CHAPTER 1

GETTING INTO EVIDENCE

COVERED IN THIS CHAPTER

In this chapter, you will learn about:

- sources—the uniform Evidence Acts;
- kinds of evidence;
- relevance, admissibility and weight; and
- drawing inferences.

CASES TO REMEMBER

Smith v The Queen (2001) 206 CLR 650

STATUTES AND SECTIONS TO REMEMBER

Evidence Act ss 55, 56, 57, 142(1)

INTRODUCTION

The law of evidence regulates the proof of the facts in issue at a trial through the operation of various rules and principles.[1] It is essential to have a good grasp of the rules and principles of evidence to ensure the adequate conduct of any kind of legal practice, particularly in the adversarial context of criminal and civil litigation. The rules of evidence, based on considerations of justice and practicality, shape the way in which judges and lawyers think about fact-finding. As a lawyer preparing a matter for litigation, you must carefully consider how the fact-finder will evaluate the factual material adduced by the parties. Problems about the admissibility or otherwise of information as evidence may be anticipated before trial, but can also arise quite unexpectedly during a trial. In the atmosphere of a trial, with the pace and other constraints operating, it is not always possible to take time to remedy your lack, or depth, of understanding of the relevant rules and principles. The point at which knowledge is necessary will quickly emerge and then subside during the course of a trial. Consequently, evidence is a most important area of study in your law degree program.

A major objective of the rules and principles of evidence is to bring integrity to the fact-finding process, and ensure that witnesses and parties are treated equitably and fairly in this process. Importantly, and perhaps ideally, the law of evidence should be a 'wholly rational body of rules and principles designed to aid the courts in their

discovery of the truth'.[2] They represent a valuable form of knowledge for any person concerned with the fact-finding process.

For students of evidence law it is important to emphasise that it is a form of *procedural or adjectival law* that provides the framework through which the substantive law, such as criminal, contract or tort law, is given practical effect.[3] The substantive law determines whether alleged conduct leads to some legal consequence, such as creating a right to damages or liability for a criminal offence, but it is the law of evidence which determines how the parties can attempt to prove that the alleged conduct actually occurred. It is the province of the law of evidence to provide a regulatory framework to decide the information which can and cannot be used to prove the facts in issue in the proceedings, ultimately leading to a determination of what are the true facts. The impact of the rules of admissibility of evidence can often determine the outcome of a case. Accordingly, even though evidence law is procedural in nature, its fundamental importance cannot be underestimated.

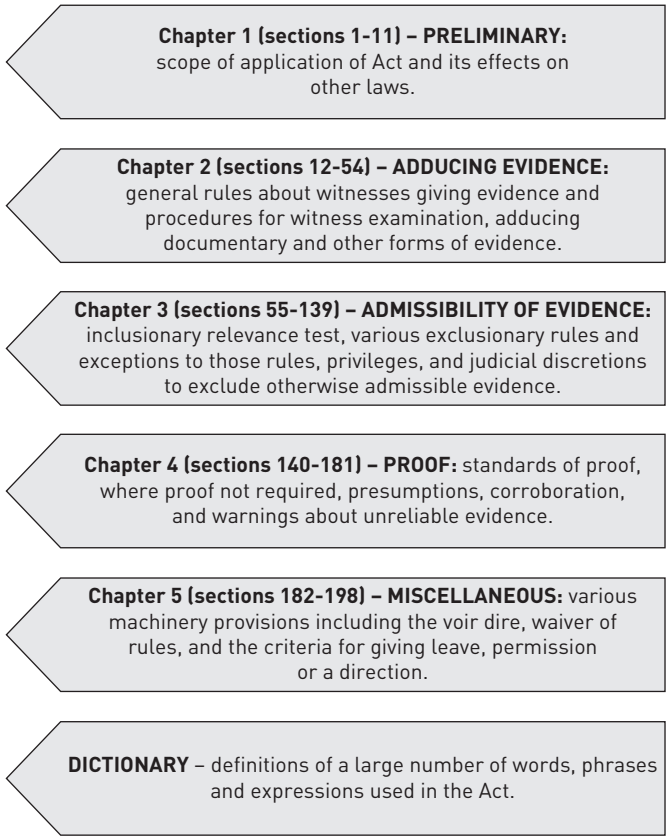
SOURCES—THE UNIFORM EVIDENCE ACTS

With its focus on the trial process in the courtroom, the law of evidence originated in the hectic adversarial context of court litigation. Accordingly, the traditional primary source was the common law. During the past century, parliaments in all Australian jurisdictions have legislated incrementally to provide various written statements of, and supplements and changes to, the law of evidence, while still preserving the common law foundation. Statutory modifications as supplements to the rules of evidence have varied across the Australian jurisdictions although it is apparent that broader shared aims have underpinned these modifications and were a catalyst for the uniform Evidence Acts (EA) that now exist in the majority of jurisdictions: the Commonwealth, New South Wales, Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.[4]

