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Using the Evidence Act for the Defence

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Introduction

I have always wanted to open a criminal trial in this way:

> "*The prosecutor has just explained how the evidence will prove that my client committed the offence. That's all and good for her. She has evidence. All I have is guile and trickery*!"

A criminal trial, whether it is before a magistrate or judge and jury, is always about evidence. If you have to resort to guile and trickery the battle is over and you may as well start preparing for sentence.

While it is fundamental that an accused is presumed innocent and does not have any obligation to mount a positive defence, in my experience, courts and juries have become more and more reluctant to give an accused the benefit of the doubt. Once there is evidence establishing the elements of the offence the defence must assume some responsibility, if not strictly a legal burden, to present an alternate version of events that compels the trier of fact to say "there is a doubt."

For the defence then the object of the trial is to prevent the prosecution getting evidence in that can prove the elements of the offence and to present or get from prosecution witnesses evidence that will compel doubt.

Now there is an abiding myth that all criminal lawyers are good for is explaining facts. It is a myth. Good criminal lawyers are good with the facts because they know there is no way the facts can help if they aren't admitted and its corollary, that if prosecution facts aren't admitted they can't hurt. Good criminal lawyers are good with the facts because they know their way around the *Evidence Act*.

In one of my first trials after the *Evidence Act* came in September 1995 the judge looked at me incredulously and said "Mr Haesler, you don't seriously expect, me to read the *Evidence Act* do you!" He retired soon after without, so far as I know, reading or applying the new Act. He did allow me to explain a few bits of the Act to him and somehow the trial stayed on the rails.

So there is no escaping it you have to read the Act. You also have to read the commentaries either Odger's or the new Butterworth's version by Jill Anderson and Neil Williams. My colleague Richard Button SC recommends reading 10 sections a night till you're done. I tried. I failed. I have much better things to do before I go to sleep but regardless of where or when you do it you need to find the time to read the Act. And you need to read the relevant sections again every time you have a hearing.

A useful starting point is John Stratton SC's Criminal Law survival kit at http://www.criminallawsurvivalkit.com.au/ or via the public defenders web page http://infolink/lawlink/pdo/ll_pdo.nsf/pages/PDO_index. Here's an example

> *'The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone': Barwick CJ in Wilson (1970) 123 CLR 334 at 337. The touchstone of admissibility is relevance. Evidence which is relevant is generally admissible, and evidence which is irrelevant is inadmissible: s. 56 Evidence Act. Evidence is relevant if it is evidence which, if accepted, could rationally affect the assessment of the probability of a fact in issue in the proceedings: s. 55 Evidence Act, Mundarra Smith (2001) 206 CLR 650, 75 ALJR 1398. A 'fact in issue' means the factual elements of the offence charged and any defence. Evidence may also be relevant if it relates to the credibility of a witness, the admissibility of other evidence, or a failure to adduce evidence: s. 55(2).*

It's all there just waiting for you. And s 55 and 56 are the obvious starting points: if the evidence is not relevant it should not be led or admitted.

What I want to do today is outline some of the more obvious areas we all *should* know. In doing so however I want to suggest ways you can best utilise the *Evidence Act* to avoid inadmissible material getting before the court and to help you get material which assist the defence into evidence.

I want to discuss five key areas:

- Hearsay
- Credibility

- Documents
- Admissions, and
- Evidence on sentence.

What I'm not talking about

There are a number of useful papers on the PD's webpage, including: the late great Anthony Cook SC on *Unreliable Evidence* (s.165); Anthony, John Stratton and I on aspects of *Hearsay* evidence; Brian Hancock on *Lay Opinion Evidence* (s. 78) and Helen Cox's *2009 Criminal Law Update* which sets out the 2009 amendments to the *Evidence Act*.

Hearsay

Section 59 excludes hearsay evidence however there are many exceptions to it. More often than not the prosecution exploits them. How do you use the exceptions for the defence?

The most obvious exception is s.60 exception for evidence which is relevant for a non-hearsay purpose:

> (*1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.*
>
> *(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).*

An accused's medical or other report will generally include the history given as it is necessary to found the opinion offered. Section 60 allows the court to take that history into account as the accused a version of events as a true history: ***R v Welsh*** (1996) 90 A Crim R 463.

If an attack is made on the accused for inventing their version of events the accused's instructions to his or her solicitor are admissible to rebut the allegation of recent invention. They too become evidence going to the matters in issue.

