Evidence and Proof

Exam notes
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Laws of evidence

**Overarching purpose**

The laws of evidence regulate the means by which facts are proven in civil and criminal trials. Evidence law is often characterised as ‘procedural’ or ‘adjectival’ law, as opposed to ‘substantive law’, but this should not obscure its importance.

Four principles summarise the objectives of the laws of evidence:

1. **Fact-finding should be rational**;
2. **All relevant information should be available to the court**;
3. **Irrational fact-finding should be discouraged**; and
4. **Unreliable information should be treated with caution**.

**Uniform Evidence Law**

In July 2004, the Attorney-General of Australia commissioned the Australian Law Reform Commission (ALRC) to investigate and review the various evidence statutes operating in each Australian jurisdiction. At the end of the lengthy consultation process, involving the NSW and Victorian law reform commissions, 63 recommendations were made to reform Australia’s laws of evidence.

Australia’s Uniform Evidence legislation was adopted in Victoria by the passing of the *Evidence Act 2008 (Vic)*. All references to sections of legislation refer to this Act unless otherwise noted.

**Burden and standard of proof**

Under the **legal or persuasive burden**:

- the prosecution must prove their case theory ‘beyond reasonable doubt’ (s 141(1)); and
- the defence must prove their case theory on the ‘balance of probabilities’ (s 141(2)).

Various courts have attempted to define ‘reasonable doubt’, but these efforts have been fruitless:

- ‘A reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another’ (*Walters v R*).
- ‘… [S]omething to which you can assign a reason … the sort of matter which might influence you if you were to consider some business matter … a matter, for example, of a mortgage concerning your house or something of that nature’ (*R v Ching*).
‘Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt … If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable”, the case is proved beyond reasonable doubt, but nothing short of that will suffice’ (Miller v Minister of Pensions).

The **evidential or tactical burden** shifts based on what the defence or prosecution are seeking to prove. For example, the defence bears the evidential burden of proving the defence of self-defence.

### Witnesses

**Witnesses may be called if they are ‘competent’ and ‘compellable’**. A witness is ‘competent’ if they can give sworn or unsworn evidence, that is, give evidence under an oath to tell the truth. A witness is ‘compellable’ if they can be placed under the threat of punishment for failure to testify.

The Acts assumes that all persons are both competent and compellable.

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| **Except as otherwise provided by this Act—**  
  (a) every person is competent to give evidence; and  
  (b) a person who is competent to give evidence about a fact is compellable to give that evidence. |

### Competent

Witnesses may **not** be competent if they suffer from an intellectual or psychiatric disability, or if they are young children. Determining whether a witness is competent will, in part, depend on the nature of evidence they are called to provide. Therefore, it is conceivable that a witness may be competent to give evidence on some matters but unable to give evidence on other matters.

### Compellable

Competent witnesses are generally also compellable. Witnesses may **not** be compellable where ‘substantial cost or delay would be incurred’ in order to ensure the witness could understand or be understood and where other witnesses could provide adequate evidence on the matter (s 14).

### Failure to call witnesses

In civil proceedings, the failure to call a witness may lead to an inferred that the reason why the person was not called to testify is that his or her testimony would **not** have assisted that party’s case. This is referred to as the rule in Jones v Dunkel. This inference can only be drawn if the witness was one who would ordinarily have been expected to be called, and to have been called by one party rather than the other.

**In criminal proceedings, the rule in Jones v Dunkel does not apply.** In criminal proceedings, the burden of proof rests on the prosecution and the defendant is generally under no duty to call evidence or to testify themselves.
Categorising types of evidence
Evidence may be categorised in a variety of different ways. Palmer describes these different methods of ‘marshalling’ in ch 4 of Proof.

According to source
• Real evidence is evidence that the fact-finder can perceive itself. For examples, juries can be taken out to the scene of the alleged murder, or an alleged murder weapon may be passed around by jurors. Real evidence will typically be accompanied with a ‘chain of custody’ document which details who had custody over the evidence and when.

• Testimonial evidence involves witnesses reporting their own perceptions of what happened to the fact-finder. A witness will sit in the witness box and provide evidence of what they perceived directly to the court.

• Documentary evidence includes sworn affidavits of a witnesses statement (or a police statement) about what their perceived. Unlike testimonial evidence, this evidence is not provided directly to the court.

Direct, circumstantial and credibility evidence
• **Direct evidence**, if accepted, establishes one or more of the facts in issue without need for inference. In the case of rape, the absence of consent is an element of the crime; if the defendant testifies that she did not consent and this is believed, this establishes one of the elements of the crime.

