

LAW 3321 EVIDENCE

Module 1 – Introduction to the law of evidence, including the trial process

Text: Andrew Hemming, *Evidence Law in Qld, SA and WA* (Thomson Reuters, 2nd Edition, 2022).

Overview: Chapter 1 Introduction and Evidence Basics, pages 1 - 75.

- ☐ Substantive law = the rules of the game
- ☐ Evidence law = what moves are actually allowed

Adjectival (procedural) law = how the law operates in court So:

- **Substantive law** → what rights you have (e.g. murder = offence)
- **Evidence law (adjectival)** → what material the court can use to decide if those rights were breached
- Facts in issue = elements of the case actually in dispute
- The adversarial system is a contest between opposing parties who control the presentation of evidence, while the judge acts as an impartial arbiter ensuring the trial is conducted fairly.
- A trial judge must direct an acquittal where the evidence, taken at its highest, cannot sustain a conviction (*Doney v R*), but may give a Prasad direction where the evidence is technically sufficient yet so weak that a jury may wish to acquit without hearing further evidence. **No evidence** → **judge ends case (Doney)**
Weak evidence → **judge hints (Prasad)**
- A voir dire is a hearing conducted in the absence of the jury to determine preliminary issues, particularly the admissibility of evidence, often described as a “trial within a trial”. s 138 (improperly obtained evidence) or admissions
- At common law, relevant evidence may nevertheless be excluded where a rule of evidence or judicial discretion applies, particularly where its admission would be unfair, unreliable, or more prejudicial than probative.
- At common law, relevant evidence may be excluded through judicial discretions, including the Christie discretion (unfairness to the accused), the Lee discretion (unfairness in the use of admissions), and the Bunning v Cross discretion (balancing the admission of unlawfully obtained evidence against the public interest in deterring misconduct).
- QLD is **NOT full UEA** That means: Common law rules **still dominate**- The Evidence Act 1977 (Qld) only **partially covers things**

LECTURE 1

Why is it that relevant and probative evidence may be excluded? The issue around this makes up the course.

- Definition of Evidence (G. Roberts)
 - ‘Evidence is the material offered in court during a trial for the purpose of enabling the finder of fact to reach a verdict on the issues in dispute.’

Civil matter, Balance of probabilities, Criminal matter beyond reasonable doubt. ⇒ *Judgment is based on the evidence presented by the party, with the party bearing the burden of proof having to meet the required standard.*

In an adversarial system of justice, judgment is based on the evidence presented by the parties, with the party bearing the burden of proof having to meet the required standard of proof.

- Each party seeks to establish the more persuasive case based on the evidence presented.

Checklist of what information can come before a court as ‘evidence’ (David Field)

1. Is it relevant?
 2. Is it admissible as evidence even if it is relevant?
 3. How much ‘weight’ is the court likely to give to it, even if it is admissible?
- This combined trio of concepts underpin the law of evidence.

- In ***R v War Pensioners Appeal Tribunal: Ex parte Bott (1933)*** Evatt J noted that these exclusionary rules represented an attempt 'to evolve a method of inquiry best calculated to prevent error and elicit truth'.

Flowchart: Chapter 3 Evidence Act 1995 (Cth)

The flowchart starts with the question: 'Is the evidence relevant?' and if the answer is 'yes', sets out a series of tests, to which if the answers are all 'no' then the evidence is admissible.

- Does the hearsay rule apply?
- Does the opinion rule apply?
- Does the evidence contravene the rule about convictions?
- Does the tendency rule apply?
- Does the credibility rule apply?
- Does the evidence contravene the rules about identification evidence?
- Does a privilege apply?
- Does **judicial discretion** to exclude evidence apply? including the Christie discretion (unfairness to the accused) as per Erin Patterson case, the prior attempts at murder of her husband.

ALRC Report 26 Vol 1, [641]

- The primary rule is —if irrelevant not admissible; if relevant, admissible (subject to the exclusionary rules). See s 56, *Evidence Act 1995 (Cth)*.

Goldsmith v Sandilands [2002] HCA 31 [31] McHugh J

it proves or makes probable the past, present, or future existence or non-existence of the other fact. Whether a fact is a fact in issue depends upon the pleadings and particulars of each party's case. ?
Not all inconsistencies matter □ Only inconsistencies about **facts in issue** really matter

J.Stone, Evidence: Its History and Policies (1991), 59 We can't expect absolute perfect truth? Catherine Foledig and Meadows Law. Unless this distinction between absolute truth and judicially obtainable truth is made, the entire law of evidence makes nonsense." Lindy Chamberlain meanwhile got 1.5m in 1980 for 1 death?

