Evidence Law

UNIVERSITY OF SYDNEY

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EVIDENCE LAW GUIDELINE

CONCEPT – VOIR DIRE

- Meaning: trial within a trial.
- When **questions of evidence are determined**, they are determined on the voir dire – jury will go out and the parties will make submissions to the judge, who will determine that question about evidence.
- The voir dire is **open to the public, but exclude the jury**.
- See **s 189** – voir dire
    - S 189(1) – preliminary questions on these matters are to be determined in the jury's absence.
        - Include
            - Whether evidence should be admitted, or
            - Evidence can be used against a person, or
            - A witness is competent or compellable.

PROOF – PT.1:

Standard of proof	Section	Requirements	Considerations
Civil	140	Balance of probabilities	Court may consider nature of cause of action or defence, nature of subject matter and gravity of matters.
Prosecution	141(1)	Beyond reasonable doubt	
Accused	141(2)	Balance of probabilities	
Admissibility of evidence	142	Balance of probabilities	

- Civil proceeding
    - **Standard of proof – s 140** – the balance of probabilities
        - s 140, especially s 140(2) reflects the common law positions as to the strength of evidence necessary to establish satisfaction on the **balance of probabilities**: ***Qantas Airways Ltd v Gama (2008)*** – p.7.
            - TJ did not apply s 140. TJ erred by using the *Briginshaw test* when applying the balance of probabilities standard with respect of Racial Discrimination Act and Disability Discrimination Act?
            - Held: focus is the statute which is similar to *Briginshaw* but the statute is to be

applied.

- In circumstances where reference was immediately made to s 140(2) of the Evidence Act, the citation of ***Briginshaw v Briginshaw*** is not inappropriate: ***Bibby Financial Service v Sharma*** – p.8.
  - Termination of contract of employment (sexual harassment) – TJ found for employee and cited ***Briginshaw v Briginshaw***.
- In civil proceedings, **the burdens of proof shifts to the shoulders of the defendant when he has a "case to answer"**: ***May v O'Sullivan*** – p.10.
  - Charges of betting at a hotel – May's evidence presents he was not present when alleged betting occurred – magistrate did not believe May's evidence and accepted without qualification.
- The "balance of probabilities" standard is a **flexible test**, which depends on the serious of the allegation: s 140(2): *Qantas*.
  - The more serious the allegation, the stronger the evidence required. -- for example, an allegation of fraud is the most serious and thus incurs the highest standard of proof, i.e., **the standard of proof for civil fraud is higher than the standard required to prove negligence**.
  - Direct evidence, admissions, documentary evidence are strongest.
- Further, "without limiting" means s 140(2) is not an exclusive list: *Qantas Airways Ltd v Gama (2008)*.

- **Burden of proof**
  - The Evidence Act does not deal with the allocation of the burden of proof in a **matter** respect of facts in issue. This is **of substantial law**.

Civil Proceedings	
General Rule	Party that alleges a fact must prove it – usually, the P bears the onus of proof
Exceptions	For example, D bears the onus of proving contributory negligence

  - Legal burden
    - Legal burden means the **obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved** either on the balance of probabilities (s 140) or beyond reasonable doubt (s 141) (i.e., standard of proof).
  - Evidentiary Burden
    - Evidential burden generally used to refer to whether a party has an obligation to show that there is sufficient evidence to raise an issue as to the existence of a fact in issue (getting past the judge).
    - Therefore, **evidential burden is the obligation to produce evidence to properly raise an issue at trial**. Failure to satisfy the evidential burden means that an issue cannot be raised at a court of law.
  - If this burden is satisfied (e.g. self-defence), the legal burden returns to the opposing party.
  - One party's duty of producing sufficient evidence for a tribunal to call upon the other party to answer - the obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.
  - The normal rule in such cases is that the accused bears the 'evidential burden' of ensuring that there is some evidence before the court from which it could find in favour of any defence raised, but that once this has occurred, the Crown then picks up the 'legal burden' of disproving that defence beyond reasonable doubt.

