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# 1. INTRODUCTION

## 1.1. Placing evidence law in context – perspectives

- Substance and procedural law
- Context for evidence law – the adversarial trial
  - Parties, judge, jury
- Sources of evidence law
  - Main source: Uniform Evidence Law
- How does evidence law control proof?
- Why does evidence law control proof?
  - Factual accuracy
  - Efficiency
  - Values

## 1.2. Substantive and procedural/adjectival law

- Substantive law = lays down the rules of behaviour for legal persons to follow; regulates behaviour
  - e.g. prohibition on murder under criminal law
- Procedural law = serves the substantive law; enables it to be enforced
  - Evidence law = procedural law that operates at trial
    - Hearsay = an out of court statement, where the person adducing it relies upon for its truth value. General subject to exclusion due to its unreliability.
    - Confessions, however, are typically admissible
- How does evidence law connect with substantive law?
  - To understand evidence law, need to grasp the substantive law behind it – e.g. to evaluate whether a certain piece of evidence is relevant (s 56 EA), one must know what facts are in issue and what elements must be proved.
  - For e.g., murder – requires certain elements to be satisfied (i.e. act/omission of accused caused death of victim, accused had intent/was reckless)
  - Evidence law requires that these elements are proved according to a particular standard (beyond reasonable doubt)
  - A common issue in murder trials is who actually committed the murder. Evidence law comes in and allows some evidence to not be put before the jury (because of exclusion rules).

### 1.3. The trial process

#### The adversarial trial

- Highly formalized and regulated
  - Contrast the inquisitorial trial
    - Far less formalized
    - Judge is also an investigator
  - Contrast 'free proof'
    - Proof that is unconstrained by formal rules
    - Few exclusionary rules
    - Adopted in the inquisitorial trial
- In the adversarial trial, interested parties gather and present evidence. To a large extent, they are in control of what happens during the trial.
  - e.g. the plaintiff decides what claim to make
- The court remains detached and objective
  - Tribunal of law (trial judge) controls admissibility and use of evidence under law
    - Instructs jury on evidence, fact and law
  - Tribunal on fact (jury) weighs up evidence in accordance with judicial directions, and reaches verdict

#### Evidence Act

##### **Sec 11 – General powers of a court**

- (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

##### **Sec 26 - Court's control over questioning of witnesses**

- The court may make such orders as it considers just in relation to:
  - (a) the way in which witnesses are to be questioned; and
  - (b) the production and use of documents and things in connection with the questioning of witnesses; and
  - (c) the order in which parties may question a witness; and
  - (d) the presence and behaviour of any person in connection with the questioning of witnesses

##### **Sec 27 - Parties may question witnesses**

- A party may question any witness, except as provided by this Act.

**Sec 28 - Order of examination in chief, cross-examination and re-examination**

- Unless the court otherwise directs:
  - (a) cross-examination of a witness is not to take place before the examination in chief of the witness; and
  - (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness

**Sec 29 - Manner and form of questioning witnesses and their responses**

- (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
- (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.
- (3) Such a direction may include directions about the way in which evidence is to be given in that form.
- (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

- Why is the criminal trial sometimes described as ‘accusatorial’ rather than ‘adversarial’?
  - ‘Adversarial’ connotes a contest, in which each side is trying to win, and the judge is an umpire who controls fairness
  - In the criminal trial, the prosecutor is not to aim simply for conviction, but is a minister of justice, who must aim for the truth
  - Furthermore, the defendant has a lot at stake (i.e. their liberty), whereas the prosecutor does not have anything at stake. Strong asymmetry between the parties. Leads to an asymmetry on the duties imposed on the parties – the prosecutor has a high ethical duty to pursue a just result.
  - Also a considerable imbalance between resources. Thus, the standard of proof of the defence and prosecution differ, and the exclusionary rules of evidence law favour the defendant.

**1.4. Taking objections****Duty to object**

- There is a duty placed on parties to object where rules of evidence law are not followed strictly

Criminal Appeal Rules
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<b>Rule 4 – Exclusion of certain matters as grounds for appeal</b>
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- “No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal”

#### Picken [2007]

- **Principle:**
  - “Leave to rely on an error to which no objection had been taken at the trial will be granted only whether the appellant can demonstrate that the error led to a miscarriage of justice...It appears to be generally accepted that the appellant must at least establish that he/she has lost a real chance (or a chance fairly open) of being acquitted”
- **Facts:**
  - Sexual assault case, without much evidence put forward by the prosecution. Trial depended upon the evidence of the complainant, and the evidence of the defendant.
  - Judge said to jury: “So as I say, you look at the witness overall and say now on balance, am I satisfied that witness has given a reliable account...”
  - D’s counsel failed to object to this error regarding the standard of proof.
- **Held:**
  - Judge’s comment understated the criminal standard of proof (BRD)
  - But since the trial judge had discussed the proper standard elsewhere, this one occurrence of error was not enough to establish that there had been a miscarriage.

### 1.5. Voir dire

- “Trial within a trial”
- Specified preliminary questions are to be heard in the absence of the jury – i.e. for competence, reliability of admissions, or illegality or impropriety in the obtaining of evidence
- If the jury is present whilst the question is being resolved, this may sway the jury in the determination of their ultimate verdict

#### Evidence Act

##### **Sec 189 – The voir dire**

- (1) If the determination of a question whether:
  - (a) evidence should be admitted...
    - depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
- (2) If there is a jury, a preliminary question whether:
  - (b) evidence of an admission, or evidence to which section 138 applies, should be admitted;

is to be heard and determined in the jury's absence  
(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

**Sec 84 – Exclusion of admissions influenced by violence and certain other conduct**

**Sec 138 – Discretion to exclude improperly or illegally obtained evidence**

**1.6. Sources of evidence law**

**Background to the Evidence Act 1995 (Cth) and (NSW)**

- Evidence Act 1995 (Cth) (including ACT), (NSW)
- 'Uniform'?
  - Adopted in Tas (2001), Vic (2008), ACT & NT (2011)
  - NB: commencement dates may be some time later
  - WA, SA and QLD not covered
- A 'code'?
  - Close to a code in some areas; but some slight differences
  - And other Acts must be consulted sometimes

**Relationship between the Evidence Acts, the common law and other statutes**

Evidence Act

**Sec 8 - Operation of other Acts etc.**

(1) This Act does not affect the operation of the provisions of any other Act...

