LAWS2016 – Evidence

Topics

1) Introduction to evidence law
2) Relevance
3) Proof (i) – burdens and standards of proof
4) Adversarial trial
5) Witnesses
6) Documents, Real Evidence
7) Credibility
8) Hearsay
9) Tendency and coincidence evidence
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12) Identification Evidence
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1) Introduction to Evidence Law

SEMINAR QUESTIONS

[1] Overview – how evidence law regulates proof

- Have regard to the uniform evidence law (EA, for 'Evidence Act') table of contents. Select a section from each EA chapter (particularly chapters 2-4, chapters 1 and 5 are optional) and explain what the section does, and how it relates to the broader function of that chapter. Try to come up with a hypothetical in which the section may have application.

[2] Substantive and procedural law

- Conjure up a brief narrative of the facts of the following hypothetical cases in which the facts in issue are narrowed as indicated. In each case suggest how/why the issues may have been narrowed. Suggest three different items of evidence going to the issue.
  - a) motor vehicle case in which breach is in issue
    - whether the brakes were applied
    - whether the brakes were working
    - whether there were signs that the brakes needed to be fixed
  - b) a motor vehicle case in which loss of earning capacity is in issue.
    - Degree of damage/harm to person – expert evidence
    - Whether plaintiff is still working
    - Plaintiff went to a different, lower-paying career
    - Injuries relevant to the career?
    - Plaintiff's other activities – e.g., sporting activities after the accident
  - c) a murder/manslaughter case with identity in issue.
    - Who done it? (see ***Smith***) → CCTV image not clear, could not tell if the person robbing the bank was the defendant
    - Eye-witnesses (**s 114-116, *EA***) → eye-witness may not have known the defendant previously, their ability to accurately identify the defendant is questionable
    - Find other people that match the description of the perpetrator given by the witness → identification parade → pictures of all these people to help witness re-identify
    - Record identification parade – what the police is doing (any undue influence on witness)?, what witness says (how confident are they)?

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6) Credibility Evidence

SEMINAR QUESTIONS

a) What does 'credibility evidence' mean?

- ***Credibility*** defined in ***Dictionary*** → includes witness' ability to observe and remember facts ('memory')
  - Would also include issue of 'honesty' – e.g., consider a perjury conviction
- ***Credibility evidence*** defined in **s 101A** → qualifying the exclusionary rule in **s 102** (for the exclusionary rule to apply, you must know if the evidence is credibility evidence)
  - **S 101A(a)** → credibility evidence if it only affects credibility (one purpose of credibility)
  - **S 101A(b)** → credibility evidence if it is relevant to credibility and another purpose, but not admissible for that other purpose
  - SO, if the evidence relevant to credibility is admissible for another purpose (e.g., hearsay) – it can be used for a credibility purpose as well
  - → e.g., evidence from an alibi (who testifies that defendant did not do it, since defendant was with me, and we were in another State that day) → that goes to the credibility of the defendant, and also to the fact in issue (of whether the defendant did it or not)

b) How has s 106 altered the Common Law 'finality rule'?

c) When is credibility evidence allowed in cross-examination? Give examples.

d) If the prosecution wanted to submit credibility evidence against an accused, what procedures would the prosecution need to apply and how might defence counsel seek to protect their client?

e) What happened and what was held by the Court in ***El-Azzi***?

- FACTS***:*** defendant was charged with conspiracy in relation to drugs (importation/distribution), and defendant was former police officer
  - Defendant testified, and P wanted to put to defendant in cross-examination several challenges to D's credibility
  - To challenge the defendant's credibility in cross-examination, evidence needed to substantially affect credibility (**s 103**) – also needed to satisfy **s 104** (since criminal defendant)
  - Not all that evidence satisfied **s 103**, and **s 104** – the evidence included three imputations ((1) isn't it the case that while you were police officer, you were subject to misconduct inquiries; (2) haven't you threatened witnesses; (3) isn't it the case that you have a criminal conviction for corruption 10 years ago)
- ISSUE:
  - Were the imputations permitted under **ss 103, and 104**?
- HELD:
  - (1) misconduct inquiries – not about dishonesty – would not satisfy basic threshold in **s 103** → leave was required, and leave had not been given
  - (2) threatening witnesses – not about dishonesty either – would not satisfy basic threshold in **s 103** → leave was required, and leave had not been given
  - (3) corruption as police officer in relation to stolen property → IS DISHONESTY – it would satisfy the threshold in **s 103** and **s 104**
  - NOTE: since criminal defendant, **s 104(4)** requires that leave is only to be granted if defence attacked prosecution witnesses (that was satisfied since prosecution witnesses including police informants and other police were challenged by the defence – e.g., revealed prior convictions)

