If evidence is **insufficient** then there is no need for jury or judge to reach verdict

2) Legal / ultimate burden (standard of proof) – the **persuasiveness of the evidence**

Whilst the evidential burden is reasonably straightforward, the legal burden is more difficult to understand –

- This is the **level of persuasion** that evidence adduced by a party must reach in order for it to succeed in its case
- Only arises **once the evidential burden has been satisfied**
- Governed by the **standard of proof**
- The legal burden is to be decided by the jury or judge if there is no jury.
- Very closely connected to the closing address that each party delivers at the end of the trial after all the evidence has been presented.
    - It is during a closing address that the prosecution will arrive at a conclusion that is based on the evidence that it has presented. This is an argument; a conclusion that is supported by evidence or reasons.
    - In their closing argument the prosecution will review the evidence and tell the jury that it leads to one conclusion: the accused is guilty.
- The jury will listen to the prosecution's argument and **decide whether it is persuasive**. If it is persuasive they will accept it, if not they will reject it.

Which party must discharge the evidential burden v legal burden?

<u>Prosecution</u>

- In criminal proceedings it is usually the **prosecution** that must **discharge the evidential burden** in relation to the facts in issue they have alleged and discharge the legal burden.
- Once the prosecution has **satisfied the evidential burden** by adducing sufficient evidence and the defence finishes presenting its case if they choose to do so the judge will allow the evidence to be considered by the jury.
- The **jury will decide whether or not the legal burden** has been satisfied by the prosecution.
    - If they decide that the prosecution's argument (accused is guilty) and evidence is persuasive they will arrive at a guilty verdict.

Note:

- the **juries are not left to their own devices in the persuasiveness enquiry**. (see **standard of proof**)
- There is overlap between the legal burden of proof and the standard of proof.

The prosecution's argument (accused is guilty) is persuasive in a criminal context if it proves the case **beyond a reasonable doubt**.

Defence

General rule = the defence does not have to prove anything.

- A fundamental assumption in the criminal justice system is that the **accused is innocent unless the prosecution can prove otherwise**. An innocent person does not need to prove anything in a criminal trial.

Where defendant bears evidential and/or legal burden

A defendant in criminal proceedings might bear an evidential burden or both an evidential burden and a legal burden where **defence if the accused pleads insanity** or if they **raise a defence such as self-defence or provocation**.

- If a defendant pleads **not guilty by reason of insanity** then their **sanity will be a fact in issue or a disputable fact** – The **evidential burden and legal burden** shifts to the defendant.
- If, however, in response to a criminal charge an accused **argues a defence (self-defence, provocation or duress)**, then the **evidential burden** must be satisfied by the defendant.
    - However there is **no legal burden** upon them. Here the legal burden is not upon the defendant, it is upon the prosecution.

Example:

John is charged with murder and at his trial he claims that he was acting in self-defence. John must introduce **evidence to support his claim** that he was acting in self-defence in order to **satisfy the evidential burden of proof**. If John **does not satisfy** the evidential burden then the **jury will not consider his self-defence claim** in their deliberations. If he does satisfy the evidential burden then the **legal burden will be upon the prosecution**.

- Where the **evidential burden is on the accused but the legal burden is on the prosecution**, the prosecution will have to **convince the jury that the evidence is not persuasive**.
    - For example, the prosecutor might make the following statement during their closing address: “The evidence introduced by the accused cannot lead to the conclusion the he was acting in self-defence, for the following reasons...”

Civil proceedings

Note: not examinable

In civil proceedings the evidential and legal burden will be upon the party making a claim, which will be the plaintiff or the party making a defence (the defendant).

STANDARD OF PROOF

An argument about a fact in issue is considered persuasive if it satisfies the standard of proof: *Evidence Act* **ss 140-142**.

The **burden of proof** determines who bears the responsibility for proving an allegation. The **standard of proof** provides jurors with a guideline that is supposed to help them determine if an allegation has been proven.

Note: There is an overlap between the standard of proof and the legal burden - An argument about a fact in issue is considered persuasive if it satisfies the standard of proof.

Criminal Proceedings: **s 141**

a) "**Beyond reasonable doubt**" is the standard of proof for the **prosecution**
    - Must **prove every element** of the offence / charge (that is the essential facts that go to make up the charge)
    - Must **disprove the existence of each defence**

b) "**Balance of probabilities**" is the standard of proof for the **defence**: **s 141**
    - **Note**: Rare that accused will carry the burden in criminal case

Civil proceedings: **s 140**

- "Balance of probabilities" is the standard of proof for both the prosecution and the defence: **s 142**
- Greater than 50% satisfaction
- Where accusations are serious courts have held that there is a need for greater scrutiny

Note: It is an error of law to apply the civil standard of proof in a criminal case or the criminal standard of proof in a civil case: *Reifek v McElroy* [1965] HCA 46; *Helton v Allen* [1940] HCA 20

a) Beyond reasonable doubt

- This is the highest standard of proof in the legal system
- In order for the prosecution to establish guilt, it must prove every element of the offence and disprove every defence raised by the accused beyond reasonable doubt
- Where the case is one based on **circumstantial evidence**: the judge can instruct the jury that guilt should only be a rational conclusion (i.e. ask the juror to think whether there could be any other reasonably possible explanation: *Henry Keogh murder trial*)

Hence, in a criminal trial the jury must decide: Has the Crown proved the guilt of the accused beyond reasonable doubt? – If the answer is "yes", the appropriate verdict is "guilty". If the answer is "no", the verdict must be "not guilty".

Re the phrase "**beyond reasonable doubt**" –

How certain should one be to satisfy the "beyond reasonable doubt" standard? 70%? 80%?

Common law position:

- Except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32–33; La *Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120 at [20].
- However, pursuant to **section 64** of the *Jury Directions Act 2015* (Vic), Judges now have the power to elaborate somewhat on this difficult question.
    - If so asked by a jury, a Judge can properly instruct a jury that "an imaginary or fanciful doubt or an unreal possibility is not a 'reasonable doubt'": **s 64** *Jury Directions Act 2015* (Vic)
    - See also at common law: *Green v The Queen* at 33; or as put in *Keil v The Queen* (1979) 53 ALJR 525, "fanciful doubts are not reasonable doubts"
- The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *Green v The Queen* at 32–33; *R v Southammavong* [2003] NSWCCA 312 at [28].
- Newman J said in *R v GWB* [2000] NSWCCA 410:
    - "The words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them": at [23].
    - "judges should not depart from the time honoured formula that the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say." At [44]
- A Judge can also adapt his or her explanation of the phrase "proof beyond reasonable doubt" in order to respond to the particular question asked by the jury: section 64 of the *Jury Directions Act 2015* (Vic).

b) Balance of probabilities

For this to be satisfied, it must be shown that a fact is **more likely to have occurred than not**, i.e. that there is a >50% possibility of the fact having occurred.

- Where an issue in a case relates to the admissibility of the evidence rather than an element of the offence or cause of action, then the facts that are relevant to the determination of these issues need only be proven on the balance of probabilities: **s 142**

MATTERS THAT DO NOT HAVE TO BE PROVED IN COURT

Matters of common knowledge: **s 144** – i.e. facts which are not reasonably open to question

Matters of law: **s 143** – laws, regulations, proclamations, orders.

OUTLINE OF THE EVIDENCE ACT

The Evidence Act, which is a collection of rules, has a fairly simple outline that is easy to remember. The individual rules can be complex, however, the overall scheme of the act is not.

The Act creates **three stages** that any item of evidence (witness, exhibit or document) must survive before it can be admitted. If an item of evidence fails to survive a single stage it will be excluded.