LLB THE LAW OF EVIDENCE

Lecture 1: Introduction to the Law of Evidence

Admissibility for what purpose?

- Evidence is admitted for a purpose i.e. To prove something;
- Example: Syd told me the car he sold me was a 1948 Morris;
- I might want to admit that evidence merely to prove that Syd said this;
- Or, as evidence of my belief that it was a 1948 Morris;
- Or, as evidence that Syd is a fraudster;
- Note that evidence might be direct evidence of Purpose A, but only circumstantial evidence of purpose B.

This week

- First, an explanation of the burden and standard of proof;
- Second, an explanation of the legal and evidential burden;
- Third, a discussion of criminal cases;
- Fourth, civil cases;
- Last, all you need to know about presumptions.

Exceptions to the orthodoxy: pre-Lambert law

- Insanity; 3 First exception to Woolmington

Insanity. If the accused pleads insanity the defence bear the burden of proving it. (so have both the legal burden and the burden of production). The D is credited with presumption of sanity which only D may put in issue. Applies M'Naughten's case

- Express provisos;Second exception to Woolmington

express reverse onus clauses - statute expressly place a probative burden on D

- Implied provisos; implied reverse onus clauses. R v Edwards - courts can imply ROCs even if the exact words of the provision are not used. R v Hunt - while the Woolmington emphasis on Parliament's intention not to place a burden on the accused remains clear, it depends on the facts of the case. Not just a question of language but also what Parliament intended.
- R v. Edwards [1975] QB 27;
- R v. Hunt [1987] AC 352.

A **reverse onus clause** is a **provision** within a statute that shifts the **burden** of proof onto the individual specified to disprove an element of the information. Typically, this **provision** concerns a shift in **burden** onto a defendant in either a criminal offence or tort claim.

RE H RIP

- Re B [2009] 1 AC 11;
- Stops all this nonsense.
- ‘there are some proceedings, although civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof.’ Problem remains on how to identify these proceedings.’
- now clear simple civil standard of proof applies, not only to care proceedings but to all family and matrimonial cases.’

of agreed or assumed facts. However, in some cases, the question of admissibility will involve a question of mixed fact and law. In such a case, the judge conducts proceedings known as a 'trial within a trial' or proceedings on the '*voir dire*', a name taken from the form of oath prescribed at common law for testimony given on secondary issues. The judge will hear witnesses examined and cross-examined on the secondary issues only, will inspect any relevant documents, and will hear argument from counsel.

If the judge decides to admit the evidence, the same witnesses must, of course, give their evidence again when the jury return to court—which makes the 'trial within a trial' a time-consuming exercise.

Almost always, the procedure on the *voir dire* is employed to determine the admissibility of a confession, in which factual issues about the manner in which the confession was obtained frequently arise.[7] Indeed, it has been questioned whether the procedure of

The problem

- What if prima facie relevant and therefore admissible evidence has been obtained by a trick?
- By an illegal phone tap?
- By a deception?
- By an agent provocateur (plural agents provacateurs)?
- Or, to be honest, why should we care?

Civil cases

- Traditionally, the Court is far less concerned with where the evidence comes from;
- Perhaps this is because of the less important nature of civil proceedings;
- Or, perhaps, the different role of a judge in civil proceedings.

Sworn or unsworn evidence?

- See s.55;
- Must be fourteen or over;
- Must have an appreciation of the solemnity of the occasion and the particular responsibility to tel the truth involved in the giving of an oath;
- Both conditions must be met and if they are not, unsworn evidence is given;
- Unsworn evidence generally carries less weight.

Persons under a mental impairment

- We lean towards competence nowadays;
- Sed [2005] 1 Cr App R 55;
- Contrast with DPP v. R [2007] EWHC 1842 (Admin);
- Consistent with the policy towards mental capacity of recent times as illustrated by Mental Capacity Act 2005;
- If they are competent, they are compellable in the normal way.

