

2010

## What is Evidence Law?

David Field

*Bond University*, [David\\_Field@bond.edu.au](mailto:David_Field@bond.edu.au)

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

---

### Recommended Citation

Field, David (2010) "What is Evidence Law?," *The National Legal Eagle*: Vol. 16: Iss. 2, Article 7.  
Available at: <http://epublications.bond.edu.au/nle/vol16/iss2/7>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:ePublications@bond). It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of [ePublications@bond](mailto:ePublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

# What is Evidence Law?

**Associate Professor  
David Field  
Faculty of Law  
Bond University**

The question perhaps ought to be ‘*Why* is Evidence law?’, but for those of you who like to collect definitions, you might start with: ‘evidence law is the material offered in court during a trial for the purpose of enabling the finder of fact . . . to reach a decision on the issues in dispute.’<sup>1</sup>

The ‘finder of fact’ in a criminal case tried on indictment will, traditionally, be a jury. Although increasingly in our States and Territories, legislation is being passed authorising a trial on indictment to take place before a judge sitting alone. In civil cases, it is the norm for the facts to be determined solely by a judge. All hearings, civil or criminal, in Magistrates’ Courts are conducted in this way, with the Magistrate determining the facts. But the rules are the same, regardless of who is deciding the facts.

The common law system of trial which Australia inherited with the First Fleet is what lawyers call ‘adversarial’. This means that, unlike the ‘truth-finding’ alternative of the civil system, which operates in mainland Europe and those Asian countries that have inherited this system from their colonial ancestors, the finders of fact (for convenience we will refer to them as ‘the court’) do not set out to discover the absolute truth for themselves. Instead, they will rely on the parties in any court case (that is, the Plaintiff and Defendant in a civil matter and the Crown and the Defence in a criminal trial) presenting evidence to the court. From this evidence the court may decide whether or not the party bearing the burden of proof in that case has discharged it, and therefore reaps the benefit (in the form, for example, of the award of damages in a civil case, or the conviction of the accused following a criminal trial).

This results in a process whereby each of the parties in a case collects all the information within its grasp with the aim of persuading the court that it should find in its favour. While, in any given case, some of the facts might not be in dispute between the parties (e.g. the location where the shooting occurred, or where the accident happened), the most crucial facts will be in dispute. It is the respective party’s different interpretation of the facts which has led to the legal dispute that the court now has to resolve. The function of that court at the end of the day is to determine whether it will believe the set of facts put forward by one party, or the contradictory facts urged by the other party, or perhaps, in the end, neither version.

In the very early stages of collecting all the information clients make available, litigation lawyers (lawyers who specialise in trials) will amass far more than they can possibly hope to present to the court. In the process of refining what will go before the court and what will be left out (often to the frustration and annoyance of the client), lawyers will make use of what becomes, after a very short time in the profession,

a mental check-list of what information they can, and cannot, expect to be allowed to place before the court as evidence.

It is a very short checklist, and it contains only three items in respect of each piece of information they have been given:

1. Is it ‘relevant’?
2. If it *is* relevant is it ‘admissible’?
3. If it *is* admissible, how much ‘weight’ is the court likely to give to it?

The first two of these concepts, when combined, constitute ‘the Law of Evidence’.

## Can you describe an elephant?

Defining ‘relevance’ is as difficult as describing an elephant; we all know what one is when we see it, but most of us would have difficulty describing those features which make it so easily recognisable. And so it is with any attempt to define ‘relevance’. This is because ‘relevance’ is not a fixed concept, but can only be expressed in general terms as a relationship which exists between two facts. Fact A is relevant to Fact B when, in the light of collective human experience, the two tend to exist together. When Fact B is required to be proved, then the existence of Fact A, which is logically linked to Fact B is, potentially, an item of evidence.

A simple example may assist here. If X is accused of having committed a crime on a certain day, at a certain time, and in a certain place, the fact that he can prove that he was several hundred kilometres away at that time is relevant to the question of whether or not he committed that crime. This is usually referred to as an ‘alibi’. But just think for a moment about the subconscious mental process one goes through in recognising the relevance of the alibi to the issue of X’s guilt. We begin with the known fact that a person cannot be in two places at once and then go on to argue: ‘therefore, if X was in place A, he cannot, at the same time, have been in place B’. The mere fact that X was in another place at the time is not directly on point in itself, but it is highly significant in assessing whether or not he was at the place alleged by the Crown. Put another way, it is relevant to the issue which the court has to decide. Equally irrelevant will, most likely, be what X had for lunch that day.

