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TRIAL DOCUMENTS – PROVING, TENDERING AND CROSS-EXAMINATION

I take my topic to require a discussion of the use of documents in one's own case – evidence in chief – and in the opponent's case – cross-examination. I understand you want me to say something about (a) the means by which documents can be got into evidence and (b) the use to which they can be put in each of these categories.

I am told that you requested a lecture on this topic because of some concerns you have about using documents in your trials. I do not know what has given rise to these concerns but I should reassure you that there is no need for any sense of alarm. You should not regard documentary proof as something of a mystery or something likely to blow up unless handled expertly. When proving the facts necessary to your case documents are your best friend. I think it true to say that judges place considerable reliance upon documents which are contemporaneous with the events in issue and which were prepared before the self interests generated by litigation became apparent. Although you can find in the text books and journals much elaborate discussion about the admissibility of documents you should not in practice encounter many difficulties.

Before dealing with particular aspects of the proof or use of documents let me say something more general. You should know before a trial starts what documents you want to get into evidence and/or what documents you want to use to damage your opponent's case. If you have been briefed to advise on evidence you will have produced an analysis of the issues of fact that are to be litigated and the evidence necessary to prove or disprove each fact. You should thus have identified each document, the issue to which it is relevant and the purpose for which it is to be used.

Even if you have not been briefed formally to advise on evidence your own preparation for trial should have included such an exercise.

I expect you will all practise in Federal courts as well as State courts. Much of the law relating to documentary evidence is now found in legislation; the State *Evidence Act*

1977 and the Commonwealth *Evidence Act* 1995. Happily I am concerned only with the State Act and do not have to perform the mental gymnastics needed to practise simultaneously in the two systems. The Commonwealth *Evidence Act* has made substantial changes to the common law rules about documentary evidence and it differs substantially from the State Act. Commonwealth law is much simplified. Part 2.2, ss 47-51 are of particular relevance. Section 51 abolishes the common law rules as to the means of proving the contents of documents. Among other things the best evidence rule does not exist for the Federal and Family courts. Section 48 says that a party who wants to prove a document merely tenders it. No particular proof of authenticity or identification is required. The court must take the document for what it appears to be. Objections to relevance will, of course, still be available. Sections 166 to 169 set out procedures which enable a party in some circumstances to examine or test documents or to require persons involved in their production or control to be called as witnesses for the purpose of testing the documents. I do not intend to go through these in detail. You should be aware of them.

There is a similar though much more limited facility in the *Uniform Civil Procedure Rules*. Rule 227(2) allows a party to tender any document which has been listed and identified by the disclosure process. These documents of course are only those in the opponent's possession and which are directly relevant. Even so the provision will obviously be helpful.

What are documents?

Both Acts contain an extended definition of "document". It includes maps, drawings, photographs, audio and video tapes, films, CD's and in whatever language.

Documents in chief

In most cases there will be agreement between counsel that various documents are relevant and admissible. Where the documents consist of communications between the parties or their agents, or where the authenticity of documents is not in question and proof of that fact would be a formality, the documents can be tendered by consent or without

objection. The modern emphasis on the efficient conduct of litigation and the discouragement of disputes except on matters genuinely in contention means that there is no usually any practical difficulty in putting relevant documents into evidence. Thus contracts, where breach is an issue, or where misrepresentation inducing the contract is alleged or some entitlement under the contractor is claimed, will be tendered in the opening. The same is true of contracts that for example are sought to be rectified or wills that are required to be proved in solemn form. In such cases the documents themselves will not be in dispute although the circumstances in which they came into existence may be or the consequences flowing from the documents may be disputed.

Tendering a document is merely the physical process whereby a document is received by the court as evidence. As you all know they become exhibits. The tender may be a part only of a document. This happens for example where someone other than the author of the document has made notes or commentaries on the document or on the back of a photograph. The tender will often be of the document or photograph "without the additional notes".

Sometimes documents are referred to before they have been formally proved and tendered and sometimes a document is shown to a witness who cannot identify it. If it is wished to put the documents into evidence later and it is important that the fact that the document was shown to the witness or was otherwise referred to be recorded the documents can be tendered or, more correctly, marked for identification. The documents are then produced to the court which maintains possession of them but they do not at that point in time become evidence in the case. The judge will not look at them. Later when sufficiently proved the document "formerly marked for identification" will be admitted as an exhibit. The same occurs with documents produced in answer to a subpoena. They are produced into the custody of the court until they are proved and tendered. Before that happens they are not evidence.