**Sec 9 – Application of common law and equity**

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment..."

**Sec 165B – Delay in prosecution** [previously governed by CL; added in 2009]

- (1) This section applies in a criminal proceeding in which there is a jury.
- (2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

## Other sources of evidence law

Criminal Procedure Act 1968

**Sec 281** [confessions not admissible unless recorded]

- (2) Evidence of an admission [to an investigating official, during official questioning, in respect of an indictable offence] is not admissible unless:
- (i) there is available to the court
  - (ii) a tape recording made by an investigating official of the interview in the course of which the admission was made, or
  - (iii) if the prosecution establishes there was a reasonable excuse...

**NB: evidence law is procedural rather than substantive law. Evidence law of the tribunal applies.**

- E.g. Cth offence tried in NSWSC = EA (NSW)
- Same offence in Fed Ct = EA (Cth)
- Same offence in QLDSC = EA 1977 (QLD); common law

### **1.7. How does evidence law control proof?**

- EA Ch 2: Adducing Evidence
  - Traditional preference for oral evidence
  - Subjecting witnesses to direct-examination and cross-examination
  - Also – docs and real evidence (objects)
- EA Ch 3: Admissibility of Evidence
  - E.g. exclusion of hearsay, opinion, tendency evidence
  - NB: each exclusion rule subject to exceptions – increasingly so (media scrutiny and public criticism has led to a ‘freeing up’ of exclusionary rules)
- EA Ch 4: Proof
  - E.g. warning in delayed complaint cases: s 165B
  - E.g. ‘presumption of innocence’, proof BRD, burden of raising a defence

### **1.8. Why does evidence law control proof?**

- What are the goals of evidence law?
  - Factual accuracy
  - Efficiency
  - Fairness

- Why not 'free proof'?
  - Could prejudice the jury - If jury made aware of prior convictions/charges etc., may mean that jury does not apply proper standard of proof/not convict on basis of evidence presented at trial

### **Factual accuracy, efficiency and fairness**

Evidence Act
<p><b>Sec 56 – Relevant evidence to be admissible</b></p> <p>(1) Except as otherwise provided by this Act, evidence that is <u>relevant</u> in a proceeding is admissible in the proceeding.</p> <p>(2) Evidence that is not relevant in the proceeding is not admissible.</p> <p><b>Sec 55 – Relevant evidence</b></p> <p>(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.</p> <p>→ Irrelevant evidence = could not have any effect on probability of the existence of the fact in issue</p> <p><b>Sec 135 – General discretion to exclude evidence</b></p> <p>The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:</p> <p>(a) be <u>unfairly prejudicial</u> to a party; or</p> <p>(b) be <u>misleading or confusing</u>; or</p> <p>(c) cause or result in <u>undue waste of time</u></p> <p>→ This section weighs in favour of evidence being admitted</p> <p><b>Sec 137 - Exclusion of prejudicial evidence in criminal proceedings</b></p> <ul style="list-style-type: none"> <li>• In a criminal proceeding, the court must refuse to admit <u>evidence adduced by the prosecutor</u> if its probative value is outweighed by the danger of <u>unfair prejudice to the defendant</u>.</li> </ul> <p>→ This section weighs in favour of evidence being excluded</p> <p>→ Asymmetrical principle that favours the defendant</p> <p><b>Sec 190 – Waiver of rules of evidence</b></p> <p>(1) The court may, <u>if the parties consent</u>, by order dispense with the application of any one or more of the provisions...in relation to particular evidence or generally</p> <p>(2) In a <u>criminal proceeding</u>, a defendant's consent is not effective for the purposes of subsection (1) unless:</p> <p>(a) the <u>defendant has been advised</u> to do so by his or her lawyer; or</p>

- (b) the court is satisfied that the defendant understands the consequences of giving the consent
- (3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:
  - (a) the matter to which the evidence relates is not genuinely in dispute; or
  - (b) the application of those provisions would cause or involve unnecessary expense or delay...

**Rights of parties – defendant, complainant, witnesses, third parties**

Evidence Act
<p><b>Sec 192 - Leave, permission or direction may be given on terms</b></p> <ul style="list-style-type: none"> <li>• “in deciding whether to give leave, permission or direction, [the court] is to take into account:           <ul style="list-style-type: none"> <li>(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and</li> <li>(b) the extent to which to do so would be <u>unfair</u> to a party or to a witness; and</li> <li>(c) the importance of the evidence in relation to which the leave, permission or direction is sought; and</li> <li>(d) the nature of the proceeding; and</li> <li>(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence               <ul style="list-style-type: none"> <li>→ Wherever leave is required, this section comes into play and the court should consider these matters</li> </ul> </li> </ul> </li> </ul>

**Institutional values and functions**

- Many of the rules of evidence law apply in criminal cases and reflect doubt about the jury’s abilities. But judge-alone trials are rare in serious criminal matters.
- The jury plays an important function in representing/upholding/ensuring:
  - Democracy – the jury a mini-parliament
  - Party control – power in individuals rather than bureaucracy
  - Norm projection – drama of the trial; representative jury
    - Deterrent effect

**PROOF – PART 1**