The Acts in the various jurisdictions are substantially identical and are largely based on reports by the Australian Law Reform Commission (ALRC) and other state commissions.[5] Queensland and South Australia have indicated that they will not adopt the national uniform evidence legislation. Where the legislation does operate it is now the primary legal source, and it has resulted in wide-ranging reforms with simplification and clarification of complex aspects of evidence law. The legislation is not a complete codification[6] as some topics associated with the law of evidence are not covered. Clearly though, full effect must be given to provisions that do cover the field and it is not 'to be used as a means to retain aspects of the common law of evidence which are inconsistent with the operation of the Act'.[7]

The EA is structured into five chapters and Figure 1.1 on the next page provides a snapshot of the essential contents of this structure.

FIGURE 1.1 The structure of the Evidence Acts



There is a significant amount of commentary about the uniform evidence legislation with judges and commentators expressing a variety of opinions about its merits.[8] Arguably, the legislation makes the rules of evidence more accessible and simplifies many of them in providing a rational and principled system of trial procedure informed by an understanding of the common law. It is aimed at ensuring procedural justice for the parties to litigation, but it cannot solve all the problems with evidence. Almost 20 years of operation in the Commonwealth and New South Wales jurisdictions have 'shown [the uniform evidence legislation] to work well in practice and the monitoring and review of its operation by the ALRC have been important in moving further towards 'harmonisation' of the laws of evidence across Australian jurisdictions'.[9]

TABLE 1.1 Classification of evidence

KIND OF EVIDENCE	BRIEF DESCRIPTION	PRACTICAL EXAMPLE
Direct '[D]irect evidence is evidence which, if accepted, tends to prove a fact in issue' [*Festa v The Queen* (2001) 208 CLR 593, 596]	Witness testifies from personal knowledge to an actual observation or perception of a fact in issue from one of their five senses. The fact-finder must infer that the witness is a credible source for the evidence to be accepted in determining the existence or otherwise of facts in issue in the proceeding.	Issue is whether D stabbed and killed V. When W gives evidence at D's trial that she saw D stab V, and this evidence is accepted by the fact-finder, it directly answers the question whether D stabbed and killed V. It is direct evidence of that fact in issue.
Circumstantial '… works by building up a strong pattern of circumstantial detail which convinces by its truth to the sense of reality that we derive from our experience of life'[10]	Witness testifies to facts that go to a fact in issue but are not sufficient to resolve it. If the evidence is accepted, the fact-finder must draw one or more inferences to be in a position to resolve that fact in issue. It can be prospectant (before the subject event), concomitant (at the time of the event) and retrospectant (after the subject event) along a time continuum.[11]	D is charged with the murder of V, his wife. There are no eyewitnesses. V's body is found dumped in a creek. At trial, the prosecution evidence comprises: - oral evidence from W, a neighbour of D and V, who heard them arguing loudly, including D shouting 'I'll see you dead, miserable bitch!' the day before V's body was found in a creek - oral and documentary evidence from I, that D took out a multimillion dollar life insurance policy on V with D as sole beneficiary ten days before V's body was discovered. - real and forensic evidence from P that D's hair was found on V's clothing, discovered on the creek bank near V's body - oral evidence from A that D asked him the day after the body was found to support his alibi that he was playing golf with him at the time V was killed although this was false. While individually each circumstance does not prove D killed V, when aggregated together they lead to various inferences that firmly support that conclusion.

(Continued)

