

Witnesses and Adducing Evidence

LAW20009: Week 4

Swinburne Online

Alana Ray

Welcome

- Witnesses and Adducing Evidence
- Assignment 1A guidance
- Trial procedures
- 15-minute break

Assignment 1A Overview

1000-word written submission as prosecution counsel



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General Assignment Tips – Evidence Analysis Framework



Step 1: Identify the Evidence

What exactly is being tendered?

Documents, testimony, objects, expert opinions?



Step 2: Identify Legal Tests

Which Evidence Act provisions apply?

Understand each element requirement



Step 3: Find Leading Cases

Key judicial interpretations

Understand and apply principles



Step 4: Apply Law to Facts

Show how principles apply to specific circumstances

Research Strategy for Assignments



Primary Sources First:

Evidence Act provisions
High Court and Court of
Appeal decisions
Recent cases from your
jurisdiction



Secondary Sources for Understanding:

Academic commentary
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Research Tip: Find the recent case
this assignment is based on!

Written Submission Best Practices



Structure:

Clear headings mirroring
legal test elements
Numbered paragraphs
Logical flow from principles
to application



Writing Style:

Authoritative but respectful
tone
Strongest arguments first
Anticipate counterarguments
Precise legal language



Avoid: Copying textbooks, ignoring
adverse authorities

Understanding Your Role

You are PROSECUTION COUNSEL:

- Client is the state/Crown
- Job: get evidence admitted to prove the case
- Be ethical but advocate firmly
- Think about WHY evidence matters to case strategy



**Questions about assignment
structure/research before main
content?**

Learning Objectives:

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Competence
and
compellability
of witnesses

2

Trial conduct in
adversarial
system

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Examination
procedures
(chief, cross, re-
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Judicial
warnings about
unreliable
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Key Cases – Your Greatest Hits

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Courtroom scenarios:

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- Defendant's spouse
- Person with dementia
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Historical context: Common law excluded whole categories:

- Spouses, children, the mentally ill, non-Christians

Modern approach: Individual assessment case by case

- "Everyone can contribute to finding truth"

The Competency Framework

Presumption (s 13(6)): Competent unless contrary established

First Test (s 13(1)) - Two parts:

- Capacity to understand questions
- Capacity to give understandable answers **Both must be satisfied**

Sworn vs Unsworn Evidence: Different capacity tests

The Sworn vs Unsworn Evidence

Section 13(3) test for sworn evidence:

- Understanding obligation to give truthful evidence
- Not about religious belief
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Example questions to child:

- "What is a promise?"
- "What happens if you break a promise?"
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The Unsworn Evidence Alternative

Section 13(5) - Court must explain three things:

- It's important to tell the truth
- Tell court if you don't know/can't remember
- Only agree with statements you believe true

Key point: Not "lesser" evidence - just without oath ceremony **Jury can give same weight as sworn evidence**

The Voir Dire Process

Competency determined through mini-hearing

Key principles:

- Judge has broad discretion
- 'Skilled questioning' required
- Expert evidence may be called (s 13(8))
- Neither party bears burden of proof
- Judicial inquiry, not adversarial contest

Incapacity Can Be Overcome

Section 31: Alternative questioning and evidence methods

Examples:

- Sign language interpreters
- Written questions and answers
- Communication devices for disabilities
- Modified questioning techniques

Law's commitment to inclusion

The General Rule and Its Limits

Section 12(b): Competent witnesses are compellable

But legal system recognises impossible conflicts:

- Constitutional roles
- Practical barriers
- Family relationships
- Fundamental rights

Practical Exceptions (ss 14-16)

Section 14: Cost/delay if adequate evidence available elsewhere

Section 15: Heads of state, MPs on sitting days

Section 16: Judges and jurors in their own proceedings

All based on practical conflicts or impossibility

The Big One - Section 17

Defendants cannot be compelled to testify for the prosecution

Fundamental principles:

- Prosecution must prove guilt
- Defendant doesn't prove innocence
- Right to silence protection
- Prevents forced self-incrimination

Section 17(2): Not even competent to volunteer!

Family Members

The tension:

- Society needs evidence to convict criminals
- Families shouldn't be torn apart by legal system

Scenario: Domestic violence with family witnesses

- Wife and daughter witness assault
- Police want them to testify
- Section 18 provides potential protection

Section 18 – The Balancing Framework

If a family member objects, the court balances:

Part (a): Likelihood of harm to person/relationship?

Part (b): Does harm outweigh the desirability of evidence?

