



Pacific Judicial
Integrity Program

Judicial Officers' Fraud and Corruption Online Course

Via Zoom - 18, 25 & 31 May, 8 & 15 June 2023



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence



Session 5: Evidence

Thursday 15 June, 2023

***Honourable Chief Judge Brian Devereaux SC
Honourable Judge Brad Farr SC
District Court of Queensland***

Session 5: Evidence



1. Welcome & Introduction (5 minutes)
2. Chief Judge Devereaux & Judge Farr's presentation (30 minutes)
3. Questions & Answers on presentation (15 minutes)
4. Scenario Questions on Evidence (40 minutes)
5. Session Wrap-Up (5 minutes)
6. Course Wrap-Up (20 minutes)

Evidentiary effect of documents



Once a document is admitted:

- The Court must determine what the document/statement contained therein **is evidence of?**
- What **weight** should be attached to it?
- The fact a document is admitted **does not mean** it will be accepted by the court or weight will be given to it. No different from oral testimony.
- What should the court play close attention to?



What is a 'document'?



- *Evidence Act 1995* (Cth) definition.
- *Evidence Act 1977* (Qld), in contrast.
- How does your jurisdiction define a 'document'?



Fraud trials most documents are:



- In the form of business records, bank records, ledgers, invoices, receipts etc and, email exchanges.
- Discussion of business records.
- Discussion of emails – may include third party emails (exception to the hearsay rule).



Refreshing memory from documents



- Usually, a witness is **not** permitted to consult a contemporary note until his/her memory of the event is **exhausted**.
- Exceptions – what are they?



Rule against hearsay

- Is based on the policy of excluding unreliable evidence.
- Forbids the repetition of a prior statement to the witness by another, if the purpose is to assert that the facts contained within the statement are true.
- Applies equally to evidence elicited in evidence-in-chief and to cross-examination.



Rule against hearsay

- Hearsay evidence may be unreliable.
- Absence of opportunity to cross-examine on it, because the alleged author of the statement in question is not the witness.
- Witnesses are only permitted to give evidence as to the matters that they personally experienced/witnessed/heard.



Rule against hearsay



- Not every repetition of another's statement infringes the hearsay rule
- Why?



Exceptions to the rule against hearsay



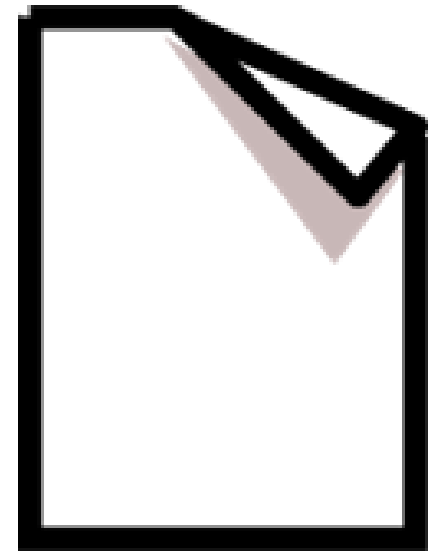
- Res gestae utterances
- Admissions
- Confessions
- Statements of deceased persons
- Statements in public documents
- Evidence in earlier proceedings; and
- Recent complaint and sexual offence cases



Documentary exceptions to the rule against hearsay



- Books of account
- Documents used testimonial in criminal cases
- Things produced by processes or devices
- Prior inconsistent statements in writing
- Expert evidence



Circumstantial Evidence



Definition: evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence.



Circumstantial Evidence



- Differs from direct evidence, how?
- What if only evidence against defence is circumstantial?
- Must each part of circumstantial evidence be proved?



Circumstantial Evidence



- Circumstantial evidence may be only evidence of intent of defendant.
- Must **assess circumstantial evidence as a whole**.
- Weight is to be given to any piece of circumstantial evidence, depending upon the nature of the evidence, the issues in contest and the strength of other evidence.



