NEW

Nutshells

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SWEET & MAXWELL

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Series Introduction

New Nutshells present the essential facts of law. Written in clear, uncomplicated language, they explain basic principles and highlight key cases and statutes.

New Nutshells meet a dual need for students of law or related disciplines. They provide a concise introduction to the central issues surrounding a subject, preparing the reader for detailed complementary textbooks. Then, they act as indispensable revision aids.

Produced in a convenient pocketbook format, *New Nutshells* serve both as invaluable guides to the most important questions of law and as reassuring props for the anxious examination candidate.

Evidence deals, first, with the law surrounding testimony—competence, compellability and examination of witnesses; cross-examination of the accused. Subsequent chapters devoted to the hearsay rule are followed by sections on similar fact evidence and opinion evidence. Other topics dealt with include privilege, estoppel, proof and corroboration, documentary and real evidence.

Contents

1 Introduction

The law of evidence may be defined as the legal regulation of the means whereby the existence of some fact may be proved to the satisfaction of the tribunal which is charged with the duty of trying fact. This definition, as with many definitions, raises more questions than it answers.

Question 1. Which facts need to be proved? In order to answer this it is necessary to look at the relationship between the law of evidence and the substantive law. The substantive law is that set of rules which has been laid down by statute or precedent in order to govern society generally, *i.e.* the Criminal and Civil Law. When a person seeks to rely on the substantive law or to put it into effect he is required to prove certain facts; the substantive law itself tells us which facts—*e.g.* in a murder trial the facts which need to be proved are that the accused killed the deceased with malice aforethought and without lawful excuse—facts of this kind are often described as the facts in issue.

Therefore in any particular legal proceedings, a detailed answer to the question posed will require knowledge of the substantive law. However, it is sufficient for the purposes of this book to give the general answer that in any legal proceedings the facts which are in issue must be proved. Whenever legal proceedings are commenced the law of evidence automatically operates as an ancillary to the substantive law. However, this does not mean that the law of evidence is inferior in status to the substantive law. The laws of evidence are made by statute and precedent in the same way as substantive law but instead of regulating conduct in a general context, they regulate conduct in the context of legal proceedings.

In fulfilling this function the law of evidence operates in harness with the law of procedure which controls the form in which legal proceedings are brought, *e.g.* which documents should be served and which courts should be involved. However, for the purposes of study the two areas can generally be kept distinct and, in this book, procedure will be considered only in so far as this is necessary for the better understanding of the law of evidence.

Before leaving Question 1 there are two exceptional situations in legal proceedings where the need for proof may be dispensed with. The first of these is where the facts in question are so obvious that they can be taken for granted. Here, it is said that judicial notice is taken of the fact in question. Examples of facts of which judicial notice has been taken are—television is a common feature of domestic life, the streets of London are crowded. The second situation is where a party involved in legal proceedings indicates that he does not dispute one of the facts which is in issue against him. Such a fact is said to be formally admitted. Formal admissions may be made in both criminal and civil proceedings before or during the trial in court.

Question 2. Who must prove? In legal jargon this question is usually phrased—Who carries the burden of proof? As a general rule the party who makes an allegation must prove it. Therefore, in a criminal case the burden of proof is usually on the prosecution, while in a civil case, it is usually on the plaintiff. However, it should be noted at this stage that there are some important exceptions to this general rule. For further details see Chap. 13.

Question 3. How much proof is required? What is the standard of proof? In criminal cases where the prosecution carry the burden of proof their case must prove the guilt of the accused beyond reasonable doubt. In civil cases the party carrying the burden of proof must prove his case on the balance of probabilities. For further details see Chap. 13.

Question 4. Who is the tribunal of fact? The answer to this question involves a consideration of the respective roles of judge and jury. In criminal cases it is necessary to distinguish between summary trials (magistrates' court) and trials on indictment (Crown Court). In summary trials the magistrates decide all questions of law and fact, having obtained advice on the law from the magistrate's clerk. In trials on indictment (generally, the more serious cases) the judge decides all questions of law, including the law of evidence, but questions of fact are decided by the jury. In civil cases the judge usually decides all questions of law and fact, although in some libel cases a jury may still be called to decide the facts in issue.

