Marshalling the Evidence

An Address to the Advanced Evidence and Proof Unit Students
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The Hon. Justice Stephen Hall
Supreme Court of Western Australia

MARSHALLING THE EVIDENCE

AN ADDRESS TO THE ADVANCED EVIDENCE AND PROOF UNIT STUDENTS UNIVERSITY OF WESTERN AUSTRALIA, LAW SCHOOL, WEDNESDAY 27 JUNE 2023

Since this unit is called Advanced Evidence and Proof, I will take the liberty of presuming that you have at least some interest in what evidence is and why we have laws relating to it.

Perhaps surprisingly, definitions of evidence are often convoluted abstractions.

Wigmore says that evidence is 'Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of the proposition, not of law or logic, on which the determination of the tribunal is to be asked'.[1]

Blackstone, more succinctly, says 'Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very point in issue; either on one side or the other'. [2]

Jeremy Bentham describes evidence as 'Any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact Taking the word in this sense, questions of evidence are continually presenting themselves to every human being, every day and almost every waking hour of his life. [In a legal context, when presented to a judge it] is some fact by which, supposing the

[1] *Wigmore on Evidence, Evidence in Trials at Common Law* (Tillers Revision, Vol 1, 1983) 8.
[2] Blackstone, *Commentaries on The Law of England* (1768) 367.

existence of it established, a decision to a certain effect would be called for at his hands'. [3]

There are a few things going on here, some expressly stated, some implied. First, evidence is about facts. That is, things which are experienced by the human senses. Things are known by being seen or heard. The word 'fact' also implies that the thing has an objective existence, whilst different people may see things differently there is only one reality. The law is a great stronghold of empiricism.

Secondly, evidence is distinguished from legal or logical principles. Evidence is the primary or raw material to which those principles can be applied but should not be confused with them.

Thirdly, and for our purposes most importantly, evidence is characterised by its purpose in a court. What makes facts evidence is their use in persuading a decision maker to come to a conclusion about an issue that has been referred to the court for determination. Of course, there is something inherently circular in this part of the definition. It doesn't assist in identifying what facts can be used as evidence and what facts cannot.

What really distinguishes the facts we use in our everyday life, as described by Bentham, from those that can be used in a court are the laws of evidence. For evidence to be admissible in a court it must be relevant and not excluded on some ground such as the rules against hearsay or non-expert opinion. I am not going to talk about the content of the law of evidence today – what I am going to do is ask you to think about why this branch of the law exists. What are the underlying principles that animate this area of law? How do they impact on those who make decisions, like judges?

[3] Bentham, *Rationale of Judicial Evidence*, Book 1, Chapter 1, 17-18, Book 1, Chapter 2, 24 (Mill edition 1827)

The laws of evidence have a bad reputation amongst the general public and law makers. They are viewed as a creation of lawyers – as the rules of an exclusive game that defy common sense. Like the Glass Bead Game in the novel of the same name by Hermann Hesse[4] – a game that has been played for centuries by high priests as the only path to enlightenment – even though the original purpose of the game has been long-forgotten and all that remains are the rules, which are obscure and difficult to understand.

This negative view leads to the exclusion of the laws of evidence – for example in tribunals or commissions of inquiry.[5] The implicit justification for this is that otherwise important and pertinent facts would be left out, and that better and fairer decisions will be made. But this assumes that the laws of evidence have become too rigid and no longer work for justice. That, in my view, is a simplistic view.

Even in tribunals where the laws of evidence are excluded the principles that animate those laws still operate in a practical way when it comes to determining what weight to give to evidence. For example, a party in the State Administrative Tribunal can give hearsay evidence of what someone else told them, but the weight given to that evidence will inevitably be affected by the fact that the other person is not present or on oath or available for cross-examination.

This brings me back to the purpose of the law of evidence. Despite what laymen may think, it is not a mere device for giving lawyers an occupational advantage. It is about ensuring that only relevant facts are taken into account and that prejudice and emotion are excluded. It is all about the fairness of the process and the quality of the decisions that are made at the end of the process. Decisions will likely be more accurate, reliable and fair if they are only based on material that is logically probative and if material that is merely prejudicial is excluded.

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[4] Hermann Hesse, *Das Glasperlenspiel,* 1943

[5] See, for example, s 32(2) of the ***State Administrative Tribunal Act*** 2004 (WA)

The reason why the law of evidence is particularly important in the common law is because it is adversarial. Every case is a contest of ideas. Each party has a theory or hypothesis that it is seeking to establish. Those theories are opposed and inconsistent. The point of a trial is to pit those theories against each other and see which one prevails. This is done by allowing each party to call witnesses and by allowing the other party to test them in cross-examination.