TABLE 1.1 Classification of evidence *(Continued)*

KIND OF EVIDENCE	BRIEF DESCRIPTION	PRACTICAL EXAMPLE
Original	Witness testimony includes a statement that has 'independent evidentiary value'[12] so that it goes to proof of a fact in issue without relying on its truth. It is relevant simply on the basis the statement was made, and its probative value[13] does not depend on the credibility of the person who made the statement.	Proof of threats by terrorists that D would be killed unless he assisted them by carrying their ammunition is original evidence to prove the threats were made (not that they were true) and had such an effect on D's state of mind that his will was overborne, supporting his defence of duress.[14]
Hearsay	Witness testimony includes a statement or other representation made out of court by another person not called as a witness, and the statement or representation is only relevant to proof of a fact in issue in the proceeding if it is true.[15]	D is charged with 'arson' of a hotel. At trial, the prosecution propose to call W, who made a statement that N told W that N had observed D in the vicinity of the hotel shortly before the fire and that D was carrying a large jerry can. This evidence is hearsay and cannot be given at trial by W unless it comes within an exception to the rule.
Documentary	Witness testifies as to the contents of a document, which contains writing or symbols that are of evidentiary significance to a fact in issue in the proceeding. Admissibility of documents is governed by special rules.[16]	P gives evidence of entering into a written contract with D for the supply of building materials and the document is produced as evidence of the terms of the contract. The writing in the document is relevant for proving the existence of the contract.
Real	Witness testifies as to the existence of an actual thing that the tribunal of fact can perceive and experience for itself. The thing proves itself and the party producing it does not have to rely on inference for its existence although, depending on the nature of the thing, it may become a source of inference.	W gives evidence that a knife produced in court that was found at the crime scene is what she saw D use to repeatedly stab V. Views, demonstrations, experiments, maps, models, diagrams and the demeanour of a witness are also forms of real evidence.[17]

KINDS OF EVIDENCE

Let us turn now to the significant classifications of evidence that you will encounter in your study of the law of evidence. Table 1.1 (see page 4) provides a useful summary. In the practical examples, terms used are shortened to an alphabetic letter and the legend for these is as follows:

D = Defendant
V = Victim
W = Witness
I = Insurer
A = Alibi witness
N = Not available as witness
P = Prosecution/Plaintiff

Finally, an important categorisation for the rules of evidence is the distinction between civil and criminal proceedings. As we proceed through a consideration of the rules of evidence, you will discover that there are some specific rules applicable only to criminal proceedings, some applicable only to civil proceedings and some applicable to both, all within one law of evidence. Generally it can be said that it is more difficult to prove facts in issue in a criminal case because the stakes involved are usually of higher importance than in a civil case, which typically involve resolution of a dispute between two parties about the liability to pay, or the amount of, money. In criminal cases there is a stronger adversarial culture where the liberty of the defendant and the balance between the state and the individual is at the forefront. Public confidence in the criminal justice system is essential, so a corollary is that the rules are more strictly applied to ensure the admission of evidence that is clearly probative of facts in issue and is not unfairly prejudicial to a defendant.

RELEVANCE, ADMISSIBILITY AND WEIGHT

RELEVANCE

> The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.[18]

This nineteenth century definition is an influential precursor to the contemporary definition of a foundational concept in the law of evidence. Fundamentally, to be admissible as evidence, information must be relevant to a fact in issue. In short, the principle is that one fact is relevant to another if it weighs on the probability that a fact in issue can or cannot be proved to exist. This is now reflected in s 55 EA:

55 Relevant evidence

(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.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

Facts in issue are ultimate facts which the plaintiff and defendant in a civil action or prosecution and defendant in a criminal proceeding must prove for their action, prosecution or defence to be successful.[19] The connection between a piece of information and the fact in issue is the linchpin of the concept of relevance in the law of evidence. Information that is relevant is admissible as evidence, unless it is found to be inadmissible through operation of an exclusionary rule or is rejected through the exercise of judicial discretion. Irrelevant information is simply inadmissible without the need to consider the operation of any exclusionary rules.

Questions of relevance are questions of fact to be decided according to our experience of the way people and things behave in the world.[20] We use a natural logic in applying our life experience to everyday events and transactions. Accordingly, 'relevance' is really an extra-legal concept for which the law provides limited interpretative assistance as it is difficult to codify the term into an absolute and precise test. This flows directly from the nature of human reasoning when trying to characterise and construe experiences.

The ALRC explained that the definition in s 55 EA requires 'a minimal logical connection between the evidence and the fact in issue. In terms of probability, relevant evidence need not render a fact in issue probable or sufficiently probable—it is enough if it only makes the fact in issue more probable or less probable than it would be without the evidence—that is, it 'affects the probability'. The definition requires the judge to ask *could* the evidence, if accepted, affect the probabilities.'[21] Accordingly, a broad threshold test is involved under the Act; this test can be distinguished from the common law concept of 'legal relevance', which excludes evidence of minimal probative value that would compound difficulties in the proceedings or unduly add to its time and cost. In *Festa v The Queen* (2001) 208 CLR 593, Gleeson CJ, in considering the threshold issue of the relevance of evidence, stated (at 599):

> If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration.

> It is not enough to say that it is 'weak' … whether it is weak might depend on what use is made of it.