If a witness is asked to identify a document so that it may be tendered it is not necessary that the document first be shown to opposing counsel. It is quite permissible to show the

document to the witness, elicit answers which prove it and make it relevant and then tender it. In such a case, however, opposing counsel who has not seen the document may ask to read it before it is received by the court in order to ascertain whether it is objectionable.

Best Evidence Rule

The rule in essence requires that the document which is the most reliable form of evidence should be tendered. That means that a signed original is to be preferred to an unsigned copy. In these days of proliferating photo copies and facsimiles the rule is not rigidly adhered to, at least with respect to letters and other communications though it is, obviously, for contracts, deeds or wills. The rule is pragmatic in operation. The best evidence of an e-mail is, I suppose, the image on a screen but a printed copy of the message would be acceptable upon proof that it is in terms identical to the electronic transmission.

A second aspect of the rule is that a party relying upon the words in a document for any purpose other than that of identifying the document must adduce primary evidence as to its contents. That is to say if you are relying upon a clause in a lease to claim rent or on the terms of a contract to claim damages for breach you must put the lease or the contract into evidence. There is a prohibition against leading what is called secondary evidence of the contents of a document. Someone who has read a document cannot say what it said. The document itself must be produced. There are of course exceptions. Proof of the actual document is not required where (i) all copies have been destroyed or cannot be found after a proper search; (ii) where the original cannot practically be produced for, example a billboard or the name and date of death on a gravestone; (iii) when the original is in the possession of a stranger who lawfully refuses to produce it; (iv) where the original is in the opponent's possession and he refuses to produce it after proper notice.

Where secondary evidence of the contents of a document is admissible the secondary evidence may take several forms. A copy of the document may be tendered. Copies may sometimes be certified or examined. These types of copies are usually restricted to

public documents. There are no degrees of secondary evidence. Oral evidence of the contents is equally admissible as a copied document.

Before a document can be tendered it must be (1) relevant to an issue and (2) admissible.

Whether a document is relevant can only be addressed by reference to the circumstances of a particular case. The admissibility of documents can be considered until two categories: Where documents are public and where they are private.

A public document is one which:

(a) Is brought into existence and preserved for public use on a public matter.

(b) Is open for public inspection.

(c) Has entries which are made promptly after the events which the document purports to record.

(d) The entries are made by a person having a duty to enquire and satisfy himself as to the truth of the recorded facts.

Examples are birth and death certificates and entries in the Land Titles Register as to proof of ownership of land. If relevant such documents are admissible as evidence of every particular stated in them. Note s 51 of the *Evidence Act* which allows certified copies of public documents to be tendered without the difficulty of producing the original.

Many statutes make documents or copies of documents admissible. Thus s 80 of the *Australian Securities & Investments Commission Act* provides that copies or extracts from a book relating to the affairs of a body corporate is admissible. See also s 155 of the Commonwealth *Evidence Act* which allows certified extracts of Commonwealth records to be admissible. This would apply to meteorological reports. Section 5 of the Act makes the section applicable to proceedings in State courts.

A primary rule within the law of evidence is that hearsay statements are inadmissible. Documents which are relevant because they contain a statement of fact are, by definition, hearsay because those statements are made out of court. If documents of this nature are to be got into evidence they must fall within one of the exceptions to the hearsay rule. The two most important are the statutory exception principally found in s 92 of the *Evidence Act* and the exception constituted by admissions against interest. On this basis, to be admissible private documents must be proved to have been signed or made or acknowledged by the opposing party. They must of course also be relevant. There is no requirement that the maker of a document must prove it in the case of photographs and maps. It is not necessary to call the photographer or map maker. Anyone who can recognise what is depicted in the document can prove it.

Proof of a document where signed by an opposing party can be given by a witness who saw him sign or who is familiar with his signature or by a handwriting expert who can compare the signature with other signatures that are proved to be the opponent's.

