



Some Issues in Evidence

FAMILY LAW CPD SUPER DAY

RACV CITY CLUB 27 MARCH 2025

JASON KORKE

Relevance

Evidence Act 1995 – s55 & s56

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.

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.

Topics for this presentation (1)

Harman undertaking aka:

- Implied undertaking
- Harman obligation
- Hearne obligation
- Implied obligation

Some issues around the standard of proof in family law proceedings:

- Usual standard
- Unacceptable risk
- Exclusion of rules of evidence (parenting proceedings *plus*)

Topics for this presentation (2)

Settlement privilege:

- s131 Evidence Act
- “Without prejudice” (and see rule 4.07)
- Waiver (including through conduct)
- s10J(1) – in relation to FDRPs

And, some small stuff

Harman Undertaking

Hearne v Street [2008] HCA 36:

“Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits.”

...

“The expression of the obligation as an implied undertaking given to the court derives from the historical original of the principle. It is now, in reality, a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information.”

~~Harman~~ Hearne ~~Undertaking~~ Obligation

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“The expression of the obligation as an implied undertaking given to the court derives from the historical original of the principle. It is now, in reality, **a legal obligation which arises by operation of law** by virtue of the circumstances under which the relevant person obtained the documents or information.” (this part quoted from an earlier decision)

... and “special circumstances”

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1995/19.html>

such an undertaking "can, in appropriate circumstances, be released or modified by the court" (55). That dispensing power is not freely exercised (56), but **it will be exercised when special circumstances appear** (57). In the Federal Court, special circumstances have been held to exist where "there is a special feature of the case which affords a reason for modifying or releasing the undertaking and (the feature) is not usually present" (58).

Kuang & Kuang [2025] FedCFamC1A 31 (5 March 2025)

Harper, Riethmuller and Strum JJ

Father faced criminal charges in NSW district court

Single expert report – psychiatric evaluation of the mother

At first instance, application to be released from the obligation was refused.

At appeal: held that the trial judge (mostly) correctly identified the legal principles, but misapplied them

- [43] “we consider the fact that the appellant’s liberty might be at stake, if convicted in the District Court proceedings, and that there were prima facie inconsistent statements made by the respondent in those proceedings and in the parenting proceedings, manifestly constitute a special feature of the case which is not usually present and which affords a reason for releasing the appellant from the implied undertaking”
- [49] “Clearly, the admissibility of the document in respect of which release from the implied undertaking is sought is a matter for the other court. Indeed, different evidentiary provisions may apply where there are criminal proceedings in one court and civil proceedings in the other. In considering whether or not release from the implied undertaking should be granted, the court from which the release is sought can, and will often need to, have regard, more broadly, to the purpose or possible use of that document in the other court; in other words, why the release of the document is sought. Without considering for what purpose an applicant wants to use a document, or how it might be used, it may be difficult to determine whether there is a good reason to release the document from the implied undertaking. However, that is qualitatively different from the first court determining whether the document could actually be used, and be admissible in, the other court.”

Kuang & Kuang [2025] FedCFamC1A 31 (5 March 2025)

- [72] “we agree that the single expert’s attitude or consent, whilst theoretically not entirely irrelevant, were not capable of, or reasonably foreseeable as being, a significant consideration.”
- Rejected first instance finding that the single expert would need to be replaced, and this would cause delay
- Noted that the order sought was not a parenting order
- But did not rule out possibility that best interests could be considered

Endorsed approach of Schonell J in *Chakora & Bhandar* [2023] FedCFamC1F 127

Kuang & Kuang [2025] FedCFamC1A 31 (5 March 2025)

Riethmuller J:

- Agreed with Harper and Strum JJ
- Agreed that the decision to grant release was a discretionary one
- But noted that ‘Whether the decision of the primary judge was discretionary (and therefore “tolerates a range of outcomes”) or should be reviewed on the correctness standard (on the basis that it “demands a unique outcome”) was not argued.’

Table supplied to court on behalf of the appellant:

Factual issues in the District Court Proceedings	Paragraph of the single expert's report
The Crown alleges that there were multiple instances of ongoing sexual and common assault during the relationship.	[239.2] <i>"the psychological presentation of the [respondent] is not consistent with that of a victim of chronic domestic violence of the level and duration that she described."</i>
The Crown makes factually detailed allegations in relation to a sexual assault in [early] 2023.	[239.3] <i>"the [respondent's] answers in relation to sexual violence were 'vague.'"</i>
The Crown's case includes no reference to biological material or physical evidence.	[239.4] <i>"The Police seized clothing and bedding."</i>
The Crown alleges that the [respondent] told [Mr E] that the maternal grandmother knew of the alleged violence. The maternal grandmother is not a witness in the Crown's case.	[46] and [239.7] <i>"The [respondent] says she regretted not telling her mother about the violence. The maternal grandmother told the single expert that the [respondent] had told her about the violence."</i>
The Crown's case is that [Mr E] (a male) advised the [respondent] of support services.	[239.8] <i>"The [respondent] says she discussed the violence with an older 'Italian woman' who gave her the contact information regarding domestic violence and that there were no men involved."</i>
The Crown's case includes allegations made by the [respondent] [in early] 2023 that, <i>"In the last few months my physical health has been declining because of all the stress I have been through. The verbal and emotional abuse was constant in the relationship."</i>	The redacted [F]amily [R]eport details the [respondent's] clinical presentation at [126]–[140]. The [respondent] had seen a counsellor for 16 sessions. The single expert reports that the counsellor (who he interviewed) advised the [respondent] from the outset <i>"seemed very well"</i> and did <i>"not seem overwhelmed or overly stressed"</i> . The single expert notes <i>"no psychological work was done regarding any trauma, even though the service is a trauma rehabilitation service."</i> The single expert provides further opinions in relation to the [respondent's] presentation insofar as it compares to that of a victim of chronic domestic violence in [239.2].

