OXFORD

UNIFORM EVIDENCE LAW
GUIDEBOOK

John Anderson
Anthony Hopkins

UNIFORM EVIDENCE LAW

GUIDEBOOK

UNIFORM EVIDENCE LAW GUIDEBOOK

John Anderson
Anthony Hopkins

OXFORD
UNIVERSITY PRESS
AUSTRALIA & NEW ZEALAND

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford.

It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and in certain other countries.

Published in Australia by
Oxford University Press
253 Normanby Road, South Melbourne, Victoria 3205, Australia

First published 2014

National Library of Australia Cataloguing-in-Publication entry

Anderson, John (John Lance), 1962- author.
Uniform evidence law guidebook / John Anderson, Anthony Hopkins.

ISBN 978 0 19 552380 5 (paperback)

Includes index.
Evidence (Law)
Evidence (Law)—Australia

Hopkins, Anthony L. (Anthony Lister), author.

347.06

Edited by Joy Window
Text design by Aisling Gallagher
Cover image: Shutterstock/Markovka
Typeset by diacriTech
Proofread by James Anderson
Indexed by Madeleine Davis
Printed by Sheck Wah Tong Printing Press Ltd

CONTENTS

PREFACE

The law of evidence provides the framework within which legal contests take place. It provides the rules, principles and processes that regulate proof of disputed facts. For this reason, evidence law is central to the resolution of all substantive legal disputes that are determined in, or in the shadow of, court. The *Uniform Evidence Law Guidebook* offers students a concise yet comprehensive tool to engage with both the principles and practice of evidence law in the jurisdictions that have adopted the uniform evidence legislation. It provides a summary of the law in key topic areas, together with incisive commentary, cross-referenced to more detailed substantive material in other texts. The guidebook includes short extracts from and summaries of principal cases and key legislative provisions, with tables, checklists, flow diagrams and 'how to' tips, bringing together all the relevant and most up-to-date material.

Central to this guidebook is its capacity to facilitate student engagement with the process of proof, drawing and maintaining explicit links between theory and practice. Through the use of a Criminal Trial Thread Scenario, the guidebook enables students to become active participants in a trial, promoting deep experiential learning. Witness statements and other materials are provided for the majority of topic areas, with each new statement requiring students to apply their acquired knowledge incrementally in a progressive and continuous manner as either prosecution or defence lawyers. This 'taste of reality' experience also allows for incremental development of important skills in oral communication, decision-making and advocacy. For those teachers who choose to adopt this approach, online materials are provided to ensure the efficacy and authenticity of assessment tasks. In other topic areas, review problems are provided to encourage students to develop their analytical problem-solving skills in relation to realistic and typical evidence issues arising in the context of criminal and civil litigation. Guides to answering these problems are available at the online resource centre.

This guidebook does not undertake detailed critique or criticism of the law of evidence. However, its premise is not simply that evidence law is best understood in practical context, but that 'in role' student engagement fosters a capacity for critique and challenge as the complexities and shortcomings of the trial process are directly revealed.

John Anderson
Newcastle
October 2014

Anthony Hopkins
Canberra
October 2014

ACKNOWLEDGMENTS

This guidebook originated from a perceived need for a learner-centred book for students of the law of evidence in the various uniform evidence law jurisdictions of Australia. Thus, our collaboration was launched and the project has evolved over approximately 18 months into this work. John contributed the substantive material for all chapters together with the brain teasers and review problems for Chapters 1, 2, 3 and 6. Anthony contributed the criminal trial thread scenario materials for Chapters 4, 5, 7, 8, 9, 10, 11 and 12 as well as undertaking the review and critique of the substantive content of each chapter. This provided an important check consistent with the *Guidebook* philosophy and the development of a great collaborative synergy.

