

## TOPIC 1: INTRODUCTION

### Dispensing with Rules of Evidence

- EA s 190 Waiver of rules of evidence if parties consent

### Taking Objections

- It is up to parties to object to evidence
- In **civil cases**, a failure to object to evidence will usually prevent the point being raised on appeal as it has been waived.
- In **criminal appeals**, rule 4 of the *Criminal Appeal Rules* (NSW) provides that there can be no appeal after a failure to object to evidence at trial
- If you had opportunity to object & you didn't, unlikely to succeed on appeal unless you can prove miscarriage of justice

### Dispensing with Rule of Evidence

- Civil proceedings – s 190(1)
- Criminal proceedings – more limited – s 190(2)

### Voir Dire

- **S 189**: Preliminary questions as to admissibility of evidence to be dealt with, in certain cases (e.g. – confessions & illegally obtained evidence), by a trial within a trial

## TOPIC 2: PROOF

### Burden of Proof

#### Civil Cases

- The one who asserts must prove
- Civil cases (general principle) – court is likely to allocate evidential burden on party who has the power to produce the evidence (*Apollo Shower Screens*)
- Legal burden: plaintiff (*Apollo Shower Screens*)
- Evidential burden:

#### Criminal Cases

- Legal burden: 'golden thread' - prosecution from beginning to end to prove elements of offence (*Woolmington v DPP*)
- No burden on D to prove his innocence, subject to the defence of insanity/mental illness, substantial impairment of mind (burden of proof on accused) or existence of a statutory exception
- Evidential burden: 'Defences' for accused

### Standard of Proof

- Where the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give a warning that each fact must be proved brd. Prosecution must prove all elements, but not all facts or pieces of evidence, only the essential ingredients (*Shepherd v The Queen*)

#### Civil Cases (BOP) – *Qantas Airways v Gama*

**140 Civil proceedings: standard of proof**

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the **balance of probabilities**.
  - (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to 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.
- Judge should not try to explain 'balance of probabilities' (*Qantas Airways v Gama*)
  - Civil standard not as onerous as criminal (*Briginshaw v Briginshaw*)

### Criminal Cases (BRD)

#### **141 Criminal proceedings: standard of proof**

- (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been **proved beyond reasonable doubt**.
  - (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**.
- Trial judge should not explain meaning of phrase "BRD" – given its ordinary meaning (*Green v The Queen*)
  - Admissibility of evidence s 142 - Facts necessary to deciding whether evidence should be admitted must be proved on BOP (except as otherwise provided by this act). So apply the test in the section, and if there isn't one, apply BOP.

### Admissibility of Evidence: Standard of Proof

- S 142

### Circumstantial Evidence

- Drawing rational conclusion to existence of fact – link in a chain
- Common law: where case relies solely upon circumstantial evidence, guilt should not only be a rational conclusion that can be drawn but also the *only* rational conclusion from the circumstances (*Shepherd v the Queen*)
- If the evidence is an 'indispensable link' in the chain of reasoning, jury should be directed that all of the evidence adduced in the trial should meet the required standard of proof (*Shepherd, Hannev v DPP [2006]*)

### Prima Facie Case

- Prima facie case means a serious (as opposed to speculative) case which has a real possibility of ultimate success
- 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.
- Consider whether the evidence, taken at its highest, COULD persuade a fact finder to the requisite standard (*Doney v The Queen*)
- If no evidence of a crime – there is no prima facie case. But if there is evidence, however tenuous or vague, it should be left to the jury & only removed if there is such a defect in the evidence that a verdict of guilty could not be sustained. (*Doney v The Queen*)
- If prima facie case established, burden of proof does not shift. Still rests with prosecution. Question of law; not fact. (*May v O'Sullivan*)
- At the close of the case for the prosecution, if the defence makes a submission that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant *ought* to be convicted, but whether on the evidence as it stands he could *lawfully*

be convicted. (*May v O'Sullivan*)

- *Test for whether there is a 'case to answer' in civil hearings* → Whether there is a lack of evidence to prove the plaintiff's case (whether evidence capable of proving case on BOP)
- *Test for whether there is a 'case to answer' in criminal trials* →
  - If the Crown has failed to adduce evidence that is capable of proving one or more elements of the offence, then there will be no case to answer (Whether evidence capable of satisfying elements of offence)
  - If the Crown has adduced evidence of proving all elements of the offence, then there is a case to answer. (Is evidence upon which jury can convict BRD?)