

NOTE FOR EVIDENCE

Xiaoyu O. Wu¹

¹Griffith University

GENERAL REFLECTION

Key Principle

Probably the most important thing in evidence law is that evidence needs to be

Evidence law focuses on the issue of relevance. Relevance, in this context, determines whether the evidence directly responds to or supports the arguments presented by counsel or the prosecutor. The key question is whether the evidence is probative in relation to the legal arguments being made.

Probably one of the most important things in evidence law is that evidence needs to be about the fact. Therefore opinions are usually not admissible. The evidence needs to help jury to determine the fact.

The materials used in arguments are either prejudicial or probative. To ensure a fair trial, the court excludes prejudicial materials while retaining probative materials as evidence. Therefore, most rules that govern evidence admission are designed to protect the fairness of the trial.

The probative evidence refers to evidence that has the ability to prove or disprove a fact in issue in a legal proceeding. The probative value of evidence is assessed based on its tendency to make a fact more or less probable than it would be without the evidence.

Therefore, the key principle is the evidence needs to be relevant and probative to be admitted.

Type of Evidence

There are two types of evidence: real evidence and documentary evidence. Real evidence consists of physical objects or events presented directly in the courtroom. Documentary evidence, on the other hand, includes written or recorded materials and is generally classified as hearsay, making it inadmissible under common law unless an exception applies. To admit documentary evidence, specific exceptions must be met, such as an affidavit in a civil case.

SOURCE OF LAW

Statue

- Common Law
- *Evidence Act 1995*(Cth) (EAC)
- *Evidence Act 1977*(Qld) (EAQ)
 - If a commonwealth matter is being litigated in a Qld court, the Qld's evidence law applies¹

Example: If a CTH criminal offence is being tried in a QLD court, the EAQ applies.

Example: If a civil matter is being litigated in a QLD court under, say, the *Competition and Consumer Act 2010*(Cth), the EAQ applied

Source of important concept

- Burden of Prove & Beyond Reasonable doubt (**Criminal Case**)

Case: *Woolmington v DPP*[1935] AC 463

Note: the Crown bears the ultimate burden of proving the guilt of an accused person beyond reasonable doubt
- Legal evidential burden & on the balance of probabilities(**Civil Case**)

Case: *Briginshaw v Briginshaw*(1938) 60 CLR 336,363

Note: Balance of probabilities means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained
- Hearsay

Principle: inadmissible²

Exceptions: admissible

 - Res gestae

Note: The very matters into which the court is enquiring

Contemporaneity: *O'Leary v R* (1946) 73 CLR 566

Spontaneity: *Vocisano v Vocisano*(1974) 130 CLR 267,273
 - Declarations by persons now deceased

¹*Judiciary Act 1903*(Cth),s79

²J D Heydon, *Cross on Evidence* 7th Aust ed, Lexis Nexis Butterworths, Sydney, 2004, [31030]

Note: Must be deceased, missing does not count³

Case: *Sussex Peerage Case*(1844) 8 ER 1034

- Declaration against pecuniary or proprietary interest

Case: *Higham v Ridgway*(1808) 103 ER 717

- Declaration made in the course of duty

Case: *Henry Coxon* (1878) LR 3PD 156

- Dying declaration

Case: *R v Bernadotti* (1869) 11 Cox CC 316

- Privilege

Note: Privilege means that the accused or person can refuse answering questions.

Privilege applies to both oral and documentary evidence.

Privilege against self-discrimination: EAQ s10

Legal Profession Privilege: Protects communications between lawyers and clients for the dominant purpose of seeking legal advice or preparing for actual or contemplated litigation

- *Baker v Campbell*[1983] HCA 39 – LPP protects the disclosure of communications.
- valid LPP can be abrogated by statute by the use of express words⁴For example, in *Crime and Corruption Act 2001 (Qld)* section 190 explicitly states that a witness cannot refuse to answer questions on the grounds of self-incrimination when appearing before the Crime and Corruption Commission (CCC)
- valid LPP can be abrogated by statute by necessary implication(by public interests)

Without Prejudice Privilege: *Field v Commissioner for Railways (NSW)*

Waiver: In principle, only the privilege holder can waive the privilege. The waiver can be expressed or implied, deliberate or inadvertent, or imputed by law. However there is a public interest immunity.⁵

- The privilege can be waived due to inconsistent with maintaining the confidentiality of the documents.⁶

³*Evidence Act 1977*(Qld) s93(1)(b)

⁴*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[2002]HCA 49.