John specifically thanks Tyler Fox for his invaluable research assistance in November and December 2012. This assistance was generously funded by a Teaching Development Program grant from the Faculty of Business and Law at the University of Newcastle. Further, John's colleagues at Newcastle Law School, including Emeritus Professor Frank Bates and Michael Guihot have indirectly contributed to this project by sharing materials and through long discussions about the utility of the criminal trial thread scenario. The 2012 cohort of students in the Evidence course at Newcastle Law School were the guinea pigs for John's testing of the efficacy of the mock trial. They deserve special thanks for admirably rising to the task of examining and cross-examining witnesses, presenting well-formulated arguments on admissibility of evidence in seminar classes each week and ultimately providing important insights and feedback for this project. John's family was a great support while he was engrossed in drafting the manuscript. His wife, Melissa, was very tolerant and accepting of the time commitment while youngest son, Heath, successfully navigated his HSC exams through this time.

Anthony thanks his past and present colleagues at the University of Canberra School of Law and Justice for their support, encouragement and enthusiasm in the development and consolidation of the criminal trial thread scenario model of teaching. In particular, he thanks all those students who have faced their fears and gamely taken to their feet to participate and later share their reflections. Anthony also thanks his colleagues at Burley Griffin Chambers for their support and guidance through his early years at the bar, during which he has straddled the teaching practice divide, enriching his experience and capacity in each field of endeavour. Anthony thanks his partner Kelli and children for their support and unfailing belief in him.

We both extend thanks to Michelle Head, Publishing Editor in the Higher Education Division of Oxford University Press. Michelle, and Katie Ridsdale before her, were excited by the unique vision for this project in using the criminal trial thread scenario as the 'how to' aspect of this guidebook, reflecting the special challenges

and needs for students learning the law of evidence. Throughout the subsequent life of this project, Michelle has provided unfailing support and encouragement. Together with the editorial team coordinated by Tiffany Bridger, Michelle has been instrumental in seeing this guidebook through the various processes to final publication. Also, we thank the anonymous reviewers of the original proposal through to the draft chapters and the full draft manuscript, who have all made useful suggestions that have contributed in various ways to the final product.

The authors and the publisher wish to thank the following copyright holders for reproduction of their material.

Commonwealth of Australia for extracts from the *Evidence Act*. This legislative material is reproduced by permission, but is not the official or authorised version. It is subject to Commonwealth of Australia copyright; Incorporated Council of Law Reporting for extracts from the *Weekly Law Reports* (WLR); Lexis Nexis Australia for extracts from *Australian Law Reports* (ALR); The State of New South Wales through the Department of Police and Justice for extract from *Evidence in Chief—The Ten Commandments*, 2002, reproduced with the approval of His Honour Judge Peter Graeme Berman SC and the Public Defenders Office; Thomson Reuters (Professional) Australia Limited for extracts from, *Australian Capital Territory Reports* (ACTR) *Australian Criminal Reports* (A Crim R), *Commonwealth Law Reports* (CLR), *Federal Court Reports* (FCR) *New South Wales Law Review* (NSWLR), *Thomson Reuters Lawbook*, 11th ed, 2014 reproduced with permission of Thomson Reuters (Professional) Australia Limited, www.thomsonreuters.com.au.

Every effort has been made to trace the original source of copyright material contained in this book. The publisher will be pleased to hear from copyright holders to rectify any errors or omissions.

LIST OF FIGURES AND TABLES

Figures

Tables

CHAPTER 1

GETTING INTO EVIDENCE

COVERED IN THIS CHAPTER

In this chapter, you will learn about:

- sources—the uniform Evidence Acts;
- kinds of evidence;
- relevance, admissibility and weight; and
- drawing inferences.

