

Evidence in practice

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Taking instructions and proofs of evidence

- What is a proof of evidence?
- Technique to adopt when proofing witnesses
- Draft proof – what does it look like?

Preparing evidence

- What type of document? What's the difference?
 - Statutory declarations
 - Affidavits
 - Witness statements
 - Witness outlines

DPP v Marijancevic [2011] VSCA 355

Content

- What to include?
 - Relevant versus irrelevant evidence
- Common evidentiary issues
 - Hearsay
 - Interlocutory applications
 - Opinion
 - Expert evidence
 - Conversations

Relevance

- s 55(1) of the *Evidence Act 2008* (Vic):

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.

Relevance

- s 56 of the *Evidence Act 2008* (Vic):
 - (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.

Hearsay

- s 59 of the Evidence Act
- Excludes evidence of a previous representation when it is adduced to prove the existence of a fact
 - What is the previous representation?
 - Has the previous representation been made by a person?
 - Are you seeking to adduce the evidence to prove the existence of a fact asserted by the representation? (or for some other purpose?)
 - Can it reasonably be supposed that the person who made the representation intended to assert the existence of that fact?

Example: The defendant is the accused in a sexual assault trial. Whitney has made a statement to the police that Charlie told her that Charlie had seen the defendant leave a night club with the complainant shortly before the sexual assault is alleged to have occurred.

If hearsay, unless one of the exceptions applies, the evidence is inadmissible.

Exceptions to hearsay rule: ss.60, 63 (notice requirements s 67), 64 (notice requirements s 67), 69 (business records (*Matthews v SPI electricity Pty Ltd & ors (Ruling 3)* [2014] VSC 59) s 75 – interlocutory hearings: *Hearsay rule* doesn't apply to evidence if the party who adduces it also adduces evidence of its source.

Opinion

- Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed: s 76
- Exceptions, including lay evidence: s 78
- The opinion rule does not apply to evidence of an opinion expressed by a person if – (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person’s perception of the matter or event.
- “Sally considers that electrical work that Dominic, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, Sally cannot give evidence of her opinion that Dominic does not have the necessary skills to do electrical work.”

Expert opinion

- s 79:
- If a person has:
 - specialized knowledge,
 - based on the person's training, study or experience,
- the opinion rule does not apply to evidence of an opinion that is wholly or substantially based on that knowledge.

Apart from the requirement of relevance, it is necessary to establish (prove) the above 3 requirements. Usually proved in the expert's report but need to check carefully.

Also necessary that the underlying facts supporting the opinion are proved (very important and sometimes overlooked).

Also, see Order 44 requirements (unless otherwise subject of court orders)

Conversations

- *Hamilton-Smith v George* [2006] FCA 1551 – direct, substance and effect, summary
- *Kane’s Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 (Jackman J) [118]-[130] – critical of NSW practice, “words to the effect” when setting out evidence of a conversation in “direct speech”, when the witness could not recall the actual words spoken
- *Gan v Xie* [2023] NSWCA 163 (17 July 2023) (White JA, Simpson AJA and Basten AJA)
- *Chu v Lin* [2024] FCA 766 (Jackman J) and *Chu v Lin, in the matter of Gold Stone Capital Pty Ltd (No 4)* [2024] FCA 980 (Jackman J); appeal *Lin v Chu* [2025] FCAFC 130 (O’Callaghan, O’Bryan and Vandongen JJ) (substantive) and *Wu v Chu* [2025] FCAFC 155 ((O’Callaghan, O’Bryan and Vandongen JJ) on costs
- *Chen v Chu* [2024] NSWSC 1139 (6 September 2024) (Hammerschlag CJ) (unsuccessful appeal: *Chu v Chen* [2025] NSWCA 76)
- *Wild v Meduri* [2024] NSWCA 230 (26 September 2024) (Bell CJ, White JA, Kirk JA)
- *Punchbowl Casual Dining Pty Ltd v Rashays Cafes & Restaurants Pty Ltd* [2024] FCA 1265 (1 November 2024) (Jackman J)

Conversations

- Where does this leave us?
 - NSW?
 - Vic?
 - FCA?

Ethical considerations

- Conferring with witnesses
 - r 25 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*
 - *Day v Perisher Blue Pty Ltd* [2005] NSWCA
- Coaching
 - r 24 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*

Questions?