• **Circumstantial evidence** is similar in that it involves witnesses testifying as to their perceptions, but unlike direct evidence, circumstantial evidence is always (on its own) inconclusive. Circumstantial evidence makes its more or less probable that the events alleged occurred.

• **Ancillary/Credibility evidence** has no direct bearing on the facts in issue, but rather aids in illustrating the probative value or credibility of direct and circumstantial evidence adduced.

Inferences
Inferences are made up of a series of elements:

1. A piece of data or evidence
2. A conclusion or inference which is drawn from that evidence
3. A generalisation or ‘warrant’ which justifies the drawing of the inference

The conclusion of one inference can become the evidence in the next chain of inferential reasoning, and this is how an argument is developed. Because each distinct chain of reasoning may rely on an inference drawn in a prior chain of reasoning, a complete argument is only ever as strong as its weakest link.
Relevance

Relevant evidence is admissible
Section 56 provides that all relevant evidence is admissible, provided that its probative value outweighs any prejudicial effect the evidence might have on the proceedings.

Section 56
(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
(2) Evidence that is not relevant in the proceeding is not admissible.

Evidence that is not relevant is never admissible in a proceeding, while evidence that is relevant is admissible, ‘except as otherwise provided by this Act’.

Evidence that has an unduly prejudicial effect is inadmissible in criminal proceedings.

Section 137
In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

Meaning of ‘relevant’
The definition of relevant evidence is very wide. Evidence is relevant to the determination of an issue if it helps the court decide that issue in a rational manner.

Section 55
(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.

In applying the test of relevance, courts must assume the credibility and authenticity of the evidence.

Questions of credibility and authenticity are considered later (Papakosmas v R, McHugh J [87]).

The ALRC described the definition as requiring a ‘minimal logical connection between the evidence and the fact in issue… it is enough if [the evidence] makes the fact in issue more probable or less probable than it would without the evidence’ (ALRC, [641]).
Whether a ‘logical connection’ exists between evidence and a fact in issue is ‘an objective test grounded in human experience, on the application of which minds may differ (Harrington-Smith v WA, Lindgren J [11]).

**Evidence must be relevant to the determination of a fact in issue.** When determining whether evidence is relevant or not, the court must be able to articulate how the evidence connects to the facts in issue:

‘In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial’ (Washer v WA, Gleeson CJ, Heydon and Crennan JJ [5]).

**Facts in issue**

In criminal proceedings, a fact in issue is typically an element of a criminal offence that must be made out in order for criminal liability to arise.

A fact is not ‘in issue’ if both sides agree that the fact existed, or that the event occurred. Therefore, if evidence relates to a ‘fact in issue’ that is not actually disputed by both sides, the evidence is not relevant under the Act.

**Provisional relevance**

In some instances, the relevance of evidence will depend on the existence of another fact. For example, the relevance of the alleged murder weapon will depend on the acceptance of evidence about the fatal wound being consistent with the use of the alleged murder weapon.

**If relevance depends on the court making another finding, the court may make a finding of provisional relevance.**

**Section 57**

(1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant—

(a) if it is reasonably open to make that finding; or

(b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

This section permits courts ‘to say evidence is provisionally relevant where the relevance of any particular piece in the jigsaw cannot be determined conclusively until the court has completed the jigsaw’ (Nodnara v Deputy Commissioner of Taxation).
Hearsay

The hearsay rule
The hearsay rule excludes evidence of a ‘previous representation’ when it is adduced to prove the existence of a fact that the person intended to assert by the representation.

Section 59
(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

The hearsay rule is justified on the basis that the out of court communications of a witness about what they observed are not made under oath, do not occur in view of the fact-finder, and cannot be tested under cross-examination.

Hearsay evidence is prima facie excluded not just because it is necessary unreliable, but because it is difficult for the tribunal of fact to determine what weight it should be given.

If a witness statement includes “I said”, “he said”, “she said”, one should immediately consider whether the hearsay rule applies.

Scope of the hearsay rule
There are four requirements for evidence to be caught by the hearsay rule:

1. the evidence is a ‘previous representation’;
2. the previous representation was ‘made by a person’;
3. the evidence of a previous representation is adduced to prove the existence of a fact asserted by the representation (‘purpose or use of evidence’);
4. it can reasonably be supposed that the person who made the representation intended to assert the existence of that fact (‘intention of declarant’).

‘Previous representation’
A ‘previous representation’ is any representation (i.e. words, silence, conduct, or statement of opinion) made between the witnessed events and the start of the trial.

In the Act, it is defined as ‘a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced’.