Law of Evidence

This subject takes you into the ‘real’ world of the practice of law and is indeed an invaluable tool to any practitioner. The importance of this subject comes with the realisation that in court, a lawyer is rarely expected to debate on the substantive law but instead the lawyer is expected to be able to ‘prove’ the existence/non-existence of the elements that form the substantive law.

Thus, although labeled as an ‘optional subject’, any budding practitioner would read this subject at the undergraduate level as a sound knowledge of the subject-matter would be invaluable at the Bar examinations and subsequently in the practice of law.

The subject is divided into 10 chapters.

Chapter 1

Basic concepts
- Relevance, admissibility and weight
- Classification of Evidence

Chapter 2

The mechanics of proof
- Burden of Proof
- Standard of Proof
- Presumptions
  Competence and compellability

Chapter 3

The Course of testimony
- Witnesses in court
- Finality of answers to collateral questions
- Cross-examination of rape victims
- Refreshing memory
- Hostile witness
- Rule against narrative
- Previous inconsistent statement

Chapter 4

The Hearsay rule
- The rule and principles
- Understanding the law pre – CJA 2003
- The CJA 2003
Chapter 5

Confessions, the right to silence, and unfairly obtained evidence
- Confessions and the right to silence
- Confessions as evidence
- Unfairly obtained evidence
- The discretion under PACE s.78(1)
- Deception and entrapment
- Bad faith
Breaches of PACE and the Codes of Practice

Chapter 6

Character Evidence

Chapter 7

Identification Evidence

Chapter 8

Judicial warnings to the jury

Chapter 9

Opinion Evidence

Chapter 10

Privileged evidence and the public policy exclusion
- The rule against self-incrimination
- Legal Professional Privilege
- Public Policy

One must also look into the impact of the following:
a) The Youth Justice and Criminal Evidence Act 1999
b) The Human Rights Act 1998
c) Criminal Justice Act 2003
Chapter 1: Introduction

Part One: Studying evidence

Core Texts


Statute Book
Palgrave McMillan Core Statute Series Evidence or Blackstone's, Statutes on Evidence (8th Edition) 2004 or if available (9th Edition 2005.)

Part Two: About the law of evidence by the previous Chief Examiner.

The law of evidence covers questions arising primarily from the amassing and proving of facts in a court. The problems are an attractive mixture of the intensely practical – how do you present items of evidence in court? How is cross-examination controlled? What is a jury permitted to hear? What is the status of confessions? – and the highly abstract and academic – what is a ‘fact’? what does ‘relevance’ mean? And what does it mean to say that evidence is prejudicial, or probative?

Criminal evidence encompasses the most interesting and difficult issues. It deals with a network of rules designed to protect an accused and ensure a fair trial. Thus the rules deal with:

- The right of the accused to silence in court
- The admissibility of confessions made to the police
- The prohibition against evidence of bad character or previous convictions of a person
- The golden rule of the English criminal law that the burden of proof of guilt is on the prosecution
- The exclusion of hearsay identification evidence
Law of Evidence

• Problems in court strategy thrown upon defence counsel by the Criminal Evidence Act 1898. (to be considered in light of CJA 2003)

And so on. These questions are not only of immense practical importance in the day-to-day running of the courts, but they involve questions of great interest to the academic, or to the ‘good minded citizen’ who is concerned with seeing that her legal system is operating in an effective and just way.

These examples arise from the criminal law. But questions of importance are raised in the civil law, too. So, for example, there are questions such as who should bear the burden of proving the issues raised before the court? As well as the standard of proof at which that standard must be discharged. Various rules determine:

• Which party must prove what facts in a trial, be it breach of contract, negligence, a commercial dispute or a trust
• The content, use and importance of presumptions in litigation (e.g. presumptions as to death, legitimacy and so on)
• What evidence is admissible as an exception to hearsay and the intricate procedures according to the Criminal Justice Act 2003?
• What evidence is privileged from disclosure
• The use of expert evidence and opinion evidence

Emphasis should be placed on the role of these areas of the law in the development of legal argument. Law, particularly the law of evidence, is best represented as an argumentative attitude. You should consider this guide as a basis upon which you should develop arguments of your own. For example, the following may be singled out as three particularly strong areas in which the rules are sufficiently wide for opposing views in any one case; the extent to which an item of evidence will be classified as hearsay; the extent to which ‘prejudicial effect outweighs probative value’; and the extent to which the courts should infer from a statute a Parliamentary intention to reverse the normal burden of proof in criminal cases.