Question 5. How, in law, may facts be proved? This is the fundamental question which arises from the definition of the law of evidence, and it is only by looking at the whole of the law of evidence that one can give a satisfactory answer to it. At first sight this may seem to be an unnecessary chore in view of the apparent simplicity of the question. In ordinary life we see and hear facts being proved

every day—the method of proving facts is to search out the relevant information and then to make a decision on the basis of that information as to whether or not the fact is believed. The keynote here is the word "relevant" and it is significant that the word evidence could easily be substituted for the phrase "relevant information" used in the previous sentence. If the question posed had been "How, in *ordinary life*, may facts be proved?" the answer would be relatively simple—facts are proved by evidence (in the sense of relevant information) and, in any particular case, our common sense tells us what is relevant and what is not.

However, question 5 concerns the proof of facts *in law* and the answer is not so simple. Although relevance does play an essential role in determining how facts may be proved in legal proceedings, it is not the only limitation. It will soon become apparent to the reader that by no means all the evidence (relevant information) may be used in legal proceedings; indeed, most of the rules of evidence are concerned with excluding evidence from the consideration of the tribunal of fact.

By way of summary, it may be said that in law, as in ordinary life, only relevant information can be used to prove facts, but in law, not all the relevant information can be used. This fundamental point can best be illustrated by looking at an example. Alf is charged with the theft of a portrait from an art gallery and the information available to the prosecution includes the following facts: (i) Alf often throws stones at his neighbour's cat; (ii) Alf has committed many other thefts of works of art; (iii) Alf admitted to his wife that he had stolen the portrait. Fact (i) is clearly not relevant to the charge and therefore, could not be used as evidence. However, although facts (ii) and (iii) are of some relevance, neither fact could be used as evidence. This example shows that a proper answer to question 5 can only be given after referring to the rules of evidence.

Before attempting to answer the questions posed it is useful to note several general points.

When evidence is excluded by the rules of evidence it is said to be inadmissible. However, the rules operate to render evidence inadmissible in two ways; (i) certain methods of giving evidence are prohibited; evidence proved by such methods is inadmissible; (ii) certain evidence is of its own nature inadmissible. The example of Alf illustrates this distinction. Although fact (iii) (Alf's confession) would normally be admissible evidence it could not be given in evidence by Alf's wife because this method of giving the evidence is prohibited (see Chap. 2). Fact (ii) (Alf's previous convictions) is

inadmissible evidence (see Chaps. 4 and 9). In this book Chapters 2-8 and 14 deal predominantly with those rules governing the methods of giving evidence while Chapters 9-12 deal predominantly with those rules concerning evidence which of its own nature is inadmissible. Although it is difficult to maintain this distinction consistently it is a useful general guide to the way the rules operate.

It is even more difficult to generalise about the justification for the rules. However, most of the rules have developed because a particular method of giving evidence or a particular kind of evidence was unreliable. This cannot however be said about the exclusionary rules dealt with in Chapters 11 and 12 which depend upon particular aspects of public policy.

The only general classification of evidence worth noting at this stage reflects the ways in which the tribunal of fact receives (or perceives) evidence—(i) oral (ii) documentary (iii) real. Oral evidence consists of information obtained from the spoken statements of witnesses. Documentary evidence consists of information obtained from reading documents or listening to tape recordings. Real evidence consists of information obtained from the inspection of physical entities whether place, person, animal or thing. For example in *Line* v. *Taylor*, 1862, the tribunal of fact was allowed to form its own impression on the issue of the "fierce and mischievous" nature of a dog by seeing it in court. The emphasis placed on oral evidence in this book reflects the fact that it is by far the most common form of evidence. Detailed consideration of documentary and real evidence is postponed until Chapter 14.