Documents used to refresh memory

A witness may refresh his memory from a document, either outside the courtroom or while giving evidence. The document used for the purpose need not be the witness's own but where it is not the witness must have known of the transactions recorded and examined the document while the facts were still fresh in his memory or the witness must have supervised the making of the document. The important point is that the witness must have personal knowledge of the contents of the document at the time when he had a recollection of the events recorded. If a privileged document is used to refresh memory the privilege is waived when the witness testifies.

Opposing counsel may call for the document and read it without having to tender it. This is so even where the witness is cross-examined on the document if the cross-examination does not go beyond the parts of the document used by the witness to refresh memory. If the cross-examination extends to parts of the document not relied on by the witness to refresh his memory the whole document may be tendered by the side which

called the witness. The cross-examiner may also be compelled to tender it. The judge has a discretion to require the tender of the statement where the opposing party does not.

Statutory exceptions to the hearsay rule

There are substantial statutory exceptions to the prohibition against the relation of documentary hearsay. The most important provision is s 92. As you know it provides that in any civil proceeding where a witness could give direct oral evidence of a fact any statement contained in a document and tending to establish that fact is admissible if the maker of the statement had personal knowledge of the matters contained in the statement and is called as a witness, or if the document forms part of a record relating to some undertaking and is made in the course of that undertaking from information supplied by persons who had or may reasonably be supposed to have had personal knowledge of the information and the person who supplied the information recorded is called as a witness. Importantly the requirement that the maker of the statement be called as a witness may be avoided where he or she cannot attend or cannot be found or there is no reason to think that the maker of the statement would have any recollection of the matters contained in it.

You should also note s 94 which applies when a statement is tendered pursuant to s 92 and the maker of the statement is not a witness. Section 94 allows the tendering of evidence which would have been admissible to discredit the maker of the statement if he had been called as a witness. Also it allows the production of statements made by the same witness inconsistent with the one relied upon for the purpose of discrediting that statement. Section 98 gives the court a discretion to reject any statement notwithstanding that it is admissible under the earlier sections.

The section is very important. It is not used as much in practice as it could be. It allows, for example, documents used by a witness to refresh his memory to become admissible in their own right. It is the means by which hospital records and various government inspectors' reports can be got into evidence. Diary entries are similarly

admissible. The section allows the tendering of prior consistent statements which would otherwise be objectionable.

The *Evidence Act* contains other provisions useful in practice. They also amount to exceptions to the hearsay rule. Sections 83 to 91 deal with books of account, that is documents used in the ordinary course of a business ("undertaking" is the term used in the sections) to record financial transactions. Entries in the ordinary books of account of the undertaking are admissible and become proof of the transaction, or payment, or receipt, they purport to record. It must be proved that the entries were made in the ordinary course of the business. That proof can be given by "a responsible person familiar with the books of account of the undertaking". That evidence may be given by affidavit. By s 86 it is not necessary to produce the original books. A copy is admissible provided that a witness testifies orally or in affidavit that he has examined the copy and the original and that the copy is true.

Apart from the statutory provisions, the common law permitted a witness to be called to prove the financial position of a company (or partnership or business) where that is relevant or where the results of a particular transaction is relevant. Where a routine system of account keeping is established even where the record is the compilation of a number of persons, the entries are to be treated as the consequence of a system and someone, from the company or an outside accountant, who has looked at the books can give evidence as to the state of affairs revealed by the books. The records looked at must be identified by the witness, and tendered, but the witness will be able to say from a perusal of the documents that the result is a profit or deficiency of x as the case may be. The authority is *Potts v Miller* 64 (CLR) 282 at 304 – 5.

You should be aware of s 95 which provides that statements in a document produced by a computer and intending to establish a fact is admissible where direct oral evidence of the fact would itself be admissible. There are conditions. They are

(a) That the document was produced by the computer during a period in which it was used regularly to store or process information.

(b) That the information recorded was of the type regularly supplied or processed by the computer.

(c) That the computer was operating properly or if not that its malfunction was not relevant to the production of the document containing the relevant information.

(d) That the information reproduced by the computer was derived from information supplied in the ordinary course of business.

These provisions allow the tendering of bank statement, invoices, statements of account and the like. There appears to be no difficulty in practice with the production and receipt into evidence of such documents.

