

TOPIC 2. PROOF

Definitions

- **Legal Burden:** obligation to establish elements of the cause of action; determined by tribunal of fact; relevant to each ingredient of the offence or claim. If not discharged, claim or case fails.
- **Evidential Burden:** obligation to show (called upon), that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, having regard to the relevant standard of proof.
- **'Tactical Burden':** common-sense strategic burden arising from the risk of losing on a given issue at a particular point in the trial; if the party does not produce evidence or further evidence, he or she runs the risk of ultimately losing on that issue.

1 Standards of Proof

- **Civil** – P bears legal and evidential burdens in asserting claim/cause of action; D may also bear legal or evidential burdens in raising a defence/counter-claims.
 - Balance of probabilities (**s140(1)**)
 - Not simply a greater weight, must be enough to enable the court to feel actual persuasion that a particular fact is so (**Brown**)
 - Without limiting matters, court to take into account (**s140(2)**): (a) nature of cause of action/defence (b) nature of subject-matter and (c) nature of matters alleged.
 - The EA applies the Briginshaw test. The degree of satisfaction that is required may vary depending on seriousness of the misconduct (**Qantas Airways**)
 - When the law requires proof of any fact, the tribunal must feel an actual persuasion to its occurrence or existence...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal (**Briginshaw v Briginshaw**)
- **Criminal** – Prosecution bears legal burden to prove all elements of the offence; D may bear an evidential burden to put a matter in issue.
 - Standard – prosecution: Beyond reasonable doubt (**s141(1)**)
 - BRD: conveys a meaning without lawyers' elaboration, judge should not try explain to jury what BRD means (**Green**)
 - Standard – defence: Balance of probabilities (**s141(2)**)
 - Legal burden on P. Evidential on accused → evidence which taken at its highest could lead a reasonable jury, properly instructed, to have a *reasonable doubt* that each of the elements of the defence had been negated? (**Braysich**)
 - Legal + evidential burden on accused → “ ” to conclude on the *balance of probabilities* that the defence has been established? (**Braysich**)
- **Circumstantial Evidence**
 - Direct Evidence: evidence which, if accepted, establishes the fact in issue per se.
 - Circumstantial Evidence: evidence which, if accepted, establishes a fact from which further inferences must be drawn in order to establish a fact in issue.
 - Where a case involves circumstantial evidence, it may be necessary to direct the jury that, where they rely upon circumstantial evidence, guilt should not only be a rational conclusion, but also the **ONLY** rational conclusion (**Shepherd**)
 - If it is necessary for the jury to reach a conclusion of fact as an 'indispensable intermediate' step in the reasoning process towards an inference of guilt, that conclusion must be established BRD. (**Shepherd**)
 - If individually doubtful factual inferences may in combination produce a finding of guilt BRD; none is indispensable because none is, or reasonably capable of being regarded as, a logically necessary link in a chain of sequential reasoning towards proof of the fact in issue BRD.
 - A direction that the prosecution must prove the fact BRD may be necessary to avoid a miscarriage of justice, however the court should bear in mind the risk of confusing the jury (**Shepherd**)

2 Prima facie case

- **Civil:** Act doesn't deal with this. Is the evidence *capable* of proving on BOP the P's claim? (P's case is taken at its highest).
- **Criminal:** Prosecution has burden from start to finish, even if they make out a prima facie case (**May v O'Sullivan**)

3 Judicial Notice

S143 Matters of Law

- (1) Proof is not required about the provisions and coming into operation of: (a) an Act, an Imperial Act in force in Aus, a Cth Act, an Act of another State or an Act or Ordinance of a Territory, or (b) regulation, rule or by-law made, or purporting to be made, under such an Act or Ordinance, or (c) a proclamation or order of the GG, Governor of a State or such Administrator/Executive of a Territory (d) an instrument of legislative character
- (2) A judge may inform himself about those matters in any way that the judge thinks fit.
- (3) Includes a reference to a private Act passed by that Parliament.

S144 Matters of Common Knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is: (a) common knowledge in the locality in which the proceeding is being held or generally, or (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) Judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (and jury) to take knowledge of that kind into account
- (4) Judge is to give a party such opportunity to make submissions...necessary to ensure that party is not unfairly prejudiced.