Part Three : About the examination

This is a 3 hour paper which consist of 8 questions. Students are required to answer 4 out of these 8 questions. They are however, divided into Part A and Part B, each consisting of 4 questions.

The student is required to answer at least one question from Part A and Part B

Part Four : Basic Concepts

A student of the law of evidence must first learn the ‘basic tools of evidence’ before he goes on to the rules and principles of the subject.

• Admissibility

All relevant facts are admissible to prove the facts in issue unless they are excluded by any of the exclusionary rules i.e. on inter alia hearsay, character or opinion. This of course means that admissibility is dependent on the law of
evidence. It must be noted that a fact may be relevant on more than one issue but admissible only on one such issue. It may also be relevant both on the issue and as to witness credibility, but admissible only as to credibility.

- **Relevance**
  Relevance is a logical question concerning probability. It depends on the existence of a logical relationship between a fact and another fact. The fact that it requires a logical nexus from a fact to another indicates that ‘relevance’ is pertaining to common sense.

- **Facts in issue**
  The facts in issue are those that a party must prove in court in order to succeed. These facts are found by examining the substantive law as well as what the other party admits or denies (perhaps by way of defence). Note that the facts in issue do not include facts pertaining to the credibility of the party. This means that in a criminal case, it is the ingredients of the offence and defences raised by the accused that are the facts in issue.

- **Credibility**
  The credibility of a witness deals with the degree of trustworthiness of the testimony given by the witness concerned.

- **Weight**
  The weight of the evidence deals with the ‘value’ or probativeness to be attached to the evidence. This is to be decided by the jury.

- **Testimony**
  This simply means the oral evidence of a witness in court.

- **Documents**
  These are evidence that is in the form of documents. It must be noted that documents have different evidential status according to whether they are classified as private or public documents. What needs to be remembered about documentary evidence is the fact that they could be hearsay (if brought into court to rely on the truth of its assertion) or non-hearsay (if it is brought into court for some other purposes apart from relying on the truth of its assertion like to show the handwriting) or even real evidence (when for e.g. where it is blood-stained and brought into court to show the existence of the blood.)

- **Real Evidence**
  These are things produced in court for the jury to draw their own inferences from the appearance of the matter in question. E.g. bloodstained knife

- **Direct Evidence**
  This is evidence that a witness observed a fact in issue.
• **Circumstantial Evidence**
  This is evidence from which the inference might be drawn that a fact in issue occurred. E.g: motive, opportunity, preparation to the event etc.

• **Hearsay Evidence**
  This is the one that gives by far the greatest difficulty. Thus, extra emphasis must be placed on this area of the law. To put it simply, hearsay evidence is what was overheard and relied on testimonially i.e. for the truth of its assertion. The test is dependent on the statement being tendered into court to rely on it's assertion i.e. to prove that the statement is true. This means that an out-of-court statement put forward to show the court that the statement was said with for e.g an Irish accent, is therefore not hearsay. This area of law has been subject to fundamental change particularly with the recent enactment of the CJA 2003.

**Part Five : A sample of what to expect**

A is charged with the murder of his wife, B on 1/5/03 who had apparently found out about A's lewd conduct of having 'sodomised' his brother. At the trial, he denies the charge put to him by the DPP. In fact, he said that he was at the office working on the day in question. It was found in his bedroom drawer, A's diary where he wrote a week before the alleged murder, 'I'm so frustrated. Why must B expose me. I'll end it once and for all'. In the other drawer, the police found B's diary and on the page dated 2nd April 2003, she wrote, 'I'm terrified that A will harm me. I'll have to watch my back from now onwards.'