CASES TO REMEMBER

Smith v The Queen (2001) 206 CLR 650

STATUTES AND SECTIONS TO REMEMBER

Evidence Act ss 55, 56, 57, 142(1)

INTRODUCTION

The law of evidence regulates the proof of the facts in issue at a trial through the operation of various rules and principles.[1] It is essential to have a good grasp of the rules and principles of evidence to ensure the adequate conduct of any kind of legal practice, particularly in the adversarial context of criminal and civil litigation. The rules of evidence, based on considerations of justice and practicality, shape the way in which judges and lawyers think about fact-finding. As a lawyer preparing a matter for litigation, you must carefully consider how the fact-finder will evaluate the factual material adduced by the parties. Problems about the admissibility or otherwise of information as evidence may be anticipated before trial, but can also arise quite unexpectedly during a trial. In the atmosphere of a trial, with the pace and other constraints operating, it is not always possible to take time to remedy your lack, or depth, of understanding of the relevant rules and principles. The point at which knowledge is necessary will quickly emerge and then subside during the course of a trial. Consequently, evidence is a most important area of study in your law degree program.

A major objective of the rules and principles of evidence is to bring integrity to the fact-finding process, and ensure that witnesses and parties are treated equitably and fairly in this process. Importantly, and perhaps ideally, the law of evidence should be a 'wholly rational body of rules and principles designed to aid the courts in their

discovery of the truth'.[2] They represent a valuable form of knowledge for any person concerned with the fact-finding process.

For students of evidence law it is important to emphasise that it is a form of *procedural or adjectival law* that provides the framework through which the substantive law, such as criminal, contract or tort law, is given practical effect.[3] The substantive law determines whether alleged conduct leads to some legal consequence, such as creating a right to damages or liability for a criminal offence, but it is the law of evidence which determines how the parties can attempt to prove that the alleged conduct actually occurred. It is the province of the law of evidence to provide a regulatory framework to decide the information which can and cannot be used to prove the facts in issue in the proceedings, ultimately leading to a determination of what are the true facts. The impact of the rules of admissibility of evidence can often determine the outcome of a case. Accordingly, even though evidence law is procedural in nature, its fundamental importance cannot be underestimated.

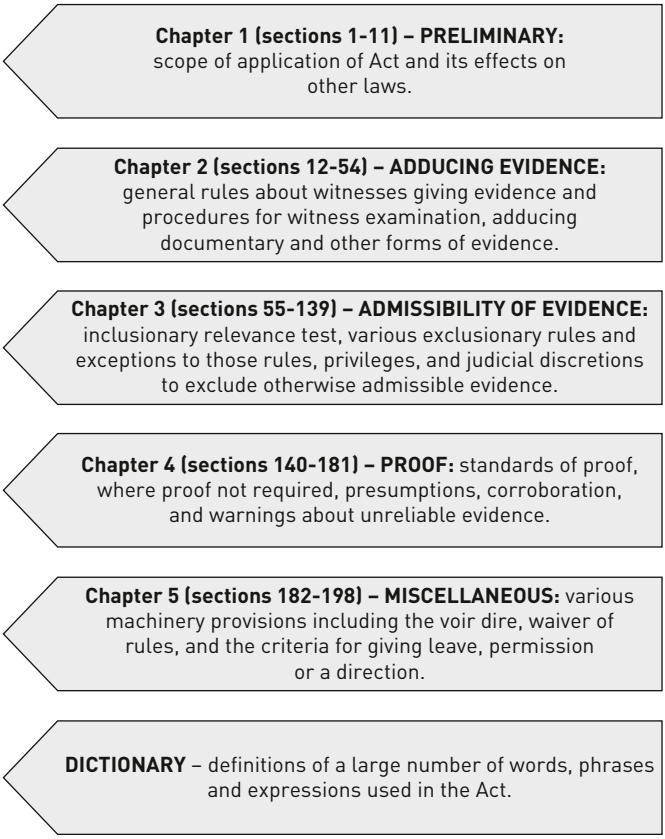
SOURCES—THE UNIFORM EVIDENCE ACTS

With its focus on the trial process in the courtroom, the law of evidence originated in the hectic adversarial context of court litigation. Accordingly, the traditional primary source was the common law. During the past century, parliaments in all Australian jurisdictions have legislated incrementally to provide various written statements of, and supplements and changes to, the law of evidence, while still preserving the common law foundation. Statutory modifications as supplements to the rules of evidence have varied across the Australian jurisdictions although it is apparent that broader shared aims have underpinned these modifications and were a catalyst for the uniform Evidence Acts (EA) that now exist in the majority of jurisdictions: the Commonwealth, New South Wales, Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.[4]