That final point relates to another important evidentiary concept known as 'weight', which we will consider later in this chapter.

A CASE TO REMEMBER

Smith v The Queen (2001) 206 CLR 650

Smith v The Queen (2001) is a bank robbery case where there was an issue of identification in relation to photographs taken by a security camera. The appellant had been identified as the person in the photograph apparently keeping lookout ('cockatoo') while the co-offenders took the money. The identification was made by two police officers who had had previous dealings with the appellant and recognised him as the person depicted in the bank security camera images. The High Court emphasised that the first question to address with such evidence (and by logical extension—any evidence) is whether it is relevant and, if it is not, no further questions about admissibility arise. In determining relevance, the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ at 653–654) stated it is fundamentally important to determine the issues at the trial. In criminal trials, the ultimate issues are expressed in terms of the elements of the offence and, applying s 55(1) EA to the specific facts of this case, there was a narrow issue of whether the appellant is depicted in the bank photographs. The police witnesses were held to be 'in no better position to make a comparison between the appellant and the person in the photographs than the jurors … who had been sitting in court observing the proceedings' (at 655). Accordingly, the witness's assertion that he recognised the appellant was not evidence that could rationally affect the assessment by the jury of the fact in issue. Rather it simply permitted substitution of one view for another and did not promote the process of reasoning from relevant evidence to the conclusion of a fact in issue. Therefore the appeal was allowed because the police evidence was irrelevant and inadmissible, as the jury were as well placed as the police officers to have a view on this fundamental issue of fact.

In the later case of *R v Marsh* [2005] NSWCCA 331, a similar issue arose involving identification of an appellant from bank security camera images. On this occasion, however, the identification was made by the appellant's sister from photographs published in a newspaper and was held to have been correctly admitted as relevant evidence, with the Court of Criminal Appeal distinguishing the facts in *Smith v The Queen* (at [18]):

> Unlike the police officers in *Smith*, Ms Wood had grown up with her brother and had an ongoing association with him. The witness had the advantage, not shared by the jury, of the long time opportunity, which she asserted, of observing her brother and of noting his characteristics, his stature, his facial features, and the manner in which he wore his

jacket, which the witness claimed was so familiar to her. Hence the evidence which Ms Wood was able to give and did give satisfied the requirement of relevance.

Basically, in the contemporary context of the EA, a fair summary is that all information that is logically relevant is admissible as evidence although if the connection to a fact in issue is too ambiguous and vague it may not reach this threshold.[22] Otherwise it will ultimately be subject to the trial judge having a discretion to exclude evidence on the grounds of remoteness or insufficiency.[23]

Provisional relevance

The relevance of certain information submitted as evidence in a proceeding will sometimes depend upon the proof of another fact,[24] which can create inexpedient obstructions to proof if the question of admissibility must be held in abeyance until there is adequate proof of the facts on which its relevance depends. Section 57 EA addresses this problem with a flexible approach allowing the court to make a finding of provisional relevance for certain evidence subject to further evidence being admitted at a later stage of the proceeding based on a test of whether it is reasonably open to a jury to find the fact established when that further evidence is admitted. The party seeking to adduce the information as evidence will ordinarily give an undertaking to the court to adduce it at a later point in the trial. In practical terms it is an issue about the order of calling witnesses. Usually a party will adopt the most logical and practical method of calling witnesses listed in the case having regard to the matters of proof to which each of their evidence is directed and their availability to appear in court at designated times.

ADMISSIBILITY

Information is 'admissible' as evidence in a proceeding if, in addition to being relevant, it is not rejected through the operation of an exclusionary rule, or in the exercise of judicial discretion, or under one of the procedural provisions in the Act. This position is reflected in s 56 EA:

56 Relevant evidence to be admissible

(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.

Importantly, evidence may be found to be admissible for one purpose but inadmissible for another. The essential question to be asked is: 'What is the use which the court is invited to make of the evidence by the party tendering it?'[25] Where information is submitted to have multiple relevance to a fact in issue and an exclusionary rule operates to prevent the information from being used in one of those ways, it will not necessarily prevent it from being admitted as evidence to be used in another way.[26] If this happens in a trial where a jury is the fact-finder, the trial

judge will be required to give a carefully framed direction as to how the evidence can be used. If it involves a complex direction which will be an insurmountable barrier to compliance, the trial judge may exercise their discretion to exclude the evidence having regard to the overriding obligation to ensure a fair trial.