f) Will a prior inconsistent statement be credibility evidence? How would the prior inconsistent statement be proved other than from the witness?

Problem Question

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- Can't adduce prior convictions – unless guilty plea [admissibility issue, not considered in this course]
- **Relevance** (**s 55**) → The question that must always be asked and answered is **relevance** (***Smith***) → relevance is where the evidence, taken at its highest, could affect the probability of the existence of a fact in issue (**s 55**)
  - Fact in issue: commission of the offence – did it happen? [issue in fact is not identity here; complainant not mistaken]
  - Evidence of similar commission is relevant → since he did a similar act 20 years ago, he has a tendency to engage in that conduct, which increases the probability that he committed it on this case
- **Tendency exclusion** (**s 97**)
  - Evidence adduced to prove that a person has a tendency to act in a particular way is inadmissible
  - If tendency evidence satisfies certain admissibility requirements, it is admissible
  - **S 97(1)(a)** → reasonable notice is required [can assume notice was given in exam – but must state that assumption]
  - **S 97(1)(b)** → must have significant probative value
  - Since it is prosecution adducing tendency evidence about defendant→ probative value outweighs unfair prejudice to defendant (**s 101(2)**)
- Probative value (**s 97(1)(b)**)
  - **S 97A(1)** → this section applies if the fact in issue is the commission of child sex assault (which is the case here)
  - **S 97A(2)** – presumption that tendency evidence about the defendant has probative value if it meets the requirements of this section
    - Facts doesn't indicate if it is tendency or coincidence evidence → so Prosecution has a choice to characterise it as tendency evidence → and would do so to get the benefit of this presumption
    - So, assume it is tendency evidence
    - Tendency evidence must be about the sexual interest of the defendant in children (**s 97A(2)(a)**) OR the defendant acting on a sexual interest that defendant has in children (**s 97A(2)(b)**)
    - Can assume that prior child sex convictions would involve conduct which involves the defendant having or acting on a sexual interest that he has in children → but there is also prior convictions for violence against children (which, on the face of it, wouldn't attract the presumption → since not about sexual interest)
    - Here, both the prior, and current offence charges – includes both physical and sexual assault of children → but only the evidence of prior sexual assault evidence (and not physical assault evidence) will benefit from this presumption
- (1) Evidence of child sex convictions
  - Attracts presumption under **s 97A** → has significant probative value
  - **S 97A(4)** → presumption can be rebutted by defendant – but only if the court is satisfied that there are sufficient grounds for it to be rebutted → but court is no to take into account matters in **s 97A(5)**
  - Defendant can rebut the presumption by arguing – the period of time that passed (20 years earlier) → but this factor is excluded in **s 97A(5)(e)** – unless there are exceptional circumstances per **s 97A(5)** (***Brookman*** → trial judge said that the legislative intent is to make it easier for this evidence to come in, so the exceptional circumstances requires a high bar, and so in that case, it was held that even though decades passed, that was not an exceptional circumstance)
  - SO – based on ***Brookman,*** there are unlikely exceptional circumstances → defendant can't rely on the 20-year gap
- (2) Evidence of child violence convictions
  - No benefit of the presumption of significant probative value in **s 97A**

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- "Sword wounds are immediately obvious and very difficult to mistake from other types of slashing and cutting wounds" → clearly contradicted her view that it was by a samurai act
- If we take this evidence at its highest (***IMM***) → then it clearly indicates against probative value
- So emphasis the contradictory nature of evidence to enable more scope for **s 137** to apply

Question 4

P has brought an action against D for injuries that P says arose out of a motor vehicle accident caused by D's negligence. The head-on collision occurred on a quiet strip of road in country NSW. Both P and D were severely injured in the accident, neither remembers how it occurred, and there were no other eyewitnesses.