The Acts in the various jurisdictions are substantially identical and are largely based on reports by the Australian Law Reform Commission (ALRC) and other state commissions.[5] Queensland and South Australia have indicated that they will not adopt the national uniform evidence legislation. Where the legislation does operate it is now the primary legal source, and it has resulted in wide-ranging reforms with simplification and clarification of complex aspects of evidence law. The legislation is not a complete codification[6] as some topics associated with the law of evidence are not covered. Clearly though, full effect must be given to provisions that do cover the field and it is not 'to be used as a means to retain aspects of the common law of evidence which are inconsistent with the operation of the Act'.[7]

The EA is structured into five chapters and Figure 1.1 on the next page provides a snapshot of the essential contents of this structure.

FIGURE 1.1 The structure of the Evidence Acts



There is a significant amount of commentary about the uniform evidence legislation with judges and commentators expressing a variety of opinions about its merits.[8] Arguably, the legislation makes the rules of evidence more accessible and simplifies many of them in providing a rational and principled system of trial procedure informed by an understanding of the common law. It is aimed at ensuring procedural justice for the parties to litigation, but it cannot solve all the problems with evidence. Almost 20 years of operation in the Commonwealth and New South Wales jurisdictions have 'shown [the uniform evidence legislation] to work well in practice and the monitoring and review of its operation by the ALRC have been important in moving further towards 'harmonisation' of the laws of evidence across Australian jurisdictions'.[9]

TABLE 1.1 Classification of evidence

KIND OF EVIDENCE	BRIEF DESCRIPTION	PRACTICAL EXAMPLE
Direct '[D]irect evidence is evidence which, if accepted, tends to prove a fact in issue' [*Festa v The Queen* (2001) 208 CLR 593, 596]	Witness testifies from personal knowledge to an actual observation or perception of a fact in issue from one of their five senses. The fact-finder must infer that the witness is a credible source for the evidence to be accepted in determining the existence or otherwise of facts in issue in the proceeding.	Issue is whether D stabbed and killed V. When W gives evidence at D's trial that she saw D stab V, and this evidence is accepted by the fact-finder, it directly answers the question whether D stabbed and killed V. It is direct evidence of that fact in issue.
Circumstantial '… works by building up a strong pattern of circumstantial detail which convinces by its truth to the sense of reality that we derive from our experience of life'[10]	Witness testifies to facts that go to a fact in issue but are not sufficient to resolve it. If the evidence is accepted, the fact-finder must draw one or more inferences to be in a position to resolve that fact in issue. It can be prospectant (before the subject event), concomitant (at the time of the event) and retrospectant (after the subject event) along a time continuum.[11]	D is charged with the murder of V, his wife. There are no eyewitnesses. V's body is found dumped in a creek. At trial, the prosecution evidence comprises: - oral evidence from W, a neighbour of D and V, who heard them arguing loudly, including D shouting 'I'll see you dead, miserable bitch!' the day before V's body was found in a creek - oral and documentary evidence from I, that D took out a multimillion dollar life insurance policy on V with D as sole beneficiary ten days before V's body was discovered. - real and forensic evidence from P that D's hair was found on V's clothing, discovered on the creek bank near V's body - oral evidence from A that D asked him the day after the body was found to support his alibi that he was playing golf with him at the time V was killed although this was false. While individually each circumstance does not prove D killed V, when aggregated together they lead to various inferences that firmly support that conclusion.