The question of admissibility is a matter of law for the court to decide and under s 142(1) EA such questions are decided on the balance of probabilities. It is possible that determining a question of admissibility may depend upon a preliminary finding of fact by the court, but it must be distinguished from the weight of evidence, the next evidentiary concept we will consider, which is a question of fact.

WEIGHT

Once admitted as relevant, the weight of evidence is its persuasive effect on proof of the fact in issue to which it is directed. There is a close relationship between weight and relevance[27] but, rather than simply just advancing proof of a fact in issue, weight is identified with factors that affect the extent to which the jury or fact-finder would accept the evidence in reaching their determination about the existence or otherwise of a fact in issue. The cogency or degree of acceptance of evidence will be paramount in determining the weight it has in resolving disputed factual issues. An important factor which affects the weight of evidence is its source, and whether it is the best that a party can reasonably procure in all the circumstances. Overall, understanding of the evidentiary concept of 'weight' can be summed up to be 'more intuitive than analytical; weight is something we are more likely to "appreciate" than to understand'.[28]

DRAWING INFERENCES

The process of drawing inferences is a prominent evidentiary concept. The significance of drawing inferences was touched on when we considered circumstantial and some other types of evidence above. Essentially there is a two-step process[29] where the question to be determined is whether from the existence of a particular fact (A) it should be inferred that another fact (B) existed, exists or will exist. First, in this reasoning process, is it possible or open to draw that inference? Second, if it is, should it be drawn in the particular case?

Inferences will be drawn by the tribunal of fact from a consideration of human conduct and experience so that, in the case of *R v Ryan* (unreported, NSWCCA, 15 April 1994), it was a question of whether the alleged victim's distress was evidence supporting an inference that the sexual intercourse was non-consensual. Certainly human experience tells us that the inference where A (distress) exists, it is possible to draw an inference that B (forced intercourse) took place. It then remains

to be determined whether, in the particular circumstances of the case before the court, it is the inference that should in fact be drawn:

> If it be concluded that the inference is open, it remains for the jury to determine whether, in the circumstances, the inference should be drawn. This will be affected by, amongst other things, the jury's view of what are the circumstances in which sexual assault led to distress of the relevant kind and whether the circumstances in the instant case are such. *These are matters in which the jury must act upon its own experience of life.*[30] (Emphasis added)

CRIMINAL TRIAL THREAD SCENARIO[31]

INTRODUCTION

It is important for students to get a real feeling for the law of evidence. In this guidebook, a mock thread criminal trial is used to give a realistic context for the operation of the rules and principles of evidence and as useful preparation for problem-based assessments. Other sources can also be utilised to gain a practical sense of evidence law, including trial transcripts, written accounts, video documentaries,[32] recreations[33] or dramatisations[34] of actual cases or fictional cases.

One mock criminal trial will be used as a thread throughout eight chapter topic areas commencing in Chapter 4 of this guidebook. This thread trial is not based on a real case, but is designed to be as authentic as possible. The names of the defendant, witnesses and businesses are fictitious. It provides students with an opportunity to engage in authentic experiential learning by 'participating as defence and prosecution lawyers, and as witnesses, in a fictional trial … [as] a controlled approximation of evidence law in action'.[35] This device provides a learning model 'where students engage directly and actively with the process of proof, applying the rules of evidence in the setting from which they arise'.[36] The thread trial brings the courtroom into the classroom and we encourage teachers of evidence law to use it in tutorial classes as an assessment item or as a formative interactive learning activity. Alternatively, it is a useful device for students to use for private or group study in preparation for assessments. The focus is on knowledge, understanding and application of the rules of evidence rather than on advocacy skills. However, to assist students in working out strategies for examining and cross-examining particular witnesses, limited advocacy tips are provided in each chapter where the thread trial is used. In the context of learning to apply the rules of evidence, these advocacy tips are designed to assist students to 'get into evidence', not to make them great advocates. Reference is made to specific trial advocacy books if students are interested in delving further into advocacy techniques.

Where the thread trial is used in class it is ideal if the teacher can access the law school mock courtroom or even a real courtroom to conduct the trial throughout the teaching semester. The thread trial can be conducted[37] by allocating three different students to the roles of (1) prosecution counsel; (2) defence counsel; and (3) prosecution witness for each topic area.[38] Usually the teacher will be the judge presiding over the thread trial in class, particularly where students are to be assessed on their presentation. Otherwise, teachers may be able to obtain assistance from members of the local legal profession to act as judges.

