

Evidence Notes

Without Prejudice documents

- These documents have privilege to not be used in court.
- Without Prejudice is marked on the correspondences to show that both parties are in the process of making an agreement and are not generally admissible as evidence;
- Neither party may rely upon anything said or written in the course of the negotiations for the purpose of proving liability and or quantum at trial.
- Without prejudice documents are only admissible once there is a binding agreement between the parties arising out of it, or for the purpose of deciding whether such agreement has been reached, and the fact that such communications have been made, to show that negotiations have taken place
- However, the content may not be used as evidence. Further in English courts the presence of 'without prejudice' is unclear as to whether the document is in fact without prejudice but it does help.

Calderbank Letters

- This letter began as a tool used to make an offer for ancillary relief in a matrimonial proceeding and to promote settlement of disputes out of court.
- A letter containing a settlement offer and written "without prejudice save as to costs", that is with the express reservation of the right to refer to the letter to the court on the question of costs if the offer is not accepted.
- The content of the offer is therefore protected by privilege and is not admissible unless to prove that an offer was made.
- However, if a party has unreasonably failed to accept the offer, the letter may be used by the successful party post trial for costs on an indemnity basis,
- Or used by the losing party for cost, e.g. if the cost granted by the court is less than the amount offered by them in the Calderbank offers
- This offer is now used in proceedings other than matrimonial or not and will be admissible on question of costs (Cutts V Head).
- In England, the Part 36 Civil Procedure Rules has taken over to regulate the Calderbank Offers, but still relevant in the common law countries.

Criminal Trial: burden and standard of proof

- The standard of proof in Hong Kong Criminal Trials is guaranteed under the Basic Law to be, the presumption of innocence before conviction.
- As such in Criminal trials, the burden of proof lies with the prosecution, unless express or implied by statutory provision.
- For the prosecution, in criminal trials, the rules of standard and burden of proof is such that they must bear the burden to prove that the matter at hand has happened, beyond reasonable doubt in order to convict the defence.
- It will be for the defence if pleading, not guilty, to draw issues with the standard of proof that the prosecution is putting up.

Civil Trial: burden and standard of proof

- General principle: burden of proof lies on the asserter of the claim. - Wilsher v Essex Area Health Authority.
- But if the defendant wishes to put up a specific defence, they have the legal and evidential burden of mounting that defence. However the incidence of the legal burden of proof will decide the outcome of the case if the tribunal is not able to come to a decision on which to prefer.
- The standard of proof is for the asserter to demonstrate that on the balance of probabilities, where the task is to prove the case is more probable than not to have happened. However there are incidences where the civil court has taken the Criminal standard of proof.

Evidential and Legal Burden

- **Legal Burden:**
 - This is to demonstrate that in the normal state of affairs directed at convincing the jury of the defendant's guilt beyond reasonable doubt/ or the civil standard of proof. Woolmington (UK CA)
 - But a defendant who raises a defence does not have a burden of proving that defence
- **Evidential:**
 - Primary as an aspect of the sensible proposition that there must be a degree of evidence on asserted issues before they can be a matter to be answered for.
 - It is for the judge to then decide whether the assertion can go before the jury. It is the prosecution's duty to adduce enough evidence of the guilt of the accused for the judge to be satisfied that there is a case to be answered.
 - Defences' duty to raise some evidence if raising a specific defence.

Voir Dire

- When two parties are considering whether a piece of evidence is admissible or not. A voir dire or, a trial within a trial may be held to determine the admissibility of a particular piece of evidence in dispute.
- In Hong Kong the standard of proof required in a voir dire for admissibility of a piece of evidence is, beyond reasonable doubt that the evidence is true or, notwithstanding that it may be true, that it was not obtained illegally, and the burden will fall upon the prosecution to show this.
- Usually held on matters such as whether a confession was made voluntarily.
- If the confession is not admissible none of the voir dire evidence is admissible for any purpose
- If it is admissible, cannot use voir dire evidence for truth and must be repeated during the trial if intended to be used to cross examine the Defendant at trial to see if there is an inconsistency.
- **CONFESSION**- if a confession is represented to be obtained by 1) oppression of the person who made it or 2) in consequence of anything said or done which is likely, in the circumstances existing at the time, to render any confession which might be

made by him in consequence of it to be involuntary, the court may not allow the confession to be given in evidence against him, except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not so obtained.