(Continued)

TABLE 1.1 Classification of evidence *(Continued)*

KIND OF EVIDENCE	BRIEF DESCRIPTION	PRACTICAL EXAMPLE
Original	Witness testimony includes a statement that has 'independent evidentiary value'[12] so that it goes to proof of a fact in issue without relying on its truth. It is relevant simply on the basis the statement was made, and its probative value[13] does not depend on the credibility of the person who made the statement.	Proof of threats by terrorists that D would be killed unless he assisted them by carrying their ammunition is original evidence to prove the threats were made (not that they were true) and had such an effect on D's state of mind that his will was overborne, supporting his defence of duress.[14]
Hearsay	Witness testimony includes a statement or other representation made out of court by another person not called as a witness, and the statement or representation is only relevant to proof of a fact in issue in the proceeding if it is true.[15]	D is charged with 'arson' of a hotel. At trial, the prosecution propose to call W, who made a statement that N told W that N had observed D in the vicinity of the hotel shortly before the fire and that D was carrying a large jerry can. This evidence is hearsay and cannot be given at trial by W unless it comes within an exception to the rule.
Documentary	Witness testifies as to the contents of a document, which contains writing or symbols that are of evidentiary significance to a fact in issue in the proceeding. Admissibility of documents is governed by special rules.[16]	P gives evidence of entering into a written contract with D for the supply of building materials and the document is produced as evidence of the terms of the contract. The writing in the document is relevant for proving the existence of the contract.
Real	Witness testifies as to the existence of an actual thing that the tribunal of fact can perceive and experience for itself. The thing proves itself and the party producing it does not have to rely on inference for its existence although, depending on the nature of the thing, it may become a source of inference.	W gives evidence that a knife produced in court that was found at the crime scene is what she saw D use to repeatedly stab V. Views, demonstrations, experiments, maps, models, diagrams and the demeanour of a witness are also forms of real evidence.[17]

KINDS OF EVIDENCE

Let us turn now to the significant classifications of evidence that you will encounter in your study of the law of evidence. Table 1.1 (see page 4) provides a useful summary. In the practical examples, terms used are shortened to an alphabetic letter and the legend for these is as follows:

D = Defendant
V = Victim
W = Witness
I = Insurer
A = Alibi witness
N = Not available as witness
P = Prosecution/Plaintiff

Finally, an important categorisation for the rules of evidence is the distinction between civil and criminal proceedings. As we proceed through a consideration of the rules of evidence, you will discover that there are some specific rules applicable only to criminal proceedings, some applicable only to civil proceedings and some applicable to both, all within one law of evidence. Generally it can be said that it is more difficult to prove facts in issue in a criminal case because the stakes involved are usually of higher importance than in a civil case, which typically involve resolution of a dispute between two parties about the liability to pay, or the amount of, money. In criminal cases there is a stronger adversarial culture where the liberty of the defendant and the balance between the state and the individual is at the forefront. Public confidence in the criminal justice system is essential, so a corollary is that the rules are more strictly applied to ensure the admission of evidence that is clearly probative of facts in issue and is not unfairly prejudicial to a defendant.

RELEVANCE, ADMISSIBILITY AND WEIGHT

RELEVANCE

> The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.[18]

This nineteenth century definition is an influential precursor to the contemporary definition of a foundational concept in the law of evidence. Fundamentally, to be admissible as evidence, information must be relevant to a fact in issue. In short, the principle is that one fact is relevant to another if it weighs on the probability that a fact in issue can or cannot be proved to exist. This is now reflected in s 55 EA:

55 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.

Facts in issue are ultimate facts which the plaintiff and defendant in a civil action or prosecution and defendant in a criminal proceeding must prove for their action, prosecution or defence to be successful.[19] The connection between a piece of information and the fact in issue is the linchpin of the concept of relevance in the law of evidence. Information that is relevant is admissible as evidence, unless it is found to be inadmissible through operation of an exclusionary rule or is rejected through the exercise of judicial discretion. Irrelevant information is simply inadmissible without the need to consider the operation of any exclusionary rules.

