

Having Your Day in Court or Surveys as Evidence

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Overview

→ Court Process

→ The Role of Evidence

→ Expert Evidence

→ Survey Practice

→ In Court

→ Market Research, Social Research or
What?

Where I Come From

→ Data Analysis Australia

→ Managing Director

→ Principal Consultant Statistician

→ First legal matter in 1985

→ Dispute over meals served in mining camp

→ Settled before Court

→ First legal survey matter 1990

→ Federal Court of Australia

→ Trade Practices Sec. 52

→ Many since

Relevance

→ Market perceptions

→ Trade Practices bans actions that confuse consumers

→ Demonstrating public needs

→ Liquor Licensing

→ Performance contracts

→ Customer satisfaction related Enterprise Agreements

Court Process

→ Define the matter

→ Document claim and counter-claim

→ Collect and present evidence

→ From all sides

→ Test evidence

→ Ensure it is true and relevant

→ Assemble into a whole

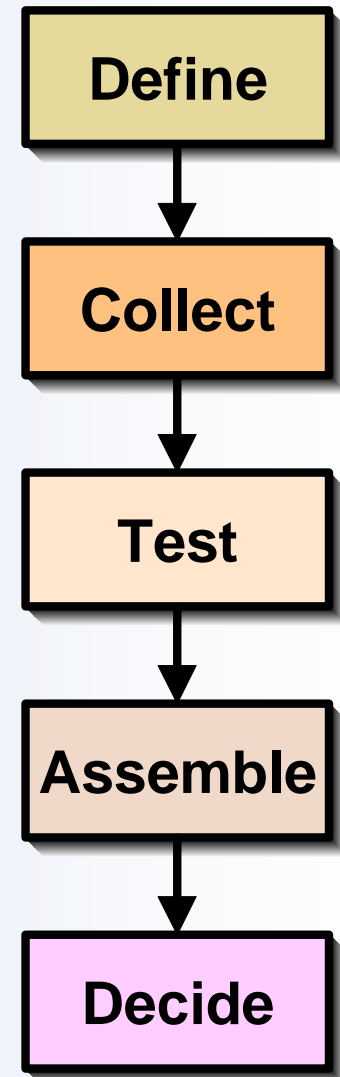
→ Consider totality

→ Highlight what is important

→ Make a decision

→ Decide the case

→ Judge or jury



Civil versus Criminal

→ Criminal where crimes committed

- Usually prosecuted by Crown
- Usually have juries for serious (indictable) cases in Supreme and District Courts
- Guilty if shown “beyond reasonable doubt”
- Can contain procedural matters