P wishes to tender a report of a X1, a private driving instructor who also has several years experience as a police driver and instructor. Other than his instructor course and various expert driving courses X1 has had no formal education since high school. X1's report indicates that, based upon his inspection of the site of the accident, the direction the cars were travelling, the position of the cars following the accident, and the damage to the cars, it is highly likely that the accident was caused by D drifting onto P's side of the road as a result of his excessive speed and a less than ideal, though typical, camber to the road.

P also wishes to call W1 who was driving the same direction as P, a kilometre or two ahead, at about the time of the accident. In her witness statement W1 says that she saw D travelling the in the other direction driving 'incredibly fast ... like a mad man ... like he had a death wish'.

One of the injuries that P attributes to the accident is partial blindness. P's eyes were not immediately affected by the accident, however, a year later P developed macular degeneration and his sight deteriorated quickly. While most experts macular degeneration to aging and high-levels of cholesterol combined with genetic predisposition, P has a report from X2, a PhD student in medicine, which says that, while more work needs to be done (and will be done in X2's PhD), there is some empirical evidence that this condition occurs at a higher rate, and appears in a more severe form, among people who have experienced severe motor vehicle accidents. This supports the preliminary hypothesis that macular degeneration is causally linked with motor vehicle accidents.

Advise P on the admissibility of the evidence of X1, W and X2.

12) Discretions

SEMINAR QUESTIONS

1.

Section 55(1) reads: '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.'

The **dictionary** of the Act defines probative value as: 'probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.'

- What does 'rationally' mean in this context?
- How would **s 55** and **ss 135-137** work differently if 'rationally' was not included (or would it work differently at all)?

- Relevance is the threshold for admissibility
- Probative value comes up in tendency/coincidence rule, and the discretionary exclusions (**s 135, s 137)** → lack of probative value can lead to exclusion
- Evidence is relevant it could 'rationally' affect fact in issue → probative value is the 'extent' of which evidence could 'rationally' affect fact in issue

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Question 2 (All Topics)

At about 1 p.m. on 12 January 2016, Mike went to his local pub, the Green Dragon, where, whilst drinking with friends, across the room he saw his friend Dom speaking to Sarah, an acquaintance of Mike's. Mike saw them talk for a little while, and when Dom appeared to go to the bathroom, Mike saw Sarah reach out and adjust or move Dom's drink. Dom returned to the table and a few minutes later, Mike saw Sarah leave.

Shortly afterwards Dom collapsed in the pub. Mike rushed to help him and Dom said to him,

> ***"Mike, I feel really terrible. I think that Sarah slipped something into my drink. I think that she has been gunning for me for a while."***

Jen, Sarah's partner (they have lived together for two years) was also at the pub that day, and overheard the conversation between Mike and Dom.

Dom was rushed to hospital, but was declared dead on arrival. The autopsy later revealed that he died of ricin poisoning.

The afternoon of the death, Mike gave a statement to Det Sgt Michelle which was reduced to writing, setting out that he saw Sarah reach out and adjust or move Dom's drink, and what Dom said to him.

The next day, Det Sgt Michelle went to Sarah's house and knocked on the door. It was quiet and she got no response, so she picked the lock and entered. In the front room she found a small bottle of blue liquid which she pocketed. Moving to the back of the house, she saw Sarah sitting in the lounge room, looking flushed. There were two empty bottles of wine, and some marijuana and related equipment on the coffee table next to her. The room smelled of marijuana.

Sarah did not object to her presence, and without giving Sarah a caution, Det Sgt Michelle said to her:

Michelle: "*Dom was found dead at the pub today, you were the last person to talk to him.*"

Sarah: *"Yes, Got him! That bastard won't be stealing from me anymore."*

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