Depending on the topic area and witness, separate instructions are provided for each of the roles in the 'Assessment Preparation' section of the relevant chapters. A witness statement and detailed instructions to both counsel and to the witness are provided in each of the eight chapters where the thread trial is used as assessment preparation. Generally, the instructions to counsel require them to question a witness, make and answer objections, as well as make and respond to submissions or an application in relation to the admissibility of certain evidence. Time limits will have to be imposed to ensure that each counsel can effectively question the witness and present any necessary submissions or applications to the court. Other members of the class who are not participating as counsel or the witness could be required to prepare a trial chart focusing on what evidence is adduced from the witness, its practical importance for the prosecution or defence case at trial, and issues relating to its admissibility in the trial.

The following is important information to keep for use throughout the conduct of the entire thread criminal trial. It sets the scene for you in providing a summary of the prosecution case, details of the charge against the defendant, the initial instructions from the defendant and his criminal record. It will be necessary for you to research the elements of the 'aggravated robbery' charge and identify the facts in issue in the thread trial. This research will inform all decisions made by you as counsel with respect to the progress of the trial, the evidence adduced, and material that will be the subject of objection.

PROSECUTION CASE STATEMENT

The accused, James Swifty, is charged with 'aggravated robbery' (*Criminal Code 2002* (ACT) s 310 <www.austlii.edu.au/au/legis/act/consol_act/cc200294/s310.html>).

At 12:30 p.m. on Friday 17 January 2014, the defendant entered the Federal Bank on the corner of London Circuit and Ainslie Avenue, Canberra. The bank was busy at the time with tellers and other bank staff serving numerous customers. Dolores Davidson had withdrawn $5000 over the counter from her savings account, consisting of 50 $100 notes, and placed it in her handbag, which was hanging over her shoulder. As she was making her way to the entrance of the bank, the defendant seized Mrs Davidson's handbag and attempted to make off with it. Mrs Davidson did not initially let go of the bag and she was knocked to the floor as the defendant wrestled it from her before he ran from the bank. As he ran from the bank, the defendant was observed to have a knife in his back pocket. The defendant was pursued and subsequently arrested in Garema Place where he stood in company with others. The knife, the handbag and its contents, including the $5000, have not been recovered.

INDICTMENT

IN THE SUPREME COURT OF THE)
AUSTRALIAN CAPITAL TERRITORY) No. SCC 0123 OF 2014
CRIMINAL JURISDICTION)
MOCK TRIAL

COPY

THE QUEEN

against

JAMES SWIFTY

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the 17th day of January 2014 at Canberra in the Australian Capital Territory, James Swifty stole a handbag containing a wallet, credit card, cash in the sum of five thousand dollars ($5000) belonging to Dolores Davidson and at the time used force on Dolores Davidson and at the time was in possession of an offensive weapon, being a knife.

Dated this 17th day of March 2014

Director of Public Prosecutions
for the Australian Capital Territory

DEFENCE INITIAL INSTRUCTIONS

At the initial interview, James Swifty instructs his counsel as follows:

> It wasn't me. They must have me confused with someone else. I was just hanging around with me mates in Garema Place. I went off to buy some smokes up in the bus interchange. Not long after I got back with the smokes the coppers turned up and arrested me. Look, I don't want to talk about it any more. Just get me off. This charge is bullshit. Yeah … I might have been in the bank earlier that day, but I never went back.

Note: In a real case your instructions would ordinarily be much more detailed, but a defendant is not required to give any particular instructions to their lawyer. They could simply say, 'I want to plead not guilty'.

Taking proper instructions is an essential skill for any lawyer, but it is beyond the scope of this mock criminal trial.

CRIMINAL RECORD OF JAMES SWIFTY

Australian Federal Police

INFORMATION FOR COURTS

COPY

NAME: SWIFTY, James
DATE OF BIRTH: 03/04/1991
PROMIS ID: 5043900

COURT	CHARGES HEARD	RESULT
ACT SUPREME COURT 13/09/2012	ROBBERY	SENTENCED TO 1 YEAR IMPRISONMENT SUSPENDED AFTER 3 MONTHS ON ENTERING RECOGS $1000 TO BE OF GOOD BEHAVIOUR FOR 2 YEARS

Offence Date: 18/11/2011

Important references

For more extensive coverage of introductory material, relevance and associated concepts, see:

1 John Anderson and Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 2nd edn, 2009) Introduction and Chapter 1.
2 Jill Anderson, Neil Williams and Louise Clegg, *The New Law of Evidence* (LexisNexis Butterworths, 2nd edn, 2009) Introduction and 160–180.
3 Peter Faris, Mirko Bagaric, Francine Feld and Brad Johnson, *Uniform Evidence Law: Principles and Practice* (CCH Australia, 2011) Chapters 1 and 5.
4 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) Chapters 1 and 4.
5 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters Lawbook, 11th edn, 2014) Introduction and 200–246.