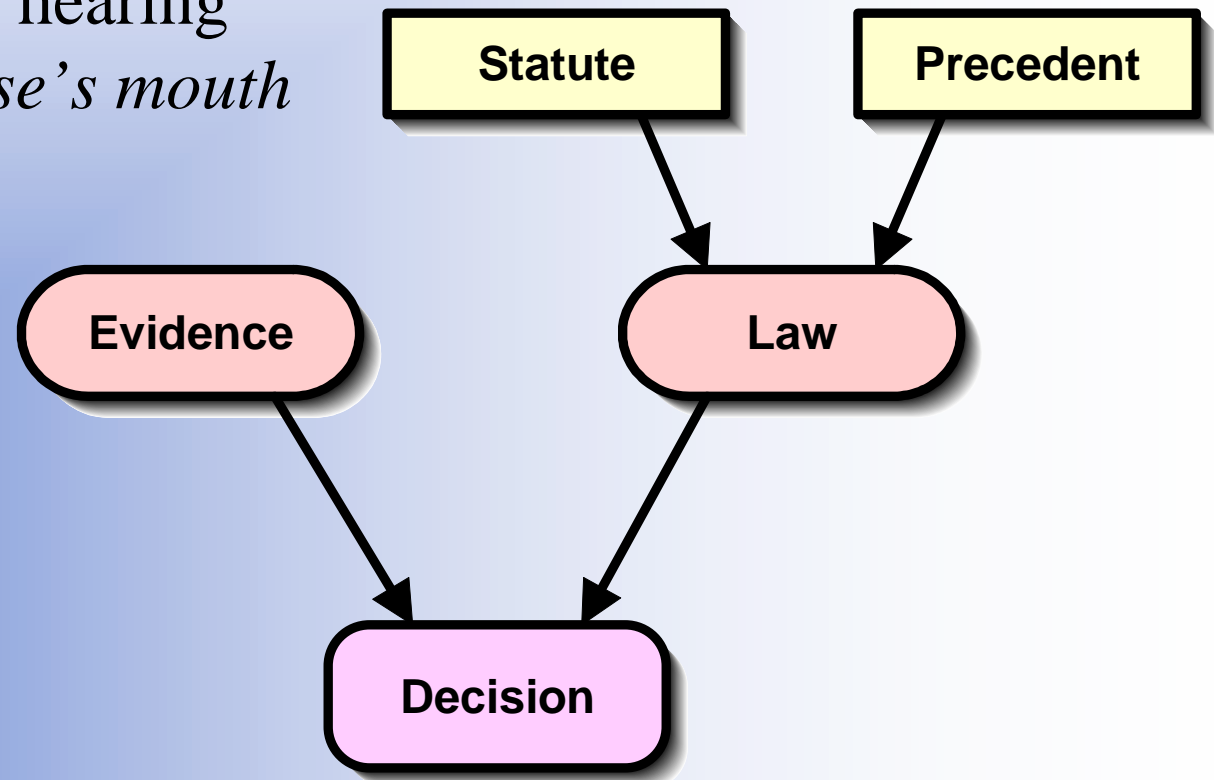
→ Civil comprises all other disputes

- Highly varied
- Most often commercial
- Decided “on the balance of the probabilities”

Role of Evidence

→ Evidence is just one part of system

- Equal with issues of *law*
- But *rules of evidence* are a big part of law
- Emphasis on hearing
from the horse's mouth



Testing of Evidence

→ The other side can cross examine any witness

→ Based on reading of affidavit

→ Their qualifications or experience

→ And any other public documents they have authored

→ Various reasons

→ Clarify

→ Discredit facts

→ Discredit person

Expert Evidence

→ Evidence given by an *expert*

- Expert must have special expertise relevant to the case
- Often defined by qualifications, professional membership and documented experience

→ An expert has special status

- Assumed that they are helping the Court
- Therefore offering impartial evidence
- Usually given a polite examination

→ Evidence often both *fact* and *opinion*

Experts and Lawyers

→ Lawyers regard them as unpleasant necessity

→ Lawyers often do not know enough of subject

→ Independence means they say the “wrong thing”

→ Judges hate disagreement between experts

→ Some experts have bad reputation

→ E.g. SIDS experts in UK

→ But lawyers have rules

→ Not supposed to pressure experts

→ Most don't

Preparing Expert Evidence

→ Discussions with solicitors or barristers

→ Outlining opinions, issues

→ Do the work

→ Produce a report

→ **IF** they like it, then a written statement or affidavit

→ Sworn statement

→ May attach or reproduce the report

→ Present in Court

Surveys as Evidence

→ Partly Fact

- Survey results
- Findings
- Even hypothesis testing

→ Partly Expert

- Gives authority to the choice of method
- Takes responsibility for quality
- Helps interpret results

Are surveys legal?