This of course presumes that instructions have been taken.

A document noting those instructions can also be tendered. On occasions I have been lucky enough to have those instructions taken by the legal aid lawyer who spoke to the client in the cells when taking bail instructions.

I can't stress enough how important it is to get and record comprehensive instructions early. Even letters to family members can be used in this way.

Never underestimate the value of repeated versions of consistent story being given, even if the material appears self-serving. Consistency and repetition can be very persuasive.

Importantly in criminal trial s. 60(3) preserves the restriction, which prevents second hand hearsay admissions going into evidence: ***Lee v The Queen*** (1998) 195 CLR 594.

Section 60 also allows a denial of guilt in a police interview to be put before the Court as evidence of that fact. In ***R v Rymer*** (205) 156 A Crim R 84 it was held the Crown should have called the exculpatory evidence as "a rule of fair play essential to the proper administration of justice".

Unavailable witnesses: If a witness becomes unavailable their statement or what they said to another can be tendered pursuant to s.65(8). The defence can call first-hand oral or written hearsay when the maker is unavailable without the need to comply with stricter requirements placed on the prosecution by s.65(2). Again, I can't stress enough how important it is to get signed statements from defence witnesses.

Available witnesses: In ***R v Crisologo*** (1997) A Crim R 178, the CCA made it clear that recent out of court statement's by an accused to others denying guilt were relevant and admissible pursuant to s.66in the same way that evidence of complaint is admissible in a prosecution case. Even statements which do not come within s.66 can be admitted with leave if evidence of a prior inconsistent statement has been admitted or the prosecution suggested that the defence evidence is fabricated, reconstructed (deliberately or otherwise) or is the result of a suggestion (s 108): ***Graham v The Queen*** (1998) 195 CLR 606.

Statements made soon after the event are also useful even if the witness is called. That statement is an earlier representation, which can be tendered as an adjunct to the oral evidence. The defence can tender the document once evidence is given: s.66(4). The prosecution cannot use a statement made in contemplation of legal proceedings.

If the accused has been called s. 66 also allows a defence witness to give evidence of exculpatory things the accused said to them, so long as what was said was "fresh" : see 66A 2A for what is meant by fresh.. Never underestimate the value of repetition when putting exculpatory material before the court.

Although it is unusual, I have also called hearsay evidence of my client's version from the Solicitor who took the instructions. In that case he lacked the capacity to give evidence (s.13) because of a bashing he received after the offence and after he had made his statement. Again, that case brought home to me the importance of getting a statement in the form of a proof of evidence at the earliest possible opportunity.

Section 66A Exception: contemporaneous statements about a person's health:

> "*The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind*.

Section 66A section can be used to rebut inferences of guilt derived from the accused's behaviour, if for example the prosecution case is your client was angry and looking for a fight, defence witness can be called to say they heard how relaxed and comfortable or cheerful he sounded. Witnesses can also be called to say that the accused had expressed innocent intentions e.g. how he was looking forward to using his new bat to play cricket; i.e. not use it as a weapon (***R v Hemmelstein*** [2001] NSWCCA 220). If it said someone else was responsible, evidence that they others had heard them making angry threats and acting violently would be admissible pursuant to s.66A (***R v Yeo*** [2005] NSWCCA 49).

Section 67 requires notice of any intention to use hearsay evidence.

Documents

As indicated above the defence can use statements as additional support or instead of evidence. To be effective they need to be in a form, which replicates oral evidence and goes to matters properly in issue in the proceedings. If admitted pursuant to s. 69 the hearsay rule does not apply to the document.

In addition, business records admitted pursuant to s. 69 are a particularly useful way of getting defence evidence before a court. If the accused has been treated at hospital their records may show that an accused has given an exculpatory account, which can be used even if the accused is not called. Such records can also be used to undermine prosecution witnesses particularly if a different version was given to a nurse or doctor to that given at court.

While limited access is given to counselling records (ss. 296 –306G *Criminal Procedure Act* 1986), other records can be utilised to undermine the credibility of prosecution witnesses. A well thought out subpoena to a school, doctor or the police could produce much that can later be used and tendered.

While the prosecution have a general duty to disclose all material in their possession the police are at times reluctant to hand stuff over. Sections 167, 168 and 169 allow a party to request relevant material and ask the court to order production if the police or prosecution prove recalcitrant.