Generally, the tribunal of fact is given no direction as to the weight which it should attach to any particular item of evidence. However, there are some items of evidence which are required to be confirmed by some other evidence; in such cases there is said to be a "corroboration requirement" (see Chap. 13 for further details).

The last general point is that although the law of evidence usually operates in the same way in both criminal and civil proceedings, there are important differences. Although these do not necessitate a division of the book into two distinct parts, several chapters deal exclusively with criminal or civil proceedings.

2 Testimony I: competence and compellability of witnesses

As observed in the introduction oral evidence is the most common form of evidence. Oral evidence is almost invariably presented in the form of testimony. Testimony may be defined as the statement of a witness spoken by him in court and pledged by him to be true.

Before he gives testimony the witness generally enters the witness box and swears an oath on the bible, although witnesses whose religious beliefs do not recognise the bible may take an oath appropriate to their religion and witnesses without any religious beliefs may affirm, Oaths Act 1978. However there are two exceptions to the rule that testimony must be sworn which apply in criminal cases:

(i) Young children are in certain circumstances (see below) permitted to give unsworn testimony (Children and Young Persons Act 1933).

(ii) The accused may make an unsworn statement from the dock (Criminal Evidence Act 1898, s. 1 (*h*)). However, it has been suggested that such statements are not equivalent to testimony (*R.* v. *Coughlan*, 1976).

Testimony is usually heard in open court, *i.e.* the public may be present (Judicature Act 1925, s. 101). However in certain exceptional cases, usually provided for by statute, the hearing may be held *in camera*, *i.e.* in the absence of the public.

In criminal cases witnesses remain outside the courtroom prior to their giving testimony (*R.* v. *Smith, Joan*, 1968). In civil cases this rule operates more flexibly but witnesses may be excluded prior to their giving testimony either at the judge's discretion or at the application of either party (*Moore* v. *Lambeth C.C. Registrar*, 1969).

The testimony of witnesses may sometimes be recorded in documentary form. However it is important to recognise that this is an exception rather than a general practice and that the document recording the testimony is almost invariably read out at the trial in question so that as far as the tribunal of fact is concerned, the

evidence is oral rather than documentary. In criminal cases, the document which records the testimony is called a deposition. The use of depositions in these cases is simply a way of obviating the need for the witness to appear in the witness box—the witness is still required to take the oath. Depositions are only resorted to in the case of:

(i) Witnesses who are dangerously ill (Magistrates' Courts Act 1952, s. 51, Criminal Law (Amendment) Act 1867, s. 6).

(ii) Child witnesses whose attendance in court might involve serious danger to their health (Children and Young Persons Act 1933, ss. 42 and 43).

(iii) Prosecution witnesses in indictable cases who are not required to attend the trial by the accused or who are unable to travel or dead (the accused or his counsel having had the opportunity to question the deponent at the time the deposition was taken) (Criminal Justice Act 1925, s. 13 (3)).

In civil cases the recording document is called an affidavit. An affidavit may be read out at the trial so long as the parties to the proceedings in question have agreed to evidence being taken in this form. It is certainly more common for the evidence of witnesses to be recorded in documentary form in civil cases than in criminal cases. However, it would be misleading to suppose that civil cases are predominantly concerned with evidence in affidavits—civil cases and criminal cases are predominantly concerned with the *hearing* of witness testimony.

However, irrespective of the nature of the testimony to be given, the first question to be considered is—Who may be a witness? The answer to this question involves the consideration of two concepts—Competence and Compellability.

Competence is the *legal* ability to give evidence. A person who is competent is *allowed* by law to give evidence.

Compellability is the legal obligation to give evidence. A person who is compellable is *obliged* by law to give evidence.

It should be pointed out that these concepts have nothing whatsoever to do with a person's state of knowledge regarding the facts at issue. As was observed in the introduction only those with relevant knowledge would be called to give evidence.