→ Surveys report what others have said

- A form of hearsay
- Hearsay normally unacceptable
 - Evidence must be direct

→ The expert has a role in ensuring that the evidence is acceptable

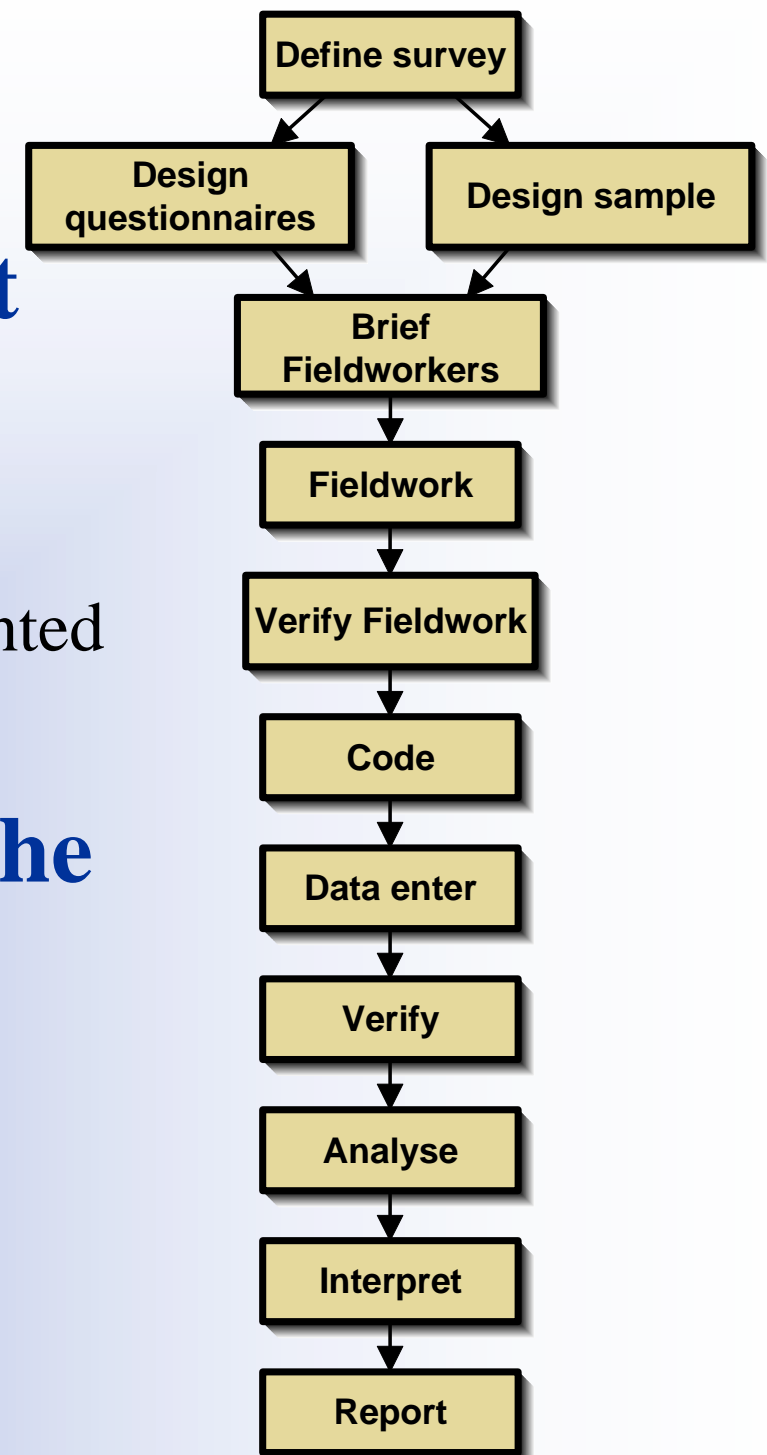
- It is not direct but it is the next best thing
- Must be clear where it comes from to establish “fact”

