



Recent Evidence Case Law from the CCA and HCA

Sophia Beckett

Barrister

The Public Defenders Chambers

THE LAW SOCIETY OF NSW
EVIDENCE ONE DAY INTENSIVE CONFERENCE
SHERATON ON THE PARK

Sio v R [2015] NSWCCA 42; *Sio v The Queen* [2016] HCA 32

Admissibility of hearsay evidence if maker is unavailable

Section 65 *Evidence Act 1995* (NSW)

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

- (a) was made under a duty to make that representation or to make representations of that kind; or
- (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
- (c) was made in circumstances that make it highly probable that the representation is reliable, or
- (d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

- (a) to damage the person's reputation, or
- (b) to show that the person has committed an offence for which the person has not been convicted, or
- (c) to show that the person is liable in an action for damages.

Section 65 *Evidence Act 1995* (NSW)

Prior to amendments

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

- (a) made under a duty to make that representation or to make representations of that kind, or
- (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or
- (c) made in circumstances that make it highly probable that the representation is reliable, or
- (d) against the interests of the person who made it at the time it was made.**

Note. Section 67 imposes notice requirements relating to this subsection.

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

- (a) to damage the person's reputation, or
- (b) to show that the person has committed an offence for which the person has not been convicted, or
- (c) to show that the person is liable in an action for damages.

GP v R [2016] NSWCCA 150;
Taleb v R [2015] NSWCCA 105

Admissibility of evidence relating to sexual experience

Section 293 *Criminal Procedure Act 1986* (NSW)

(2) Evidence relating to the sexual reputation of the complainant is inadmissible.

(3) Evidence that discloses or implies:

(a) that the complainant has or may have had sexual experience or a lack of sexual experience, or

(b) has or may have taken part or not taken part in any sexual activity, is inadmissible.

(4) Subsection (3) does not apply:

(c) if:

(i) the accused person is alleged to have had sexual intercourse (as defined in section 61H (1) of the Crimes Act 1900) with the complainant, and the accused person does not concede the sexual intercourse so alleged, and

(ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person.

Ali [2015] NSWCCA 72

DNA: Issues of continuity, contamination and transference

Section 55 Evidence Act 1995 (NSW)

Relevant evidence

- (1) 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.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.

Section 137 Evidence Act 1995 (NSW)

Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

***Miller v R* [2015] NSWCCA 206**

Voice Identification Evidence

Section 137 *Evidence Act 1995* (NSW)

Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Part 1 Definitions *Evidence Act 1995* (NSW)

“Identification evidence” means evidence that is:

(a) an assertion by a person to the effect that a defendant was, or resembles (visually, **aurally** or otherwise) a person who was, present at or near a place where:

(i) the offence for which the defendant is being prosecuted was committed, or

(ii) an act connected to that offence was done, at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or

(b) a report (whether oral or in writing) of such an assertion.

Haidari v R [2015] NSWCCA 126

Morgan [2016] NSWCCA 25

Ad Hoc Expert

Section 76 Evidence Act 1995 (NSW)

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (section 50 (3))
- evidence relevant otherwise than as opinion evidence (section 77)
- lay opinion (section 78)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A)
- **expert opinion (section 79)**
- admissions (section 81)
- exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- character of and expert opinion about accused persons (sections 110 and 111).

The Queen v GW [2016] HCA 6

Test and Directions for unsworn evidence

Section 13 *Evidence Act 1995* (NSW)

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;
- and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

- (a) that it is important to tell the truth; and
- (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
- (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

Czako [2015] NSWCCA 202

Admissibility of expert evidence by detective concerning use of code words in illicit trade

Section 90 *Evidence Act 1995* (NSW)

Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution, and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note : Part 3.11 contains other exclusionary discretions that are applicable to admissions.

Perish, Perish & Lawton [2016] NSWCCA 89

Requirement to object

Section 59 *Evidence Act 1995* (NSW)

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an asserted fact.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Photograph reference

MDK Law (2015) 'MDK Law Expands Representation to Texas' *Law Washington's Business Law Firm*, p. 1.
<<http://www.mdklaw.com/mdk-law-expands-representation-to-texas/>>