- Note (e) Rules and Directions for the Questioning of Suspects and Taking of Statements: it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

Alternative procedure

- Abandon voir dire at trial: A magistrate or district judge may use this, where the issue of the admissibility of the evidence is dealt with at the same time as the general issue.
- This is because the judge is going to hear the evidence anyway and they are professionals that can separate the issues.
- The Judge will hear evidence about the special issue, and the Defendant may testify about the special issue and maybe crossed examined about the special issue but not the truth of the statement.
- The judge will then make a ruling on the admissibility of the statement
- Saves time as no need to repeat the confession evidence.

Direct and Circumstantial Evidence

Evidence must be relevant to a material issue to be admissible. Relevant evidence makes the fact in question more likely to be true based on logic and human experience

- **Direct:** substance of evidence is identical to the fact you want to prove
- **Circumstantial:** Substance of evidence is not identical to the fact you want to prove as such there is a 1) chain of inferences and 2) special direction on inferences that is required to prove that fact (CB 8)
 - i. Chain of inference
 - Common sense, logic and human experience that comes into play. It is not about how strong the case is
 - Watson (Ont CA 1996) - Conclusion on relevancy of evidence by way of inference.
 - ii. Special direction on inference to help jury to apply standard of proof to a circumstantial case (only given in such cases)
 - Dickson Tang (2002 CFA) citing McGreevy (1973 HL) It is at the discretion of the judge to give such direction. However in Dixon, a special direction is not considered unless the jury is asked to find that part or all of the prosecution's case is proved by inference from primary facts (CB12), i.e. partially or the entirely circumstantial case. However, even then it is normally enough to direct the jury that they cannot convict unless they are sure of guilt (CB 10)

- No inference is to be drawn against the accused unless it is the only reasonable inference.

Functions of Judge/ Jury

- **Judge:**
 - Tribunal of law
 - Decides relevancy and admissibility
 - MUST Instruct jury on proper use of evidence and on the burden and standard of proof required, separate treatment of the counts against the defendant and, the separate treatment of defendants
 - Also gives directions on the ingredients of each offence including joint responsibility, defences as appropriate, alibi, self defence etc.
 - Directions MAY instruct jury on evidence regard character, child witness, video evidence, identification and lies.
 - Gives special direction on inferences
 - Oversees trial to ensure it is fair
- **Jury:**
 - Tribunal of fact
 - Assess credibility of witness (verify if they are telling the truth)
 - Assess reliability of evidence (accuracy of evidence and if it could be mistaken)
 - Draws inferences on circumstantial evidence if warranted by the judge.

WITNESS

Competence and Compellability

GENERAL RULE- anyone who is competent and compellable (S5 EO)

- I. Competence: Whether the witness will lawfully be permitted to give evidence at all
- II. Compellability: Whether the witness who is competent to give evidence may be compelled to attend court to give evidence.

THE DEFENDANT

- A defendant is competent to give evidence on his own behalf at trial. However, he is not a competent witness for the prosecution
- A defendant cannot be compelled to give evidence on his own behalf at trial, although it is normal practice for a defendant to give such evidence.
- PROBLEMS
 - LIE OF THE ACCUSED- 1) infers that the accused lacks credibility and therefore his defence should be disbelieved or 2) use the lie as circumstantial evidence from which to infer guilt on the basis that the accused would not deliberately lie about such things unless he was in fact guilty
 - LIE DIRECTION (YUEN KWAI CHOI (2003 CFA)) given when there is danger that jury may misuse the lie, or where there is a risk that the jury may regard lies told by an accused as probative of his guilt
 - A lie can never prove guilt
 - Lies usually affect credibility only