S.Gageler, 'Evidence and Truth' (2017) The Judicial Review Behavioural science shows that humans are not particularly good at estimating probabilities of the likelihood of an existence of a fact on the basis of incomplete information or uncertainty, with consequent errors or biases

The functions of Judge and Jury The Queen v Dao [2005] VSCA 196 "A judge's job isn't to lecture the jury about all aspects of the law. The judge's job is to make sure the trial is fair, explain the relevant law, identify the questions the jury must answer, and guide them on how to use the evidence in reaching their verdict." Also (Alford v Magee (1952) 85 CLR 437 at 466);

Standard of Proof – Civil & Criminal

'What Dixon J was saying in *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-363, was that satisfaction on the balance of probabilities involves the formation under conditions of acknowledged

uncertainty of a subjective belief. The requisite belief is an “actual persuasion” that the fact in issue actually exists.

Vic has enacted Section 63 to 64 of the Jury Directions Act for a judge to address that question of 75% - 90% sure?

Proof in an adversarial context – *Blatch v Archer - Swain v Waverley Municipal Council*

Lord Mansfield: ‘It is certainly a maxim that all evidence is to be weighed according to proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.’

Should they moved the flags in the sand?

Ethics and Litigation *Tuckiar v R* [1934] HCA 49 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ)

Tuckiar had been convicted of killing a policeman then acquitted then knocked off? - “*Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed.*”

The case is remembered for three main points:

1. **Judicial impartiality in summing up** — judges must not effectively tell the jury which evidence to believe.
2. **No adverse inference from silence** where legislation prohibits it.
3. **Legal professional privilege** — defence counsel's disclosure of the client's confession was a grave breach of duty.

General propositions for conduct of a criminal trial-

The Queen v Apostilides (1984) 154 CLR 563, 575

- ☐ Prosecutor decides witnesses – sole responsibility of Crown
- ☐ Judge can ask but not assess reasons – may ask why, not judge sufficiency
- ☐ Judge cannot compel – can invite reconsideration, not direct calling
- ☐ Jury direction – may comment on failure to call witness
- ☐ Judge calling witness – only in *exceptional* cases
- ☐ Appeal ground – only if failure causes *miscarriage of justice*

Duty of Prosecutor- *Nguyen v The Queen* [2020] HCA 23 “*fairness encompasses the presentation of all available, cogent and admissible evidence ...*”

***Taig v The King* [2022] VSCA 235** In our view the re-examination was calculated to cause this explosive outburst from the witness. The role of a prosecutor does not extend to using shallow strategic devices designed to achieve a conviction at any cost

Nature of evidence law

- Evidence is adjectival, as distinct from substantive law. (*Cardile v Nominal Defendant*).
- Rules of evidence are crystallisations of procedural fairness (*R v War Pensioners Appeal Tribunal: Ex parte Bott*).
- Technical objections received less favourably today (*Queensland v Pioneer Concrete*).
- Evidence practical rather than academic: points not taken promptly difficult to retrieve.
- Stringent tests before new trial granted for ‘fresh evidence’ (*R v Gilvarry* and *Mickelberg v The Queen*).
- Generally, adversary system based on information parties place before a court (*Kristeff v The Queen*).
- Wrong decision or a miscarriage of justice, subject to the proviso, and, Queensland, it's Section 668E.

The Unreasonableness Ground of Appeal *M v The Queen* (1994) 181 CLR 487, 493 [9] *otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an*

innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence

Voir dire- “voir dire” which literally means “to see [them] say” is a “trial within a trial” in the absence of the jury where the evidence is likely to be prejudicial to the accused- is required to satisfy the court of the facts necessary to justify admission of the evidence on the balance of probabilities: **Wendo v The Queen** (1963). See also **R v Buttery** [2012] NTSC 103 (Mildren J).

There are many rules or discretions which are applied by or exercised by a judicial officer which may exclude evidence which is otherwise relevant.

- Examples include: hearsay evidence; confessional evidence in particular circumstances; evidence tainted by unlawfulness or impropriety; evidence covered by privilege; similar fact or propensity evidence; the credibility rule; rules concerning identification evidence; evidence which is unfair to an accused; evidence which is more prejudicial than probative; and the rule concerning evidence of judgments and convictions.