The first rule of the Law of Evidence is, therefore, that information cannot be put before the court unless it can be shown to be relevant to some issue which that court is being called upon to decide. But if the law were that simple, I would not have to teach it to my students over an entire semester, and – as you may have suspected – there is a bit more to it than that.

## Don’t mention the War<sup>2</sup>

Even non-lawyers are quick to appreciate the fact that a court should not be allowed to consider an item of information which is irrelevant to the matter in hand. However, to their confusion (and to the occasional irritation of even the trial lawyer), they also discover that in certain defined situations, and for various reasons, the courts will refuse to admit as evidence items of information which are undoubtedly (and sometimes highly) relevant.<sup>3</sup> When they do so, they label such information (whether it is relevant or not) as ‘inadmissible’.

Over the years, it has been decided that certain items of

evidence, although relevant, are unacceptable in a court of law, because they are unreliable, because they are potentially misleading, or simply because the public interest requires that the evidence not be admitted for some reason or other. These considerations all spring from a common root – the desire to ensure a fair trial.

For example, a piece of potential evidence may be classed as unreliable because it cannot be adequately tested in cross-examination. A clear example of unreliable evidence is what evidence lawyers call ‘hearsay’, which is the recounting of what A saw by B, to whom A recounted their experience. Ideally, it should be A who gives this evidence, since only A can be cross-examined on it in order to test A’s powers of observation.

Evidence is said to be misleading where the court (and particularly a jury) is in danger of considering it for the wrong reason. High on this list is evidence of the fact that X has previous convictions for precisely the same offence for which X is now on trial. This, goes the argument, makes it more likely that X was the offender on this more recent occasion, and while this may be true, how does it distinguish him from all the other offenders in the locality with the same track record, who are equally likely to have been the offender? Without more, the bare fact of X’s previous conviction will be deemed ‘inadmissible’.

The clearest example of potentially relevant evidence which is excluded on the ground of public policy is a confession from a crime suspect which was obtained by the police after they threatened to bash him if he did not confess. Apart from the fact that a confession obtained in these circumstances is inherently less reliable than one freely and voluntarily given, there is also the public policy consideration of not encouraging police tactics of this type. The court sends a message to the police by refusing to admit a confession obtained in this manner.

We may therefore add a second rule of evidence to the first one described above, and conclude that: all items of evidence must be relevant, but not all relevant items will be admissible.

## Why do we need Evidence law?

Most of our current laws of evidence have a long history, dating back to an age when juries were less sophisticated, and judges were less kindly to litigants. Some of these rules now look a little odd in their contemporary setting, and a significant number of them are abolished or amended each year, in order to reflect the changing face of the court process. In particular, it is now being argued that in respect of criminal trials conducted by judges sitting alone, we no longer need these laws, because judges – as experienced lawyers – can be trusted to take into account only those pieces of information which are both relevant and admissible, and we do not need to protect them from hearing things that they should not.

I do not subscribe to that theory, and not just because I teach and write on the subject. I do not wish to risk a libel action or a professional striking-off for stating my reason for this, but it is both my hope and belief that Law students will still be required to study a subject called ‘Evidence Law’ well into the middle of the current millennium. The detailed rules may have changed by then, but the reason why we have those rules will still be valid.

## References

- <sup>1</sup> Adapted from Graham B. Roberts, *Evidence, Proof and Practice* (1998) LBC Information Services, 1.
- <sup>2</sup> BBC, ‘The Germans’ *Fawlty Towers* (Season 1, Episode 6) originally aired 24 October, 1975.
- <sup>3</sup> For example, the fact that an accused person has previous convictions for the same sort of offence.

### Have you been paying attention?

Assume that Sean (aged 17) is accused by store security officer John of having put a ‘Concrete Mousetrap’ CD into his pocket and attempting to leave the store without paying for it. How relevant are the following facts, and why?

- 1 John is due to have surgery to remove cataracts from both eyes.
- 2 Sean is a ‘Concrete Mousetrap’ fan.
- 3 When the police searched Sean twenty minutes later, no CD was found on him.
- 4 Sean has a previous warning from police for chroming when he was 14.
- 5 John is the father of Sean’s girlfriend Amy, and disapproves of their relationship.
- 6 Sean hopes to study Law at Uni.
- 7 Sean bought the same CD three days previously from another store.