- There may be an innocent explanation for the lie
- In some cases a lie could be used to strengthen the prosecution's case or undermine the defence
- **The lie cannot be used to strengthen the prosecution's case or undermine the defence unless the jury is sure that there was no innocent explanation or motive for the lie**
- Not appropriate to give lie direction where it could confuse the jury or where there was simply a conflict between the prosecution and defence evidence and an allegation that the accused had told a pack of lies in giving his evidence and was not worthy of belief.
- SILENCE: The accused has a right to silence
 - S54(1)(b) CPO states prosecution cannot comment on trial silence
- 1. Silence pre-trial (Lee Fuk Hing)
 - a. It is inappropriate in Hong Kong to use a person's silence against him in any way.
- 2. Silence in the courtroom (Li Defan)
 - a. Accused has right to not testify and jury is not to draw adverse inferences from the accused's silence.
 - b. Jury is not to speculate on what evidence the accused might have given had he or she testified.
 - c. But Li Defan: the judge was entitled to regard the failure of the accused to give any explanation on oath as strengthening the inference to be drawn from the prosecution's case. The standard direction is to be given: Even though silence in court does not imply guilt, it may mean there is no evidence from the defendant to undermine the evidence put before you by the prosecution.

CO- DEFENDANT

- Co-defendants who are tried together are not competent to be called as prosecution witnesses to give evidence against each other. However, if two defendants are jointly charged with the same offence, the prosecution may call one defendant as a witness against the other if that defendant has either pleaded guilty at an earlier hearing, or is tried separately from the defendant.

THE SPOUSE-SPECIAL RULES

- BUT IN CRIMINAL: S57 (1) CPO- The spouse is a competent witness for the prosecution unless they are standing trial together.
- S57 (2) CPO the spouse is competent and compellable for the defence as a witness to give evidence.
- S57 (3) the spouse will be compellable by the prosecution if the offence is a specified offence in s57 (4).
- The spouse is a competent witness but will not be compellable for the prosecution.
- Hoskyn- in spousal abuse cases spouse is competent but not compellable as the identity of interest between husband and wife and because it will allow her to give evidence will rise to discord and to perjury and would be to ordinary people repugnant.

- **S57A HOWEVER IF COMPELLABLE UNDER S57(3) FOR THE PROSECUTION, THE SOUSE MAY APPLY TO THE COURT FOR EXEMPTION IF (they must be informed of this rule by the judge)**
 - **57A (2b) harm to relationship, psychological, emotional and economic interests are in play.**

CHILDREN (s4 (1) EO)-person under 14 years of age)

- S4 EO permits children to give evidence but requires it to be unsworn.
- They are not incompetent by reason of age alone
- They are deemed competent based on their sufficient intelligence to testify and properly to appreciate the distinction between good and evil and the duty of speaking the truth
- Lam Chi Keung (1997 CA): Even if: the child is unable to give intelligible evidence is not per se ruled incompetent.
- Duty of judge to ensure no weight is given and decide if they are competent
- There is no issue of corroboration because it is unsworn, the evidence of an unsworn child may corroborate evidence, sworn or unsworn, given by any other person.

WHO IS INCOMPETENT?

- PREVIOUSLY: Children if in a preliminary inquiry, the judge decides incompetent by way of lacks capacity to communicate or aware of responsibility to tell the truth.
- Mentally ill persons who are incapable of testifying
- Deaf and dumb persons if they are unable to sign or otherwise communicate
- There are also temporary causes: illness or drunkenness rendering the witness unable to understand the question or give rational account of event.
- The accused is not competent for the prosecution.

COURSE OF EVIDENCE

REFRESHING MEMORY- witness is not in a memory test. Ribble Mag Ex p Cochrane 1996(Eng DC)

- A witness who gives oral evidence in court is not allowed to have a copy of his statement in front of him when doing so. However party may apply to court for the witness to refresh his memory in the witness box from a document which was made or verified by him at an earlier time. E.G asks if that is the statement they gave. (inside or ,with discretion from the judge, outside the witness box)
- After the statement is put away, remove to ask the witness to testify
- Allows for independent recollection if witness is having difficulty remembering.
- Ask qualifying questions.
- However: in Auld Report, it is recommended that the only precondition should be if there is good reason to believe that the witness would have been significantly better able to recall the vents at the time the statement was made.

