

Burden

Criminal proceedings

- It is the duty of the prosecution to prove the prisoner's guilt *Woolmington v DPP (1935)*
- Exception: defences, the defence has the burden to discharge the burden to the standard required

Standard of proof

- Balance of probabilities *EA s 140*
 - There must be an actual shift for one way or another before this standard will be met
 - The seriousness of a claim affects the way the perception of the balance shifting must be demonstrated

Civil proceedings

- The general rule is that if you bring the litigation (plaintiff), you have the burden to bring evidence that meets the standard
- But some defences such as contributory negligence, the onus is on the defendant

Standard of proof

- Beyond reasonable doubt *EA s 141*

Judicial Notice

- Matters of 'common knowledge' do not need to be proven **EA s 144**
 - Time saving device
 - E.g. what "UTS" stands for

Examples

- ***Australia Communist Party v Commonwealth (1951) 83 CLR 1***
 - Court took judicial notice, did not need to hear about Lenin and Marx's writing. Did not need to hear about the events of communism and the Russian revolution
- ***R v Zundel (No 2) (1990)***
 - Neo-nazi, holocaust denier. He went to Canada and wrote pamphlets denying the holocaust. Holocaust denial in Canada is a crime, which he was charged with
 - Court took judicial notice of the whole holocaust, he argued that it was unfair since he was denying the holocaust, essentially denying him the right to a fair trial. To which the High Court of Canada agreed, hence (No 2) trial
- ***Irving v Penguin Books Ltd [2000]***
 - Litigation that was brought by David Irving (historian) of Third Reich, also a holocaust denier. Brought action against Penguin books who had published a holocaust denial book which had named him as a holocaust denier. He sued for defamation.
 - Court had to prove all of the facts in the holocaust which Irving in his own book said it was not true
 - Defence of truth succeeded for Penguin Books against the defamation

Relevance

s 55 – Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) (“**logical relevance**”) the assessment of the probability of the existence of a fact in issue in the proceeding – **very low threshold**
 - Note that it has very subjective wording, what is relevant or not could be subjective
 - Any amount of **probative value** can make the evidence relevant
 - How much probative value is referred to the weight of the evidence (see below s 135)
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - A) Credibility of witness, or
 - B) admissibility of other evidence, or
 - C) failure to adduce evidence

Logical relevance

- In logic, an item of evidence is relevant if it affects, no matter how minimally the probability of the existence or non-existence of a fact in issue *Smith v The Queen [2001]*
 - **However**, the evidence must be capable of having some effect *Lithgow City Council v Jackson [2011]*
 - “? Fall from 1.5 meters onto concrete” was so ambiguous as to be equally consistent with either possibility and therefore had no effect on probability of either

Notes

- *Papakosmas v The Queen*
 - Other issues such as probative value (i.e. warnings, directions) are dealt with later separately under discretion provisions

s 56 – Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding
- (2) Evidence that is not relevant in the proceeding is not admissible

s 57 – Provisional relevance

- If the determination of the question whether evidence adduced by a party is relevant depends upon the court making another finding (including a finding that the evidence is what a party claims it to be), the court may find that evidence is relevant:
 - **a)** if it is reasonably open to make that finding; or
 - **b)** subject to further evidence admitted at a later stage of proceeding that will make it reasonably open to make that finding
 - e.g. blood on clothes situation. Blood on clothes would be admissible, subject to subsequent evidence being led to establish that the item of clothing belonged to D. If no such evidence was led, then the earlier evidence would become retrospectively inadmissible

Case examples

Smith v The Queen [2001] HCA 50

- Facts
 - Smith on trial for robbing bank, alleged that 4 people robbed the bank. At this bank, at the beginning of robbery, teller presses a button, and this camera takes a still photo at 1 fps.
 - No argument that people in photographs are bank robbers, the only argument are whether the people in the photos were Smith i.e. Only issue was whether Smith is the man in the photo
 - Two policemen testified that they knew Smith, they looked at the photo and said that they recognised him from the photo. Is this relevant for the fact in issue
- Finding
 - Majority said not relevant
 - The policemen offered nothing that the jury could not themselves see from the photos

Papakosmas v The Queen (1999)

- Facts
 - Christmas party rape case
 - Whether the evidence of the 3 co-workers (Ms Ovadia, Ms Stephens and Ms Fahey) was relevant under s 55 of the Evidence Act
 - Fact in issue was whether there was a lack of consent
- Finding
 - Court held evidence of recent complaints in sexual assault cases were allowed in for the purpose of enabling the jury to decide whether a woman's conduct was consistent with her testimony saying she gave no consent (**credibility s 55(2)(a)**)
 - When applying s 55, evidence of complaints was relevant. If evidence were accepted, it could rationally have affected the assessment of the probability of the fact in issue (whether there was consent or not)

DPP v Williams [2010]

- Facts
 - Accused was charged with stabbing an acquaintance; accused denied that he had been the attacker. The issue was one of identity
 - There was evidence that prior to stabbing, accused had told his GP that he felt like killing someone and that he had prepared gloves and covers for his shoes, but that he had been stopped by someone
 - Doctor thought that person whom accused had intended to kill was his drug supplier. Doctor believed the conversation had taken place a day before stabbing, but conceded that it may have taken place around two weeks earlier
- Finding
 - The accused was not alleged to have used gloves and shoe covers in the attack, and the victim was not his drug supplier
 - In those circumstances, trial judge held that the doctor's statements were irrelevant to prove that the accused was the person who had attacked the alleged victim

Evans v The Queen [2007]

- Facts
 - A man entered the council chambers wearing dark blue overalls, a red balaclava and sunglasses and carrying a sawn-off rifle. He took council cash and ordered two members of the public to hand over their money
 - **During the trial**, He was then required to walk up and down in front of the jury, wearing overalls and balaclava and to say the words “give me the serious cash” and “I want the serious cash”
- Finding
 - 3-2 majority ordered a new trial, there was miscarriage of justice
 - **However, on question of relevance:**
 - Gummow and Hayne JJ (thought irrelevant)
 - It revealed nothing about the wearer and nothing about the appellant that was not already apparent to the jury observing him in the dock. It focuses on the disguise and said nothing about who had worn it
 - This is to be contrasted with requiring person to talk in front of jury and requiring him to speak certain word (this was relevant)
 - Heydon, Kirby, Crennan JJ (thought relevant)
 - If attired in balaclava, the accused had looked very different from descriptions given by eyewitnesses, which would have been materially capable of raising a reasonable doubt
 - Kirby said it was artificial to use the relevant threshold to exclude evidence that’s relevant but artificial for different problems (prejudicial etc.)

R v Acuna [2008]

- Facts
 - Accused had undoubtedly carried out the random attack that caused the death of the victim; question was whether his conduct was voluntary (question of intent for murder)
 - There was evidence that approximately 3 months prior to attack, he told his community corrections officer that he wanted to kill someone, adding “don’t care, anyone at random”
- Finding
 - Given that those were the issues, judge held that evidence was relevant, as it was ‘material that the jury could use in deciding whether he had turned his mind to the act of killing
 - i.e. was voluntary and also on the question of intention