Questions of relevance are questions of fact to be decided according to our experience of the way people and things behave in the world.[20] We use a natural logic in applying our life experience to everyday events and transactions. Accordingly, 'relevance' is really an extra-legal concept for which the law provides limited interpretative assistance as it is difficult to codify the term into an absolute and precise test. This flows directly from the nature of human reasoning when trying to characterise and construe experiences.

The ALRC explained that the definition in s 55 EA requires 'a minimal logical connection between the evidence and the fact in issue. In terms of probability, relevant evidence need not render a fact in issue probable or sufficiently probable—it is enough if it only makes the fact in issue more probable or less probable than it would be without the evidence—that is, it 'affects the probability'. The definition requires the judge to ask *could* the evidence, if accepted, affect the probabilities.'[21] Accordingly, a broad threshold test is involved under the Act; this test can be distinguished from the common law concept of 'legal relevance', which excludes evidence of minimal probative value that would compound difficulties in the proceedings or unduly add to its time and cost. In *Festa v The Queen* (2001) 208 CLR 593, Gleeson CJ, in considering the threshold issue of the relevance of evidence, stated (at 599):

> If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration.

> It is not enough to say that it is 'weak' … whether it is weak might depend on what use is made of it.

That final point relates to another important evidentiary concept known as 'weight', which we will consider later in this chapter.

A CASE TO REMEMBER

Smith v The Queen (2001) 206 CLR 650

Smith v The Queen (2001) is a bank robbery case where there was an issue of identification in relation to photographs taken by a security camera. The appellant had been identified as the person in the photograph apparently keeping lookout ('cockatoo') while the co-offenders took the money. The identification was made by two police officers who had had previous dealings with the appellant and recognised him as the person depicted in the bank security camera images. The High Court emphasised that the first question to address with such evidence (and by logical extension—any evidence) is whether it is relevant and, if it is not, no further questions about admissibility arise. In determining relevance, the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ at 653–654) stated it is fundamentally important to determine the issues at the trial. In criminal trials, the ultimate issues are expressed in terms of the elements of the offence and, applying s 55(1) EA to the specific facts of this case, there was a narrow issue of whether the appellant is depicted in the bank photographs. The police witnesses were held to be 'in no better position to make a comparison between the appellant and the person in the photographs than the jurors … who had been sitting in court observing the proceedings' (at 655). Accordingly, the witness's assertion that he recognised the appellant was not evidence that could rationally affect the assessment by the jury of the fact in issue. Rather it simply permitted substitution of one view for another and did not promote the process of reasoning from relevant evidence to the conclusion of a fact in issue. Therefore the appeal was allowed because the police evidence was irrelevant and inadmissible, as the jury were as well placed as the police officers to have a view on this fundamental issue of fact.

In the later case of *R v Marsh* [2005] NSWCCA 331, a similar issue arose involving identification of an appellant from bank security camera images. On this occasion, however, the identification was made by the appellant's sister from photographs published in a newspaper and was held to have been correctly admitted as relevant evidence, with the Court of Criminal Appeal distinguishing the facts in *Smith v The Queen* (at [18]):

> Unlike the police officers in *Smith*, Ms Wood had grown up with her brother and had an ongoing association with him. The witness had the advantage, not shared by the jury, of the long time opportunity, which she asserted, of observing her brother and of noting his characteristics, his stature, his facial features, and the manner in which he wore his

jacket, which the witness claimed was so familiar to her. Hence the evidence which Ms Wood was able to give and did give satisfied the requirement of relevance.