Lies

- Lucas [1981] QB 720;
- In order for a lie to be treated as evidence against the accused it must be:
- (i) A deliberate lie);
- (ii) concerned with a material issue in the case;
- (iii) Motivated by the realisation of guilt and fear of the truth; and
- (iv) shown to be untrue.
- The effect of these ingredients' being present is that the lie may bhen be used as evidence of guilt;
- Not strictly speaking an inference, but similar.

The Lucas Direction taken from the Crown Court Bench Book

- “It is alleged [admitted] that the defendant lied to the police [or X] in saying [that…’],and you are entitled to consider whether this supports the case against him. In this regard you should consider two questions: 1. (If the issue arises) You must decide whether the defendant did in fact deliberately tell [these] lies. If you are not sure he did, ignore this matter. If you are sure, consider: 2. Why did the defendant lie? The mere fact that adefendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons,and they may possibly be ‘innocent’ ones in the sense that they do not denote guilt,for example, (add as appropriate) lies to bolster a true defence, to protect somebody else,to conceal some disgraceful conduct [other than] [short of] the commission of the offence, or out of panic, distress or confusion. In this case the explanation for his lies is [....]. If you think that there is, or may be, an innocent explanation for his lies then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason that his lies can be regarded by you as evidence [going to prove guilt] [supporting the prosecution case].”

The circumstances

- See Cowan [1996] QB 373;
- Essentially, this case is authority that inferences may be drawn if the true reason is that the defendant has no answer that would bear scrutiny.

Silence in civil cases

A lot of it is done on paper in civil;

Basically, if I am silent about a matter I ought to have denied, or required the other side to prove, I am deemed to admit it;

For example, if I am a defendant in a negligence matter and I don't deny the Claimant's allegation of breach, I am deemed to have admitted it.

This Lecture

- Public interest immunity;
- Privilege (in outline;
- Distinctions between the two concepts.

Public Interest immunity: basic definition

- Lord Templeman with a great definition of public interest immunity in Ex Parte Wiley: "Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice."

- "In R v H 2003, the H.O.L considered the procedures under the Criminal Procedure and Investigations Act 1996 in the light of developing practice in the UK courts and European jurisprudence:" 7 STAGE TEST:
- Page 304- test: 4. "It must determine whether the defendant's interest can be protected without disclosure or limited disclosure can be ordered that will give adequate protection to the public interest and also to the interests of the defence and also to the interests of the defence. The court may have to consider what measures can be taken to offer adequate protection for the defence short of full disclosure."…. 3. "It must determine whether there is a real risk of serious prejudice to an important public interest if full disclosure of the material is ordered." … 5. "The court must consider whether measures proposed in answer to step 4 represent the minimum derogation necessary to protect the public interest in question. (The court is under a duty to get as close as possible to full disclosure while offering adequate protection for the interest in question)."… 6. "It must consider whether any order for limited disclosure under steps 4 or 5 above may render the trial process unfair to the defendant. (If the trial process is rendered unfair, fuller disclosure should be ordered even if this leads the prosecution to discontinue the proceedings so as to avoid having to make disclosure." 7. "It must keep the fairness of the trial process under constant review during the trial in light of the order for limited disclosure."

Learning Outcomes

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- Understand when evidence is hearsay evidence in criminal proceedings;
- Understand the key provisions relating to hearsay in the Criminal Justice Act 2003;
- Understand the rules relating to admissibility of hearsay statements;
- Analyse evidence to determine whether it is admissible hearsay using both statutory and case law.

What is Hearsay?

- “Gary told me that Ibrahim had told him he would kill him if he ever saw him in the area again.”
- If we tender that to prove the truth of the statement, that is hearsay;
- This is an introductory definition, the statutory definition is more important.

