MLL334 – Evidence Law

Topic 1 - Introduction and overview

- **Evidence law**
  - Rules which determine the information that fact-finders can and cannot receive by a decision maker (whether a judge alone or member of the jury) to resolve factual issues in dispute in civil and criminal proceedings
- **Objectives of evidence law**
  - Accurate,
  - Rational fact-finding,
  - Truth
  - Disciplinary
  - Protective
- **Evidence law in Victoria**
  - ***Evidence Act 2008 (Vic)***
  - ***Criminal Procedure Act 2009 (Vic)***
  - ***Evidence (Miscellaneous) Provisions Act 1958 (Vic)***
  - **Case law**
- **Structure of the Act**
  - Part 1 – Formal/preliminary matters
  - Part 2 – Witness/documents/other evidence
  - Part 3 – Rules about admissibility of evidence
  - Part 4 – Issues re, proving matters
- ***Uniform Evidence Act* test of admissibility of evidence**
  - Is the witness competent?
  - Is the evidence relevant?
  - Is the evidence excluded by application of exclusionary rule or privilege?
  - Is the evidence excluded by operation of a discretion?
- **Introduction to the Uniform Evidence Act**
  - The 2008 Victorian Evidence Act is based on legislation that has been operational in NSW and Federal courts since 1995
  - It has only been operational in Victorian courts since January, 2010
  - The legislation extinguishes most of the common law rules with the goal of uniform evidential rules in all state, territorial and federal courts
  - Needless to say there are many similarities between the common law evidential rules and the legislative evidential rules
  - Look at common law cases if such cases help to clarify the meaning or application of a provision in the Act
  - The 2008 Victorian Evidence Act is a work in progress as is the mirror legislation that has been in operation for 14 years
  - 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
  - *62 Restriction to 'first-hand' hearsay*
    - *(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact*

        - It is an unnecessarily complex definition of what is essentially a simple concept - first hand hearsay
        - There are other provisions that have been and still are a source of confusion for students, legal practitioners and judges
        - **Sections 97 and 98** are excellent examples
            - These sections deal with what used to be called similar fact evidence, but now separated out as tendency evidence and coincidence evidence
        - The Evidence Act is a work in progress
        - Cases will help clarify the meaning of the provisions and more importantly offer an example of their application
        - The Victorian Courts in particular the Supreme Court and Court of Appeal are rapidly accumulating case law that explores the provisions in the 2008 Victorian Evidence Act
- **Criminal proceedings**
    - State (prosecution/Crown) brings proceedings against individual (accused/defendant) who is suspected of committing a crime with aim of vindication/punishment, and;
    - Must adduce evidence to prove each element of charge and rebut defences
- **Civil proceedings**
    - Plaintiff brings proceedings against defendant who it claims committed legal wrong with aim of redress for plaintiff, and;
    - Must adduce evidence to prove each element of cause of action and rebut defences
- **Overarching Concepts – Evidence in the Courtroom**
    - The best place to start with the ***2008 Evidence Act*** is with the various types of evidence that are dealt with by the legislation and the overall scheme of the legislation
    - The legislation deals with three types of evidence -
        - 1. Witness testimony
        - 2. Physical objects or exhibits
        - 3. Documents
- **1. Witness Testimony**
    - Witness testimony is usually called oral evidence or viva voce evidence in practice – testimony is more of an American usage
    - Of the three types of evidence, oral evidence is the most problematic
    - It is problematic since it based on the perceptions and memory 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
    - However, the evidence that the witness gives will fall into one of these three types –
        - 1. It will be honest evidence
        - 2. It will be dishonest evidence
        - 3. It will be honest but mistaken evidence
    - Working out what type of evidence is being given is in part derived from the person giving the evidence
    - What to believe and what not to believe is the function of the jury or judge/magistrate depending on the type of hearing
    - A reliable guide as to a person's honesty or otherwise is elusive.
        - 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
    - 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
    - It is hard to imagine a criminal trial in which no witness is called by either the prosecution or defence
    - Most of the rules of evidence that we examine in this course deal with witnesses in one way or another
- **2. Physical Objects or Exhibits**
    - We will not see many examples of exhibits or physical objects in any of the cases that we look at and we will not cover this type of evidence in great detail
    - **Note** - exhibits or physical objects are 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
        - **Eg.** A murder weapon such as a rifle that is owned by the accused
    - 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
    - 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 found 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
- **3. Documents**
    - In fraud and tax evasion cases there can be a very large number of documents that will be admitted as evidence
    - A document might include such things as an airline ticket that is introduced to support an alibi
    - Or it might be a sales receipt for a large quantity of potassium or nitric acid
    - Both are ingredients that can be used to make a bomb
    - Bear in mind that 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
- **Direct Relevance, Indirect Relevance and Circumstantial Evidence**
    - The terms direct and indirect are used in the ***Evidence Act*** as we shall see when we look at relevance
    - Circumstantial evidence is often quite common in a criminal trial