Basically, in the contemporary context of the EA, a fair summary is that all information that is logically relevant is admissible as evidence although if the connection to a fact in issue is too ambiguous and vague it may not reach this threshold.[22] Otherwise it will ultimately be subject to the trial judge having a discretion to exclude evidence on the grounds of remoteness or insufficiency.[23]

Provisional relevance

The relevance of certain information submitted as evidence in a proceeding will sometimes depend upon the proof of another fact,[24] which can create inexpedient obstructions to proof if the question of admissibility must be held in abeyance until there is adequate proof of the facts on which its relevance depends. Section 57 EA addresses this problem with a flexible approach allowing the court to make a finding of provisional relevance for certain evidence subject to further evidence being admitted at a later stage of the proceeding based on a test of whether it is reasonably open to a jury to find the fact established when that further evidence is admitted. The party seeking to adduce the information as evidence will ordinarily give an undertaking to the court to adduce it at a later point in the trial. In practical terms it is an issue about the order of calling witnesses. Usually a party will adopt the most logical and practical method of calling witnesses listed in the case having regard to the matters of proof to which each of their evidence is directed and their availability to appear in court at designated times.

ADMISSIBILITY

Information is 'admissible' as evidence in a proceeding if, in addition to being relevant, it is not rejected through the operation of an exclusionary rule, or in the exercise of judicial discretion, or under one of the procedural provisions in the Act. This position is reflected in s 56 EA:

> **56 Relevant evidence to be admissible**
>
> **(1)** Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> **(2)** Evidence that is not relevant in the proceeding is not admissible.

Importantly, evidence may be found to be admissible for one purpose but inadmissible for another. The essential question to be asked is: 'What is the use which the court is invited to make of the evidence by the party tendering it?'[25] Where information is submitted to have multiple relevance to a fact in issue and an exclusionary rule operates to prevent the information from being used in one of those ways, it will not necessarily prevent it from being admitted as evidence to be used in another way.[26] If this happens in a trial where a jury is the fact-finder, the trial

judge will be required to give a carefully framed direction as to how the evidence can be used. If it involves a complex direction which will be an insurmountable barrier to compliance, the trial judge may exercise their discretion to exclude the evidence having regard to the overriding obligation to ensure a fair trial.

The question of admissibility is a matter of law for the court to decide and under s 142(1) EA such questions are decided on the balance of probabilities. It is possible that determining a question of admissibility may depend upon a preliminary finding of fact by the court, but it must be distinguished from the weight of evidence, the next evidentiary concept we will consider, which is a question of fact.

WEIGHT

Once admitted as relevant, the weight of evidence is its persuasive effect on proof of the fact in issue to which it is directed. There is a close relationship between weight and relevance[27] but, rather than simply just advancing proof of a fact in issue, weight is identified with factors that affect the extent to which the jury or fact-finder would accept the evidence in reaching their determination about the existence or otherwise of a fact in issue. The cogency or degree of acceptance of evidence will be paramount in determining the weight it has in resolving disputed factual issues. An important factor which affects the weight of evidence is its source, and whether it is the best that a party can reasonably procure in all the circumstances. Overall, understanding of the evidentiary concept of 'weight' can be summed up to be 'more intuitive than analytical; weight is something we are more likely to "appreciate" than to understand'.[28]

DRAWING INFERENCES

The process of drawing inferences is a prominent evidentiary concept. The significance of drawing inferences was touched on when we considered circumstantial and some other types of evidence above. Essentially there is a two-step process[29] where the question to be determined is whether from the existence of a particular fact (A) it should be inferred that another fact (B) existed, exists or will exist. First, in this reasoning process, is it possible or open to draw that inference? Second, if it is, should it be drawn in the particular case?

Inferences will be drawn by the tribunal of fact from a consideration of human conduct and experience so that, in the case of *R v Ryan* (unreported, NSWCCA, 15 April 1994), it was a question of whether the alleged victim's distress was evidence supporting an inference that the sexual intercourse was non-consensual. Certainly human experience tells us that the inference where A (distress) exists, it is possible to draw an inference that B (forced intercourse) took place. It then remains