1. INTRODUCTION

The purpose of adducing evidence is to prove facts. The question of which facts must be determined depends on the cause of action/charge/SOC.

This course focuses on: how to adduce evidence; admissibility of evidence; and proof. These issues need to be considered with relation to every piece of evidence.

Adversarial system: importance placed upon oral testimony. Evidence from witnesses must be the subject of cross-examination in order for the court to come to the correct result.

Cf Inquisitorial system: judge takes a more active role, asking questions and directing the progress of the case, the proceedings are more of a fact-finding mission, and there is importance placed on documentary evidence.

International courts are a hybrid of the two systems, primarily because the professionals involved come from different legal traditions.

What are the aims of the laws of evidence?

- To ensure a fair trial

1.1. THE TRIAL PROCESS

The laws of evidence operate during a trial.

Criminal Process: indictment → plead → jury selection[1] → Crown opens the case (outline of case, in order & consistent with evidence) → (Defence can also open if they choose) → Crown presents its case (call witnesses, examination by Chief, cross-examination, re-examination by Crown; tender evidence) → Crown closes case → (Defence may submit that is has "no case to answer" (judge can direct verdict of not guilty) → Defence calls witnesses (if it wishes) (can include the defendant)(same process as Crown) → Defence closes → Crown makes closing address (not evidence, just presentation of how jury should use evidence to determine guilt) → defence gives closing address → Judge's summing up and directions to jury → jury deliberates & comes to decision (guilty, not guilty, hung) → sentencing or acquittal

Civil process: no jury (unless it's a defamation hearing, which has 4-person jury). Plaintiff opens case → P presents evidence → D presents evidence → closing addresses → Judge determines law and facts

Appeals: focus on grounds that evidence incorrectly adduced or that evidence shouldn't have been admitted

Rules governing questioning of witnesses: adducing evidence + rules admissibility. Admissibility: opinion, hearsay, credit, relevance…

[1] Letter in mail, check they don't know witnesses, empanelment (by judge's associate), each side has 3 challenges (no information about jurors, just based on looks). The Court may take a larger pool of 15 jurors, then select 12 at the end of the trial (so if anything happens, they can still get a verdict). This is an open process.

Directions to jury: about the *law* (standard of proof, how the jury can use evidence, elements of crime, etc.)

Prejudice: if there is a reason the jury may be prejudiced, the judge can direct the jury to disregard certain information/news, or the jury could be discharged.

Types of verdicts in NSW:

- majority verdict: 11 jurors against 1 (disregard the 1)
- unanimous verdict

S 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.

S 11 preserves the power of a court to control its own proceedings, subject to the other provisions of the Act.

Division 3 – General rules about giving evidence

S 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.

S 27 Parties may question witnesses

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

S 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.

S 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.

Division 3 deals with procedural rules relating to the adducing of evidence from witnesses in a proceeding.

Section 26 gives a general power to a court to control the questioning of witnesses, notwithstanding the principle of the adversarial system that it is for the parties to decide which witnesses to call and the order in which to call them.

The common law principle continues to apply: without objection by counsel for any other party, the trial judge should only intervene in the questioning of a witness in limited circumstances.

Section 28 deals with the order of examination in chief, cross-examination and re-examination.

1.2. BACKGROUND TO THE EVIDENCE ACT 1995 (CTH) AND (NSW)

Federal A-G told ALRC to look at laws of evidence, NSW LRC did the same thing simultaneously. The result was the Australian Law Reform Commission, *Evidence* Interim Report (No 26) 2 vols (1985) and then *Evidence* Final Report (No 38) (1987). In 1995, the Federal and NSW Parliaments enacted the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW), respectively. Prior to this, the laws of evidence were contained solely in the common law. The Act was intended to simplify the principles and that every State/Territory would adopt the Cth Act to produce uniform laws. In 2005, the ALRC looked at the Evidence Act again and its operation over the previous decade, producing Report 102.[2] It recommended significant reform, most of which were enacted in the 2009 amendments. Victoria has now enacted it, so it operates in ACT, Tasmania, Norfolk Island, NSW and Victoria. The main changes were to overturn the effect of significant HCA judgments.

Determining which Act applies depends on the *Court* in which proceedings are held (s4), i.e. Family Court or Federal Court deals with the Cth Evidence Act. If it's an appeal to the High Court, the rules are determined by the original court's jurisdiction (i.e. appeal from NSW Supreme Court brings with it NSW Evidence Act).