Grech v The Queen / Kadir v The Queen was a 2020 joint decision of the High Court of Australia concerning the admissibility of covertly obtained video evidence in prosecutions arising from a greyhound “live baiting” investigation. It clarified the operation of s 138 of the Evidence Act 1995 (Cth), which governs the exclusion of improperly or illegally obtained evidence.

of **R v Christie** [1914] AC 545 Even if evidence is legally admissible, the judge may still exclude it if its **prejudicial effect outweighs its probative value** or if admitting it would risk an unfair trial.

Another judicial discretion is the Lee discretion which permits exclusion of a confession of an accused in a criminal case. In **R v Lee** (1950) 82 CLR 133, at 154, the discretion was expressed in terms of “whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused”.

A third judicial discretion is the **Bunning v Cross** public policy discretion where evidence is obtained by unlawful or improper conduct

- **Wood v R** [2012] NSWCCA 21 and **Patel v The Queen** [2012] HCA 29, where the respective convictions were overturned on appeal primarily due to the manner in which the Crown case was conducted.

No jury order: s 614 Criminal Code (Qld)

614 APPLICATION FOR ORDER

- (2) The application must be made under section 590AA before the trial begins. [Section 590AA deals with pre-trial directions and rulings.]
- In the second Patel trial, the defence applied for a ‘no jury order’ which was refused by Douglas J (**R v Patel** [2012] QSC 419 at [47]).

1995: A new Cth Act

- Post 1995, the **Cth Evidence Act** applies to federal courts and courts of the ACT, but not to State courts exercising federal jurisdiction (s 4)
- when you're considering the Queensland Evidence Act, you assume that the common law survives unless it's been altered by statute.

Changes to Evidence Act 1977 Qld

☞ There have been changes to the 1977 Act. These include liberalisation of conditions and reception of children’s evidence (1989, 2000 and 2003), similar fact or propensity evidence (1997 and 2024) and the standard of proof in sentencing hearings (2000).

☞ Section 132BA Delay in Prosecuting Offence of the Evidence Act 1977 (Qld) is drawn from s 165B of the Evidence Act 1995 (NSW) and s 39 of the Jury Directions Act 2015 (Vic). The provision commenced on 15 September 2020- In giving the direction, the judge must inform the jury of: the nature of the disadvantage: s 132BA(4)(a)(i); and the need to take the disadvantage into account when considering the evidence: s 132BA(4)(a)(ii).

Types of Evidence

1. Testimony, which consists of a witness's sworn assertions of fact or opinion, such as in person or on affidavit
2. Documents, including paper, microfilm, audiotape, videotape and computer disc
3. Real evidence, such as physical objects like tools or packaging, but also can include demonstrations in aid of testimony, physical appearance and conduct

Dispensations from adducing evidence

- Dispensations from the normal presentation of evidence are:
 - Formal admissions (when a party concedes a fact).
 - Judicial notice, where a court may dispense with proof of a well-known fact
 - Presumptions: a rebuttable presumption of law is a partial dispensation from circumstantial proof,

Judicial notice of statistics

Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460 McHugh J took judicial notice of the ABS Health Surveys- [168] *In this case ... resort to statistics contained in National Health Surveys is not only impermissible but also, with respect, unhelpful.*

Summary of Hemming, "Do Juries Understand the Criminal Standard of Proof of Beyond Reasonable Doubt?" (2021)

- For almost 50 years, the High Court has maintained that it is both **unnecessary and unwise** for judges to explain "beyond reasonable doubt" because the phrase is supposedly well understood by ordinary people. The most recent affirmation was in *R v Dookheea* (2017).
- if jurors genuinely understood "beyond reasonable doubt", then it is difficult to explain why appellate courts repeatedly overturn convictions because the evidence was incapable of proving guilt to that standard.
- Australia is unusual because it largely refuses to define the standard, whereas other common-law countries provide some explanation to jurors

BUT Correlation is not causation

The biggest weakness is that Hemming assumes overturned convictions may indicate juror misunderstanding. Most of the examples come from historical sexual abuse prosecution
The High Court fears that defining reasonable doubt may create new confusion or invite appeals about the wording used

Hemming's Proposed Reform

He proposes that judges should be allowed to explain beyond reasonable doubt in every case, not merely when jurors ask. His suggested directions include explaining that:

- "Probably guilty" is insufficient.
- "Very likely guilty" is insufficient.
- A reasonable doubt must be based on reason.
- The prosecution bears the burden throughout.
- Jurors should not convict merely because they prefer the complainant's evidence over the accused's.