Many financial documents, especially those prepared by banks such as loan agreements and mortgages contain a provision that a statement signed by a manager or other identified official asserting that a particular amount is due and owing is conclusive evidence of the amount of the debt. You should be aware of s 57 of the *Property Law Act* which provides that such a contractual provision means only that the certificate is to be received as prima facie evidence of the assertion in it. It may be challenged.

Conclusiveness of documents

Evidence extrinsic to a document is as a general rule inadmissible if it is tendered to add to, vary, or contradict the terms of a document which is a judicial record, a transaction required by law to be in writing, or a contract. "Parol testimony cannot be received to contradict vary add to or subtract from the terms of a written contract or the terms in which parties have deliberately agreed to record any part of their contract". The rule finds most applications with respect to contracts. There are exceptions. Contracts partly written and partly oral is one obvious case. Evidence can be led of the oral terms which supplement the written ones. However this exception cannot be used as a means of adducing terms which would alter what is in writing.

Another exception is where a written contract has been varied by subsequent oral agreement. This of course produces a contract which is partly in writing and partly oral.

Another exception is where a written contract is discharged and brought to an end by oral agreement.

Questions concerning the validity of a written contract may be the subject of oral evidence. Such evidence is admissible to show that the contract is effected by a mistake or illegality or was induced by fraud or innocent misrepresentation or that the contract was conditional upon the fulfillment of some event.

Documents in cross-examination

This topic has been the subject of a number of papers. You can consult *Seminars on Evidence* (edited by Glass) at p. 136; *Cross-examination on Documents* by McHugh 1985 1 Australian Bar Review 51; *Cross-examination on Documents* by Malcolm 1986 2 Australian Bar Review 267; *Cross-examination of a Party on Pleadings* by MacNamara 1989 5 Australian Bar Review 176 and *Cross-examination and Documents* by Phillips 1990 64 ALJ 591. The articles by McHugh and Malcolm appear to me, with respect, to be excessively technical and seem to reflect particular New South Wales practises especially in jury trials. Some parts of the articles are not apposite here because of the operation of s 92 and s 101 of the *Evidence Act*. Be aware of the effect of those sections when you read the articles.

The technique of cross-examination is beyond the scope of this lecture but this much can be said. You should always have a plan for cross-examination and if you are using documents you should know exactly what ones you propose to use and what purpose each is to serve in your cross-examination. You should always know what it is you want to get out of the witness in cross-examination or what particular parts of the testimony you need to discredit and how you intend to go about that. If you are relying upon a document to establish an inconsistency you will have to tie the witness down to a precise statement which is obviously inconsistent with the document. You cannot leave room for ambiguity. Cases exist, but they are relatively rare, where the documentary statement is directly contradictory to the later testimony. More usually the inconsistency is subtle or implied in the sense that a state of affairs is described in the document which would not

exist if the facts were in accordance with the later testimony. To make the point that the witness has changed story it is necessary to prevent the witness having any scope to supply explanations for their differences. Knowing what the document says the cross-examination should aim to confine the testimony so that the inconsistency is stark and immovable.

On a matter of practicality you will probably find that the cross-examination will proceed more smoothly if you arm yourself in advance with a number of copies of each of the documents which you will put to a witness. Nothing disturbs the flow of a cross-examination more than counsel scrabbling at the bar table to find the document or worse still not being able to find it. If you have a number of documents which will feature in cross-examination and the cross-examination is likely to be at all lengthy I would suggest that you have enough copies for the witness, yourself and the judge and, if you feel like being helpful, your opponent. The cross-examination is likely to be more effective if the judge has a copy of the document at the same time the witness has it and is being questioned about it. Technically I suppose the judge should not see the document until it is tendered but in practice the procedure I have mentioned is not objected to and works well.

Malcolm suggests that there are three purposes for which a cross-examiner may wish to utilise documents. They are

(a) to prove a document which the cross-examiner wishes to tender

(b) to prove a fact referred to in a document without necessarily tendering the document

(c) discrediting the testimony of the witness.

It is convenient to deal with each separately.

As to (a) you may wish to put into evidence a document which has come or which you believe has come from your opponent's side but you may not be able to prove in your own case that it was made or signed by the opposing party. You can put it to a witness in

cross-examination to elicit those facts. If the answer is favourable it can be tendered. Of course if the answer is unhelpful you will have to prove the document through some other witness.

