Evidence: getting back to basics

By Tom Percy QC

Perth silk, Tom Percy QC, assesses the merits of going right back to basics when preparing cases.

As an articled clerk some 25 years ago, I was told very early on by my astute principal that no matter what my ultimate area of practice might be, the one thing that I should know above all else was the law of evidence.

It was good advice.

Whether you have a practice that takes you to court on a regular basis or not, it is impossible to advise clients in any meaningful way without a sound knowledge of both the inclusionary and the exclusionary rules of evidence.

To assess the prospects of winning or losing a case properly, you must be able to say with some degree of certainty what evidence will be admissible in support of your claim, and what might be admissible *against* you.

What follows is not meant to be a profound treatise on the latest developments in the law of evidence (the authors of *Cross* can breathe easy ...), nor is it intended to be an insult to your intelligence; but rather a thumbnail guide to what, in my experience, are those areas of the law of evidence that are often not understood as clearly as one might hope by lawyers who advise the lay clients on a day-to-day basis.

I have also included a couple of practical tips for the preparation for trial which, while not rocket science, are often overlooked by practitioners.

DOCUMENTS AND FACTS ADMITTED BY CONSENT

Before sitting down to plan an ingenious strategy for the admission of a particular document or piece of evidence, always consider the possibility that it may be non-contentious.

Ask the other side. They may consider it to be of little consequence and admit it as a fact, saving you the trouble. I have known solicitors agonise for weeks over how a particular matter could be proved, only to find that the opposition had no difficulty with it.

Conversely, it also sometimes happens that you prepare for trial assuming that a particular issue is non-contentious, only to find that it is in fact highly contentious and requires strict proof. This situation is a lot less humorous.

It is imperative that the lines of the evidentiary battles be drawn as early as possible, especially those not apparent on the face of the pleadings. There may ultimately be no battle, or one that is to be fought on fewer fronts than you had envisaged. But it also pays to be prepared for the prospect that a seemingly non-contentious issue might require strict proof.

Don't assume that your expert will solve all your problems; the ultimate arbiter will still be the judge or jury.

VARIOUS STANDARD STATUTORY PROVISIONS

Life is made a lot easier these days with legislative changes giving *prima facie* admissibility to various documents that in years gone by had to be strictly proved.

These provisions differ somewhat from state to state, but there is an underlying uniformity about them.

Birth and death certificates, business records, banking records, various medical records can often be proved without calling witnesses, or at least not the specific witness who made the record.

There are, however, some prerequisites to the admissibility of some of these types of documents, and you should be aware of them.

The concept of what might constitute a 'business record' is becoming increasingly wide, and now seems to plug a multitude of evidentiary gaps without the need to call a witness at all. For example, cases involving s79c of the Western Australian *Evidence Act* (and its interstate equivalents) are being more widely interpreted all the time (the concept is explored in *Caratti v The Queen* in the WA Court of Appeal,[1] and it was also the subject of the appeal in *Beamish v R*, which was heard last year in the WA Court of Criminal Appeal, the judgment in which has yet to be delivered).

And the phobia and suspicion that existed for years about the use (and authenticity) of photocopies is now largely gone. Judges and legislators of the 60s and 70s did not grow up with, or enjoy, the luxury of good photocopying. But as these judges have passed on, so it seems has the scepticism about the admission of photocopies.

Similarly, the necessity of calling the person who took a photograph as a prerequisite to its admission (unless there is something overwhelming contentious about it) is largely a thing of the past. But, of course, beware of digital photos, which can be altered in ways that 'film' photos cannot.

The best advice I can offer in this regard is that before issuing any unnecessary subpoena to call in someone to prove a fairly pedestrian document or exhibit, check to ensure that the document doesn't have a statutory saviour, making it admissible on its face.

HEARSAY – HAVE ANOTHER LOOK AT IT

There are few rules of evidence so regularly misunderstood, even by experienced practitioners, as the laws relating to hearsay evidence.

Take the time to give yourself a refresher course on the subject at some stage. You might be surprised.

It is obviously true that some forms of hearsay are not able to be led as evidence of the truth of the contents of the statement. But not every hearsay statement will attract the >>

rigour of the rule and be excluded.

Res gestae is a good example of an exception to the rule, as are statements against interest. I will deal with these separately, as both are important in their own right.