S145 Crown Certificates

Part does not exclude the application of the principles and rules of the CL and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

- Health statistics fall into a class of 'legislative facts' that a court can notice. They fall into the class of 'legislative' facts that a court may judicially notice and use to define the scope or validity of a principle or rule of law. They are matters that 'are not particular to the parties' and assist in defining the content of the principles that govern this case and others like it (Woods)
- An adjudicative fact is a fact in issue or fact relevant to a fact in issue. (Woods)
- A legislative fact is a 'fact which helps the court determine the content of law and policy and to exercise its discretion or judgment in determining what course of action to take' Judges are free to apply their own views to make their own enquiries of legislative facts without requiring evidence or other proof. (Woods)
- Callinan J (Dissenting): First, parties must be given an opportunity to deal with all matters which the court regards as material. Secondly, rarely is there any universal acceptance of what are true history, politics and social ethics. (Woods)
- Court cannot take notice of research that has been done on whether certain forms of evidence would be more influential on juries than others. In this case, knowledge of the proposition in question could not be said to be 'not reasonably open to question' and 'common knowledge' or 'capable of verification by reference to a document the authority of which cannot be questioned.' (Aytugrul v The Queen)
- Since the enactment of s144, there is no room for the common law doctrine of judicial notice. Must apply the legislation (Aytugrul v The Queen)
- Where judicial notice is taken on inquiry the mode of inquiry is left to the courts and the ordinary rules of evidence do not apply...the Court should give the parties the opportunity to comment upon the propriety of taking judicial notice and the appropriate method of enquiry, before it embarks upon an inquiry of its own. Where that inquiry consists of consulting authoritative works of experts, there is authority for the view that this should be taken in the presence of the parties, allowing opportunity for comment (Maluka & Maluka)

4 Inferences from absence of evidence

Jones v Dunkel

- I) That the absence of the defendant as a witness cannot be used to make up any deficiency of evidence;
- li) The evidence which might have been contradicted by the defendant can be accepted more readily if the defendant fails to give evidence
- lii) Where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstances that the defendant disputing it might have proved contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.
- (Kitto J): the jury should at least have been told that it would be proper for them to conclude that if defendant's employee had gone into the witness-box his evidence would not have assisted the defendants by throwing doubt on the correctness of the inference which...I consider was open on the plaintiff's evidence.

TOPIC 3. Adducing Evidence

1. Calling a witness

- Court may make such orders as it considers just in relation to (s26); way witnesses are questioned (a), production/use of documents or things in connection with witness questioning (b), order parties may question witnesses (c), presence/behaviour of person in connection with connection with witness questioning (d).

Civil

- A judge cannot call a witness in a civil proceeding unless there is consent from the parties or a lack of objection (*Clark Equipment Credit of Australia Ltd*)
- Presiding judge has power to call a witness over objection for purpose of enabling each party to examine upon material matters → furtherance of justice in **exceptional circumstances** (*Obaleco Pty Ltd*) most exceptional cases (*Sharp*)

Criminal

- The crown should call all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence (*Whitehorn, Kneebone, Velevski*)
- Unreliability is not founded where witness' account doesn't accord with case theory attractive to prosecutor (*Kneebone*)
- Duty for prosecutor to call on **all material witnesses** BUT does not require a head count of experts with different opinions (*Velevski*) Prosecutor is bound to ensure that the prosecution case is presented with fairness to the accused.

2. Competence and compellability

Should be heard on Voir Dire. **Competence** → Capability, **Compellability** → Compulsion to give evidence

Presumption: every person is competent to give evidence (12a), and a person who is competent is compellable (b)