HOSTILE WITNESS s12EO (A.K.A adverse witness)

- When a witness does not co-operate in the witness box, by his demeanour or prior inconsistent statement, shows no desire to honour the oath.

- It is up to a judge to decide if the witness bears a hostile animus to the party calling him and so does not give evidence fairly and with a desire to tell the truth
- Inconsistency alone may be sufficient grounds for judge to declare witness hostile (Choi Hok-Man)
- Common law: if witness is hostile to the party calling them, the court could grant leave allowing that party to cross examine the witness. But this must be applied for without delay as you cannot declare a witness hostile unless they are testifying.
- The party making the application bears the onus of prove
- As a matter of strategy it is best for counsel to get witness to adopt their earlier statement, so that the court may use the statement for truth as of its content.
- S12 EO- discredits the witness supplementing the common law (R v Fraser and Warren). First, asking hostile witness, with leave from court (because you cannot impeach the witness' credibility), whether or not they made a previous inconsistent statement. Then, show that they have made an inconsistent statement.

PRIOR CONSISTENT STATEMENT

- Common law prevents witness from being asked about a previous oral or written statement made by him and consistent with his evidence. (R v Roberts)
- Exceptions:
 - in sexual offence cases, where the victim made a voluntary complaint shortly after the offence had been committed (Leung Chi Keung 2005 CFA)
 - In criminal cases where the accused made a statement when confronted with incriminating facts;
 - Where the statement forms part of the res gestae of the matter in issue;
 - Where it has been suggested that a witness's evidence has been recently fabricated (mere denial of charge may not be enough) and the prior statement must have been made sufficiently early to be capable of rebutting the allegation and the statement cannot be used for its truth it only has probative value lies in the fact that it was made (Hui Chung Wing 2989 CA)
 - In civil proceedings where a previous statement made by a person called as a witness, other than a statement made while giving oral evidence in those proceedings, is admissible as evidence of any fact contained in it.

PRIOR INCONSISTENT STATEMENT-goes only to the credibility of the witness, but you may get the witness to adopt the statement then it goes in for its truth (Anthony Wu 1999 CFI)

- S13- if the witness in court makes a statement that is inconsistent to the one he gave earlier, proof that he made, the original statement may be given to him to ask if he made that original statement.
- Contrary to the collateral finality rule (if you cross examine as to credibility you can't call rebuttal evidence, you have to take the witness' word as final.
- This exception applies if it is to written statement (s14EO) if relative to the subject matter of the proceedings
- In civil proceeding it may be used as the truth if leave is granted by the court (s51 EO)

CORROBORATION RULE

- Other independent (not that of the accused or co-accused) evidence/ testimony which supports the evidence to be corroborated and which implicates the defendant in the crime with which has been charged. (R v Baskerville)
- It is desirable because if there is not corroboration; warning will be given to the jury that it is dangerous to convict without it.
- Trial judge needs to warn jury of the dangers of convicting a person on uncorroborated evidence and need to instruct juries on what evidence was capable of constituting corroboration in the circumstances of the case.
- Failure of judges to discharge these duties was generally grounds for quashing the conviction.
- However s60 CPO, this requirement has been abrogated, but still of some relevance (Wong Chi King).

PROTECTION OF VULNERABLE WITNESSES- Part IIIA of Criminal Procedure Ordinance (CAP 221)

- E.g. children under 17 (for sexual abuse offence) and under 14 (for all others), mentally incapacitated persons, witness in fear (time delay between offence and court made them forget or if there are reasons to make them fear of giving the evidence.
- Court will protect these witnesses instead of using viva voce
 - Live Television Link (79B CPO) for all of them
 - Video Recorded Evidence (s79C CPO) for all except witness in fear
 - Depositions (sworn witness statement s79E CPO) applies to all except for witness in fear.
- These are all clearly hearsay but it is an exception taken by the court to protect these vulnerable witnesses.
- In UK further measures are available to protect them that is at the discretion of the court to adopt
 - Screens
 - Clearing people from the court
 - Judges and barristers removing the wig