- **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
    - 1. The evidence must be relevant
    - 2. The evidence must not violate any exclusionary rule
    - 3. The evidence must satisfy the discretion of the trial judge
  - If the evidence survives all the stages, it will be admitted
  - A complete answer would recognize that all three stages must be satisfied as opposed to focusing exclusively on a single exclusionary rule and overlooking the requirement of relevance and discretion
  - If relevance and trial discretion are not the focus of the question you need only mention the requirements in passing
  - In most problems that we look at the question will focus on the exclusionary rule
- **Burden of Proof**
  - Relationship between evidence and the burden of proof
  - The burden of proof is not regulated by the Evidence Act
  - The burden of proof is regulated by common law principles
  - Trials never begin with facts
  - Trials always begin with an allegation such as the Crown's allegation that the accused has committed a crime or the plaintiff's allegation that the behaviour of the defendant was negligent
  - These allegations will not be accepted as fact unless evidence is introduced to support and prove them
  - The burden of providing evidence that is used to prove an allegation will either be on the prosecution or the accused in a criminal trial or plaintiff and defendant in a civil trial
  - In addition to the need to introduce evidence the burden of proof also requires that the evidence must form a persuasive argument
  - Although it is possible that both parties will introduce evidence in relation to an allegation or issue that must be proved it is usually only one party who will be obligated to introduce evidence
  - For the other, it is optional
    - **Eg.** If the prosecution alleges that the defendant has murdered their wife then the prosecution will have to introduce evidence that supports the allegation
    - The defendant may introduce or adduce evidence that refutes the prosecutions allegation however as a general rule they are not under an obligation to adduce evidence
  - As a general rule the party who makes the allegation must provide relevant evidence that supports it
  - Since it is the prosecution that makes the allegations in a criminal trial it is generally the prosecution that bears the burden of proof
  - There are however some exceptions as we shall see
  - It is possible that the burden of proof will also place the defence under an obligation to provide relevant evidence
- **Legal and evidential Burdens**

- The burden of proving each allegation or fact in issue in a criminal or civil dispute to the required legal standard or proof is divided into two stages or requirements
- There is an evidential burden that relates to the sufficiency of evidence introduced to make out the claim
- There is a legal burden that relates to the persuasiveness of the evidence
- Whilst the evidential burden is reasonably straightforward, the legal burden is more difficult to understand

- *Evidential Burden -*
  - The evidential burden requires that the prosecution or defendant has to produce sufficient evidence before a jury or judge in the capacity of a fact finder is required to consider it
  - If it is decided that the evidence is insufficient then there is no need for a jury or judge to reach a verdict
  - 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
  - The evidential burden is fairly easy to understand
  - It is simply a question of looking at the volume and weight of evidence (witnesses, documents and exhibits) and deciding whether there is enough
  - The legal burden is not as clear
- *Legal Burden -*
  - The legal burden is to be decided by the jury or judge if there is no jury
  - It only arises if the evidential burden is satisfied first
  - The legal burden is 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
  - In case you did not know in logic and in law an argument is 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 argument and decide whether it is persuasive
  - If it is persuasive they will accept it, if not they will reject it
  - 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)?
    - Both questions have to be addressed before the burden of proof can be discharged
    - If the prosecutions evidence is sufficient and persuasive then the jury will arrive at a guilty verdict
  - Determine which party must discharge the evidential burden and which party must discharge the legal burden
  - It differs depending upon whether it is a criminal trial or a civil trial
- **Prosecution –**
  - 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