LPAB 11: Evidence – Winter 2025

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Topic 1: Introduction

Key cases/legislation

Stanoevski v The Queen (2001) 202 CLR 115 (KPT [12.100])
- Facts: NRMA insurance fraud, evidence regarding previous allegations

'Uniform Evidence Law'

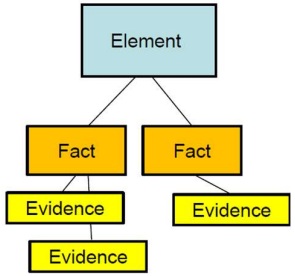
The Evidence Act 1995 (NSW)

Main concept

Rules of evidence:
- Regulates what a court may consider in determining factual issues
- How that material is presented to the courts
- How the court goes about deciding the factual issues based on the evidence

Parties, not the court, produce the evidence, and the courts supervise proceedings/act as umpires.

The Law of Evidence course covers:
- Methods of adducing evidence – How
- Admissibility of evidence – What
- Matters of proof



Background

The Act was introduced in NSW in 1995 after a 1979 ALRC report and several previous iterations.

It operates in all states with almost exact wording.

Prior to the *Evidence Act*, common law prevailed.

Key terms

Inference - are the conclusions of fact that you seek the arbiter of fact to draw from the evidence.
Representation - describe something that someone says/does (Example: an express or implied representation (whether oral or in writing), or a representation to be inferred from conduct). Often includes intention over literal meaning,
Previous Representation - Is a representation made at any time prior to giving evidence in court in this case.
Credibility - believability of a witness or piece of evidence. Poor credibility = less believable and facts given less weight. Common law sometimes treats credit (truthfulness) and reliability (powers of perception) as distinct. EA essentially combines them.
Prior Consistent statement - a previous representation that is consistent with evidence currently given by the witness.
Prior Inconsistent Statement - previous representation that contradicts with evidence currently given by the witness.
Leading – neutral = led the witness to give evidence. Or leading questions = directly or indirectly suggests a particular answer to the question OR assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked (not permitted s37)
Tender – document submission to enter into evidence (at which point it is given an exhibit number for reference). This is usually done after it has been used to question a witness (if that applies), and after any objections to the document have been dealt with.

Trial process

Criminal v civil trial process

a) Juries decide matters of fact (and ultimate issue) in criminal trials.
b) Judge decides issues of law.

In civil trials, the judge usually does both.
- *McKell v The Queen* **"**it should be clearly understood that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury so as to avoid the risk of unfairness to either party."

Appeals

Threshold is set out in s 6(1) of the Criminal Appeal Act 1912, which states that an appeal against conviction can only be allowed on the following grounds:

a) If the verdict is unreasonable or cannot be supported, having regard to the evidence, [*findings of fact/credibility*]
b) If there has been a wrong decision of any question of law,
c) On any other ground whatsoever there was a miscarriage of justice.

Finding of fact
- if a jury decision – if unreasonable or unsafe (the verdict as a whole)
- If a judge makes findings of fact: "…a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are

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"glaringly improbable" or "contrary to compelling inferences". *Robinson Helicopter Company Incorporated v McDermott [2016] HCA 22*

Finding in relation to credibility

- An appellate Court will only overturn a judge's finding on credit if it is "inconsistent with facts incontrovertibly established by the evidence."*Devries v Australian National Railways Commission [1992] HCA 41* See also: *Fox v Percy [2003] HCA 22*
- The jury does not give reasons for its decision, so these issues cannot be overturned on this granular a basis.

Exercise of discretion

House v The King (1936) 55 CLR 499 "[i]t is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge

- acts upon a wrong principle,
- if he allows extraneous or irrelevant matters to guide or affect him,
- if he mistakes the facts,
- if he does not take into account some material consideration,

then his determination should be reviewed ... It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

- Also – The ability of the court of appeal to intervene is limited: must demonstrate that exclusion of evidence was not reasonably open to the trial judge in a sound exercise of the discretion. *DPP v Marijancevic [2011] VSCA 355* (KPT [6.180])

Evidence Act 1995 (NSW)

EA *structure*

- Ch 1: Introductory matters
- Ch 2: Adducing evidence i.e. issues of procedure - how it will be produced rather than whether it is admissible
- Ch 3: Admissibility of evidence
- Ch 4: Proof
- Ch 5: Miscellaneous matters

Relationship between EA and other laws

- Under *s 79 of the Judiciary Act 1903 (Cth),* the laws of each state or territory—including the laws relating to procedure, evidence, and the competency of witnesses—are binding on all courts exercising federal jurisdiction in that state or territory.
- The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the state or territory rather than the *EA*, except for those provisions that have a wider reach.
- The passage of *EA* therefore has had the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction.
- EG: A Brisbane barrister defending a client charged with a fed crime before the QLD Supreme Court would use that state's evidence law; but would use the Evidence Act 1995 (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the following day.