Credibility

Evidence going solely to credibility is inadmissible (s.102) but if admitted for another purpose there is no problem with relying on it to damage a prosecution witness's evidence. In any event credibility evidence is admissible if "the evidence could substantially affect the credibility of the witness"(s. 103).

The one danger with attacks on the credibility of prosecution witnesses is if you call your client they too will be vulnerable to attack. Section 104 allows the prosecution to cross-examine on credit with leave, however:

> "*Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:*
>
> *(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and*
> *(b) is relevant solely or mainly to the witness's credibility. (s.104(4))"*

Admissions

The recent changes to the *Evidence Act* reinforced the key fairness provisions which restrict the admissibility of admissions to first hand accounts and strict rules where police evidence of admissions is sought to be led. Nevertheless I have noted a few gaps through which prosecutors are getting admissions before the courts. Here are three cautions:

Letters offering settlement: If a solicitor writes on a client's behalf offering to plead to a lesser charge the words "without prejudice "are technically useless (s.131(5)). The police have sought to tender such a letter as an admission, which waives privilege. While the DPP would never (under the present regime) seek to use negotiation letters as an admission the police may try again.

Gaol conversations: Corrective Services tape all calls made from police cells and gaols. These calls are preceded by a caution that they will be taped and may be monitored. In my opinion these recordings do not fall foul of the *Listening Devices Act*. There is nothing improper or unlawful about making and using as evidence such a recording unless it is with a lawyer and subject to privilege (ss. 117 & 118).

The police now keep close tabs on these calls. As any representation adverse to a client's interest falls within the definition of admission in the Dictionary a call to a relative asking that a witness be approached could, depending on the context, be interpreted as adverse and admitted. In one case I unsuccessfully defended a conversation between an accused and his dad talked about the possibility that a guilty plea to manslaughter might be contemplated depending on the prosecution evidence was admitted.

The new verbal: Section 281 *Criminal Procedure Act* 1986 prevents evidence of police interviews going to a jury unless they are recorded. There are two key exceptions. The first is where there is a reasonable excuse for not making the recording. The courts have a accepted as a reasonable excuse the accused blurting out adverse things when the police first arrive or while for example a siege situation is occurring and no direct questions are asked: e.g. ***R v Walsh*** [2003] NSWSC 1115 & ***R v Naa*** [2009] NSWSC 851.

A more pernicious situation is where the police simply add to the verbal the words "*No sergeant, I don't want to be recorded but I'm happy to talk to you off the record*". The Police Code of Practice- CRIME at page 55 says such a refusal should itself be recorded however many magistrates and judges would say that a failure to record was not so improper that the admission should be excluded pursuant to s 137.

The second and more common Local Court situation is where the offence can be dealt with summarily without the consent of the accused (s 281(1) (c)). Now I don't do much Local Court work, and I stand ready to be corrected, but my experience is the younger police do not tend to verbal as they did when I was a lad and that fabrications of confessions in summary matters is rare. Rarer still is the magistrate who would convict based on a confession alone. Of course in the Children's' Court technically the verbal is impossible without the connivance of the next friend as s 13 *Childrens (Criminal Proceedings) Act* 1987 applies.

Sentence Proceedings

The *Evidence Act* does not apply to sentence proceedings unless the court directs it apply (s. 4). These directions are rarely, if ever given, in the Childrens Court. As a consequence almost anything goes. Frankly most magistrates are able to extract the relevant from the dross and take some statements from family and even juvenile justice officers with the proverbial grain of salt. However, particularly in the more serious matters, consideration should be given to putting the prosecution on notice that an application will be made and that the authors of reports are required for cross-examination.

Some juvenile justice and parole officers go too far and include material attributed to a client or a family member, which is simply not correct. These remarks cannot simply be allowed to be tendered without objection and testing.

Choose your time and the matter carefully. Understandably some magistrates will see such applications time wasting but where maters are very much in contest and the consequences potentially devastating. Often report writers are so used to being blindly accepted that they will give way if properly cross-examined.

Conclusion

Emboldened by an Act which appears designed to allow for evidence to get in rather than be kept out, prosecutors have been more adventurous than the defence is their use of the *Evidence Act* 1995. The defence need to respond in kind. With a thorough knowledge of the Act we assist our clients by having useful evidence admitted and by keeping out evidence that hurts the defence.

Good luck Andrew Haesler

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