VISUAL IDENTIFICATION –EYE WITNESS Risk of mistake

- This is so that serious concerns about reliability of the eye witness, the compelling force of such evidence, the tendency of the jury to overvalue these evidence and past cases of miscarriages of justice are avoided
- The witness identifies the defendant if
 - Picks them out informally
 - Picks them out at the police station
 - Claim to recognise the defendant as someone previously known to him
- Turnbull Directions (1977) gives special guidelines to jury when a case is wholly or substantially dependent on the correctness of one or more witnesses who gives evidence to visually identify the defendant as the person who committed the crime and the defendant disputes that identification.
- The directions are:
 - Identify evidence he adjudges as capable of supporting identification
 - Judge should point out to the jury the dangers of relying on identification evidence, and the special need for caution when such evidence is relied on. He will tell the jury that it is very easy for an honest witness to be mistaken as to identity and he will direct the jury to examine closely the circumstances of the original sighting and take into account the factors listed when considering the quality of the identification evidence.
- The judge must assess good and bad quality of identification by;
 - Amount of time the person was under observation.
 - Distance between the witness and the person observed
 - Visibility
 - Obstructions blocking the witness's view
 - Know or seen the person before
 - Any other reason to remember the person
 - Time lapse between sighting and identification
 - Errors
- Good identification- judge to decide then give Turnbull direction
- Bad identification but supported by other evidence, judge to give a similar warning but draw specific to weakness of identification.
- Bad identification and no support- judge should end the trial immediately as no case to answer for.
- R v Keane- Turnbull directions are to deal with problems inherent in the fleeting glance of an eye witness, in this case identification may be poor even though it is given by a number of witnesses.

NON EXPERT OPINION

- Opinion evidence rule, witness is there to testify to facts not opinions; however some lay opinions are acceptable but generally qualitative descriptions made without any special knowledge or tools.
- Such as everyday life scenarios, distance, value of objects, identification of objects, apparent age etc.

EXPERT OPINION EVIDENCE- Juries are instructed that they can reject the experts based on their own common sense. Duty is to court and not the party that hired him (r35A CJO)

- Based on a set of assumed facts that cannot be used to prove facts of the case.
- Must be 1) Relevant, 2) Necessary 3) Reliable based on qualified expert, and reliable scientific method, before the expert evidence will be admitted.
 - **Relevancy-** Hui Chi Wai (2001 CA) only as to facts not to the mens rea of the defendant.
 - **Necessity-** Bonython (1984) - is it the kind of subject matter where expert evidence is needed for the jury to form a judgment. If on character, they have to make it an issue before a psychologist's expert evidence can be submitted.
 - **Reliability-** is the expert qualified?
 - Frye test: "Generally acceptance in the particular field"
 - Tsang Chiu Tik (1999 CA)- psychologist not qualified to give expert opinion on whether accused was suffering from abnormality of mind induced by the disease
- HOWEVER IT IS THE residual discretion to exclude if prejudicial (R v DD CB778)

WITNESS: CHARACTER

GOOD CHARACTER- Vye Direction given:

- A defendant's good character will be relevant both to his;
- 1) Credibility as a witness. This means it is a factor to take into account whether you decide to believe his evidence and
- 2) To show the absence of a propensity to commit the offence with which he has been charged.
- Relevancy: if character itself is a fact in issue, then character is direct evidence but if regarding credibility or propensity it is circumstantial.
- Civil proceedings: rules against bolstering credibility and weight given to this evidence
- Criminal proceedings: Non accused witness: rules against bolstering credibility. BUT **ACCUSED WITNESS**: special direction:
 - TANG Siu Man (1998 CFA): Good character cannot amount to defence but it supports his credibility.
 - Trial judge has wide discretion on when and how to instruct jury on good character to pick credibility or propensity unlike Vye common law Vye principles.
- **Vye Direction**: If the defendant with a previous good character gives evidence in his own defence at his trial, the judge will give a direction to the jury that this is relevant both to matters of credibility and propensity (NOW IN HK, TRIAL JUDGE TO DECIDE WHICH LIMB or LIMBS to follow). If the defendant does not give evidence at his trial, the judge will give a direction as to propensity only, unless the defendant has put his defence on record elsewhere
- Tang may have ignored ROWTON (case before Tang): good character can only be adduced by reputation evidence and not by evidence of disposition or specific acts.