The laws of evidence are the rules of engagement in the contest that is the trial. Like the rules of a boxing match or a football game or a game of chess. A boxing match without rules is just a fight, a football game without rules is just a riot, a chess game without rules is simply pointless. So, what would a trial be if we didn't have the law of evidence? Let's just do a thought experiment about what would happen if all the rules were removed.

In fact, you don't have to look far for an analogy. How do arguments progress in the relatively unregulated world of social media? You know how it goes – one person states an opinion – usually in categorical terms – another person disagrees and presents an opposing opinion in equally categorical terms – the first person reiterates their opinion with emojis – the second person responds with emojis – the first person responds by resorting to the philosophical fallacy of *ad hominim*, being a derogatory remark accompanied by expletives – the second person responds in kind – nobody wins. Social media is the triumph of attitude over substance. Everyone is entitled to an opinion, and nobody has to justify it to anyone.

If this was to happen in a court a trial would degrade into a free-for-all where prejudicial material would be relied on and it would become a contest of character and not of the merits of the case. We need rules to ensure that the process is fair and the outcome is correct. In a court of law, you are <u>not entitled</u> to your opinion. To advance your case you have to be prepared to present evidence to support it

and logical arguments that lead the decision-maker to your point of view. You have to know what evidence is admissible and what weight that evidence will be given. You have to be conscious of how the evidence that favours you can be put together into a compelling case.

Just going back to the definitions of evidence, the concept of persuasion looms large. Persuasion is a human activity. Facts don't persuade, they simply exist. It is the advocate who deploys the facts who persuades. You will hear it said that advocacy is the art of persuasion – and so it is – but calling it an art suggests that it is some nebulous thing. A thing that doesn't have logic at its core, but rather appeals to emotions. This is where advocacy training often goes wrong – of course there is room for style and technique in advocacy – but that is the final touch, the varnish on the painting.

Good advocacy has to start with preparation and the construction of a case around a case concept. Then thought has to be given as to how that case will be presented. How will the client and his or her claim be characterised? What evidence will be led and what questions asked in cross-examination? How will opening and closing addresses be organised? Everything must be outcome focussed – but not in a blunt and obvious way – rather in a way that coaxes and draws the decision maker to reach their own conclusion, being the conclusion that you want them to reach.

In ancient Greece and Rome rhetoric was an essential part of the education for those who had ambitions to play a role in a public life, including in the law courts. It was no mere intensive 2-week unit – it was studied for years. Students learnt how to structure and present their arguments in the most effective ways. This was a respected and comprehensive discipline. Today the word rhetoric has only negative connotations – it implies word play and mere trickery – as typified in the phrase 'empty rhetoric'.

This is very regrettable – because although skill in arguing has been largely lost in the contemporary public forum (and, notably, in politics), there is one place where it still matters. Aspiring advocates would do well to read the works of Aristotle, Cicero and Quintilian on rhetoric.[6] And not just their pedagogical works – we still have some of Cicero's great speeches available to study.

Let me give you an example, in 66 BC Cicero was retained to represent Aulus Cluentius Habitus on a charge of murder. Cluentius was a member of a leading ancient family that were based in a town east of Rome. Cluentius was accused of poisoning his step-father, Oppianicus, whose fifth wife had been the mother of Cluentius. The two men had what might today be called 'a history'. Two years before his death Oppianicus had been accused of the attempted murder of Cluentius. Oppianicus was convicted and sentenced to a period of expulsion, but it was widely believed that the judges at that earlier trial had been bribed. The obvious person with a motive to bribe the judges was Cluentius.

The trial did not take place until 8 years after Oppianicus' death. By that time there had been a great deal of rumour and debate about the circumstances. General public sentiment was firmly against Cluentius. All of this made the task of defending Cluentius very difficult indeed.

Most of the evidence against Cluentius came from slaves and was suspect. Perhaps for this reason the prosecution relied strongly on the evidence of the earlier trial – both as showing that Cluentius had animus towards Oppianicus, but also that he was unscrupulous in his pursuit of a man he hated.

In his closing speech Cicero utilises a range of rhetorical devices and techniques, he outflanks the prosecution case by presenting a plausible explanation for the result in the earlier trial, he undermines the character of Oppianicus by painting

[6] Aristotle, *Rhetoric*. Cicero, *De Oratore*, Quintillian, *Institutes of Oratory*.

him as a man who lived a life of appalling criminality, he then carefully makes an appeal to the judges to follow their higher duty to do justice rather than making what might be a popular decision. This all follows a logical sequence that he explains at the outset, in what is a very long speech.

