RELATIONSHIP BETWEEN THE EA THE COMMON LAW AND OTHER STATUTES

s4 Courts and Proceedings to which the Act applies

Act applies to all proceedings in a **NSW court**, including bail, interlocutory proceedings, heard in chambers and maybe sentencing.

s7 – The EA binds the Crown eg. criminal prosecution, any government department.

s8 – Where an inconsistency arises between a complementary Act and the EA, the complementary Act takes precedence.

s9 – does not affect the operation of any existing principle of common law or equity law, in relation to evidence in a proceeding to which this Act applies, except to far as this Act provides otherwise expressly or by necessary intendment.

s11 General Powers of the Court

TAKING OBJECITIONS

Parties' duty to object manifests in the adversarial nature of the NSW court system. Objection can be on the basis of:

- (Ch 2) adducing evidence
- (Ch 3) Admissibility

The two overlap and it is possible to have an objection to both.

Making an objection:

- you may need to submit objections ahead of time when the evidence is made by affidavit
- any new evidence which is not seen ahead of time eg. oral testimony, the opposing party must stand up in court and object. If you object, you need to argue on what grounds the objection is made and the judge will make a determination. This is called a voir dire.

Criminal Appeal Rules r4

no direction, omission to direct, or decision as to the admission or rejection of evidence given by a trial Judge will be allowed as grounds for appeal unless the party objects or seeks direction/leave

Under rule 4, when relying on an error to which no objection had been taken at the trial, leave will be granted only where the appellant can demonstrate that the error led to a miscarriage of

justice. The appellant must at least establish that he or she has lost a real chance (or a chance fairly open) of being acquitted: ***Picken*** [2007] NSWCCA 319

DISPENSING WITH THE RULES OF EVIDENCE

s190 Waiver of rules of evidence

(1) Rules can be waived by an order of a court where the parties consent.

- Effectively renders section applicable to most rules applying to admissibility, the giving of evidence, examination and cross examination.
- Div 1 regarding competence and compellability remains and oaths and affirmations and identification and privilege remains.

(2) In **criminal cases**, consent requires a party has legal advice or if not, the court is satisfied of the defendant understands the consequences of giving consent.

(3) In **civil proceedings** where there is an absence of consent by the parties, the court can make an order dispending with rules even without consent if:

a. The court holds the view that the matter to which evidence relates is a matter not genuinely in dispute; or
b. the application of those provisions would cause or involve unnecessary expense or delay.

(4) Certain matters court **MUST** take into account when applying s190(3):

a. *importance* of the evidence in the proceeding

b. the *nature of the cause of action* or defense and the nature of the subject matter of the proceeding

c. the *probative value* of the evidence
d. the powers of the court (if any) to adjourn the hearing, to make another order or to give an order in relation to the evidence.

s192 Leave, permission or direction may be given on terms

(1) If a court may give any leave, permission or direction

(2) Court must in addition to any other matters, take into account:

a. extent to which it would add unduly to or shorten the length of the hearing

b. extent to which to do so would be unfair to a party or witness
c. importance of evidence
d. nature of proceeding
e. power of court to adjourn the hearing or to make another order or to give a direction in relation to the evidence

VOIR DIRE

s189 The voir dire

(1) The types of matters that constitute a voir dire include:

a. whether evidence should be admitted
b. evidence can be used against a person; or
c. a witness is competent or compellable.

(2) – (4) voir dire not to be heard in the presence of a jury unless the court orders

(5) The court IS to take into account:

a. whether the evidence is likely to be prejudicial to the defendant
b. whether the evidence concerned will be adduced in the court of that hearing to decide the preliminary question
c. whether the evidence to be adduced in the course of that hearing would be admitted at another stage of the hearing

(7) Rules in Ch 3 relating to admissibility apply to voir dire

(8) To what extent can evidence adduced and presented in the voir dire then be used in the trial itself:

a. where the witness has given inconsistent evidence at the voir dire and at the trial

b. where the witness has given evidence at the voir dire and then died.

BURDEN/ STANDARD OF PROOF

Standard of Proof

Standard – more serious civil cases

140-Civil proceedings: standard of proof
s 140(2) 'Without limiting the matters that the court may take into account

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.'

Dixon J's statement in Briginshaw: The standard is fixed, but the prior probability is lower for more serious charges. Fraud is less common than negligent misrepresentation; murder is very uncommon.

Qantas Airways Ltd v Gama (2008) FCAFC

Civil→ "Briginshaw test" does not create a third standard of proof between civil and criminal. It is still assessed on the balance of probabilities.

But the degree of satisfaction that is required in determining that the standard has been discharged may vary according to the seriousness of the allegations of misconduct.

Section 140 applies this test.
Take in to account the s 140 factors and others. – Here, racial discrimination is a serious matter.

Bibby Financial Services Australia Pty Ltd v Sharma [2014]

Termination of employment for cause – sexual harassment

TJ found that this not proven with reference to Briginshaw and EA s 140(2)

Held: under EA, reference to Briginshaw is not an error, sexual harassment allegation sufficiently serious to bring these principles into play

- consider nature of allegations
- consequences of adverse finding for employee

141 Criminal proceedings: standard of proof

(1) In a criminal proceeding, P needs to prove beyond reasonable doubt '

141 (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.'