BAD CHARACTER

- Common law: Prosecution cannot adduce evidence of the accused's bad character. They cannot for the purpose of impeaching credibility, adduce evidence as it is uncertain whether the defendant will testify. This is due to rule against propensity reasoning: if bad character evidence has probative value only due to mere propensity then its prejudicial effect will outweigh its probative value.
- ADMISSIBLE IF: Zabed Ali (2003 CFA)- starting point to question 1) what is the matter in issue 2) is the evidence of bad character relevant and 3) why is it relevant?
 - If there are reasons other than mere propensity (inference is drawn without any connection to the circumstances of the offence) on the part of the accused to commit the crime then the DPP v P test will apply
 - If mere propensity there may be exceptions.
 - DPP v P test: whether probative force in support an allegation against the accused is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused.

- Adequate jury direction: direct jury as to the matter in issue which such evidence might be relevant and how it might be relevant. Just because he is a bad character does not mean he did it.
- Exceptions for WHEN is bad character admissible:
- When good character evidence is called upon the (e.g. put *character in issue*, the prosecution can adduce bad character as rebuttal evidence (Butterwasser: to attack credibility))
- *Similar fact evidence* in DPP v P- if circumstances involving identification and there is a striking similarity, then it is relevant for admissibility.
- *Cut throat defences* (Randall): if it can assist the jury solving factual dispute, therefore probative value is greater than prejudicial effect.

In cross examination you may ask questions that tend to connect the defendant with the commission of the offence charged (s54(1)(e)) but there is a shield against prior bad character, the cross examination cannot tend to show that he has committed or been convicted or charged with any offence (s54(1)(f)). But there are 4 exceptions to this

1. Common law limb: admissible if prosecution didn't already adduce the evidence before
2. Good Character limb: if character is in issue
3. Imputation limb: imputations on character of prosecution witness-butterwasser
4. Co accused limb: evidence that supports prosecution's case in a material way more than credibility which undermines the defence of the co-accused.

HEARSAY

Definition: a) out of court statement or conduct containing an expressed (express statement) or implied assertion (making assumptions/inferences based on some observed conduct), b) used to prove the truth of that assertion.

Common law: Not admissible in trial proceedings unless it can come within an exception. There is no discretion to admit hearsay that fails to come within an exception.

EXCEPTION Computer generated documents assertion of certain facts: R v Spiby (1990CA) if the document is asserting information which was originally recorded by a machine without the intervention of a human mind. It is hearsay but does not trigger the hearsay rule. But still have to prove the machine was working at the time.

Myers v DPP: court no longer have power to decide exceptions to admit hearsay, it is left for the legislative to decide

This is because:

- Absence of cross-examination
- Absence of oath or affirmation
- Inability to see witness' demeanour
- Fear that jury will give it more weight than it deserves

How to identify hearsay echoes Zabed Ali

- 1) Identify fact in issue to be proven by the proposed evidence
- 2) Identify which one of the four ways the proposed evidence is being used to prove the fact in issue
 - a. **HEARSAY** : Proving on the **truth on an express assertion**
 - i. Sparks: he was a coloured boy as evidence to prove he was not the perpetrator
 - b. **HEARSAY**: The fact in issue is being proven by relying on the **truth of an implied assertion** contained in the proposed evidence. Evidence is being used circumstantially but it involves multiple inferences from the evidence to the fact in issue.
 - i. Kearley: 'found drugs in apartment' and drugs were subsequently found but can we adduce evidence of people looking for the Defendant to buy drugs, the purpose is to imply that the defendant's intention to supply: HEARSAY as you have to assume that defendant had supplied them in the fact before you can move onto supporting the fact in issue.
 - ii. Blastland: Premature knowledge implying he did the crime: HEARSAY as this could give rise to miscarriage of justice
 - c. **NOT HEARSAY**: The proposed evidence is being used as original evidence to prove the fact in issue directly.