The first thing he does is to use surprise. He starts with what seemed to be the strongest part of the prosecution case - the earlier trial - and accepts that it was tainted by bribery. But he frames the prosecution case as one that essentially relied on prejudice and not proof[7] …

> First, I will deal with the question of prejudice arising from the trial of Oppianicus, and then I will turn to the actual charges that are before you today. And I will make it abundantly clear to everyone that it is not part of my plan either to evade the facts by suppression or to darken them by misrepresentation. But when I turn my mind to the question of how these two themes can best be developed, it becomes apparent that the second of them - the theme which comes within the scope of this tribunal appointed to try poisoning cases and is therefore the proper object of your investigation - will scarcely demand a great deal of time or oratorical effort. But as regards the other theme, the question of prejudice, the situation is entirely different. That is a matter which has nothing to do with legal decisions at all. It has much more in common with the seditious agitations of public meetings than with the calm deliberations of the courts. Nevertheless, I can see very clearly indeed that it is going to cause me far the greatest amount of toil and trouble.
>
> Yet confronted though I am with this difficulty, gentlemen, there is one thing which gives me a good deal of comfort. It is this. When a court such as your own is able to concentrate on the actual facts of a charge, you normally expect the defence counsel to provide all the refutation that is necessary. That is to say, you do not consider yourselves obliged to offer any special contribution to the defendant's acquittal over and above whatever arguments

[7] Marcus Tullius Cicero, *Murder Trials*, Translated by Michael Grant (Penguin Classics 1986)

> his counsel may be able to bring forward to contradict the accusations and prove his own case.
>
> But when, on the other hand, it is a question of prejudice that is involved, you are under an obligation, before deciding between the two sides, to consider not only the pleas which the advocate has actually advanced, but also those which he *ought* to have advanced. Take this case of Aulus Cluentius. In the actual charges against him his own interests are affected, and those of no one else. But seeing that prejudice, too, is so largely involved, the matter becomes more serious, because this means that the common interest, the interest of every one of us, is at stake.
>
> In one part of my speech, therefore, I shall have to employ the language of proof, and in the other the language of entreaty. In one, I shall only need to request your attention: in the other I shall have to appeal for your protection. For against prejudice no man can hope to make any headway at all, unless he feels assured of the sympathetic support of your eminent selves.[8]

What Cicero then does is deal directly with the earlier trial and sets out to prove that Oppianicus was in fact plainly guilty of the earlier charge of attempted murder and that he was the person who had attempted to bribe the judges, though he failed in the end when he was convicted by one vote. By this means Cicero turns what seemed to be an insurmountable strength of the prosecution case into a fatal flaw. He argues that Cluentius had no need to bribe the judges in the earlier case and in so doing manages to portray his client as a victim and Oppianicus as an immoral schemer who only married Cluentius' mother for her property.

Cicero then moves on to another argument – that the court did not have jurisdiction because it could only try senators or officers of state who were accused of murder. But this entirely legal argument, though probably sound, is

[8] Op Cit p121 to 122

only used to make a different point. Cicero tells the judges that he has been instructed by his client not to take the point because 'He believes it is best for himself that his innocence should be demonstrated on its merits and on the facts, and not on legal technicalities'. By this means Cicero simultaneously demonstrates his own abilities as a lawyer and the virtue of his client.

In a passage that resonates with us today, Cicero then goes on to appeal to the duty of the judges to be fair and independent. He uses the technical argument regarding jurisdiction to illustrate his point…

> So let us suppose, gentlemen, that this is what occurs, and that you find yourselves confronted with an action of this kind, in which the defendant belongs to a category exempted from the law. Well, if this were the situation, even if he was the manifest object of the most widespread hostility and detestation, even if you yourselves hated him and would be deeply reluctant to vote for his acquittal, I am perfectly confident that you would acquit him all the same: since you would feel obliged to subordinate your hatred to your conscience.
>
> For a thoughtful judge cannot avoid reflecting that the Roman people has assigned and entrusted to him a certain range of duties - and that the commission he has received from them extends to that point and not one single step farther. He must bear in mind not only the powers he has been granted, but the trust that has been placed in him as well. He must have the courage to acquit a man he dislikes, and to condemn a man he does not dislike at all. He must unceasingly keep before his eyes not merely his own inclinations, but the duty he owes to the law - and to his own idea of what is right. He must also note with the most meticulous care the legal provisions under which the charge is being brought, the sort of person that the defendant is, and the facts that have been brought to the attention of the court.
>
> These are all matters a judge must never lose sight of. But if he is really good and wise, he will also feel, when he takes his voting-tablet to record his verdict, that it is his duty to remember something else as well. He does not

> stand alone. He is not at liberty to follow his own whims. For there are other matters he has got to take into consideration. They include the law, and his knowledge of what is right and fair, and the demands of honour. Feelings such as caprice, malice, prejudice, fear, personal passions of every kind, he must just dismiss from his heart. He must place the promptings of his own conscience above everything else. We were given our consciences by the immortal gods, and nothing can take them away from us. If *they* remain satisfied with everything we do and plan throughout our entire lives, then other people will approve of us, too, and we shall be able to live out our whole existence without ever being frightened of anything at all.[9]

Finally, Cicero turns to the allegation that Cluentius poisoned Oppianicus. He has created the impression that the largest part of the prosecution case (which he has previously dealt with) is based on mere prejudice. He says that he can deal with the actual evidence briefly, precisely because it is so insubstantial. He approaches this by asking the judges (rhetorically) a series of questions ….