Burden of proof in Criminal Cases

A matter of substantive law. Not dealt with by EA.

" It is the duty of the prosecution to prove BRD the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception. ... ***Woolmington v DPP*** [1935]

ADDUCING EVIDENCE

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how evidence can be produced

Failure to comply with the requirements in Ch 2 may result in evidence not being admitted.

Parts dealing with competence and compellability **codify and abrogate the common law**.

2.1 CALLING A WITNESS

parties call witness, governed by common law

s11 – general powers of the court to control proceedings.

s26 – court has control of **questioning** of witnesses However, neither of these relating to calling of witnesses.

CAN THE COURT CALL A WITNESS?

Civil Cases

If a judge calls a witness it can disrupt a party's presentation of the case and give rise to an apprehension of bias.

Clark Equipment Credit of Australia v Como Factors (1988)→ a judge in a civil case may not call a witness. The inability to call a witness is a **matter of principle**, not a rule of evidence.

Sharp: highly unusual for judge to call a witness

Criminal Cases In criminal trials, judges can call witnesses in **exceptional circumstances.** It is prosecutor's duty to present the case fairly, exceptionally, if prosecutor fails to do so, judge may call witness

The Queen v Apostilides (1984) More important here for judge to be seen as not stepping in

The crown is obliged to call witness that are material to the case and if they fail to do so, the trial may be unfair *the 6 rules

If the accused is convicted, the decision of the prosecutor to not to call a witness can be a

ground to set aside a conviction if looking at the trial as a whole it seemed to give rise to a miscarriage of justice. Importance of looking at the trial as a whole is to avoid letting people off the hook on the basis of a mere technicality.

6 rules of conduct of criminal trials which was cited in Kneebone.

R v Damic [1982] 2 NSWLR 750

Rare example of 'exceptional circumstances'.

Judge became aware that self-represented defendant had unstable mental state and refused to make defence against murder on basis of mental illness.

Judge asked psychiatrist back who had given evidence of the defendant's ability to give evidence, to question regarding the availability of the defence.

D was convicted and appealed on basis Judge should not have called witness. Dismissed.

R v Kneebone (1999) 47 NSWLR 450

Alleged aggravated sexual assault. Daughter alleged mother said 'that's enough'. Mother later denied that any assault had taken place and subsequently left the jurisdiction.

Prosecution decided not to call the mother because they believed her to be an unreliable witness

K was convicted and appealed on the basis that the prosecution was obligated to call a material witness and in not doing so had caused a miscarriage of justice.

The prosecutor should have called the spouse because **the evidence was essential to the unfolding of the narrative and her credibility was crucial because she was the only witness.**

Though a prosecutor may refuse to call a material eye witness on the grounds of credibility **the evaluation of unreliability of the witness must be based on identifiable factors and not assumed**.

The court applied the 6 propositions to the conduct of criminal trials as laid down in **R v Apostilides:**

1. Prosecutor alone decides on Crown witnesses.
2. Trial judge doesn't need to ask for reasons why witnesses were not called. He may question Crown (voir dire) re why they didn't call Wit – but are not called upon to

adjudicate on the sufficiency of reasons.

3. At the close of the case, the judge may invite prosecution to call a witness (but may not order/direct the calling of a certain witness).
4. When charging the jury, the judge may comment on the effect of the failure to call a witness.
5. Trial judge may not call a witness, 'save in the most exceptional circumstances'.
6. Decision not to call a witness would only give rise to setting aside a case's judgment if it resulted in a miscarriage of justice.

Regarding 6:

If a prosecutor fails to call a witness whose evidence is essential the question is whether, **in all the circumstances the verdict is unsafe or unsatisfactory.**

Generally, prosecution should call an eye witness, even though their testimony may be unreliable/inconsistent:

- A prosecutor, whose decision not to call a witness is under examination, must be able to point to identifiable factors which can justify a decision not to call a material witness on the ground of unreliability.
- Therefore, the prosecutor must take appropriate steps eg. interviewing the witness in order to be able to form the opinion.

Velevski v The Queen (2002) 76 ALJR 402

Two theories, P called 5 experts, 4 supported P, 1 (actually viewed the body) supported D, other supporter of D not called

Did this amount to a miscarriage of justice? No. But court was divided.

Conclusion appeared to be that a numerical imbalance in expert testimony might entail a miscarriage of justice but it is determined on a case by case basis.

Gleeson CJ and Hayne J

P is not required to adduce evidence to achieve balance.

There is **less of a duty to call expert witnesses** to give their opinion than to call witnesses who have actually seen something and can detail what they've seen.

Thus the guidelines in Apostilides don't apply to expert evidence – difference between evidence of fact and expert evidence of opinion.

Gaudron J

It was a miscarriage of justice. Crown experts based opinions mainly on photographs whereas doctor who assisted the defense expert was not called.

Jury had to weigh up evidence and reject some part to resolve conflict of opinion. May not have rejected defence expert if other evidence had been adduced.