- Criminal proceeding
  - **Standard of proof – s 141**
    - S 141 provides for the standard of proof in criminal proceedings, namely '**beyond reasonable doubt'**.
    - The **jury is not to be directed** about what those words mean: ***Green v The Queen (1971)*** – p.8,
      - Conviction of rape – Green appealed on the basis that TJ improperly instructed the jury as to the onus of proof (i.e., TJ explained what BRD means).

- **The expression is to be given its ordinary and natural meaning**. It is the subjective view of the jury.
- But where the one party misdirects the jury, the judge can properly instruct the jury that such direction ought not to be regarded by them as the source of reasonable doubt (***Green***).
- The standard of proof should not be elaborated on by the judge, as it may confuse the jury. The judge should not have said the jury should convict unless they had a rational doubt. That amounts to reversing the onus of proof.

- Defendant needs only to prove **defence on balance of probabilities: s141(2)**, for example. defence of insanity.
- By comparison, in the UK the expression is explained to the jury as a question of whether they are sure.
- In criminal proceedings, subject to contrary intention of legislations, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end: ***May v O'Sullivan***.
- The law from ***May v O'Sullivan*** and ***Doney v The Queen*** is that the Crown's evidence must be looked at 'at its highest', however 'weak or tenuous'. If that evidence could, in law, support a conviction, then the TJ must leave the case to the jury, even if any resulting conviction would be likely to be overturned on appeal as 'perverse', or 'unsafe'.
- **Circumstantial evidence:** ***Shepherd*** – p.9.
  - Conviction of conspiring to import heroin – P relied on circumstantial evidence including overheard conversation, accomplices' evidence + bank account details – D argued TJ did not direct the jury that they had to be convinced that EACH FACT upon which their inference of guilt was based was proved BRD – held TJ did not err.
  - In a case involving substantial circumstantial evidence, a **direction** that "guilt should not only be a rational inference, but should be the only rational inference that could be drawn from the circumstances" **will be helpful**.
    - The direction just means "no inference consistent with innocence is reasonably open on the evidence".
    - But such direction is not helpful, even may be confusing for those cases where the amount of circumstantial evidence involved is slight.
  - A judge is **not required to direct jury that each intermediate fact should be proved beyond reasonable doubt** in a case where those intermediate facts only consist of strands in a cable rather than links in a chain.
    - In such a case, all evidences can be viewed as a whole to be satisfied of guilt beyond reasonable doubt.
  - However, in a case where the intermediate facts constitute indispensable links in a chain of reasoning towards an inference of guilt, it is appropriate for a judge tell the jury that each fact must be found beyond reasonable doubt before the ultimate inference can be drawn.
  - Example of proper direction: p.838 TB.

	Direct (Testimonial) Evidence	Circumstantial Evidence
Definition	Direct evidence is the evidence, which if accepted, establishes the fact in issue.	Circumstantial evidence is the evidence, which even if accepted, requires further inference to establish the fact in issue.
Examples	Eyewitness,W: 'I saw D stab V'. - Did D stab V? What is the credibility of the evidence? - Will the jury accept W as credible? Depends on motive; state of mind; demeanor; age; perjury; their criminal record; prior consistent / inconsistent statement;	In a murder scenario, the followings are circumstantial evidences: - W1: 'I saw D argue with V hours before the stabbing' -- **MOTIVE/OPP?** - W2: 'I saw X outside V's house, minutes before the killing. I identify D as X.' -- **IDENTIFICATION** - W3: 'I met D on the evening of the killing. He said V had it coming.' -- **ADMISSION**

	- For murder, you need a death, caused by action or omission and to have the necessary intent. - The statement goes to an act causing death.	- W4:'The knife found at the scene had V's blood and D's fingerprints' -- **FORENSIC ID** - W5:'I saw D with a similar knife a week before the killing' -- **MEANS**
Impact	The acceptance of direct evidence is sufficient to establish the guilt of the accused.	The acceptance of circumstantial evidence establishes facts from which further inferences must be drawn.