Classifying evidence as hearsay evidence

Hearsay evidence consists of statements or assertions that are made on previous occasions, which are tendered as evidence to prove that their contents are true. Under the *old* rules, determining whether evidence was hearsay evidence and whether it was inadmissible was a two-stage approach. The court would ask: does the evidence consist of a previous statement or assertion, which amounts to hearsay, and what is the purpose for which it is being tendered?

The CJA 2003 and a new approach to hearsay evidence

The Criminal Justice Act 2003 introduced a brand new inclusionary approach to hearsay evidence modernising the law. Under the new approach the rule in s 114 of the CJA 2003 provides that hearsay evidence, i.e. a statement not made in oral evidence in the proceedings, is admissible in criminal trials of any matter stated. The occasions are when any provision makes it admissible, any rule of law preserved by s 118 makes it admissible, all the parties agree to it being admissible, or the court is satisfied that it is in the interests of justice for it to be admissible.

Previous statements or assertions

The hearsay rule applies to previous statements, assertions or gestures that are made by any person; this includes a previous statement that may have been made by the witness themselves. It is accepted by the law that a person may use a variety of methods to communicate information, i.e. orally, visually, spoken word, in a document or by gestures. The CJA 2003 covers previous inconsistent statements that are admitted in accordance with the Criminal Procedure Investigations Act 1865 (CPIA).

Statements relevant only to truth

In criminal cases the rule against the admission of hearsay evidence has been strictly applied; the basic position was that a hearsay statement is inadmissible unless it falls within an exception.

Criticisms

- Hearsay need not be less reliable;
- Difficulties of cross-examination can be offset by an appropriate direction;
- For that reason, juries can cope;
- The rule can lead to unjust results.

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Exclusion of unfair evidence.

(1)

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2)

Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

[F1(3)

This section shall not apply in the case of proceedings before a magistrates' court inquiring into an offence as examining justices.**]**

Question 2: if it's hearsay, is it admissible hearsay?

- The starting point is s.114(1);
- Statutory admissibility;
- Preservation of common law exceptions
- If the parties agree;
- If it's in the interests of justice to admit the statement.

Business and other documents

- S.117;
- Very important exception;
- Legacy of the common law, these things are likely to be reliable.

Certain common law exceptions (outline only)

- S.118;
- S.118(4) res gestae;
- Andrews [1987] AC 281; Hearsay evidence - Stabbing victim assailant dying breath. Admissible under res gestae exception, the test for which was redefined.
- Saunders [2012] EWCA Crim 1185.

4. John is attacked at his home by sarah. John is stabbed four times and Sarah makes her escape. John manages to make it the ten yards to his next door neighbour, Ryan, and is just able to say: "Ryan, Sarah, she, look what she has done to me!" before losing consciousness.

When he regains consciousness after a lengthy coma, he has no recollection of the incident, though he is willing to attend and give evidence Should John's evidence be admitted at trial, assuming the parties cannot agree it should be?

(a) Yes, it is admissible hearsay in the interests of justice under Criminal Justice Act s*114(1D);*

(b) Yes, it is being adduced to prove the truth of the matter stated and therefore admissible hearsay;

(c) Yes, it will be admissible as part of the res gestae pursuant to s.*114(1B)* Criminal Justice Act 2003;

(d) No, it cannot be part of the res gestae because it was not contemporaneous.

5. "Even after the Criminal Justice Act 2003, the default position is that hearsay is not admissible in criminal proceedings and it must not be let through on the nod." Which case reminded us of this proposition?

(a) Maher v. DPP;
(b) R v. Saunders;
(c) R v. Riat;
(d) R v. Twist.