- i. Subramaniam (1956 PC)- If purpose of the original statement from the communist captors is to prove another fact that he was subject to threats then it is not hearsay.
- d. **NOT HEARSAY**: The proposed evidence is being used as original evidence to prove the fact in issue circumstantially involving only a single inference from the evidence to the fact in issue
 - i. Jerry Lui (2000 CFA): using false financial records to hide criminal wrong doing. The financial records are not hearsay because it infers wrong doing and not using it to prove the contents.
 - ii. Mawaz Khan (1967 PC): using confession statement from D1 against D2 to draw inference that these are fabrication, not used to prove any alleged facts therefore not hearsay

EXCEPTIONS TO HEARSAY

1) Common law exceptions:

- **Admission and confessions (Wong Wai Man (2000 CFA))**
 - A statement against interest, a confession can only be used against the accused who made the confession, and not for or against any other persons;
 - Mixed statement extensions, the exculpatory parts of a mixed statement can be used for their truth to exculpate the accused that made the statement. But the jury may be entitled to give less weight to the exculpatory parts (Li Defan (2001 CFA)).
 - Myers (1998): co-accused may rely up accused's confession to exculpate himself. But only if the statement was given voluntarily.
- **Declarations against interest by person now deceased**
 - Rogers (1995 EngCA) conditions 1) statement must be against his proprietary or pecuniary interest 2) deceased must have had a peculiar means of knowing the fact 3) it must be against the interest of the deceased at the time that the statement was made 4) declarant must know that the declaration is against his interest.
- **Dying declarations by person now deceased**-because dead people won't lie (Osman)
 - Nembhard (1981 PC): No need for corroboration but still need to care in assessing significance of this evidence
 - Declaration must have been made under unqualified, settled and hopeless expectation of death (Queen v Jenkins (1869))
 - Expectation must be one of imminent but not necessarily immediate death (King v Perry (1909))
 - Exception only applies to cases of murder or manslaughter
 - Evidence is only admissible to prove the cause of the deceased's death (Mills (1955 PC))
- **Res Gestae (things done)**
 - The common law principle of evidence being admitted as part of the res gestae provided that a statement made contemporaneously with an event would be admissible as an exception to the hearsay rule because the spontaneity of the statement meant that any possibility of concoction could be disregarded. Beddingfield test (1879)

- **Prior Identification exception** for observing police officer's evidence to be admitted if Tat and Long (1997):
 - Witness identifies the accused as the perpetrator in the courtroom and recalls identifying accused in the identification parade, police evidence admissible to in dock identification and not for the truth
 - Witness identifies the accused as the perpetrator in the courtroom and recalls identifying someone at the identification parade, police's evidence admissible only to support the in dock identification and not for the truth
 - Witness fails to identify the accused in the courtroom but recalls identifying someone at the identification parade, police can show that the person was in fact picked instead of whether or not they did it
 - Witness fails to identify the accused in the courtroom and forgets having identified someone (toss up, some say police records are admissible but some say it's not).

DOCUMENTS: Statutory exceptions in Evidence Ordinance

- Negative assertions s17A
 - That records that shows that the alleged event did not occur
- Banking records s20-21
 - Law Ka Fu (1996 HKCA) about credit card fraud
- MAIN EXCEPTION: Records Compiled under duty s22
 - Person who supplied the information is dead, unavailable, or cannot be identified, who had or may reasonably be supposed to have had personal knowledge of the information, whilst acting under duty
 - HOWEVER: s22 (2) statements made in connection with criminal proceedings or investigation is not admissible.
 - If a person who prepare the document came to testify he would be admissible providing admissibility requirements are met
- Computer records s22A
 - S22 (8) stipulates that s22 will not apply if s22A applies, computer records are not computer records if the author of handwriting adopted content of computer document.
 - The content of the document may be used as evidence to satisfy the statutory preconditions if s22 (1) (b) is satisfied (that they had compiled the record under a duty and may reasonably be supposed to have personal knowledge. (JERRY LUI)