ASSESSMENT PREPARATION

Short brain-teasers

1 The body of Verity (V) was discovered in bushland. Her death resulted from multiple blows to her head with a blunt instrument. A star-shaped hammer, which is ordinarily used as part of the equipment to tune pianos, was found a few metres from her body. There were traces of blood on the hammer and the DNA profile from these blood traces was found to match that of V. Damien (D), who works as a piano tuner, is charged with the murder of V. At trial, during the evidence of the police officer in charge of the case, the following occurs:

> *Prosecutor:* Your Honour, the witness has identified the four star-shaped hammers that were found in D's garage when a search warrant was executed at D's premises the day after V's body was found. I tender those hammers.
> *Defence counsel:* I object, your Honour – this evidence is irrelevant. The four star-shaped hammers found in D's garage are all stainless steel with black star tips and rounded wooden handles of the 'Keyes' brand. The hammer found near the body of V is a larger 'Baxter' brand hammer made of hardened steel with a silver star tip and nylon handle. Also, D is a piano tuner by trade and it is common for him to have these implements for his everyday work.

How would the trial judge rule on defence counsel's objection? What reasons would be given for this ruling?

2 When David's (D) vehicle was stopped and searched by police in connection with a drug trafficking surveillance operation, a sports bag was found on the front passenger seat containing a commercial quantity of the prohibited drug, methylamphetamine, and a box of bullets was found in the front passenger door pocket. No handgun in which the bullets could be used was found in the vehicle. D is charged with supplying a commercial quantity of a prohibited drug.

At trial, what arguments could counsel for D raise to challenge the relevance of the box of bullets to facts in issue? What is the likelihood of counsel for D having the box of bullets successfully excluded on this basis?

3 Paul (P) has taken an action in negligence against his local council (D) for damages for personal injuries resulting from a fall into a concrete drain in a council-owned park. The fall occurred in the early hours of the morning. P was moderately intoxicated at the time and has no recollection as to how he fell into the drain. The drain has a sheer unfenced wall approximately 1.75 metres high at one end, but the sides of the drain have a gentle downward slope, which children use for skateboarding. There were no eyewitnesses to P's fall and the only information to support P's assertion that he fell from the sheer unfenced wall and not one of the sides is the following written record made by two ambulance officers who attended the scene several hours after the fall when morning walkers discovered P lying injured in the drain:

Found by bystanders—parkland
? Fall from 1.75 metres onto concrete
No other history.

At the trial of this action before a judge alone, a question arises as to the relevance of this written record. Discuss the arguments for and against a finding that this document is relevant to facts in issue.

For additional notes on the brain-teasers, please refer to <www.oup.com.au/andersonhopkins>.

Notes

1 See *HML v The Queen* (2008) 235 CLR 334, 350–351 per Gleeson CJ for a neat statement of the essential features of the law of evidence.
2 Peter K Waight and Charles R Williams, *Evidence: Commentary and Materials* (Thomson Lawbook, 7th edn, 2006) 2.
3 See *Pollitt v The Queen* (1992) 174 CLR 558, 573 where Brennan J describes it as a 'working tool … [and] the ground on which the dynamics of a trial, especially a criminal trial, are played out'.
4 *Evidence Act 1995* (Cth) (commenced operation 18 April 1995), *Evidence Act 1995* (NSW) (commenced operation 1 September 1995), *Evidence Act 2001* (Tas) (commenced operation 1 July 2002), *Evidence Act 2008* (Vic) (commenced operation 1 January 2010), *Evidence Act 2011* (ACT) (commenced operation 1 March 2012), and *Evidence Act 2011* (NT) (commenced operation 1 January 2013). Hereafter these Acts will be referred to collectively as the Act or EA. The New South Wales Act will be used as the standard in this guidebook with any differences in the legislative provisions of other jurisdictions noted in the relevant part of the text or in an endnote.
5 These include ALRC, *Report No 26* (1985) volumes 1 and 2 (hereafter referred to as ALRC26), ALRC *Report No 38* (1987) (hereafter referred to as ALRC38), ALRC *Uniform Evidence Law Report No 102* (2005), collaborative with the NSWLRC (Report 112) and Victorian LRC (Final Report) (hereafter referred to as ALRC102).
6 See the observations by Einstein J in *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640, 651 that 'it is obviously correct to say that the *Evidence Act* is not a code in the sense that it contains a complete and exhaustive statement of the law of evidence'. Note also s 9(1) EA that it does not affect the operation of other legislation or (consistent) common law and equitable rules of evidence.