Parties to an offence



- **Queensland position:** Section 7(1) of the *Criminal Code Act 1899* (QLD) : When an offence is committed, **each of the following persons** is deemed to have taken part in committing the offence and to be **guilty of the offence**, and may be charged with actually committing it ...
- Section 8 of the *Criminal Code Act 1899* (QLD) deals with **counselling another** to commit an offence, and the consequences if an offence is committed.
- Section 9 of the *Criminal Code Act 1899* (QLD) deals with when two or more persons form **a common intention to prosecute an unlawful purpose** in conjunction with one another.



Section 10A of the Criminal Code Act 1899 (QLD) provides:



(1) Under section 7 a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is either the offence proved against the person who did the act or made the omission that constitutes that offence or any statutory or other alternative to that offence.

- Discussion of *R v Taylor*.
- Application of section 7(1) (a).

Section 10A of the Criminal Code Act 1899 (QLD) provides:



- To establish criminal responsibility under s 7(1)(b) or s 7(1)(c), the prosecution must prove that the defendant knows “the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting”.
- Discussion of aiding and procuring.
- What are the defences?

Withdrawal as a party to an offence **PJIP**

Whether the defendant has withdrawn from a common purpose, or from a role enabling, aiding, counselling or procuring an offence, may arise as a **question of fact** relevant to whether the offence has been committed, **rather than as constituting a defence.**



Expert witnesses



“In matters of trade or business, the opinion of an expert, or a person intimately acquainted with it is admissible to furnish the court with information which is likely to be outside the experience or knowledge of a judge or jury. But, if on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary”.
(Archbold, 2017)



Matters court should have regard to with respect to expert witnesses



- Qualifications of the expert.
- Whether the witness was impartial or partial to either side.
- Does the opinion accord with whatever other facts the fact finder finds proved?
- Have the facts, from which the expert's opinion is based, been established?
- Expert should be independent, impartial and uninfluenced by the potential outcome of the case.



Matters court should have regard to with respect to expert witnesses



- What if the expert has a conflict of interest?
- Competing expert witnesses.
- An expert can't prove disputed facts by inadmissible hearsay.
- Most common types of expert testimony in fraud trials from forensic accountants + fingerprint experts.



Matters court should have regard to with respect to expert witnesses



- Courts can allow expert witnesses to have their written report in front of them whilst giving evidence.
- Juries must be directed as to the way in which they can treat expert evidence.
- Persons qualified to express an expertise opinion are permitted to do so on relevant matters **within the field** of their expertise.
- An 'expert' witness does not mean their evidence has to be automatically accepted – as judge you make this decision.



Common defences in fraud cases in Queensland



- **Honest claim of right** and **mistake of fact**.
- Law will not necessarily be the same in your jurisdiction.
- Section 22(1) in Qld re honest claim of right and section 24 for mistake of fact.

Honest claim of right. Factors need to prove:



- That he/she honestly believes himself or herself to be entitled to do what he or she is doing.
- Need not be reasonable but can't be with an intention to defraud.
- Does not matter if the right asserted by the belief is one which is unfounded in law or fact.
- The question of fact not law as to whether a person was acting under an honest claim of right.



Mistake of fact defence (Qld)

A person who does or omits to do an act **under an honest and reasonable but mistaken belief** in the existence of any state of things, to the same extent as if the real state of things had been such as the person believed to exist.



Mistake of fact defence (Qld)

- **Excuse** is distinct from a defence, and is a matter which the prosecution must negate beyond reasonable doubt.
- Defendant does not have to give evidence but there must be some evidence, looking at the case as a whole, of operative mistake.
- Mistake must be one of **fact** and not of law.



Mistake of fact defence (Qld)

- Belief must be positively held - mere inadvertence will not suffice.
- Must be an honest belief and a reasonable belief – held by defence on reasonable grounds.
- Defence can be claimed by corporations.
- Complications with this defence.



Discussion



**Session 5: Evidence Scenario and
Questions**

Questions



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Feedback

Upcoming PJIP activities



- Self-paced workshop for judges
- Second in-person workshop for judges
- Judicial Networking and Mentoring Program
 - Evidentiary Issues webinar
 - Unconscious bias in judicial decision-making webinar
- Online live & self-paced course for court staff
- Second in-person workshop for court staff
- Resources

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Thank you!