⁵*Sankey v Whitlam* [1978] HCA 43

⁶*Mann v Carnell*(1999) 168 ALR 86

Direction: especially when accused refuse to answer questions, the judge should warn the jury that no inference can be drawn as to his/her guilt from that silence.⁷

Weissensteiner: remember *Weissensteiner v R*: Exception applies when accused uniquely has knowledge of facts but chooses to remain silent – Cannot be directly used to draw adverse inference, but only in weighing prosecution evidence.

- Competent

Note: Everyone is competent.⁸

- Compellable

Note: The general rule is that a competent witness is also compellable to testify⁹ as competence implies compellability.

Direction: It is prohibited for the judge to warn or suggest that the law regards any class of persons as unreliable witnesses.¹⁰

Character: may be of good or bad character. It may be about the character of the accused, witness and/or the victim.

- Character of accused.

- * Accused Leading Evidence of own Good Character.¹¹

- * Prosecution rebutting Accused's Good Character, by leading Evidence of Bad Character.¹²

- * Co-accused Leading Evidence of the Accused's Bad Character.¹³

- Character of a witness

- * Prior inconsistent statements¹⁴

- * Prior convictions of the witness may be proved¹⁵

- * Credibility

Admission: Previous convictions of a witness are admissible on the issue of their credit Subject to EAQ, s 15A

Limitation: EAQ s20,s21

⁷ *Sanchez v R*; Direction 29

⁸ EAQ, s9

⁹ *ACC v Stoddart*; EAQ s7

¹⁰ *QCC*, s632(3).

¹¹ *R v Rowton* (1865) 169 R 1497

¹² *R v Rowton* (1865) 169 R 1497

¹³ *Lowery v R* [1974] AC 85

¹⁴ EAQ, ss 18-19

¹⁵ EAQ, s 16

- Opinion

Note: Generally opinions are inadmissible. Except expert opinions and lay opinions.

Expert opinion: – Is an expert opinion necessary?¹⁶

- Is it a recognised field of expertise?¹⁷
- Is the witness truly an expert within that field?¹⁸
- Does the witness’s evidence stay within their range of expertise?¹⁹
- Is the witness’ testimony based on admissible evidence?²⁰

Lay opinion: Opinion evidence by laypersons (‘non-experts’) may be admissible²¹.

- can be used for certain issues, such as handwriting identification, etc.

- Confession

Note: Confession, by its nature, is an out of court statement (Hearsay). However, confession may be admissible. Confession can still be excluded under the judge’s discretions (common law practice) or by statute.

Mandatory exclusion: Involuntary confession.²²

- Involuntary includes duress, intimidation, persistent importunity, sustained, or even undue insistence or pressure²³
- Standards of voluntariness includes free from threats, freedom from compulsion, coercion.²⁴

Discretion Exclusion: Unfairness²⁵, public policy²⁶

- Label-Documentary

Note: Label needs to have witness to testify the label itself. Otherwise, it will be inadmissible due to lack of evidence chain.

Case: *Commissioner for Railways (NSW) v Young*(1962) 106 CLR 535

Case: *Godfrey v Woolworths (WA) Pty Ltd*(1998) 103 A Crim R336.

¹⁶ *Farrell v R*(1998) 194 CLR 286

¹⁷ *Clark v Ryan*(1960) 103 CLR 486

¹⁸ *Clark v Ryan*(1960) 103 CLR 486

¹⁹ *R v Mackenzie* [2016] QCA 277

²⁰ *Ramsay v Watson* (1961) 108 CLR 462; inadmissible

²¹ *Sherrard v Jacob* [1965] NI 151

²² *Criminal Law Amendment Act 1894* (Qld) s10

²³ *McDermott v R*(1948) 76 CLR 501

²⁴ *Tofilau v R*(2007)231 CLR 396

²⁵ *R v Swaffield*; *Pavic v R* (1998) 192 CLR 159

²⁶ *R v Ireland* (1970) 126 CLR 32

- Corroboration

QLD practice: No need for corroboration.²⁷

Jury Warning: A judge may give a corroboration warning, but any warning that is given is subject to s 632(3) of QCC.²⁸ The need for a warning is contextual.²⁹

Give Warning: There are exceptional cases requires warning direction.

- verbalised confession was made by the accused while in police custody.³⁰
- corroborative evidence is needed before relying solely on an eye-witness identification by a stranger.³¹
- If Prisoner A has their own reasons for lying about Prisoner B confessing to a crime while they were in prison together, this is known as a "jail-yard confession."³²

²⁷ QCC, s632

²⁸ *Robinson v R* (1999) 197 CLR 162

²⁹ *Longman v R* (1989) 64 ALJR 73

³⁰ *McKinney v R* (1991) 171 CLR 468

³¹ *Domican v R* (1992) 173 CLR 555

³² *Pollitt v R* (1992) 174 CLR 558