ADMISSIONS (civil) AND CONFESSIONS (criminal)

Lam Tat Ming: The prosecution must establish that the statement made is a voluntary statement in the sense that it has not been obtained from the accused either by fear or prejudice or hope of advantage extorted or held out by a person in authority or by oppression

Voluntariness must be proven beyond reasonable doubt before it can be admitted as evidence. This is so that the confession is reliable, a man should not be compelled to

incriminate himself and it pinpoints the importance of modern society against police brutality forcing a confession of those in their custody (Lam Chi Ming PC 1991)

- An admission or confession is a statement or conduct that is damaging to the interests of the party who made it or carried it out
 - Conduct demonstrating how the offence was committed (Lam Chi Ming (1991 PC))
 - An apology will constitute an admission if it is a statement against the interest of the author of the statement (Lau Ka Yee (2004 CFA))
- It is an exception to the hearsay rule if
 - Made against the interest of the maker and only inherently reliable to that extent (Wong Wai Man)
 - Mixed statement extension: sometimes confessions also include a statement which is favourable to the defendant, the whole statement will be admissible (Li Defan)
 - Accused may rely on their co-accused's voluntary confession (Myers (1998))
 - Jury should be told the weight to be attached to the confession depends upon all the circumstances on which the confession was made, and that it ought to give the confession such weight as it things fit

Voluntary rule only applies if the confession is made to a person in authority

- Person in authority: anyone who has authority or control over the accused or over the proceedings against him (Rex v Todd 1901)
 - The person who obtains the statement is a person in authority
 - The accused regarded the individual as a person in authority (Deokinanan 1969 PC)
- Nauthum Chau: 1) whether there is any conduct on the person in authority which is construable as inducement, capable of influencing the mind of the accused, and 2) whether the prosecution have proven beyond reasonable doubt that such inducement had not influenced the mind of the accused.
- If there is fear or prejudice or hope of advantage excited or held out by that person in authority then it is not voluntary.
- The fact that whole or part of the statement was the result of a question and answer session between the police officer and the suspect was not a ground in itself for rejecting the statement (R v Chan Bak Chiu)

Oppression: torture, inhuman or degrading treatment, and the use or threat of violence.

- R v Fulling: oppression consisted of exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors.
- This will challenge the admissibility of the confession.

Unreliability: For the court to exclude unreliable confessions, if something was done during the obtaining of the confession e.g. denying the defendant the basic rights whilst under custody.

EVIDENCE UNFAIRLY OR ILLEGALLY OBTAINED

Judge can exclude evidence if unconstitutionally obtained –**HKSAR v Chan Kau Tai (HKCA 2006)**

Sang: Judges in Hong Kong only have two residual powers to exclude evidence

- 1) Prejudicial influence on the minds of the jury would be out of proportion to its true evidential value
- 2) Unfairly obtained self-incriminatory evidence.

It is not the court's duty to discipline police officers for their acts outside the court room.

LAM TAT MING (2000)

- The judge should have a single discretion to exclude admissible evidence to safeguard a fair trial for the accused. It is not about whether the law enforcement agency has committed a misconduct.
- No man is to be compelled to incriminate himself, his right of silence should be safeguarded
- No one can be convicted except upon the probative effect of admissible evidence.

Since Sang, (Looseley 2001 HL) Lord Nicholls revisited the issue, Lee Ming Tee (2001) has similar outcome:

- 1) Common law developed so that court may stay the proceedings for abuse of process (Bennett 1994 HL)
- 2) Human Rights Ordinance

Lee Ming Tee (CFA 2001)

- 1) Stay proceedings in the beginning of the trial on grounds of common law abuse of process
- 2) Where fair trial would be impossible
- 3) Circumstances of abuse offend the court's sense of justice and propriety.

This is down to the principle of integrity the judiciary has responsibility to maintain rule of law they also oversees executive action and to refuse the countenance behaviour that threatens either basic human rights or the rule of law.