Continuity

→ When presenting fact must prove where it came from

→ Each step must be documented

→ In extreme cases all the detail is part of the evidence



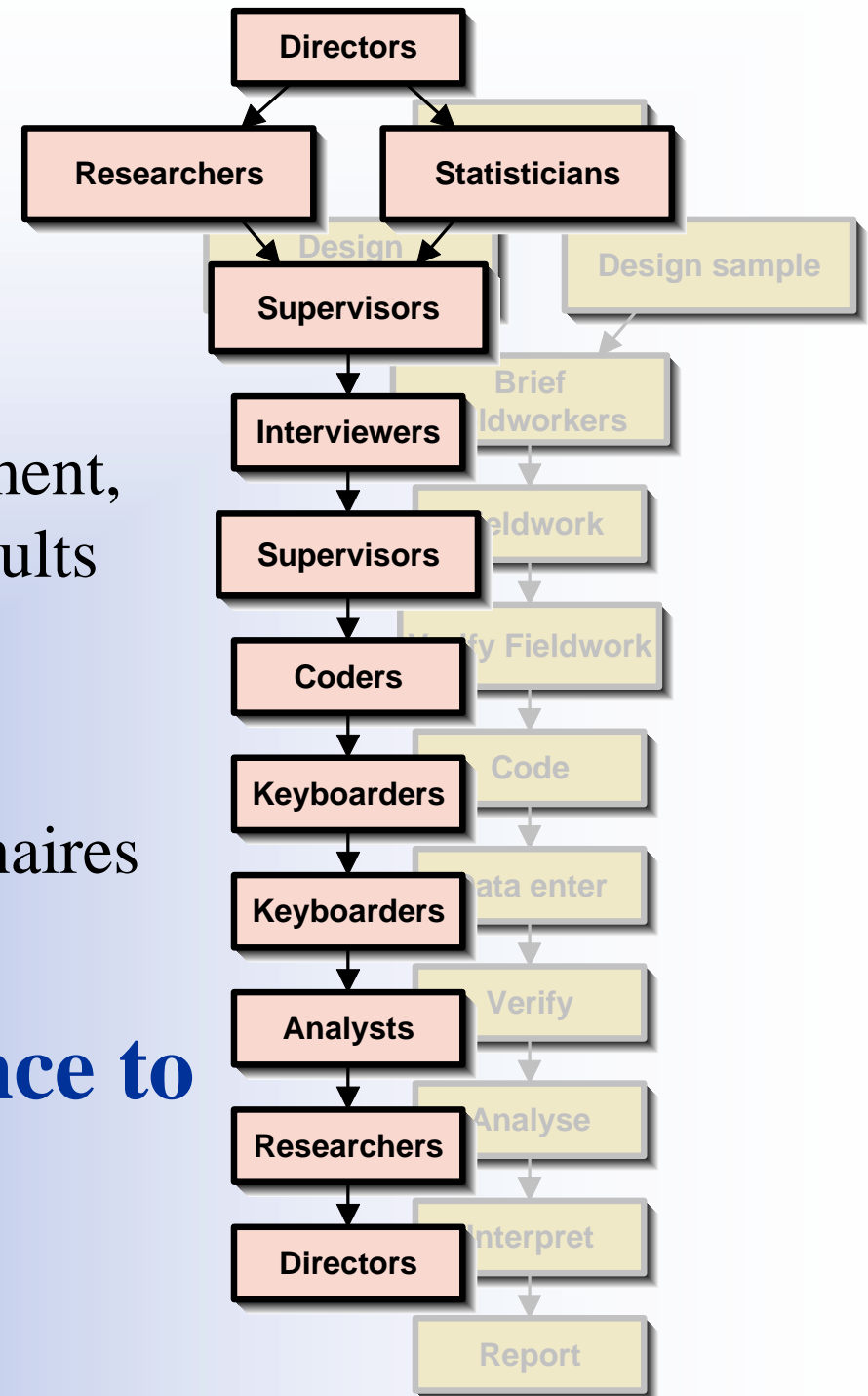
Affidavits

→ Sworn statements

- Prepared with lawyers
- Qualifications, involvement, instructions, actions, results
- Attachments
 - Briefing notes
 - Completed questionnaires
 - Printouts

→ Presented in advance to Court

- And other sides



Large volume of evidence

→ Consider a survey of 800 interviews

- 25 interviewer affidavits, each with briefing notes, sample sheet and about 32 questionnaires
- 2 or 3 supervisor affidavits, with briefing notes and verification sheets attached
- 3 coder affidavits with coding instructions and coding frames attached
- 2 data entry operator affidavits with instructions and possible data structure attached
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→ 20 lever arch files not uncommon