> My first question is this. What motive could Cluentius have had for murdering Oppianicus? I admit that they did not get on well with one another. But if a man hopes for the death of his enemy, it is because he either fears him or hates him. Now, as to the former, it is quite impossible to point to any fear which could conceivably have induced Cluentius to undertake the responsibility of so appalling a crime. Indeed, there was no longer any reason for anyone to be afraid of Oppianicus at all, now that he had paid the penalty for his misdeeds - expulsion from the community. For what was there, in fact, to be frightened about? An attack from a ruined man, an accusation from a convicted criminal, the evidence of an outlaw? these presented no perils whatsoever. Or alternatively, seeing that the two men were enemies, let us imagine for a moment that Cluentius was so blinded by hatred that he could not bear Oppianicus to stay alive. But surely he cannot have been stupid enough not to realize that the life which Oppianicus was

[9] Op Cit p 226 to 227

> living at that time could scarcely be described as a life at all. For his existence was that of a condemned man, an outcast, an individual whom everyone had abandoned; a scoundrel so repulsive that no one would accept him under his roof, or go hear him, or even speak to him; no one would so much as give him a single glance.[10]

Cicero then goes on to ask who could have actually administered the poison and considers who had an opportunity to do so and by what means. He suggests that there were others who could equally have wanted Oppianicus dead. And then he pulls out a final surprise …

> You make the point that Oppianicus died very suddenly. Well, suppose he did. And so do many other people too: but that does not necessarily mean that they have been poisoned! Besides, even if he did die suddenly, even if the suddenness aroused some suspicion, it would be directed against others before it ever fell upon Cluentius. But actually this story of his sudden death is a bare-faced fabrication. To prove that this is so, let me tell you the true facts about Oppianicus' death - and let me tell you also how, after he was dead, Cluentius' mother made every effort to pin the responsibility falsely upon her own son.[11]

He then tells a story of how when Oppianicus was banished he and his wife stayed with a farmer, that the wife had an affair with the farmer, Oppianicus found out and left and sometime later fell from his horse and died. There was nothing suspicious in the death but Cluentius' mother, out of hatred for him because he had never forgiven her for remarrying, set up a false story that he had poisoned Oppiancicus. It is not an entirely convincing alternative story - but by this time the judges are receptive to the defence case and ready to embrace a reason to acquit.

[10] Op Cit p 233 to 234
[11] Op Cit p 235

Cicero only needs to add that the prosecution case critically depends on the evidence of two slaves, who were tortured and forced to sign a document and then not called at the trial. He reveals that one of these slaves is owned by Oppianicus' son and the other is dead (pre-empting by thousands of years the rule in ***Jones v Dunkel***)[12].

Cicero ends by presenting a petition from the townsfolk of Cluentius' hometown and has them stand in court to show their support - a form of good character evidence. He then makes a final appeal …

> You are fair-minded people, gentlemen, and when a man is brutally assailed it is your custom to grant him your generous help. Save Cluentius, I beg you. Permit his hometown to welcome him back unharmed. Restore him to his friends, his neighbours, his associates, whose devotion you behold. Place him under an obligation to yourselves and your children - an obligation which will last for all time.
>
> That, judges, is what you must do. It is demanded of you by your honour and your humanity. I appeal to you, and I appeal in the absolute confidence of a just cause, to release finally from his misfortunes a truly good and innocent man, a man who is loved and cherished by a whole host of his fellow-citizens. And when you do this, you will also be triumphantly proving something else as well: that whereas the place for prejudice is a public meeting, a court of law is the abode of truth.[13]

Cluentius was acquitted.

But my point is not to tell the story of Cluentius, but to show what Cicero did with it. How he used a case concept to make an argument that defied expectations. How he accepted the major point of the prosecution case and turned it back on his opponents. How he appealed to the judges to put aside prejudice

[12] ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298.
[13] Op Cit p 253

and be true to the principles of impartial justice. And many of the things that Cicero said to the judges are as true today as they ever were.

Hon. Justice Stephen Hall
Supreme Court of Western Australia

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