- **Lack of capacity** (competence) (s13): doesn't have capacity to understand a question about the fact (a), or doesn't have capacity to give an answer that can be understood to a question about the fact (b).
 - A child isn't automatically incompetent (*SH v The Queen*).
 - Judge must be affirmatively satisfied that the witness didn't have capacity to give sworn evidence (*The Queen v GW*)
- **Reduced capacity** (compellability) (s14): substantial cost or delay to ensure they understand (a), adequate evidence already given/will be given (b)
- **Cannot be compelled: Sovereign and others** (s15) **Judges and Jurors** (s16), unless court gives leave (s16(2)), **Defendants in criminal proceedings** for prosecution (s17), unless associated defendant tried separately (s17(3))
- **Compellability of spouses** (s18): May object (ss2), Must not be required to give evidence if likelihood that harm would or might be caused (ss6(a)), nature/extent of harm > desirability of evidence being given (ss6(b)). Consider: nature/gravity of offence, substance/importance of evidence, other evidence available, nature of relationship, disclosure of material in confidence (ss7a-e). Doesn't apply for offences against/referred *Children and Young Persons (Care and Protection) Act 1998* (s19) **pp16**
 - Application of ss6/7 → (*R v Khan*)
 - No spousal privilege at common law (*Stoddart*)
- **Comment on failure to give evidence** – Criminal (s20): (ss2) → judge may comment, but mustn't suggest that D failed to give evidence because D was/believed guilty of the offence concerned.

3. Oaths and affirmations

- Witness must take an oath/affirmation before giving evidence (s21), interpreter must too (s22), court to inform person they have choice between oath/affirmation, unless satisfied they already know (s23) not necessary that religious text be used for oath (s24) Alternative oath for no god (s24A)

4. Examination of witness

- Court to control questioning (s26) | Parties may question any witness (s27) | Party may question in anyway party thinks fit, except as provided by act or directed by court (s29(1))
 - All the rules as to cross-examination are not rules dealing with the rights of parties at all, but are guidelines to judges as to how they should, in fairness, conduct trials before them → only actual right is a right to a fair trial (*GPI Leisure Corp Ltd*)
- **Judge's role** → generally limited to remove apparent ambiguities, ensure issues are clarified and justice dispensed within reasonable limits of efficiency (*FB v The Queen*). Cannot become an advocate for one side (*R v Esposito*) intervention for clarifying uncertainty = permissible (*Ryland*)
- **Leading questions:** not put to witness in examination in chief/re-examination (s37(1)), unless, leave, introductory matter, no objection, matter not in dispute, expert asked a hypothetical (a-e) LQ: suggests a particular answer to question/assumes existence of fact in dispute. Not necessarily yes/no (*State v White*)
- **Reviving memory:** Witness must not, in course of giving evidence, use a document to try revive their memory about a fact or opinion, unless court gives leave (s32(1)) Loss of privilege when document used to revive memory (s122)
- **Police officers (criminal):** May be guided through previous written statement (s33(1)), if made at time of/soon after events (s33(2)(a)), officer signed when made (s33(2)(b)). Loss of privilege as per above.
 - In defining 'the event' → statement is made in relation to matters which were contemporaneous to its making (*Dodds v R*): interpreting pig latin.
 - Matter of days rather than weeks suggested to be appropriate time (*Orchard v Spooner*)
- **Reviving memory outside court:** Court may, give such directions as are appropriate...for purposes of proceeding (s34(1)) may refuse to admit evidence if directions not complied with (s34(2))
- **Effect of calling for production of documents (s35(1)):** A party is not required to tender a document only because the party, whether under this Act or otherwise, (a) called for the document to be produced to the party, or (b) inspected it when it was so produced.
- **Unfavourable witnesses (s38):** (1) A party who called a witness, may with leave of the court, question the witness, as though the party were cross-examining the witness about; (a) evidence given that is **unfavourable** to the party, (b) reasonably supposed to have knowledge and not making genuine attempt to give evidence, (c) made a prior inconsistent statement. (3) may, with leave of court, question the witness about matters relevant only to the witness's credibility. (6) court to consider; (a) whether party gave notice of intention to seek leave ASAP, (b) likelihood matters will be questioned by another party. **s38(6); 192, 135 and 137** all to be considered when contemplating granting leave (*Hogan*)
 - Unfavourable: not merely neutral, must be unhelpful or detract from the case (*Adam; Hadgkiss*)
 - Not entirely unfavourable, some unfavourable evidence or not a genuine attempt regarding some is sufficient (*Pantola*)
 - Scope of questioning includes; testing of evidence in chief with the view of establishing truth of the matters in a prior inconsistent statement, examination of credibility, background of the prior inconsistent statement and any other consideration of any motives for changing the statement. Court doesn't have to distribute 'little dollops of leave' to ask questions under s 38. Failure to consider ss192, 135 and 137 is immaterial if same conclusion would have been reached (*R v Le*)

5A. Cross-examination of witnesses

Cross-examination: the questioning of a witness by a party other than the party who called the witness to give evidence (**Dictionary CL2s2(2)**)

Witness called in error: not to be questioned about a matter relevant (**s40**)

Improper questions (s41(1)): 'disallowable question'; (a) misleading or confusing, (b) unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, (c) put in a manner that is belittling, insulting or otherwise inappropriate, (d) has no basis other than a stereotype (sex, race, culture, ethnicity, age, disability).