- **Burden of proof**
  - The Evidence Act does not deal with the allocation of the burden of proof in respect of facts in issue. This is a **matter of substantial law**.

Criminal Proceedings	
General Rule	Usually, the P bears the onus of proof to **prove all elements of a crime** or **to rebut available defences**: Schedule 13.1, Criminal Code Act 1995 (Cth)
Exceptions	For example, **defence of insanity** – party raising the issue of insanity, usually the D, bears the legal burden of **proving insanity** on the balance of probability: Porter (when the P has proved all elements of the crime).

  - ***Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985)***
    - There was a statutory scheme for leave provisions for temporary workers – concerns that Apollo breached the scheme – Apollo sought declaration that its workers were not within the definition of 'workers' – Plaintiff had onus to prove a negative proposition.
    - **Held**: Plaintiff must establish sufficient evidence from which the negative proposition can be inferred, D then has an evidential burden to advance in evidence any particular matter with which the Plaintiff would have to deal in the discharge of the Plaintiff's overall burden of proof.
  - Legal burden
    - Legal burden means the **obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved** either on the balance of probabilities (s 140) or beyond reasonable doubt (**s 141**) (i.e., standard of proof).
  - Evidentiary Burden
    - Evidential burden generally used to refer to whether a party has an obligation to show that there is sufficient evidence to raise an issue as to the existence of a fact in issue (getting past the judge).
    - Therefore, **evidential burden is the obligation to produce evidence to properly raise an issue at trial**. Failure to satisfy the evidential burden means that an issue cannot be raised at a court of law.
  - If this burden is satisfied (e.g. self-defence), the legal burden returns to the opposing party.
  - One party's duty of producing sufficient evidence for a tribunal to call upon the other party to answer - the obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.

- Warning of the evidence
  - Under circumstances where an appropriate warning of the evidence can be directed to the jury, the weight to be given to that evidence is to be determined by inference based on **the jury's collective experience of ordinary affairs** as the question whether the evidence is truthful: ***Doney*** – p.11.
    - conviction of importing cannabis – P's case depends on the evidence of an accomplice and required a warning – as accomplice admitted to telling lies at various stages – TJ was right in ruling that he had no power to direct the jury to enter a verdict of not guilty on the ground that

such a verdict would be quashed by an appellate court on the basis that it would be unsafe and unsatisfactory.

- Direction as to verdict of not guilty
  - A trial judge cannot direct a jury to return a verdict of not guilty notwithstanding the evidence is tenuous, weak or vague, as long as it is capable of sustaining a guilty of verdict: ***Doney***.
  - A verdict of **not guilty may be directed only if there is a defect in the evidence and such defect will not sustain a verdict of guilty**, other than the reason that the verdict may be set aside in the appellate court: ***Doney***.

- Admissibility of evidence
  - S 142: '**on the balance of probabilities'**.
    - s 142 prescribes the standard of proof in respect of a question about the admission of evidence – standard is on the **balance of probabilities** (***Bibby Financial***).
- Prima Facie Case (***May; Doney***)
  - The Evidence Act 1995 does not deal with the allocation of the burden of proof in respect of facts in issue, nor with the test for when an opponent has a "case to answer". -- This is left to the common law.
  - At the close of a party's case in civil proceedings, **the defendant may submit that there "is no case to answer", that is, that the plaintiff has failed to establish a prima facie case**.
    - Whether there is a case to answer depends on whether there is a lack of evidence to prove the plaintiff's case.
    - Consequence of no case to answer
      - Defendant must seek leave to call evidence if the submission fails.
  - In criminal cases, whether there is a case to answer depends on whether the Crown has failed to adduce evidence that is capable of proving one or more elements of the offence. If the Crown has adduced evidence of proving all elements of the offence, then there is a case to answer.
    - Consequence of a defendant making a 'no case to answer'
      - If the defendant succeeds in the submission then the jury will be directed to acquit. If unsuccessful, the trial proceeds.