1.3. AMENDMENTS TO EVIDENCE ACT 1995 (CTH) AND (NSW)

Evidence Amendment Act 2007 (NSW)

Evidence Amendment Bill 2008 (Cth)

The most recent amendments enacted on 1st January 2009.

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[2] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, 'Uniform Evidence Law' (ALRC Report No 102 Via AustLII, NSWLRC Report 112 Via AustLII, VLRC Final Report, Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, 2005).

1.4. Relationship between the Evidence Acts, the common law and other statutes

The Evidence Act coexists with other statutes (s8). Its provisions work *with* other statutes containing provisions which deal with evidential issues.[3]

The common law rule continues to apply as to any area of law/rule upon which the Evidence Act is silent (s9). Areas that the Evidence Act doesn't cover: circumstantial evidence direction, *Jones v Dunkel* inference; some remedies for breach of rule in Brown v Dunn; burden of proof (but standard of proof governed by EA).

s8 Operation of other Acts

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

The Commonwealth Act includes additional subsections relating to the operation of the Corporations Act 2001 of the Commonwealth, the Australian Securities and Investments Commission Act 2001 of the Commonwealth and certain laws in force in the ACT. It also provides for the regulations to have continued effect (until amended) after the commencement of the Commonwealth section.

s9 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.

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following:

(a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a court,

(b) the operation of a legal or evidential presumption that is not inconsistent with this Act,

(c) a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

The NSW version of this section differs from section 9 of the Commonwealth Act. That section preserves the written and unwritten laws of States and Territories in relation to various matters.

1.5. Taking Objections

Where the other party objects to the adducing/admissibility of evidence or to a direction being given. The Judge has to rule on that objection. If you succeed on the objection, it may be excluded. Even if you don't succeed, the objection is important because you can later

[3] E.g. *Defamation Act*, *Criminal Procedure Act* (for example, when police interview suspect, must have audio/video recording of it to be admissible), *Family Law Act* (for example, children do not testify, can rely on hear say evidence of what children say), *Uniform Civil Procedure Act*.

appeal from it. In a civil case, the matter cannot be appealed without having made the objection. In criminal cases, an appeal can be made in the Criminal Court of Appeal without having made an earlier objection if you claim incompetent counsel (this loophole is allowed because of the gravity of the consequences in criminal proceedings).

1.6. Dispensing with the Rules of Evidence

Section 190 allows dispensing from rules of evidence – waiver of *some r*ules of evidence *if* the defendant consents (and only if there has been advice from the defendant's lawyer that they should consent). This provision is not often used.

In criminal cases, the rules of evidence are strictly applied, whereas they are not so strict in civil cases. Judges in civil proceedings may allow evidence but degrade the amount of weight s/he gives that evidence. In the UK, the rules of evidence only apply to criminal cases. The Australian practice is similar, but some rules of evidence are applied more rigidly than others (e.g. use of expert evidence and legal professional privilege arise more frequently in civil cases).

s190 Waiver of rules of evidence

(1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:

(a) Division 3, 4 or 5 of Part 2.1, or

(b) Part 2.2 or 2.3, or

(c) Parts 3.2-3.8,

in relation to particular evidence or generally.

(2) In a criminal proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:

(a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel, or

(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.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

(a) the importance of the evidence in the proceeding, and

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding, and

(c) the probative value of the evidence, and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

S184 allows a defendant in criminal proceedings to make formal admissions (although evidence can still be adduced on the facts being admitted). If the parties agree to facts under s191, evidence cannot be adduced to contradict or qualify those agreed facts unless the court gives leave.

1.7. VOIR DIRE

Questions of evidence are determined on the voir dire. If there's a question about admissibility or something that has occurred in the trial, the jury will go out and the parties will make submissions to the judge, who will determine that question about evidence. The voir dire is open to the public, it's just the jury that is excluded.

Section 189 deals with the voir dire. S189(1) – preliminary questions on these matters are to be determined in the jury's absence.

s189 The voir dire

(1) If the determination of a question whether:

(a) evidence should be admitted (whether in the exercise of a discretion or not), or

(b) evidence can be used against a person, or

(c) a witness is competent or compellable,

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:

(a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or

(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.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(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.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and

(c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Section 128 (10) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:

(a) it is inconsistent with other evidence given by the witness in the proceeding, or
(b) the witness has died.