Person in authority

- This touches on the preserved common law rule;
- Park v. R [1976] 1 WLR 1251 (even terms): Silence - P was confronted by the mother of a woman bleeding from stab wounds. She asked P, who was holding a knife, why he had stabbed her daughter. P made no reply but when the mother tried to get hold of him tried to stab her. The PC held that the jury had been entitled to take into account P's silence and his reaction as evidence of guilt. The parties are on even terms, silence in the face of an accusation may amount to a confession.

walker

acute withdrawal symptoms. In *Walker* [1998] Crim LR 211, the Court of Appeal seems to have accepted that the fact that an accused had ingested cocaine before making a confession was a circumstance relevant to the question of whether any confession he might have made might be unreliable. This approach is virtually impossible to reconcile with that taken in *Goldenberg*, and seems greatly preferable to that taken in *Goldenberg*.

The cat out of the bag argument

- Smith [1959] 2 QB 35;
- McGovern [1991] 92 Cr App R 228: where the defendant was a pregnant young woman with a low IQ. She was improperly denied access to a solicitor and confessed to the charge of murder. In a subsequent, properly conducted interview she again confessed. Both sets of statements should have been excluded since the later admissions may have been made in consequence of the earlier ones.

smith

Other cases where it was held that a confession should have been excluded because of a threat or inducement of a comparatively mild or slight kind, include *R v Smith*,[63] where, a soldier having been stabbed in a fight, a sergeant-major had paraded the company and threatened to keep them on parade until he learnt who was responsible, and *R v Cleary*,[64]

The fruit of the poisonous tree

- Can evidence that was discovered as a result of the confession be adduced?
- Can evidence of why or how that evidence was discovered i.e. By reason of the excluded confession be adduced?
- PACE s.76(4-6).

Section 78 and confessions

- Mason [1988] 1 WLR 139: Confession – Defendant was arrested for setting fire to a car. Officers lied to him and his solicitor, that his fingerprints had been found on glass fragments in the car. Solicitor advised explaining his involvement and defendant confessed. The confession should have been excluded due to solicitor trickery.
- Samuel [1988] QB 615;
- Aspinall [1999] 2 Cr App R 115;
- Kirk [2000] 1 WLR 567: He wanted to retract his confession admitting the theft. His convictions for robbery and manslaughter were overturned. Code C para 10.3 requires that the person who is arrested must be informed at the time or as soon as reasonably practicable that they are under arrest and the grounds for their arrest. See also Art 5(2) ECHR which provides that 'Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest

1. Confessions are hearsay statements.

(a) True.

(b) False.

2. Consider the following statement made by the accused in his interview by the police on suspicion of murder:

"I admit that I pushed her to the ground but look, I never meant her to die! I was shoving her out the way, that's all."

Which of the following is a correct way for the judge to sum up to the jury on this issue?

(a) "As to the first sentence, you must take that into consideration as evidence against the accused, but as to the second, well that is what we call self-serving and you cannot consider it; you must disregard it."

(b) "The defendant, from the tone of these remarks, is clearly agitated. You must therefore treat this statement as unreliable."

(c. "You may look at this statement as a whole, both the first sentence where is adverse to the defendant and the second."

(d) "You may look at the whole statement, both the first sentence which is adverse to the defendant and the second. I would invite you to consider the weight you accord to each of these sentences too, you might think a defendant is more likely to say something in support of his case than against it."

This lecture

- Character, the traditional approach;
- Good Character;
- Bad characte.

Good Character

- Not generally in civil cases;
- The exception might be an action in defamation or deceit;
- But in criminal cases, good character is very important.

When is the Vye Direction to be given?

- Absolute good character: no previous convictions, cautions, or other reprehensible conduct =defendant entitled to both limbs of the good character direction;
- Effective good character: previous convictions or cautions that are old or not relevant =judge has a discretion whether or not to treat defendant as of good character;
- Defendant has no previous convictions or cautions but prosecution relies on other reprehensible behaviour as evidence of bad character under CJA s.101 =judge must give a bad character direction, but may interweave into his remarks a modified good character direction, subject to the absurdity principle;
- Defendant has no previous convictions or cautions but admits other reprehensible behaviour, but the prosecution is not relying on this as probative of guilt =left to the good sense of the trial judge, defendat not entitled to a good character direction.