When A was cross-examined, he said that he now remembers that he was at home alone with his wife on that day cleaning his hunting dagger when he tripped over the tiger rug and fell towards his wife. The next thing he knew was the feeling of something liquid dripping down his arm. It was his wife's blood spurting out of her jugular vein. The neighbour, C can come to court to give evidence that he heard a heated argument between A and B the night before the incident. On 2/5/2003, A told D 'I've got rid of her at last! Let's go and party'. D however, has gone to the UK to do his English Bar to complete his childhood ambition of being an advocate and solicitor of the High Court of Malaya. However, he tells his brother, E, before he leaves for his studies.

The police finds a bloodied dagger near the bushes at the back of A's house. F, B's good friend can come to court to state that B has told her that her husband and her are planning a trip to Paris for their second honeymoon due in July 2003.

G, the old man that lives opposite to A and B said he saw someone who resembled A rushing out of his house in a distressed condition on the day in question. G is however, 70 years old and suffers from severe short-sightedness.
The telephone operator can say that a telephone call was made from the number that corresponds with that of A’s house wherein a lady spoke in a hysterical fashion, ‘get me the police, please’ and the line was disconnected.

Advise on the evidential issues that arise.

Part Six : Truth and Blind Justice; Is the law about justice?

R v Blastland [1985] 2 All ER 1095

In this case, the accused person, Blastland (B), was charged with buggery and a murder of a boy. At the trial, B admitted that he had indeed met the boy and engaged in homosexual activity but said that when he saw another man nearby, who might have witnessed what he had done, B panicked and ran away. B gave a description of the other man which corresponded closely to one Mark (M). He alleged that M must have committed the murder.

At the trial, some formal admissions were made by the prosecution. Some related to M’s movements on the evening in question and others showed that M had been investigated by the police after the murder and had been known to engage in homosexual activities in the past with adults but not children. The defence sought leave from the court to call a number of witnesses to elicit from them that before the body of the victim was found, M had made statements to them that a boy had been murdered. The trial judge held this evidence to be inadmissible. B was convicted on both counts and he appealed to the House of Lords.

The House of Lords held that the statements would only be admissible if the state of mind of the maker of the statement is either directly in issue itself or is of direct and immediate relevance to an issue arising at the trial. The issue at the trial was whether B had committed the offences charged and what was relevant to that issue was not the fact of M’s knowledge but the source of his knowledge, how he had come by it. However, since he might have done so in a number of different ways, there was no rational basis on which the jury could be invited to draw an inference as to the source of that knowledge or conclude that he, rather than B, was the offender. Any attempt would be merely speculative. The evidence, therefore, had been properly rejected. His conviction was upheld.

Sparks v R [1964] AC 964

A ‘white man’ was convicted of indecently assaulting a three-year-old girl who did not give evidence at the trial. The defence had sought to call the mother to give evidence that shortly after the assault the child had said to her, “It was a coloured boy”. The Privy Council held that the trial judge had properly ruled that the evidence was inadmissible hearsay. The effect of this ruling on the case would seem to imply that the victim could not identify her assailant.

R v Kearley [1992] 2 All ER 345
(This is a very important decision on the issue of ‘implied assertion’ which we will deal with in great detail later in the course.)

The facts are *inter alia*, Kearley, the accused person was charged with trafficking in dangerous drugs. In his absence, the police raided his house. While they were there, there were about 20 calls (some phone calls and some personal callers) to the house asking for ‘Chippie’ (Kearley’s nickname) requesting for drugs. The House of Lords held that the police were not permitted to repeat the request made for drugs because it amounted to inadmissible hearsay and Kearley was acquitted on the charge of trafficking.

Things to ponder:

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According to the legendary private investigator, Sherlock Holmes, if one has eliminated all the impossibilities, what remains is the truth. And that is elementary, my dear Watson.

The question that a student of evidence will have to ask himself is whether Sherlock Holmes theory applies in a court of law. So does it?

Helpful hint : Why is Lady Justice blind-folded?
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