Littlefield & Pemble [2023] FedCFamC1A 198

Tree, Christie and Strum JJ

First instance decision appeared, on appeal, to have missed the mark somewhat, referring primarily to s121 of the Act and dismissing the relevance to the implied obligation:

- “Counsel for the applicant father briefly mentioned issues of the ‘Harman’ undertaking. I am not persuaded that this consideration is relevant where the documents in question are not obtained by discovery or subpoena or under any compulsion but rather is an issue for the discretion of the Court.” (at para 38 of the appeal judgment)
- “The primary judge’s rejection of the implied undertaking in [10] was misconceived. At the very least, as we have explained, both single expert reports relied on material which had been produced pursuant to subpoena, and hence itself subject to an implied undertaking. Further, no question of “privilege” applied, nor did s 121. It is therefore plain that the test which the primary judge applied was erroneous.”

Littlefield & Pemble [2023] FedCFamC1A 198

- [39] “Now true it is that strictly speaking whilst there was no direction requiring either party to attend for an interview with Dr E, in the overall scheme of things there is inevitably some practical compulsion to do so, as failure to submit to an interview would be potentially highly adverse to the party who does not attend. Nonetheless attendance does not carry with it an obligation to reveal facts.”
- Cites *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (which cites *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*) to set out “*considerations which may, depending upon the circumstances, be relevant to the exercise of the discretion*”

Littlefield & Pemble [2023] FedCFamC1A 198

[35] These were:

- *the nature of the document;*
- *the circumstances under which the document came into existence;*
- *the attitude of the author of the document and any prejudice the author may sustain;*
- *whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;*
- *the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);*
- *the circumstances in which the document came in to the hands of the applicant; and*
- *most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.*

That statement was adopted by this Court in Pace & Halkias

“Special circumstances”

Also as to special circumstances, see *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3 (Full Court of the Federal Court) at para 31:

...The notion of “special circumstances” does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes...

[quoted in Littlefield & Pemble]

First instance decisions

Division 1:

- Wilmoth & Wilmoth [2021] FedCFamC1F 281
- Meadis & Meadis [2022] FedCFamC1F 62
- Mertz & Mertz [2024] FedCFamC1F 704
- Sokoloff & Sokoloff [2024] FedCFamC1F 509

Division 2:

- Plantier & Plantier (No 2) [2023] FedCFamC2F 386
- Gerber & Beck [2023] FedCFamC2F 346
- Siddell & Siddell [2022] FedCFamC2F 1239
- Cabrera & Enfield [2023] FedCFamC2F 248
- Jaros & Calden (No 2) [2023] FedCFamC2F 1173

State court decisions

Victoria:

- Re Rock S Pty Ltd & Rock P Pty Ltd; Flood v Serra [2024] VSC 362

NSW:

- Johnston v Allen [2024] NSWSC 187

Where does this leave us?

Standard(s) of proof

s140 Evidence Act:

Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject - matter of the proceeding; and
 - (c) the gravity of the matters alleged.

Essentially a codification of the common law position – balance of probabilities, taking into account *Briginshaw*

Isles & Nelissen [2022] FedCFamC1A 97

How should a court determine “unacceptable risk”

FINANCIAL REVIEW

**Abuse your spouse,
lose your house:
Divorce settlement
changes kick in**

Settlement privilege

EVIDENCE ACT 1995 - SECT 131

Exclusion of evidence of settlement negotiations

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

Aka “without prejudice” privilege

Settlement privilege

(2) Subsection (1) does not apply if:

- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or
- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

Settlement privilege

RULE 4.07

Open and without prejudice offers

- (1) An offer to settle is made without prejudice (a ***without prejudice offer***) unless the offer states that it is an open offer.
- (2) A party must not mention the fact that a without prejudice offer has been made, or the terms of the offer:
 - (a) in any document filed; or
 - (b) at a hearing or trial.
- (3) If a party makes an open offer, any party may disclose the facts and terms of the offer to other parties and the court.
- (4) Subrule (2) does not apply to:
 - (a) an application relating to an offer; or
 - (b) an application for costs.

Some cases:

- Henley & Bestari [2024] FedCFamC1A 12
- Goodheart & Goodheart [2023] FedCFamC1F 715
- Jess & Jess (No 3) [2022] FedCFamC1F 408

- Calvin & Calvin [2022] FedCFamC1F 627
- Melounis & Melounis (No 4) [2024]
- Leon & Bonnay (No 2) [2024] FedCFamC1F 305

- Rubra & Potter [2023] FedCFamC1A 159

Pragmatic considerations

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Bonus slide #1

Myron & Milson [2020] FamCAFC 151; (2020) FLC 93-969, at [41]:

“The mere assertion of unfitness for work or inability to attend court, even by a medical practitioner, is unlikely to carry weight. It is expected that some explanation is given concerning the person’s medical condition and, unless the consequences of the condition are obvious, some explanation as to why the person is unable to attend court is necessary. This can be done briefly and it is not suggested that in the circumstances of this case, busy medical practitioners were expected to provide lengthy medical reports. However, the paucity of information provided in the medical certificates as to the underlying facts and the basis upon which the conclusion as to incapacity was reached, more than justifies the primary judge’s decision to give them little weight.”

Bonus slide #2

Undefended hearings governed (since May 2024) by rules 10.26 and 10.27

- Older cases will refer to rule 1.33(2)
- Lambers & Earle (No 2) [2024] FedCFamC2F 816
 - Notes significant flexibility in how court should approach undefended hearings
- Evidence you should have if you think you may be headed for an undefended hearing