If the EA is inconsistent with another act, the other act will prevail.

- Does not affect the operation of other acts s 8
- Commonwealth provision is more complex.
- E.g. Civil Procedure Act 2005 (NSW) provisions relating to privilege and confidentiality during mediation prevail over s 31 of the EA: *Azzi v Vovlo Car Australia Pty Ltd [2007] NSWSC 375*

Where does EA apply?

- in "NSW Court" – See definition in Dictionary.

"NSW court" means:

a) the Supreme Court, or
b) any other court created by Parliament,

and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

- It includes the District Court of NSW, the Local Court of NSW, the NSW Land and Environment Court.
- Does not include NCAT – See Civil and Administrative Tribunal Act 2013 (NSW), s 38(2). But subject to s 38(3).
- Within these courts, the Evidence Act generally applies to proceedings. But generally, it only applied to hearings (as opposed to other court procedures).
- To what hearings does the EA apply? - S4.
  - Bail, but subject to Bail Act 2013 (NSW) - See S31 (Doesn't apply).
  - Sentencing - only of Court directs.
  - Not to matters heard/determined in chambers.
- To what extent does the Evidence Act apply to pre-trial processes? - See S131A (Topic 15).

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- What about non-curial processes, such as hearings/examinations conducted by regulators? No

Act is not a code

Does not affect operation of common law or equity unless done expressly or by necessary intendment – s 9

But it has been held to "cover the field" and therefore be a code (by necessary intendment) in relation to:

- Competence and compellability *R v Grasby (2000)*
- Chapter 3 – Admissibility: *Telstra Corp v Australis Media Holdings (No 2) (1997)*

Odgers says that the weight of authority supports Chapter 3 being a code, and says that this should be considered settled. But notes ongoing controversy eg *Ch 3*. See *Quick v Stoland Pty Ltd (1998), Hughes v The Queen [2017], Dasreef v Hawchar (2011)*

'Chapter 3 is designed to deal exhaustively with this topic and, in a practical sense, constitutes a code relating to the admissibility of evidence in proceedings to which the Act relates'.

Objections

- It is often necessary for a party to object to evidence or a question eliciting evidence before a court will ensure strict compliance with the provisions of the UEL.

Criminal Appeals Rules 1970 (NSW)

Made under the *Supreme Court Act 1980 (NSW)*

- Rule 4.15 - Exclusion of certain matters as grounds for appeal etc 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.

Cannot raise appeal points without leave, if you did not object to the ruling of the trial judge.

When will you get leave?

See: *Picken v R [2007]* :

"Leave to rely on an error to which no objection had been taken at the trial will be granted only where 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 or she has lost a real chance (or a chance fairly open) of being acquitted."

Dispensing with rules

Some rules can be dispensed with by consent – *s 190(1):*

- Part 2.1, Divisions 3, 4, 5
- Part 2.2, 2.3
- Part 3.2 – 3.8 (important admissibility sections)

But consent in criminal proceedings is limited.

- Court can dispense with these provisions in civil proceedings – *s 190(2):*
  - If matter not genuinely in dispute.
  - Application of these sections would involve unnecessary expense or delay. In practice this is rare.

Voir Dire – trial within a trial

- 'hearing within a hearing' to establish preliminary questions. Can be used in civil and criminal
- proceedingspre-trial procedure used to determine the admissibility of particular evidence. It occurs when one party challenges the admissibility of evidence the other party proposes to adduce.
- consists of the court making findings of fact and applying the law after hearing evidence and submissions.

Section 189 – 'preliminary hearing' to establish preliminary questions.

Criminal proceedings:

- Jury is not to be present during the voir dire if relates to an admission or potentially improperly obtained evidence – *s 189(2)*
- In other cases the jury is not to be present unless the court orders – *s 189(4).* Factors listed in *189(5).*

Can be used in civil and criminal proceedings.

Advance rulings

- *Section 192A* – the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.
- Where a question arises in any proceedings, being a question about: (a) the admissibility or use of evidence proposed to be adduced, or (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or (c) the giving of leave, permission or direction under section 192, the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.
- Prior to the *192A amendment*, Courts operated on the assumption that they could make rulings in advance of the hearing in relation to the admissibility of evidence.
- But in *TKWJ v The Queen (2002)* HCA held that the UEL only permitted advance rulings to be made in some cases where leave, permission or a

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