A person's competence and compellability will be determined in respect of the particular trial at which it is proposed that he be called as a witness; in respect of such trial he will be *either*

(i) competent and compellable or

(ii) incompetent or

(iii) competent but not compellable.

The general rule

Most people in most trials will be competent and compellable. Normally such a person will attend the trial voluntarily but he may be served with a *subpoena*—a legal document which orders his attendance. Failure to answer such order may result in imprisonment. Furthermore, a competent and compellable witness must answer questions which are put to him in the witness box. If he fails to answer he will normally be in contempt of court for which he may be imprisoned. The latter statement is qualified because it may be possible for a witness to refuse to answer certain specific questions if he is able to claim some kind of privilege. Privilege is an important exclusionary rule of evidence (see Chap. 11) but it is only necessary at this stage to distinguish it from competence and compellability. In any particular trial a claim to privilege would not prevent a person being called as a witness but it may protect him from a certain line of questioning. However, if a person is incompetent he cannot be called as a witness, even if he wishes to give evidence. Furthermore, if a person is competent but not compellable he cannot be called as a witness against his will.

Competence and compellability are matters of law and are not therefore decided by the tribunal of fact. Whenever an issue arises in regard to competence and compellability there will be a preliminary trial of that issue—such trial is called the *voir dire* meaning literally "to speak truly" and is quite different in many ways from the main trial. In the course of the *voir dire* the judge (or the magistrates in summary trial) will make such inquiries as are necessary to determine the issue. In trial before a jury in so far as it became necessary during the *voir dire* to discuss matters which were relevant to the main issues of the case, the jury may be asked to leave the courtroom.

Exceptions to the general rule 1. incompetence

(a) Children

In civil cases, children who do not understand the nature of an oath are incompetent. However, in criminal cases children of "tender years" are competent to give *unsworn* testimony (see above) even though they do not understand the nature of the oath, so long as they "are possessed of a sufficient intelligence to justify the reception of evidence and to understand the duty of speaking the truth" (Children and Young Persons Act 1933, s. 38). The questions whether a child is of tender years and has the necessary intelligence will be determined by the judge in the *voir dire*. In both civil and criminal cases children

who do understand the nature of an oath are competent to give sworn testimony. However, it is not altogether clear what is meant by "understanding the nature of an oath." In *R.* v. *Hayes*, 1977, the Court of Appeal held that the test is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. The fact that the divine sanction of the oath was not recognised by the child did not necessarily preclude him from giving sworn testimony.

(b) Persons of weak intellect

Those whose intellect is impaired by mental illness, drunkenness, drug addiction, etc. will be classed as incompetent if their disability means that they cannot understand the implications of the oath. However, when it is possible for the person to return to a sounder state of mind an adjournment of the case may be ordered to allow this (*R.* v. *Hill*, 1851).

(c) The accused

The accused is competent for the defence (Criminal Evidence Act 1898, s. 1) but incompetent for the prosecution. Any person who is jointly charged or indicted with the accused, *i.e.* a co-accused, is incompetent for the prosecution. Therefore, the prosecution cannot call one accused X to give evidence against another Y unless they are tried and dealt with separately. There are a variety of procedural ways in which this may be done but it would be important for the prosecution to recognise the difficulties of joint trial at an early stae in order that the necessary steps can be taken. However, assuming that X and Y are tried jointly both are competent for the defence and in giving evidence for themselves may incidentally give evidence against each other (*R.* v. *Rudd*, 1948).

(d) The spouse of an accused

The spouse of an accused is generally only competent for the defence with the consent of the accused spouse (Criminal Evidence Act 1898, s. 1. and s. 1 (*c*)). However, there are certain cases where the spouse is competent for the defence without the consent of the accused spouse (see below).

The spouse is incompetent for the prosecution except in the following cases:

(i) At common law, the spouse is competent for the prosecution in

cases of "personal violence" against the spouse, (*Lord Audley's case*, 1631). The words personal violence have been widely defined (*R.* v. *Blanchard*, 1952 and *R.* v. *Verolla*, 1963). Under this exception the spouse is also competent for the defence without the consent of the accused spouse.