The main objection to a hearsay statement is that it tends impermissibly to prove the truth of its contents. It will be inadmissible for this purpose unless it falls within one of the inclusionary rules, either statutory or at common law. If not, you should consider whether it may nevertheless be admissible for another limited purpose.

> You simply can never know too much about the laws of evidence. You can, however, certainly know too little.

Res gestae

This is an inclusionary rule of great significance. The fact that someone was heard to say something at the time of an event in question may, despite its *prima facie* hearsay status, be admissible as the truth of the contents of the statement in question.

The rule in my experience is commonly misunderstood. Many statements of great significance ("My God! That car has gone through a red light!") have often been omitted from proofs of evidence because an over-zealous junior practitioner has made a decision to exclude it as being inadmissible hearsay.

When in doubt, include all marginally admissible materials in your proofs. Let your counsel be the judge of whether it gets in or not. He or she will not think any the less of you for it.

Admissions against interest

There is no more critical piece of evidence, whether for you or against you, than a well-proved admission.

If you are looking to prove that the opposing party has made an admission against their interests, then you should be acutely aware of the restrictions on leading that evidence in certain cases and how to avoid them.

Conversely, if the admission is sought to be admitted against you, you should carefully examine any potential grounds for having it excluded.

Be careful to look for any suggestion of illegality or impropriety in the recording or obtaining of the admission (contravention of listening or surveillance devices legislation, for example) or any suggestion of coercion, duress, involuntariness, unfairness or other vitiating factor.

It can be a devastating moment when your trump card is excluded (or included) in the exercise of a judicial discretion that you hadn't foreseen.

SELF-SERVING STATEMENTS

The general rule is that a statement made by the party in question will not be admissible in support of that party's case – that is, your client cannot give evidence that he or she has previously told the same story!

There are, however, some exceptions to this that you should be aware of. Primarily, this will be where there has been a suggestion that some part of your client's evidence has been recently invented. In this case, an earlier statement in which your client made the same assertion may become admissible.

Make sure that any relevant statements of this nature are not overlooked in the preparation of your case.

EXPERT EVIDENCE

Be careful to ensure that your expert witness is just that. While there is usually no difficulty with medical evidence, the more marginal areas of emerging sciences and developing technology may be more troublesome to get into evidence through someone purporting to be an expert.

While the advantage that the expert enjoys over other witnesses is that he or she can proffer an opinion, there are some limitations on this as regards the resolution of the ultimate issue for determination by the court. Be careful not to assume that your expert will solve all your problems; the ultimate arbiter will still be the judge or jury.

Take care to know what the expert witness means by the terminology in his or her report, no matter how self-evident you consider it to be. It may not be the same as you assume, or even the same as the last expert you called on the subject. Nothing is quite as devastating for your case than an expert who falls well short of the mark.

SEE THE WITNESSES – ALL OF THEM

Many a potential witness may seem just fine on paper, or even when interviewed over the phone; and while their evidence may not seem to be pivotal to the case, appearances do count for a great deal. Always make sure you have seen them in the flesh before the day of the trial.

There may be language, hearing, articulation or any manner of physical problems that are not evident from a witness statement. Worse still, the witness may just dress or present appallingly. Many a disaster has ben occasioned by calling a witness 'cold', and this should be avoided at all costs. Also take the time to advise your client on their manner of dress and presentation.

GET SOME EARLY ADVICE ON EVIDENCE AND KEEP IT UPDATED

Unless you are going to run the case as counsel yourself (and perhaps even then) take some advice very early in the piece. As the issues define and narrow (or even enlarge) you should keep your advice from counsel updated.

We can all get too close to our cases and overlook aspects of them from time to time. There is nothing more essential than a detached opinion from someone else on the matters in issue.

CONCLUSION

Most of the foregoing will have been apparent to most of you at one time or another, and the purpose of this article is not to re-state in a cursory fashion some fairly fundamental rules of evidence. Rather, it is intended as a simple reminder that we can occasionally make things a lot easier for our clients and ourselves by taking a clinical look at how we prepare our cases by reference to the very rules by which they will be decided.

My own experience in the years since my articles have proven my former principal correct. You simply can never know too much about the laws of evidence. You can, however, certainly know too little. ■

Note: **1** [2000] 22 WAR 527.

Tom Percy QC *is based at Albert Wolff Chambers in Perth.*
PHONE *(08) 9218 9200* **EMAIL** *percyqc@wolffchambers.com.au*