- Copies for all parties

But not always

→ Lower Courts and tribunals have more relaxed rules

→ Less detail required

→ Expert takes on greater responsibility

→ Parties do not have the money

→ Typically a report is all that is required

→ But not always

→ If someone decides to play it hard, almost impossible to stop

Cross Examination

→ After evidence in chief, opposing counsel ask questions

→ Few minutes or few days

→ May be well prepared

→ May have expert assistance

- Another expert

→ Trying to find a weakness

Confidentiality of Respondents

→ Opposing counsel may insist on access to what market researchers consider highly confidential

- Names of respondents
- Originals of documents
- Some internal documents

→ May call respondents

→ Need special provisions to allow this

Weaknesses - procedures

→ Instructions not followed

→ Especially when unclear or verbal

→ Differences in methods

→ Interviewer effect can be tested

- Length of verbatim responses
- Number of probes
- Response rates

→ Errors

→ Inconsistent responses

→ Discrepancies between questionnaires and final report

Weaknesses - Questionnaire

→ Clear language

- Did the respondent understand?
- What did the response mean?

→ Leading questions

- Questions that bias towards a certain answer
- Biased show cards

→ Closed questions with incomplete options

- What happens when no answer fits?

→ Who developed the questionnaire

- Was it the expert?

Weaknesses - Sampling

→ Sample frame

- How respondents selected
- Discretion of interviewers
- Representivity

→ Sample size

- Valid for purpose

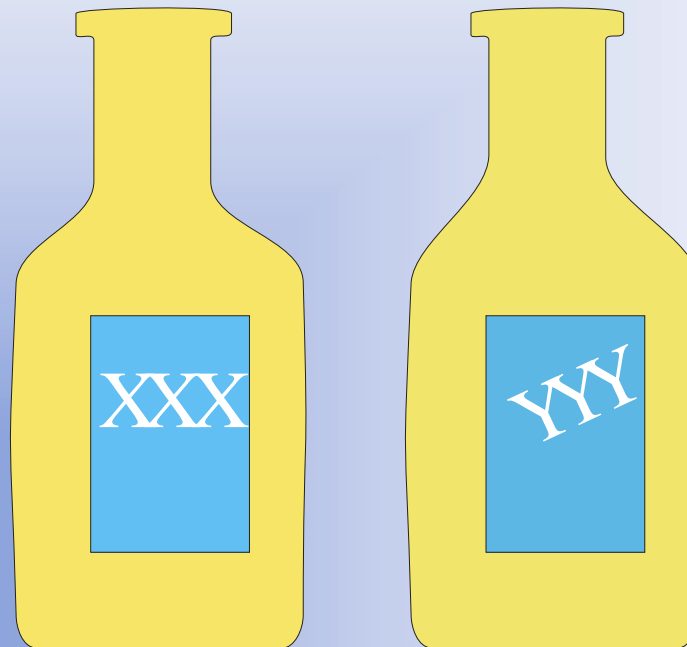
→ Non response

- Follow ups and call-backs
- Refusals

Leading

→ Comparing two beers

→ Do they look the same?



Leading (cont.)

→ Place them amongst several others

→ Ask respondents to identify similar pair



Weaknesses - Analysis

→ Weakest part of many surveys

→ But most lawyers don't know it yet

→ What is significant?

→ Statistics a key part

What is significant?

→ Standard statistics based on Neyman-Pearson testing

- Equivalent to “accept null hypothesis H_0 unless sure beyond reasonable doubt that it is not true”
- One test considered in isolation

→ Is it appropriate?

- Civil matters decided on the balance of the probabilities
 - What is most likely to be true?
- Survey rarely the only evidence

How to do it right

→ Design it right in the first place

→ Keep it simple

→ Minimise verbal instructions

→ Document everything

→ Good interviewing (IQCA ?)

→ Keep it simple

→ Relax in Court

→ Except when it is terrifying