As to (b) McHugh suggests that a document may be put to a witness in cross-examination even though the witness was not the author of the document if its contents are within the personal knowledge of the witness. In such a case the witness can be asked whether a fact appearing in the statement is true. In this way facts may be got into evidence without the production of a document which, in any event, may be inadmissible. The authority cited by McHugh for the proposition, *Alchin v Commissioner for Railways* 35 SR (NSW) 498 at 509 does not seem to me to support it. I have reservations about such use of documents. I have always thought that it was impermissible to question a witness about a document which cannot, in some way, be shown to be the witness's own. Thus a director might be asked about the minutes of a meeting of directors at which he was present even though he did not make them, but a stranger could not be cross-examined on them.

If a witness has personal knowledge of facts which are set out in a document he can be cross-examined about his knowledge and about the facts. If he gives a version different to that which appears in the document it cannot become a tool in the cross-examination unless the witness was responsible in some way for the compilation of the document.

The limit on the use of such documents may be that referred to by both Malcolm and McHugh. A document, not the witness', could be shown to the witness who could then be asked:

> "Having looked at that document do you still adhere to your testimony?"

If the witness answers in the negative you will have achieved a great deal. If the answer is in the affirmative the document, unless otherwise admissible, has served no purpose and cannot be put into evidence. Nor can any questions be asked of the witness which might elicit the contents of the document.

In my 27 years at the Bar I think I saw the technique used twice both times without success. I do not recommend it but you can if you wish try for yourselves.

(c) affords the most frequent use of documents in cross-examination. This is to discredit the testimony of a witness. Typically what you hope to do is to show that the evidence of the witness contradicts an earlier statement made by the same witness or that the statements made earlier are inconsistent with testimony given in court.

An allied use of documents in cross-examination, in more complex cases, is to use them to prove a course of conduct or dealing inconsistent with the story told by the witness or to prove that the witness's state of knowledge was different to what is claimed in the witness box.

The use of inconsistent statements is regulated by sections 17, 18, 19 and 101 of the *Evidence Act*. Section 18 requires that if a witness is to be asked about a former inconsistent statement and it is desired to tender the earlier statement the witness must first be asked to "distinctly admit" that he made such a statement. The section applies to prior oral inconsistent statements as well as documentary ones. In the case of written statements it is easy enough to establish whether or not the witness distinctly admits having made the statement. You show it to him and ask if he signed or otherwise made it.

Of course you do not have to tender the prior inconsistent statement. You may not wish to if it contains passages that otherwise corroborate what the witness has said. It is permissible to ask the witness about the previous statement, identifying it sufficiently, and ask whether on that occasion a contradictory statement had been made. If the witness will not make the admission or cannot remember you will have to show him the document. Even so you do not have to tender it though your opponent may.

Note section 19 which provides that a witness may be cross-examined on a previous written statement without having to show it to the witness. Normally you would want to show the witness the document and then tender it especially if the inconsistency is stark. If you do intend to tender the document you must "call the attention of the witness to those parts of the writing which are to be used for the purpose of contradicting" the witness. That is most easily done by putting the document or a copy of it into his hands.

Section 101 has an important effect. At common law the effect of proving that a witness had made two inconsistent or contradictory statements about the same fact would lead generally to the court finding the witness's testimony unreliable. Neither version could be accepted. However the earlier inconsistent statement could be received only for the purpose of discrediting the witness. What had been said on the earlier occasion could not be received as evidence of what had happened. Section 101 changes this. The prior statement is admissible as evidence "of any fact stated therein of which direct oral evidence" would be admissible.

Be aware that if in a trial you call for a document from your opponent and it is produced your opponent may require you to put it into evidence. It would seem that once tendered in this way it becomes evidence of the facts stated in it even though it would not ordinarily have been admissible.

If a witness is cross-examined as to part of a document counsel who called the witness may, in re-examination, put that part of the document into evidence together with such other parts of it as are necessary to explain or modify it. This opportunity will only arise where the document has actually been shown to the witness and questioned about it.

You should also be aware that if you cross-examine a witness on a document you can be required to tender the document.