Section 18(7) factors:

- Nature of offence
- Importance of evidence
- Exclusivity of evidence
- Nature of relationship
- Confidential communications

Section 19 – The Exceptions to Section 18

Some crimes are too serious for usual family protections:

- Domestic violence offences
- Child abuse and neglect
- Sexual offences against children

Policy: These crimes often occur in private family settings **If the family could always refuse, prosecutions would be nearly impossible**

Examination in Chief – The Art of Storytelling

Fundamentally about narrative construction

Robbery case example:

- Chapter 1: Victim's ordinary evening
- Chapter 2: The terrifying attack
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Each witness provides story pieces

The Golden Rule – No Leading Questions

Hollywood gets this wrong constantly!

Proper examination: "What did you observe at the intersection?"

Improper (leading): "Did you see defendant's car run the red light?"

Difference: Witness tells story vs lawyer feeds answers**

The Two Types of Leading Questions

Type 1: Suggests a particular answer: "You were terrified when the defendant pointed the gun, weren't you?"

Type 2: Assumes disputed fact "When did you stop being afraid of defendant?"

Classic example: "Have you stopped beating your spouse yet?"

Any answer assumes spouse-beating occurred

Leading Questions – The Exceptions

Section 37 exceptions where leading IS permitted:

- (a) Court gives leave:** Broad judicial discretion
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Memory Refreshment

Challenge: Trials occur months/years after events

Solutions:

Section 32: Regular witnesses with strict requirements

Section 33: Police officers get special treatment

Requirements for s 32:

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Strategic decision: Whom NOT to call as witnesses

The inference: If party fails to call expected witness, may infer evidence wouldn't help their case

Requirements:

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Civil cases: More readily applied **Criminal cases:** Heavily restricted

Jones v Dunkel in Criminal Cases - Heavily Restricted

Different because of fundamental principles:

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- Right to silence
- Fair trial requirements

Key restriction: Generally, shouldn't apply when defendant chooses not to testify

Cross-Examination

Wigmore: "Greatest legal engine ever invented for discovery of truth"

Three purposes:

- Cast doubt on unfavourable evidence
- Establish facts favourable to your case
- Discredit the witness if necessary

Key difference: Cross-examiner controls witness

Leading Questions – Now Encouraged!

Complete contrast to examination in chief

Demonstration of control:

"You had been drinking that evening, hadn't you?"

"In fact, you consumed at least six beers?"

"Your vision was impaired?"

"So you're asking the jury to rely on intoxicated observations?"

Each question demands yes/no answer

Cross-Examination Restrictions - Protecting Fairness

Section 41 - Court MUST disallow:

- Misleading or confusing questions
- Harassing, intimidating, offensive questions
- Questions based on stereotype
- Inappropriate manner or tone

Examples:

"When did you decide to lie?" (misleading)

Asking the same question 20 times (harassing)

"All addicts are liars?" (stereotype)

Section 42 - Discretionary Restrictions

Court MAY disallow leading questions when:

Witness in cross-examiner's 'camp'

Witness vulnerable to suggestion

Has particular disabilities

Section 42(3) - MUST disallow:

If facts are better ascertained without leading questions

Prior Inconsistent Statements

Section 43 procedure:

Step 1: Ask about inconsistency without showing statement

Step 2: If denied, provide circumstances of making

Step 3: Direct attention to specific inconsistency

Step 4: If still denied, prove independently

Why powerful: Destroys credibility, suggests unreliability

Browne v Dunn – The Golden Rule of Fair Play

The rule: Must put contradictory version to witness in cross-examination

Three benefits:

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Full explanation opportunity for all evidence

Example: If your witness will contradict, must put: "You're mistaken about seeing Sarah there, aren't you?"

Re-examination – Damage Control and Clarification

Section 39(a): Only matters arising from cross-examination

Permitted:

- Clarifying ambiguities
- Explaining contradictions
- Providing context
- Restoring credibility

NOT permitted:

- New evidence forgotten in chief
- Matters not touched in cross-examination

Unreliable Evidence Warnings

Historical: Rigid mandatory warnings about accomplices, children, sexual assault complainants

Evidence Act revolution:

Section 164: Abolishes mandatory corroboration

Section 165: Guided judicial discretion

Section 165A: Special children protections

Section 165 – Guided Discretion Framework

When party requests warning about unreliable evidence:

Court must warn unless good reasons not to

Required warning content:

- Evidence may be unreliable
- Specific matters causing unreliability
- Need caution in accepting evidence
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Categories of Unreliable Evidence

Prison informers (s 165(1)(e)):

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Accomplices (s 165(1)(d)):

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Identification evidence (s 165(1)(b)):

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Children's Evidence

Section 165A prohibits:

Warnings that children as a class are unreliable

Section 165A(2) requires:

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Other than age alone

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Examples sufficient:

Specific suggestibility demonstrated

Cognitive development issues

Pattern of inconsistencies

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