- **Not disallowable** because (**s41(3)**); (a) challenges truthfulness or consistency/accuracy of any statement, (b) requires witness to discuss a subject that could be considered distasteful.

S41(4): party may object to a question on ground that it is disallowable. **S41(5):** Court **must disallow** even if no objection. **S41(6): not inadmissible** if they answer the question, but can form basis of appeal.

- **Libke v The Queen:** offensive questioning; calculated to humiliate, belittle and break the witness. Tone was often sarcastic, personally abusive and derisive → 'taunting' = bullying. Statements of counsel's personal opinion have no place in cross-examination. Compound questions = ambiguity (multiple facets and complexity) and confusion as to which question the witness is answering. Cutting off answers before complete, questions resting on controversial assumptions.
- Distinguish; questioning suggesting a motive is incorrect vs line of questioning driving the appellant into saying it was made up or fabricated. Latter was the case and disallowable. (**Picker**)

Leading questions (s42): (1) may be made in cross-examination, **unless court disallows/directs** witness not to answer. (2) factors; (a) unfavourable evidence in chief to party who called, (b) witness has interest consistent with cross-examiner (c) witness is sympathetic to cross-examiner/party (d) witness's disability may affect answers.

Prior inconsistent statements: (s43): (1) witness may be cross-examined about PIS. (2) if witness doesn't admit to PIS, cross-examiner can't adduce evidence of the PIS statement unless; (a) informed witness enough of circumstances to identify statement (b) drew witness's attention to the inconsistencies with statement and witness's evidence

Previous representations of other persons: (s44): (1) except as provided, cannot question a witness about a previous representation alleged to have been made by person other than witness. (2) may question if; (a) evidence of the rep. has been admitted (b) court satisfied it will be admitted.

If (2) doesn't apply and rep is in **document**; (a) doc. Must be produced to witness (b) if taped, witness must be provided with means to listen without others present (c) having examined, witness must be asked whether they stand by their evidence (d) counsel/witness not to identify document/disclose any of its contents.

- Evidence not impermissible under s44(3)(d) as long as the piece of evidence is not identified and the contents are undisclosed to the jury (**R v S**)

Documents (s45): (1) applies if party cross-examining witness about; (a) a PIS alleged to have been made by the witness that is recorded in a document or (b) a previously representation alleged to have been made by another person that is recorded in a document. (2) if court orders, party must produce: (a) document or, (b) such evidence of the contents of the document as is available to the party to the court/other party. (3) court may; (a) examine a document or evidence that has been so produced, (b) give directions as to its use, (c) admit it even if it has not been tendered by a party.

- Mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document (**s45(5)**)

5. Credibility

S102 - Credibility evidence about a witness is not admissible

Common law (pre evidence act) (Palmer v The Queen)

- 'in general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are the fact that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.'
- 'If evidence is regard to **solely** go to the **credit** of the complainant, the **finality and bolster** rules come into place. This is where evidence given by a witness in cross-examination is taken as 'final' and cannot be rebutted or bolstered subject to exceptions.'

Evidence Act (pre amendment) (Adam v The Queen)

- If the evidence is relevant for a purpose other than the credibility purpose, then it will be admissible for the credibility purpose. It need not be admissible for the other purpose.

S101A – Credibility evidence in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

- (a) Is relevant only because it affects the assessment of the credibility of the witness or person, or
- (b) Is relevant:
 - a. Because it affects the assessment of the credibility of the witness or person, and
 - b. For some other purpose for which it is **not admissible, or cannot be used**, because of a provision of Parts 3.2 to 3.6.