7 *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 652.
8 See, for example W A N Wells QC, 'A Critique of the Australian Law Reform Commission Draft Evidence Bill' (1992) *Australian Bar Review* 185–201; The Hon. Justice Smith, 'The More Things Change The More They Stay The Same? The Evidence Acts 1995—An Overview' (1995) 18 *UNSWLJ* 1; and Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters Lawbook, 11th edn, 2014) 25–26.
9 John Anderson and Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 2nd edn, 2009) 10–11.
10 Graham Roberts, *Evidence: Proof and Practice* (LBC Information Services, 1998) 65. Circumstantial evidence is explored in detail in Chapter 2.
11 Ibid, 66.
12 See *Walton v The Queen* (1989) 166 CLR 283, 289 (Mason CJ).
13 The term 'probative value' is defined in the EA Dictionary Part 1 and this meaning is discussed in Chapter 3.
14 Facts of the case of *Subramanian v Public Prosecutor* [1956] 1 WLR 965 (PC).
15 The hearsay rule and its exceptions are discussed in detail in Chapter 7.
16 Documentary evidence is covered in detail in Chapter 5.
17 Real evidence is covered in detail in Chapter 5.
18 Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (Macmillan & Co., 4th edn, 1893) 2.
19 See *Goldsmith v Sandilands* (2002) 190 ALR 370 in relation to civil actions where McHugh J observed (at [31]) that relevance is determined by reference to the elements of the cause of action and any defence raised by a party in the pleadings.
20 See *Martin v Osborne* (1936) 55 CLR 367, 375 (Dixon J).
21 ALRC26, vol 1 [641]. Also, see *Papakosmas v The Queen* (1999) 196 CLR 297.
22 See *Lithgow City Council v Jackson* [2011] HCA 36 [25]–[26].
23 This will be by using s 135 EA after the information has been found to be relevant and otherwise admissible. See Chapter 3 for detailed consideration of the judicial discretion to exclude evidence.
24 For some common examples see Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) 77–78.
25 Roberts, above n 10, 73.
26 This phenomenon of multiple relevance will be considered in relation to hearsay evidence in Chapter 7, opinion evidence in Chapter 9, credibility evidence in Chapter 10, and tendency and coincidence evidence in Chapter 11.
27 See *R v Stephenson* [1976] VR 376, 380–381.
28 Roberts, above n 10, 77.
29 See *R v Ryan* (unreported, NSWCCA, 15 April 1994). Also, see *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206.
30 *R v Ryan*, ibid, per Mahoney JA—BC9402482, 7.
31 We are grateful for the assistance of Shane Drumgold, Senior Prosecutor, Office of the Director of Public Prosecutions (ACT) for the initial provision of materials to enhance authenticity of this scenario.
32 See, for example, *On Trial* (five-part documentary series, ABC Television, 2011); and *The Staircase* (eight-part documentary about the trial of Michael Peterson for the murder of his wife in North Carolina, USA, Maha Productions, 2004).

33 See *Beyond Reasonable Doubt* (four-part series involving presentation, discussion and recreation of four notorious Australian criminal trials, ABC Television, 1977).
34 Useful films include *The Accused* (Paramount Pictures, 1988), *Presumed Innocent* (Warner Bros, 1990), *Primal Fear* (Paramount Pictures, 1996), *A Civil Action* (Buena Vista Pictures, 1998), and *Snow Falling on Cedars* (Universal Pictures, 1999). Television series include—*North Square* (Channel 4 UK, 2000–1), *Crownies* (ABC Television, 2011), *Rake* (ABC Television, 2010–2014), *Janet King* (ABC Television 2014), and *Silk* (BBC Television UK, 2011–2014).
35 Anthony Hopkins, 'Teaching Evidence Law within the Framework of a Trial: Relating Theory to Practice as Students Take to their Feet and Take Responsibility for the Trial Narrative' (2009) 2 *Journal of Australian Law Teachers Association* 173–184, 173–174.
36 Ibid, 176.
37 See ibid, 177–182 where Anthony Hopkins describes how the thread criminal trial was designed and conducted in the tutorials in his Evidence course at the University of Canberra in 2008.
38 Ultimately the allocation of roles will depend on the number of student enrolments in the course and in each tutorial class. Another strategy for teachers is to organise students into groups and each counsel could be instructed by another student acting as a solicitor to foster the capacity for working in teams.