(ii) The Criminal Evidence Act 1898, s. 4 made the spouse competent for the prosecution in the case of offences mentioned in a schedule to the Act. This schedule has been cut down by subsequent Acts and the only important offences now mentioned in it are child destruction and bigamy.

(iii) The Sexual Offences Act 1956, s. 39 provides that in the case of all sexual offences mentioned in the Act, except for buggery and indecent assault on a man, the spouse is competent for the prosecution. Unfortunately, section 39 has created a slight anomaly in regard to the spouse's competence for the defence. Sexual offences had previously been mentioned in the Schedule to the Criminal Evidence Act 1898, so that before 1956 in such cases the spouse would have been competent for the defence without the accused spouse's consent. However, section 39 specifically incorporates section 1 Criminal Evidence Act 1898 which requires the accused spouse's consent (see above). This contradiction has yet to be resolved by a decision of the courts.

(iv) The Theft Act 1968, s. 30 (2) provides that the spouse is competent for the prosecution in any prosecution brought by the spouse. This provision is unlikely to have a significant impact in practice since a private prosecution of the kind envisaged is unlikely to occur frequently. However, section 30 (3) provides that the spouse of the accused is competent for the prosecution and defence in any prosecution for any offence committed "with reference to" the spouse or the spouse's property. If the words "with reference to" are widely defined then this exception will have a much wider ambit than the common law exception discussed above. The only authority on the construction of section 30 (3) is *R.* v. *Noble*, where the Court of Appeal held that forging a spouse's signature on a cheque was an offence falling within the ambit of the subsection; however, it is clear that some cases may still give rise to problems of construction. Under section 30 (3) the spouse is competent for the defence without the accused spouse's consent.

The accused and spouse are competent for the prosecution and defence in cases of public nuisance (under an anomalous exception created by the Evidence Act 1877).

Exceptions to the general rule 2. non-compellability

In cases of incompetence the question of compellability does not arise. The general rule where a witness is competent is that he is also compellable—thus, a child or person of weak intellect who is ruled competent is also compellable. However, there are several exceptions to this rule.

(a) The accused

The Criminal Evidence Act 1898, *s.* 1 (*a*) provides that although the accused is competent for the defence he is not compellable.

(b) *The spouse of an accused*

In all cases in which the spouse of an accused is competent either for the prosecution or defence she (he) is not compellable. The question of the spouse's compellability for the defence does not seem to have been directly in issue in any reported case but in *R.* v. *Boal*, 1965, it was assumed that the spouse was not compellable (however, it is arguable that this assumption is inconsistent with the intention of the Criminal Evidence Act 1898). Where the spouse is competent by virtue of section 4, *Leach* v. *R.*, 1912, is clear authority that she (he) is not compellable. The Sexual Offences Act 1956, s. 39 and the Theft Act 1968 clearly state that the spouse is not compellable. It used to be the case that where the spouse was competent at common law she was compellable (*R.* v. *Lapworth*, 1931), however, in *Hoskyn* v. *Metropolitan Police Commissioner*, 1978, the House of Lords overruled this decision holding that the spouse was not compellable.

Note. Since the spouse of an accused is a major exception both in regard to competence and compellability it is necessary to consider the position in the event of divorce or annulment. If the ex-spouse will be required to give evidence about matters occurring before or during the marriage she (he) is treated as the spouse of the accused, *i.e.* in accordance with the rules outlined above (*R.* v. *Algar*, 1953). Moreover, the fact that the parties were not living as man and wife or were legally separated at the time of the events in question makes no difference to the application of the rules. Presumably in those rare cases where the marriage is declared void the rules would not apply.

The accused and spouse are compellable for prosecution and defence in cases of public nuisance (Evidence Act 1877).

(c) *Sovereigns*

The Sovereign and foreign Sovereigns are not compellable. Non-compellability extends also to sovereign officials under various