- **Credibility:** Credibility of the representation, and includes the person's ability to observe or remember facts and events which the person has made the representation (Dictionary)
- **Assessment:** subjective. Judges need to take care in making the assessment. (Devries)
 - 'It is **impermissible** for a **trial judge to direct the jury to assess evidence given by an accused** according to the **interest** that the **accused** has in the **trial**, or suggesting that the accused's evidence should be scrutinised more carefully than the evidence of other witnesses.' (Hargraves v The Queen)

Cross-Examination

- Credibility rule does not apply to evidence adduced in cross-examination of a witness if the **evidence could substantially affect the assessment of the credibility of the witness**. (s103(1)) Have regard to; (2a) whether the evidence tends to prove the witness **knowingly or recklessly** made a **false representation** when the witness was under an obligation to tell the truth, and (2b) the **period has elapsed** since the acts or events to which the evidence relates were done or occurred.
- CRIMINAL – (104(2)) D must not be cross-examined about a matter that is relevant to the assessment of the D's credibility, unless the court gives leave. (104(3)) leave not required for cross-examination by prosecutor about whether the defendant: (a) is biased or has a motive to be untruthful, (b) unable to be aware/recall matters to which their evidence relates (c) has made a prior inconsistent statement.
- (108A) – someone has made a representation, but they are not a witness. (1a) evidence of previous rep. admitted in a proceeding, (1b) person hasn't/won't be called, **credibility evidence** about them is **not admissible** unless the evidence **could substantially** affect the **assessment** of the person's **credibility**. Consider (2a) whether they knowingly/recklessly made a **false representation** when under an obligation to tell the truth, (2b) period elapsed between acts/events and representation.
- (108B) CRIMINAL – (2) if person referred to in 108A is a defendant, credibility evidence not admissible unless court gives leave. (3) leave not required for cross-examination by prosecutor about whether the defendant: (a) is biased or has a motive to be untruthful, (b) unable to be aware/recall matters to which their evidence relates (c) has made a prior inconsistent statement.
- **Permission:** to cross-examine is in the **discretion** of the **judge**. Appellate courts should not interfere with judges' ruling on credit, at least where there is no basis for thinking that the trial judge didn't understand the purpose and nature of the questions. (State Rail Authority of NSW v Brown)

Experts

- (s108C): Credibility rule doesn't apply to evidence given concerning another witness if (a) expert (b) evidence of opinion that (i) wholly/substantially based on knowledge, and (ii) could substantially affect assessment of credibility of witness and (c) court gives leave to adduce the evidence.
- (Dupas v The Queen) Credibility in the UEL imports notions of both truthfulness and reliability. The s108C exception permits expert evidence to be called as to behavioural factors – environmental, cognitive or otherwise – which would assist the court's understanding of the capacity of a witness to give credible evidence.
- (Ma v The Queen) Evidence relating to maternal response to complaints of child sexual abuse was sufficiently interrelated with and relevant to the evidence of potential responses by a victim of sexual abuse and so fell in s 108C (related to how the victim deals with this response).
- (Da Silva v The Queen) Purpose of expert evidence bearing on credibility is educative (for benefit of jury). Evidence will be inadmissible where the expert strays beyond their area of qualification.

Re-Establishing Credibility (s108)

- (1) Credibility rule doesn't apply to evidence adduced in re-examination of a witness. (3) credibility rule doesn't apply to evidence of a **prior consistent statement** of a witness if (a) evidence of a PIS has been admitted, or (b) it is/will be suggested that evidence given by the witness has been fabricated/re-constructed (deliberately/not) or is the result of a suggestion.
- (R v Ngo): Credibility evidence can be admissible in examination in chief in anticipation of an attack on credit in cross-examination as long as it is done in general terms.
 - (Graham v The Queen): The exercise of the discretion under s 108 depends upon the effect of the evidence on the witness's credibility: here, the suggestion of fabrication.
 - (R v Whitmore): The denial of the events alleged without more does not necessarily suggest, expressly or implicitly, positively, reconstruction, fabrication or suggestion. Every express denial of events/subject should not provide a basis for the admission of credibility evidence.
 - (Nikolaidis v The Queen) Before seeking leave, you must establish that the evidence of PIS has been admitted or that it was suggested that the evidence is fabricated or reconstructed. Then look at s 192 to determine whether leave should be given.
 - (Papakosmas v The Queen) Rejected argument that s 136 should be applied to limit complaint evidence to prevent its hearsay use.