In *O'Brien* v *Chief Constable of South Wales Police* [2005] 2 AC 534, the claimant was convicted of murder and served 11 years of imprisonment before his case was referred to the Court of Appeal, which quashed his conviction. He sued the Chief Constable for malicious prosecution and misfeasance in public office, alleging misconduct by two senior police officers who, he claimed, had in effect 'framed' him for the murder. He sought to adduce evidence that the same officers had been guilty of similar misconduct in other, unrelated, cases, for the purpose of enhancing the strength of his allegations against them. Both the judge at first instance and the Court of Appeal held that at least some of the proposed evidence should be admitted. The Chief Constable appealed to the House of Lords, which dismissed the appeal. It was argued, relying principally on the

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“Bad character”

References in this Chapter to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a)

has to do with the alleged facts of the offence with which the defendant is charged, or

(b)

is evidence of misconduct in connection with the investigation or prosecution of that offence.

Admissibility: the gateways

These are under s.101(1);

- All parties agree;
- Evidence adduced by defendant himself;
- Important explanatory evidence;
- Relevant to an important matter in issue between defence and prosecution;
- Of substantial probative value in relation to an important matter between defendant and co-accused;
- Evidence to correct a false impression;
- Defendant has made an attack on another person's character.

Matter in issue

- Supplemented by s.103;
- Propensity to commit offences of same description or in same category;
- Or propensity to be untruthful;
- Hanson [2005] 1 WLR 3189;
- Campbell [2007] 1 WLR 2798;
- Note that this gateway is subject to the exclusionary discretion in s.101(3) CJA.

Persons other than the Defendant

- Dealt with in s.100;
- Provisions are markedly different;
- Brewster [2010] 2 Cr App R 20;
- South [2011] EWCA Crim 754: (Narrow approach to admissibility) convictions for dishonesty- Must consider dis/similiarities between offences, truthfulness? Witness pleaded guilty or not guilty.(Same approach in Brewster).

Brewster: the general approach

- Per Pitchford L.J. At para 23: The first question for the trial judge under section 100(1)(b) is whether creditworthiness is a
- matter in issue which is of substantial importance in the context of the case as a whole. This
- is a significant hurdle. Just because a witness has convictions does not mean that the opposing
- party is entitled to attack the witness' credibility. If it is shown that creditworthiness is
- an issue of substantial importance, the second question is whether the bad character relied
- upon is of substantial probative value in relation to that issue. Whether convictions have
- persuasive value on the issue of creditworthiness will, it seems to us, depend principally on
- the nature, number and age of the convictions. However, we do not consider that the conviction
- must, in order to qualify for admission in evidence, demonstrate any tendency towards
- dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them

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Lecture 10: Identification Evidence

WHAT DOES A TURNBULL DIRECTION REQUIRE?

A judge giving a *Turnbull* direction must do three things:

- warn the jury of the special need for caution before convicting the defendant on the evidence of identification;
- tell the jury the reason why such a warning is needed; notably the proven unreliability of eyewitness identification. Some reference should be made to the fact that a mistaken witness can be a convincing one, and that a number of such witnesses can all be mistaken. *R v Pattinson* [1996] suggests that there should be a reference to the risk of miscarriages of justice resulting from mistaken identifications;
- tell the jury to examine closely the circumstances in which each identification came to be made. But it is not necessary in every case for the judge to summarise for the jury all the weaknesses of the identification evidence. If he does choose to summarise that evidence, he should point to strengths as well as weaknesses (*R v Pattinson* [1996]).

Police Officers

- A judge is entitled to take the view that a policeman in view of his professional role might be more careful as to identification;
- But that does not mean that a policeman can be mistaken.

Situations where a Turnbull warning will not be necessary

- No possibility of mistake;
- Where witness identifies clothing or cars;
- Where the Defence allege that the identification witness is lying.